To Be (A Publisher) or Not To Be

Abstract

The Communications Decency Act provides online sites - notably social media companies - immense discretion to moderate content. Through Section 230 of the law, companies are allowed to remove not only "obscene" posts but also things that they consider "otherwise objectionable." Moreover, the law allows for many prominent companies like Facebook, Google, and Twitter to remain not liable for the content that appears on them (as they are seen as "platforms") all the while allowing these sites to function as "publishers," meaning they can moderate the content on the sites. As our conversations become housed nearly entirely on these ostensible platforms, thus moving the "marketplace of ideas" from the public realm to the private, Section 230 likely provides these companies with the tools to shape our dialogues and thus pierce the heart of free expression. In short, this enigmatic standard needs more careful examination. Therefore, this article argues for a two-pronged effort spearheaded by both the judiciary and the legislature to better tailor the Communications Decency Act's Section 230. For the courts, "otherwise objectionable" appears to be too vague and likely needs to be struck down as unconstitutional as predecessors to the Communications Decency Act were. Likewise, Congress must act too: in a potential revision of the Communications Decency Act, the small step of giving users (not providers) the discretion to moderate their pages can maintain the lack of liability while also allowing individuals to make determinations as to what posts they may want to engage with.

I. Introduction

Remarkably, in about thirty years' time, "Google" is now both a noun and a verb, Twitter may have come to rival the *New York Times* as America's paper of record, and a "meme" is not just an idea which spreads from person to person, as Richard Dawkins once theorized, but a picture too.[1] The "Internet as we know it" has allowed for an unprecedented ability for individuals to communicate around the world. Indeed, it is now easier to connect with old acquaintances and, especially, easier to communicate one's thoughts, unfettered by the old gatekeepers of intellectual debate.[2] Accordingly, "[t]he Internet offers extraordinary opportunities for 'speakers,' broadly defined. Political candidates, cultural critics, corporate gadflies - anyone who wants to express an opinion about anything - can make their thoughts available to a world-wide audience far more easily than has ever been possible before."[3]

But as our means of communication grow more digital with each passing day, the "forum" of ideas is not a public square but, increasingly, a privately regulated marketplace on sites like Facebook.[4] Of course, private companies are not held to the standards of the First Amendment (which was designed to apply exclusively to government);[5] however, at a certain point one must question whether this trend of policing certain speech online is without remedy. In short, without any kind of intervention, are we to eventually be left with corporations determining what speech is appropriate for debate and what is not?

The principal means of allowing this immense discretion to various social media companies - and the target of my chagrin discussed here - stems directly from Section 230 of the

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[1] *See* Olivia Solon, Richard Dawkins on the internet's hijacking of the word 'meme' WIRED UK (2013), https://www.wired.co.uk/article/richard-dawkins-memes.
[2] *See* Tom Nichols, The Death of Expertise: The Campaign Against Established Knowledge and Why it Matters (2017).
[3] *See* William Fisher, Freedom of Expression on the Internet (2001), https://cyber.harvard.edu/ilaw/Speech/.
[4] *See* Daphne Keller, Facebook Restricts Speech by Popular Demand The Atlantic (2019), https://www.theatlantic.com/ideas/archive/2019/09/facebook-restricts-free-speech-popular-demand/598462/.
[5] *See Manhattan Community Access Corp. v. Halleck* 587 US _ (2019)

Communications Decency Act (CDA).[6] This law was designed to regulate how then-nascent internet companies may be held liable for the speech that appears on their sites.[7] The CDA's Section 230 quietly fast-tracked the eventual development of the social media companies of today as they would no longer be responsible for information posted on their ostensible platforms.[8] Not only did this law grant companies the ability to remove content that is "obscene, lewd, lascivious, filthy, excessively violent, harassing" but also, in the view of the content provider, anything that may be "otherwise objectionable" - regardless of whether or not that speech would otherwise be protected by the First Amendment.[9] This, then, opened a Pandora's box of agency for companies to determine what can be seen or posted on their sites without the liability associated with this act.[10]

Much of this discourse around revising - or even outright repealing - Section 230 refers to an attack on particular political viewpoints. Importantly, this article is not to argue *per se* on behalf of those claims. For one "there is no evidence that internet platforms systematically discriminate against conservatives – or progressives, for that matter."[11] Yet, with this said, political viewpoints are just that: perspectives on an issue. Section 230 provides the tool to not just block out particular views but offer legitimacy to those that exist on the site.[12] Put another way, given that Twitter and others choose to inconsistently regulate some content, things that do slip through are affectively ordained as being worthy or acceptable.[13] They are not always, though. As a result, this practice of regulating some, but not all, allows these sites to *de facto*

[6] *See* 47 U.S. Code § 230
[7] *See* Sara Morrison, Section 230, the internet free speech law Trump wants to repeal, explained Vox (2020), https://www.vox.com/recode/2020/5/28/21273241/section-230-explained-trump-social-media-twitter-facebook.
[8] *See id*.
[9] *See supra* note 6
[10] *See* Keller*, supra* note 4
[11] *See* Derek E. Bambauer, How Section 230 reform endangers internet free speech Brookings (2020), https://www.brookings.edu/techstream/how-section-230-reform-endangers-internet-free-speech/.
[12] *See* Keller, *supra* note 4
[13] *See* Nadine Strossen, Hate: Why We Should Resist it With Free Speech, Not Censorship (2018).

dictate what can be debated or, more generally, engaged with online. In turn, if Twitter or any other organizations chooses to police certain speech, such is their right as a private company - but in the name of protecting free expression especially, these actions must come with the associated liability moving forward.

In essence, this is the present predicament: various social media sites (including Google) have been allowed to function as a "publisher" while being regulated as a "platform." The difference between these two is critical as, with the latter, companies cannot be held liable for the content posted on their site - they are a forum for ideas;[14] for publishers, companies are free to choose what gets posted and what does not but are subsequently liable for that which does wind up on their website.[15] This means that a given post exposes not just the author but the company as well to libel suits, for example.[16] What we have now, however, is an unhappy middle ground in which companies can operate as publishers while being regulated as platforms.[17] Should this continue in tandem with even medical journals like *BMC Medicine* depending on Google directing traffic towards its content,[18] Silicon Valley may ultimately be the sole arbiter of what content is worthy of debate by default.

Accordingly, this article will argue for change: Section 230 must be faced with a substantial revision, not because of its aims but because of its potential effects. This will come not from one branch of government but two: Congress and the courts are both essential in tackling this problem. On one hand, courts are necessary to reign in the law. But, additionally, a legislative overhaul will also offer clarity - gone will be the days of eating the proverbial cake

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[14] *See* Adam Candeub & Mark Epstein, Platform, or Publisher? City Journal (2018), https://www.city-journal.org/html/platform-or-publisher-15888.html.
[15] *See id*.
[16] *See id.*
[17] *See id*.
[18] *See* BMC Medicine, https://bmcmedicine.biomedcentral.com/about. ("All articles published by *BMC Medicine* are made freely and permanently accessible online immediately upon publication, without subscription charges or registration barriers."

and having it too for Facebook, Google, Twitter and others who have benefited many times over from this lax standard. Simply, these corporations, further left unchecked, can erode the public's ability to speak its mind once the primary - if not eventually exclusive - medium of communication is held on these sites. Therefore, in Part II, I will begin by outlining the political background and basis for free speech in the United States. This will, ideally, help to ground the conversation regarding some of the shortcomings of Section 230. Next, I will provide background on the CDA - the political dynamics that shaped it, legal challenges to its predecessors, and its aims (Part III) - followed by a highlighting of the key sections of the law (Part IV). Following this, I will seek to underscore the importance of the CDA in developing the modern internet (Part V). Thereafter, though, in Part VI, I will demonstrate why the law is imperfect. Finally, I will offer a legislative proposal along with an interpretative framework for the judiciary, which takes into account the various interests at play while trying to salvage as much as possible from the existing legislation (Part VI).

Specifically, I will ultimately argue that these companies should be publishers with the agency placed not in their hands but in the pockets of users. What will therefore differentiate these companies of the future with the devious actors of the present is that individuals will be able to choose what content they see. Some individuals correctly fear that some content may rehash significant and traumatic episodes in their life;[19] others may also rightly say that certain content has no place in the marketplace of ideas.[20] In turn, the proposed legislation is two-fold in its efforts: first, content moderation on platforms must be in the hands of those who use the site; second, a revision, as opposed to a complete rejection of Section 230, is essential. For the latter, "obscene" content (as defined by current Supreme Court jurisprudence) can be removed but the

[19] *See* Strossen, *supra* note 13
[20] *See* Danielle Keats Citron & Benjamin Wittes, The Problem Isn't Just Backpage: Revising Section 230 Immunity, 2 GEO. L. TECH. REV. 453 (2018)

leeway bestowed to companies through the "objectionable" content loophole must be closed by courts for it is patently vague and broad. To be sure, then, providers would be able to maintain some semblance of reasonable control in line with the understood scope of the First Amendment - that is, this is not a call to see the dark underbelly of the Internet on a regular basis. As for the former, content moderation may be helpful in ensuring that some users are not faced with inappropriate or psychologically deleterious information. Yet, regulation on these sites must come from the users. In short, it must be an individual user's decision to mask certain pieces of content as opposed to the provider making blanket determinations. In this updated version, all users would start with the same populated canvas and can re-arranged in line with their preferences and needs.

II. First Amendment: Origins and Current Precedent

It is first helpful to outline the political and theoretical origins of free speech in the United States. Starting with the Framers of our Constitution onward, a panoply of political figures have rallied around the power of citizens to speak one's mind.[21] James Madison, for one, stated "[t]he people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."[22] Just the same Benjamin Franklin wrote in the *Pennsylvania Gazette* that the "Freedom of speech is a principal pillar of a free government; when this support is taken away, the constitution of a free society is dissolved, and tyranny is erected on its ruins."[23] Or,

[21] *See* David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 Maryland Law Review 3 (1983); *see* "The Constitution How Did it Happen?," National Archives (2019), https://www.archives.gov/founding-docs/constitution/how-did-it-happen

[22] *See* Freedom of Expression - Speech and Press, Legal Information Institute, https://www.law.cornell.edu/constitution-conan/amendment-1/freedom-of-expression-speech-and-press#:~:text=Madison's version of the speech,bulwarks of liberty, shall be.

[23] *See* Benjamin Franklin, *On Freedom of Speech and the Press*, Pennsylvania Gazette, November, 1737.

most pointedly of all, George Washington said that if citizens "are to be precluded from offering their sentiments on a matter, which may involve the most serious and alarming consequences that can invite the consideration of mankind, reason is of no use to us; the freedom of speech may be taken away, and dumb and silent we may be led, like sheep, to the slaughter."[24] Importantly, reverence for the First Amendment did not disappear following the Framers: President Barack Obama reminded spectators at Howard University's commencement in 2016 that free debate allows for "accountability."[25] Similarly, Chief Justice John Roberts wrote on the importance of protecting even hateful speech because "as a Nation we have chosen...to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[26] These quotes offer a window to lay readers into the origins of free speech - namely, what motivated our political forefathers in drafting and later ratifying the First Amendment - but also why respect for free expression is maintained today.

In carrying on this very tradition, the Supreme Court as acted as a "bulwark of liberty" and has largely endorsed a nearly limitless domain for free speech. Yet, there have been narrowly defined criteria designed to curb particular kinds of speech. For example, in *Brandenburg v. Ohio*, the Supreme Court even felt it necessary to overturn precedent and prescribe the "imminent lawless" action standard for assessing the severity (or lack thereof) of an individual's speech.[27] Earlier, in *Chaplinsky v. New Hampshire*, the Supreme Court not only stipulated that the First Amendment does not perfectly protect "lewd and obscene...profane... libelous,

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[24] *See* Address to the Officers of the Army - Saturday, March 15, 1783, George Washington's Mount Vernon, http://www.mountvernon.org/library/digitalhistory/quotes/article/for-if-men-are-to-be-precluded-from-offering-their-sentiments-on-a-matter-which-may-involve-the-most-serious-and-alarming-consequences-that-can-invite-the-consideration-of-mankind-reason-is-of-no-use-to-us-the-freedom-of-speech-may-be-taken-away-and-dumb-/.
[25] Obama's full remarks at Howard University commencement ceremony, Politico (2016), https://www.politico.com/story/2016/05/obamas-howard-commencement-transcript-222931.
[26] *See Snyder v. Phelps*, 562 US 443 (2011)
[27] *See Brandenburg v. Ohio*, 395 US 444 (1969)

and...insulting" sentiments but also does not protect "fighting words" either.[28] These cases, along with others too, show that free speech is not perfectly absolute. However, for speech restriction to be constitutional, they must meet various specific standards - tailored in such a way for the dominant current to remain the free exchange of ideas.

To these ends, the Framers' vision and the Supreme Court's interpretations provides an intellectual backdrop for the conversation regarding Section 230: of course, as private entities, internet companies like Twitter or Facebook are largely free to regulate what appears on their platform irrespective of the current understanding of the First Amendment;[29] however, given the immense power these sites now hold, heavy-handed content moderation on the sites is doubtless inconsistent with the *spirit* of the First Amendment in this country, its "anticensorial soul."[30] More to the point, seeing as social media companies function as the digital forums of conversation - not, as in ancient Greece or Rome for example, a town center by the same name - content regulation there appears to be in direct conflict with the type of system the Framers outline, in which the free and open exchange of ideas is essential. With this in mind, the subsequent motivations for changing Section 230 (outlined here) take into account where the law produced a deviation in original visions but also grounded in a judicial and historical understanding of speech as well.

III. Background: The Communications Decency Act of 1996

For legislative context now, in the mid-1990s Congress was faced with a problem as the internet was on the rise: pornography.[31] The Communications Decency Act (CDA), a

[28] *See Chaplinsky v. New Hampshire 315 US 568 (1942)*
[29] *See supra* note 5
[30] *See* Floyd Abrams, The Soul of the First Amendment (2017).
[31] *See supra* note 19

once-thought inconsequential facet of the Telecommunications Act of 1996,[32] generally, sought to make the internet's content "decent" and presumably fit for minors.[33] In doing so, an early version of the law made it illegal to knowingly transmit "obscene or indecent messages to underage recipients" or "sending...to a minor any message 'that...depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."[34] Yet, the Supreme Court struck down these provisions as impermissibly vague.[35] Writing for a unanimous court in *Reno v. American Civil Liberties Union (Reno)*, Justice John Paul Stevens wrote that "[n]otwithstanding the legitimacy and importance of the congressional goal of protecting children from harmful materials...the statute abridges 'the freedom of speech' protected by the First Amendment."[36] Justice Stevens further elucidated that "the CDA threatens violators with penalties including up to two years in prison for each act of violation" these sanctions "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images."[37]

In response to this decision, Congress passed another law, the Child Online Protection Act which criminalized the display of "indecent material" for a "commercial purpose."[38] Yet, in *Ashcroft v. American Civil Liberties Union (Ashcroft)*, the Court found these to be content based restrictions and thus unconstitutional as well.[39] Writing for the majority, Justice Anthony Kennedy stated that "content-based prohibitions, enforced by severe criminal penalties, have the

[32] *See* Nick Gillespie, Ajit Pai on Net Neutrality, 5G, and Why He Wants To 'Clarify' Section 230 Reason.com (2020), https://reason.com/podcast/2020/12/02/ajit-pai-on-net-neutrality-5g-and-why-he-wants-to-clarify-section-230/.
[33] *See* supra note 30
[34] *See* Andrew Sevanian, Section 230 of the Communications Decency Act: A "Good Samaritan" Law Without the Requirement of Acting as a "Good Samaritan," 21 UCLA Ent. L. Rev. 121 (2014)
[35] *See Reno v. American Civil Liberties Union 521 US 844 (1997)*
[36] *See id.*
[37] *See id.*
[38] *See Ashcroft v. American Civil Liberties Union 542 US 656 (2004)*
[39] *See id.*

constant potential to be a repressive force in the lives and thoughts of a free people. To guard against that threat the Constitution demands that content-based restrictions on speech be presumed invalid, and that the Government bear the burden of showing their constitutionality. This is true even when Congress twice has attempted to find a constitutional means to restrict, and punish, the speech in question."[40]

Both *Ashcroft* and *Reno* underscore the relationship between these content-based pieces of legislation and free speech broadly. Simply put, the content-motivated restrictions of these two early pieces of legislation failed to hold up to Constitutional scrutiny under the First Amendment. What's more, the Court's decisions here emphasize the power that comes with regulating content (or speech) - and why citizens should be leery of its use. Again, as Justice Kennedy notes, restricting speech (in that case based on its content) is a "repressive force." This is to say, any tool used to shield some individuals from certain content is equally a cudgel to infringe upon one's right to speak out.

It is also following these cases - knowing full well the Constitutional barriers that they would face - that Congress tailored the CDA to accommodate these understandings.[41] A resulting amendment, Section 230, represented a shift in which "Congress switched gears from sanctioning Internet speech to instead eradicating the...disincentive to self-regulation."[42] which dealt with the problem of "under-screening"[43]: Section 230(c)(1) stated that "no provider or user of interactive computer services shall be treated as the publisher or speaker of any information provided by an information content provider."[44] Similarly, Section 230(c)(2) addressed "over-screening"[45] material as "no provider or user of an interactive computer service shall be

[40] *See id.*
[41] *See* Citron, *supra* note 20 at 458
[42] *See* Sevanian, *supra* note 34 at 125
[43] *See supra* note 41
[44] *See supra* note 7
[45] *See supra* note 41

held liable on any action voluntarily taken in good faith to restrict access to material that the provider or user considers to be obscene, lewd, lascivious, filthy excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[46]

The importance of this amendment is two-fold: one, internet publishers are "enabled to relay and distribute controversial and even defamatory third-party created content without fear of tort liability"; second, the law creates a "disincentive to censorship: the threat of defamation liability"[47] For the latter, Congress "immunized computer service providers from liability 'on account of any action voluntarily taken...to restrict access to or availability of [objectionable content'" even if this meant that, should a provider censor some content, they were not acting purely as a publisher of this content.[48] As with the Supreme Court cases, this initiative was instigated by judicial action. Stratton Oakmont, a financial services firm, sued Prodigy, then a "widely read" online bulletin in the financial sector, for libel when it failed to take down posts while it edited other material it "considered inappropriate."[49] The New York Superior Court sided with Stratton Oakmont and found that Prodigy lost its status as a "mere distributor of third-party information" when it chose to selectively edit out other pieces on the site.[50] It is with this as a backdrop that Congress passed Section 230: contextually speaking, Congress sought to protect these information distributors from liability when it edits some, but not all, content on their sites.

IV. The Publisher Versus Platform Problem

[46] *See supra* note 7
[47] *See* Section 230 as First Amendment Rule, Harvard Law Review (2018), https://harvardlawreview.org/2018/05/section-230-as-first-amendment-rule/.
[48] *See* Gregory M. Dickinson, An Interpretive Framework for Narrower Immunity Under Section 230 of the Communications Decency Act, Harvard Journal of Law and Public Policy, Vol. 33, No. 2, 2010 at 886
[49] *See Stratton Oakmont v. Prodigy Servs. Co.,* 1995 WL 323710 (N.Y. Sup. Ct. Nassau County May 24, 1995)
[50] *See id*.

The basic (pre-internet) understanding of content providers breaks into two major categories: publishers and platforms.[51] Publishers are "liable for material they publish [or republish] in the same way they [are] liable for their own speech."[52] Accordingly, then, publishers are allowed to moderate content in any way they see fit: a newspaper, for example, can choose to publish a certain piece and are under no obligation to publish others.[53] By contrast, a platform is not liable at all for information transmitted on its service.[54] And, while it is not liable for its content, the presumption is that platforms do not screen or regulate the content on its services.[55]

It is necessary to define these terms clearly here because they are far too often conflated - perhaps because of Section 230. For one, though, the Internet, as a forum, does not perfectly fall within the traditional publisher-platform binary.[56] Yet, companies themselves, which benefit from the nebulous standards of Section 230, are somewhat to blame for this confusion too: in response to a lawsuit questioning the site's moderating policies, for example, Facebook cited that the First Amendment protects "quintessential" publisher functions which "[include] both the decision of what to publish and the decision of what not to publish" while noting that "the publisher discretion is a free speech right irrespective of what technological means is used. A newspaper has a publisher function whether they are doing it on their website, in a printed copy or through the news alerts."[57] Fair enough; however, in that same suit Facebook also stated that, as a "computer service," it should not be "treated as the publisher."[58] In this instance, the grey area

[51] *See* Eugene Volokh, 47 U.S.C. § 230 and the Publisher/Distributor/Platform Distinction Reason.com (2020), https://reason.com/volokh/2020/05/28/47-u-s-c-§-230-and-the-publisher-distributor-platform-distinction/.
[52] *See id.*
[53] *See id.*
[54] *See id.*
[55] *See id.*
[56] *See id.*
[57] *See* Sam Levin, "Is Facebook a publisher? In public it says no, but in court it says yes," The Guardian (2018), https://www.theguardian.com/technology/2018/jul/02/facebook-mark-zuckerberg-platform-publisher-lawsuit.
[58] *See id*.

that the internet writ-large falls into, coupled with legislation that complicates previously understood categories, offers technology companies an out: they are able to operate in practice as functionally both a platform and a publisher.[59]

V: Section 230 and the Birth of the Modern Internet

While the CDA explicitly deals with the liability of internet companies, it is perhaps directly responsible for the birth of the internet as we know it.[60] Section 230 catalyzed the development of "websites like Facebook, Reddit, and YouTube [which] have millions and even billions of users. If these platforms had to monitor and approve every single thing every user posted, they simply wouldn't be able to exist [because no] website or platform can moderate at such an incredible scale."[61] Put simply, content-rich websites, chief among them being social media companies, could not possibly regulate the information that travels on their platform based on the sheer number of users.[62]

Without the fear of exposing themselves to lawsuits for a given post on their sites, these various social media companies have helped to develop the internet of today.[63] Not only have these sites provided "perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard"[64] but this law has also been a license for companies to innovate without fear of an eventual legal roadblock.[65] In the simplest terms, Section 230 has provided the necessary protection for companies to grow unrestrained with few "vague and legally

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[59] *See supra* note 50
[60] *See* Morrison, *supra* note 7
[61] *See id.*
[62] *See id*.
[63] *See id*.
[64] *See Packingham v. North Carolina* 582 US _ (2017)
[65] *See* Derek Khanna, The Law that Gave Us the Modern Internet-and the Campaign to Kill It The Atlantic (2013), https://www.theatlantic.com/business/archive/2013/09/the-law-that-gave-us-the-modern-internet-and-the-campaign-to-kill-it/279588/.

treacherous regulations that stop them in their tracks."[66] So, while this law has made it difficult to ascertain whether a given entity is a publisher or platform, it has not been without gains - those being, of course, a technologically broad and expansive version of the Internet.[67]

VI. The Dark Side of Section 230

This, of course, has not completely been for the best. In direct contrast to internet-based companies, users may be harmed under this system. Though individual users are able to expand the range of their audience - to "make his or her voice heard" - there is a more nefarious outcome in which it is lost to an abyss of various internal forms of regulation. Unbeknownst to a given individual, for example, one's own page may look vastly different to another person's based on the aggregation of data from things such as "likes," or interactions, with other posts.[68] Consequently, a heavily influenced feed diminishes the voices of other users. Let me explain through an example: imagine, for a moment, you are in a public square speaking, jockeying for attention in competition with other speakers. You lack any kind of amplification device but individuals passing by may wander over and stop to hear you, applaud when appropriate, and maybe even subsequently voice their displeasure. No one is, of course, obligated to listen to what you may have to say but some will nonetheless.

But now picture a similar - but wholly different - world: you occupy the same space in the square but other occupants are now guided through to approach certain speakers based on their non-verbally expressed preferences. In this scenario, you have an amplifier - but one that only reaches designated listeners. Not all patrons will have the chance to listen to you. Some

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[66] *See id*.
[67] *See id.*
[68] *See* Natasha Singer, What You Don't Know About How Facebook Uses Your Data The New York Times (2018), https://www.nytimes.com/2018/04/11/technology/facebook-privacy-hearings.html.

other rival speakers may amass a larger audience while some may lack even one person to hear them speak. Herein is the problem that site manipulation poses: though a curated page may be more aesthetically pleasing, this carefully sculpted feed simultaneously erodes one of the more appealing aspects to the internet in that it is, namely, a potential outlet for *all* individuals to express themselves on equal ground.[69]

But, not only has the effect been to the detriment of users and their perspectives, our own system of self-governance has been nearly skewered too.[70] Following the 2016 election, Facebook was rocked by the "Cambridge Analytica" scandal in which it came to light that users' data were compiled to make psychological profiles which in turn were subsequently packaged to political candidates in hopes of targeting certain individuals.[71] In essence, the marketplace for a particular user was bombarded with a deluge of information in hopes of muscling out - not with talent, but with dollars - competition in the form of dissenting opinions. Advertisements were pushed forward to blocks of users and promoted for better visibility - allowable under the current framework. Similarly, in this same election, Russian's took to these sites to "sow discord" among citizens and thus "disseminated inflammatory posts that reached 126 million users on Facebook, published more than 131,000 messages on Twitter and uploaded over 1,000 videos to Google's YouTube service" according to *The New York Times*.[72] The cases of interference (in these various forms) is not, perhaps, the most disconcerting aspect of these events, though; rather, they may offer an ominous warning for the potential for the current regulatory framework to catalyze chaos.

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[69] *See supra* note 64
[70] *See* Kevin Granville, Facebook and Cambridge Analytica: What You Need to Know as Fallout Widens The New York Times (2018), https://www.nytimes.com/2018/03/19/technology/facebook-cambridge-analytica-explained.html.
[71] *See id*.
[72] *See* Mike Isaac & Daisuke Wakabayashi, Russian Influence Reached 126 Million Through Facebook Alone The New York Times (2017), https://www.nytimes.com/2017/10/30/technology/facebook-google-russia.html.

While, these instances are not, in and of themselves, sufficient to call attention to the problems presented by Section 230, they apply to a theme: for one, despite the vast potential, one's message may fall upon deaf ears because of various kinds of content moderation on these sites; second, and slightly related, these sites reach an perhaps incomprehensibly large number of people with messages designed to zero in on an easily manipulated group of targets.[73] To this latter point, any willing actor is playing with an unprecedented amount of information: given what these companies have amassed in terms of data, it is possible to possess a frightening and asymmetric level of information.[74] This would be akin to playing a game of chess in which your opponent knows exactly the move you will make before the final pawn has been placed on the board at the start. Regulation with an eye towards overcoming the deleterious effects of a mass disinformation campaign that targets specific individuals seems more than warranted.

To this end as well, these instances also highlight the potential for catastrophe as "conversations" - those between individuals or more basically the means of communicating one's thoughts - move more online.[75] If every post one sees is not according to one's openly expressed interest but by the implications derived from collected data or if posts sharing misinformation could be promoted to a point beyond silencing them, it would be difficult - if not impossible - to ascertain the "truth."[76] Professor Claudio Lombardi observed that "the traditional model of a 'marketplace of ideas' was intended to justify freedom of speech in terms of its optimal outcome in the production of truth. But today our behavior on the internet, the main locus of the 'marketplace of ideas,' is continuously monitored and processed through the analysis of big data.

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[73] *See id.*; *see* Granville, *supra* note 70

[74] *See* Olivia Solon & Cyrus Farivar, Mark Zuckerberg leveraged Facebook user data to fight rivals and help friends, leaked documents show NBCNews.com (2019), https://www.nbcnews.com/tech/social-media/mark-zuckerberg-leveraged-facebook-user-data-fight-rivals-help-friends-n994706.

[75] *See* Keller*, supra* note 4

[76] *See* Claudio Lombardi, The Illusion of a "Marketplace of Ideas" and the Right to Truth American Affairs Journal (2019), https://americanaffairsjournal.org/2019/02/the-illusion-of-a-marketplace-of-ideas-and-the-right-to-truth/.

Complex algorithms categorize our choices and personalize our online environment, which is used to provide, among other things, bespoke news and information. In their quest to gain more traffic and advertising dollars, news providers often shape their content for online consumption in mobile formats...and often with "clickbait" headlines."[77]

This is, fundamentally, what makes Section 230 so troubling: it is not because of the oft-cited deliberate lack of political diversity,[78] for example, but, rather, because this piece of the CDA gives internet companies the ability to regulate the marketplace of ideas. John Stuart Mill, in his seminal essay *On Liberty*, summarized the "optimal outcome" alluded to above as the product of wrestling with ideas in which if "[an] opinion is right, [humans] are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error."[79] Simply, the free exchange of ideas pushes individuals towards the "right" perspective through constant "collisions" which ultimately chisel away at the societal marble to produce a better, more pleasing, product.

However, social media companies, through their Section 230-blessed discretion, have the capacity to silence opinions implicitly or explicitly and deprive all people accordingly. Of note, "platforms such as Facebook rely on software that can monitor everything we write, route it for review, or just automatically delete forbidden words or images."[80] Ironically, it is now Facebook operating in the same tyrannical way the Framers may have feared government may have - and with the same ultimate effects of the silencing of particular voices.[81]

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[77] *See id*.
[78] *See supra* note 7
[79] *See* John Stuart Mill, On Liberty (2002) [1859]
[80] *See* Keller, *supra* note 4
[81] *See id.*; see Franklin, *supra* note 23

In short, the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, [and] that a free press is a condition of a free society."[82] And, though content-restrictions are allowable in certain circumstances, the Internet generally "constitute[s] a unique medium...located in no particular geographical location but available to anyone, anywhere in the world, with access to [it]"[83] and, as such, "content-based restrictions on Internet speech receive the full scope of First Amendment scrutiny."[84] This said, however, content *on* the Internet, as opposed to the Internet itself, is vastly different in terms of the application of this standard. In general, many ostensible forums of information online are not simple repositories but, as alluded to, private companies - and thus the First Amendment does not apply directly to them.[85]

Ultimately, Congress is at least somewhat to blame for failing to stop this runaway train as a result of its inaction. Section 230 makes clear that it does not matter "whether or not...material is constitutionally protected"[86] for it to be subject to a company's moderation. In doing so, Congress has blessed a given company's operations even in spite of the fact that they may fly directly counter to the spirit and letter of our Constitution. Congress has also, rather notably, punted on revisiting the law.[87] In turn, many companies - notably Facebook, Twitter, and Google - which have rightly been called "the modern public square"[88] can cripple citizens'

[82] *See Associated Press v. United States, 326 U.S. 1, 20 (1945).*
[83] *See Reno*, supra note 35
[84] https://globalfreedomofexpression.columbia.edu/cases/nunes-v-twitter-inc/
[85] *See supra* note 5
[86] *See supra* note 6
[87] *See* John T Bennett, House passes defence bill despite Trump's veto threats The Independent (2020), https://www.independent.co.uk/news/world/americas/us-election-2020/section-230-trump-ndaa-congress-b1768309.html.
[88] *See* Keller, *supra* note 4

Constitutionally endowed ability to not only share their views but also autonomously determine how others' speech falls within the bounds of collective norms.[89]

And, lastly, despite seemingly "good faith" efforts to push out and banish heinous comments and posts from their sites, it may not be for the best overall. By analogy, let us look across the Atlantic to Germany: prior to the rise of Hitler and Nazism, German "hate speech" laws were stringently enforced with "two hundred prosecutions based on anti-Semitic speech."[90] However, "rather than suppressing the Nazis' anti-Semitic ideology, these prosecutions helped the Nazis gain attention and support."[91] Ironically, then, in an attempt to drive out hateful views, the Germans inadvertently gave them more credence. Similar laws designed to eradicate hateful expressions exist today - not just in Germany, but in France and Canada too.[92] As with early-20th century antisemitism in Germany, these efforts may have unintended consequences.[93] Most importantly, "censorship drives some discriminatory expression underground, with important negative consequences" among these being that "some people who harbor hateful, discriminatory ideas are deterred from expressing them" along with the fact that we simultaneously "lose the opportunity to dissuade them and to monitor their conduct."[94] Simply put, though these laws are exceptionally laudable in their aims, paradoxically, they may produce the opposite end - they may, in fact, make these hateful views worse.

Just the same, sites like Facebook or Twitter, which deliberately censor content in the name of dismissing hateful or bigoted or simply ignorant views, may inadvertently exacerbate existing (and likely chronic) societal ills.[95] As but one example, the *New York Post* published a

[89] *See id.*
[90] *See* Strossen, *supra* note 13
[91] *See id.*
[92] *See id.*
[93] *See id.*
[94] *See id.*
[95] *See id.*

series of articles detailing what it believed demonstrated a connection between President-elect Joe Biden's son, Hunter, and some ostensibly salacious business dealings in Ukraine.[96] The piece was largely seen as conjecture and, indeed, lacked clear or conclusive links between then-candidate Biden, his son, and members of the Ukrainian government.[97] But Twitter banned the *Post*'s account and refused to allow the article to circulate on its site.[98] This resulted in a boon - perhaps for the *New York Post* most of all. The paper now became something of a martyr for what members of the political right believed was a larger mission to silence conservative voices on the site.[99] Of course, the Twitter example is not an instance of hateful content - but it illustrates the potential for eye-roll worthy views to enter popular discourse as if they rightly belong.

More dramatically, in October of this year, Facebook took the significant step to cripple and silence hate online by banning the right-wing conspiracy group QAnon.[100] QAnon followers posit that "high-profile Democrats and Hollywood celebrities are members of a child-eating cabal that is being secretly taken down by President Donald Trump, and that members of this fictitious cabal will soon be marched to their execution."[101] These ideas almost self-evidently hold no currency in the marketplace of ideas, they should be dismissed outright and repudiated. Yet, Facebook's heavy-handed approach did little to quash the QAnon craze: not only has at least one supporter remarkably become member of the United States House of Representatives,[102] the unsubstantiated conspiracy theory has metastasized to Japan which is now "home to one of its

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[96] *See* Kate Conger & Mike Isaac, In Reversal, Twitter Is No Longer Blocking New York Post Article The New York Times (2020), https://www.nytimes.com/2020/10/16/technology/twitter-new-york-post.html.
[97] *See id.*
[98] *See id.*
[99] *See id.*
[100] *See* Ben Collins & Brandy Zadrozny, Facebook bans QAnon across its platforms NBCNews.com (2020), https://www.nbcnews.com/tech/tech-news/facebook-bans-qanon-across-its-platforms-n1242339.
[101] *See id.*
[102] *See* Sam Levin, QAnon supporter Marjorie Taylor Greene wins seat in US House The Guardian (2020), https://www.theguardian.com/us-news/2020/nov/03/qanon-marjorie-taylor-greene-wins-congress.

most active networks outside the U.S."[103] Now, there is no direct correlation between Facebook's policy initiatives and the rise of right-wing conspiracies in the United States or abroad - nor am I trying to illustrate one here. Nevertheless, social media companies are likely blocking out the necessary sunlight needed to better shut out these abhorrent and aberrant ideas.[104] Put plainly, the best efforts to rid ourselves of perverse perspectives like QAnon or, unfortunately, countless other internet-based conspiracy theories may be to strip major sites of the censoring power ironically.

VII: Proposed Legislation

Given this, we users are largely reliant on companies complying with the *spirit* of the First Amendment - that is, we hope that these companies never turn on positions far more in the political and intellectual mainstream. Thus, should the courts be called to intervene, they must ensure that mere hopes are not the only protection we have for creating a robust marketplace for debate online.

One such target would be to strike down the "otherwise objectionable" standard as impermissibly vague which would simultaneously neuter companies' censoring power.[105] As to what the preceding "lewd" or "obscene" or any other content mentioned is, it is likely insufficient to rely on Justice Potter Stewart's infamous quip.[106] Instead, though, we can rely broadly on Supreme Court precedent (some of which was previously discussed). The Supreme Court dealt explicitly with obscenity in *Miller v. California* (*Miller*).[107] The result in the opinion

[103] *See* Max Zimmerman, QAnon's Rise in Japan Shows Conspiracy Theory's Global Spread BloombergQuint (2020), https://www.bloombergquint.com/politics/qanon-s-rise-in-japan-shows-conspiracy-theory-s-global-spread.
[104] *See* Louis Brandeis, OTHER PEOPLE'S MONEY - CHAPTER V - Louis D. Brandeis School of Law Library Louis D. Brandeis School of Law Library, http://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-v.
[105] *See* Morrison, *supra* note 7
[106] *See Jacobellis v. Ohio 378 U.S. 184*
[107] *See Miller v. California 413 US 15 (1973)*

authored by then-Chief Justice Warren Burger outlined a three-pronged test to assess whether something was obscene: first is "whether the average person, applying contemporary community standards, would find that the work taken as a whole, appeals to the prurient interest"; the second, is "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"; and, lastly, "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[108] Beyond this rule for obscenity though, content that involves "fighting words" or language designed to "incite imminent lawless action" can both be removed for they are not in direct tension with what we understand free speech to entail.

To these ends, too, Section 230's must also face further change - this time, hopefully, from a now-active Congress - in the form of removing the language that explicitly states that companies may regulate content regardless of "whether or not such material is constitutionally protected."[109] In striving for a more open and free arena for conversation and debate, the presence of constitutionally protected speech is essential for a more perfect version of the Internet.

But creating this seemingly endless vat of content without regulation poses other problems. In particular, there is the issue of whether some content seen on these sites will pose the risk of irrevocable harm. For example, in its Community Standards, Facebook states that it "[does] not allow hate speech...because it creates an environment of intimidation and exclusion."[110] To this point, researchers have identified "hate speech" as causing psychological harm and increased stress levels.[111] Critically, though, "companies like Facebook, Twitter, and

[108] *See id.*
[109] *See supra* note 6
[110] *See* Community Standards, Facebook, https://www.facebook.com/communitystandards/hate_speech.
[111] *See* Koustuv Saha, Eshwar Chandrasekharan & Munmun De Choudhury, Prevalence and Psychological Effects of Hateful Speech in Online College Communities NCBI (2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7500692/.

Google generally respond *reactively* to such material: offensive messages that have already been posted are reviewed by human moderators if complaints from users are received. The offensive posts are only *subsequently* removed if the complaints are upheld; therefore, they still cause the recipients psychological harm."[112] In other words, even the best efforts put forth by these companies still does not solve the problem: merely seeing this hateful content online poses significant risks to users - and thus granting the regulatory controls to these companies does not solve the problem.

Limiting the regulatory agency of these companies does not just apply to the issue of psychological harm but of simply inappropriate content for particular audiences. To reiterate, Section 230 was passed in the shadow of Congress dealing with internet pornography.[113] It surely goes without saying that this content is not suitable for some individuals, particularly minors.[114] There is a justifiable fear that in calling for less content moderation, it may expose individuals to information and content that is not fit for them.[115]

There is a small solution, though, which would further revise Section 230: placing content moderation in the hands of users. With this scheme, it would be the individual user controlling what content they see - not a faceless company. The controls would be placed in users' hands to manipulate what their "feed" may contain. Accordingly, too, companies will remain not liable for this content (though in a different way). In short, Section 230 was off to a reasonable start - but more revision is necessary in light of more recent developments. Part of the language of Section 230, in following this proposal may read now as follows:

No provider or user of an interactive computer service shall be held liable on account of

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[112] *See* Stephanie Ullman & Marcus Tomalin, Quarantining online hate speech: technical and ethical perspectives, Ethics Inf Technol 22, 69–80 (2020)
[113] *See* Citron *supra* note 20
[114] *See id.*
[115] *See* Strossen, *supra* note 13

> allowing any action voluntarily taken in good faith *to allow users* to restrict access to or availability of material that *the user* considers to be [obscene, lewd, etc.].

Notice the small but immeasurably significant difference compared to the original: it is not the "provider" of the content who has a say in what can be seen online but the user alone who dictates what content may appear on the site for their specific page.

These two proposals, one with respect to provider-based content moderation and another focused on the user, ultimately can help guide the conversation towards settling the publisher-or-platform debacle. Simply put, these two routes likely end in many of the most popular websites finding themselves operating as content platforms - and appropriately so. As previously stated, Facebook, Twitter, and others could not possibly be responsible for all the content that appears on their site.[116] And, indeed, even when they deem a post inappropriate or ill-fitting given their companies' standards, it may not solve the problem as just seeing the post poses risks.[117] Most of all, these sites possess an immense wealth in the form of its leagues of users. If seeking to provide an outlet for engagement, debate, or, simply expression, we would all be well served in maintaining the most robust form of interaction through un-moderated online sites. Efforts taken by Congress to nudge these sites towards operating fully as platforms achieves this end.

By contrast, if one were to seek to have these sites operate as publishers, the effects may be worse. As stated, many of these existing sites form the backbone of the modern intellectual forum. Users from around the world are connected through their various electronic devices. This is a net social good for this reason alone as, in the Millian sense, now more users can nudge one another toward more optimal "truths." In effect, then, other kinds of change - in which social media companies would be held liable by design for the content on their sites - would shrink

[116] *See* Morrison, *supra* note 7
[117] *See supra* note

intellectual arenas, disconnect users, and, worst of all, shape the internet in a design commissioned by the few. The proposals outlined above are thus argued with a specific, overarching aim: to maintain the potential for an immense diversity of exchanged thought that these spaces currently offer while removing the avenues for content moderation which stifle speech. Pulling these various sites towards the world of being a platform offers more users still the opportunity to have their voices heard - and providing a needed connection to the spirit of free expression which has ordinarily been defended in the United States "more often, more intensely, and more controversially" than anywhere else.[118]

VIII: Conclusion

In sum, Section 230 is in need of change. The current form of the legislation simply poses too many risks: in particular, we are reliant on both companies and others not taking advantage of the immense power these sites offer to cripple and silent dissident voices. The current version of the law is just incompatible with both our system of self-governance and the underlying ethos respecting the freedom of speech.

To achieve this end, a bifurcated but joint effort is necessary, undertaken by both the courts and Congress. As it relates to the former - if faced with the opportunity to do so, of course - the judiciary ought to reconsider the use of the phrase "otherwise objectionable" in Section 230. This vague phrase allows companies to offer their view as to what is allowable on their sites. Indeed, Google in fact argued that a broad interpretation is critical for their business.[119] Be that as it may, this phrasing offers too much discretion to social media and technology companies and

[118] *See* Abrams, *supra* note 30
[119] *See* Google, Inc., Plaintiff, v. MyTriggers.Com, Inc., et al., Defendants. Court of Common Pleas of Ohio, Franklin County, Civil Division, August 31, 2011.

should be struck down as impermissibly vague. As for what the preceding phrases about "lewd" or obscene content refer to, the Supreme Court has already provided a rubric.[120] This not only assists in defining these terms, but grounding the speech on these sites in alignment with the First Amendment, thereby effectively nullifying the provision which allows for content moderation beyond the reasonably understood range of the First Amendment.

Similarly, Congress is also needed to intervene on behalf of users. In particular, Section 230 can be revised to strike out the agency offered to "providers" of content in the name of moderating the content on the page. As it relates specifically to largely indecent or hateful content, providers do not offer enough as it stands: for one, they respond "reactively," failing to shield users from the harmful content.[121] Additionally, their immense popularity can also wrongly draw attention to sources when they are silenced - creating a belief of martyrdom, for example, which only calls greater attention to this repugnant content.

More fundamentally, these steps taken by judges and lawmakers alike will push us towards a more free and open internet space for expression and inquiry. Now, more so than any other time in history, individuals are connected through these various media. This allows for the exchange of ideas not only across boundaries but between cultures. In seeking to develop a more perfect internet space, our laws should reflect the desire to incorporate as many voices as possible in order to reach the "true" conclusion, as John Stuart Mill may call it. Should social media companies be allowed further to regulate the content that appears on their sites, this will doubtlessly stifle the range of views one is exposed to. Troublingly, this runs wholly counter to the "soul" of our Constitution in which there is seemingly the expectation that our country is one that is "anticensorial."[122] Thus, an Internet made up of constituent parts which adhere to the spirit

[120] *See Miller*, *supra* note 107
[121] *See* Ullman *supra* note
[122] *See* Abrams*, supra* note 30

of free expression is to the benefit of all individuals, users of a given site or not, while also maintaining a comforting closeness to providing a forum for open engagement with a plethora of positions.