Internet Regulation vs. Freedom of Speech:
A Cyberlaw Case Study of Section 230

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Abstract

Hailed as a savior of free speech while concurrently facing harsh criticism as an immunity shield for scandalous behavior and big tech, there is no denying the notoriety of Section 230. Big tech companies claim the statute is an essential building block of progress and allows for free internet. Contrarily, both democrats and republicans want it reformed or revoked altogether yet disagree about why or how. Referencing Twitter tagging his tweets as misinformation, former President Donald Trump tweeted on various occasions about the need to repeal or revoke Section 230—at one point claiming Twitter was "out of control."[1] Meanwhile, on the other side of the presidential trail, Joe Biden also called for the revocation of Section 230. Biden's reasoning contrasted directly with Trump's. He argued that social media ought to be held responsible when it assists users in spreading things that are not true.[2] Trump essentially argued social media companies ought not regulate user content, whereas Biden argued they ought to regulate content more. But in both cases Section 230 was to blame. Arguments against 230 often fail to consider how they depend on the very protections also offered by the clause. This understandably spurs confusion around the topic. Yet, in a polarized society, this kind of dichotomy is all too familiar. Nonetheless, the peculiarity and prevalence of the rhetoric regarding Section 230 warrants analysis. We must not let the essential protections of the statute be victim to the whims and chaos of current political discourse. Effective and meaningful reform of Section 230, if necessary, would require clarity over misconceptions and half-truths.

Introduction

Recent events have sparked continuous conversation regarding Section 230 which has cast the statute into the spotlight. Misinformation surrounding a global pandemic has brought on calls for more social media platform oversight. Yet when platforms attempt to correct misinformation, such as during the 2020 election, additional calls for reformation of the statute were leveraged. These conflicts came to a head with the January 6th attack at the Capitol

[1] Donald Trump (@realDonaldTrump), Twitter (Oct. 6, 2020, 12:08 PM & Nov. 6, 2020, 2:23 AM & May 29, 2020, 11:15 AM)

[2] Makena Kelly, Joe Biden wants to revoke Section 230 The Verge (2020), https://www.theverge.com/2020/1/17/21070403/joe-biden-president-election-section-230-communications-decency-act-revoke.

Building. The aftermath of that event was swift: The President of the United States was banned from various social media platforms. Parler, an entire platform run by a small group, was blocked by large and powerful companies like Google, Amazon, and Apple. This resulted in the platform being brought completely offline and falling victim to significant data breaches. This led to rallying cries about big tech censorship and antitrust violations. Conversely, there were calls saying Section 230 was to blame for the attack itself and that social media companies ought to be liable for their roles in the planning of the attack.[3] Amidst a presidential election, social unrest, and a pandemic, Section 230 has been hotly debated. This paper attempts to clarify these contradictions, address misconceptions, and outline congressional arguments against the clause. Section 230, while controversial, is a necessary piece of legislation that has protected and fostered the rapid and sustained growth of an entire industry. Due to this importance, this paper will argue that reform is vital insofar as to fortify the protections granted in Section 230 against piecemeal court decisions often decided by the politics and judicial decisions of the day.

Before addressing any objections, misconceptions, or implications, first it is important to lay out a very brief history and summary of Section 230. Section 230 refers to the formal code of the Communications Act of 1934 at 46 U.S.C. § 230. In 1934 congress reorganized and combined existing regulations and provisions regarding telephone, telegraph, and radio communications. This act, The Communications Act of 1934, had several significant impacts at the time. Aside from combining existing regulations of the industries mentioned above, this act notably created the Federal Communications Commissions (FCC) to oversee and regulate these industries. It largely concerns privacy and civil liberties including customer privacy, access to individuals with disabilities, and nondiscrimination.

Though it was amended various times through the years, the most extensive changes came 62 years later with The Telecommunications Act of 1996. This act begins with the stated intention: “To promote competition and to reduce regulation in order to secure lower prices and higher quality services for American telecommunication consumers and encourage the rapid

[3] Daniel Howley, Capitol Hill attack could end Section 230 as we know it money.yahoo.com (2021), https://money.yahoo.com/capitol-hill-attack-could-end-section-230-as-we-know-it-211421783.html (last visited Mar 19, 2021).

deployment of new telecommunications technologies."[4] The new act aimed to address how to regulate advancing technologies while honoring civil liberties and promoting growth in the field.

The short title under Title V of the Telecommunications Act is the "Communications Decency Act" (CDA).[5] The CDA focuses on obscenity and was largely added to address and regulate the rapid spread of pornography on the internet. Title V attempted to regulate internet content with the purpose of minimizing the spread of illegal pornography. However, the year after the act was passed, in the landmark case Reno v American Civil Liberties Union, the Supreme Court ruled unanimously that the inclusion of anti-indecency provisions in the CDA was unconstitutional.[6] The court stated: "It is true that we have repeatedly recognized the government interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults."[7] The outcome of this court case set monumental precedence for future internet, including leaving Section 230 intact.

Section 230 was written separately by House Representatives Chris Cox and Ron Wyden. Following several court cases impacting the internet, services and providers were worried about future legislation that could potentially suppress the free growth of the internet and digital technologies. It was on this premise that Cox and Wyden framed the Internet Freedom and Family Empowerment Act; and what would ultimately become Section 230.[8] [9] The court ruling in Reno v ACLU and the retention of 230 was seen as a victory for free speech.

This paper will address the various misconceptions and objections concerning Section 230. For context, it is worth briefly overviewing the section itself. There are two key aspects of Section 230 under what is known as the "Good Samaritan" clause.[10] The first part of this clause, Section 230(c)(1) protects interactive website content providers from being liable for content posted by their users; it grants safe harbor. "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another

[4] Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996).
[5] Communications Decency Act of 1996, (CDA), Pub. L. No. 104-104 (Tit. V), 110 Stat. 133 (Feb. 8, 1996), codified at 47 U.S.C. §§223, 230
[6] Reno v ACLU, 521 U.S. 844
[7] *Id.* at 875
[8] Internet Freedom and Family Empowerment Act, H.R. 1978, 114th Cong. (1995).
[9] Matt Reynolds, The strange story of Section 230, the obscure law that created our flawed, broken internet Wired UK (2019), https://www.wired.co.uk/article/section-230-communications-decency-act.
[10] 47 U.S.C. § 230 (1996).

information content provider."[11] This provision protects internet service providers (ISPs) as well as countless "interactive computer service providers." For example, this policy and framework allows for users to upload videos to YouTube, post tweets to Twitter, and add reviews to Yelp without burdening those platforms with the responsibility of every word posted to their platforms. Section 230(c)(2) offers liability protections for providers who chose to remove content from their platforms. This allows platforms to perform "any action taken in good faith" to remove material that a provider or user may consider to be "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[12]

Competing arguments against 230 will typically be charged against Section 230(c)(1) or Section 230(c)(2). For example, when Trump tweets about the dangers of Section 230, he is referring to 230(c)(2) and liability protections for platforms, but he fails to acknowledge that without 230(c)(1) platforms would likely be forced to more vigorously vet content posted by third parties. In contrast, when Biden speaks of the dangers of Section 230, he is typically referring to 230(c)(1) and the need to hold platforms responsible for content shared through their services. This creates convoluted and confusing rhetoric surrounding the issue. This paper aims to dissect these arguments, the misconceptions around them, and what could reasonably be done regarding reforming the statute.

Implications of Section 230

Section 230 protects websites from lawsuits if a user posts something illegal in them. This law is particularly vital for social media networks, but it covers other sites and services, including news websites with comment sections, blogs, and much more. Section 230 essentially allows sites like Twitter and Facebook to avoid being regulated as publishers, which protects them from being held liable for illegal posts. By contrast, a newspaper would be held liable for the content it publishes. It should be noted that there are exceptions for copyright violations, sex work-related material, and violations of federal criminal law.[13] The section also gives these websites the ability to regulate content. Section 230(c)(1) protects social media websites against

[11] 47 U.S.C. § 230(c)(1). (1996).
[12] 47 U.S.C. § 230(c)(2). (1996).
[13] 47 U.S.C. § 230 (1996)

claims which say the First Amendment gives them the power to post whatever they'd like as long as it's not illegal.[14]

Before jumping to some of the key cases that Section 230 is taken into action, it is good to mention the relation between Section 230 and the First Amendment because both rules are used in most discussions for free speech topics and social media platforms. In the United States, the First Amendment prohibits the government from restricting most forms of speech. It states that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[15]

The first amendment does not apply to social media platforms regulated by private companies. Rather, it regulates Congress specifically. Twitter, Facebook, and Google are private companies and can choose to create rules within their terms of service that restrict speech on their platforms. This distinction is also reiterated and strengthened by Section 230(c)(2). Therefore, Twitter can ban hate speech based on its own rules,[16] even if that speech is otherwise protected in the United States under the first amendment. Though Section 230 lays this out explicitly, it is consistent with precedent on the enforcement and protections of free speech being the responsibility of the government, but not an obligation of private companies.

Section 230 has been used in a variety of contexts in different cases. Below is a brief summary of key cases and their causes of actions with section 230. Defamation is one of the most common cases in which Section 230 might be used. In Blumenthal v. Drudge[17], Blumenthal sued Drudge and America Online (AOL) for defamation over an article written by Drudge and posted on AOL's website. Victims sued both Drudge for publishing defamatory content and AOL for hosting his website. Section 230 made AOL immune from liability in a defamation claim when the allegedly defamatory material was created by an independent third party and posted by the provider.

[14] 47 U.S.C. § 230(c)(2). (1996)
[15] U.S. Const. amend. I, § 1
[16] The Twitter Help Center, The Twitter Rules Twitter.com (2021), https://help.twitter.com/en/rules-and-policies/twitter-rules.
[17] Blumenthal v. Drudge, 992 F. Supp. 44, 49-53 (D.D.C. 1998)

Batzel v. Smith[18] is another important defamation case. The distributor of an electronic newsletter, which was a museums network operator, was made immune by CDA § 230 when he forwarded a third party's email to the newsletter listserv with only minor edits. The email contained defamation material to Batzel. The court held that, if the network operator had reasonably believed that the third-party person provided the email to be published on the mailing list, then CDA § 230 protected him from defamation liability for publishing the content of the email. This case is important because it shows how CDA § 230 granted Internet publishers broad protection for publishing third party content.

Negligence is another common case barred by CDA § 230. In Doe v. America Online[19] America Online (AOL) chat rooms were used to market child pornography of the plaintiff's son. But America Online was immunized by Section 230 in this case for negligence.

Contract liability and Section 230 are used in Barnes v. Yahoo![20] When Yahoo failed to take down a false profile of the plaintiff even after an employee assured her that it would be removed, the plaintiff sued Yahoo claiming that it had acted negligently and broken a binding promise to remove the material. The court held that because the action in question was publishing or removing third-party content, CDA § 230 applied. But the court permitted the plaintiff to recast her tort claim in terms of promissory estoppel.[21]. She could potentially hold the company liable "as the counter-party to a contract" created by that promise.

It was mentioned that CDA § 230 does not immunize websites when the issue being discussed is about copyrighted content and intellectual property. But in Perfect 10, Inc. v. CCBill LLC[22], we see that things within the state law definition of intellectual property might be protected by CDA § 230 too. In this case, the plaintiff sued two web service providers for hosting third-party sites which were displaying images stolen from the plaintiff. The plaintiff claimed that CDA § 230 should not be applied because images fell within the state-law definition of intellectual property. But the court held that intellectual property must be defined according to federal law so CDA § 230 made the web service providers immune.

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[18] Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003)
[19] Doe v. America Online, 783 So.2d 1010, 1013-1017 (Fl. 2001)
[20] Barnes v. Yahoo!, Inc., 565 F.3d 560 (9th Cir. May 7, 2009)
[21] *Id.* at 5523
[22] Perfect 10, Inc. v. CCBill, LLC, 488 F.3d 1102, 1119 (9th Cir. 2007)

It can be seen that CDA § 230 has been used in a huge number of cases with different categories. It should be known that without Section 230, most web applications, websites, and especially social media applications would face a huge amount of lawsuits and liability risks. So, they have to change their functionality and implement preapproval methods for contents created by their users.

Section 230 Necessity

One argument against Section 230 is that it incentivizes platforms not to moderate. However, a close reading of the statute shows that this is not the case. Section 230(c)(2) states that "[n]o provider or user of an interactive computer service shall be held liable" for, as noted in (c)(2)(b), "any action voluntarily taken in good faith to restrict access or availability of material [. . .] whether or not such material is constitutionally protected."[23] In fact, the law explicitly encourages moderation by freeing computer services from stringent liability considerations that would otherwise cause them to limit the speech on their platforms. It is possible to consider how the online space would be governed without Section 230 by looking at the case Stratton Oakmont v. Prodigy.[24] Prodigy was a computer service that owned a message board called "Money Talk".[25] An anonymous user of "Money Talk" posted messages decrying Stratton Oakmont, a banking firm, as "a cult of brokers who either lie for a living or get fired" in relation to an initial public offering that the user considered to be fraudulent and criminal.[26] Stratton claims that Prodigy could be considered the publisher of these messages because of their policy of moderating the "Money Talk" message board, including deleting messages.[27] Specifically, the court notes how Prodigy has likened itself to a newspaper and thus applies the standards for a newspaper editorial board to this case.[28] Prodigy claims that their policy used to be to manually look at every message, but since their user base has grown that is no longer possible.[29] Thus, they empower their moderators to enforce their guidelines on a per-message basis, but Prodigy claims

[23] 47 U.S.C. § 230 (1996).
[24] Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995)
[25] *Id.* 1
[26] *Id.*
[27] *Id.* 2
[28] *Id.*
[29] *Id.* 3

this does not rise to the level of them being editors.[30] However, the court finds that because Prodigy is moderating any content on their board, they are subject to the same liability as regular publishers.[31]

The standard shown in Stratton would be troublesome in the modern Internet with its billions of daily users. It implies that if a service decides to moderate any of its users' content, it is liable for all its users' content. This is entirely impractical for services with such large user bases, because there would simply be too much content to moderate. Smaller companies who do not have the resources would find it even more difficult to strictly monitor their boards. In (a)(3), Congress states why they passed the bill: "[t]he Internet . . . offers a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual diversity."[32] The purpose is to promote substantive conversation between users. Service providers are the bridge that connects users, and Section 230 offers them reasonable protection to control what communications they are facilitating, while recognizing that not everything can be controlled.

Another misconception about Section 230 is that services who moderate in a biased way or portray a biased stance are not eligible for Section 230 protections. This is inconsistent with the text of the law and the decisions that courts have made. The only prerequisites are to be an interactive computer service, which is defined in (f)(2) as, in part, "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet," and to not be an information content provider.[33] That is defined in (f)(3) as, in part, "any person or entity responsible, in whole or in part, for the creation or development of information."[34] It is clear from these definitions that there is no neutrality requirement to be afforded Section 230 protections. The conclusion that an entire website could lose immunity does not follow from (c)(1), which is the specific section courts have relied on when deciding such cases. It reads, "[n]o provider or user of an interactive computer service shall be treated as

[30] *Id.*
[31] *Id.* 4
[32] 47 U.S.C. § 230 (1996).
[33] *Id.*
[34] *Id.*

the publisher or speaker of any information provided by another information content provider."[35] For an entire service to lose protections, it would have to contribute in some substantive way to all of the content that its user's create, which is not the case in most services today.

Courts have found that it is also possible for only part of a service to have Section 230 protections, as in Fair Housing Council of San Fernando Valley v. Roommates.com, LLC.[36] Roommates.com, which will be referred to as Roommates, was a website that allowed users to offer and look for housing.[37] In order to make an account and start looking for housing, users are required to enter their sex, sexual orientation, and whether they will bring children.[38] The Council sued Roommates for violating the Fair Housing Act by restricting what housing arrangements were shared based on those discriminatory factors.[39] The court found that because Roommates wrote those questions and required answers to them, the content stemming from that part of the website was not protected under Section 230.[40] Therefore, that means Roommates' search functionality, where users can look up specific housing using the answers to the above questions, is also not protected.[41] It is important to note that the court did not rule that the website lost its Section 230 protections, just specific aspects relating to the website. This case shows Section 230 is not a blanket shield for service providers to hide behind in all cases, but instead a tool that considers the practicalities of using the Internet that still holds services accountable when the law is broken.

Yet another misconception is that Section 230 benefits big businesses the most. However, this is not the case. Small businesses do not have the same resources available to them as big businesses. It logically follows that a small business would be less capable of moderating its platform to the standard outlined in Stratton.[42] If Section 230 did not exist, then there could be a scenario where a new start-up has their innovative service, but one rogue user posts obscene or objectionable content. Suddenly, that company could be sued and probably go out of business because their service would get shut down. Innovation would be stifled, and the big businesses

[35] *Id.*
[36] Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157 (9th Cir. 2008)
[37] *Id.* 1161
[38] *Id.*
[39] *Id.* 1162
[40] *Id.* 1164-1165
[41] *Id.* 1166
[42] Stratton, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) at 5

who could be more capable of moderating their platforms would maintain their market dominance. On the other hand, the benefits to a big business are less vital to their survival. A larger business will presumably be bringing in more revenue and more capable of policing itself. Therefore, their ability to moderate themselves is proportional to the cost it takes to moderate; it is a matter of how much money they are willing to spend. That cost may be steep for massive platforms like Facebook, but it is much less severe than whether or not a business can continue to exist.

Current Proposals for Repeal

Senator Josh Hawley introduced a bill to reform Section 230 in 2019 called the Ending Support for Internet Censorship Act.[43] This bill would require large tech companies to submit to an external audit every two years through the Federal Trade Commission (FTC) in order to benefit from the legal protections provided by Section 230. In this audit, big tech companies would have to demonstrate to the FTC that their content moderating practices, which includes the personnel and algorithms they employ, are politically neutral in a "clear and convincing" way. If they are held to have failed this audit in any way, then that company will be stripped of Section 230 protections.

Conservatives are angry at big tech companies such as Facebook, Google, and Twitter because they believe these companies carry an anti-conservative bias built into their platforms. Specifically, the belief was that conservative speech, content, and accounts were being lopsidedly censored and blocked, while liberal views were being heavily favored and promoted.[44] Recent academic studies have revealed that is not the case.[45] The tech companies that are the target of these accusations strongly deny the allegations of unfairness and biasedness.[46] However,

[43] Ending Support for Internet Censorship Act, S. 1914, 116th Congress (2019). https://www.congress.gov/bill/116th-congress/senate-bill/1914/text?r=39&s=1

[44] Vogels, E., Perrin A., & Anderson, M. (2020, August 19) Most Americans Think Social Media Sites Censor Political Viewpoints. https://www.pewresearch.org/internet/2020/08/19/most-americans-think-social-media-sites-censor-political-viewpoints/

[45] Barret, P., Sims Grant J. (2021, February) False Accusations: The Unfounded Claim that Social Media Companies Censor Conservatives. https://static1.squarespace.com/static/5b6df958f8370af3217d4178/t/60187b5f45762e708708c8e9/1612217185240/NYU+False+Accusation_2.pdf

[46] Senator Mike Lee of Utah. "Alphabet, Facebook, Square Space, Microsoft, and Twitter's response to Senator's Mike Lee anti-conservative claim" September 10, 2020.

these same companies are opaque in revealing how their content moderation practices truly work. This proposed reform by Senator Hawley is a course of action that will look to create transparency on how tech companies perform content moderation. That is an outcome of the bill most platform users would want to be clearly informed of. However, the bill aims to achieve not only the total removal of an anti-conservative bias but also the removal of any political bias these big and influential tech companies may carry onto their content moderation. Section 230 is what frees and protects companies from litigation on their content moderation practices. The bill aims to change that.

Senator Hawley's proposed reform revolves around the theme of political bias and the envisioned political neutrality of tech companies. The bill defines political bias in a content-moderational-context in three ways – "(aa) designed to negatively affect a political party, political candidate, or political viewpoint; or (bb) disproportionately restricts or promotes access to, or the availability of, information from a political party, political candidate, or political viewpoint or (cc) an Officer or employee of the provider makes a decision about moderating information by other information content providers that is motivated by an intent to negatively affect a political party, political candidate, or political viewpoint."[47] In short, the content moderation of tech companies is only acceptable if it is politically neutral, proportionate in its use, and does not affect those specified parties negatively.

From the appearance of the reform, any political bias in an organization's content moderation system is the single point of failure that will end their Section 230 protections. This will be done regardless if bias is an outcome of their algorithm or if it's intent from a single employee. Senator Hawley's approach to reforming Section 230 presents a piece of legislation that doesn't seek to flesh out the uncertainties of the reform's actual practical application. Nowhere does the reform inform tech companies on how to properly moderate content in a way that fits this vague definition of politically neutral.

It seems that the reform would only provide Section 230 protections to companies if they don't moderate anyone or anything, as that hand-off approach would ensure a company is not

https://www.lee.senate.gov/public/index.cfm/2020/9/sen-lee-responds-to-big-tech-denial-of-anti-conservative-bias

[47] Ending Support for Internet Censorship Act at 3.

politically biased because they are not doing anything. The bill does provide an open definition of moderational-political-bias. However, it does not address how a company could measure they are within political neutrality if they decide to moderate content. It doesn't define what is a baseline for moderating content. A company would be forced to moderate some arbitrary value of all political content and hope that would be considered proportionate. Also, moderating every party, candidate, and viewpoint equally might not protect a company from section aa of the bill, even if it would statistically calm arguments of anti-conservative bias. These flawed proposals within the bill makes it realistically unattainable for tech companies to achieve Section 230 protection and just sets them up for failure.

This reform also paints a very undefined stroke for identifying what is a political viewpoint. In terms of a political viewpoint, user content discussing any current news could be seen as a political viewpoint. For example, discussing differences between legitimate science and science conspiracy could be seen as political to some. Moreover, political parties are not defined in the bill. The term political party could imply any unofficial or officially recognized political parties or just the major political parties in the United States. These would be arguments of facts that would need to be discussed in court. These broad statements can give way to a hefty number of lawsuits if a company does decide to moderate, which seems to be an intended consequence.

Another bill was introduced by Representative Scott DeJarlais in early 2021 called the "Protecting Constitutional Rights from Online Platform Censorship Act".[48] The reform wants to make it unlawful for platforms to remove, moderate, or restrict access to any content posted by a user. Users that are the victim of any moderation or removal efforts may receive a monetary reward between "$10,000 - $50,000"[49] for their relief.

This bill introduces the concept of a platform's "protected material of a user."[50] It defines protected material of a user as "material that is protected under the Constitution or otherwise protected under Federal, State, or local law."[51] So, for example, protected material would include a user's first amendment right to free speech on a platform that is represented by the content they

[48] Protecting Constitutional Rights from Online Platform Censorship Act, H.R 83, 117th Congress (2021). https://congress.gov/117/bills/hr83/BILLS-117hr83ih.pdf
[49] *Id.* 1
[50] *Id.*
[51] *Id.*

post on that platform. The bill prohibits platforms from taking "an action to restrict access to or the availability of protected material of a user of such a platform." The bill does not provide a clear-cut example of what is a user's protected material on an online platform, rather, it provides us with broad definitions up for any interpretation.

The purpose of this bill is to restrict platforms from removing any user content by deeming what users post as first amendment protected speech. Essentially, this would invalidate the text written out in Section 230(C), "Protection for Good Samaritan Blocking and Screening of Offensive Materials."[52] In Matal v. Tam, the Supreme Court held that there is no hate or offensive speech exception under the first amendment.[53] In the court's opinion, Justice Alito wrote that "Speech may not be banned on the ground that it expressed ideas that offend."[54]. The bill's plan is to secure user's content on a platform as first amendment protected speech. That would protect any type of speech, including hate speech, to be left up on platforms. Companies would not be able to remove any of that content, even if it is legitimate hate-speech that offends certain communities. Section 230(c) is what provides companies legal protection for removing any content they decide is offensive, hateful, and against their terms of use policy, regardless of constitutional protections.[55] This bill would protect a lot of terrible content on platforms and legally prevent tech companies from cleaning up through moderation efforts by removing any offensive hate speech on it.

Republicans have taken an aim at reforming Section 230 in order to lessen the moderation of tech companies. The two bills introduced are an attempt to rein in some of big tech companies' control over the online content they host. As most Americans gradually believe social media platforms censor political viewpoints,[56] Republican lawmakers seek to restrict the moderation freedoms that big tech companies wield in order to hold them accountable for the moderating choices they make. Whether or not these bills would help in tackling the supposed

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[52] 47 U.S.C. § 230 (1996).
[53] JOSEPH MATAL, INTERIM DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE, PETITIONER v. SIMON SHIAO TAM 582 U. S. _(2017)
[54] Matal v. Tam at 1.
[55] 47 U.S.C. § 230 (1996).
[56] Vogels, E., Perrin A., & Anderson, M. (2020, August 19) Most Americans Think Social Media Sites Censor Political Viewpoints.
https://www.pewresearch.org/internet/2020/08/19/most-americans-think-social-media-sites-censor-political-viewpoints/

anti-conservative bias or any political bias on social media platforms, is not clear from their reforms.

On the Democrat side, Senators Mark Warner, Mazie Hirono, and Amy Klobuchar introduced the "Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms Act" (SAFE TECH)[57] as a reform of Section 230. They proposed to amend Section 230, stripping down the broad immunity granted to interactive computer services. This prevents protections on a number of circumstances that companies can currently hide behind without facing liability. Adding these exclusions would provide legal opportunity for victims to raise permissible claims against those companies in court.

Democrats want big tech companies to take more accountability about what is hosted on their platforms. They argue that these platforms are riddled with disinformation and harmful content.[58] They blame these companies for hiding behind the wide legal barrier of Section 230 as an excuse to not properly handle and take accountability for what appears on their platforms. This reform strips some of the legal barriers afforded to companies by Section 230 on the content within their platforms in hopes of forcing big tech companies to employ more of a robust content moderation system.

The bill proposes several conditions that would not be protected under Section 230. These exclusions include "(1) ads or other paid content, (2) injunctive relief, (3) enforcement of civil rights laws, (4) stalking/cyber-stalking or harassment and intimidation laws, (5) wrongful death actions, and (6) suits under the Alien Tort Claims Act."[59]

Certain circumstances provided by the bill are questionable under a practical lens, especially for smaller companies. For example, the injunctive relief context could forebode several lawsuits for claims of harm that would be allowed to stand in court until the facts are heard. It appears as if this would allow anyone to file a lawsuit seeking to remove any content or service on the platform that they allege was misused and caused harm upon them. This type of

[57] Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms Act (SAFE TECH Act), S. 299, 117th Congress (2021). https://www.congress.gov/117/bills/s299/BILLS-117s299is.pdf

[58] Auxier, B. (2020, October 27) How Americans see U.S. tech companies as government scrutiny increases. https://www.pewresearch.org/fact-tank/2020/10/27/how-americans-see-u-s-tech-companies-as-government-scrutiny-increases/

[59] Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms Act (SAFE TECH Act), S. 299, 117th Congress (2021). https://www.congress.gov/117/bills/s299/BILLS-117s299is.pdf

claim could get fully abused as a way to remove any content. For example, anyone could properly file a lawsuit against content they don't like accusing it of causing them any type of irreparable harm. These types of claims get thrown out without companies having to exert much of a thought about them due to Section 230. These injunctive suits are not seeking monetary damages. Rather, it's for the use of removing some piece of content from the platform. Currently, those that want to remove certain content on a platform due to any misconduct, can report their complaint to the platform's customer support services and follow that process. Allowing this injunctive relief carve-out to stand in court would force companies to just automatically remove the specific content that's identified in the lawsuit. Companies without the adequate legal resources would rather choose that approach than continue with a potential lengthy legal battle to determine if irreparable harm was properly caused by some content.

Republicans and Democrats are committed to "fixing" what they believe to be broken about Section 230, each in their own ways. Each party has introduced a slate of bills that aims to reform Section 230 in some capacity, either to expand or restrict companies' content moderation practices. With an increasing majority of people wanting reforms to limit the powers of big tech companies,[58] both parties want to curb the legal protections given to tech companies by Section 230 and hold them accountable for their decisions. However, they want to do it for different reasons. Republicans accuse these tech companies of an anti-conservative bias and want weakened content moderation on conservative content. Democrats accuse these companies of amplifying misinformation within their platforms and want increased accountability and content moderation. The reforms created by each party present ideas that are either too broad, undefined, or flawed in practice and illustrate lawmakers' fragmented understanding of Section 230 and their lack of consideration on the foresight of their policy reforms.

Misconceptions and Arguments Surrounding 230

Disagreements surrounding Section 230 noticeably increased during the Trump presidency but vary in opinion depending on political affiliation. However, the disagreements are not focused on the same issues, which creates a disconnect in finding any middle ground in the discussion of reform. In other words, both sides want reform, but for different reasons and in different ways. Additionally, the arguments on both sides of the debate are sometimes

contradictory. For example, conservative leaning supporters want to hinder platforms' ability to editorialize or add disclaimers to posted information that is classified as misinformation or at least as disputed to create an environment favorable for political rhetoric and perspective. On the other hand, though, they also want to exempt other types of immunity for illegal activity, such as material on sex trafficking and child abuse. In one case, conservative supporters do not want online platforms to have the ability to editorialize or remove content, but in other cases they do. Similarly, progressive supporters want platforms to have less editorial ability with respect to groups speaking for social, economic, and racial issues, but want platforms to be more active on removing content having to do with hate speech. Again, in one case, progressive supporters want platforms to decrease editorialization, but in other cases, they don't. In both cases the line that distinguishes one case from the other is often blurred.

Given that there are clearly disconnects in the opinions of what needs to be reformed in Section 230 and how to reform it, it is possible that the court will continue to hear Section 230 cases and may inevitably create judicial precedents that define and constrain the law in unintended ways. In the 2020 Supreme Court Case Malwarebytes, Inc. v. Enigma Software Group USA, LLC, Justice Clarence Thomas pointed out this inevitability when he wrote about how difficult it was for the court to interpret a law written before most websites and certainly any form of mass social media platforms existed. In his argument, he stated:

> "Paring back the sweeping immunity courts have read into §230 would not render defendants liable for online misconduct. […] Extending §230 immunity beyond the natural reading of the text can have serious consequences."[60]

With such varied opinions on reform and with cases continuing to be pushed to higher levels of court, finding some common ground on the issue is needed. However, the method of identifying the most extreme aspects of Section 230 and carving out pieces of immunity that should be removed instead of taking a more holistic approach to reform weakens the law and may have unintended repercussions.

Legislation propositions to reform Section 230 have largely followed the pattern of focusing only on the most extreme cases to find agreement across the aisle. However, continuing

[60] Malwarebytes Inc. v. Enigma Software Group USA, LLC. 592 U. S. 9-10 (2020)

to carve out Section 230 immunities piece by piece is inefficient and is diluting the intent of the original law. The strategy for defining anything that fits this extreme definition just because it has bipartisan support is an endless effort and is not all encompassing. Defining exceptions to Section 230 as a reform strategy is not the best course of action for several reasons, which can be seen through various legislative efforts.

One of the first attempts at reform of Section 230 came with a bipartisan bill known as the "Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA)", which was passed in 2018.[61] This reform of Section 230 took away platform immunity for liability of third-party content if the content relates to the sexual exploitation of minors or sex trafficking. Although protection against sex trafficking is not controversial (the bill passed by the astounding margin of 97-2 in the Senate), the overarching language used in this reform caused several websites to shutdown large parts of their site services not because they were, in fact, publishing illegal content, but because there were no mechanisms in place to police that activity. Such was the case with Craigslist's Personals page.[62] Instead of quickly implementing a potentially incomplete solution to detect illegal content, because the unknown flaws could now result in criminal liability, sites simply shut down or removed all their content completely. It can be argued that, although exploitation of children and trafficking require Congressional action to curtail, reforming Section 230, even if in a bipartisan manner and even if it found some common ground across the aisle, using Section 230 as a vehicle to this end may have been incorrect in this case.

Following FOSTA, there were a handful of proposed legislative efforts that largely took the same form of defining exceptions to the immunity rule of Section 230 for extreme cases. One example that follows this same pattern is Senator Lindsey Graham's proposed "Earn It" Act of 2020, which, again, had bipartisan support and acts in the same way as FOSTA, but for child sexual abuse laws[63]. Another example is Representatives Eshoo and Malinowski's proposed bill, which looks to hold platforms liable for algorithmic promotion of extremism.[64] These examples

[61] Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Congress (2018)

[62] Chokshi, Niraj. "Craigslist Drops Personal Ads Because of Sex Trafficking Bill." *New York Times*, March 23, 2018.

[63] Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020, H.R. 8454, 116th Congress (2020)

[64] Protecting Americans from Dangerous Algorithms Act, H.R. 8636, 116th Congress (2020)

are defining exceptions to Section 230 and invariably increasing the liability and risk of online platforms. It is impossible to guarantee that these extensions of the law and exemptions from the rule of law are being entirely followed. Facebook alone has 2.65 billion mobile active users and there are over 350 million photo uploads every day.[65] Even with Artificial Intelligence and filters, there is no guarantee that every upload of illegal content will be caught. Additionally, because there are numerous laws in the works and endlessly changing technologies, there is no way for tech companies to fully comply. What happens when you can't comply? Platforms will invariably shut down and the common spaces for communication and content will diminish.

Even though these extreme corners of the law are being carved away from Section 230 immunity in the name of causes that are vastly supported (ending child abuse, sexual trafficking and extremism), finding exceptions to the rule of law is clearly endless and not a good method for reform. There are too many unintended consequences as the burden of policing content continues to be pushed to the platform owners. Continuing to find reasons to hold platform owners liable for more and more exceptions takes away from the intent of Section 230 in the first place, which is to protect platforms from liability for third party content posted through their platforms. It is clear that a different strategy for reform is necessary. A new strategy that takes the modern social media environment into account by protecting vulnerable populations, decreasing hate speech, providing a safe platform for expression and, at the same time, protecting platform owners, is needed for the modern times.

Conclusion

Section 230 has a strong history shown in both its age, having adapted over many years, and its resilience, surviving surrounding legislation being deemed unconstitutional. It is easy to see both its necessity and importance in how it serves as the interpretation of the first amendment on our most valuable modern tool, the internet. Any legislation that seriously seeks to reform Section 230 will need to heed this importance if it is to change it for the better. Slapping on piecemeal bandage fixes convolute the law and can have unforeseen negative impacts as clearly demonstrated by FOSTA and Craigslist. Worst of all they are tangential to its original intentions at best and unquestionably contradictory to them at worst. These contradictions extend beyond

[65] Facebook by the Numbers (2021): Stats, Demographics & Fun Facts (omnicoreagency.com)

the intentions of Section 230 to the intentions of the proposed changes themselves. Many acts have been drafted in the recent fervor surrounding this statute, yet muddled ideals both among and between parties gain no ground pushing in opposing directions. When all agreements halt after the basic concept that a change is both desired and necessary, careful and deliberate action must be taken if disastrous effects are to be avoided. To this extent the best method for meaningfully changing Section 230 without destroying it in the process would rely not on changing it directly, but on promoting a separate vehicle for legislation. In this manner Section 230 can be spared from multi-party maceration, preserving its intentions while providing a compromising solution that is modern and can accurately contextualize the setting for which it is intended.