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REPLACING WHAT WORKS WITH WHAT SOUNDS GOOD: THE  
ELUSIVE SEARCH FOR WORKABLE SECTION 230 REFORM

❖ Note ❖

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## I. INTRODUCTION

Section 230 of the Communications Decency Act of 1996 was a tiny and overlooked fragment of a behemoth bill Congress passed to crack down on the pervasiveness of obscene and indecent communications online.<sup>1</sup> Yet, in the quarter-century since it was passed Section 230 has proven to be the only lasting piece of the Communications Decency Act and, indeed, the most important piece of legislation ever passed with respect to the internet.<sup>2</sup>

By emancipating interactive service providers (ISPs) from the whip hand of publisher's liability, Section 230 became the liberating force that jolted the massive and sustained growth of the internet marketplace and the free and robust exchange of ideas online.<sup>3</sup> Since Section 230's conception at law, critics of the legislation have been chipping away at its free market and free speech protections as slowly and surely as water erodes rock.<sup>4</sup> This Note intends to offer a counterpoint to that trend.

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1. 47 U.S.C. § 230.

2. *Reno v. Am. C.L. Union*, 521 U.S. 844, 873–85 (1997) (holding all the anti-indecency provisions of the Communications Decency Act unconstitutional as an abridgment of freedom of speech but leaving Section 230 intact).

3. See JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET*, 3–4 (Cornell Univ. Press, 2019).

4. See, e.g., *Allow State and Victims to Fight Online Sex Trafficking Act of 2017*, Pub. L. No. 115-164, 132 Stat. 1253 (codified as amended at 47 U.S.C. § 230(e)(5) (eliminating liability protections for material that promotes or facilitates prostitution)); Fair Hous. Council of San

Part II of this Note will discuss the background against which Section 230 was enacted and subsequent developments which have affected the way Section 230 is interpreted. Part III of this Note will analyze the concerns Republicans and Democrats have about the law and how eliminating Section 230's liability shield would hurt internet companies and constrict online free speech. Part IV of this Note will recommend that to maximize online free speech and ensure the continued growth of the digital marketplace, ISPs be considered common carriers and conferred total immunity against lawsuits arising from third-party content posted on their forums, except as already exempted by the current version of Section 230.

## II. BACKGROUND

Section 230 of the Communications Decency Act of 1996 was enacted against the background of a Second Circuit case—*Stratton Oakmont, Inc. v. Prodigy Services Co.*<sup>5</sup> In *Stratton Oakmont*, a New York trial court awarded partial summary judgment for a defamation claim brought against PRODIGY, an internet service provider (“ISP”).<sup>6</sup> At issue was whether PRODIGY could be subject to publisher liability for its policy of moderating user posts for content that violated its conditions-of-use guidelines.<sup>7</sup> The court held that PRODIGY, by moderating its forums, exercised “editorial control,” and was, therefore, subject to publisher’s liability for defamatory content posted on its forums.<sup>8</sup>

The *Stratton Oakmont* decision stood in sharp contrast to another online defamation case from the Second Circuit, *Cubby, Inc. v. CompuServe, Inc.*<sup>9</sup> The issue was identical to that in *Stratton Oakmont*, except that CompuServe declined to moderate its forums for content.<sup>10</sup> Since CompuServe did not moderate content on their forums, the *Cubby* court ruled that CompuServe was not a publisher, but instead a distributor, and subject to a more lenient liability standard.<sup>11</sup> The difference in

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*Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (interpreting Section 230 as not offering liability protections to companies who contribute to the development of unlawful content); Exec. Order No. 13925, 85 FR 34079 (May 28, 2020) (ordering the “Secretary of Commerce, in consultation with the Attorney General,” to “file a petition for rulemaking with the Federal Communications Commission (FCC) requesting that the FCC expeditiously propose regulations to clarify” the narrow breadth of Section 230 immunity protections).

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

6. *Id.*

7. *Id.* at \*1.

8. *Id.* at \*4.

9. See *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

10. *Id.* at 137.

11. *Id.* at 140.

outcome between *Stratton Oakmont* and *Cubby* created an odd situation in which “[a]ny online service provider who made an effort to restrict or edit user-submitted content . . . faced a much higher risk of liability if it failed to eliminate all tortious material than if it simply did not try to control or edit the content of third parties at all.”<sup>12</sup>

Hence, Section 230 was born.<sup>13</sup> Recognizing the chilling impact publisher liability would have on the growth of the internet marketplace and online free speech, Congressmen Christopher Cox and Ron Wyden introduced Section 230 as an amendment to the Communications Decency Act of 1996.<sup>14</sup> They reasoned that if ISPs were free from the fear of liability for third-party content posted on their forums, ISPs would be incentivized to moderate that content in good faith, promoting forums conducive to the civil and thoughtful exchange of ideas as well as the growth of the digital market.<sup>15</sup>

Section 230 is characterized by its brevity. Its key language reads in full: “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.”<sup>16</sup> Though consisting of only twenty-six short words, courts construed Section 230 as conferring broad immunity to ISPs hosting third-party content.

In *Zeran v. America Online, Inc.*, a Fourth Circuit District Court posited that the role of a publisher and that of a distributor were inseparable.<sup>17</sup> The court held that once an ISP is put on notice of defamatory content being distributed on its forum, it must make a decision as whether to “publish, edit, or withdraw” the content and is thereby thrust into the role of a publisher, and immunized from liability under Section 230.<sup>18</sup> Other courts quickly followed suit, extending publisher immunity to websites<sup>19</sup> and re-affirming that Section 230’s protections did not merely apply to un-moderated content, but also to ISPs exercising their “editorial and self-regulatory functions.”<sup>20</sup> Essentially, courts interpreted Section 230 as granting “broad federal immunity to any

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12. KOSSEFF, *supra* note 3, at 55 (quoting David 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, 409–10 (2010)).

13. See 47 U.S.C. § 230.

14. See KOSSEFF, *supra* note 3, at 2.

15. See *id.* at 2-3.

16. 47 U.S.C. § 230(c)(1).

17. See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997).

18. *Id.*

19. See *Batzel v. Smith*, 333 F.3d 1018, 1029 (9th Cir. 2003) (concluding that Section 230 does not protect just internet service providers).

20. *Ben Ezra, Weinstein, & Co., Inc. v. Am. Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000) (citing *Zeran*, 129 F.3d at 331).

cause of action that would make service providers liable for information originating with a third-party user of the service.”<sup>21</sup> Then, the rollback began.

In the face of increasingly disturbing claims,<sup>22</sup> courts began re-evaluating the breadth of Section 230 immunity.<sup>23</sup> In *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, an ISP solicited information about sex, sexual orientation, nationality, and other classes of people protected under the Fair Housing Act to help individuals find compatible roommates.<sup>24</sup> Concluding that Section 230 did not cover the alleged violation, the Ninth Circuit reasoned that Section 230 immunity did not extend to a website who “contributes materially to the alleged illegality of the conduct[]” by “help[ing] to develop unlawful content[.]”<sup>25</sup> However, in *Jones v. Dirty World Entertainment Recordings LLC*, where an online tabloid solicited untrue and embarrassing stories about private citizens, the court held that merely soliciting defamatory content did not constitute a material contribution to the development of that content and, therefore, did not abrogate Section 230 immunity.<sup>26</sup> Thus, the broad immunity outlined in *Zeran* seemed to be pared back some, but not too much.<sup>27</sup>

Then, in 2017, Congress stepped in. Responding to the increasing awareness that sex traffickers were using the internet to sell their victims, Congress passed, and President Trump signed into law, the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (“SESTA-FOSTA package”).<sup>28</sup> The law created a carve out to Section 230 liability protections, now holding ISPs responsible for third-party prostitution ads appearing on their forums.<sup>29</sup>

Most recently, Justice Thomas has authored a statement respecting the denial of certiorari and a concurring opinion signaling a willingness to interpret Section 230

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21. *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) (quoting *Zeran*, 129 F.3d at 330).

22. *See, e.g., J.S. v. Vill. Voice Media Holdings, LLC*, 184 Wash. 2d 95, 359 P.3d 714 (2015) (involving, among other claims, sexual assault and battery and the sexual exploitation of children); *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398 (6th Cir. 2014) (involving a defamation claim concerning the solicitation of embarrassing and untrue gossip).

23. *Fair Hous. Council of San Fernando Valley*, 521 F.3d 1157 (interpreting Section 230 as not offering liability protections to companies who contribute to the development of unlawful content); *Jones*, 755 F.3d 398 (applying the interpretation set forth in *Roommates.com*).

24. *Fair Hous. Council of San Fernando Valley*, 521 F.3d 1157.

25. *Id.* at 1168.

26. *See Jones*, 755 F.3d at 416 (relying on *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009) (holding that merely steering content creation did not constitute development)).

27. *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997).

28. Allow State and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (codified as amended at 47 U.S.C. § 230(e)(5)).

29. 47 U.S.C. § 230(e)(5).

differently than previous courts have.<sup>30</sup> In *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, Justice Thomas argued that, from a purely textualist perspective, ISPs are not protected from distributor liability—only publisher liability—rejecting the *Zeran* court’s conclusion that the two forms of liability could not be separated.<sup>31</sup> In *Joseph R. Biden, Jr., President of the United States, et al. v. Knights First Amendment Institute at Columbia University, et al.*, Justice Thomas authored a concurring opinion positing that social media forums could be considered common carriers, which would restrict an ISP’s right to exclude users from its services, and that “colorable” first amendment arguments could be made about the control over speech that tech companies exercise.<sup>32</sup>

In the aftermath of Congressional rollback and Justice Thomas’s statement respecting the denial of certiorari in *Enigma* and his concurring opinion in *Knights*, the central issues to be resolved are first, whether Section 230 should continue to be interpreted as providing broad liability protections to ISPs and second, what, if anything, can or should be done about tech companies moderating speech on their forums.

### III. ANALYSIS

If Section 230 protections were pared back, it would have adverse effects on the internet marketplace and online free speech. To understand the impact proposed Section 230 reforms would have, it is vital to understand the dual functions of Section 230.

Section 230 provides ISPs with both a shield and a sword. Section 230’s shield is the broad immunity from publisher and distributor liability it provides to ISPs for third-party content posted on their forums.<sup>33</sup> Section 230’s sword, on the other hand, is the grant of striking power it gives ISPs to moderate that same third-party content.<sup>34</sup> These dual functions have allowed ISPs to improve their user-forums by allowing them to screen for inappropriate, false, or criminal content and either label or remove it.<sup>35</sup>

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30. See *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 15-16, 208 L. Ed. 2d 197 (2020).

31. See *id.*

32. See *Joseph R. Biden, Jr., President of the United States, et al. v. Knights First Amendment Institute at Columbia University, et al.*, 141 S. Ct. 1220, 1221–27 (2021).

33. See Emily Stewart, *Ron Wyden Wrote the Law that Built the Internet. He Still Stands by It—and Everything It’s Brought with It*, VOX (Mar. 16, 2019, 9:50 AM) <https://www.vox.com/recode/2019/5/16/18626779/ron-wyden-section-230-facebook-regulations-neutrality>.

34. See *id.*

35. See *id.*

The narrow carve-outs to the protections Section 230 confers on ISPs is that ISPs can be held liable for criminal content and material promoting prostitution posted on their forums.<sup>36</sup> Currently, however, political forces would like to further whittle down Section 230 protections.

There is bipartisan support to reform (or scrap) Section 230.<sup>37</sup> Each side of the political aisle worries that a few tech giants have amassed monopoly power, cornering the market and giving them too much control over what people see and hear.<sup>38</sup> To get after what politicians regard as unaccountable tech-monopolies, both Republicans and Democrats would diminish the liability protections tech companies currently enjoy.<sup>39</sup> That, however, is where the agreement ends.

Republicans and Democrats are bitterly divided over the second of Section 230's dual functions—the sword function. Democrats worry that tech companies—particularly social media companies—are too lax in regulating their forums, not doing enough to combat the spread of misinformation.<sup>40</sup> Republicans, on the contrary, are concerned that big tech is doing too much to regulate speech on their forums, and unfairly censoring conservative voices.<sup>41</sup> Essentially, the difference between the Republican and Democratic positions is that while Democrats would sharpen Section 230's sword, Republicans would dull it. While Section 230 reform is in fashion politically,<sup>42</sup> in most cases the proposed reforms would have the opposite of their intended effects, resulting in more monopoly and less free speech.

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36. 47 U.S.C. § 230(e)(1), (5).

37. See Daisuke Wakabayashi, *Legal Shield for Social Media Is Targeted by Lawmakers*, N.Y. TIMES (May 28, 2020), <https://www.nytimes.com/2020/05/28/business/section-230-internet-speech.html>.

38. See Matthew Feeney, *Big Tech and Free Speech*, CATO INST. (Jan./Feb. 2020), <https://www.cato.org/policy-report/january/february-2021/big-tech-free-speech>.

39. *Id.*

40. See *Why Big Tech Should Fear Amy Klobuchar*, N.Y. TIMES (Mar. 29, 2021), [https://www.nytimes.com/2021/03/29/opinion/sway-kara-swisher-amy-klobuchar.html?auth=login-google&campaign\\_id=9&emc=edit\\_nn\\_20210329&instance\\_id=28597&nl=the-morning&regi\\_id=92782340&segment\\_id=54399&cte=1&user\\_id=607a204d17a0fed3011ce21aa261f087](https://www.nytimes.com/2021/03/29/opinion/sway-kara-swisher-amy-klobuchar.html?auth=login-google&campaign_id=9&emc=edit_nn_20210329&instance_id=28597&nl=the-morning&regi_id=92782340&segment_id=54399&cte=1&user_id=607a204d17a0fed3011ce21aa261f087).

41. See Mack DeGeurin, *Majority of Republicans Think Tech Companies Are Censoring Them*, N.Y. MAG. (June 29, 2018), <https://nymag.com/intelligencer/2018/06/republicans-think-tech-companies-censor-political-speech.html>; *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 15–16 (2020).

42. See, e.g., H.R. 285 117th Cong. (2021); H.R. 874, 117th Cong. (2021); S. 299 117th Cong. (2021). There are over a dozen other proposed bills that could be included in this footnote.

### A. *The Shield*

Breaking the liability shield would call into question the very viability of digital companies whose business model is based largely or wholly on third-party content. Litigation costs alone could prove fatal to tech companies.

The price tag of litigating one single lawsuit can exceed \$700,000.<sup>43</sup> Even a pre-trial motion for summary judgment can range between \$15,000 and \$150,000.<sup>44</sup> While multibillion-dollar tech giants might be able to bear the burden of these litigation costs, it would surely prove a death sentence for smaller, resource-pinchd tech companies. This is especially true since the incentive to sue even smaller tech companies, despite these companies not having deep pockets, would still remain, as the cost of settling these lawsuits would be less than the cost of bringing them through trial.<sup>45</sup> In other words, the claimants would still get a payout even if their claims have no merit. As one Ninth Circuit court observed, it would mean “death by ten thousand duck bites.”<sup>46</sup> Considering that most lawsuits concerning third-party content are meritless,<sup>47</sup> subjecting tech companies to liability for these claims would create a perverse situation in which small, innovative tech start-ups are driven out of business by frivolous lawsuits. The risk of devastating legal fees would force tech companies to change their business models. The aftermath of SESTA-FOSTA provides a convenient case study.

After the SESTA-FOSTA package narrowed Section 230 liability protections, Reddit and Craigslist took down parts of their websites which might prospectively violate the new laws.<sup>48</sup> They did so not because those parts of their websites were in fact violating SESTA-FOSTA by “promoting ads for prostitutes, but because policing them against the outside possibility that they might was just too hard.”<sup>49</sup> If social media companies could be held liable for any illegal or defamatory third-party content appearing on their forums, they similarly would have three possible courses of action: first, shut down completely; second, open the floodgates to litigation; or third, and most likely, try to preemptively moderate all third-party content.

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43. ENGINE, SECTION 230: COST REPORT, <https://www.engine.is/intermediary-liability> (last visited Apr. 10, 2021).

44. *Id.*

45. *Id.* (comparing the cost of settling a Section 230 lawsuit to the cost of litigating one through trial).

46. ENGINE, SECTION 230: COST REPORT, <https://www.engine.is/intermediary-liability> (last visited Apr. 10, 2021) (quoting Fair Hous. Council of San Fernando Valley, 521 F.3d at 1174).

47. *Id.*

48. See Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet as We Know It*, VOX (July 2, 2018 1:08 PM), <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom>.

49. *Id.*

Trolls will troll.<sup>50</sup> The odds of anonymous weirdos defaming others or uploading illegal content via the internet are, as everyone's experience will confirm, a near mathematical certainty. To avoid the flood waters of litigation, internet companies would have to screen all content before they allowed it to appear on their forums. The New York Times ("NYT") already does this.<sup>51</sup> Almost needless to say, doing so necessarily requires a great deal of resources, as thousands of reader comments are posted to the site daily.<sup>52</sup> The process is time-consuming, as each individual comment needs to be reviewed by NYT's in-house censors and approved for publication before posting.<sup>53</sup> While doing all that is possible for a large media company like the New York Times, it would be impossible for many smaller news sites who simply do not have the resources or manpower to patrol their comment sections. It would likely be exponentially more difficult for companies like Twitter and Facebook because of the sheer volume of content posted on those websites every day.<sup>54</sup>

Social media deals primarily in instant gratification. 6,000 tweets are posted every second and around 500 million tweets are posted every day.<sup>55</sup> Likewise, there are 'more than 100 billion of pieces of content posted' to Facebook in any given 24-hour period.<sup>56</sup> Despite employing around 15,000 people and using artificial intelligence to moderate its forums, Facebook still struggles to screen user-generated content effectively.<sup>57</sup> It would be humanly impossible to review all that data pre-publication online. Social media companies would have to employ far more advanced forms of artificial intelligence than they now do to screen that vast amount of data for illegal or defamatory content.<sup>58</sup> It would be a tremendous burden. While deep-pocketed tech companies are best situated to develop that technology, in the meantime, if it took an

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50. *Troll*, THE MERRIAM-WEBSTER DICTIONARY (2021).

51. *Comments*, N.Y. TIMES, <https://help.nytimes.com/hc/en-us/articles/115014792387-Comments> (last visited Apr. 18, 2021).

52. See Lucia Moses, *How The New York Times Moderates 12,000 Comments a Day*, DIGIDAY (June 19, 2017), <https://digiday.com/media/new-york-times-moderates-12000-comments-day/>.

53. *Comments*, NY TIMES, <https://help.nytimes.com/hc/en-us/articles/115014792387-Comments> (last visited Apr. 18, 2021).

54. See Jason Koebler & Joseph Cox, *The Impossible Job: Inside Facebook's Struggle to Moderate Two Billion People*, VICE (Aug. 23, 2018, 12:15 PM), <https://www.vice.com/en/article/xwk9zd/how-facebook-content-moderation-works>.

55. *Twitter Usage Statistics*, INTERNET LIVE STATS., <https://www.internetlivestats.com/twitter-statistics/> (last visited Apr. 13, 2021).

56. See Scott Lincicome, *Fine, Let's Talk about Section 230*, DISPATCH (Oct. 20, 2020), <https://capitolism.thedispatch.com/p/fine-lets-talk-about-section-230>.

57. See *id.* (citing Jeff Horowitz, *Facebook Has Made Lots of New Rules This Year. It Doesn't Always Enforce Them*, WALL STREET J. (Oct. 15, 2020) (noting that content violating Facebook's content guidelines is often not removed from the site)).

58. See Koebler & Cox, *supra* note 54.



average of even an hour or thirty minutes to review tweets before posting, it would destroy social media's instant gratification business model. In the worst-case scenario, it might even mean the end of social media altogether and, along with it, the end of what may be called the hashtag revolution.

#BringBackOurGirls.<sup>59</sup> This hashtag, first shared on Twitter by a Nigerian lawyer,<sup>60</sup> started a worldwide movement to rescue 276 Nigerian schoolgirls who were captured by the Islamic terrorist group Boko Haram in 2014.<sup>61</sup> This simple hashtag was eventually shared millions of times,<sup>62</sup> including by former first lady Michelle Obama,<sup>63</sup> to raise awareness of the kidnapping of the young girls by Boko Haram. Just days after the hashtag began trending, several major western powers, including the United States, committed resources to Nigeria to help find the stolen schoolgirls.<sup>64</sup>

It is fair to argue that hashtag activism has not saved those 276 schoolgirls. It would be obtuse, however, to say that Twitter did not play an important role bringing this atrocity to the attention of the global community and generate worldwide support, including in the West Wing, for the girls' plight. It is this much needed awareness and support which has spurred freedom activists in hundreds of oppressed regions around the world to take to Twitter and other social media to spread their message. One ongoing struggle is that of the Burmese people.

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59. See Anne-Marie Tomchak, *#BBCTrending: The Creator of #BringBackOurGirls*, BBC (May 7, 2014), <https://www.bbc.com/news/blogs-trending-27315124>.

60. *Id.*

61. See Nina Strohlic, *Six Years Ago, Boko Haram Kidnapped 276 Schoolgirls. Where Are They Now?*, NAT'L GEOGRAPHIC MAG. (Mar. 2020), <https://www.nationalgeographic.com/magazine/article/six-years-ago-boko-haram-kidnapped-276-schoolgirls-where-are-they-now>.

62. See BBC Trending, *#BBCTrending: Five Facts about #BringBackOurGirls*, BBC (May 13, 2014), <https://www.bbc.com/news/blogs-trending-27392955>.

63. Michelle Obama (@FLOTUS44), TWITTER, (May 7, 2014), [https://twitter.com/FLOTUS44/status/464148654354628608?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E464148654354628608%7Ctwgr%5E%7Ctwcon%5Es1\\_&ref\\_url=https%3A%2F%2Fblog.twitter.com%2Fen\\_us%2Fa%2F2014%2Fmichelle-obama-tweets-to-bringbackourgirls.html](https://twitter.com/FLOTUS44/status/464148654354628608?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E464148654354628608%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fblog.twitter.com%2Fen_us%2Fa%2F2014%2Fmichelle-obama-tweets-to-bringbackourgirls.html).

64. See Caitlin Dewey, *#Bringbackourgirls, #Kony2012, and the Complete, Divisive History of 'hashtag activism'*, WASH. POST (May 8, 2014), <https://www.washingtonpost.com/news/the-intersect/wp/2014/05/08/bringbackourgirls-kony2012-and-the-complete-divisive-history-of-hashtag-activism/>.

#SaveMyanmar.<sup>65</sup> #HearTheVoiceOfMyanmar.<sup>66</sup> #RespectOurVotes.<sup>67</sup> In recent months, these three Twitter hashtags, along with others, have all been trending in response to the military coup overthrowing the democratically elected government in Burma.<sup>68</sup> Understanding the power a people determined to be free possess when they can share ideas and coordinate their movements, the new military dictatorship banned Twitter, Facebook, and Instagram as part of a crackdown on the democratic resistance.<sup>69</sup> Those who discount the power of 280 characters to subvert evil regimes and evil deeds need look no further than every oppressive dictatorship across earth which has banned social media and other forms of internet communications to realize just how egregiously wrong they are.<sup>70</sup> The hashtag revolution is real. It is a boon to all those weary people yearning for freedom in the dark and oppressed corners of the world. Of course, just as the power of social media can be used for good, it can also be used for evil.

### B. *The Sword*

Section 230 gives tech companies the ability to moderate their forums by removing content that violates their content rules and guidelines.<sup>71</sup> As noted above, how tech companies exercise this power has divided Republicans and Democrats, with Republicans arguing tech companies exercise this power too much and Democrats arguing tech companies exercise it too little.<sup>72</sup>

To illustrate their point, Democrats have often cited the events leading up to the capital insurrection.<sup>73</sup> January 6, 2021 will be regarded by posterity as the darkest day for the republic of the United States of America since succession gripped the nation and tore her asunder. The capital insurrection itself was but the culminating event of a long and coordinated misinformation campaign cooked up by a conniving and

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65. *Myanmar Military Rulers Order Block on Twitter, Instagram 'Until Further Notice'*, CNBC (Feb. 5, 2021, 3:54 PM), <https://www.cnbc.com/2021/02/05/myanmar-military-rulers-order-block-on-twitter-instagram-.html>.

66. *Id.*

67. *Id.*

68. *Id.*

69. See Rishi Iyengar, *Myanmar Blocks Twitter and Instagram*, CNN (Feb. 5, 2021), <https://www.cnn.com/2021/02/05/tech/myanmar-blocks-twitter-instagram/index.html>.

70. See, e.g., Bloomberg News, *The Great Firewall of China*, BLOOMBERG (Nov. 5, 2018, 5:36 PM), <https://www.bloomberg.com/quicktake/great-firewall-of-china>; Robyn Dixon, *Why Russia Is Tightening Its Grip on Social Media*, WASH. POST (Mar. 12, 2021, 11:06 AM), <https://www.washingtonpost.com/world/2021/03/12/russia-social-media-putin-opposition/>.

71. 47 U.S.C. § 230(2).

72. See Feeney, *supra* note 38.

73. See *Why Big Tech Should Fear Amy Klobuchar*, *supra* note 38.

demagogic President and his groveling henchmen, whose purpose was to sow distrust in the results of a democratically held and fairly administered election.<sup>74</sup> Much of that misinformation was spread over Twitter and other social media.

It is in this context that Democratic calls for increased regulation of third-party content on social media forums are most compelling. An informed and assertive citizenry is the best defense against usurping government.<sup>75</sup> If misinformation is permitted to spread through media bubbles, unchallenged and unabated, the events of January 6 could repeat themselves wearing another face in another context. Therefore, Democrats reason, something must be done to rein in the spread of false information. Requiring tech companies to police the content on their forums more stringently is one possible solution.

Justice Thomas, however, along with much of the political right, has voiced concern that tech companies are exercising too much control over speech, potentially running afoul of First Amendment protections.<sup>76</sup> Despite tech companies not being government actors themselves, there is caselaw to support that concern.<sup>77</sup>

In *Marsh v. Alabama*, the plaintiff—a Jehovah’s witness—was arrested for distributing “religious literature on the premises of a company-owned town contrary to the wishes of the town’s management.”<sup>78</sup> Holding that the plaintiff’s actions were protected by the First Amendment, the court reasoned, “[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”<sup>79</sup> The Court, referring to the fact that the town’s streets and businesses were held open to the whole public, remarked, “[s]ince these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation.”<sup>80</sup> There is, at least, an argument to be made that this same line of reasoning could be applied to tech companies like Twitter.

For one thing, Twitter holds itself out to the public for the public’s benefit: “The mission we serve as Twitter, Inc. is to give everyone the power to create and share ideas and information instantly without barriers. Our business and revenue will always

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74. See Anita Kumar and Gabby Orr, *Inside Trump’s Pressure Campaign to Overturn the Election*, POLITICO (Dec. 21, 2020, 4:30 AM), <https://www.politico.com/news/2020/12/21/trump-pressure-campaign-overturn-election-449486>.

75. According to the internet, although I was unable to independently verify this, William F. Buckley Jr. once said, “The best defense against usurpatory government is an assertive citizenry.” Whether Buckley actually said this or not, the point remains valid.

76. Joseph R. Biden, Jr., President of the United States, et al. v. Knights First Amendment Institute at Columbia University, et al., 141 S. Ct. 1220, 1221–27 (2021); Feeney, *supra* note 38.

77. See, e.g., *Marsh v. State of Alabama*, 326 U.S. 501, 502, (1946).

78. *Id.*

79. *Id.* at 506.

80. *Id.*

follow that mission in ways that improve—and do not detract from—a free and global conversation.”<sup>81</sup> While sharing free speech is by no means Twitter’s only function—it also mines user data to sell to other companies and sells ads to its users—free speech is inextricable from Twitter’s business model. President Trump certainly used that model to great effect, even employing Twitter’s forum to speak in an official capacity.<sup>82</sup> It is arguable that Trump’s twitter threads were “essentially a public function . . . subject to state regulation,”<sup>83</sup> and, therefore, protected as speech under the First Amendment. Additionally, considering the sheer volume of speech on its platform, Twitter could, if so inclined, potentially exercise a great deal of control over a great deal of speech. As the hashtag revolution should demonstrate, there is a public interest or concern in the speech published on Twitter—enough so, perhaps, that Twitter’s own rights to exercise control over its forum should be circumscribed by the rights of the people who use its services.

Could the #MeToo movement have existed without Twitter? It is difficult to say. However, #MeToo only became a global movement ten years after Tarana Burke coined the phrase when actress Alyssa Milano used it on Twitter to expose the sex crimes of Harvey Weinstein.<sup>84</sup> It is at least fair to argue that Twitter provided a good platform for the movement to take-off. In an alternate universe, however, Twitter could have decided to use all its power to stop the #MeToo movement. It would be simple enough to create an algorithm to recognize the hashtag and remove the posts that use it. While #MeToo may have been an idea whose time had come, Twitter, if it were so inclined, could have dampened its impact by silencing its message. It is that exercise of power over speech which is a legitimate cause for concern.

Even if the first amendment argument does not bear out—and it may well not—Congress could still pass a law deeming ISPs common carriers. Doing so would mean simply that Twitter, Facebook, Amazon, et cetera would be restricted in their right to exclude users from their platforms. This would eliminate the possibility that a few large tech companies, who can exercise control over so much speech, would abuse that control to stamp out unpopular or dissenting voices. The common carrier approach has the added benefit of being a simple enough change that it would not totally upend

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81. *Investor Relations*, TWITTER, <https://investor.twitterinc.com/contact/faq/default.aspx#:~:text=The%20mission%20we%20serve%20as,a%20free%20and%20global%20conversation> (last visited May 22, 2021).

82. *See* Joseph R. Biden, Jr., President of the United States, et al. v. Knights First Amendment Institute at Columbia University, et al., 141 S. Ct. 1220, 1221–27 (2021).

83. *See Marsh*, 326 U.S. at 506.

84. *See* Gurvinder Gill & Imran Rahman-Jones, *Me Too Founder Tarana Burke: Movement Is Not Over*, BBC (July 9, 2020), <https://www.bbc.com/news/newsbeat-53269751#:~:text=Tarana%20began%20using%20the%20phrase,Harvey%20Weinstein%20of%20sexual%20assault>.

the internet as it exists and has existed for the last quarter of a century. Put differently, it might be a change that, though it certainly will not sound good to everyone, could work.

#### IV. RECOMMENDATION

Section 230 is deceptively tricky. Even though the statute is so short, any small change to it carries profound implications for the tech marketplace and online free speech. Unfortunately, many of the proposed Section 230 reforms would create a world in which free speech can be stifled with impunity and the very existence of thousands of tech companies put in jeopardy by an ill-considered imposition of liability for content those tech companies had no hand in creating. To ensure the continued viability of the free and open exchange of ideas online, Congress should pass legislation designating ISPs as common carriers, restricting tech companies' ability to exclude third-party users of their services. Furthermore, to guarantee the survival of tech companies and a tech marketplace in which small as well as large companies can compete, Section 230 liability protections should be construed as granting outright immunity from any litigation except as already set out in Section 230(e).<sup>85</sup>

The first and last consideration must be free speech. The people of any free society should be weary that a few large companies can exercise control over such an immeasurably large amount of speech online. When Amazon, which accounts for almost 90% of all eBook sales and nearly 50% of all paper book sales online,<sup>86</sup> decides to block a listing, that decision will have a dramatic, chilling effect on the sales of the blocked book. It will stifle speech. Likewise, when Twitter blocked President Trump from its platform, it restricted his ability to communicate with his 89 million followers. While Twitter may have had valid reasons for permanently suspending President Trump's account, it is just as easy to imagine a world in which those who have so much power over so much speech will exercise that power arbitrarily to smother dissenting and unpopular voices.

Censorship, in this context like any other, is a question of trust. Who can the people of a free society trust to censor—or moderate—online speech? A large part of American society may not trust a few giant tech companies to decide what speech is acceptable any more than they would trust the government to make those decisions. It

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85. See 47 U.S.C. § 230(e) (providing that Section 230 immunity from liability does not affect criminal law, intellectual property law, state law, communications privacy law, or sex trafficking law).

86. See Joseph R. Biden, Jr., President of the United States, et al. v. Knights First Amendment Institute at Columbia University, et al., 141 S. Ct. 1220, 1225 (2021) (citing Matt Day & Jackie Gu, *The Enormous Numbers Behind Amazon's Market Reach*, BLOOMBERG (March 27, 2019), <https://www.bloomberg.com/graphics/2019-amazon-reach-across-markets/>).

would be better to give the devil himself the benefit of free and uncensored speech, to give him leave to try to seduce the upright and the good, than to travel down the road of censorship. Robert Bolt, at a poignant moment in his seminal play *A Man for All Seasons*, taught this lesson well.<sup>87</sup> After being confronted by what Christopher Hitchens described as a “witch-hunting prosecutor”<sup>88</sup> for recognizing a corrupt man’s rights, the witch-hunter said to Sir Thomas More:

[Witch-hunter]: So now you’d give the Devil benefit of law!

[More]: Yes. What would you do? Cut a great road through the law to get after the Devil?

[Witch-hunter]: I’d cut down every law in England to do that!

[More]: Oh? And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country’s planted thick with laws from coast to coast . . . and if you cut them down . . . d’you really think you could stand upright in the winds that would blow then? Yes, I’d give the Devil benefit of law, for my own safety’s sake.<sup>89</sup>

Irrespective of whether any court would hold that the first amendment reaches online communications hosted by private companies, the principle remains the same—speech should not be silenced for any reason in any circumstances. Giving someone, anyone, the power of the censor is to give him the power to decide what the truth is. The very idea is repugnant to any free and open society. Therefore, to defend free speech and protect the free and unhindered exchange of ideas online, Congress should pass legislation deeming ISPs common carriers.

The other consideration is whether ISPs, if they are to be recognized as common carriers, should be considered publishers, who play an active role in printing or broadcasting information created by others, or distributors, who merely distribute information created by others.

ISPs should be considered publishers. Since operating as common carriers ISPs would not be allowed to remove most third-party content, they should be granted total immunity from lawsuits arising out of any third-party content posted on their forums. Traditionally, out of concerns for fairness, governments have “sometimes given common carriers special government favors,” such as immunity from certain types of lawsuits.<sup>90</sup> If textualist jurists, like Justice Thomas, do not square Section 230’s protections against publisher liability as granting total immunity from lawsuits arising

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87. See generally ROBERT BOLT, *A MAN FOR ALL SEASONS* (Vintage International, A Division of Random House, Inc.) (1962).

88. CandaEH, *Christopher Hitchens Defending Free Speech Full Debate*, YOUTUBE (Nov. 17, 2016) [https://www.youtube.com/watch?v=H\\_ohvc\\_ZqzA](https://www.youtube.com/watch?v=H_ohvc_ZqzA).

89. BOLT, *supra* note 87, at 66.

90. See *Biden v. Knights First Amendment Institute*, 141 S. Ct. at 1223.

from third-party content, then Congress should amend Section 230(c)(1) to say, “No provider or user of an interactive computer service *shall be held liable*<sup>91</sup> for any information provided by another information content provider.” Of course, as already noted, and as is provided for in another part of Section 230,<sup>92</sup> that immunity would not affect certain, other defined areas of the law as it applies to ISPs. While this would assuage Republican fears that conservative voices are being unfairly censored by big tech companies, it would do little to address Democratic concerns of the rampant spread of misinformation over the internet.

Misinformation can be dangerous. While Democrats, and most Americans for that matter, are correctly concerned that Twitter and other social media can act as conduits for the widespread dissemination of misinformation, and, as the insurrection of January 6 demonstrates, the spread of misinformation can be a threat to republican government itself, they are wrong in their Section 230 reform prescription. The people who believe the election was stolen, despite all the evidence to the contrary,<sup>93</sup> would likely have believed the same even in the absence of social media. And while some websites—like 4chan and its ilk<sup>94</sup>—made it easier for them to organize,<sup>95</sup> it is still possible they would have stormed the capitol building without the help of Twitter or Facebook. Opening social media companies up to liability for the content posted by the capitol rioters would not solve the problem. It would merely drive these people to darker, more conspiratorial parts of the web.

Social media is not the cause of misinformation. Human beings are the cause of misinformation. Though social media is one means by which false information is spread, it is also a means by which true information is spread. The best way to fight false information is by injecting true information into people’s media bubbles. Of

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91. This language replaces the language in Section 230(c)(1) which reads, “shall be treated as the publisher or speaker...”

92. 47 U.S.C. § 230(e).

93. See, e.g., Hope Yen, Alie Swenson & Amanda Seitz, *FACT CHECK: Trump’s Claims of Vote Rigging Are All Wrong*, DENVER POST (Dec. 3, 2020, 10:31 AM), <https://www.denverpost.com/2020/12/03/trump-vote-rigging-fact-check/>; Jon Ward & Andrew Romano, *The 2020 Election Wasn’t ‘Stolen.’ Here Are All the Facts that Prove It*, YAHOO! NEWS (November 12, 2020), <https://www.yahoo.com/now/the-2020-election-wasnt-stolen-here-are-all-the-facts-that-prove-it-184623754.html>; Melissa Quinn, *Sidney Powell Tells Court “No Reasonable Person” Would Take Her Voter Fraud Claims as Fact*, CBS NEWS (March 23, 2021, 12:32 PM), <https://www.cbsnews.com/news/sidney-powell-dominion-defamation-lawsuit-voter-fraud/>.

94. Oscar Gonzales, *8chan, 8kun, 4chan, Endchan: What You Need to Know*, C|NET (Nov. 7, 2019, 2:45 PM) <https://www.cnet.com/news/8chan-8kun-4chan-endchan-what-you-need-to-know-internet-forums/>.

95. Sheera Frenkel, *The Storming of Capitol Hill Was Organized on Social Media*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/us/politics/protesters-storm-capitol-hill-building.html> <https://www.cbsnews.com/news/sidney-powell-dominion-defamation-lawsuit-voter-fraud/>.

course, that will be hard to do with social media platforms, whose algorithms are designed to expose people only to information they want to see. Nevertheless, tweaking algorithms to expose people to a greater diversity of political views would be far more simple and far more desirable than a form of Orwellian-esque censorship. Freedom of speech must eclipse concerns about the spread of misinformation. A few elitists in tech or government must not be empowered to decide what the truth is. The determination of what is true and what is false should not be left to big tech censors, but instead to every individual in his capacity as a thinking human being.

## V. CONCLUSION

Section 230, for the most part, works. Turning tech companies into common carriers is one simple reform that will maximize free speech online without destroying the platforms based primarily on third-party content. Exempting internet companies from liability has fostered a market revolution, creating millions of new jobs, spurring the creation of some of the world's largest companies, connecting the several billion inhabitants of this planet, and undermining totalitarian regimes all over the earth. While concerns over monopoly and the spread of misinformation are real, eliminating liability protections or subjecting social media posts to preemptive review to remove false or unpleasant information would kill everything about the internet that works and replace it with what sounds good. The best trade-off available is to turn ISPs into common carriers, eliminating the possibility of censorship of unpopular voices online, and maintain broad liability protections, saving small tech start-ups from being sued into oblivion and guaranteeing their ability to compete in the digital marketplace. Common carrier status, in conclusion, would be the keeper of the internet and everything about it that is good.