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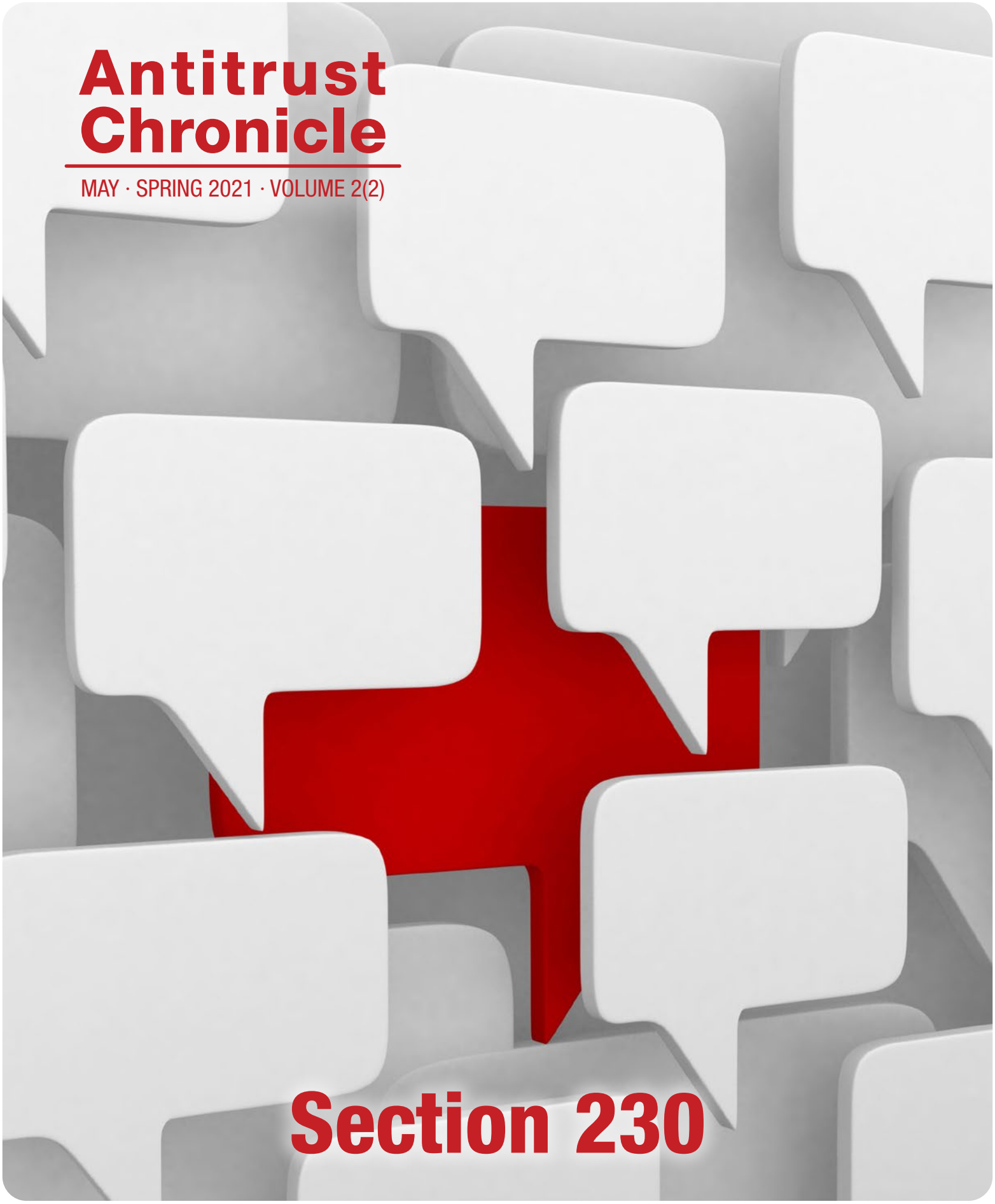

Section 230

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

An originally obscure provision of the Communications Decency Act ("CDA") of 1996, Section 230 provides that "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."

In other words, online intermediaries that host or republish speech are protected against a range of laws that might otherwise be used to hold them legally responsible for what others say and do. The protected intermediaries include not only regular Internet Service Providers ("ISPs"), but also a range of service providers, including basically any online service that publishes third-party content.

From its originally obscure origins, Section 230 of the CDA has come to be viewed as a touchstone of freedom of expression online, and is considered by many to have been a key liberty allowing for the massive growth of online platforms in the decades since its original adoption.

Recently, political focus has turned to the reform or repeal of Section 230, in a manner that could have significant impact on the business models and potential legal liability of online services providers ranging from ISPs to "over the top" services such as social networks, review platforms, search engines and video or image hosting services. In short, the potential implications are profound, and carry significant antitrust implications, not least in terms of potential legal liability for potentially "biased" or "exclusionary" moderation that service providers may find themselves obliged to engage in under any potential reform.

Needless to say, this debate has raised significant controversy from stakeholders, free speech advocates, and within the antitrust community. The contributions in this Chronicle seek to unify the threads of this debate, with a particular focus on the implications of Section 230 of the CDA (and any potential reform thereof) for antitrust enforcement, and how it interacts with other legal provisions, notably the First Amendment and aspects of telecommunications regulation.

Perhaps more than any other aspect of contemporary regulation, this question merits a cross-disciplinary approach, and the articles presented here form a vital part of this ongoing debate.

As always, thank you to our great panel of authors.

Sincerely,

CPI Team

SUMMARIES

Section 230 Reform in the Era of "Big Tech": What Does That Mean for Antitrust?

By Zhao Liu

Today, online platforms such as Facebook, YouTube, and Twitter have become the primary means of expression and source of information for many Americans. Since their inception, these platforms have enjoyed legal immunities under Section 230 of the Communications Decency Act — a 25-year old statute that largely shields them from liability for hosting and moderating content posted by their users. For years, Section 230 was seen as striking the right balance between encouraging free expression on the internet and protecting content moderation by online platforms. But as both sides of the political aisle start to criticize "Big Tech," the once-obscure statute, which is seen as providing sweeping immunities to some of the largest companies in the world, is taking fire from all directions. Multiple reform bills have been proposed by legislators, including ones that would prevent online platforms from using Section 230 as a defense in cases brought under antitrust law. Some have suggested that a Section 230 reform would broaden the reach of antitrust law and make it more likely for an antitrust case against "Big Tech" to succeed. This article explains why we believe a Section 230 reform would have little impact on antitrust law.

Regulating Internet Services by Size

By Eric Goldman & Jess Miers

In their zeal to curb Big Tech, regulators are crafting legislative reforms that make distinctions between Internet services based on size. A crucial Internet law, Section 230, is among the targets for such reforms. This essay discusses the nuanced considerations that regulators should address when drafting size-based distinctions for Internet services. It also raises concerns that such distinctions are not good policy in the context of Section 230.

Section 230 Reform: A Typology of Platform Power

By Matt Perault

Most Section 230 reformers are motivated by a desire to constrain the power of large technology companies, but many proposals to reform Section 230 would do the opposite. They would shift power toward large technology platforms and away from people and governments, making it even harder for startups to compete with large platforms. This paper provides a typology of these power shifts, examining the specific ways in which reform proposals could increase the power of large tech platforms. The paper then offers alternative proposals for addressing some of the concerns raised by legislators that would instead shift power in the opposite direction: away from platforms and toward people and governments.

What We Talk About When We Talk About Section 230

By Zephyr Teachout

When we talk about Section 230 in a vacuum, separate from antitrust policy, or public utility policy, we miss how it works — or rather, how it fails, and, more importantly, how to coherently set up a new, comprehensive regulatory regime with a thriving informational sphere. Section 230 was born along with consolidation, and instead of just talking about full or partial repeal, we should be talking about a new vision for communications infrastructure in America.

SUMMARIES

Section 230 Protects Speech, Not Business Models

By John Bergmayer

Properly interpreted, Section 230 is not "anticompetitive" because it does not advantage one business or set of businesses over others that operate in the same market. Its core purpose is to allow online platforms to host and moderate speech under conditions that differ from those in the offline world. There have been attempts to use Section 230 to advantage some online businesses over direct competitors, for example, in the home rental and retail markets. But courts have generally concluded that Section 230 does not preclude regulation of business activities that do not themselves involve the publication or moderation of third-party speech, even though they may relate to it in some way.

Antitrust, Section 230 & the First Amendment

By Berin Szóka

The First Amendment allows antitrust action against media companies for their business practices, but not for their editorial judgments. Section 230 mirrors this distinction by protecting providers of interactive computer services from being "treated as the publisher" of content provided by others, including decisions to withdraw or refuse to publish that content (230(c)(1)), and by further protecting decisions made "in good faith" to take down content, regardless of who created it (230(c)(2)(A)). Section 230 provides a critical civil procedure shortcut: when providers of interactive computer services are sued for refusing to carry the speech of others, they need not endure the expense of litigating constitutional questions. Thus, changing Section 230 could dramatically increase litigation costs, but it would not ultimately create new legal liability for allegedly "biased" or "unfair" content moderation. Nor will the First Amendment permit new quasi-antitrust remedies that compel websites to carry content they find objectionable.

Is Content Moderation an Antitrust Issue? Section 230 and the Current Tech Antitrust Debates

By Jennifer Huddleston

The internet has been an incredibly powerful tool for enabling users to share a wide variety of content. Some have argued that large online platforms like Facebook and Twitter have too much power over what speech can be heard. Often this leads to calls to change Section 230, a critical legal protection that enables content moderation and protects platforms from being held liable for their users' content, or is used as evidence of these platforms' "monopoly" power. To use antitrust enforcement to address concerns about content moderation is unlikely to result in the desired policy changes and could set a dangerous precedent for abusing antitrust enforcement for non-competition related purposes. Policymakers should not ignore the important role Section 230 plays in enabling a dynamic market for services to host user-generated content well-beyond the social media context. History has shown that it is often hard to predict which small company may prove to be an innovative and disruptive success, but a framework including Section 230 that allows new entrants to start with minimal regulation is most likely to yield a competitive marketplace and benefit consumers.

Beyond Speech: Section 230 and Its Implications for State and Local Governments

By Abbey Stemler

Section 230's implications radiate far beyond speech. This essay discusses the ways 230 has affected state and local governments. In particular, it outlines how platforms use 230 to chill and slow regulatory efforts aimed at addressing the market failures platforms themselves create. For example, when Airbnb moves into a city, the short-term rental platform tries to use 230 to externalize the costs to public safety and housing affordability it inflicts on communities. As the case law related to 230 continues to grow, change, and diverge, the scope of 230 only becomes more confusing to local and state lawmakers. Congress must act to clarify this extremely important law and return it to its origins as a law that protects platforms from speech-related torts. Such a move is urgent and necessary to make this pillar of the modern Internet work better for all involved.

WHAT'S NEXT?

For June 2021, we will feature Chronicles focused on issues related to (1) **Buyer Cartels**; and (2) **Interoperability**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2021, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLES JULY 2021

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Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

SECTION 230 REFORM IN THE ERA OF "BIG TECH": WHAT DOES THAT MEAN FOR ANTITRUST?

BY ZHAO LIU[1]

1 Zhao Liu is a counsel in the Washington, D.C. office of O'Melveny & Myers LLP. Zhao represents clients in antitrust and healthcare matters, as well as other complex commercial disputes. The views are those of the author and do not necessarily reflect the views of the firm or any client.

I. INTRODUCTION

Section 230 of the Communications Decency Act ("Section 230") has never been in the forefront of national debate like it is today. Once hailed as the Magna Carta of the internet, this 25-year old statute has witnessed the flourish of the internet and social media. Many have attributed the success of the internet to Section 230, which, in providing online platforms immunities for hosting and moderating user-generated content, has allowed them to innovate, grow, and thrive without the burden of examining the legality and appropriateness of every single message posted by their users.

Thanks to Section 230, user-generated content plays an increasingly vital role in our daily life and the digital economy today. Yet there is now a public debate about whether Section 230 immunities are doing more harm than good. Specifically, does Section 230 disincentivize action to combat the spread of disinformation and messages of violence, bigotry, and extremism on internet platforms? On the flip side, does Section 230 give companies too much discretion and control over what information users see or do not see?

These talks have taken place against a backdrop of a recent call to revamp the antitrust law to reign in "Big Tech" companies. Some worry that "Big Tech" companies' tolerance or intolerance of certain types of user-generated content on their platforms may "ha[ve] less to do with making platforms safer or freer and more to do with the companies' commercial interests," and that the broad scope of Section 230 under existing law creates an impediment to enforcement actions or civil antitrust suits against "Big Tech" companies.[2] Legislative proposals, therefore, have been made to eliminate Section 230 immunities in their entirety or in specific areas, such as antitrust. In the Supreme Court's recent denial of a petition for certiorari in a case involving Section 230, Justice Clarence Thomas indicated that the Court might be willing to consider the reach of Section 230 in an appropriate case.[3]

A change to the scope of Section 230 seems on the horizon, whether it takes the form of a legislative or judicial action. But would such reform make it easier for plaintiffs to get past the motion to dismiss stage in antitrust cases against "Big Tech"? We think not. For one, the current debate on Section 230 — and the reform proposals — center on online platforms' handling of user-generated content. But if the allegations in past antitrust cases are any indication, there seems to be very little evidence of harm to competition caused by content hosting, moderation, or removal in the way antitrust law cares about.

In this article, we discuss why some think Section 230 immunities should be revisited in the era of "Big Tech," what form a reform of Section 230 might take, and why, in our opinion, a Section 230 reform, if any, would have little impact on antitrust law.

II. SECTION 230 IMMUNITIES IN THE ERA OF "BIG TECH"

Congress enacted Section 230 in 1996, at a time when the internet was still in its nascent stage. Only 0.9 percent of the world population then used the internet;[4] online propaganda for terrorism and racism was virtually unheard of, and online disinformation, even if existed then, would have very limited reach. By enacting Section 230, Congress intended to promote the continued development of the internet, to preserve the vibrant and competitive free market for the internet, and to remove disincentives for blocking and filtering technologies.[5] To achieve these policy goals, Section 230 shields a "provider or user of an interactive computer service" from liability when they act as a host for third-party speech, when they, acting in good faith, remove third-party speech that they consider to be objectionable, and when they enable others to restrict access to third-party speech.[6]

Today, at the Silver Jubilee anniversary of Section 230, online platforms have become increasingly indispensable to our daily life and the digital economy: people socialize with friends, colleagues, acquaintances, and even strangers on Facebook and LinkedIn, comment on current events on Twitter, and watch and share videos on YouTube, Vimeo, and TikTok. The prevalence of online platforms have also contributed to the emergence of "Big Tech" — a term coined to refer to the major U.S. information technology companies, the business model of many of which relies on user-generated content and consumer data. Some have questioned whether Section 230 immunities are still necessary to protect online

2 *What Does President Trump's "Crackdown" on Twitter Do?*, The Markup, https://themarkup.org/ask-the-markup/2020/06/11/what-does-president-trumps-crackdown-on-twitter-do (June 11, 2020).

3 *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13 (2020).

4 *Internet Growth Statistics*, Internet World Stats, https://www.internetworldstats.com/emarketing.htm.

5 47 U.S.C. § 230(b).

6 47 U.S.C. § 230(c).

companies, especially "Big Tech" companies, when they apparently are much bigger and more powerful than any provider of "an interactive computer service" that Congress could have envisaged when enacting Section 230.[7] Many are also concerned that "Big Tech" companies have become too big and used their size, profit, and control of data to hurt small businesses and stifle innovation,[8] and that Section 230 immunities only serve to maintain the status quo and the power of "Big Tech" companies.

One aspect of that power, according to some, is the ability of "Big Tech" to grow bigger and become more dominant by deterring and eliminating nascent competition.[9] The concerns with that "power" could potentially be addressed by more targeted enforcement actions — for example, the lawsuits that federal and state antitrust authorities launched against Google and Facebook in recent months — or legislative actions that afford more protections to nascent rivals of "Big Tech" companies. But many are specifically concerned that Section 230 gives "Big Tech" a *carte blanche* to remove content posted by or tools developed by their smaller competitors, harming innovation and competition in products and services. Some have thus proposed to eliminate Section 230 immunities altogether or in certain areas, including antitrust. For example, the Department of Justice under the Trump Administration proposed to clarify that federal antitrust claims are not covered by Section 230 immunities.[10] Last month, three Democratic senators also announced a proposed bill that would prevent online platforms from using Section 230 as a defense in cases brought under antitrust law.[11]

The other aspect of the power of "Big Tech" is their perceived role as "information gatekeepers that have huge control over what information users see and how it's organized"[12] and the perceived concentration of "the avenues for engaging in" online speech in the hands of a few large online platforms[13]. This is potentially problematic in two ways. One, as some on the left have argued, is a lack of incentive by "Big Tech" to take proactive measures, including develop new technologies, to combat dissemination of disinformation and messages of violence, bigotry, and extremism on their platforms.[14] The other, as some on the right and some free speech advocates have argued, is the power of "Big Tech" to moderate or remove online speech that they dislike, including content posted by people who hold a political view that is at odds with the platforms' own, which would potentially harm free competition in ideas and values.[15]

In recent years, online platforms have invoked Section 230 to defend their alleged inaction as to alleged dissemination of disinformation on their platforms, in some circumstances, and removal of accounts and user-generated content, in other circumstances — all at their own discretion.[16] Although people on the two sides of the political aisle cannot agree on why Section 230 should be revamped, both sides have made proposals to reform or repeal Section 230. At least 18 bills were introduced in Congress last year, and more have been introduced in the current congressional session.[17] CEOs of several "Big Tech" companies have been called to testify before Congress twice this year about disinformation and extremism on social media.[18]

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7 See Attorney General William P. Barr Delivers Remarks at the National Association of Attorneys General 2019 Capital Forum, Department of Justice, https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-national-association-attorneys-general.

8 See Elizabeth Warren, *Here's How We Can Break up Big Tech*, https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c (March 8, 2019).

9 *Id.*

10 See U.S. Department of Justice, Section 230—Nurturing Innovation or Fostering Unaccountability? Key Takeaways and Recommendations, June 2020.

11 *All the Ways Congress Wants to Change Section 230*, Slate, https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html (Mar. 23, 2021).

12 *What Does President Trump's "Crackdown" on Twitter Do?*, The Markup, https://themarkup.org/ask-the-markup/2020/06/11/what-does-president-trumps-crackdown-on-twitter-do (June 11, 2020).

13 See U.S. Department of Justice, Section 230—Nurturing Innovation or Fostering Unaccountability? Key Takeaways and Recommendations, June 2020.

14 *Big tech CEOs face Congress in House hearing on social media's role in extremism, misinformation*, The Washington Post, https://www.washingtonpost.com/technology/2021/03/25/facebook-google-twitter-house-hearing-live-updates/ (Mar. 25, 2021); Keith Hylton, *Digital Platforms and Antitrust Law*, No. 19-8 Boston University School of Law, Law and Economics Research Paper (2019), available at https://scholarship.law.bu.edu/faculty_scholarship/605 ("Given Section 230 immunity, the key factor that motivates Google in screening content is a concern for its own brand, which may be tarnished by the hosting of offensive material on its search engine or on the YouTube platform. This is a different set of incentives than those created by defamation or by copyright law. It is not at all clear that a concern for brand tarnishment will lead a platform to exercise the same care in monitoring postings than would a concern over the risk of liability.").

15 See U.S. Department of Justice, Section 230—Nurturing Innovation or Fostering Unaccountability? Key Takeaways and Recommendations, June 2020.

16 *What Does President Trump's "Crackdown" on Twitter Do?*, The Markup, https://themarkup.org/ask-the-markup/2020/06/11/what-does-president-trumps-crackdown-on-twitter-do (June 11, 2020).

17 *All the Ways Congress Wants to Change Section 230*, Slate, https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html (Mar. 23, 2021).

18 *Big tech CEOs face Congress in House hearing on social media's role in extremism, misinformation*, The Washington Post, https://www.washingtonpost.com/technology/2021/03/25/facebook-google-twitter-house-hearing-live-updates/ (Mar. 25, 2021).

On the other hand, some have argued against revamping Section 230.[19] Tim Wu, who is a prominent critic of "Big Tech" and has been named to the National Economic Council by President Biden, wrote in December 2020 that "[r]epeal of 230 would . . . hurt smaller platforms or startups more than the larger ones" and would not affect the content moderation policies of "Big Tech" companies.[20] Others disfavoring eliminating Section 230 have warned that doing so would "only incentivize platforms against moderating al all," and suggested leaving the law intact but using alternative means to combat harmful content.[21] Some have also suggested that the concerns over Section 230 could, at least partially, have been addressed by more rigorous antitrust enforcement actions against "Big Tech," reasoning that enhanced competition in the online platform space may dilute concentration of the avenues for engaging in online speech and potentially promote more divergent views on the internet, as well as give online platforms more competitive pressure to combat misinformation.[22]

With little consensus over whether Section 230 should be reformed, the reasons for reform, or how it should be reformed, both across party lines and within Democrats, and given the Biden Administration's other priorities, such as immigration and plans for economic recovery, it remains to be seen whether a legislative resolution may come to fruition in the near future.

Meanwhile, judicial reshaping of Section 230 is likely to take place before the passage of any reform bill. Last October, joining the Supreme Court's denial of a petition for certiorari regarding the interpretation of Section 230, Justice Clarence Thomas criticized "questionable precedent" under that statute and signaled a willingness to consider, in an appropriate case, whether the text of the "increasingly important statute" aligns with the immunities enjoyed by internet platforms under existing case law.[23] He suggested a fresher look at Section 230 to avoid bestowing unwarranted and "sweeping immunity on some of the largest companies in the world."[24]

That would almost certainly invite more litigation aimed at challenging the boundaries of Section 230 immunities set forth in precedents. Indeed, courts are already seeing an influx of cases against "Big Tech" online platforms that would potentially implicate Section 230: in the first three months of this year alone, at least six federal district courts have dismissed claims against internet platforms, including Google and Facebook, on the basis of Section 230 immunities. We expect that at least some courts will take cues from Justice Thomas and venture to start redrawing the boundaries of Section 230. Specifically, some courts are likely to reconsider where the line should be drawn to strike the right balance between encouraging free expression by platform users and protecting content moderation by platforms. Courts, for example, may reconsider whether an online platform is protected by Section 230 even when it "distributes content that it knows is illegal" and whether Section 230 "protect[s] any decision to edit or remove content" by an online platform.[25]

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19 See, e.g. Tim Wu, *Liberals and Conservatives Are Both Totally Wrong About Platform Immunity*, https://superwuster.medium.com/liberals-and-conservatives-are-both-totally-wrong-about-section-230-11faacc4b117 (Dec. 3, 2020) (arguing that "[r]epeal of 230 would . . . hurt smaller platforms or startups more than the larger ones" and would not affect the content moderation policies of "Big Tech" companies); Ashley Gold, *The People Trying to Get Biden's Head on Holding Tech Accountable*, AXIOS (Oct., 2020), https://www.axios.com/the-people-trying-to-get-in-bidens-head-on-holding-tech-accountable-383b5866-164d-42aa-8531-0c24ff8a8f30.html (eliminating Section 230 have warned that doing so would "only incentivize platforms against moderating al all").

20 Tim Wu, *Liberals and Conservatives Are Both Totally Wrong About Platform Immunity*, https://superwuster.medium.com/liberals-and-conservatives-are-both-totally-wrong-about-section-230-11faacc4b117 (Dec. 3, 2020).

21 See, e.g. Ashley Gold, *The People Trying to Get Biden's Head on Holding Tech Accountable*, AXIOS (Oct., 2020), https://www.axios.com/the-people-trying-to-get-in-bidens-head-on-holding-tech-accountable-383b5866-164d-42aa-8531-0c24ff8a8f30.html.

22 See Attorney General William P. Barr Delivers Remarks at the National Association of Attorneys General 2019 Capital Forum, Department of Justice, https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-national-association-attorneys-general ("[U]ltimately, fair competition can cure many of the ills we see. In a functioning free market, consumers can demand alternatives that better address their preferences, including for greater privacy, more transparency, or increased safety. For consumer choice and the free market to work, however, firms have to be playing by the established rules of competition.").

23 *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13 (2020).

24 *Id.*

25 *Id.*

III. WHAT SECTION 230 REFORM MEANS FOR ANTITRUST

Section 230 and antitrust law have often been mentioned together in the broader discussion of the power of "Big Tech" and the competitive health of digital markets. But any reform of Section 230, including one that eliminates Section 230 immunities to antitrust law, would likely have little impact on antitrust law or the likelihood of success for antitrust cases against "Big Tech."

One of the reasons is that Section 230 immunities are largely a "non-antitrust" issue,[26] and most of the concerns over Section 230 immunities discussed in this article are not antitrust ones in and of themselves. To be clear, Section 230 and antitrust are not completely unrelated. After all, one of Section 230's goals is to preserve the vibrant and competitive free market for the internet, which echoes the goal of antitrust law. But they achieve that goal through two completely different means. Section 230, on the one hand, encourages online platforms to rely on user-generated content to innovate and grow without worrying about legal liabilities. Antitrust law, on the other hand, punishes online platforms when they conspire to harm competition in price, quality, or quantity of products or services or when a monopolist (even one who earned that status lawfully) "use [its] power to engage in anticompetitive conduct to preserve [its] dominant position."[27] As discussed above, a Section 230 reform would likely focus on an online platform's content moderation, whether you think the online platforms are doing too much or too little in that respect. But antitrust law is ill-equipped to police the boundaries of online speech, at least in its current form.

That does not mean Section 230 and antitrust have no overlap. Section 230 allows a court to dismiss antitrust claims when the claims fall squarely within Section 230 immunities without answering the sometimes-more-difficult question of whether plaintiffs' allegations meet the heightened pleading standard for antitrust claims under *Twombly*.[28] For example, in *Marshall's Locksmith Serv. Inc. v. Google, LLC*, plaintiff locksmith companies' alleged that Google, Yahoo!, and Microsoft conspired to "flood the market" of online search results with information about so-called "scam" locksmiths, in order to extract additional advertising revenue.[29] According to the plaintiffs, the defendants furthered this scheme by publishing the content of scam locksmiths' websites, translating street-address and area-code information on those websites into map pinpoints, and publishing the defendants' own original content.[30] The plaintiffs further alleged that the defendants used their market power with respect to online search to extract payments from legitimate locksmith companies like themselves, in violation of Sections 1 and 2 of the Sherman Act.[31] The D.C. Circuit affirmed the district court's dismissal of these antitrust claims, holding that these claims are barred by Section 230 because the plaintiffs were trying to hold the defendants liable for third-party content hosted by the defendants.[32]

Cases like *Marshall's Locksmith* demonstrate that if a court does not wish to engage in a full antitrust and *Twombly* analysis, Section 230 could provide an "easy out" in an appropriate case. But to our knowledge, only very few published cases have applied Section 230 to dismiss claims brought under antitrust law. That is probably due to the limited overlap between Section 230 and antitrust: Section 230 immunities only apply to an online platform's hosting and moderation of user-generated content. How often would conduct like that harm competition in the way that antitrust law cares about? In other words, how often would content hosting, moderation, or removal have an impact on price, quantity, or quality of a product or service? How often is that done to maintain the predominance of an incumbent online platform? As discussed above, some are concerned that Section 230 gives "Big Tech" a *carte blanche* to remove content posted by or tools developed by their smaller competitors, harming innovation and competition in products and services. While that concern is certainly plausible, it remains to be seen, in the real world, how often an online platform's removal of user-generated content is motivated by anticompetitive malice. We have seen very little evidence of that happening in published cases.

Given the limited overlap between Section 230 and antitrust law, even if Section 230 immunities are significantly curtailed or completely eliminated to take that "easy out" under Section 230 away from courts, we are doubtful that would materially change a plaintiff's odds of getting past the motion to dismiss stage in antitrust cases against "Big Tech." For one, a plaintiff is still required to meet the heightened pleading

26 See *Top DOJ official signals intensifying state and federal antitrust probe of big tech*, The Washington Post (Aug. 20, 2019), https://www.washingtonpost.com/technology/2019/08/20/top-doj-official-signals-intensifying-state-federal-antitrust-probe-big-tech/.

27 See Attorney General William P. Barr Delivers Remarks at the National Association of Attorneys General 2019 Capital Forum, Department of Justice, https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-national-association-attorneys-general.

28 For example, under *Bell Atl. Corp. v. Twombly*, stating a claim under Section 1 of the Sherman Act "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." 550 U.S. 544, 556-57 (2007).

29 925 F.3d 1263, 1265 (D.C. Cir. 2019).

30 *Id.*

31 *Id.* at 1266.

32 *Id.* at 1272.

standard for antitrust claims, including antitrust injury. Take *Brittan v. Twitter*.[33] In that case, the plaintiff, whose accounts were suspended by Twitter, alleged, among other things, that Twitter engaged in anticompetitive practices in violation of Section 2 of the Sherman Act, by "deceptively and illegally limiting users who reference new/competing networks and/or utilize Third Party API services, and exaggerating their own stock values/prices."[34] Although the court did not find Section 230 applies to these antitrust claims, the court held that the plaintiff failed to allege an antitrust injury under the heightened pleading standard under *Twombly*.[35]

Moreover, perceived political bias in content moderation, which some on the right and some free speech advocates are particularly concerned about, is unlikely to give rise to antitrust violations, and allegations on that basis is unlikely to pass muster under *Towmbly*.[36] A Section 230 reform is unlikely to change the results of those cases. The antitrust claims Parler, a social media platform, recently brought against Amazon but later decided to withdraw illustrate this point. On January 10, 2021, Amazon announced that it was suspending its web-hosting services for Parler because, in Amazon's view, Parler had failed to respond to an increase in violent content on its platform after the riot on Capitol Hill earlier this year.[37] Parler responded by filing a lawsuit against Amazon, alleging, among other things, that Amazon violated Section 1 of the Sherman Act by conspiring with Parler's competitor Twitter to favor Twitter, even though, according to Parler, Twitter's content can be just as violent and abusive as posts on Parler.[38] Amazon argued that Section 230 precludes Parler's claims because Amazon acted in good faith to block Parler, which contains violent and harassing content.[39] But as Amazon also argued — and many agree — Parler's claims under the Sherman Act would fail regardless of whether Section 230 applies because Parler did not even allege that Amazon and Twitter ever discussed Parler, let alone that they reached an agreement to block Parler.[40] In other words, Parler's claims likely would not fly even if there were no Section 230 immunities to antitrust law.

IV. CONCLUSION

As the executive and legislative scrutiny of "Big Tech" continues, Section 230 will remain a hot topic on legislative agendas and in public discussions. But it remains to be seen whether any legislative proposals would be enacted. Litigants will likely continue to challenge the scope of Section 230 by filing lawsuits against "Big Tech," and it would be interesting to see whether some courts might start reevaluating precedents and reshaping the scope of Section 230 immunities. That said, in our opinion, any legislative or judicial action to redefine or curtail protections under Section 230 is unlikely to have a material impact on antitrust law or the ultimate results of cases against "Big Tech" brought under antitrust law.

33 2019 U.S. Dist. LEXIS 97132 (N.D. Cal. Jun. 10, 2019).

34 *Id.* at *10.

35 *Id.* at *9-11.

36 *Will Parler Prevail in Its Antitrust Case Against Amazon?*, Knowledge@Wharton, https://knowledge.wharton.upenn.edu/article/parler-antitrust-case-against-amazon/ (Herbert Hovenkamp stated that antitrust law typically does not cover "political terminations").

37 *The hollow core of Parler's antitrust case against Amazon*, Reuters (Jan. 14, 2021), https://www.reuters.com/article/legal-us-otc-parler/the-hollow-core-of-parlers-antitrust-case-against-amazon-idUSKBN29I309.

38 *Id.*

39 *Id.*

40 *Id.*; *Will Parler Prevail in Its Antitrust Case Against Amazon?*, Knowledge@Wharton, https://knowledge.wharton.upenn.edu/article/parler-antitrust-case-against-amazon/ (Herbert Hovenkamp commented on the Parler lawsuit: "You can't just kind of make an atmospheric claim that there is a conspiracy. You really have to put some facts into it, and there really aren't any facts here that would support that kind of conspiracy claim.").

SECTION 230 REFORM: A TYPOLOGY OF PLATFORM POWER

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I. INTRODUCTION

The CEOs of a handful of tech companies — Amazon, Apple, Facebook, Google, and Twitter — have testified repeatedly in congressional hearings over the past eight months, responding repeatedly to questions about the existence of an offensive tweet, a horrific Facebook Group, or an objectionable YouTube video. Each time, the message from legislators has been the same: you have too much power to set the rules for speech on your platform, we don't like the rules you set, and we don't like how you enforce them. Democrats argue that tech companies censor too little, that harmful speech is allowed to run rampant on their platforms, posing particular harm to vulnerable communities. Republicans argue that tech companies censor too much, that left-leaning executives and employees develop content moderation practices that disproportionately restrict conservative speech.

But regardless of political party, for nearly all legislators, the culprit is clear: Section 230 of the Communications Decency Act. Enacted into law in 1996, Section 230 ensures that online content hosts aren't liable for the speech of content creators.[2] Its supporters refer to it as the internet's Magna Carta.[3] Its critics argue that it is a harmful relic of a previous era.[4]

In the last several months, legislators have gone on a Section 230 reform spree, as documented in the Section 230 Legislative Tracker that launched in March, a partnership between the Center on Science & Technology Policy at Duke, Future Tense, and the Washington College of Law at American University.[5] The Tracker includes information on each Section 230 reform proposal introduced in the last Congress and the current one, including bill name, co-sponsors, status, reform type, and a summary of the proposal.

Although nearly all efforts to reform Section 230 appear to be motivated by a desire to constrain the power of large technology companies, many of the proposals would likely do the opposite. They would shift power toward large technology platforms and away from people and governments, making it even harder for startups to compete for users and advertisers and more deeply entrenching the market position of large tech platforms.

The purpose of this paper is to provide a typology of these power shifts, examining the specific ways in which reform proposals could increase the power of large tech platforms. The paper also offers alternative proposals for addressing some of the concerns raised by legislators that would instead shift power in the opposite direction: away from platforms and toward people and governments. Ultimately, putting more power in the hands of people (to control their experiences on the tech products they use) and governments (to strike the right balance in public welfare tradeoffs) will produce a better internet.

2 47 U.S.C. § 230.

3 *A digital Magna Carta*, QUARTZ (December 2, 2020), https://qz.com/emails/quartz-obsession/1940615/.

4 Issie Lapowsky & Emily Birnbaum, *Mark Warner is ready to fight for Section 230 reform*, PROTOCOL (March 22, 2021), https://www.protocol.com/policy/mark-warner-section-230.

5 Kiran JeevanJee et. al., *All the Ways Congress Wants to Change Section 230*, SLATE (March 23, 2021) https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html.

II. HOW REFORMS COULD INCREASE PLATFORM POWER

Several proposed reforms of Section 230 could increase the power of large tech platforms by creating stronger incentives to censor content, raising barriers to entry that reduce competition, reducing competition on quality and innovation, and aiding large news publishers at the expense of news cost and quality.

A. Shifting Power from People to Platforms: Incentivizing Censorship

Several proposed reforms will likely lead to increased censorship, with platforms playing a stronger intermediary role and serving more as gatekeepers to expression rather than as facilitators of it. Any Section 230 reform that subjects platforms to more suits, that extends the duration of suits, or that results in more prohibitively-costly verdicts for plaintiffs is likely to create strong incentives for platforms to limit user expression. When people have their speech removed or are deterred from speaking in the first place, power shifts from people to platforms.

A number of proposed reforms would likely increase litigation costs sufficiently to create these strong censorship incentives. For example, a full repeal of Section 230 -- as several members of Congress, Trump, and Biden have proposed[6] -- would subject platforms to increased legal liability. But even more modest reforms could have a similar impact on litigation risk. Making liability protections contingent upon a showing of reasonableness, as some experts have proposed,[7] would necessitate litigating the question of whether a platform's behavior was reasonable. This change would mean that platforms couldn't use Section 230 to dismiss a case at the motion to dismiss phase of litigation, before defendants are forced to bear the expensive burdens of discovery. Similarly, "quid pro quo" approaches -- where a platform must demonstrate that it has complied with certain substantive or procedural best practices[8] – would make it difficult to resolve cases before discovery.

Platforms that host user-generated content would thus need to bear heightened litigation costs, both because litigation costs rise as litigation becomes lengthier and also because prospective plaintiffs may have more incentives to sue in the first place. And if content becomes more expensive, platforms will take steps to limit those costs, either by removing content more aggressively or by changing their products to make it harder for users to speak and share.

Increased liability could also shift power from users to platforms in more subtle ways. When it becomes more expensive to host content, platforms might also seek to deploy technical tools to differentiate between low-risk content and high-risk content, since technology may be preferable to human review as a means of addressing risk at scale. Increasing the types of content that are subject to review by artificial intelligence systems puts more power in the machines deployed by platforms and advantages platforms that are able to invest in building those systems. Similarly, a shift toward technology-oriented, centralized moderation models might make it less likely that platforms could rely on community moderation models like Reddit's,[9] meaning that users would not only experience a reduced capacity to speak, but also a reduced capacity to self-govern.

6 Kiran Jeevanjee et. al., *All the Ways Congress Wants to Change Section 230*, SLATE (March 23, 2021) https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html. President Biden suggested repealing Section 230 as a candidate, but has not announced a recommendation for reforming Section 230 since he became president. Makena Kelly, *Joe Biden Wants to Revoke Section 230*, THE VERGE (January 17, 2020), https://www.theverge.com/2020/1/17/21070403/joe-biden-president-election-section-230-communications-decency-act-revoke.

7 Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 Fordham L. Rev. 401 (2017).

8 Stigler Committee on Digital Platforms, *Final Report* (2019), https://www.publicknowledge.org/wp-content/uploads/2019/09/Stigler-Committee-on-Digital-Platforms-Final-Report.pdf.

9 Spandana Singh, *Everything in Moderation* (July 22, 2019), https://www.newamerica.org/oti/reports/everything-moderation-analysis-how-internet-platforms-are-using-artificial-intelligence-moderate-user-generated-content/case-study-reddit.

B. Shifting Power from People to Platforms: Raising Barriers to Entry

Any reform that has the effect of significantly increasing the cost of user-generated content business models will not only create incentives for censorship, but will also likely introduce barriers that will make it more difficult for smaller platforms to compete with larger ones. Platforms like Amazon, Apple, Google, and Facebook have huge user bases, but also employ tens of thousands of people.[10]

If litigation costs increase, large companies will have the ability to choose whether to maintain their current models in the face of these new expenses or change their products to decrease potential costs. A company like Facebook or Google could decide to bear the risk of increased costs if doing so protects their market position and makes it more difficult for other companies to compete. Competing platforms with fewer resources are unlikely to have the luxury of choice.

One example is the SESTA/FOSTA legislation that reformed Section 230 in an attempt to combat sex trafficking. The law not only failed to protect the community it was designed to protect,[11] but it also forced smaller, less well-resourced dating sites to shut down. Facebook entered the online dating market shortly afterward.[12]

For smaller companies, prohibitive compliance costs could come not just from increased litigation expenses, but also from mandating more extensive operational procedures, such as reporting channels, appeals mechanisms, and transparency reports. For instance, the Platform Accountability and Consumer Transparency ("PACT") Act proposes several operational requirements for platforms, several of which are already common current practice for large tech platforms.[13] In Europe, the Digital Services Act proposes similar requirements.[14]

But for smaller platforms, many of these operational standards are prohibitively burdensome, and diverting employee capacity away from engineering and sales and into legal and policy compliance functions could make it even more difficult for them to compete with established platforms.[15]

It's also not surprising that larger platforms have endorsed reforms that could entrench their market position. Facebook CEO Mark Zuckerberg has expressed support for "quid pro quo" reforms that require companies to implement certain operational procedures in order to earn Section 230 protections.[16] Facebook already has most of these procedures in place, and has the scale and resources to adopt additional procedures that Congress might require, but new operational requirements may prove burdensome for smaller providers that are seeking to compete with Facebook.

Finally, reform proposals that remove protections for hosting advertising are likely to erect barriers to entry in the online advertising market. The SAFE TECH Act, for instance, includes a carve-out from Section 230 protections for paid speech.[17] The bill laudably seeks to reduce advertising fraud, but would increase compliance costs for platforms seeking to build advertising systems to rival Google, Facebook, and Amazon's. That challenge is already difficult, and increasing litigation risks and operational burdens will make it even harder to compete.

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10 Amazon has more than 1 million employees, Apple has more than 145,000, Google has more than 135,000, and Facebook has more than 50,000. In contrast, Twitter has roughly 4,500 employees, Snap has fewer than 3,000 employees, and Reddit has roughly 700 employees.

11 Rose Conlon, *Sex workers say anti-trafficking law fuels inequality*, MARKETPLACE (April 30, 2019), https://www.marketplace.org/2019/04/30/sex-workers-fosta-sesta-trafficking-law-inequality/.

12 Elliot Harmon, Changing Section 230 Would Strengthen the Biggest Tech Companies, THE NEW YORK TIMES (October 16, 2019), https://www.nytimes.com/2019/10/16/opinion/section-230-freedom-speech.html?referringSource=articleShare.

13 *Platform Accountability and Consumer Transparency Act*, S. 797 (introduced March 17, 2021), https://www.congress.gov/117/bills/s797/BILLS-117s797is.pdf.

14 European Commission, *The Digital Services Act: ensuring a safe and accountable online environment*, https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en.

15 It is therefore not surprising that a coalition of smaller tech platforms responded to the PACT Act by warning that reform could "unintentionally harm smaller sites and organizations."

16 Written testimony of Mark Zuckerberg, Hearing Before the United States House of Representatives Committee on Energy and Commerce Subcommittees on Consumer Protection & Commerce and Communications & Technology (March 25, 2021), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Witness%20Testimony_Zuckerberg_CAT_CPC_2021.03.25.pdf.

17 Senator Mark Warner, *Warner, Hirono, Klobuchar Announce the SAFE TECH Act to Reform Section 230* (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.

C. Shifting Power from People to Platforms: Reducing Competition on Quality and Innovation

Some reforms could shift power from people to platforms by stifling competition on quality and innovation. For instance, TikTok has grown rapidly as a rival to Facebook, Google, and Twitter in large part due to the strength of its algorithm.[18] But the space for algorithmic competition may narrow if proposals like the Protecting Americans from Dangerous Algorithms Act become law. The bill removes Section 230 as a defense in civil rights and terrorism cases where algorithms are used to sort and distribute content to users, but provides exemptions if platforms offer the ability to sort content chronologically. [19] If relying on algorithmic ranking could cause platforms to lose Section 230 protections, platforms may pivot to a heavier reliance on chronological sorting, which could reduce a competitive advantage for companies like TikTok.

Platforms also use Section 230 protections to compete on content moderation. For instance, while Twitter blocked sharing of the controversial *New York Post* story about Hunter Biden in October 2020, Facebook merely downranked it in News Feed.[20] Parler quickly became appealing to conservatives because of a more lenient approach to moderation.[21] Similarly, TikTok has sought to distinguish itself by offering more transparency about its algorithm and its moderation practices.[22] Different approaches to content moderation enable users to make choices based on their moderation preferences.

Several proposals threaten this competition. Some bills would narrow the "Good Samaritan" provisions of Section 230, which provide broad protections to platforms when they moderate content,[23] and others impose a neutrality requirement on platforms, reducing their freedom to set their own moderation policies.[24] If platforms face increased liability when they take steps to moderate content or if they must receive a certification of neutrality from a government agency, they will have less room to compete on the quality of their content moderation offerings.[25]

D. Shifting power from people to large platforms and publishers: Antitrust exemptions for news publishers

Some reformers also claim that Section 230 creates an unequal playing field between platforms and news publishers, since news publishers face liability for defamation and libel while platforms can use Section 230 as a defense in such cases.[26] They claim that this imbalance gives platforms an unfair advantage in competition for user attention and advertising. In response, legislators have proposed exempting news publishers from antitrust laws to allow them to collude in negotiations with tech platforms.[27]

Antitrust exemptions are disfavored as a policy tool because antitrust law exists to ensure that consumers are protected from harm.[28] By definition, exemptions from a body of law designed to protect consumers would immunize companies when they engage in conduct that produces harm, and would therefore increase the likelihood that companies will behave in ways that harm consumers.

Antitrust exemptions for the news industry could harm consumers by increasing the costs of consuming news, decreasing the supply of news, or reducing the quality of news. An antitrust exemption would also likely benefit large publishers at the expense of smaller ones, since

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18 Ben Thompson, *The TikTok War*, STRATECHERY (July 14, 2020), https://stratechery.com/2020/the-tiktok-war/.

19 Representative Tom Malinowski, *Reps. Malinowski and Eshoo introduce bill to hold tech platforms liable for algorithmic promotion of extremism* (October 20, 2020), https://malinowski.house.gov/media/press-releases/reps-malinowski-and-eshoo-introduce-bill-hold-tech-platforms-liable-algorithmic.

20 Shannon Bond, *Facebook And Twitter Limit Sharing 'New York Post' Story About Joe Biden*, NPR (October 14, 2020), https://www.npr.org/2020/10/14/923766097/facebook-and-twitter-limit-sharing-new-york-post-story-about-joe-biden.

21 Shannon Bond, *Conservatives Flock To Mercer-Funded Parler, Claim Censorship On Facebook And Twitter*, NPR (November 14, 2020),

22 Vanessa Pappas, *TikTok to launch Transparency Center for moderation and data practices*, TIKTOK NEWSROOM (March 11, 2020), https://newsroom.tiktok.com/en-us/tiktok-to-launch-transparency-center-for-moderation-and-data-practices.

23 *Limiting Section 230 Immunity to Good Samaritans Act*, S. 3983 (introduced June 17, 2020), https://www.congress.gov/bill/116th-congress/senate-bill/3983/text?r=6&s=1.

24 *Ending Support for Internet Censorship Act*, S. 1914 (introduced June 19, 2019), https://www.congress.gov/bill/116th-congress/senate-bill/1914/text.

25 evelyn douek has written extensively about the subtle implications of cooperation and competition between providers on content moderation. For instance, see evelyn douek, *The Rise of Content Cartels*, KNIGHT FIRST AMENDMENT INSTITUTE (February 11, 2020), https://knightcolumbia.org/content/the-rise-of-content-cartels.

26 This claim is misleading, since publishers benefit from Section 230 protections when they act as an interactive computer service and host user comments, and platforms cannot use Section 230 as a defense when they act as an information content provider and create content.

27 Senator Amy Klobuchar, *Senator Klobuchar and Representative Cicilline Introduce Legislation to Protect Journalism in the United States* (March 10, 2021), https://www.klobuchar.senate.gov/public/index.cfm/2021/3/senator-klobuchar-and-representative-cicilline-introduce-legislation-to-protect-journalism-in-the-united-states#:~:text=The%20Journalism%20Competition%20and%20Preservation%20Act%20only%20allows%20coordination%20by,discriminatory%20to%20other%20news%20publishers.

28 See, e.g. Antitrust Modernization Commission, *Report and Recommendations* (April 2007), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

larger publishers would likely be well-positioned to bargain for licensing agreements with platforms while smaller publishers might not be able to secure similar deals.[29] Finally, an antitrust exemption would benefit large platforms over smaller platforms, since companies with deep pockets could afford to compensate publishers for their content, to divert engineering resources to product changes demanded by publishers, and to devote time and energy to the process of negotiating agreements.

III. RECOMMENDATIONS FOR SHIFTING POWER TO PEOPLE AND GOVERNMENTS

Aspiring reformers who believe that governments – and not companies – should set the regulatory agenda in tech policy or who believe that users should be more empowered to control their experience on tech products should consider an alternative reform agenda. To shift power away from large platforms and toward people and governments, reformers should consider the following proposals.

A. Reforms that shift power from platforms to people

1. Algorithmic Choice

Several reforms would shift power from platforms to people, giving users more control over the content they see in their tech products. One obvious example is enhancing algorithmic choice so as to provide people with more choices about the content that is surfaced to them. Facebook recently announced that it will offer a "Feed Filter Bar" to make it easier for people to switch between an algorithmic feed, a chronological feed, and a new "Favorites" feed, and Twitter CEO Jack Dorsey proposed offering people the ability to select third-party algorithms.[30]

That approach is similar to a proposal made by my Duke colleague Barak Richman and Stanford professor Francis Fukuyama in recent policy brief.[31] The proposal would require tech platforms to offer APIs that integrate with "middleware" algorithm services such that consumers could choose their preferred algorithms to sort their news, rank searches, and order their tweets.

Of course, platforms could also offer more consumer choice in their own products, even in the absence of third-party algorithms. Platforms could offer users a menu of options to set more individualized content preferences, and offer more specialized feeds like "political junkie," "sports fan," or "pet lover."

2. Transparency

Many platforms have supported increased transparency about their content practices. Many platforms publish transparency reports that detail the volume and types of content they remove. Several platforms have sought to provide more information to users about why they see certain ads or content, both by expanding the content they offer in help centers and by experimenting with in-line context and labeling.[32]

But despite these efforts at transparency – most of which exceed transparency in other industries[33] – it is still difficult to get the granular data that would illuminate where platforms are falling short in their content moderation practices and which interventions would be most successful in addressing user concerns. To understand those dynamics, researchers must have better access to data.

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29 The agreements that Google and Facebook have struck in Australia, for instance, suggest that negotiations would likely focus on large deals with large publishers, and leave smaller publishers at a competitive disadvantage relative to others in the publishing industry. See, e.g. *News Corp and Google Agree To Global Partnership On News*, NEWS CORP (February 17, 2021), https://newscorp.com/2021/02/17/news-corp-and-google-agree-to-global-partnership-on-news/.

30 Written testimony of Jack Dorsey, Hearing Before the United States Senate Committee on Commerce, Science, and Transportation (October 20, 2020), https://www.commerce.senate.gov/services/files/7A232503-B194-4865-A86B-708465B2E5E2.

31 Francis Fukuyama, Barak Richman, et. al., Middleware for Dominant Digital Platforms: A Technological Solution to a Threat to Democracy, STANFORD UNIVERSITY, https://fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/cpc-middleware_ff_v2.pdf. The authors made similar arguments in subsequent articles in Foreign Affairs and The Wall Street Journal.

32 *Why you're seeing an ad*, GOOGLE ACCOUNT HELP, https://support.google.com/accounts/answer/1634057?hl=en#:~:text=Your%20activity%3A&text=Your%20previous%20interactions%20with%20ads,Your%20activity%20on%20another%20device. Facebook Newsroom, TWITTER (April 7, 2021), https://twitter.com/fbnewsroom/status/1379887135998763014?s=20. Providing information alongside a post enables people to get more context at the same time as they are seeing the content, while also connecting them directly to controls that enable them to change the content they receive.

33 Cf. *Transparency Report*, AT&T (February 2021), https://about.att.com/content/dam/csr/2019/transparency/2021/2021-February-Report.pdf.

Currently, researchers fear that they may be prosecuted under the Consumer Fraud and Abuse Act if they try to obtain company data, and companies fear that they may be held liable if they share data with researchers who subsequently misuse it.[34] In the wake of data sharing controversies, platforms have taken steps to reduce third-party data access.[35] To facilitate the study of content moderation, policymakers must develop a more sensible regulatory regime for data sharing.

Congress or the FTC could make it easier for researchers to access data by immunizing researchers who obtain company data consistent with a company's terms and by immunizing platforms that provide data to researchers consistent with privacy and security best practices. Congress could achieve this result by including safe harbors for researcher data access in federal privacy legislation or as a standalone reform. Alternatively, the FTC could issue a policy statement indicating that it will not pursue enforcement action when researchers and platforms share data consistent with security and privacy safeguards.

3. User Control and Competition

Legislators might also consider reforms that bolster competition by putting more power in people's hands, lowering barriers to entry, and spurring innovation. One example is to encourage more data portability, which is the ability to take data from one service to another. Mandatory data portability has gained support from industry and a bipartisan group of lawmakers.[36] By enabling people to move their data more easily from one product to another, it reduces the ability of a platform to "lock in" users even when higher-quality or lower-priced options are available elsewhere in the market.

B. Reforms that Shift Power from Platforms to Government

1. Modernizing Federal Election Law

In some circumstances, it may be preferable to put decision-making power in government hands, rather than expecting platforms to make decisions about critical aspects of governance. One example is election regulation. During the 2020 election, advocacy organizations and news reports suggested that tech platforms should play a more aggressive role in policing voter suppression.[37] In response, several platforms announced measures to remove, downrank, or contextualize content aimed at suppressing the vote.[38]

But governments, not private companies, should set the rules for elections. Extensive federal and state laws exist to govern the process and an entire federal agency, the Federal Election Commission, is dedicated to developing and enforcing the law. In light of this existing regulatory backdrop, it seems odd to ask tech companies to play a primary role in regulating election speech.[39]

Rather than gutting Section 230 in the hopes of policing election speech, Congress should modernize voting law by passing new criminal law on deceptive practices in voting, prohibiting speech that intentionally suppresses the vote. While some states have laws that prohibit deceptive practices, no equivalent federal law exists. The Deceptive Practices and Voter Intimidation Prevention Act – which was first introduced in 2006 and is included in the For the People Act of 2021 that recently passed the House[40] – is one way to achieve this objective. To increase the chances of garnering bipartisan support, the legislation could also include additional protections against voting fraud.

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34 *FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook*, FEDERAL TRADE COMMISSION (July 24, 2019), https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions.

35 *A Platform Update*, FACEBOOK NEWSROOM (July 2, 2018), https://about.fb.com/news/2018/07/a-platform-update/.

36 Data Transfer Project (https://datatransferproject.dev/); Representative Ken Buck, *The Third Way*, https://buck.house.gov/sites/buck.house.gov/files/wysiwyg_uploaded/Buck Report.pdf; Senator Mark Warner, *Senators Introduce Bipartisan Bill to Encourage Competition in Social Media* (October 22, 2019), https://www.warner.senate.gov/public/index.cfm/2019/10/senators-introduce-bipartisan-bill-to-encourage-competition-in-social-media.

37 *Investigate Facebook: Profiting off voter suppression*, https://actionnetwork.org/petitions/investigate-facebook-profiting-off-voter-suppression/.

38 Twitter Safety, *Expanding our policies to further protect the civic conversation*, TWITTER BLOG (September 10, 2020), https://blog.twitter.com/en_us/topics/company/2020/civic-integrity-policy-update.html.

39 It is even more puzzling because many of the same people calling for platforms to be more aggressive in censoring speech during elections also advocate for more constraints on platform power.

40 *For the People Act* (January 4, 2021) https://www.congress.gov/bill/117th-congress/house-bill/1/text.

This law would need to be narrowly crafted to survive a challenge under the First Amendment, but that challenge would not necessarily be fatal. For instance, the Supreme Court has upheld laws restricting election-related speech when those laws are needed to "protect[] voters from confusion and undue influence" and to "ensur[e] that an individual's right to vote is not undermined by fraud in the election process."[41]

Modernizing federal law on voting would serve several purposes. First, because Section 230 cannot be used as a defense against claims based on federal criminal law, a new law would eliminate Section 230 as a bar in voter suppression cases, as long as they are brought under federal law.

Second, even in cases where platforms were not criminally liable, new law would enable prosecutors to pursue cases against individuals who use online platforms to engage in deceptive practices that suppress the vote. The risk of prosecution will likely deter some people from engaging in deceptive practices, reducing the volume of problematic content that harms the election process.[42]

Third, federal criminal law on voter suppression would give platforms a basis for cooperating with law enforcement to prosecute voter suppression. Currently, platforms regularly provide data in response to requests they receive from law enforcement.[43] But in order to provide data in these cases, a platform must receive a lawful request, and in the absence of law criminalizing the conduct, a platform has no basis for providing data to a law enforcement body. With new law, the government could request relevant data held by platforms, and platforms would have a lawful basis for complying with those requests.

C. Modernizing Federal Criminal Law on Incitement to Riot

The issue of online incitement to riot has come into sharper focus in the wake of the January 6th attack on the Capitol, with allegations that the attacks were facilitated by coordination that occurred on tech platforms.[44] These allegations have been accompanied by calls for tech companies to be more aggressive in policing content that might incite violence.[45]

To address these concerns, Congress should modernize federal criminal law on incitement to riot. There is existing law on incitement, but it was passed in 1968, before the rise of the internet, mobile technologies, and social media, and appeals courts have found some of its provisions to be unconstitutional.[46] The law is outdated and in need of reform.

As with new federal criminal law in voter suppression, passing new criminal law on incitement would bar Section 230 from being used as a defense in cases brought pursuant to that law. And as with other criminal law, it would likely have a deterrent effect and would provide a basis for platforms to disclose data to law enforcement to assist with investigations.

Passing new law in this area would shift power toward legislators and judges in determining what constitutes incitement and what does not, and would put platforms in the position of complying with government rules rather than setting the rules on incitement themselves.

41 *Burson v. Freeman*, 504 U.S. 191 (1992).

42 *Five Things about Deterrence*, NATIONAL INSTITUTE OF JUSTICE, (June 5, 2016), https://nij.ojp.gov/topics/articles/five-things-about-deterrence#one.

43 See, e.g. *Google Transparency Report*, GOOGLE, https://transparencyreport.google.com/?hl=en.

44 Katie Paul, et. al., Analysis: Facebook and Twitter crackdown around Capitol siege is too little, too late, REUTERS (January 8, 2021), https://www.reuters.com/article/uk-usa-election-hate-analysis/analysis-facebook-and-twitter-crackdown-around-capitol-siege-is-too-little-too-late-idUKKBN29D2WA?edition-redirect=uk.

45 Adam Satariano, *After Barring Trump, Facebook and Twitter Face Scrutiny About Inaction Abroad*, NEW YORK TIMES (January 14, 2021), https://www.nytimes.com/2021/01/14/technology/trump-facebook-twitter.html.

46 Josh Gerstein, *Court pares back federal Anti-Riot Act*, POLITICO (August 24, 2020), https://www.politico.com/news/2020/08/24/court-pares-back-federal-anti-riot-act-400999.

D. Facilitating Off-platform Resolution of Disputes

While Section 230 immunizes platforms for certain speech created by others, it doesn't immunize anyone — platforms or users — for the speech they create. Policymakers could shift power away from platforms and toward governments and people by creating new reporting flows that would make it easier to hold people accountable and resolve disputes.

Platforms already use reporting flows for this purpose. Some platforms recommend that users report certain behavior to law-enforcement officials.[47] Platforms also sometimes facilitate reporting to trusted members of a community, such as in bullying cases where a potential victim might prefer to report an incident to a teacher instead of to a platform or to law enforcement.[48]

Similar design features might make it easier for users to resolve disputes and easier for governments to enforce existing law. For instance, platforms could provide functionality that enables people to report content not only to the platform, but also to the offices of state attorneys general.[49] Alternatively, platforms could provide options to report false voting information to an election-monitoring organization, to report harassment to victims' support services, or to report defamation to lawyers who specialize in defamation law.

E. Institutionalizing the Study of Power: Regulatory Curiosity and Section 230 Reform

No matter what reforms we pursue, their effects will be uncertain. We may embark on reform that intends to shift power from platforms to people,[50] and find that it has the opposite effect. Reforms that aim to shift power from platforms to governments may instead aggregate power in platforms' hands, just as some argue that privacy reform in Europe has dug a moat around large platforms' market position.[51]

The uncertainty should be humbling. Outcomes that appear certain may be anything but. In the face of this uncertainty, an agenda for reforming Section 230 should focus not only on substance, but also on process. Regulators should implement reforms that institutionalize learning, providing them with information about the reform agenda's performance and creating opportunities for intervention to change course. In the absence of certainty, we should encourage regulatory curiosity.

Regulations have several options for institutionalizing curiosity. For instance, they could deploy regulatory sandboxes, a policy tool that trials a novel approach for a fixed period of time, uses that period to gather detailed data about the performance of the regime, and then implements changes to reflect learnings during the trial period.[52]

Due to the potential power implications of Section 230 reform, regulators should use a sandbox to monitor how power dynamics change in response to reform. For instance, regulators should work with researchers to develop metrics for evaluating user empowerment, barriers to entry, and product quality so that they can monitor the progress of reforms against these benchmarks.

These metrics might be particularly relevant for certain reforms, such as data portability. Portability has the potential to make it easier for people to leave established platforms for smaller ones, but it may instead entrench large platforms by giving them access to data at competing startups. It's also possible that it could constitute a step backward for user empowerment, if it enables people to transfer data to less secure services or if it makes it easier to transfer data that is relevant to you but that you don't control, such as a photo that you are tagged in. With so much unknown, a regulatory sandbox on portability would help us to learn which policies work best and whether they bring us closer to our policy objectives.

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47 *Making it easier to report threats to law enforcement*, TWITTER BLOG (March 17, 2015), https://blog.twitter.com/en_us/a/2015/making-it-easier-to-report-threats-to-law-enforcement.html; *What should I do if someone is asking me to share non-consensual intimate images with them over Messenger?*, FACEBOOK HELP CENTER, https://www.facebook.com/help/messenger-app/android/330915461156611?helpref=uf_permalink.

48 Dustin Petty, *Facebook Fights Bullying*, (April 2, 2012), https://news.jrn.msu.edu/bullying/2012/04/02/facebook-fights-bullying/.

49 For an example of existing systems that state attorney general's use for receiving complaints, see the North Carolina Attorney General's website. https://ncdoj.gov/file-a-complaint/.

50 For example, SESTA/FOSTA legislation was designed to protect sex workers and has instead made them more vulnerable. Ted Andersen et. al., The Scanner: Sex workers returned to SF streets after Backpage.com shut down, SAN FRANCISCO CHRONICLE (October 15, 2018).

51 Nick Kostov & Sam Schechner, *GDPR Has Been a Boon for Google and Facebook*, WALL STREET JOURNAL (June 17, 2019), https://www.wsj.com/articles/gdpr-has-been-a-boon-for-google-and-facebook-11560789219.

52 Regulatory sandboxes have been used widely in other countries. *A journey through the FCA regulatory sandbox*, DELOITTE, https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/financial-services/deloitte-uk-fca-regulatory-sandbox-project-innovate-finance-journey.pdf.

IV. CONCLUSION

According to its proponents, Section 230 reform is necessary to reduce the power of large technology companies, to level the playing field with other industries, and to empower users. But most proposals to reform Section 230 would do the opposite, aggregating power in the hands of large platforms.

To empower users and governments, rather than large platforms, reformers should consider an alternative set of proposals focused on increasing user choice, promoting competition, and situating the government as the primary decision-maker for setting the rules that govern online behavior. To ensure that the reforms we enact achieve the objectives we desire, we should institutionalize "regulatory curiosity" so that we can learn from reform efforts and improve them over time.

REGULATING INTERNET SERVICES BY SIZE

BY ERIC GOLDMAN & JESS MIERS[1]

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I. INTRODUCTION

Regulators across the globe want to impose more stringent regulations on "Big Tech," but that requires regulators to explain what "Big" Tech means. As it turns out, it's not easy to craft sensible regulations that distinguish Internet services by size.

This essay will consider how regulators might incorporate a size-based regulation distinction into a critically important Internet law, Section 230,[2] which says websites typically aren't liable for third-party content.[3] When Congress enacted Section 230 in 1996, the Internet looked quite differently than it does now.[4] Now, with help from Section 230, Google and Facebook have emerged as two of the most valuable companies ever.[5] In response, pending bills would reduce or eliminate Section 230 for large services.[6] Other proposals at the federal[7] and state[8] level would impose greater duties on big Internet services.

This essay discusses the logistical considerations when drafting size-based distinctions for Internet services. The essay then discusses the policy pitfalls such distinctions can create for Section 230 reform.

II. WHY MAKE SIZE-BASED REGULATORY DISTINCTIONS?

Regulators might make size-based regulatory distinctions: (1) to target bigger producers of social harm; (2) to reduce barriers for new market entrants; or (3) because it feels fairer.

Social Harm. Social harm may scale with entity size.[9] If so, curbing the harms caused by larger entities may provide the best cost-benefit return from the regulatory efforts — especially in consolidated markets.[10]

Entry Barriers. Incumbents may be able to afford compliance costs better than new entrants[11] due to their greater economies of scale (such as have an existing team of compliance personnel),[12] better access to capital, or greater profitability. In contrast, higher compliance costs increase the capital required to enter the market and make it harder for new entrants to achieve profitability.[13] Thus, giving compliance breaks to new entrants can have pro-competitive benefits.

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2 47 U.S.C. § 230.

3 See Eric Goldman, *An Overview of the United States' Section 230 Internet Immunity*, The Oxford Handbook of Online Intermediary Liability 155 (Giancarlo Frosio, ed. 2020).

4 For example, in late 1995, industry leader America Online had a $4B market capitalization. https://www.bloomberg.com/news/articles/1995-10-22/america-online-has-it-peaked. At its April 1996 IPO, leading Internet directory Yahoo had a market capitalization under $1B. Wayne Duggan, *This Day in Market History: The Yahoo! IPO*, Benzinga, Apr. 12, 2021, https://www.benzinga.com/general/education/21/04/11510037/this-day-in-market-history-the-yahoo-ipo.

5 See Anupam Chander, *How Law Made Silicon Valley*, 63 Emory L.J. 639 (2014).

6 Two examples:

- A bill would scale back Section 230 in specified circumstances except for services with "10,000,000 or fewer unique monthly visitors or users for not fewer than three of the preceding 12 months." Protecting Americans from Dangerous Algorithms Act, H.R. 2154 (117th Cong. 2021), §2(C).
- A bill would restrict Section 230 in some cases for "edge providers" with 30M+ U.S. users (or 300M+ users worldwide) and $1.5B+ in global revenue. Limiting Section 230 Immunity to Good Samaritans Act, H.R. 277 (117th Cong. 2021).

7 E.g. Platform Accountability and Consumer Transparency Act, S. 797 (117th Cong. 2021), §23(6) (imposing duties on Internet services with 1M+ unique monthly visitors and revenues of $50M+).

8 See, e.g. Florida SB 7072 (501.2041(g)), defining a "social media platform" as services with over $100M of annual revenues or "100 million monthly individual platform participants globally." (As will be clear from Part II(A)(5) *infra*, the term "individual platform participants" is incoherent). State laws regulating Internet services may violate the Constitution or Section 230, but those concerns aren't slowing many legislatures down.

9 C. Steven Bradford, *Does Size Matter? An Economic Analysis of Small Business Exemptions from Regulation*, 8 J. Small & Emerging Business L. 1 (2004).

10 The proposed EU Digital Services Act explains: "Very large online platforms may cause societal risks, different in scope and impact from those caused by smaller platforms. Once the number of recipients of a platform reaches a significant share of the Union population, the systemic risks the platform poses have a disproportionately negative impact in the Union." Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, Recital 54, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM:2020:825:FIN.

11 Bradford, *supra* note 9.

12 *Id.* at 11.

13 Higher capital requirements also dilute the entrepreneurs' equity stakes, undercutting their personal risk-reward calculus.

Fairness. When there are large profit or size disparities among competitors, it may not feel fair to treat them equally. It's analogous to progressive tax schemes that impose higher tax rates on wealthier subjects.

III. DESIGNING SIZE-BASED EXCEPTIONS

This part discusses how regulators might configure size-based distinctions for Internet services. As the prior part showed, there are different motivations for making such distinctions, which means that there is no single optimal configuration. It depends on what regulators are trying to accomplish. Furthermore, this part will identify some traps and pitfalls regulators face when drafting these provisions.

A. Metric Options

This subpart looks at five alternatives to measure the "size" of Internet enterprises:

1. *Enterprise Age*. A regulation could distinguish between enterprises based on their age. For example, Article 17 of the E.U. Copyright Directive provides favorable regulatory treatment for "new online content-sharing service providers" that are less than three years old.[14] Age-based distinctions rely on the dubious stereotype that businesses become better-positioned to comply with regulations over time. However, a new corporate spinout can be massive; while many businesses (especially family businesses) can successfully remain small for years or decades without increasing their capacity to handle onerous regulations.

2. *Employees*. Employee headcount is a common way to measure entity size. Headcount typically grows along with other size metrics like consumer demand, revenue, and market cap, and it's comparatively easy to track and report. However, employee headcounts are not a great way to measure Internet services. First, Internet services do not necessarily add employees in proportion to usage. Operating "at scale" implies that the enterprise can handle increased consumer demand without concomitant growth in the number of employees.[15] Second, some services (such as Wikipedia and Reddit) principally delegate content moderation to their user community, which enables them to leverage a small employee base. Third, Internet services can rely on business process outsourcers ("BPOs") for labor-intensive tasks like content moderation,[16] which artificially lowers their employee headcount.

3. *Market Capitalization*. Market capitalization ("market cap") is the total value of a company's outstanding stock. It's a commonly used metric for the size of publicly traded companies, though it's less reliable for private companies because their stock prices aren't set by a "market." Market capitalization reflects investors' predictions about the company's future profitability, so it can change rapidly as investors revise their estimates based on new information. Further, small high-growth entrants can have higher market caps than mature industry giants.[17] For these reasons, it's not a great proxy for Internet service size.

4. *Revenues*. Revenues (called "turnover" in Europe) are another common metric for measuring enterprise size. Higher revenues suggest that the enterprise has achieved greater economies of scale. Also, revenues are (imperfectly) correlated with profits, which signal the enterprise's capacity to bear compliance costs. As an added advantage of this metric, public companies publish audited financial statements, including their revenues (though private companies don't).

5. *Consumer Usage*. Consumer usage is another way to measure Internet service size. Some of the most common consumer usage metrics include:

14 Article 17, §6, Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0790&from=EN. This favorable treatment only applies when the entities also have less than €10M in annual revenues.

15 Internet entrepreneurs often aspire to build a service that can scale by "just adding servers."

16 For example, Facebook's BPOs have included Accenture, Arvato, CCC, Cognizant, CPL, Genpact, SamaSource, Teledirect, Telus, and Voxpro. See generally Justin Ofosky, *Our Commitment to Our Content Reviewers*, Facebook Newsroom, Feb. 25, 2019, https://about.fb.com/news/2019/02/commitment-to-content-reviewers/.

17 E.g. Michael Wayland & Lora Kolodny, *Tesla's Market Cap Tops the 9 Largest Automakers Combined — Experts Disagree About if That Can Last*, CNBC, Dec. 14, 2020, https://www.cnbc.com/2020/12/14/tesla-valuation-more-than-nine-largest-carmakers-combined-why.html.

- *Users / Site Visitors / Monthly Active Users (MAU)*. There are several ways to measure the number of "eyeballs" exposed to the service[18] Users/visitors can be measured as a cumulative all-time total or over a specified time period. A popular metric, MAU, describes "the number of unique customers who interacted with a product or service of a company within a month."[19] However, each service defines MAU a little differently.[20] For these reasons, regulators using the terms "user," "visitor," or "MAU" need to precisely define those terms, including how to compute them.

- *Registered Accounts / Subscribers*. For paywalled or subscription services, paid subscribers is a critical metric. Account registrations are a key number for services requiring registration before user-to-user engagement, but account numbers can be distorted by bots,[21] spam accounts, and abandoned accounts.

- *Page Views / Page Impressions*. A page view occurs each time a web page is viewed, a so it's a good way of measuring readership; and ad-supported services routinely use "ad views"/"ad impressions" to measure payment obligation.[22]

B. Designing Appropriate Metrics

So which metric(s) should regulators adopt? There's no ideal answer. Each metric measures different things and poses unique measurement challenges. Creating sensible size-based metrics for Internet services requires careful statutory drafting and a candid assessment of potential unintended outcomes. Some questions that regulators need to resolve:

1. *Is the Metric Published & Audited?* Audited and published data provides the most reliable foundation for size-based metrics. Unaudited and unpublished data are less credible. Note that most usage metrics are unaudited and unpublished.[23] Worse, each service computes their own usage metrics using proprietary formulae. For example, each service decides how to handle possibly inauthentic activity (such as bot engagement), which makes it hard to compare numbers across services and creates opportunities to game the numbers. Regulators could require Internet services to audit and publish their metrics, but regulators must supply precise definitions and specify the auditing method; plus the associated costs will hurt some services.

2. *What Constitutes the "Service"?* Some metrics, like revenues and market cap, are typically measured, audited, and reported at the corporate level. Other metrics, like usage, are typically measured by domain name (or within-app). Regulators need to specify the service's boundaries. For example, with respect to Alphabet, do the metrics apply to its corporate structure, service name (e.g. "Gmail" or "Google Search"), second-level domain name (e.g. "Google.com"), third-level domain name (e.g. news.google.com), or something else?

To avoid false positives, regulators should evaluate their "service" definition against a "test suite" that includes a diverse mix of Internet enterprises.[24] Some examples to consider:

- Enterprises may offer a UGC complement to their core offerings, such as retailers who accept consumer reviews on items they sell. These enterprises' revenue and usage will reflect the non-UGC activity, making the enterprises appear large even if their UGC activity is quite small. In those circumstances, the enterprise may nix its UGC functionality in the face of costly regulation.

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18 "User" and "visitor" are usually synonyms.

19 *Monthly Active Users*, Corporate Finance Institute (CFI), https://corporatefinanceinstitute.com/resources/knowledge/ecommerce-saas/monthly-active-users-mau/.

20 Facebook's MAU definition: a "registered active user who logged in and visited Facebook through the website, mobile app, or Messenger application in the last 30 days as of the date of measurement." Twitter's MAU definition: a "Twitter user who logged in or were otherwise authenticated and accessed Twitter through the website, mobile website, desktop or mobile applications, SMS, or registered third-party applications or websites in the 30-day period ending on the date of measurement." *Id.*

21 For example, 10%+ of online Old School RuneScape players may be bots. *OSRS is Over 70% of Total RS3/OSRS Players*, GameFAQs, https://gamefaqs.gamespot.com/boards/562728-runescape/77113116.

22 Rebecca Tushnet & Eric Goldman, Advertising Law: Cases & Materials, ch. 17 (5th ed. 2020). A single pageview can generate multiple ad views/impressions when the page contains multiple ads.

23 With the possible exception of ad-related metrics. *See Standards, Guidelines & Best Practices > Measurement*, Interactive Advertising Bureau, https://www.iab.com/guidelines/?topic=measurement.

24 Mike Masnick, *The Internet Is Not Just Facebook, Google & Twitter: Creating A 'Test Suite' For Your Great Idea To Regulate The Internet*, Techdirt, Mar. 18, 2021, https://www.techdirt.com/articles/20210317/23530146442/internet-is-not-just-facebook-google-twitter-creating-test-suite-your-great-idea-to-regulate-internet.shtml.

- For example, traditional publishers like the *New York Times* may allow user comments but derive most of their revenues/profits from their editorial content, not UGC. Miscalibrated "service" definitions will prompt these enterprises to eliminate their UGC.

- Wikimedia operates one of the most popular websites, but it has trivial revenues[25] and a surprisingly small full-time staff.[26] A usage-based metric may treat Wikimedia as a large service, even if it can't bear the associated costs.

Regulators sometimes impose geographic qualifications on the designated metrics. For example, a state legislature might seek to measure activity only within its state. Unfortunately, services often cannot tell exactly where online activity takes place, especially with respect to sub-national borders;[27] and they may not publish or audit their data based on that geographic boundary. Thus, geographic qualifications often exacerbate the metric's unreliability.

3. *What is the Measurement Time Period?* Regulators need to specify the measurement time. Employee headcount, market cap, and account registrations can be measured as snapshots. Revenue and other usage activity are measured over periods that need to be specified.

Shorter measurement periods are subject to greater volatility. For example, Internet services may experience seasonality (such as higher revenues or traffic during the holidays), non-repeating viral successes that lead to short-term spikes in usage/revenue,[28] and short-term changes due to search engine algorithm updates. To smooth out this volatility, any metrics should be measured over sufficiently long time periods and averaged over multiple measurement periods. For example, MAUs should be averaged over at least twelve months to smooth out seasonality and viral spikes.

When a service initially crosses the applicable statutory threshold, it should be given a phase-in period for compliance. Otherwise, to avoid being non-compliant immediately upon reaching the threshold, the service must comply anticipatorily (and bear the associated costs) before they are legally required to do so. But if the service never actually reaches the threshold, those steps were never required at all.

4. *How Should Metrics Be Combined?* To smooth out volatility and reduce false positives, any size-based regulatory distinction should rely on multiple metrics, such as both revenue and usage measures, so that compliance requirements only apply when the service meets all of the metrics.

25 In FY 2019-20, Wikimedia received $120M in donations/contributions and had other income of about $9M. Wikimedia Foundation Inc. Financial Statements, June 30, 2020 and 2019, https://upload.wikimedia.org/wikipedia/foundation/f/f7/Wikimedia_Foundation_FY2019-2020_Audit_Report.pdf.

26 Wikimedia had about 250 employees, plus another 120 contractors, as of April 18, 2021. *Wikimedia Foundation Staff and Contractors*, Wikimedia, https://meta.wikimedia.org/wiki/Wikimedia_Foundation_staff_and_contractors.

27 Eric Goldman, Internet Law: Cases & Materials, ch. 1 (2020).

28 For example, the pandemic provided possibly non-permanent boosts to services like Zoom.

IV. POLICY CONCERNS ABOUT SIZE-BASED DISTINCTIONS IN SECTION 230

Part I showed that size-based distinctions can make sense, but not when the underlying policy is bad.[29] Good policy ideas should apply to all enterprises, regardless of size; bad policy ideas should be ditched rather than imposed only on large enterprises. With respect to Section 230, adding a new size-based distinction would increase adjudication costs, drive large services to make socially disadvantageous choices, and encourage unwanted countermoves.

A. Increased Adjudication Costs

Courts frequently grant early dismissals in Section 230 cases.[30] These early dismissals promote free speech online by reducing defendants' defense costs.[31] Size-based distinctions in Section 230 would add another contestable element to Section 230 defenses. In some cases, especially when the metric isn't subject to judicial notice, this new element would block motions to dismiss, increase defense costs,[32] and undermine Section 230's speech-enhancing function.

B. Services Without Section 230 Immunity Will Make Socially Disadvantageous Choices

Internet services, large and small, without Section 230 immunity will choose among three options:[33]

- Option #1: aggressively moderate user content to reduce the liability risk. This raises the service's costs in two ways. First, services will spend more to moderate content, plus it will cost more to do legal research/compliance (especially when facing exposure to heterogeneous state laws).[34] Second, because they can't moderate content perfectly,[35] services will incur sizable legal defense costs and damages awards for their "mistakes." To ameliorate these risks, these services will overremove socially beneficial content.[36]

- Option #2: conduct minimal content moderation efforts with the hope that not moderating content will disqualify the service's scienter and ultimate liability. The law supporting this approach is untested and probably won't work. Worse, when services do less socially valuable content moderation work, trolls and spammers overrun their services. That drives away legitimate users and advertisers and accelerates their demise.[37]

- Option #3: exit the industry because the other options aren't profitable. Those services might swap in professionally produced content for UGC, which could change the nature of the Internet.[38]

Many regulators assume that, without Section 230, large services will invest more resources in content moderation and do a better job of it. Services might choose that route if they can afford it, but their overremovals will still hurt the community. Services that can't afford option #1 will make choices that also hurt the community.

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29 Bradford, *supra* note 9, at 25-29.

30 Eric Goldman & Jess Miers, *Online Account Terminations and Content Removals*, 1 J. Free Speech L. __ (forthcoming 2021) [hereinafter Goldman & Miers, *Terminations/Removals*]; see also David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity under Section 230 of the Communications Decency Act*, 43 Loy. L.A. L. Rev. 373 (2010).

31 Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 Notre Dame L. Rev. Reflection 34 (2019).

32 A Section 230 case with discovery can cost $100,000+. Evan Engstrom, *Primer: Value of Section 230*, Engine, Jan. 31, 2019, https://www.engine.is/news/primer/section-230costs.

33 This choice is sometimes called the "moderator's dilemma." Eric Goldman, *Internet Immunity and the Freedom to Code*, 62 Comm. ACM 22 (2019).

34 Bradford, *supra* note 9, at 8 (discussing the "information costs" of regulation).

35 Eric Goldman & Jess Miers, *Why Can't Internet Companies Stop Awful Content?*, Ars Technica, Nov. 27, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3518970.

36 Eric Goldman, *The U.K. Online Harms White Paper and the Internet's Cable-ized Future*, 16 Ohio State Tech. L.J. 351 (2020) [hereinafter Goldman, *Cable-ized Future*].

37 Goldman & Miers, *Terminations/Removals*, *supra* note 30.

38 Goldman, *Cable-ized Future*, *supra* note 36.

C. Unwanted Countermoves

To avoid the regulatory burdens, Internet services may make countermoves before reaching the statutory threshold.[39] One countermove would be to "break up" the service to stay below the threshold. If the metric is corporate revenue, the service could split into multiple subsidiaries. If the metric is traffic measured by domain name, the service could shift to multiple domain names. These moves may undermine the service's economies of scale and increase transactions costs.[40]

Another countermove would be to combine with other enterprises to achieve greater economies of scale.[41] For example, a service below the statutory threshold might sell to an existing incumbent that has already implemented the required compliance mechanisms. Those combinations would remove competitors from the marketplace and reduce overall industry competition.[42]

Other possible countermoves: If the metric is based on employee headcount, services might use BPOs more extensively, which could be deleterious to workers[43] and increase offshoring to cheaper labor markets. If the metric depends on consumer or geographic usage, services might collect additional user data that exacerbates privacy concerns.

The point is that regulators need to contemplate the services' possible countermoves and how those moves could harm consumers, workers, marketplace competition,[44] and society generally.

V. CONCLUSION

Many regulators assume that Section 230 originally sought to foster the nascent commercial Internet. With the Internet's maturation and the emergence of Internet giants, that concern seemingly has evaporated.[45] But since the beginning, Section 230 was designed to promote content moderation by all services, regardless of size.[46] Section 230's co-authors explained (emphasis added):[47]

> Section 230…was designed to address the obviously growing problem of individual web portals being overwhelmed with user-created content. This is not a problem the internet will ever grow out of; **as internet usage and content creation continue to grow, the problem grows ever bigger**. Far from wishing to offer protection to an infant industry, our legislative aim was to recognize the sheer implausibility of requiring each website to monitor all of the user-created content that crossed its portal each day.
>
> Critics of Section 230 point out the significant differences between the internet of 1996 and today. Those differences, however, are not unanticipated. When we wrote the law, we believed the internet of the future was going to be a very vibrant and extraordinary opportunity for people to become educated about innumerable subjects, from health care to technological innovation to their own fields of employment...

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39 Bradford, *supra* note 9, at 22.

40 Many people would be thrilled to see "Big Tech" break itself up. However, threshold-induced breakups don't necessarily spur greater competition or increase the number of competitors.

41 Bradford, *supra* note 9, at 23.

42 Mark A. Lemley & Andrew McCreary, *Exit Strategy*, 101 B.U. L. Rev. 1 (2021).

43 E.g. Casey Newton, *The Trauma Floor: The Secret Lives of Facebook Moderators in America*, Verge, Feb. 25, 2019, https://www.theverge.com/2019/2/25/18229714/cognizant-facebook-content-moderator-interviews-trauma-working-conditions-arizona; Casey Newton, *Bodies in Seats*, Verge, June 19, 2019, https://www.theverge.com/2019/6/19/18681845/facebook-moderator-interviews-video-trauma-ptsd-cognizant-tampa.

44 Bradford, *supra* note 9, at 22-23.

45 E.g. Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 n.39 (9th Cir. 2008) ("the Internet has outgrown its swaddling clothes and no longer needs to be so gently coddled") (en banc majority opinion by Judge Kozinski).

46 See Cathy Gellis, *Is Section 230 Just For Start-ups? History Says Nope*, Techdirt, Feb. 18, 2021, https://www.techdirt.com/articles/20210210/11282346225/is-section-230-just-start-ups-history-says-nope.shtml.

47 Reply Comments of Co-Authors of Section 230 of the Communications Act of 1934, In the Matter of National Telecommunications and Information Administration Petition for Rulemaking to Clarify Provisions of Section 230 of the Communications Act of 1934, RM-11862, Federal Comm. Comm'n, Sept. 17, 2020, https://ecfsapi.fcc.gov/file/10917190303687/2020-09-17%20Cox-Wyden%20FCC%20Reply%20Comments%20Final%20as%20Filed.pdf.

> The march of technology and the profusion of e-commerce business models over the last two decades represent precisely the kind of progress that Congress in 1996 hoped would follow from Section 230's protections for speech on the internet and for the websites that host it. The increase in user-created content in the years since then is both a desired result of the certainty the law provides, and further reason that the law is needed more than ever in today's environment….

In the 1990s, when internet traffic was measured in the tens of millions, the implausibility of holding websites responsible for monitoring all of the user-created content they hosted was already apparent. Today, in the third decade of the 21st century, when billions of content creators are publishing their words, data, sounds, and images on some 200 million active websites, the reason for protecting websites from liability for other people's content is more abundantly clear than ever.

The fact that Section 230 was designed to grow with the Internet provides a cautionary warning to any regulators contemplating making size-based regulatory distinctions among Internet services. Good regulatory policy like Section 230 makes sense for enterprises at all stages of the corporate life cycle. In contrast, hardwiring size-based limits into Section 230 undermines Section 230's core policy payoffs to the detriment of all of us.

WHAT WE TALK ABOUT WHEN WE TALK ABOUT SECTION 230

BY ZEPHYR TEACHOUT[1]

1 Zephyr Teachout is Law Professor at Fordham Law School and a former Democratic gubernatorial and congressional candidate in New York.

It was probably about five years ago that I realized I had been totally wrong on Section 230, a kind of depth of wrongness that can make one more humble not just about the particular policy area, but all policy areas. I had adopted the view that Section 230 was fundamentally necessary for the flowering of decentralized, creative, online life, and that without it, there would be an internet, but it would be a highly controlled internet, one without joy or quirks, one that was organized from the top down. I advocated for it and campaigned on it.

There are two primary reasons for my wrongness about 230. First, I came to the law through copyright, and while I am by no means a free culture warrior, I have real and ongoing concerns about the monopolistic lock up of culture, and control that flows therefrom, in our current intellectual property regimes. As a result, many of my late aughts-early 2010s objections to touching 230 came not from a deep belief in the importance of platform immunity (I've had antipathy to Google's gross power for a long time), but to a singular discomfort with the reach of copyright laws and their timespans, a set of laws that works with patent and trademark to close down creative remixing. Through the lens of draconian copyright enforcement, Section 230 seemed to be a blessing, or at least necessary. I welcomed it as an indirect relaxing of the most stringent and difficult to justify aspects of copyright law.

But, as I said, I was wrong. First, the evidence from Canada and elsewhere (where there is no 230, but, remarkably, an internet, and generativity), gives the lie to the oft-used argument that repeal of Section 230 would destroy creativity and connection. Second, Section 230 has done nothing to stop the top-down lock up of the internet, as a handful of companies now play an interlocking feudal role, deciding what content and what kinds of applications are preferred, preferring content that serves their interests.

I share my mea culpa because it is not unusual — Section 230 is routinely described in ways that are not wrong, but not right either, and is routinely used — either in offense or defense — as standing for something else.

This "arguing about something else" feature of Section 230 persists. An enormous amount of the debate about it is not about 230 at all, or only orthogonally. Sometimes it is in active bad faith. Sometimes 230 questions get carelessly mashed together with a different — and interesting! — possibility, the possibility that we decide, legislatively, to extend the logic of *Marsh v. Alabama* to certain forms of social media and search architecture.

Sometimes the bad faith is not careless, but purposeful, as when Congressman Jim Jordan uses 230 to derail serious antimonopoly efforts. In the House Antitrust Subcommittee last year, for instance, he would regularly show up to try to get the lawmakers doing their job off topic, saying that 230 should be the real focus. Jordan and others have pushed the fanciful idea that *repeal* would allow people to sue for being kicked off a platform — and while of course an amendment of any bill could include anything, the implicatures in his arguments are just wrong and often too confusingly wrong to disentangle.

A more generous way to understand some of the ongoing confusion of tongues is that Section 230 does not exist in a vacuum, and when we talk about Section 230 in a vacuum, separate from antitrust policy, or public utility policy, we miss how it works — or rather, how it fails, and, more importantly, how to coherently set up a new, comprehensive regulatory regime with room for tort law.

Section 230 isn't just tort law, or copyright law, but coexists with an architecture of power, and a vision about the appropriate business models for social and search and coexists with antitrust law, and it is impossible to talk seriously about reform without laying out either a dystopian general vision of what we are trying to avoid, or, preferably, laying out a vision of what we are trying to achieve.

So let's look at 230 in this contextual way, starting with the historical context of its birth. The 1996 Telecommunications Act not only enshrined Section 230, but also enabled consolidation in telecoms. And so when Section 230 created broad immunity for illegal behavior on "interactive computer services" it did so in the context of a pro-consolidation policy, a policy that supported both immunity and monopolization. This consolidation in telecom was part of a broader pro-monopoly vision that was ascendant in the Clinton years. 25 years after Reagan's presidency, Bork's antitrust paradox found its greatest champions in Clinton's team, as Barry Lynn details in Liberty from All Masters (McMillan, 2020).

The short term result of the 1996 law, was a burst of innovation and investment, a profusion of experimentation, because companies simply didn't have to wonder whether they were making money off of enabling illegal deals or violating copyright. Effective immunity from antitrust threat, along with the Microsoft case limiting Gates' ability to control, and along with effective immunity from tort provided a major spur for cash to flow into serious and exciting experimentation, as well as into half-baked ideas.

It was a time of an almost embarrassing level of naivete about power and business models. The presumption was that the information flow was wide open, that communications networks would compete and proliferate, not consolidate and calcify. It was an article of faith that even without a regulatory authority telling it otherwise "the internet" would discover a monetization method that wasn't just ads, more ads, and more targeted ads. As Larry Page and Sergey Brin presciently argued in 1998, Google could not do its core function of search well, with integrity, if the business model was advertising. Because when advertising drives the architecture, as they argued, there are inherent conflicts between the advertiser and the user, and those conflicts will be resolved in favor of the advertiser. Search would serve sellers, not people, and search – and later social media – would put their energy into capturing and controlling users.

But, much like the "we will find a *new* for-profit business model for local news" fantasy that occupied the aughts, the non-advertising business model never emerged. The sustained fantasy of an alternative, that would be discovered by the market, simply allowed for the suspension of regulatory intervention until the ad model had not only taken hold, but conquered the most basic functions of the internet. These quasi-religious postulates about power and business models infected regulators, who didn't see their role where the market would fix it.

The FTC and DOJ were, for instance, on cruise control in the Borkian worldview. They simply ignored monopolistic threats, totally failing to see the collective power of accumulating companies, and the power of growing chokepoints. Google in particular engaged in an all-out buying spree, rolling up a huge array of digital advertising companies and companies that were soon rolled into the digital advertising umbrella of Google, including buying over a company a week in 2011, and spending nearly $25 billion on 145 companies, some small but some enormous, like Maps, Youtube, Android, and DoubleClick, which allowed Google to control the entire advertising infrastructure. The combination of advertising data and user data created a juggernaut that crowded out potential competitors.

Facebook came to acquisitions later, but pursued a similar strategy, this one more focused on spying on potential competitors, and then choosing to either crush them or acquire them. The FTC sat by, as it had during the Google spree, while Facebook bought potential competitor Instagram and potential competitor WhatsApp, while also buying Onavo, a service that allowed it to watch how people used their competitors.

In short, while the regulators allowed them to gobble up power, Section 230 gave Google and Facebook tort immunity. The double immunities fed on each other, allowing for the companies to compete on quality less while engaging in more experimentation on the human brain and algorithmic decision-making and systems for extracting ad dollars. It allowed them to take over the news industry, steal ad dollars from journalists, and avoid the liabilities that journalists face.

Now, over a quarter century after 1996, the three different forces that merged in the late 1990s have created monsters. Tort immunity, antitrust weakness, and a dangerous business model have converged to create some of the most dangerous anti-democratic institutions, right at the heart of our democracy and communications networks. Today, Google and Facebook have billions of users locked in across multiple properties, share data sets across those properties, and — per the Page/Brin warning — prioritize advertisers' needs and their own needs against the needs of consumers, which is to say, removing illegal or false content that makes money is not a high priority.

When it comes to the content on their site, they lack both of the traditional mechanisms used to ensure that content is safe: competition and tort law. They operate outside of competition, atop a market, not within it, and they operate outside of law, because of Section 230. And, to add insult to injury, the business model means they have an incentive to push whatever content is the most addictive and viral, an incentive that works at direct cross purposes to both tort and anti-monopoly law.

What does this mean for today? For one, it means that when we talk about reforming Section 230 without talking about also reforming the pro-merger policies of the last 30 years, actively breaking up the leviathans, and directly considering whether we need to regulate the business model, we are looking at reforms that address only some of the problems that the Reagan and Clintonian regime put in motion. It's as if, after a car crash, we are thinking about repairing the frame but leaving two blown out tires.

So yes, we should scrap the 230 framework. It seems fairly straightforward that Facebook and Google should be at least as responsible for the content that they carry that news organizations should be, so long as they serve their current function. In other words, companies are in the business of curation, which they clearly are. Their business model is curation. Any company that makes money off of advertising, and chooses to prioritize advertising either through promotion (Youtube, Facebook) or in Search results (Google Search), should not also be allowed to say that if they are aware, or reckless, about illegal content they take no liability for it.

That doesn't mean that no immunity should exist for any business, just that we shouldn't use 230 as the starting place for reform. If nothing else changes, and no new antitrust laws are put in place, it would be better to be clear that tort liability attaches to mega-platforms that are aware or reckless about illegal content on their sites. The question is how.

We can't go back to Kansas or 1996, so let's start with what we want. There are four different visions of search and social media that could be expressed in a new vision of where immunity should lie. All of them involve full or partial repeal of 230 and different visions of what our communications infrastructure should look like.

Option 1 is that big social media platforms should be treated like mega publishers This is the most obvious, but the most fraught. In the publisher model, Facebook and Google are playing the curatorial role that publishers play, and should be liable just as Fox, the New York Times, or The Enquirer are liable. It is especially galling for publishers that these tech giants escape liability because they not only control the flow of information, and therefore can extract value from news producers, but directly compete with publishers for advertising dollars. It is only fair, in this vision, that Google and Facebook should be subject to the rules of other curators.

While it might be better than nothing, this model, and vision of platforms is deeply disturbing, because it doesn't address the consolidation of power. It would elevate the radical notion that democracy can exist with a handful of uber-editors (Google, Facebook, a few others), who have responsibilities not to share illegal content but are otherwise free to make massive, systemic choices about the shape of our thoughts and ideologies, about what can be promoted and what cannot. To accept them as our Editors-in-Chief would be to enshrine a terrifying private, centralized model of information flow.

Option 2 is that immunity should track traditional concepts in tort, like ability to pay, best cost-avoider for harms, and justice. Immunity under this vision could either grant judges a great amount of discretion, or legislatively track some of the elements of tort law — large providers would be liable, small ones with no meaningful capacity to protect against illegal commenters would not. Companies who make money off of selling ads by promoting and sorting user content are the best positioned to protect against illegal content. They have the cash, of course, but they also have the technological wherewithal. They are currently making fistfuls of cash from anonymous lies. And as it stands, no one can be sued – the anonymous Facebook poster is vanished, and the platform can shrug.

The difference between the tort vision and the publisher vision is that the former would simply remove 230, whereas the latter would remove 230 for big platforms who engage in curation. In this sense, the tort vision is more democratically coherent; the reason for immunity is that there are certain small entities that lack the capacity to stop illegal activity and still thrive, whereas the big ones don't fit with that. However, this vision without more still allows for these gross concentrations of informational and gatekeeping power.

Option 3 is the "break 'em up" vision, radical decentralization. This could happen with or without the removal of immunity. In this vision, we need to follow the long American tradition of breaking up and decentralized communications systems, and so Facebook and Google should be broken into hundreds of interoperable parts. Perhaps a tiny category of immune companies might still exist, but only those that play truly no curatorial role, and certainly no company that makes money off selling ads, and the fact of radical decentralization would justify that lingering immunity. The challenge with this model is that there are genuine, positive network effects that come from some degree of centralization in search and social.

Option 4, the public utility option, would involve a classification of some (or all, but more likely some) of the large public platforms as public utilities, in exchange for an entire set of responsibilities and immunities that flow from their centralized public roles. Immunity would exist for those properties in search and social, but it would be as part of a bargain of publicness — these companies would be split off from all other properties, the business model of targeted advertising would be banned, and basic non-discrimination principles of equal access would apply to these publicly-designated companies.

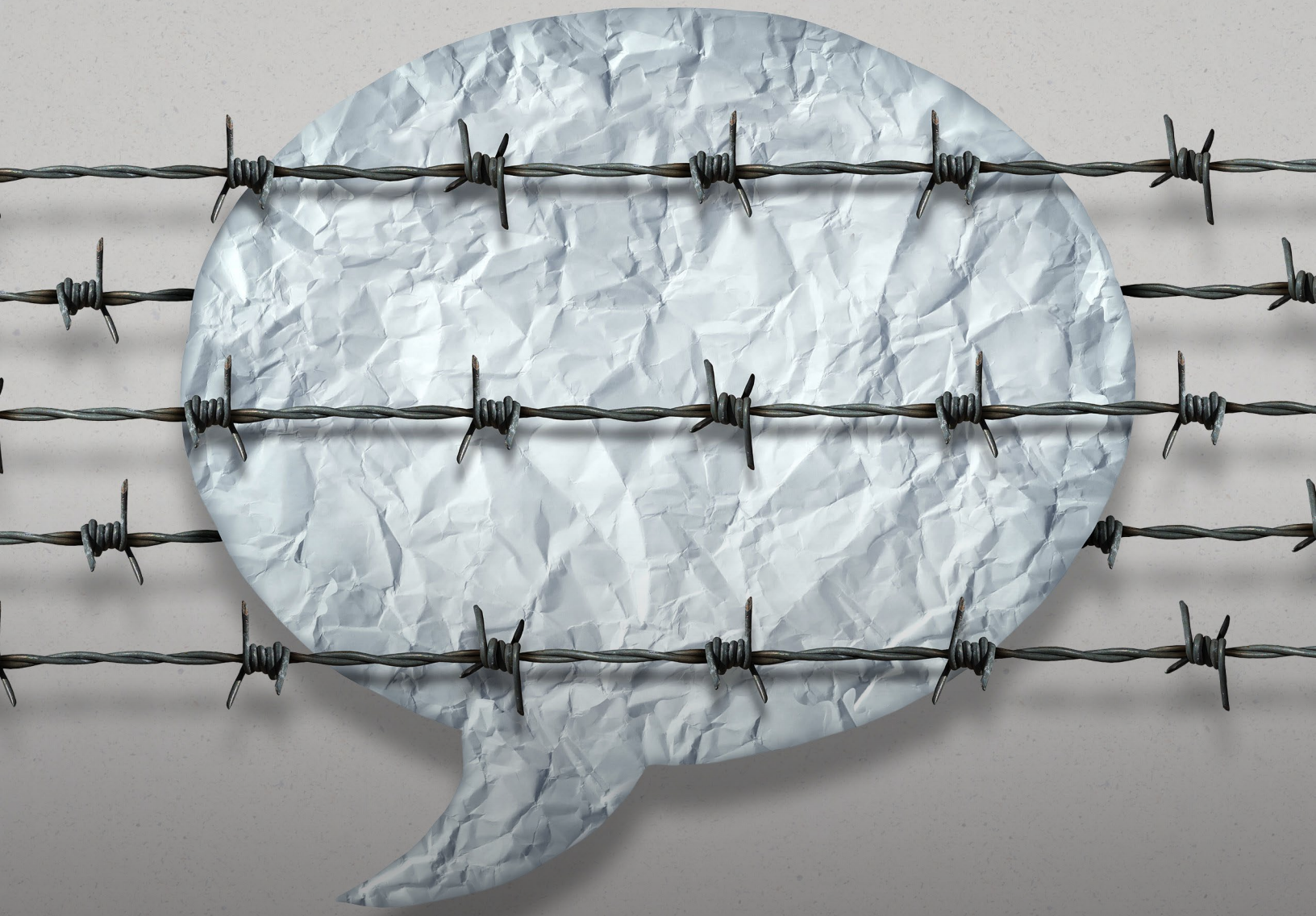
Option 5 is my own preference, and it involves all of the above, along with banning the behavioral advertising business model altogether. My own view is that we should be repealing all of Clinton's 1996 framework, not just 230. Clinton installed the double-immunity vision, one that is both excessively fearful of the capacity of the internet to exist in a world in which laws exist (it can!), and excessively optimistic about power. We should replace this with a vision in which there are multiple search engines, and multiple social media sites, which are interoperable with each other, and which do not use targeted advertising. Social and search are both essential public infrastructure, and targeted advertising undermines and even destroys their public value. Social and search should be subject to basic open access nondiscrimination principles and should have principles of open access. And only those social and search companies that do no curation should be able to claim immunities. Social and search, as essential public infrastructure, should not be allowed to own properties that seek access to their platforms, because that creates a conflict.

As you can see, Section 230 "repeal" is part of this vision, but it plays a supporting role, not the major role. Taking on concentration and the business model are the leading elements. That's because much of the harmful content that goes viral online isn't illegal, and many of the pathologies of power aren't fixed with removing immunity.

In other words, maybe when we talk about Section 230, we should embrace that for some of the harms, we need to really be talking about breakups and banning targeted ads, not just removing immunity.

These are just thumbnails. Instead of talking about how to fix a badly thought out law, we should be laying out a vision of how we want to see search and social, as a matter of business model, decentralization, liabilities and relationship to journalism. There is no way around it; we are not just solving problems, we are building a vision of social and search public infrastructure.

SECTION 230 PROTECTS SPEECH, NOT BUSINESS MODELS



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I. INTRODUCTION

Section 230 of the Communications Act[2] is a simple but wide-reaching law with significant competitive implications. Its core function of facilitating the hosting and moderation of third-party speech allows large and small online platforms and services to exist that otherwise would face a more challenging, or impossible, legal environment.

Among civil society groups, some argue that Section 230 allows platforms to serve as venues for free speech, and protects voices that would otherwise be silenced; some see it as a tool that allows hate, harassment, and harm to flourish online, giving victims no practical recourse.

Businesses whose operating models are challenged by the internet or by major platforms see Section 230 as a form of subsidy, allowing online services to avoid the typical costs of doing business in terms of tort liability, and allowing them to escape the harms their practices and business models create. Internet platforms, of course, see Section 230 that allows pro-competitive entry into the market.

These issues relating to free expression and the health of the information ecosystem take up a great deal of my work as a consumer advocate. But in this article I want to address the narrower question of whether Section 230 is anticompetitive, and what that would mean.

The argument set out in this piece is that, when applied to its core function of facilitating online speech, Section 230 is competitively neutral, or even pro-competitive. This does not mean it's a perfect law. But its competitive effects should be properly understood.

However, if allowed to shield behavior beyond its core function of facilitation the publication and moderation of speech, it can become anticompetitive, by granting advantages to business that operate according to some online business models that are not available to their offline counterparts, and that have no, or an attenuated connection to facilitating speech. When interpreting Section 230, judges should be sure not to extend the law beyond its intended effects, and when considering Section 230 reforms, policy makers should think about its competitive effects in this light.

II. SECTION 230'S IMMUNITIES FOR HOSTING AND MODERATING SPEECH ARE NOT ANTICOMPETITIVE

Section 230's core function is to allow online services to host third-party speech without facing liability as a "publisher or speaker," while strengthening their discretion (which the First Amendment also gives them) to keep up, take down, restrict, or promote speech on their platforms according to whatever criteria they see fit. This is in some ways the most controversial part of Section 230, and it has had significant effects on the media landscape, democracy, and public discourse — all of which are beyond the scope of this short article.

Section 230 applies to all online services equally, including the online components of business that also have offline operations, and does not create an incentive for one approach to hosting or moderating content over another. If the law had continued to develop in the direction some feared at the time of the passage of Section 230, sites might have faced a difficult trade-off: either adopt a hands-off approach to content moderation where you are liable, at most, for removing specific pieces of potentially unlawful content that you are alerted to, or heavily moderate your site, but take full responsibility for the content that you leave up.[3] Section 230 takes the law out of the equation — sites can heavily moderate content according to whatever criteria they want, or not, without liability questions pushing them toward one approach or another — just economic, social, and other considerations.

Section 230 allows for the emergence of business models, such as social media, that "compete for attention" with traditional media. To the extent that Section 230 allows for business to exist that otherwise would not it certainly has an effect on competition. It might even have a bad effect on competition to the extent that certain online services might be socially harmful.[4] But this is not the same thing about a law having an *unfair* effect on competition, which I would view as giving an advantage to one company, and not another, even though they effectively do the same thing.

2 47 U.S.C. § 230. See Blake Reid, Section 230...of what (Sep. 4, 2020), https://blakereid.org/section-230-of-what, for more on how to refer to this frequently mis-cited law.

3 In may ways, for example the right of platforms to take down content they find objectionable, Section 230 merely adds procedural protections to existing First Amendment protections. It is impossible to know how the common law would have developed absent 230, though it is unlikely that *Stratton Oakmont v. Prodigy Services*, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995), the case frequently cited as a motivation for the passage of 230, a poorly-reasoned and flawed decision from a lower court in New York holding that if platforms moderate content they become responsible for everything they keep up, would have become the law of the land.

4 Arguments about intellectual property rights, real or proposed, for example that platforms unfairly compete with traditional media by linking to and excerpting them, are interesting, but not part of a Section 230 discussion, as Section 230 does not apply to IP claims.

To state the obvious, online and offline media operate in a different way (and, in antitrust parlance, compete in a different product market). Traditional print and broadcast media have limited space, as measured in column inches, or the number of hours in a day. Most of the content they publish is their own, first-party content, which they are liable for (just as online service are). The burden of screening the limited amount of third-party content they might print or air — callers to a talk show, invited guests, or letters to the editor — do not appear to be particularly onerous, nor does liability for this content appear to be a particular onerous burden for traditional media.

Online services typically work in a different way. They publish content with no or limited pre-screening, and moderate after the fact. This allows for discussions between users, and for people to use platforms to publish their views that would never find space on traditional media. For some platforms, too, the scale at which they operate has a quality of its own. A broadcast network airs 24 hours of content per day, much of which it created itself. It is not unreasonable for it to be legally liable for all 24 hours of this content. By contrast, about 30,000 hours of video are uploaded to YouTube every hour, or 720,000 hours per day. A legal regime that held YouTube liable according to traditional "publisher" standards for every minute of that video might simply make YouTube impossible. And this would hold true even if YouTube were broken up into dozens of smaller companies.

Again, one might reasonably believe that business models like YouTube's are problematic and that Section 230 should be reformed so that it no longer enables them. But there is no reason to view such a critique through a lens of unfair competition.

III. SECTION 230 DOES NOT PREVENT STATES AND LOCALITIES FROM REGULATING BUSINESSES THAT OPERATE IN THEIR JURISDICTIONS

Section 230 is a short law, with sweeping words. Many plaintiffs' attorneys and other advocates argue that judges have made the law stronger than it was intended. At the same time, judges are naturally skeptical of creative pleadings that try to find a back door to holding platforms liable for activities that Congress clearly immunized.

However, litigation around local laws seeking to regulate online platforms that allow users to rent their properties for short times such as AirBnB and HomeAway showed that Section 230 does not stand in the way of efforts to regulate online marketplaces in ways that are similar to how their offline counterparts are regulated.

Attempts to regulate marketplace listings themselves would be preempted by Section 230. If a community passes a law requiring certain listings to be taken down, and a platform does not comply, holding it liable for this would be holding it liable "as a publisher."

Many local communities wish to regulate online rental marketplaces like AirBnB in the same way they regulate hotel and home rentals. Naturally, they are less interested in regulating advertisements for rentals than rentals themselves. At the same time, it is more efficient for them to attach new legal obligations on rental platforms themselves, rather than trying to enforce against individual renters. The case law confirms that they have the right to do this, if they prohibit the transaction associated with the rental itself (business conduct), as opposed to the listing (speech).

Rental platforms argued that ordinances attaching liability to completing rental transactions were preempted by Section 230 since as a practical matter they affected what listings they would take down and what they would keep up. But courts have rejected this line of reasoning. As the United States District Court for the Northern District of California wrote,

> But the Ordinance does not threaten the liability plaintiffs fear. As the text and plain meaning of the Ordinance demonstrate, it in no way treats plaintiffs as the publishers or speakers of the rental listings provided by hosts. It does not regulate what can or cannot be said or posted in the listings. It creates no obligation on plaintiffs' part to monitor, edit, withdraw or block the content supplied by hosts. To the contrary, as San Francisco has emphasized in its briefs and at oral argument, plaintiffs are perfectly free to publish any listing they get from a host and to collect fees for doing so — whether the unit is lawfully registered or not — without threat of prosecution or penalty under the Ordinance. The Ordinance holds plaintiffs liable only for their own conduct, namely for providing, and collecting a fee for, Booking Services in connection with an unregistered unit.[5]

A similar ordinance was challenged and made its way to the Ninth Circuit, which similarly observed:

5 *Airbnb, Inc. v. City and County of San Francisco*, 217 F. Supp. 3d 1066, 1072-73 (N.D. Cal 2016) (cleaned up).

> Here, the Ordinance does not require the Platforms to monitor third-party content and thus falls outside of the CDA's immunity. The Ordinance prohibits processing transactions for unregistered properties. It does not require the Platforms to review the content provided by the hosts of listings on their websites. Rather, the only monitoring that appears necessary in order to comply with the Ordinance relates to incoming requests to complete a booking transaction—content that, while resulting from the third-party listings, is distinct, internal, and nonpublic... [I]t is not enough that the third-party listings are a "but-for" cause of such internal monitoring. The text of the CDA is "clear that neither this subsection nor any other declares a general immunity from liability deriving from third-party content." Barnes, 570 F.3d at 1100. To provide broad immunity "every time a website uses data initially obtained from third parties would eviscerate [the CDA]." Barnes, 570 F.3d at 1100. That is not the result that Congress intended.[6]

These cases demonstrate a clear, and administrable principle. While Section 230 shields platforms from liability for hosting third-party content, it does not shield their business models. The business activities that platforms engage in *as a result of* user-submitted material are not shielded by 230. 230 shields their ability to host the material, but not to monetize it in any way they see fit.

This principle is also applicable to a more complicated situation — whether, and how, online marketplaces should be considered the "sellers" of third-party goods, a legal designation that could make the marketplace liable for any defects in or damages caused by the products they sell.

IV. SECTION 230 DOES NOT PRECLUDE HOLDING ONLINE MARKETPLACES LIABLE AS THE "SELLER" OF GOODS

The question of whether to treat Amazon (or other online marketplaces) as "sellers" of third-party goods has been actively litigated in the past few years. The question does not always turn on whether such a claim would be preempted by Section 230. For example, in Eberhart v. Amazon, 325 F. Supp. 3d 393, 400 n.5 (S.D.N.Y. 2018), the District Court disposed of it in a footnote. However that same court cited a series of opinions in other jurisdictions that form an "emerging consensus against construing Amazon as a 'seller.'" 400.

Whether or not such a consensus exists or is wise is a separate question than whether it's a result of Section 230. While synthesizing all the various cases applying the state law of seller liability and how it intersects with Section 230 for a through line may be beyond the scope of this article, looking at a few of the cases shows that, while Section 230 might indeed seem like a formal block to liability at times, this may only be in circumstances where the underlying course of conduct by the platform would not have been enough to trigger liability as a seller in the first place.

First, a somewhat easy case. In *Erie*, the Fourth Circuit determined, using logic analogous to the rental marketplace cases, that liability as a "seller" of a good is not precluded by Section 230, since being a seller involves more than merely hosting third-party speech. The court explained,

> The products liability claims asserted by Erie in this case are not based on the publication of another's speech. The underpinning of Erie's claims is its contention that Amazon was the *seller* of the headlamp and therefore was liable as the seller of a defective product. There is no claim made based on the *content of speech published* by Amazon — such as a claim that Amazon had liability as the publisher of a misrepresentation of the product or of defamatory content....While the Communications Decency Act protects interactive computer service providers from liability as a publisher of speech, it does not protect them from liability as the seller of a defective product.[7]

Oberdorf illustrates this as well. Interestingly, however, this same principle animates both the district court opinion, and the appellate court opinion, which reversed it.

6 *HomeAway.com v. City of Santa Monica*, 918 F. 3d 676, 682 (9th Cir. 2019) (cleaned up).

7 *Erie Ins. v. Amazon*, 925 F. 3d 135, 139-40 (4th Cir. 2019).

The court first characterized Amazon's conduct, concluding that it does not qualify as a "seller" under Pennsylvania law. Analogizing to a previous case involving an auctioneer who was found not to be a "seller," the court reasoned as follows:

> Like an auctioneer, Amazon is merely a third-party vendor's "means of marketing," since third-party vendors — not Amazon — "choose the products and expose them for sale by means of" the Marketplace. Because of the enormous number of third-party vendors (and, presumably, the correspondingly enormous number of goods sold by those vendors) Amazon is similarly "not equipped to pass upon the quality of the myriad of products" available on its Marketplace. And because Amazon has "no role in the selection of the goods to be sold," it also cannot have any "direct impact upon the manufacture of the products" sold by the third-party vendors.
>
> The Amazon Marketplace serves as a sort of newspaper classified ad section, connecting potential consumers with eager sellers in an efficient, modern, streamlined manner.[8]

After determining that Amazon's conduct did not qualify it as a "seller" under state law, the court dismissed of additional claims as precluded by Section 230.

> Although the Complaint frames those claims broadly, it is clear from the Oberdorfs' papers that they are, in fact, attempting to hold Amazon liable for its role in publishing an advertisement for The Furry Group's product. In other words, the Oberdorfs are attempting to "treat[Amazon] as the publisher or speaker of ... information provided by" The Furry Group. Therefore, these claims are barred by § 230 of the CDA.[9]

But the main claim — that Amazon should be considered a seller — was not precluded by Section 230. It was precluded by the court's conclusion that Amazon is not a seller to begin with.

By contrast, the Third Circuit found that Amazon, in this circumstance, *was* a seller under Pennsylvania law, "based on its role in effectuating sales of physical products offered by third-party vendors," 143 n.11, agreeing with the plaintiffs that seller liability would be based on Amazon's "direct role in the actual sale and distribution of the defective product," 152, and not its editorial role as a platform.

> While we recognize that Amazon exercises online editorial functions, we do not agree that all of Oberdorf's claims seek to treat Amazon as the publisher or speaker of information provided by another information content provider. As previously discussed, Amazon is a "seller" of products on its website, even though the products are sourced and shipped by third-party vendors such as The Furry Gang.[77] Amazon's involvement in transactions extends beyond a mere editorial function; it plays a large role in the actual sales process. This includes receiving customer shipping information, processing customer payments, relaying funds and information to third-party vendors, and collecting the fees it charges for providing these services.
>
> §1 Oberdorf v. Amazon. com, Inc., 930 F. 3d 136, 152-53 (3d. Cir. 2019). Therefore, to the extent that Oberdorf's negligence and strict liability claims rely on Amazon's role as an actor in the sales process, they are not barred by the CDA.[10]

While the court did find that a "failure to warn" claim was precluded by Section 230, the primary product liability claim could proceed.

As far as Section 230 is concerned, it is possible to reconcile the district court and Third Circuit opinion. In the *Oberdorf* District Court opinion, Amazon's connection to selling the item was seen as so minimal that under Pennsylvania state law, not only would it not be considered a "seller," but the the court was able to characterize the product listing as an "advertisement."

Under this view, Amazon's connection with the sale was primarily as a publisher of information, and the fact that it offered payment processing services was not enough for it to be a "seller" under Pennsylvania law. Given this perceived attenuated relationship between the product and the buyer, holding Amazon liable in any way would amount to holding it liable for publishing speech, and is therefore preempted by Section 230.

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8 501 (citing *Musser v. Vilsmeier Auction*, 522 Pa. 367, 562 A.2d 279 (1989)).

9 *Oberdorf v. Amazon*, 295 F. Supp. 3d 496, 502-503 (M.D. Pa. 2017).

10 *Oberdorf v. Amazon. com, Inc.*, 930 F. 3d 136, 152-53 (3d. Cir. 2019).

The Third Circuit's disagreement with the district court was as much a factual issue as a legal one. Emphasizing that Amazon "plays a large role in the actual sales process," meant among other things that Amazon was a seller, and if it was a seller, then holding it liable for that was not the same as holding it liable merely for publishing an "advertisement."

In other words, if Amazon is considered a seller under state law, almost by definition, its involvement in the sales process is more involved than a hosting mere product listing or something like a classified ad. Thus holding it liable would not be precluded by Section 230.

By contrast, if a platform's relationship to a transaction is so attenuated that it would not be considered a seller under state law, then Section might *also* block the claim. But the claim would likely fail anyway, as there is no underlying liability to begin with.

It might also be the case that a platform's connection with a transaction is involved enough to overcome Section 230, but still not enough to be considered a seller under relevant state law. This was actually the case with *Erie*. The product in dispute was part of Amazon's fulfillment program. Thus, in addition to being listed on Amazon's website, the products were stocked and shipped by Amazon. The court considered this involvement with the transaction to be enough that any liability would not necessarily hinge on liability for third-party content. Yet this *still* wasn't enough for Amazon to be considered a "seller" under Maryland law. But it was enough for Section 230, at least, to not preempt the claim.

While Section 230 complicates the analysis, at least as far as these three opinions are concerned, it doesn't change the outcome. Section 230 blocks claims that hold a platform liable merely for hosting content, but if it's merely hosting content, state law is unlikely to hold it liable as a seller to begin with. If a platform does enough to be considered a seller under state law, then holding it liable for those same actions is not blocked by 230, since it is being held liable for a course of conduct that is distinct from its role as a publisher, and which leaves its editorial prerogatives intact.

V. CONCLUSION

A broad law like Section 230 does carry the risk of unfairly distorting the marketplace. But Section 230's core function of facilitating the hosting and moderation of third-party speech by online platforms does not give one set of actors an unfair advantage over their direct competitions, though of course it can still be criticized for other reasons. While platform defendants have invoked Section 230 in context where, if successful, the law would give them an unfair advantage over direct competitors, courts have proven able so far to distinguish holding a company liable for hosting and moderating speech — which 230 continues to provide immunity for — and from its other business conduct, which is outside the scope of Section 230 and subject to the usual police powers of state and local authorities.

IS CONTENT MODERATION AN ANTITRUST ISSUE? SECTION 230 AND THE CURRENT TECH ANTITRUST DEBATES

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I. INTRODUCTION

In January 2021, several social media platforms banned then-President Donald Trump's accounts. Similarly, Amazon Web Services cloud hosting and Apple and Google's app stores removed the social media app Parler for violating their terms of service. These actions led some to question whether the ability of these platforms to "silence" a sitting president and remove a potential new entrant was evidence of "monopoly" power. But even prior to the events of January 2021, some critics had argued that Section 230, a liability protection that allows a wide range of online services to engage in content moderation actions and prevents them from being held liable for content created by their users in most cases, was unfairly benefiting "Big Tech" companies. These critics argue that Section 230 has become a special privilege that provides tech giants with unfair power and some even suggest that this necessitates breaking up these successful companies.

But only looking at large companies misunderstands the critical role Section 230 plays in enabling platforms of all sizes to host user-generated content. Focusing only on the alleged harms of specific content moderation actions misses the benefits that a vibrant marketplace for many different types of user-generated content has had on social media. In many ways changing Section 230 would make it more difficult for new entrants and smaller players, while pursuing antitrust action to address concerns about content moderation decisions would set a dangerous precedent for the use of antitrust law and be unlikely to result in the desired policy changes.

II. ANTITRUST AND CONTENT MODERATION

Pursuing antitrust action to achieve changes in large platforms' content moderation decisions would both set a dangerous precedent for the potential political abuse of antitrust and would be unlikely to achieve its desired policy outcomes. There remain a growing number of platforms that compete to host user-generated content in a dynamic and ever-changing market. Rather than being harmed, consumers are benefitting from having greater access to information and to services on which to share their own content. Antitrust is an ill-fit policy tool to address concerns about content moderation decisions.

A. The Market for User-Generated Content Remains Dynamic

The internet is a dynamic and booming market for a range of user-generated content including social media. A little more than a decade ago, antitrust concerns regarding big tech were focused on players such as America Online ("AOL") and MySpace. These concerns missed the overall dynamics and changes that new market players such as Facebook and Google were bringing.[2] While today's giants might appear unstoppable and dominant, new players such as TikTok and Clubhouse provide different models of social media and are gaining traction particularly with younger users.[3]

This competition is even clearer if one dismantles social media platforms into their many different components. For example, Facebook's WhatsApp competes with other encrypted messaging services such as Signal as well as other forms of messaging such as iMessage and Google Chat. Google's YouTube must compete with an increasing array of streaming entertainment options including similar free and consumer-generated services such as Twitch. This explosion has benefited consumers including providing additional competitors to previous services.

Innovation is often our best competition policy and can completely disrupt existing markets. In the case of services hosting user-generated content, there is not the clear evidence of behavior typically associated with a monopolist.[4] For example, while AT&T's breakup increased competition among long distance providers, it was the expansion of new technologies such as voice over internet phone (VOIP) and mobile that truly transformed the consumer experience.[5] Similarly in focusing only on brick-and-mortar video rental, antitrust regulators missed that new dynamic competitors were changing the way consumers consumed home entertainment.[6]

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2 Adam Thierer & Trace Mitchell, *The Crystal Ball of Antitrust Regulators is Cracked*, National Review (Jul. 21, 2020), https://www.nationalreview.com/2020/07/antitrust-regulation-rapidly-changing-marketplace-requires-humility/.

3 More Young Teens Use TikTok than Facebook, Morning Consult, https://morningconsult.com/form/more-young-teens-use-tiktok-than-facebook/; Christopher Zara, *Basically Everyone is on Clubhouse Now*, Fast Company (Feb. 22, 2021), https://www.fastcompany.com/90606693/basically-everyone-is-on-clubhouse-now.

4 Adam Thierer and Jennifer Huddleston, *Facebook and Antitrust, Part 1: What is the Relevant Market?*, The Bridge (Jun. 7, 2019), https://www.mercatus.org/bridge/commentary/facebook-and-antitrust-part-1-what-relevant-market.

5 Adam Thierer and Jennifer Huddleston, *Facebook and Antitrust, Part 3: Will Structural Remedies Solve Alleged Problems?* (Jun. 18, 2019), https://www.mercatus.org/bridge/commentary/facebook-and-antitrust-part-3-will-structural-remedies-solve-alleged-problems.

6 Thierer & Mitchell, *supra* note 2.

B. Antitrust Remedies Would Not Resolve Concerns About Content Moderation

The definition of the relevant market for these services is much debated. But even if one were to successfully determine that a giant such as Facebook or Google was a monopolist when it came to a certain type of user-generated content service, breaking up an existing tech giant would not address concerns about content moderation and could even exacerbate the perceived problems.

There is no guarantee that a smaller or separate platform would have different content moderation strategies than the existing giants. Services typically engage in content moderation to support the environment for the type interactions they wish to serve. Smaller platforms with general audiences would still be responding to the same consumer demands regarding content. Breaking up current large platforms would not change the way platforms respond to concerns about "cancel culture" or hate speech given that existing standards support the user experience.

In some cases, breaking up larger tech giants into smaller separate companies might make addressing existing concerns about harmful content or certain actions even more difficult. Smaller platforms have fewer resources and this can make content moderation more difficult. In some cases, they may not be able to afford the tools they had access to when part of a larger company to engage in content moderation.[7] They also are likely to have more limited staff to dedicate to monitoring for problematic content. The result could be that overall content moderation becomes more difficult and that more problematic content such as violence or nudity gets left up and that content gets miscategorized and wrongly taken down.

As a result, not only is antitrust action ill-advised given the current dynamics of the market, it would also fail to resolve the Big Tech critics' concerns.

C. Expanding the Definition of Harm to Include Content Moderation Would Open Antitrust to Other Political Purposes

Even if one disagrees with the analysis of the current tech market and potential impact of a breakup on content moderation policies, there should still be a hesitancy to use antitrust enforcement to respond to concerns beyond antitrust enforcement's traditional scope. Antitrust is a powerful tool with dramatic consequences designed to ensure consumers receive the benefits of a competitive market and it should not be used to address other policy concerns or target unpopular industries. Using antitrust to achieve policy changes that do not stem from anti-competitive behavior, such as changes to content moderation policy, would shift antitrust law away from its currently objective standard that provides certainty for businesses of all sizes. Opening up what constitutes potential violations to new concerns such as the impact of content moderation policies would create uncertainty about what behaviors are considered anti-competitive or harmful and are likely to result in enforcement actions.[8] This would make antitrust far more disruptive and disturb dynamic and competitive markets. It should be particularly concerning when such proposed changes are coupled with arguments around speech.

Using antitrust enforcement regarding content moderation policy could result in such standards being abused for political purposes such as to target companies that supported political opponents or who found themselves unpopular.[9]

7 Tyler Cowen, *Breaking Up Facebook Would Be a Big Mistake*, Slate (Jun. 13, 2019), https://slate.com/technology/2019/06/facebook-big-tech-antitrust-breakup-mistake.html.

8 Ryan Young, *Antitrust Basics: Rule of Reason standard v. Consumer Welfare Standard*, Competitive Enterprise Institute (Jul. 8, 2019), https://cei.org/blog/antitrust-basics-rule-of-reason-standard-vs-consumer-welfare-standard/.

9 Ben German, *DOJ Whistleblower to Allege Political Interference in Antitrust Probes*, Axios (Jun. 23, 2020), https://www.axios.com/justice-department-antitrust-whistleblower-6a506915-96c1-44a5-98e1-e6f93897fc5c.html.

III. WOULD CHANGES TO SECTION 230 PROMOTE COMPETITION?

Antitrust enforcement would fail to resolve concerns about online content moderation and changing Section 230 could have a negative impact on competition. Without Section 230, new services carrying user-generated content would lack the legal certainty that could protect them from potentially business ending liability and face additional costs when it comes to starting a service.

A. Small Platforms Would Lack Resources to Weather Increased Litigation

Section 230 has been important in allowing new services hosting user-generated content to emerge with minimal barriers to entry. Without Section 230, new platforms might find themselves subject to lawsuits either from users disgruntled with their content moderation decisions or with what another user stated on their service. Since the cost of defending these suits can quickly reach tens of thousands and even hundreds of thousands of dollars,[10] the result would be that large platforms may be able to afford the litigation costs associated with this increased litigation and already have well-established legal teams, but small platforms would be less likely to have these resources. As the CEO of new social networking service MeWe wrote, "The big boys have deep pockets. They can easily hire the massive moderation and legal teams that would be necessary to defend themselves. I can't. Revoking Section 230 would put hundreds of startups and other smaller companies out of business."[11]

These fears are not without merit. As Techdirt's Mike Masnick points out, smaller hosts of third-party content already find themselves subject to litigation and the impetus behind many notable defamation cases against online services is rarely about the just the monetary compensation the defamed may receive.[12]

To understand what this reality might look like, one can look at examples of how other liability regimes regarding certain kinds of content impact small companies online. Under the Digital Millennium Copyright Act ("DMCA") companies are subject to a notice and takedown requirement for copyright claims. This means a company that fails to take down or otherwise respond to claims and restrict the content that is alleged to be violating copyright following notification by the copyright owner may be sued for its failure to do so. Nearly a third of DMCA claims may prove to be questionable, but because of the lack of liability protection, services that host content about which they have received a copyright claim still have to respond.[13] This results in two concerning dynamics. The first is the unnecessary removal of speech that should have been allowed due to a desire to avoid the risk of litigation. The second is that small platforms have at times found themselves bankrupted by the accompanying litigation even if their decision around the associated content was vindicated in court.[14]

The ability to abuse such a system and impose burdensome litigation would dramatically increase in a world without Section 230 where platforms found themselves potentially liable for any type of user-generated content.

B. Revoking Section 230 Would Reduce New Entry Into the Market and Negatively Impact Consumers

Without Section 230, consumers would have fewer choices for user-generated content hosting services as startups struggled to meet the additional costs or investors were dissuaded by the potential litigation risk for those without the most advanced tools.[15] These difficulties may lead innovators to pursue other opportunities and result in fewer opportunities for speech for online users beyond existing large platforms. This impact would be true not only for potential new entrants in social media, but also a variety of other user-generated content hosts such as video game streaming, review sites, or allowing comment sections.[16]

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10 Evan Engstrom, *Primer: Value of Section 230*, Engine, https://www.engine.is/news/primer/section230costs.

11 Mark Weinstein, *Small Sites Need Section 230 to Compete*, Wall Street Journal (Jan. 25, 2021), https://www.wsj.com/articles/small-sites-need-section-230-to-compete-11611602173.

12 Mike Masnick, *How Mark Warner's SAFE TECH Act Will Make Many People a Lot Less Safe*, TechDirt (Mar. 26, 2021), https://www.techdirt.com/articles/20210323/07373746473/how-mark-warners-safe-tech-act-will-make-many-people-lot-less-safe.shtml.

13 Brent Lang, *Policing the Pirates: 30% of Takedowns are Questionable (Study)*, Variety (Mar. 26, 2019), https://variety.com/2016/film/news/movie-piracy-robots-failing-copyright-protection-1201741331/.

14 Mike Masnick, *Our Comment on DMCA Takedown: Let's Return to First Principles (and the First Amendment)*, TechDirt (Apr. 1, 2016), https://www.techdirt.com/articles/20160401/11332234082/our-comment-dmca-takedowns-lets-return-to-first-principles-first-amendment.shtml.

15 Derek Bambauer, *What Does the Day After Section 230 Reform Look Like?*, Brookings Institute, Jan. 22, 2021, https://www.brookings.edu/techstream/what-does-the-day-after-section-230-reform-look-like/.

16 *CDA 230*, Electronic Frontier Foundation, https://www.eff.org/issues/cda230.

Those new entrants that chose to pursue hosting user-generated content would quickly face "the moderator's dilemma," a choice between no moderation to ideally absolve themselves of any liability for the content or engaging in very heavy-handed moderation that risks deleting allowable speech or detracting from the ability to interact in real time.[17] Without content moderation, the experience on user-generated content would be far from what most users desired as they would be more likely to encounter pornography, violence, and other distasteful content along with the material they were looking for. As a result, to keep users, many platforms would be more likely to take the latter option and engage in heavy-handed moderation, but to do so would increase the costs to small platforms. Without sufficient resources the user experience would likely be less enjoyable as users found their benign post delayed in review to ensure bad actors were caught or their legitimate content such as a bad review deleted after a complaint. Even the best content moderation system is likely to fail at some point, and these companies would still have to deal with the cost of litigation discussed above.[18]

Facing these struggles and the accompanying disadvantages would make it more difficult for new entrants to compete with existing and already well-resourced giants.

C. Section 230 Enables a Market for Specialized Content and Services Beyond Social Media

One advantage of Section 230 is it allows the creation of services to host user-generated content for specialized needs or smaller communities. This includes the ability of communities to connect around certain medical conditions, minority communities, and family-focused services. These communities often require content moderation tools that are more specific and addressed to the unique community's needs. Faced with increased costs and litigation risks, it is less likely these options would be able to serve markets that fewer demand. This would limit the reach of communities that have traditionally struggled to connect and have their voices heard given more limited options.[19]

Removing Section 230 would also limit conversations around important issues on general use. For example, without this protection, social media platforms might be less likely to carry information about sexual harassment during the #metoo movement or allow conversations about police brutality for fear of the liability it could bring.[20]

This also is seen in the way Section 230 is useful beyond social media. It is difficult to imagine how a review website could survive if it faced lawsuits for negative reviews that a business disagreed with or that such sites would be useful if to avoid litigation a website had to take down any disputed review. Similarly, content hosts such as Medium would be less able to allow writers to share their thoughts without the traditional publication process if they were liable for the content of every article. This continues to many other areas that may not be initially thought of as user-generated content from user content on fitness apps such as Strava to Airbnb descriptions.[21] Through these services, Section 230 has introduced new competitors into many markets and also lowered the barriers for a range of producers to share their services. As Santa Clara University law professor Eric Goldman notes, "there literally is no offline equivalent where complete strangers are comfortable enough with each other to blindly transact without doing any research on each other. That basic premise has unlocked hundreds of billions of dollars of wealth in our society (both producer surplus and consumer surplus)."[22]

While changes to Section 230 would impact many different services that host user-generated content, it would be most acutely felt by smaller services including ones that serve specialized audiences. The impact of these changes would limit the choices consumers have both to host their own speech as well as to access valuable information and services.

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17 Bobby Allyn, *As Trump Targets Twitter's Legal Shield, Experts Have a Warning*, NPR (May 30, 2020), https://www.npr.org/2020/05/30/865813960/as-trump-targets-twitters-legal-shield-experts-have-a-warning.

18 Mike Masnick, *Masnick's Impossibility Theorem: Content Moderation at Scale is Impossible to Do Well*, TechDirt (Nov. 20, 2019), https://www.techdirt.com/articles/20191111/23032743367/masnicks-impossibility-theorem-content-moderation-scale-is-impossible-to-do-well.shtml.

19 Billy Easley, *Revising the Law that Let's Platforms Moderate Content Will Silence Marginalized Voices*, Slate (Oct. 29, 2020) , https://slate.com/technology/2020/10/section-230-marignalized-groups-speech.html.

20 Eric Goldman, *Section 230 Protects Hyperlinks in #MeToo "Whisper Network" – Comyack v. Gianella*, Technology & Marketing Law Blog (Apr. 28, 2020), https://blog.ericgoldman.org/archives/2020/04/section-230-protects-hyperlinks-in-metoo-whisper-network-comyack-v-giannella.htm.

21 Jennifer Huddleston, *Could Messing With Internet Law Mess Up Your Vacation?*, InsideSources (Aug. 29, 2019), https://www.insidesources.com/could-messing-with-internet-law-mess-up-your-vacation/.

22 Eric Goldman, *Amazon is Strictly Liable for Marketplace Items, Reinforcing that Online Marketplaces are Doomed—Bolger v. Amazon*, Technology & Marketing Law Blog (Sep. 8, 2020), https://blog.ericgoldman.org/archives/2020/09/amazon-is-strictly-liable-for-marketplace-items-reinforcing-that-online-marketplaces-are-doomed-bolger-v-amazon.htm.

IV. CONCLUSION

In the current policy environment, conversations about Section 230 or other content moderation issues and antitrust often get muddled together. Aggressive antitrust enforcement seems to not reflect the current market dynamics and is unlikely to resolve the concerns that some have about content moderation decisions by large platforms. The use of antitrust to resolve content moderation concerns would set a dangerous precedent for antitrust enforcement beyond traditional measures of consumer harm.

Section 230 is not part of the problem for those concerned about today's tech giants, but rather may hold the solution by allowing new entrants to host user-generated content with low barriers to entry. Ensuring liability protection while allowing services to determine appropriate content moderation rules for their audiences, not only allows search engines and social media, but also has increased competitors and information for many other services.

While individuals may be upset about particular content moderation decisions by certain platforms, it is important to recognize that the current framework for intermediary liability does not unfairly benefit large players and has been key to a flourishing of online voices. When considering questions of competition concerns and content moderation concerns, it is important that policymakers choose the right tools and carefully consider the consequences intervention in a dynamic and innovative market may have. History has shown that it is often hard to predict what small company may prove to be an innovative and disruptive success, but a framework including Section 230 that allows new entrants to start with minimal regulation is most likely to yield a competitive marketplace and benefit consumers.

ANTITRUST, SECTION 230 & THE FIRST AMENDMENT

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I. INTRODUCTION

The media are not exempt from the antitrust laws. As the Supreme Court ruled in *Associated Press* (1945), publishers "are engaged in business for profit exactly as are other business men who sell food, steel, aluminum, or anything else people need or want… The fact that the publisher handles news while others handle food does not … afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices."[2] The same applies to digital media: "whatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears."[3] But what about *editorial* judgments? May a publisher, of traditional or new media, be subject to liability under the antitrust laws for refusing to carry the speech of others?

Increasingly, Republicans invoke antitrust as a tool to combat what they see as "censorship" of their speech by digital media companies. They allege that these companies have "gatekeeper" control over speech and are using that power in "biased" or "unfair" ways to curate, or moderate, the speech of users, right-wing publishers such as *The Federalist*, and apps or websites such as Parler, an alternative "free speech" social network with a radically hands-off approach to content moderation.[4] Republicans routinely blame this so-called censorship on Section 230 of the Telecommunications Act of 1996.[5]

But when a website refuses to carry speech that it deems to be inconsistent with its values, or deprioritizes that speech in some fashion, the website is exercising well-established First Amendment rights of private parties not to carry the speech of others. Section 230 merely provides a civil procedure shortcut, ensuring that courts will dismiss the lawsuit without the website enduring the expense of litigating the First Amendment question. Section 230 draws the same line as the First Amendment itself: antitrust suits may proceed against "interactive computer service" ("ICS") providers only insofar as those suits target "business practices," rather than editorial judgments.

II. THE FIRST AMENDMENT PROTECTS THE MEDIA'S EDITORIAL JUDGMENTS, BUT NOT ITS BUSINESS PRACTICES

In *Associated Press*, the Court ruled that the nation's leading press poll had violated the antitrust laws by giving member newspapers the right to veto requests by local competitors to join the press pool[6] — clearly an anti-competitive "business practice," not an editorial judgment. Likewise, in *Lorain Journal* (1951), the Court ruled that a newspaper could be sued when it refused to carry ads from local advertisers who refused to join in a boycott of a new radio station.[7] This abuse of its market power was a "business practice," not an exercise of editorial discretion protected by the First Amendment. As Prof. Eugene Volokh notes, "[t]he *Lorain Journal Co.* rule … does not authorize restrictions on a speaker's editorial judgment about what content is more valuable to its readers."[8]

Likewise, the Tenth Circuit has noted that "the First Amendment does not allow antitrust claims to be predicated solely on protected speech."[9] This is true even when speech has clear economic consequences. Thus, Moody's, the leading bond rater, could not subject to antitrust action based on its publication of an article giving a school district's bonds a negative rating.[10] In each decision cited by the plaintiff in that case, "the defendant held liable on an antitrust claim engaged in speech related to its anticompetitive scheme," but that speech was purely incidental to

2 *Associated Press v. United States*, 326 U.S. 1, 7 (1945).

3 *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 790 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)) (emphasis added).

4 Reply Comments of TechFreedom, *In the Matter of National Telecommunications and Information Administration Petition for Rulemaking to Clarify provisions of Section 230 of the Communications Act of 1934*, RM – 11862, 21-28, 30-38 (Sept. 17, 2020) https://techfreedom.org/wp-content/uploads/2020/09/NTIA-230-Petition-Reply-Comments-9.17.2020.pdf.

5 47 U.S.C. § 230 (commonly referred to as Section 230 of the Communications Decency Act).

6 326 U.S. at 10.

7 *Lorain Journal Co. v. United States*, 342 U.S. 143, 152, 155 (1951).

8 Eugene Volokh & Donald Falk, *First Amendment Protection for Search Engine Search Results*, UCLA School of Law Research Paper No. 12-22, at 22 (April 20, 2012) (emphasis added).

9 *Jefferson Cty. Sch. Dist. No. R-1 v. Moody's Inv'r Servs.*, 175 F.3d 848, 860 (10th Cir. 1999).

10 *Id.*

the antitrust violation.[11] Those courts did not impose antitrust liability for editorial judgments, and none of these cases involved editorial decisions *not* to publish, or otherwise associate with, the speech of others. The Supreme Court has established a clear right to do just that, regardless of market power.

In *Miami Herald* (1974), the Court struck down a 1913 state law that required newspapers to carry replies by any political candidates subject to attack by the newspaper. "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment."[12] It did not matter whether, as the political candidate alleged, the "elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper's being owned by the same interests which own a television station and a radio station" had "place[d] in a few hands the power to inform the American people and shape public opinion."[13] Subsequent courts have recognized that even newspapers with "substantial" or "virtual" monopolies have a First Amendment right to refuse to carry content the government seeks to compel them to carry.[14]

Existing antitrust law has led to the same result. For example, Facebook blocked users from accessing its site while using a browser extension that super-imposed its own ads onto Facebook's website, the extension-maker brought an antitrust suit, and the court dismissed it: "Facebook has a right to control its own product, and to establish the terms with which its users, application developers, and advertisers must comply in order to utilize this product…. Facebook has a right to protect the infrastructure it has developed, and the manner in which its website will be viewed.[15] Antitrust law is so well-settled here that the court did not even need to mention the First Amendment. Instead, the court simply cited *Trinko*: "as a general matter, the Sherman Act 'does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'"[16] That "discretion" closely parallels the First Amendment right of publishers to exclude content they find objectionable under *Miami Herald*.

11 *Id.* at 859 ("*See, e.g.*, Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 430-32 (1990) (upholding finding that an attorneys' association's boycott of assignments to cases involving indigent defendants violated the antitrust laws even though the boycott had an expressive component); National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) (upholding finding that a professional association's ban on competitive bidding for engineering services violated the antitrust laws even though one means of carrying out the ban was through the publication of an ethical code); American Society of Mechanical Eng'rs v. Hydrolevel Corp., 456 U.S. 556 (1982) (upholding finding that professional association violated the antitrust laws through the issuance of an inaccurate safety report used to undermine a competitor's product); Wilk v. American Medical Ass'n, 895 F.2d 352, 357-58, 371 (7th Cir. 1990) (upholding finding that a medical association's boycott of chiropractors violated the antitrust laws even though one means of enforcing the boycott was through the association's code of ethics). More generally, the School District relies on decisions holding that the First Amendment does not provide publishers with immunity from antitrust laws. See Citizen Publishing Co v. United States, 394 U.S. 131, 135 (1969) (upholding injunction prohibiting newspaper publishers from engaging in joint operating agreement) . . . .").

12 *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974); see also *Sinn v. The Daily Nebraskan*, 829 F.2d 662 (8th Cir. 1987).

13 *Id.* at 250.

14 Volokh & Falk, *supra* note 7 at 23 ("the Ninth Circuit has concluded that even a newspaper that was plausibly alleged to have a 'substantial monopoly' could not be ordered to run a movie advertisement that it wanted to exclude, because '[a]ppellant has not convinced us that the courts or any other governmental agency should dictate the contents of a newspaper.' *Associates & Aldrich Co. v. Times Mirror Co., 440 F.2d 133, 135 (9th Cir. 1971). And the Tennessee Supreme Court similarly stated that, '[n]ewspaper publishers may refuse to publish whatever advertisements they do not desire to publish and this is true even though the newspaper in question may enjoy a virtual monopoly in the area of its publication.' Newspaper Printing Corp. v. Galbreath*, 580 S.W. 2d 777, 779 (Tenn. 1979).").

15 *Sambreel Holdings LLC v. Facebook, Inc.*, 906 F. Supp. 2d 1070, 1075-76 (S.D. Cal. 2012).

16 *Id.* at 1075 (quoting *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004)).

III. DIGITAL MEDIA HAVE THE SAME FIRST AMENDMENT RIGHTS AS OTHER MEDIA.

Courts have recognized that social media publishers have the same rights under *Miami Herald* as newspapers to reject content (including ads) provided to them by third parties.[17] Various arguments have been made as to why the First Amendment should not protect "Big Tech" companies' right to exclude content they find objectionable, just as it protects the right of newspapers not to run letters to the editor or parade organizers to exclude signs.[18] Some claim digital media are "public fora." Yet the Court recently declared that "merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints."[19] Lower courts have reached the same conclusion regarding digital media.[20]

Nor may digital media be forced to carry the speech of others as common carriers like railroads or telephone networks,[21] which must "offer service indiscriminately and on general terms."[22] Like antitrust, common carriage regulation regulates business practices, not expressive decisions. "What appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier 'undertakes to carry for all people indifferently. . . .'"[23] This, railroads and telephone networks do, but social media clearly do not: every social media site provides detailed terms of service and expressly reserves the right to remove content that violates those terms.

This is radically different from, say, providers of mass-market broadband service, which have promised not to block, throttle, or otherwise restrict access to lawful content even when they were not required to do so by net neutrality rules.[24] In 2017, a three-judge panel of the D.C. Circuit upheld the FCC's 2015 reclassification of broadband providers as common carriers. When broadband providers sought rehearing by the full D.C. Circuit, then-Judge Kavanaugh argued that imposing common carrier status on ISPs violated the First Amendment. Not so, explained the two judges who wrote the panel decision below, because the rules applied only insofar as broadband providers represented to their subscribers that their service would connect to "substantially all Internet endpoints" — and thus merely "require[d] ISPs to act in accordance with their customers' legitimate expectations."[25] Conversely, the judges wrote, ISPs could easily avoid the burdens of common carriage status, and exercise their First Amendment rights: "[T]he rule does not apply to an ISP holding itself out as providing something other than a neutral, indiscriminate pathway—*i.e.*, an ISP making sufficiently clear to potential customers that it provides a filtered service involving the ISP's exercise of 'editorial intervention.'"[26] A "filtered" service is exactly what every social network offers to its customers, and "filtering" is exactly what they must expect.

Those proposing to force websites to carry speech against their will often invoke *Turner Broadcasting v. FCC* (1994), in which the Supreme Court ruled that requiring cable companies to carry local broadcasters' channels for free did not violate the First Amendment. In fact, a careful reading of the case illustrates why social media *cannot* be compelled to carry content they find objectionable. Initially, a special three-judge panel upheld the law, concluding that the law was "simply industry-specific antitrust and fair trade practice regulatory legislation: to the extent First Amendment speech is affected at all, it is simply a by-product of the fact that video signals have no other function than to convey information."[27] On direct appeal to the Supreme Court, the government again argued that "the must-carry provisions are nothing more than industry-specific antitrust legislation, and thus warrant rational-basis scrutiny under this Court's 'precedents governing legislative efforts to correct market failure in a market whose commodity is speech,'" citing *Associated Press* and *Lorain Journal*, and arguing that the law should be subject, like any economic regulation, to rational basis review.[28] The Court rejected this argument and ruled that must-carry mandates triggered heightened scrutiny under the First Amendment. This alone proves the initial point made above: antitrust cannot itself be used to compel carriage of speech.

17 See, e.g. *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622 (D.Del. 2007).

18 *Assocs. & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 136 (9th Cir. 1971) (a newspaper could not be compelled to print content as-provided, even if the content that the editor rejected was not objectionable.)

19 *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019).

20 See, e.g. *Prager Univ. v. Google LLC*, 951 F.3d 991 (9th Cir. 2020); *Howard v. Am. Online, Inc.*, 208 F.3d 741, 754 (3d Cir. 2000).

21 See generally Berin Szóka & Corbin Barthold, *Justice Thomas's Misguided Concurrence on Platform Regulation, Lawfare* (April 14, 2021), https://www.lawfareblog.com/justice-thomass-misguided-concurrence-platform-regulation.

22 *Cellco Partnership v. Fed. Commc'ns Comm'n*, 700 F.3d 534, 546 (D.C. Cir. 2012).

23 *Nat. Ass'n of Reg. Utility Com'rs v. F.C.C.*, 525 F.2d 630, 641 (D.C. Cir. 1976).

24 See, e.g. Comcast, *Open Internet* (2021), https://corporate.comcast.com/openinternet ("We do not block, slow down or discriminate against lawful content.").

25 *U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n*, 855 F.3d 381 (D.C. Cir. 2017).

26 *Id.* at 389 (Srinivasan, J., concurring) (citing *In the Matter of Protecting & Promoting the Open Internet*, 30 F.C.C. Rcd. 5601 (2015)).

27 *Turner Broadcasting System, Inc. v. F.C.C.*, 819 F. Supp. 32, 40 (D.D.C. 1993).

28 *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 640 (1994).

Ultimately, the Court upheld the must-carry mandate for cable, but only because it applied intermediate, rather than strict, scrutiny. Intermediate scrutiny for two relevant reasons — neither of which applies to social media. First, although the law gave some broadcasters a right to cable carriage (and therefore favored their speech over the cable providers), the majority nonetheless concluded that the law was not content-based. The cable providers had not objected to any content or viewpoints expressed in the broadcasters' programming; rather, as the majority noted, cable operators suffered an *economic* loss from not being able to charge for the one-third or so of their channel capacity allotted to broadcasters. Whether "must carry" for cable was really content-neutral in *Turner* was debatable: the majority saw no "subtle means of exercising a content preference" while the minority argued Congress's "interest" in platforming "diverse and antagonistic sources" was not "content-neutral."[29] Regardless, the agenda behind "must carry" for social media is unmistakable: conservatives decrying the "monopoly power" of social media and invoking values like "neutrality," are, in fact, trying to compel websites to carry particular kinds of content that they deem objectionable but which conservatives find politically useful.

The second reason the Court applied intermediate scrutiny was that forcing cable companies to carry local broadcasters' channels would not, it concluded, "force cable operators to alter their own messages to respond to the broadcast programming they are required to carry."[30] Noting that the FCC had first instituted some form of must-carry mandate in 1966, the Supreme Court concluded: "Given cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator."[31]

Unlike cable operators, social media *cannot* be expected to operate as pure conduits. Instead, they can be, and are, generally associated with, the content they allow. Like newspapers, and unlike telephone networks, social media sites are increasingly held accountable for the consequences of the speech they carry. They are regularly boycotted by users — and, increasingly, by advertisers, under growing pressure from their own investors — for refusing to take down objectionable content. This is business reality for Facebook, as reflected in the multiple references in its most recent quarterly report to "risk factors" related to how the company's handling of content is perceived.[32] In Facebook's last quarterly earnings call, CEO Mark Zuckerberg spent most of his time explaining how the company would handle misinformation about the then-impending election.[33]

While these market expectations have clearly increased in recent years, they are not new. In *Stratton Oakmont v. Prodigy* (N.Y. Sup. Ct. May 24, 1995), Prodigy, which provided both Internet access and a curated proto-social network, was held liable for user content because it had "held itself out as an online service that exercised editorial control over the content of messages posted on its computer bulletin boards."[34] Specifically, Prodigy advertised itself as follows: "We make no apology for pursuing a value system that reflects the culture of the millions of American families we aspire to serve. Certainly, no responsible newspaper does less when it chooses the type of advertising it publishes, the letters it prints, the degree of nudity and unsupported gossip its editors tolerate."[35]

Taking such responsibility as "Good Samaritans" is precisely what Congress intended to encourage in enacting Section 230. By overruling *Stratton Oakmont*, the law has ensured that content moderation does not create legal liability for websites — either when they take content down or when they leave it up. Clearly, Congress did not want social media to be forced to function as mere conduits (like telegraph and telephone networks) for the speech of others.

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29 *Id.* at 645.

30 *Id.* at 655.

31 *Id.* at 655; see also *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972).

32 U.S. Securities and Exchange Commission, Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (Form 10-Q), at 53 (Oct. 29, 2020), https://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/518957aa-c936-455b-8ba0-9743ca4c3855.pdf#page=53.

33 Facebook, Inc., FB Q3 2020 Earnings Call Transcript, (Oct. 29, 2020) https://s21.q4cdn.com/399680738/files/doc_financials/2020/q3/FB-Q3-2020-Earnings-Call-Transcript.pdf.

34 *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *2 (N.Y. Sup. Ct. May 24, 1995).

35 *Id.*

IV. HOW SECTION 230 PROTECTS EDITORIAL DISCRETION

Section 230 has two primary functions. First, the law ensures that providers (and users) of "interactive computer services" (including websites and other tech companies) cannot, with several exceptions (most notably, federal criminal law), be held liable for content created by others. Specifically, Section 230(c)(1) provides: "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."[36]

Second, Section 230 likewise protects websites from being held liable for how they present or moderate content. Section 230(c)(2)(A) explicitly covers content moderation, protecting "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be . . . objectionable."[37] Because 230(c)(1) does not explicitly address "restriction" of access to content, many commentators across the political spectrum (and nearly all commentators on the right) assume that the two functions of the statute map neatly onto these two provisions, with (c)(1) protecting "hosting" and *only* (c)(2)(A) protecting moderation. In fact, (c)(1) has consistently been interpreted to cover both. In its 1997 *Zeran* decision, the Fourth Circuit became the first appellate court to interpret Section 230(c)(1), concluding that "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content — are barred."[38] Subsequent courts have consistently held that 230(c)(1) protects content moderation, and nearly all content moderation cases are resolved under 230(c)(1) rather than 230(c)(2)(A).[39]

The two provisions serve different functions: (c)(1) protects ICS providers and users — but only insofar as they are not themselves information content providers ("ICPs") — i.e. not responsible, even "in part, for the creation or development of information provided through the Internet or any other interactive computer service."[40] But (c)(2)(A)'s protections apply even when an ICS provider or user is responsible, at least in part, for developing the content at issue.

These two immunities, especially (c)(1), allow these ICS providers and users to short-circuit the expensive and time-consuming litigation process, usually with a motion to dismiss — and before incurring the expense of discovery. In this sense, Section 230 functions much like anti-SLAPP laws, which, in 30 states,[41] allow defendants to quickly dismiss strategic lawsuits against public participation ("SLAPPs") — brought by everyone from businesses fearful of negative reviews to politicians furious about criticism — that seek to use the legal system to silence speech.

Without Section 230 protections, ICS providers would face what the Ninth Circuit, in its landmark Roommates decision, famously called "death by ten thousand duck-bites:"[42] liability at the scale of the billions of pieces of content generated by users of social media sites and other third parties every day. As that court explained, "section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles."[43]

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36 47 U.S.C. § 230(c)(1).

37 47 U.S.C. § 230(c)(2)(A).

38 *Zeran v. Am. Online*, 129 F.3d 327, 330 (4th Cir. 1997); see also *Barrett v. Rosenthal*, 146 P.3d 510, 515 (Cal. 2006).

39 Elizabeth Banker, *Internet Association: A Review of Section 230's Meaning & Application Based On More Than 500 Cases* at 10, Internet Association (July 27, 2020), https://internetassociation.org/wp-content/uploads/2020/07/IA_Review-Of-Section-230.pdf (concluding, based on a study of more than 500 Section 230 cases, that Section 230 "typically" protects content moderation "through application of subsection (c)(1) rather than (c)(2).").

40 47 U.S.C. § 230(f)(3) ("The term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.").

41 Austin Vining & Sarah Matthews, Reporters Committee for Freedom of the Press, *Introduction to Anti-SLAPP Laws*, https://www.rcfp.org/introduction-anti-slapp-guide/#:~:text=As%20of%20fall%202019%2C%2030,New%20York%2C%20Oklahoma%2C%20Oregon%2C.

42 *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008).

43 *Id.*

V. BOTH 230 IMMUNITIES MIRROR THE FIRST AMENDMENT'S PROTECTIONS.

Like the First Amendment itself, both the (c)(1) and (c)(2)(A) immunities protect decisions to moderate or prioritize third-party content only insofar as these are truly editorial decisions (forms of expression and association), rather than pure business practices (conduct).

The (c)(1) immunity bars only those claims that hold an ICS provider (or user) liable as the "publisher" of content provided by another — for, as *Zeran* noted, "deciding whether to publish, withdraw, postpone or alter content."[44] This is precisely the same editorial discretion protected under *Miami Herald*.[45] "Since *all* speech inherently involves choices of what to say and what to leave unsaid . . . for corporations as for individuals, the choice to speak includes within it the choice of what not to say."[46] In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, the Supreme Court barred the city of Boston from forcing organizers of a St. Patrick's Day parade to include pro-LGBTQ individuals, messages, or signs that conflicted with the organizers' beliefs.[47] The "general rule," declared the Court, is that "the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid."[48]

The (c)(2)(A) immunity does not explicitly turn on whether the cause of action involves the ICS provider being "treated as the publisher," yet it clearly protects a subset of the rights protected by *Miami Herald*: decisions to "restrict access to or availability of 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."[49] Including the broad catch-all "otherwise objectionable" ensures that this immunity is fully coextensive with the First Amendment right of ICS providers and users, as recognized under *Hurley*, to avoid speech they find repugnant.

Just as *The Lorain Journal* was not acting "as a publisher" when it refused to host ads from advertisers that did not boycott its radio competitor, it was also not acting "in good faith." The "publisher" and "good faith" clauses limit the scope of Section 230's protections, and ensure that Section 230 tracks the protections of the First Amendment. Thus, either immunity could be defeated by showing that the actions at issue were not matters of editorial judgment, but of anti-competitive business practices.

44 *Zeran*, 129 F.3d at 330.

45 *Miami Herald*, 418 U.S. at 258.

46 *Pacific Gas and Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 11, 16 (1986) (plurality opinion) (emphasis in original).

47 515 U.S. 557, 573 (1995).

48 *Id.* at 573.

49 47 U.S.C. § 230(c)(2)(A).

BEYOND SPEECH: SECTION 230 AND ITS IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS

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I. INTRODUCTION

When people think about Section 230, content moderation is what often comes to mind. Less discussed are 230's implications for state and local governments. When platforms' digital operations spill into physical spaces, regulators on the ground must respond to the inevitable market failures created. Airbnb is a clear illustration of this. When the short-term rental ("STR") platform comes to a town, issues of safety, taxation, and housing affordability all must be addressed. Yet, Airbnb and similar platforms have and will continue to use Section 230 in all its abstruse glory as both a defense and a threat to local regulations.

As Congress considers whether and how to amend Section 230, it must think beyond keeping smut off the Internet and ask: How will our revisions impact community functions and resources?

II. THE USE OF 230 TO EXTERNALIZE COSTS

While Section 230 allows platforms to wash their hands of legal responsibility for user speech, which can involve anything from defamatory statements[2] to attempts to recruit terrorists,[3] it can also be used to protect platforms from facilitating transactions that have offline consequences.

Platforms have avoided tort liability for facilitating transactions that directly lead to physical harms in numerous cases. For example, in 2020, a Massachusetts Superior Court found Section 230 protected a website, Armslist.com, from negligence liability for facilitating a gun sale to a convicted felon,[4] the sale of which resulted in the murder of a police officer. If a gun show promoter had facilitated that same transaction *in-person*, it's unlikely they would have avoided legal responsibility. This dissonance between transactions that are legal online and illegal offline is something Chris Cox, the former U.S. Representative and co-author of Section 230, said Section 230 was never intended to create.[5]

When Section 230 reaches beyond tort law and precludes local regulators from creating and enforcing rules to curtail unwanted offline behavior, the connection between the original purpose of 230 and its interpretation is even more attenuated. Regardless, platforms continue to use 230 to avoid regulation, either by frightening regulators from regulating in the first place, or by directly opposing them when they do.

A. The Chill of 230

At the most basic level, platforms assert that their activities simply facilitate digital communication. Consequently, when regulators try to hold platforms responsible for unlawful transactions, platforms argue that to do so would improperly treat them as publishers or speakers of content provided by third parties, which Section 230 prohibits. For example, if a seller on eBay sells an unlawful item, whether it be a counterfeit, recalled, or illicit good, eBay will assert that the seller, and not eBay, provided the information associated with the listing (e.g. the description, minimum bid price, and any photos). Therefore, eBay is not the provider of any prohibited content and is protected by 230. While that seems like a simple enough argument, Section 230 is never simple.

Because of or in spite of its Tweet-length wordcount, the case law interpreting 230 is all over the place. It can take incredible amounts of time to even begin to wrap one's head around the evolution of 230 jurisprudence, its divergent interpretations, and its impact on state and local regulations.[6] Sometimes holdings come out in favor of platforms, other times they do not. Because of this muck, platforms attempt to deter regulators by provoking fear that 230 would render their regulatory efforts futile. Airbnb's litigation strategy is a clear example of this method.

2 *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

3 *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. July 31, 2019).

4 *Stokinger v. Armslist LLC*, 2020 WL 2617168 (Mass. Superior Ct.).

5 Gilad Edelman, *Everything You've Heard About Section 230 Is Wrong*, WIRED (May 6, 2021 7:00AM), https://www.wired.com/story/section-230-internet-sacred-law-false-idol/.

6 To see headaches in action, read Benjamin Edelman & Abbey Stemler, *From the Digital to the Physical: Federal Limitations on Regulating Online Marketplaces*, 56 Harv. J. on Legis. 141 (2019).

From 2008 to early 2020, Airbnb sued local and state governments eleven times. In nine of those cases, it asserted 230 as a defense.[7] Governments across the U.S. must weigh whether the threat of litigation from the multi-billion-dollar juggernaut is enough to stop them from even attempting to regulate inside their neighborhoods. For instance, in Anaheim, CA, a city spokesperson said, "[a]fter considering federal communications law, we won't be enforcing parts of Anaheim's short-term rental rules covering online hosting sites."[8] Similarly, when Boston decided to regulate STRs, Airbnb shook the sword of 230. Before Boston even implemented its regulations, the City conceded that as a result of 230, it did not have the power to enforce its regulation requiring the platform to monitor and remove unlawful listings.[9]

As discussed below, recent caselaw developments clarify Section 230's applicability to STR platforms, but as long as Section 230 remains in its present form, platforms today and in the future will continue to chill regulatory efforts, especially in communities with limited resources.

B. The Realities of Regulating Under 230

Platforms have successfully used 230 to avoid regulations already in effect in cases like *Jane Doe No. 1 v. Backpage.com, LLC*.[10] Backpage was a classified ads platform notorious for its adult section, which was a hub for sex trafficking. In 2016, 16-year-old, Desiree Robinson, was killed after she was prostituted through Backpage's website. To avoid liability under, among other things, Massachusetts' Anti–Human Trafficking and Victim Protection Act of 2010, Backpage invoked 230 as a defense. It successfully argued that the content on its website was from third parties and not the company itself.[11] As the First Circuit Court stated: "Congress did not sound an uncertain trumpet when it enacted the CDA, and it chose to grant broad protections to internet publishers."

Much less disturbing than the awful facts of *Backpage*, StubHub, the online ticket marketplace, was able to evade North Carolina's anti-scalping law which prohibited the selling of tickets for more than face value plus $3.00.[12] In *Hill v. StubHub, Inc.*, tickets for a *Miley Cyrus as Hannah Montana* concert were sold on the platform for much more than face value. StubHub was able to use 230 to avoid liability for the unlawful sale because the sellers on the platform provided the price for the tickets and thus the sellers, and not StubHub, were the content providers.

In the past few years, platforms have seen their luck inside courtrooms change with regard to 230. Courts have begun to permit regulation of platforms so long as laws focus on the platforms' transaction processing activities. The case that opened the door for regulators here was *HomeAway v. City of Santa Monica*.[13] After fighting and then stalling STR regulations in San Francisco for years, HomeAway (another STR platform) and Airbnb chose to sue the City of Santa Monica under 230 for STR regulations that were almost identical to San Francisco's. Airbnb and HomeAway lost their bet in both the district court and the Ninth Circuit Court of Appeals. The courts found that 230 did not prevent Santa Monica from holding the STRs responsible for completing booking transactions for unlicensed rentals. The same principle used in *HomeAway* has been applied to Turo, a peer-to-peer car rental platform, for violations of regulations governing motor vehicle rentals on airport grounds.[14]

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7 Olivia Carville, Andre Tartar, and Jeremy C.F. Lin, *Airbnb to America's Big Cities: See You in Court*, Bloomberg (February 14, 2020), https://www.bloomberg.com/graphics/2020-airbnb-ipo-challenges/.

8 Lily Leung, *Anaheim Won't Fine Websites Like Airbnb for Illegal Short-Term Rental Listings*, Orange Cty. Reg. (Aug. 23, 2016), http://www.ocregister.com/articles/city-726671-term-short.html.

9 *Airbnb, Inc. v. City of Boston*, 386 F.Supp.3d 113 (D. Mass. May 3, 2019). Note that the court did not find that Section 230 prevented Boston imposing a fine on Airbnb for booking illegal short-term rentals. This is in line with the holding in the Santa Monica cased discussed below.

10 *Jane Doe No. 1 v. Backpage.com*, LLC, 817 F.3d 12 (1st Cir. March 14, 2016).

11 As discussed below, FOSTA-SESTA's passage in 2019 amended 230 to prevent companies like Backpage from being able use 230 as a shield for their involvement in sex trafficking.

12 *Hill v. StubHub, Inc.*, 727 S.E.2d 550 (2012).

13 *HomeAway v. City of Santa Monica*, 918 F.3d 676 (9th Cir. March 13, 2019).

14 *Massachusetts Port Authority v. Turo Inc.*, 487 Mass. 235 (Mass. Supreme Ct., April 21, 2021).

III. THE NEW 230

The law heralded as the one that made sure the modern Internet will not be easy to rewrite or amend, and that's fine. It shouldn't be easy. Section 230 has promoted innovations in more ways than we realize, and it will be hard to craft similar regulation that can appropriately anticipate the level of responsibility platforms should have for the harms that develop as a result of their design.

What should not be tolerated, however, are piecemeal reform efforts like the one that resulted from *Backpage*. The ruling in that case and the company's continued involvement in sex trafficking, caused Congress to revoke 230's immunity for platforms that knowingly facilitate sex trafficking. The amendment, often referred to as FOSTA-SESTA,[15] caused outrage among platforms and academics who believed that the change to 230 would open Pandora's box to online censorship. While we have yet to see if the amendment has significantly caused platforms to restrict speech out of fear of ruinous litigation, it is clear that FOSTA-SESTA has unintentionally imperiled sex workers who now have to rely more on pimps and darker parts of the Internet to find safe work.[16]

Creating industry-specific exceptions to 230 would make iterations of the law both under- and over inclusive- and could lead to other dangerous consequences.[17] Yet, we now see such amendments proposed regularly. For instance, in response to Airbnb's historic use of 230 to subvert regulation, Representative Ed Case sponsored the Protecting Local Authority and Neighborhoods Act (the "PLAN Act"). The PLAN Act was supported by the hotel lobby and sought to amend 230 so that state and local governments could enforce short-term-rental laws against platforms without ever running afoul of 230.

Section 230 reform efforts should be thorough and focus on clarifying the boundaries of 230. This is why a bill announced in February 2021 by Senators Mark Warner, Mazie Hirono, and Amy Kobuhar is worthy of attention as a starting point. While far from perfect, the Safeguarding Against Fraud, Exploitation, Threats, Extremism and Consumer Harms (SAFE TECH) Act attempts to comprehensively return 230 to its origins by reducing the heart of 230's scope to speech-related torts such as defamation. In particular, the bill replaces the word "information" with "speech" in the first part of the statute to read: "No provider or user of any interactive computer service shall be treated as the publisher or speaker of any speech provided by another information content provider." This change, along with additional clarifying language, could prevent platforms from claiming immunity from local and state regulations at the earliest stages of litigation.

If carefully done, reforming Section 230 will not blow up the Internet, afterall, laws akin to Section 230 do not exist everywhere in the world. Instead, restrained and thoughtful revisions can provide state and local regulators the help they need to shift negative externalities back to their sources.

15 The name comes from the House bill "Fight Online Sex Trafficking Act" and the Senate bill "Stop Enabling Sex Traffickers Act."

16 Samantha Cole, *Pimps Are Preying on Sex Workers Pushed Off the Web Because of FOSTA-SESTA*, VICE (April 30, 2018, 1:09PM), https://www.vice.com/en/article/bjpqvz/fosta-sesta-sex-work-and-trafficking.

17 This argument is also made by Danielle Keats Citron and Mary Anne Franks. *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. Chi. Legal F. 45 (2020).

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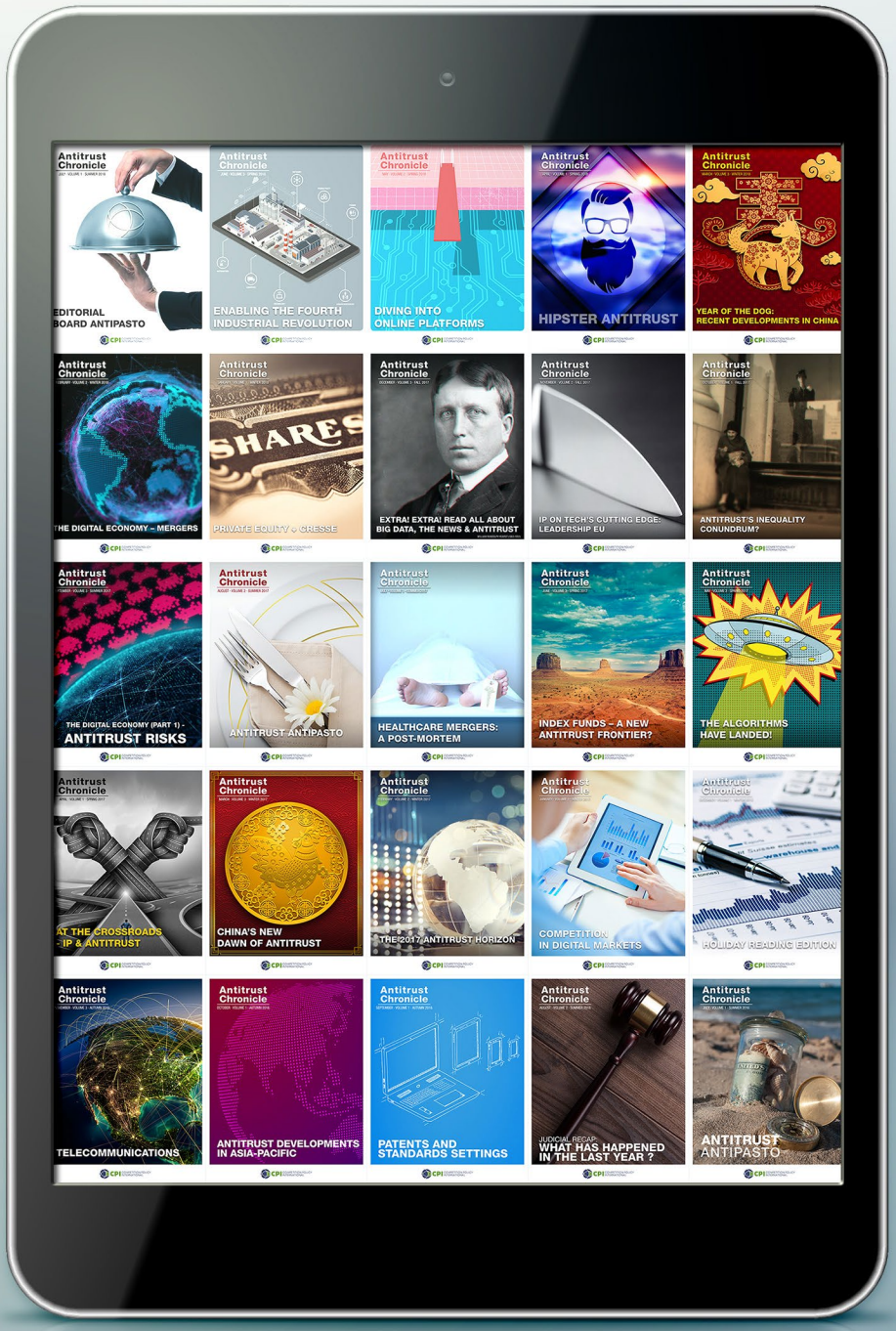


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