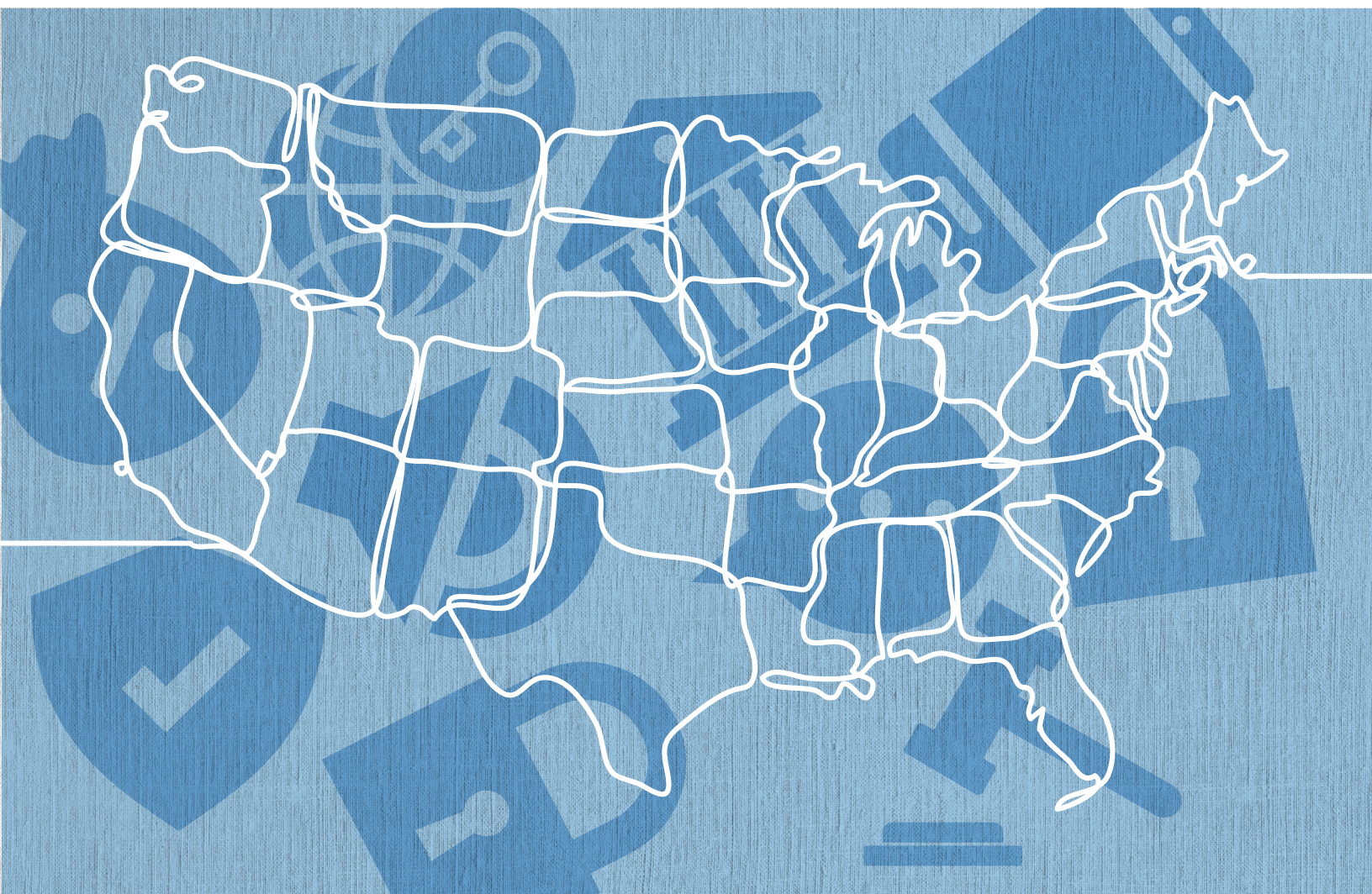


The State of State Platform Regulation

J. Scott Babwah Brennen & Matt Perault





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UNC's Center on Technology Policy (CTP) seeks to craft public policy for a better internet. Utilizing an interdisciplinary academic framework, CTP works to identify knowledge gaps and develop actionable policy frameworks that will enable us to realize the potential benefits of technology while minimizing its harms. By working closely with students and expanding the University's offerings in technology policy analysis, we seek to cultivate and train the field's future practitioners.

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Executive Summary

States will lead the development of technology policy in the United States over the next two years. While Congress has struggled to pass legislation that would reform governance of the technology sector, states have already succeeded in changing the rules on key issues like privacy, child safety, and taxation.

However, despite a series of landmark laws and state-led court settlements, states have been slow to regulate platforms. States passed approximately 28 platform regulation bills that directly related to platform regulation in the last two years: four states passed comprehensive privacy legislation and four passed significant content moderation bills. California passed a law governing children's online safety, but few states have followed. In antitrust, several states considered bills regulating app stores, and New York and Minnesota considered sweeping overhauls of their antitrust laws, but none were passed.

In the state legislative sessions that kick off in January 2023, states are likely to pass laws that shape technology products and business models. Many of the state legislatures that reconvene in January will be meeting for the first time following the Supreme Court's [decision](#) to overturn *Roe v. Wade*. They will be under enormous pressure to pass laws that expand, protect, or restrict reproductive rights. Because online speech and privacy are so closely intertwined with how people express their views on the issue, technology will inevitably be swept up in these battles. State lawmakers will seek to use platform regulation to advance their objectives.

While states have an incentive to pass new legislation this session, their political architecture also makes new legislation more likely. Over the last two years, of the 28 platform regulation bills that were enacted by states, 23 were passed by a "[trifecta](#)"¹ government where one party controlled both houses of the legislature and the governor's mansion. Following the midterms, there are now 38 trifecta state governments, up from 37 in the last session. Four states now have trifectas that did not in the last session: Michigan, Minnesota, Massachusetts, and Maryland.² Given the stakes and political realities, states are likely to be the epicenter of technology policymaking in the months ahead.

This report provides a roadmap to the coming debates by describing the state of state platform regulation. It offers overviews of recent state action in five prominent areas of platform regulation: privacy, content regulation, antitrust, child safety, and taxation. In addition to discussing both introduced and enacted state legislation, it examines notable state litigation.

The report also outlines some of the major trends seen over the past legislative session and anticipates likely policy developments in the next one. Below we preview some of the major trends we expect to see in the forthcoming legislative sessions.

1. We use the terms "trifecta" and "unified" interchangeably to mean state governments where a single party controls both legislative houses and the governor's seat.
2. And three now have divided governments that previously had trifectas.

Looking Ahead to 2023



Privacy

- States will continue to consider bills based on the Washington Privacy Act that do not include a private right of action, have an opt-out rather than opt-in provision, and include a significant cure period.
- More states will pass genetic or biometric data privacy legislation.
- Abortion debates will spur state action on privacy.
- There is unlikely to be federal action that will slow down states' policymaking in privacy.



Content Moderation

- Republican-controlled states will likely continue introducing bills similar to those passed in Florida and Texas, which define social media platforms as common carriers and limit content moderation.
- Upcoming SCOTUS cases will shape the landscape for state lawmaking.
- Abortion debates will spur state action on content regulation.



Antitrust

- Revisions to state antitrust laws remain unlikely.
- Antitrust enforcement through multistate litigation will likely remain a significant priority for both Republican and Democratic attorneys general.
- App stores will continue to be a focus for state legislation and litigation.



Child Safety

- Both parties will prioritize online child safety policy.
- State privacy legislation will include heightened protections for children. As more states pass privacy bills, many of them will likely implement specific additional privacy protections for the data of minors.
- More state bills will adopt a "safety by design approach, following the model of California's Age-Appropriate Design Code.



Taxation

- Lawmakers will continue to propose new digital taxes.
- Due to the legal challenges to Maryland's digital tax law, states will likely pursue alternative models for taxing the technology sector.

Background

In the last session, state legislators introduced hundreds of bills that promised to reform how technology platforms are governed. While most of these bills have not become law, they underscore how technology policy is rapidly becoming as much a state issue as it is a national or international one. Every state legislature will convene in the next few months. For many of them, this will be the first legislative session since the Supreme Court overturned *Roe v. Wade*. That decision has significant implications for online privacy and expression and is likely to motivate a flurry of state activity in tech policy that could reshape the sector.

States have long been seen as the “[laboratories](#)” of democracy, in part because they can be quicker to test out new laws and regulations. Unlike the US Congress, [most states](#) do not have a filibuster. [States are able](#), in some instances, [to enforce federal law](#). Dozens of state governments are controlled by one political party, which makes it easier to pass new legislation.

Following the 2022 midterms, 38 states now have “trifecta” governments, with Democrats controlling 17 and Republicans controlling 21 (with the control of two state governments still undecided as of 12/5). Unified control of state governments greatly increases the chance that states pass meaningful legislation. As seen in Figure 2, of the 28 platform regulation bills passed in 2021-2022 that we identified for this report, 23 (82%) were enacted by states with unified governments. All five exceptions were passed in Virginia or Maryland. Notably, the two bills passed in Virginia under a divided government in 2022 were amendments to major comprehensive privacy legislation passed under a trifecta Democratic government in 2021.

Despite state legislators’ growing interest in technology policy, there remain significant limitations to how states can regulate digital platforms. The US Congress is responsible for [regulating interstate commerce](#), and federal law preempts state law. For example, state content regulation cannot violate the First Amendment, and if it imposes liability in a way that conflicts with [Section 230](#) of the Communications Decency Act, courts are likely to strike it down. Similarly, new state taxes on internet platforms must not run afoul of the [Internet Tax Freedom Act](#).

State policymaking receives far less attention and is often less understood than federal action, in part due to the differences in the policy process at the state and federal levels. While the US Congress is in session year round, most state legislatures meet for only part of the year. Some states, like New York or Pennsylvania, meet throughout the year. For others, like Arkansas or Virginia, the regular legislative session lasts only a few weeks. Four states, Texas, Nevada, Montana, and North Dakota did not have *any* regular sessions in 2022.

As might be expected, there is also a wide variation in the number of bills different state legislatures consider each year. For example, the Wyoming legislature is [estimated](#) to consider 500 bills in the upcoming legislative session; the New York state assembly is [estimated](#) to consider 16,000.³

In most states, legislators are neither expected to work full-time on their legislative duties nor have the capacity to hire large staffs. [While legislators in 10 states](#) are employed full-time and on average are compensated on average about \$82,000. For the other states, legislators

Table 1: Democratic and Republican Control of State Governments

Election year	Democratic trifectas*	Republican trifectas*	Divided government
Post-2020 elections	15	23	12
Post-2021 elections	14	23	13
Post-2022 elections	17	21	10

*Trifecta is when one party controls both houses of legislature and the governorship. [Source](#) (control of the Alaska and New Hampshire governments remains undecided as of 12/5)

3. New York has about 34 times the population of Wyoming, and so perhaps it is not surprising the state considers 32 times the number of bills.

generally spend between half and two-thirds of their time on their legislative duties, and earn between \$18,000 and \$41,000. Many legislators have other regular employment.

As a result, many state legislators rely on outside help to understand and address complex policy issues. There are many state and national organizations that offer policy advice, expertise, and even model legislation related to platform regulation. National networks like the [American Legislative Exchange Council](#), the [State Policy Network](#), and the [State Innovation Exchange](#) and state-based think tanks like the [Pelican Institute](#) all provide state-specific policy guidance.

State legislators often rely on model legislation written by think tanks, companies, or trade organizations.

[One analysis](#) found that between 2016 and 2018, state legislators introduced 10,000 bills directly based on model legislation. As discussed below, the recent [South Carolina bill](#) that criminalized sharing abortion-information online, was based on a model bill written by the [National Right to Life Committee](#). The sponsors made only minor changes to the text of the model bill.

In the sections below, we review some of the main trends in state platform regulation across five key areas: privacy, content moderation, antitrust, child safety, and taxation. Table 2 identifies the key pieces of legislation passed in each category. We also consider ideas introduced in proposed legislation that were not enacted, as well as significant state litigation.

Table 2: State platform regulation passed in 2021-2022

State	Bill	Subject	Year	Trifecta Control	Supermajority
CA	S.B. 41	Privacy: genetic data	2021	DEM	No
CA	A.B. 587	Social media content regulation	2022	DEM	Yes
CA	A.B. 2273	Child safety	2022	DEM	Yes
CA	A.B. 825	Privacy: genetic data	2021	DEM	No
CA	A.B. 694	Privacy: comprehensive update	2021	DEM	No
CA	A.B. 1242	Privacy: abortion data	2022	DEM	Yes
CO	S.B. 190	Privacy: comprehensive	2021	DEM	No
CT	S.B. 6	Privacy: comprehensive	2022	DEM	Yes
ME	H.B. 669	Privacy: info brokers	2022	DEM	No
NV	S.B. 260	Privacy: info brokers	2021	DEM	No
NY	S.B. S4511A	Social media content regulation	2022	DEM	No
OR	H.B. 3284	Privacy: website data	2021	DEM	No

Table 2 continued: State platform regulation passed in 2021-2022

State	Bill	Subject	Year	Gov Status at the time	Supermajority
VA	S.B. 1392	Privacy: comprehensive	2021	DEM	No
AR	H.B. 1514	Privacy: other consumer data	2021	GOP	Yes
AZ	H.B. 2069	Privacy: genetic data	2021	GOP	No
FL	H.B. 833	Privacy: genetic data	2021	GOP	No
FL	S.B. 7072	Social media content regulation	2021	GOP	No
KY	H.B. 502	Privacy: genetic data	2022	GOP	Yes
MT	H.B. 602	Privacy: genetic data	2021	GOP	No
SC	S.B. 510	Privacy: other consumer data	2021	GOP	No
TX	H.B. 20	Social media content regulation	2021	GOP	No
UT	S.B. 227	Privacy: comprehensive	2022	GOP	Yes
WY	H.B. 86	Privacy: genetic data	2022	GOP	Yes
MD	S.B. 187	Privacy: genetic data	2021	Divided	No
MD	H.B. 866	Privacy: genetic data	2022	Divided	No
MD	S.B. 783	Taxation	2021	Divided	No
VA	S.B. 534	Privacy: comprehensive update	2022	Divided	No
VA	S.B. 393	Privacy: comprehensive update	2022	Divided	No

Privacy

- **Five states have passed comprehensive data privacy legislation since 2018. Two states passed comprehensive privacy legislation in 2022 and two in 2021. All four bills passed in the latest session were based on the Washington Privacy Act (WPA).**
- **At least 14 states have also passed targeted data privacy laws that address one type of data or business.**
- **Over the past year, several companies have entered into settlements to address alleged violations of Illinois's Biometric Information Privacy Act.**

Although the federal government still has not passed national data privacy legislation, over the past several years, states have aggressively debated and passed their own data privacy protections. This section provides an overview of those protections, focusing both on comprehensive bills that grant a wide range of new protections or requirements and limited privacy bills that are more narrowly targeted. It also briefly discusses prominent privacy-related state litigation.

Comprehensive Privacy Legislation

In 2022, two states, [Utah](#) and [Connecticut](#), passed comprehensive data privacy legislation. Both laws cover a wide range of types of digital data, and establish a broad set of rights for consumers and responsibilities for businesses that collect or process user data. These two states join [Virginia](#) and [Colorado](#), which both passed similar legislation in 2021, and [California](#), which passed the first comprehensive state privacy bill in 2018.⁴ Notably, all five bills will fully take effect in 2023.⁵ While these are the only states that have successfully passed comprehensive privacy legislation, legislators in more than 30 states introduced similar bills in 2021 and 2022.

Most of the comprehensive privacy bills—both those introduced and those passed—grant consumers certain data rights while imposing new requirements on companies that collect or process user data.

[Specifically](#), many bills grant consumers the right to access, correct, delete, download, or transfer the data companies collect and store about them. Many give

consumers a right to restrict or opt-out of having their data sold to third parties. Finally, several of these bills impose additional requirements on businesses: they must provide notice to consumers regarding data collection or use, and they are prohibited from discriminating against consumers that exercise their new privacy-related rights.

While there are broad similarities in these comprehensive privacy bills, there are also subtle differences. [The California Consumer Privacy Act](#) (CCPA) has inspired legislators to introduce similar bills in other states, including in [Alaska](#), [Florida](#), and [New York](#). None of these bills have been signed into law.

However, the four bills enacted in 2021 and 2022 were modeled on the [Washington Privacy Act \(WPA\)](#), a proposal that has [not yet been passed](#) in Washington state.

Below we examine some of the main differences across both enacted and introduced comprehensive privacy legislation.

Enforcement

One of the most contentious issues is enforcement—most notably whether the bill includes a private right of action. A private right of action enables consumers to sue companies for violations of the law.

[CCPA](#) grants Californians a private right of action for some privacy violations.⁶

In contrast, the four other bills that were passed in 2021 and 2022 do not include a private right of action

4. A state referendum, the California Privacy Rights Act (CPRA), amended CCPA in 2020

5. CCPA technically went into effect on January 1, 2020; CPRA will take effect January 1, 2023.

6. The CCPA grants a private right of action in cases when “nonencrypted or nonredacted personal information...is subject to an unauthorized access or exfiltration, theft, or disclosure as a result of the business's violation of the duty to implement and maintain reasonable security procedures and practices.” CPRA significantly expanded this by revising the definition of personal information to include “email address in combination with a password or security question and answer that would permit access to the account.”

and instead reserve enforcement to state attorneys general. In [Colorado](#), the attorney general can bring cases under existing consumer protection law. Notably, [Utah](#) instituted a multi-step enforcement process, requiring that consumers file complaints with the state Department of Commerce, which may choose to investigate the complaint and surface cases to the attorney general. The attorney general then decides whether to initiate legal action. Other states have considered alternative models. Proposals in [New York](#) and [Massachusetts](#) include more expansive private rights of action than those granted in the CCPA, covering any violation of the law that results in an injury. In [North Carolina](#), state legislators introduced a bill modeled on the WPA that includes a private right of action.

Opt-out/Opt-in

As noted above, [all five of the bills](#) signed into law grant consumers the right to opt-out of having their data sold to third parties or be used for targeted advertising. The laws passed in [Virginia](#) and [Colorado](#) require opt-in consent for collecting or processing of sensitive data.

However, a number of bills—including those introduced in [New Jersey](#), [Georgia](#), [Massachusetts](#), [New York](#), and an [alternative to the WPA](#) in Washington—would require consumers to opt-in to both the sale and the collection of personal data. Additionally, a [Texas](#) bill would establish an opt-in requirement for geotargeting.

Automated Decision Making

The [California Privacy Rights Act](#) (CPRA) amended the CPPA to grant consumers the right to opt-out of “automated decision making,” although it largely leaves further definition of this term to the California Privacy Protection Agency. The Agency can [also require](#) businesses to provide “meaningful information about the logic involved in those decision making processes.” Similarly, a [New Jersey](#) comprehensive privacy bill would also grant consumers the right to be informed about automated decision making and to opt-out of it. A [New York](#) bill would require annual impact assessments for data controllers who rely on automated decision making.

Safe Harbor

The laws in [Utah](#), [Virginia](#), [Connecticut](#), [Colorado](#)—and many of the other WPA-based proposals introduced in other states—include “safe harbor” provisions which allow companies to avoid penalties if they correct violations within a 30 or 60-day “cure period.” While the [CCPA](#) originally had a 30-day cure period, it was removed by the [CPRA](#).

Personal Data

The WPA-based bills [define personal data](#) as that which “is linked or reasonably linkable to an identifiable individual.” In contrast, [CCPA](#) and its related legislation offer a more expansive definition as that which “identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household.” Both models include exceptions for de-identified or publicly available data.

Sensitive Data

Each comprehensive privacy bill imposes stricter rules for sensitive data. Most define sensitive data as that which reveals information about a consumer’s race, ethnicity, religion, sexuality, or citizenship status, along with health, genetic, or biometric data.

Again, [CCPA](#) includes a more expansive definition of sensitive data than the [WPA](#)-based bills. Perhaps most notably, [CPRA](#) amended CCPA to expand the definition of sensitive data to include financial information, social security numbers, and “the contents of a consumer’s mail, email, and text messages unless the business is the intended recipient of the communication.” While all bills include some exceptions for data regulated under federal law,⁷ WPA-bills also exclude “commercial B2B” data.

Limited Privacy Bills

All of the bills discussed above provide comprehensive data protections, rights, or requirements for a range of data and types of businesses. However, legislators in many states have also introduced or passed bills that focus on a single type of data or industry.

For example, in the past two years, legislatures in [Maine](#) and [Nevada](#) passed, and a handful of [others](#) introduced bills that impose new privacy restrictions and requirements on data brokers. Most of these bills would require data brokers to establish a process that allows consumers to opt-out of having their data sold. The [Maine](#) law also requires data brokers to register with the state government. The bills proposed in [Delaware](#) and [New York](#) include this same registration requirement. A series of proposed bills in New York, Wisconsin, and California impose stricter privacy requirements on [websites](#), [ISPs](#), or [connected devices](#).

In September of 2022, California [passed a law](#) that prevents any platform headquartered or incorporated in California from sharing data with out-of-state law

7. e.g. [Health Insurance Portability and Accountability Act](#) and the [Gramm-Leach-Bliley Act](#)

enforcement agencies investigating an abortion-related offense. The law also requires out-of-state law enforcement agencies seeking data from California-based platforms to attest that their investigation does not concern the violation of an abortion-related law.

Perhaps the most notable limited privacy state action is the passage of legislation governing biometric and genetic data. Over the past two years, 10 states have passed genetic data protection laws. These laws either impose data handling and protection requirements on DNA testing companies (e.g. [Hawaii](#)) or on any handling of genetic material (e.g. [Kentucky](#)).

While no states passed new biometric privacy protections in the past two years, a [handful](#) of [states](#) introduced laws [modeled](#) on [Illinois's Biometric Information Privacy Act](#) (BIPA). These proposals would require companies to have a written biometric data policy, to inform consumers before collecting data, and to receive consent to sell data. Many of these bills include a private right of action.

Even though none of these new BIPA-modeled bills passed this session, over the past several years, consumers have pursued a series of class action lawsuits against companies for violations of BIPA.

[Meta](#), [Google](#), [TikTok](#), and [Snap](#) have all recently settled class action lawsuits for BIPA violations: paying \$650 million, \$100 million, \$92 million, and \$35 million, respectively. [Other companies](#)—including McDonalds, Walmart, CVS, 7-Eleven, OkCupid, Louis Vuitton, 365 Retail, UKG Biometrics, Personalizationmall.com, Descorté, Giorgio Armani, Pearson Education, Pret A Manger—have been sued for violations. In September, [BNSF Railway Company](#) was the first company to lose a jury trial for a BIPA violation and was ordered to pay \$228 million for collecting employees' fingerprints without consent.

Privacy Litigation

As states debate and pass new privacy legislation, some are using existing state unfair or deceptive trade practices law to bring civil cases against platforms for privacy violations. For example, states have [filed](#) and settled a series of lawsuits against Google for tracking consumers who had ostensibly opted-out of location tracking. In November, 2022, [Google settled one case](#) brought by 40 states for nearly \$400 million and another brought by [Arizona for \\$85 million](#).

Looking ahead to 2023

- States will continue to consider bills based on the Washington Privacy Act that do not include a private right of action, have an opt-out rather than opt-in provision, and include a significant cure period.
- More states will pass genetic or biometric data privacy legislation.
- Abortion debates will spur state action on privacy.
- There is unlikely to be federal action that will slow down states' policymaking in privacy.

Content Moderation

- Since 2021, four states have passed landmark content moderation legislation.
- Florida and Texas passed new legislation in 2021 limiting platforms' ability to moderate or remove legal content. Republicans in both states led the effort to pass the bills. Although both bills remain in litigation, lawmakers in dozens more states have introduced similar legislation.
- Democratic legislators have recently supported new requirements regarding hateful or false speech. New York enacted one bill requiring platforms to have tools to report hateful speech.
- Democratic legislators in California passed a bill requiring platforms to disclose policies and submit semi-annual disclosure reports. However, state lawmakers in both parties have supported new transparency requirements for platforms.

Over the past two years, state representatives have passed four legislative proposals to address online content and content moderation.⁸ They have introduced dozens more. Republicans have long claimed that tech platforms are [biased](#) against them and have introduced bills to address this concern. In contrast, Democrats have advocated that platforms should do more to remove harmful content on their platforms, and have introduced bills seeking to mitigate this issue.

Below, we review state legislators' approaches to content regulation.

Prohibiting content removal

The most common tactic in state content regulation bills has been to prohibit companies from removing users' legal speech. Typically, these bills have been introduced by Republicans. While some proposals—such as bills introduced in [Ohio](#), [Alabama](#), [Tennessee](#), [North Dakota](#), [Iowa](#), [Wyoming](#), and [Alaska](#)—apply broad prohibitions on moderation of nearly any legal user content, others include exceptions that permit moderation in certain circumstances, such as for “obscene,” “excessively violent,” or “otherwise objectionable” content. A bill in [Montana](#) would permit moderation in these circumstances even if the material is “constitutionally protected.”

Perhaps most notably, [Texas bill H.B. 20](#), which was signed into law in September 2021, prohibits “censorship” of any user’s content based on that user’s

“viewpoint,” the “viewpoint represented in the user’s expression,” or the “user’s geographic location in this state.” A federal district court enjoined the bill on May 11, however, the Court of Appeals for the Fifth Circuit [reversed that injunction](#) but [granted a stay](#) pending further appeal to the [Supreme Court](#).

A [handful](#) of [bills](#) would prohibit companies from moderating any speech by political candidates. Notably, bills introduced in [New Jersey](#) and passed in [Florida](#) not only prohibit moderation of content by candidates, but also moderation about them. The Florida bill, which was signed into law in May 2021, was enjoined by a federal district court judge. Later, the Court of Appeals for the Eleventh Circuit [ruled](#) that the law’s limitations on platform content moderation were unconstitutional, although it upheld some of its transparency provisions (see below). The Supreme Court is expected to review the Texas and Florida laws this term.

Other bills impose prohibitions on moderation in more limited circumstances. For instance, a series of nearly identical bills introduced by Republicans in at least 15 [states](#) would prohibit platforms from “delet[ing] or censor[ing]” users’ “religious speech or political speech” specifically.⁹

A bill introduced in [West Virginia](#) would require that platform moderation of any election-related content—including information about voting processes or about any candidate—be first approved by the secretary of state. The bill introduced in [New Jersey](#) and the one

8. This section is an updated version of a section originally published as part of a [report on state content moderation](#)

9. The state bills include: Arizona HB1428, Hawaii SB357, Idaho HB323, Illinois HB4145, Kentucky SB111, Louisiana SB196, Maine HP1198, Mississippi HB151, Missouri HB482, North Carolina SB497, Oklahoma SB383, Pennsylvania SB604, Rhode Island HB5564, South Carolina HB3450, and South Dakota HB1223. Wisconsin AB 591 also adopts many of the provisions of this bill.

passed in [Florida](#) also prohibit moderation of content created by journalistic outlets. The two bills include different definitions of news outlets, with the [New Jersey](#) bill adopting a definition that would likely cover most people producing content online.¹⁰

Interestingly, some bills, such as those introduced in [Illinois](#) or [Tennessee](#), specify that only state attorneys general can enforce violations of new online content laws. Others, including bills introduced in [Hawaii](#) or [North Carolina](#), would grant a private right of action to users so that they can file civil cases on their own. While some proposals confine the private right of action to those whose content has been [moderated](#), [others](#) include anyone who might have seen moderated content. In doing so, these bills seem to be taking a page from the 2021 [Texas abortion bill](#) that permits citizens to file civil lawsuits against abortion providers.

Prohibiting algorithmic curation, “post-prioritization,” or “shadow banning”

Beyond limiting content moderation, a series of bills introduced by Republicans would also prohibit many forms of algorithmic curation. The group of [15 nearly identical bills](#) includes language that would prevent platforms using an “algorithm to disfavor, shadowban, or censor the user’s religious speech or political speech.” The bill introduced in [New Jersey](#) and the one passed in [Florida](#) ban “post-prioritization” and “shadow banning” for any political candidates. While those bills would technically permit algorithmic curation otherwise, they—[along with other bills](#)—require platforms to “allow a user to opt out of post-prioritization and shadow banning algorithm categories to allow sequential or chronological posts and content.” The enacted Texas bill prohibits “censorship” by platforms, which it [defines](#) as “to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression.”

Importantly, the Supreme Court will issue a decision in [Gonzalez v. Google](#) this term. Many expect the eventual decision to address whether [Section 230](#) of the Communications Decency Act protects companies when they promote or recommend content, in addition to offering liability defense for hosting that content. The Court’s ruling in this case could have a profound impact on if and how states pursue limitations on algorithmic curation.



Creating transparency requirements

Both parties have introduced state legislation imposing transparency requirements on platforms. These disclosure requirements range from informing users when and why their content has been actioned and how many people saw a post, to broader disclosures about content policies, enforcement actions, and moderation and ranking algorithms. Interestingly, the [Arkansas](#) bill, which would have extended existing unfair and deceptive laws to include certain forms of content moderation, notes that “it is an affirmative defense” for violation of new provisions, that a company has provided clear information about its policies, the action fits with its policies, and the platform provided an explanation to users along with a quarterly transparency report.

10. While both bills define a journalistic outlet as an entity operating a cable channel or operating under an FCC broadcast license, they disagree about what counts as online journalistic outlets. For the Florida bill, an entity qualifies a “journalistic outlet” if it publishes more than 100,000 words online with more than 50,000 paid subscribers or 100,000 monthly active users. Alternatively, an entity can qualify if it hosts 100 hours of audio/video with 100 million viewers annually. For New Jersey, a journalistic outlet is any entity that “publish[es] words, audio, or video online and mak[es] such published material available to Internet users.”



On the Democratic side, California recently signed a [new bill](#) requiring platforms to display content policies and to submit quarterly or biannual reports reporting “violations of the terms of service.” A bill in [Connecticut](#) simply requires that the general statutes be amended to “[i]ncrease transparency from social media companies.”

While the courts of appeal for the 5th and 11th Circuits [disagreed about the constitutionality](#) of restrictions on content moderation, they agreed that some of the disclosure and transparency requirements in the bills were permissible. Both agreed that requiring disclosure of platform policies, rule changes, and synthetic statistics is constitutional. However, while the 5th Circuit upheld the law’s requirement that platforms provide explanations for moderation to users, the 11th Circuit found such requirements unconstitutional. As noted above, the Supreme Court is expected to rule on the constitutionality of both laws next year.

Process limitations

Several bills introduced by Republicans, such as those in [Utah](#) and [Texas](#), would require platforms to create an appeals process so that users could challenge content moderation decisions.

Other bills would restrict the number of times that a platform can make changes to its terms of service or community standards. For example, the bill passed in [Florida](#) specifies a platform may not make changes more than once every 30 days, while a [Wisconsin](#) bill specifies no more than once every 180 days.

Bills such as those in [Florida](#), [Montana](#), [Wisconsin](#), and [New Jersey](#) would require that content moderation be “applied equally” or “consistently.” However, none of these proposals specifies what “equal” or “consistent” moderation means or how this principle would be assessed and enforced.

A [bill introduced by Democrats in California](#) would require platforms “located in California” to develop policies regarding both “unprotected speech” and speech “that purport[s] to state factual information that is demonstrably false.”

Limiting harmful content

While the bills discussed above focus on limiting content restrictions, several state bills introduced by Democrats aim to achieve the opposite objective: increasing restrictions on false content. A [legislator in New York introduced](#) a bill that would ban platforms from carrying or algorithmically curating any content that “endangers the safety or health of the public,” specifically that supports or is likely to incite violence, that “advocates for self-harm,” or that “includes a false statement of fact or fraudulent medical theory” that is likely to cause harm.

Following the murder of 10 people in a supermarket in Buffalo in May, 2022, [New York passed a law](#) that requires platforms to have “clear and concise policy” that is publicly available and to provide a mechanism for users to “report incidents of hateful conduct.”

After the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, legislators in [South Carolina](#) introduced a bill, based on model legislation drafted by the [National Right to Life Committee](#), that would have outlawed "providing information" regarding or "maintaining an internet website" "regarding self-administered abortions or the means to obtain an abortion, knowing that the information will be used, or is reasonably likely to be used, for an abortion."

As discussed below, most states already criminalize certain types of false election speech. However, Democratic legislators in some states have recently introduced legislation to expand these laws. A [bill in California](#) would criminalize distributing "with actual malice materially deceptive audio or visual media." A bill introduced in [Oregon](#) would prohibit producing or circulating false claims about election dates, deadlines, voting locations, or methods. Similarly, a bill in [Washington](#) would prohibit any false claims about "election process or election results."

A bill introduced by Republicans in [West Virginia](#) would require that platforms obtain approval before publishing any content about the time, date, or process of elections.

Supporting research

A [bill](#) recently introduced by a Democrat in the Virginia House of Delegates would create a legislative commission to analyze "the impacts and harms to citizens caused by social media platforms hosting or amplifying content that includes threats or suggestions of physical violence or danger."¹¹ Relatedly, a [Republican-backed bill](#) in New York would create a task force to "to study the practices and policies of social media companies ... including but not limited to, forms of censorship employed by social media companies."

Oversight institutions

Finally, a handful of bills have proposed setting up new state-level institutions to oversee content decisions made by platforms. A bill introduced by Democrats in [Colorado](#) proposed a permanent "digital communications" division within state regulatory agencies, as well as a digital communication commission that would pull members from government, industry, and civil society. A bill introduced in [Montana](#) by a Republican representative would create a state commission to resolve complaints against platforms regarding content moderation. The commission would have the power to impose fines on platforms up to "1% of the providers gross revenue during the period of the breach."

Looking ahead to 2023

- Republican-controlled states will likely continue introducing bills similar to those passed in Florida and Texas, which define social media platforms as common carriers and limit content moderation.
- Upcoming SCOTUS cases will shape the landscape for state lawmaking.
- Abortion debates will spur state action on content regulation.

11. One of us (JSBB) spoke at a hearing of the Committee of Rules on Feb 3rd, 2022, before the bill was tabled.

Antitrust

- **State attorneys general have been active on antitrust; state legislatures have not.**
- **Legislators in [New York](#) and [Minnesota](#) introduced proposals to significantly reform state antitrust laws.**
- **At least 10 states have introduced, but not passed, legislation that would impose new restrictions on app stores**

Antitrust activity at the state level has primarily focused on litigation, rather than legislation. On the legislative side, the New York Assembly considered a revision to state antitrust laws that would have permitted increased state antitrust action. At least 10 state legislatures also considered bills that would have imposed new regulations and limits on app stores. Notably, none of these bills have been passed.

Legislation: Monopolization

New York's proposed [Twenty-First Century Antitrust Act](#) would [overhaul the Donnelly Act](#), the state's 120-year-old antitrust law. While the Donnelly Act prohibits only anticompetitive agreements between two or more firms, the new bill would prohibit and criminalize monopolization by a single company, echoing Section 2 of the federal Sherman Act, and expand the scope of New York antitrust law.

Unlike the Sherman Act, however, the [New York](#) bill and a similar one introduced in [Minnesota](#) would both adopt an "abuse of dominant position" standard. Importing language from European law, the bills would allow action against firms that "foreclose or limit the ability or incentive of one or more actual or potential competitors to compete." Evidence of a firm's "unilateral power to set prices, terms, conditions, or standards" would also count as evidence of predatory behavior by dominant companies. Both bills would also set a presumption that a firm is dominant if it has a market share greater than 40%. The New York bill also includes criminal penalties, and provides consumers with a private right of action.

Legislation: App Stores

During the past legislative session, lawmakers in at [least 10 states introduced legislation to regulate app stores](#). Republicans introduced app store bills in [Arizona](#) and

[North Dakota](#), and Democrats introduced bills in [New York](#) and [Massachusetts](#). While there are notable differences between these bills, most state app store bills are focused on app-store commissions and payment processes.

The majority of these app store bills target digital app distribution platforms that have either made more than \$10 million from state residents (e.g. [Hawaii](#) or [Minnesota](#)) or accrued more than one million downloads in the state ([Arizona](#) and [Illinois](#)), in the previous or current year. These 10 bills would prohibit app stores from requiring developers to use the app store's in-app payment system. They would also prevent retaliation against a developer for not using a particular payment service. However, while most of these app store bills reserve enforcement to the state attorney general, the five bills in [Massachusetts](#), [North Dakota](#), [Rhode Island](#), [Illinois](#), and [Georgia](#) would create a private right of action, with Georgia's bill authorizing class action suits.

Several bills focus on self-preferencing in app stores. The bills in [Hawaii](#), [Minnesota](#), and [New York](#) would make it unlawful to disadvantage developers for using other app stores, and would prohibit companies from requiring developers to use an app store to distribute their apps on a particular device, operating system, or software. The bills in [Massachusetts](#) and [Hawaii](#) would prohibit app stores from preferencing their own apps and using data they collect from developers to compete against those developers. Under these bills, app stores must develop "fair, objective and nondiscriminatory standards for privacy, security, quality, content and digital safety," and can remove an app only for clear violations of app store policies. These two bills would also prohibit app stores from preventing or restricting communication between developers and users. They would also require that companies permit users to hide or uninstall preloaded apps.

Federal legislators have also introduced app store legislation. The [Open App Markets Act](#) was [introduced](#) by Senators Marsha Blackburn (R-TN), Richard Blumenthal (D-CT), and Amy Klobuchar (D-MN). If passed, the legislation would likely preempt state law governing app stores.

Litigation

While no states passed significant antitrust legislation in the past two years, states have been active in seeking to enforce existing antitrust law in court.

States have filed four key suits against Google. In October 2020, the US Department of Justice joined with 11 states [to sue Google](#) for allegedly monopolizing general search and search advertising markets. In July 2021, attorneys general from 36 states and the District of Columbia [sued](#) Google, arguing, among other things, that Google has maintained a monopoly in Android app distribution. [The suit claims](#) that Google gave money to app developers and attempted to pay Samsung, a leading manufacturer of Android phones, to deter the growth of other competing app stores.

In another case, 38 states and territories allege that Google secured and maintained a monopoly in the search market, such as by signing exclusionary contracts. In December 2020, a [Texas-led group of 17 states](#) and territories filed a suit accusing Google of engaging in anticompetitive conduct in its online display advertising business .

Amazon and Meta have also faced legal challenges in state courts on grounds that they violated state antitrust laws. [California sued Amazon](#) for allegedly preventing fair competition in the online retail market and creating a “vicious anti-competitive cycle” that ultimately raises prices for consumers. The lawsuit echoes an earlier complaint [filed in the District of Columbia](#) in May, 2021, which the D.C. Superior Court dismissed in March 2022.

Finally, a [group of states](#) joined the FTC in accusing Meta of thwarting competition in social networking through its acquisitions of Instagram and WhatsApp. In June 2021, a federal judge [dismissed the state claims](#) but permitted the FTC’s claims to proceed. The states [appealed the dismissal](#) of their claims.

Looking Ahead to 2023

- Revisions to state antitrust laws remain unlikely.
- Antitrust enforcement through multistate litigation will likely remain a significant priority for both Republican and Democratic attorneys general.
- App stores will continue to be a focus for state legislation and litigation.

Online Child Safety

- **“Safety by design” state legislation has gained traction as a model for regulating minors’ experiences online. California passed a “safety by design” bill modeled on [regulation in the United Kingdom](#). New York is considering a similar bill.**
- **At least three other states introduced explicit child safety bills in 2022. Dozens introduced privacy legislation that includes new restrictions for children.**

Online child safety has become a growing concern for both federal and state lawmakers of both political parties. Policymakers have been increasingly [focused](#) on this issue since [Francis Haugen’s 2021 disclosures](#) of internal research about Facebook and Instagram’s impact on minors. States have sought to impose new restrictions to make the internet safer and healthier for minors.

Safety by Design

California became the first state to pass a comprehensive safety-by-design code when Governor Gavin Newsom signed the [California Age-Appropriate Design Code Act](#) (AADC) into law in September 2022. This bill adopted an approach taken from the United Kingdom’s [Age Appropriate Design Code](#) (also known as the Children’s Code).

The law requires businesses of a certain size “doing business in California” to submit a data protection impact assessment (DPIA) to the California attorney general explaining how their online service may expose children to harmful content. Examples of harmful designs include facilitating unwanted contact between children and adults, using algorithms to promote harmful content, certain forms of targeted advertising, and encouraging unhealthy use of technology. The bill also requires businesses to default their platforms or services to the highest level of privacy when used by a child unless the business can provide a compelling reason that a different setting is in the best interest of the child.

The AADC seems likely to provide a model for other states considering regulation of minors’ online experiences. In September 2022, New York introduced [its version](#) of the California law. Although it generally follows the California bill’s template, the New York bill would also require online platforms to notify parents in case of emergencies involving their children and to expedite

warrants and subpoenas about crimes involving children. The bill remains in committee.

Children’s Privacy

As discussed above, all five of the comprehensive state data privacy bills passed since 2018 include some provisions related to protecting children’s data privacy. Each of these bills requires parental opt-in consent for the collection or sale of certain children’s data. [Colorado](#), [Connecticut](#), and [Virginia](#) require parental opt-in only for sensitive data. [California](#) and [Utah](#) require it for any personal data. Notably, [Utah](#), [Virginia](#), and [Colorado](#) define “child” as anyone under 13, while [California](#) and [Connecticut](#) include anyone under 16. [Several](#) of the [bills](#) introduced but not passed in other states set the bar at 18.



Proposed laws on addiction, algorithms, and account creation

Beyond the laws discussed above, a series of bills intended to protect children online have been proposed but not yet passed.

One bill targets addiction. In August 2022, California state senators introduced the [Social Media Platform Duty to Protect Children Act](#). The bill [would allow](#) local prosecutors to sue social media companies for knowingly utilizing tools to make children addicted to their platform or service.

A Minnesota [proposal](#) would prohibit platforms from “using a social media algorithm to target user-generated content at an account holder under the age of 18.”

Finally, in [Connecticut](#), a bill was introduced that would require parental consent before children under the age of 16 can create a social media account. The bill has yet to be voted on.

Federal legislators have also introduced child safety legislation. The [Kids Online Safety Act](#) was [introduced](#) by Senators Marsha Blackburn (R-TN) and Richard Blumenthal (D-CT). If passed, the legislation would likely preempt some portions of state law governing child safety online.

State Litigation

Beyond legislation, states have initiated investigations and lawsuits accusing social media platforms of causing harm to children and misusing children’s personal information. NC Attorney General Josh Stein has recently led bipartisan, multistate investigations focusing on children’s experiences on [Meta](#), [Snap](#), and [TikTok](#). In June 2022, eight states brought lawsuits against Meta claiming that prolonged exposure to Meta’s platforms—including Instagram—led to suicides, suicide attempts, self-harm, eating disorders, anxiety, depression, and other mental health conditions among young users.

In 2019, Google and YouTube agreed to a [\\$170 million settlement](#) with the New York Attorney General for allegedly violating the federal Children’s Online Privacy Protection Act (COPPA). The lawsuit alleged that YouTube collected personal information from viewers of “child-directed channels” without parental consent making millions by using the information to deliver targeted ads to viewers. As part of the settlement, Google was required to develop a system that permits channel owners to identify their content as child-oriented.

Relatedly, in late 2021, Google and the New Mexico Attorney General [reached a settlement](#) over allegations that Google violated COPPA. The lawsuit accused Google of using its educational platforms as a means to collect the personal data of New Mexico children without their knowledge or permission.

Looking ahead to 2023

- Both parties will prioritize online child safety policy.
- State privacy legislation will include heightened protections for children. As more states pass privacy bills, many of them will likely implement specific additional privacy protections for minors’ data.
- More state bills will adopt a “safety by design approach, following the model of California’s Age-Appropriate Design Code.

Taxation

- **Maryland is the first state to enact a digital services tax on online advertising. The law would use a portion of the tax receipts to pay for public education. The law remains in limbo pending litigation.**
- **Legislators in at least five states have also introduced proposals to impose new taxes on digital advertising.**
- **At least four states have proposed taxing the collection or sale of consumer data.**

Maryland passed a new digital advertising tax in February 2021. The law was passed after a Democratic supermajority in the legislature voted to override Republican Governor Larry Hogan's veto. The law defines digital advertising services to include "advertisement services on a digital interface, including advertisements in the form of banner advertising, search engine advertising, interstitial advertising, and other comparable advertising services." The tax applies to entities with at least \$100 million in global annual gross revenue and \$1 million in annual gross revenue derived from digital advertising services in Maryland. The tax rate varies based on the global annual gross revenue of the company and ranges from 2.5% to 10%. The tax is [expected](#) to raise as much as \$250 million per year, and most of the revenues would be used for improve public education in the state.

On October 17, the [Maryland Circuit Court struck down](#) the law, holding that it is unconstitutional and preempted by federal law. Maryland's attorney general has [announced](#) that he will appeal the decision.

In the past two years, legislators in at least five states have proposed but not passed bills that would

impose taxes on digital advertising. Proposed bills in [Connecticut](#) and [Indiana](#) would apply only to in-state advertising revenue on social media platforms. Proposed bills in at least [three other states](#) would impose taxes on all in-state digital advertising, following the Maryland model.

Lawmakers in [Washington](#), [West Virginia](#), and [New York](#) introduced bills that would tax the collection of consumer data. Legislators in [Massachusetts](#) proposed taxing the sale of consumer data.

Legislators have suggested states should use the funds from these new digital taxes to help address community needs. As in Maryland, bills in [Massachusetts](#) and [Texas](#) would use tax revenues for education. Legislators in [Connecticut](#) and [Indiana](#) sought to use their proposed taxes to fund efforts to prevent suicide, online bullying, and social isolation. Legislators in [Arkansas](#) proposed to use a portion of the tax revenue to address cyber crimes against children. Legislators in [Arkansas](#), [Indiana](#), and [Massachusetts](#) proposed using funds to improve broadband services in rural areas.

Looking Ahead to 2023

- **Lawmakers will continue to propose new digital taxes.**
- **Due to the legal challenges to Maryland's digital tax law, states will likely pursue alternative models for taxing the technology sector.**



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