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Preserving Section 230 Is Key to Maintaining the Free and Open Internet *Innovation Beats Regulation in Content and Social Media Moderation*

By Jessica Melugin *

Passed as part of the Telecommunications Decency Act of 1996, Section 230 was intended to clarify liability rules online and to encourage sites to create their own content moderation rules and curate their platforms accordingly.¹ It succeeded in achieving those goals. Today, the law is known as “the twenty-six words that created the Internet.”² The online liability regime it created allowed the Internet to develop as a thriving marketplace of ideas.

But now the freewheeling nature of online speech is under threat. Claims of political bias from the right and of harmful misinformation from the left have put Section 230 in the crosshairs of politicians seeking to curtail or repeal the law. That would harm consumers, innovation, and speech. Better to let market responses address complaints with current content moderation.

What Is Section 230? When the Internet first gained in popularity in the 1990s, it was not clear how third-party content and liability would work online. Would the host of the content be liable for content? Would the author retain legal responsibility?

Up until that time, courts connected legal liability for information distributors to the reasonability of their knowing about the content in question. For instance, how reasonable is it for a bookstore to be aware of legally actionable content in a book or magazine it sells? That was not an easy question to answer with consistency even at the modest scale of a brick-and-mortar bookstore, but it was even less realistic when applied to online forums and their millions of user-generated posts.

Two of the main services for getting online in the 1990s were CompuServe and Prodigy. Both involved users dialing up through their land lines to gain access to bulletin boards, chat rooms, and the third-party-posted content of fellow users. Because of the unsettled question of legal liability, CompuServe and Prodigy took diametrically opposed approaches to moderating their bulletin boards and chat rooms. CompuServe took a hands-off approach in the hope that its lack of moderation would imply a lack of knowledge about its users’ posts and thus free the company from legal liability.³ Prodigy wanted to create a more user-friendly environment and was proactive about creating and enforcing standards for posted content, but in doing so, it made itself more vulnerable to liability lawsuits.⁴

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This disincentive to curate is called the moderator's dilemma. The predicament came to a head in 1995 when a New York Supreme Court found that Prodigy was liable for third-party content because it had chosen to be proactive about moderating content.⁵ That verdict and a desire to end the moderator's dilemma prompted the bipartisan drafting of Section 230 of the Communications Decency Act in 1996.⁶

The heart of Section 230 reads:

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.⁷

That means that the third party posting the content, not the website or platform on which it appears, retains the liability for the post. For example, if Donald Trump tweets something, Trump, not Twitter, is legally responsible for that message. The First Amendment's protections against forced speech ensure Twitter's right to take down a tweet, but Section 230 protects the social media platform from being sued for the content of the tweet if it decides to leave it posted. The two protections function differently and are often confused in the debate around content moderation.⁸

Section 230 ended the moderator's dilemma by protecting platforms from liability even if they curate and remove content created and posted by third parties. It clarifies the default law and saves the cost and trouble of countless lawsuits being brought.

Section 230 has limits. It does not protect platforms from liability for federal criminal activity, intellectual property infringement, or violations of electronic communications privacy laws. Additionally, Section 230 was curtailed in 2018 to hold platforms liable for third parties engaged in prostitution and sexual trafficking, under the Fight Online Sex Trafficking Act from the House and its Senate companion, Stop Enabling Sex Trafficking Act—known as FOSTA-SESTA.⁹ That reform has been criticized for forcing sex workers deeper into the shadows, where they are less safe, and for legal, sex work-adjacent online material being swept up in platforms' increasingly aggressive content removal in response.¹⁰

Everybody's a Critic. Section 230's liability protections create a procedural fast lane that allows platforms to host and to remove third-party content without fear of costly legal repercussions for doing either. That default facilitated the Internet ecosystem of today because liability claims against platforms were dismissed much earlier in the legal process than they otherwise would have been. Thanks to this flourishing of user-generated content online, speech is more egalitarian and abundant than at any point in history and more people are able to communicate than ever before.

But progress brings challenges. Failures, mistakes, and shortcomings are inevitable at the edge of innovation. That is the case with social media on today's economic frontier. Some on the left fret about the consequences of harmful misinformation circulating online, while some on the right think their conservative views are disproportionately targeted for removal by politically biased tech companies. Accordingly, the left wants more third-party content

removed, while the right wants less third-party content removed. While these criticisms come from different sides of the aisle and have opposite aims, they converge with criticisms of Section 230. Since the beginning of 2021, at least eight bills have been introduced in the U.S. House and Senate to repeal or curtail Section 230's liability protections.¹¹

There is also activity at the state level. A law in Florida is currently being challenged in court and will likely be deemed unconstitutional on First Amendment and federal preemption grounds.¹² Similar legislation has been introduced this year in at least 20 states.¹³

Proposals from the Left. Proposals from the left advocate repealing or curtailing Section 230 because removing online platforms' liability protections for defamatory content will incentivize more removal of content. Supporters of these reforms aim to tip the scales in favor of increased removal of material some on the left find objectionable. The First Amendment will continue to protect platforms' right to remove content, while removing Section 230's procedural fast-lane will raise the risk to platforms of legal costs for content they leave up.

Senator Warner (D-VA) is the cosponsor of one such measure, the SAFE TECH Act.¹⁴ Upon introducing the legislation he said, "Section 230 has provided a 'Get Out of Jail Free' card to the largest platform companies even as their sites are used by scam artists, harassers, and violent extremists to cause damage and injury."¹⁵ As it relates to the Senator's mention of "scams," content related to any federal crime is already beyond the protections of Section 230. His last two examples are indicative of the concerns many in his party have about legal, but objectionable content allowed to remain on platforms.

Recent examples of legal, disagreeable speech viewed as "misinformation" by many on the left include social media third-party posts about the COVID-19 pandemic, the outcome of the 2020 U.S. presidential election, and the violent events at the U.S. Capitol on January 6, 2021. Illustrative of a typical criticism from the left, House Energy and Commerce Committee Chairman Rep. Frank Pallone (D – NJ) told a March 2021 House hearing, "today our laws give these companies a blank check to do nothing, rather than limit the spread of disinformation."¹⁶

Repeal of Section 230 would likely lead to more content being removed as online platforms opt to be legally safer than sorry. To minimize the threat of costly litigation, platforms will take down any content that could be the subject of legal challenges. This legal risk may prove lethal for smaller and medium-sized social media platforms.¹⁷ Business models will have to change. Nascent platforms will not benefit from the same environment that allowed Facebook, Twitter, and other market leaders to thrive. Venture capital for yet-to-be-invented platforms may dry up completely as compliance and legal liability costs prove prohibitive. Among large platforms that could absorb the enormous compliance and legal costs, there will be an overall reduction of speech online.

While it is likely that right-of-center content will be hit hardest with increased removal of minority opinions like pro-life sentiments, global warming skepticism, and pro-religious

opinions, liberals should be concerned too. They may become subject to this same increased scrutiny when political winds change.

Proposals from the Right. Calls for regulation of social media from the political right constitute a reversal of the pro-First Amendment corporate protections that conservatives have defended as crucial to the marketplace of ideas.¹⁸ The right's enthusiasm for government intervention into speech implies that competition and consumer welfare need political force. That runs counter to conservatives' usual regard for free markets and limited government.

The rise of populism on the right and the frustration with perceived leftist bias from "Big Tech" have overpowered traditional conservative regulatory instincts for many voters, pundits, and politicians. That reached its apex with the Trump administration's request in 2020 for the Federal Communications Commission to rewrite Section 230.¹⁹ The Biden administration revoked the order in May 2021.²⁰

Currently, there are various legislative proposals pending in Washington, D.C. and in state capitals introduced in reaction to frustration about conservative content being removed from social media sites. Legislation includes proposals to repeal or curtail Section 230, create carveouts from Section 230's protections, and impose certification requirements for platforms to retain Section 230's benefits.

However, the First Amendment, not Section 230, empowers platforms to take down content they do not wish to carry, so some on the right have pivoted to supporting federal regulation of social media platforms as common carriers. That regulatory treatment would significantly curtail platforms' First Amendment right to remove content. Notably, respected conservative legal scholar Richard Epstein and Supreme Court Justice Clarence Thomas have suggested that common carrier status could be applied to social media companies.²¹

Whatever the legal and constitutional feasibility of applying common carrier regulations to social media platforms, it is certain that such classification will eviscerate the value of those platforms for their users and investors.²² Common carrier regulation will turn existing dynamic platforms into passive, regulated entities that are significantly less valuable, useful, and enjoyable for consumers. If platforms cannot curate their sites to distinguish themselves from competitors, how do they create value? One dumb pipe platform becomes indistinguishable from the next. And if platform owners cannot remove any third-party content, platforms will become flooded with spam, pornography, violence, and hate speech in short order.

Today's communications networks are nothing compared to what they could be in the future. Burdening and freezing in place today's social media platforms with common carrier regulations will shut off incentives for creating the next—and improved—generation of platforms. That erosion of private property rights will hurt consumers in the long run, because the lack of a financial incentive to build the next generation of social media and communications technologies will short-circuit the solving of today's problems by tomorrow's innovations. Instead, those sympathetic to conservative views should look for

ways to extent and defend property rights for things digital, intangible, and complex. Common carrier regulations are the opposite of that.

What Is the Solution to Social Media Content Moderation Failures? Proposals from both sides of the aisle to regulate platforms or repeal or curtail Section 230 would harm free speech, chill innovation, and give large incumbents a distinct advantage over nascent or yet-to-be-invented competitors. Consumers will not benefit from any of these proposals. The preemption of market solutions by government regulation is an underestimated but significant cost of government intervention. Yet, such market responses to improve online content moderation problems are already underway.

For example, Facebook spent \$130 million to set up an Oversight Board to review its content moderation decisions.²³ The Board’s website explains its purpose “is to promote free expression by making principled, independent decisions regarding content on Facebook and Instagram and by issuing recommendations on the relevant Facebook company content policy.” The effectiveness of this entity is still unknown, but succeed or fail, it avoids the dangers of government regulation chronicled above. Better to let the Oversight Board experiment run its course than to foreclose its possible benefits with government intervention.

Partly in response to critics of today’s social media structure and its resulting content moderation, the next generation of social media is already taking shape in the form of decentralized offerings.²⁴ Decentralized social media has a different infrastructure with no central server. It works similarly to, but not exactly like, the music sharing service Napster did. No company controls the site. The users themselves control content moderation. Some platforms will likely use cryptocurrency to promote and reward content. The apps are decentralized via blockchain technology to varying degrees and there will be no way for either big tech or big government to de-platform them.²⁵ At a March 2021 House Energy and Commerce Committee hearing, Twitter CEO Jack Dorsey testified about Twitter’s investment in a decentralized approach called Bluesky.²⁶ Similar offerings are already available to consumers in the form of Mastodon, Steem, and many others.²⁷ These new apps could compete with or eventually even replace Facebook, Twitter, and Parler.

That is good news for consumers worried about the bias of a handful of tech companies, and for those concerned about the harmful consequences of government regulation. As long as Congress does not prevent these new technologies by banning strong encryption, regulating cryptocurrencies like securities, or locking today’s social media giants into place with regulations that act as barriers to entry against competitors, consumers on both the left and right can look forward to the next generation of online platforms markedly improving over those of today. The market can provide solutions if politicians can exercise restraint and not prematurely regulate social media.

Conclusion. Criticism of social media content regulation comes from both sides of the aisle and converges on calls for repeal or curtailing of Section 230. Those proposals are misguided. Consumers, innovation, and the proliferation of speech will suffer if they are

instituted. Politicians and regulators should exercise restraint and let innovators working in a free market work to find solutions to the challenges of content moderation online.

Notes

¹ Tech Dirt, “Author of Section 230 Chris Cox Says All the Critics Are Wrong About the History and Intent of 230,” *Above the Law*, June 26, 2020, <https://abovethelaw.com/2020/06/author-of-section-230-chris-cox-says-all-the-critics-are-wrong-about-the-history-and-intent-of-230/>.

² Jeff Kosseff, *The Twenty-Six Words That Created the Internet*, (Ithaca, N.Y.: Cornell University Press, 2019).

³ *Smith v. California*, U.S. 147 (1959) created a strong, if not unlimited, incentive for distributors to know as little as possible about the content of the materials they distributed in order to avoid liability, <https://supreme.justia.com/cases/federal/us/361/147/>.

⁴ Kosseff. For a detailed review of the evolution and conflicts of liability law and the reactions they prompted in the marketplace, see chapters 1 and 2.

⁵ *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL323710 (N.Y. Sup. Ct. 1995), <https://h2o.law.harvard.edu/cases/4540>.

⁶ Chris Cox, “Policing the Internet: A Bad Idea in 1996 – and Today,” *Real Clear Politics*, June 25, 2020, https://www.realclearpolitics.com/articles/2020/06/25/policing_the_internet_a_bad_idea_in_1996__and_today.html.

⁷ The Telecommunications Act of 1996, 47 U.S. Code Section 230, <https://www.law.cornell.edu/uscode/text/47/230>.

⁸ Jess Miers, “Your Problem Is Not with Section 230, But The 1st Amendment.” Tech Dirt, November 2, 2020, <https://www.techdirt.com/articles/20201030/09165945621/your-problem-is-not-with-section-230-1st-amendment.shtml>.

⁹ Aja Romano, “A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet As We Know It,” *Vox*, July 2, 2018, <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom>.

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¹¹ Elizabeth Nolan Brown, “Section 230 Haters Aren’t Going Away,” *Reason*, June 2021, <https://reason.com/2021/05/24/section-230-haters-arent-going-away/>

¹² Gilad Edelman, “Florida’s New Social Media law Will Be Laughed Out of Court,” *Wired*, May 24, 2021, <https://www.wired.com/story/florida-new-social-media-law-laughed-out-of-court/>.

¹³ Stephen Gandel, “Texas Governor Backs Law to Prohibit Facebook and Twitter from Banning Users,” CBS News, March 5, 2021, <https://www.cbsnews.com/news/texas-greg-abbott-social-media-conservative-bias-censorship-law/>.

¹⁴ S. 299 – SAFE TECH Act, 117th Congress, First Session, introduced February 8, 2021, <https://www.congress.gov/bill/117th-congress/senate-bill/299>.

¹⁵ Office of Sen. Mark Warner, “Warner, Hirono, Klobuchar Announce the SAFE TECH Act to Reform Section 230,” news release, February 5, 2021, <https://www.warner.senate.gov/public/index.cfm/2021/2/warner-hirono-klobuchar-announce-the-safe-tech-act-to-reform-section-230>.

¹⁶ Marguerite Reardon, “What’s Section 230? The Social Media Law Is in the Crosshairs of Congress,” *CNET*, March 26, 2021, <https://www.cnet.com/news/whats-section-230-the-social-media-law-is-in-the-crosshairs-of-congress/>.

¹⁷ For a detailed explanation, see Ryan Nabil, “Why Repealing Section 230 Will Hurt Start-Ups and Medium-Sized Online Businesses,” *Open Market*, Competitive Enterprise Institute, February 1, 2021, <https://cei.org/blog/why-repealing-section-230-will-hurt-startups-and-medium-sized-online-businesses/>.

¹⁸ David French, “A Surprising Opinion from Justice Thomas on Free Speech,” *Time*, April 9, 2021, <https://time.com/5953715/clarence-thomas-tech-free-speech/>.

¹⁹ Petition for Rulemaking of the National Telecommunications and Information Administration, July 27, 2020, https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf.

²⁰ “The President Revokes Prior Administration’s Executive Order of CDA Section 230,” *National Law Review*, May 17, 2021, <https://www.natlawreview.com/article/president-revokes-prior-administration-s-executive-order-cda-section-230>.

²¹ *Joseph R. Biden, Jr. v. Knight First Amendment Institute at Columbia University et al*, on petition for writ of certiorari to the United States Court of Appeals for the Second Circuit, No. 20–197, decided April 5, 2021, https://www.supremecourt.gov/opinions/20pdf/20-197_5ie6.pdf. Federalist Society, “Is Common Carrier the Solution to Social-Media Censorship?” A Regulatory Transparency Project Webinar, February 9, 2021, <https://fedsoc.org/events/is-common-carrier-the-solution-to-social-media-censorship>.

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²⁵ Iain Murray, “The Answer to Our Big Tech Problem Is Decentralization,” *National Review*, March 16, 2021, <https://www.nationalreview.com/2021/03/the-answer-to-our-big-tech-problem-is-decentralization/>.

²⁶ House Committee on Energy and Commerce, Hearing, “Disinformation Nation: Social Media’s Role in Promoting Extremism and Disinformation,” March 25, 2021, <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-disinformation-nation-social-medias-role-in-promoting>.

²⁷ Abhishek Prakash, “9 Decentralized, P2P and Open Source Alternatives to Mainstream Social Media Platforms Like Twitter, Facebook, YouTube and Reddit,” *It’s Foss*, January 13, 2021, <https://itsfoss.com/mainstream-social-media-alternaives/>.