

3-2022

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Recommended Citation

Weaver, Russell L. (2022) "Social Media, Section 230, and Free Expression," *Mercer Law Review*: Vol. 73 : No. 2 , Article 8.

Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol73/iss2/8

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Social Media, Section 230, and Free Expression

Russell L. Weaver*

I. INTRODUCTION

Throughout history, as new communications technologies have been developed, they have been controlled by “gatekeepers” who had the power to decide who could access those technologies.¹ Although Johannes Gutenberg’s invention of the printing press in the Fifteenth century was revolutionary and ultimately led to major innovations in science and technology, as well as to dramatic societal changes,² Gutenberg’s invention was not accessible by everyone. Because printing presses were expensive, only wealthy individuals could afford to own and operate them,³ and those few individuals had the power to control who could use their technologies to mass communicate.⁴ Many of the technologies that followed, including radio,⁵ television, satellite, and cable, were correspondingly expensive, or required the owner to obtain one of a limited number of governmental licenses,⁶ and therefore were also owned and operated by wealthy individuals or corporations who could control their use.⁷ Without access to new technologies, ordinary people were forced to communicate in more primitive ways (such as

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1. See RUSSELL L. WEAVER, FROM GUTENBERG TO THE INTERNET: FREE SPEECH, ADVANCING TECHNOLOGY, AND THE IMPLICATIONS FOR DEMOCRACY 21–60 (Carolina Academic Press, 2d ed. 2019).

2. WEAVER, *supra* note 1, at 12–18.

3. *Id.* at 19–35.

4. *Id.* at 19–35.

5. *Id.* at 43–47.

6. See *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 394 (1969).

7. See WEAVER, *supra* note 1, at 43–47.

orally or through handwritten documents), and found it difficult to “mass communicate.”⁸

The Internet revolutionized communication by giving ordinary people the opportunity to mass communicate and widely disseminate their ideas, free of the traditional “gatekeepers.”⁹ Like the Gutenberg printing press, the Internet’s communications potential led to profound societal changes.¹⁰ Outside of the United States, the Internet played a prominent role in the Arab Spring uprisings in the Middle East,¹¹ as well as in social movements in China, Russia, and around the world.¹² Within the United States, the Internet has helped spur social movements,¹³ and played a major role in politics and political campaigns.¹⁴

Like the technologies that came before, the Internet’s potential has slowly come under the influence and restraint of social media companies who have tried to function as the Internet’s newest “gatekeepers.”¹⁵ While social media companies have unquestionably expanded the ability of ordinary individuals to express themselves on both personal and political matters,¹⁶ their platforms are regarded as private (rather than governmental) entities and therefore have not become subject to the First Amendment.¹⁷ As a result, these social media companies have censored and restricted freedom of expression on their platforms.¹⁸

The power of social media companies to promote free expression, as well as to censor it, has been greatly enhanced by Section 230 of the Communications Decency Act of 1996 (CDA).¹⁹ Section 230 gives social media platforms broad protections against civil liability for information posted on their platforms by others, but it specifically authorizes them to limit or censor material posted on their platforms.²⁰ This Article

8. *Id.* at 19–38, 51–60.

9. *Id.* at 67.

10. *Id.* at 67–114.

11. *Id.* at 73–82.

12. *Id.* at 70–82.

13. *Id.* at 84–95.

14. *Id.* at 95–109.

15. *Id.* at 124–32.

16. *See id.* at 71–83.

17. *See* *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019); *see also* RUSSELL L. WEAVER, STEVEN I. FRIEDLAND & RICHARD ROSEN, CONSTITUTIONAL LAW: CASES, MATERIAL & PROBLEMS 557–624 (5th ed. 2021).

18. WEAVER, *supra* note 1, at 124–32.

19. 47 U.S.C. § 230 (2018).

20. 47 U.S.C. § 230(c) (2018).

argues that § 230 is fundamentally inconsistent with this nation's First Amendment tradition. While Congress might have had good reasons for providing social media companies with broad protections against civil liability, it was inappropriate for Congress to vest those companies with the power to censor speech and ban individuals from their platforms. Either social media companies are not serving as publishers and editors, in which case they should be exempt from liability for information posted on their platforms by others, or they are publishers and editors, in which case they should be subject to liability. At the very least, social media platforms should be prohibited from discriminating on the basis of content or viewpoint.

II. THE FIRST AMENDMENT AND CENSORSHIP

Although the U.S. free speech tradition developed slowly over centuries, it resulted in a consensus—the federal government possesses very limited power to censor speech.²¹ The United States' approach marked a significant departure from the prior history of censorship and repression that existed in both Europe and the American colonies.²² Speech restrictions were imposed shortly after Gutenberg's invention of the printing press.²³ At the time, governments limited the number of existing printing presses, and generally allocated licenses to print to only those who were regarded as favorable by the government.²⁴ Governments also imposed content-licensing requirements, which required those who wish to be published to submit their manuscripts to governmental censors, and prohibited publication absent such approval.²⁵ The English government went so far as to impose the crime of seditious libel which criminalized criticism of the King and other high clergy.²⁶ For this crime, truth was not a valid defense.²⁷ Indeed, if it

21. See *United States v. Alvarez*, 567 U.S. 709, 715–17 (2012); *Brown v. Ent. Merchs. Ass'n.*, 564 U.S. 786, 790–91 (2011); see also *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Near v. State of Minnesota*, 283 U.S. 697 (1931).

22. See RUSSELL L. WEAVER & CATHERINE HANCOCK, *FIRST AMENDMENT: CASES, PROBLEMS & MATERIALS* 5–7 (6th ed. 2020).

23. See *id.* at 5; WEAVER, *supra* note 17, at 476–90.

24. See WEAVER, *supra* note 22, at 5; WEAVER, *supra* note 17, at 476–90.

25. See *Lovell v. City of Griffin*, 303 U.S. 444, 447–48 (1938); see also WEAVER, *supra* note 22, at 5–6.

26. See William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 248 (1982).

27. *Id.* at 248.

were shown that the defendant's criticisms of the King were in fact true, the punishment was more severe.²⁸

As the U.S. free speech tradition has evolved over the last couple of centuries, it has come to include several important principles. First, prior restraints on speech are presumptively unconstitutional.²⁹ Thus, the government may not impose content-licensing requirements, like those imposed by medieval governments,³⁰ and is generally prohibited from imposing injunctions against speech, even if the speech is arguably defamatory,³¹ or potentially implicates national security interests (absent a compelling set of circumstances).³²

The second principle is the theory that both content-based and viewpoint-based restrictions on speech are presumptively unconstitutional.³³ Of course, under the U.S. free speech tradition, there are certain categories of speech treated as completely "unprotected" under the First Amendment.³⁴ Outside of those unprotected categories, however, content-based, and viewpoint-based restrictions are not only regarded as presumptively unconstitutional, but also are subject to strict scrutiny.³⁵ Similarly, the government generally has only limited authority to ban speech on the grounds of falsity. Except in a few limited contexts—such as prosecutions for perjury or civil actions for defamation if the constitutional requirements are satisfied—the government does not have the power to declare that particular facts are true and unassailable.³⁶ As the Supreme Court of the United States recognized in *United States v. Alvarez*,³⁷ the "remedy for speech that is false is speech that is true."³⁸ Indeed,

28. See Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111, 184 n.290 (1998).

29. *New York Times Co.*, 403 U.S. at 714; *Lovell*, 303 U.S. at 451–52; *Near*, 283 U.S. at 733.

30. See *Lovell*, 303 U.S. at 452; see also WEAVER, *supra* note 22, at 5–6.

31. See *Near*, 283 U.S. at 703.

32. See *New York Times Co.*, 403 U.S. at 726–27.

33. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992).

34. See *Virginia v. Black*, 538 U.S. 343, 358–59 (2003); see also *New York v. Ferber*, 458 U.S. 747, 754 (1982) (child pornography unprotected); *Miller v. California*, 413 U.S. 15, 20–21 (1973) (obscene speech unprotected); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (fighting words unprotected).

35. See *R.A.V.*, 505 U.S. at 403 (“[A]nd that which could be regulated on the basis of content only upon a showing of a compelling state interest (*i.e.* all remaining expression).”).

36. See *Alvarez*, 567 U.S. at 720.

37. 567 U.S. 709 (2012).

38. *Id.* at 727.

Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth. *See* G. Orwell, *Nineteen Eighty-Four* (1949) (Centennial ed. 2003)

. . . Freedom of speech and thought flows not from the beneficence of the state but from the inalienable right of the person. And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right . . . to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.³⁹

III. THE PECULIAR RULES APPLICABLE TO SOCIAL MEDIA

Because of their private status, social media platforms have not been bound by the strictures of the First Amendment. Thus, these platforms possess a unique status, giving them the power to censor speech posted and to ban individuals from access to those platforms. The power of social media platforms is enhanced by § 230 of the CDA.⁴⁰ Under this Act, social media companies are provided two special benefits. First, § 230 makes clear that they are not considered as having published or spoken information posted on their sites, and therefore they are not liable for information posted by other content providers.⁴¹ Second, this Act established a “Good Samaritan” defense, specifically allowing social media companies censorship of information posted on their platforms without the risk of civil liability.⁴² That defense states that:

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

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be

39. *Id.* at 723, 728.

40. 47 U.S.C. § 230.

41. 47 U.S.C. § 230(c)(1) (“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.”). Section 230’s protections extend not only to social media companies, but also to Internet Service Providers (ISPs), and any other online intermediaries that host or republish speech.

42. 47 U.S.C. § 230(c).

obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).⁴³

Section 230 marks a significant departure from the nation's free speech tradition. If the government attempted to restrict the types of speech that § 230 allows social media companies to prohibit, the governmental restrictions would undoubtedly be struck down as unconstitutional. Section 230 allows social media companies to remove material that is excessively violent, harassing, or otherwise objectionable.⁴⁴ Certainly, such language suffers from an unconstitutional level of vagueness and overbreadth.⁴⁵ It is doubtful whether speech that is regarded as "excessively violent" would be treated as "unprotected speech" under the First Amendment.⁴⁶ In addition, although there are several categories of unprotected speech, there are no unprotected categories that cover "otherwise objectionable" speech.⁴⁷ This lack of protection is presumably why the CDA explicitly allows social media companies to censor speech "whether or not such material is constitutionally protected[.]"⁴⁸

Given their unique status, and the special powers conferred by § 230, social media companies have aggressively utilized censorship on their platforms. For one thing, they have exercised one power that the government would never have been allowed to do: ban speech by particular individuals. For example, both Facebook and YouTube have banned former U.S. President, Donald Trump, from their platforms.⁴⁹ Indeed, Donald Trump has been banned from Facebook through 2023.⁵⁰ Likewise, YouTube temporarily banned U.S. Senator Rand Paul for posting a video claiming that masks are ineffective against the COVID-

43. *Id.* at § 230(c)(2).

44. *Id.* at § 230(c)(2)(A).

45. *See* Mayton, *supra* note 26, at 268.

46. *See Brown*, 564 U.S. at 805.

47. *See* WEAVER, *supra* note 22, at 45–46.

48. 47 U.S.C. § 230(c)(2)(A).

49. *See* Will Feuer, Juliegrace Brufke & Steven Nelson, *As Facebook Bans Trump 'til 2023, He Fires Back: 'Next time I'm in White House there'll be no more dinners with Mark Zuckerberg'*, N.Y. POST (Jun. 4, 2021, 1:02 PM), <https://nypost.com/2021/06/04/facebook-says-trump-ban-wont-end-until-at-least-2023/>; *see also* Gerrit De Vynck & Rachel Lerman, *YouTube Suspends Trump, Days After Twitter and Facebook*, THE WASHINGTON POST (Jan. 13, 2021, 6:56 PM), <https://www.washingtonpost.com/technology/2021/01/12/trump-youtube-ban/>.

50. Feuer, *supra* note 49.

19 virus.⁵¹ Various controversial individuals have also been banned by social media platforms, including Alex Jones,⁵² Louis Farrakhan,⁵³ Milo Yiannopoulos,⁵⁴ the Daily Stormer,⁵⁵ the Taliban,⁵⁶ and Infowars.⁵⁷

Social media platforms routinely censor both speech and ideas. Even though the government cannot ban ideas that it deems false, social media platforms can. Facebook's user bans apply not only to persons, but to anything that Facebook regards as "harmful" information or "disinformation." In a single three-month period, Facebook banned around 1.3 billion accounts because it concluded that those accounts were distributing harmful material or what some might refer to as "fake news."⁵⁸ Facebook decides for itself what constitutes "disinformation" and summarily bans it. For some time, Facebook banned all claims that COVID-19 was man-made.⁵⁹ However, Facebook changed its mind in 2021, and allowed such claims.⁶⁰ In addition, Facebook purportedly

51. See Rebecca Shabad, *YouTube Suspends Sen. Rand Paul Over a Video Falsely Claiming Masks are Ineffective*, NBC NEWS (Aug. 11, 2021, 8:07 AM), <https://www.nbcnews.com/politics/congress/youtube-suspends-sen-rand-paul-over-video-falsely-claiming-masks-n1276534>.

52. Steven Musil & Sean Hollister, *Facebook bans Infowars' Alex Jones for 30 days—But He's Still Streaming*, C/NET (Jul. 27, 2018, 10:17 AM), <https://www.cnet.com/news/facebook-bans-infowars-alex-jones-for-30-days-but-hes-still-streaming/>.

53. See Michael Cappetta & Ben Collins, *Alex Jones, Louis Farrakhan, others banned from Facebook and Instagram*, NBC NEWS (May 2, 2019, 2:42 PM), <https://www.nbcnews.com/tech/tech-news/facebook-bans-alex-jones-louis-farrakhan-others-facebook-instagram-n1001311>.

54. Cappetta, *supra* note 53.

55. See Alex Swoyer, *Daily Stormer banned by Facebook after criticizing Charlottesville victim Heather Heyer*, THE WASHINGTON TIMES (Aug. 16, 2017), <https://www.washingtontimes.com/news/2017/aug/16/daily-stormer-banned-by-facebook-after-criticizing/>.

56. See Jillian C. York, *Why Facebook's Continuing Taliban Ban Should Concern Us All*, CNN (Aug. 20, 2021), <https://www.msn.com/en-us/news/world/why-facebooks-continuing-taliban-ban-should-concern-us-all/ar-AAuYAO?ocid=uxbndlbing>.

57. See Kevin Roose, *Facebook Banned Infowars. Now What?*, N.Y. TIMES (Aug. 10, 2018), <https://www.nytimes.com/2018/08/10/technology/facebook-banned-infowars-now-what.html>.

58. See Melissa Holzberg, *Facebook Banned 1.3 Billion Accounts Over Three Months To Combat 'Fake' And 'Harmful' Content*, FORBES (Mar. 22, 2021, 11:54 AM), <https://www.forbes.com/sites/melissaholzberg/2021/03/22/facebook-banned-13-billion-accounts-over-three-months-to-combat-fake-and-harmful-content/?sh=72441d005215>.

59. See Thomas Barrabi, *Facebook Ends Ban on Posts Claiming COVID-19 is Man-Made: Facebook Had Previously Insisted the Claim Had Been 'Debunked'*, FOX BUSINESS (May 26, 2021), <https://www.foxbusiness.com/technology/facebook-ends-ban-posts-claiming-covid-19-man-made>.

60. Barrabi, *supra* note 60.

banned references to certain passages of the Bible, as well as hyperlinks to Biblehub.com.⁶¹ After investigating further, Facebook confirmed that the hyperlinks to Biblehub.com had been banned, but claimed that it had acted in error and purportedly rectified the problem.⁶² Facebook even went so far as to ban academics, who were conducting research on ad transparency and the spread of misinformation on Facebook.⁶³ Facebook admitted to said ban, but claimed it was necessary because the academics were scraping user data without permission.⁶⁴

Social media platforms frequently control and limit free expression. For example, Facebook has shut down online pages linked to the “Muslim Cyber Army.”⁶⁵ The alleged Neo-Nazi website, the Daily Stormer, was banned by GoDaddy after it mocked a young woman, Heather Heyer, who was killed in 2017 during the white nationalist rally that occurred in Charlottesville, Virginia.⁶⁶ GoDaddy claimed that the article might incite violence and therefore, violated its terms of service.⁶⁷ GoDaddy alleged it was not engaging in “censorship,” and that it supported a “free and open Internet.”⁶⁸ The Daily Stormer then moved its website to Google, which banned it for violating its terms of service.⁶⁹

Likewise, three internet companies (Google, Apple, and Facebook) have moved aggressively to remove content produced by Alex Jones,

61. See Julia Marnin, *Fact Check: Is Facebook Banning Bible Passages?*, NEWSWEEK (Jan. 28, 2021, 1:00 PM), <https://www.newsweek.com/fact-check-facebook-banning-bible-passages-1565190>.

62. Marnin, *supra* note 61.

63. See James Vincent, *Facebook Bans Academics Who Researched Ad Transparency and Misinformation on Facebook: The Researchers Say Their Work is Being Silenced*, THE VERGE (Aug. 4, 2021, 7:08 AM), <https://www.theverge.com/2021/8/4/22609020/facebook-bans-academic-researchers-ad-transparency-misinformation-nyu-ad-observatory-plugin>.

64. Vincent, *supra* note 63.

65. See Max Fisher, *With Alex Jones, Facebook's Worst Demons Abroad Begin to Come Home*, WRAL (Aug. 8, 2018, 6:27 PM), <https://www.wral.com/with-alex-jones-facebook-s-worst-demons-abroad-begin-to-come-home/17755992/>.

66. See Bill Chappell, *Neo-Nazi Site Daily Stormer Is Banned By Google After Attempted Move From GoDaddy*, NPR (Aug. 14, 2017, 8:30 AM), <https://www.npr.org/sections/thetwo-way/2017/08/14/543360434/white-supremacist-site-is-banned-by-go-daddy-after-virginia-rally> (GoDaddy announced that it had “informed the Daily Stormer that they have 24 hours to move the domain to another provider, as they have violated our terms of service.”); see also Christine Hauser, *GoDaddy Drops Daily Stormer Site*, N.Y. TIMES (Aug. 15, 2017), <https://www.proquest.com/docview/1928763972?accountid=12384&parentSessionId=i%2Bht%2BYuAW31D%2Fb7SR3shjiJv3YqNriVH%2F%2FChIkS8Z0s%3D>.

67. Chappell, *supra* note 66.

68. Hauser, *supra* note 66.

69. *Id.*

and his Infowars site, as “hate speech.”⁷⁰ Infowars has been described by one newspaper as a “right-wing conspiracy site,”⁷¹ and Jones is the founder of the New Century Foundation which (according to the Southern Poverty Law Center) “purports to show the inferiority of blacks to whites.”⁷² One newspaper referred to Jones as someone “who became famous for his spittle-flecked rants and far-fetched conspiracies, including the idea that the Sandy Hook massacre was an elaborate hoax promoted by gun-control supporters.”⁷³ Jones has also referred to the 9/11 attacks as an “inside job” and he assisted in the spread of the “Pizzagate” controversy (which involved allegations that Hillary Clinton was in cahoots with others to run a child sexual abuse ring out of a pizza parlor in Maryland).⁷⁴ In regard to the 9/11 attacks, Jones stated that “[n]ow 9/11 was an inside job, but when I say inside job it means criminal elements in our government working with Saudi Arabia and others, wanting to frame Iraq for it.”⁷⁵ Other sites—including YouTube, Pinterest, and MailChimp—have also banned Infowars.

Although Twitter chose to leave Mr. Jones’s posts alone for a while,⁷⁶ the company eventually changed course and banned both Jones and Infowars from its platform for allegedly violating Twitter’s terms of use policy.⁷⁷ Twitter expressed concern that Jones was harassing a CNN reporter. Jones responded that the reporter is a “public figure” who’s attempting to “bully” tech companies into banning Jones. Interestingly, thirteen of Jones’s most popular tweets involved reposts of tweets by

70. See Li Yuan, *The Week in Tech: Infowars and China’s Great Firewall*, N.Y. TIMES (Aug. 10, 2018), <https://www.nytimes.com/2018/08/10/technology/tech-infowars-china-great-firewall.html>.

71. See Brian X. Chen, *The Internet Trolls Have Won. Get Used to It*, N.Y. TIMES (Aug. 9, 2018), <https://www.proquest.com/docview/2085432391?accountid=12384>.

72. See *American Renaissance*, SOUTHERN POVERTY LAW CENTER, <https://www.splcenter.org/fighting-hate/extremist-files/group/american-renaissance> (last visited Nov. 16, 2021).

73. Kevin Roose, *After the Ban on Infowars, What’s Next?*, N.Y. TIMES (Aug. 10, 2018), <https://www.proquest.com/docview/2086091947?accountid=12384>; see Christine Hauser, *Megyn Kelly Calls Alex Jones’s Sandy Hook Denial “Revolting,” But Still Plans to Air Interview*, N.Y. TIMES (Jun. 12, 2017), <https://www.nytimes.com/2017/06/12/business/media/megyn-kelly-alex-jones-newtown.html>.

74. See Hauser, *supra* note 73.

75. *Id.*

76. See Yuan, *supra* note 70.

77. See Kate Conger & Jack Nicas, *Twitter Bars Alex Jones and Infowars, Citing Harassing Messages*, N.Y. TIMES (Sept. 7, 2018), <https://www.proquest.com/docview/2100028413?accountid=12384>.

President Trump.⁷⁸ Apple, Inc. removed links to most of Infowars podcasts, but initially left the Infowars app on its site.⁷⁹

Twitter considered whether to ban “dehumanizing” speech, which does not involve direct threats of violence, or hate speech,⁸⁰ but it struggled to find a suitable definition of the term “dehumanizing.”⁸¹ Twitter expressed concern that such speech might lead to violence.⁸² As a result, Twitter was forced to decide whether to allow anti-immigrant speech or whether to allow rape victims to relate their experiences.⁸³ Twitter struggled to find suitable policies for a platform that brought “together world leaders, celebrities, journalists, political activists, and conspiracy theorists.”⁸⁴ Even though Twitter’s guiding light had been free expression, it has shifted to suggesting that “safety” should come first. In an effort to protect its “safety team” against trolls, Twitter has asked that the members not be identified.⁸⁵

Leading social media companies have also banned other right-wing individuals.⁸⁶ Twitter has banned Milo Yiannopoulos allegedly for an online harassment campaign against an actress, as well as Chuck Johnson, a Breitbart writer, for alleged threats against a civil rights activist.⁸⁷ Twitter has also banned organizations such as the American Nazi Party and Golden Dawn.⁸⁸

78. Conger, *supra* note 77.

79. See Sara Salinas, *Twitter Permanently Bans Alex Jones and Infowars Accounts*, CNBC (Sept. 6, 2018, 4:45 PM), <https://www.cnbc.com/2018/09/06/twitter-permanently-bans-alex-jones-and-infowars-accounts.html>.

80. See Roose, *supra* note 73.

81. *Id.*

82. Conger, *supra* note 77.

83. See Roose, *supra* note 73.

84. See Cecelia Kang & Kate Conger, *Inside Twitter’s Struggle Over What Gets Banned*, N.Y. TIMES (Aug. 10, 2018), <https://www.nytimes.com/2018/08/10/technology/twitter-free-speech-infowars.html>.

85. Kang, *supra* note 84.

86. See Kevin Roose, *The Alt-Right Finds a New Enemy in Silicon Valley*, N.Y. TIMES (Aug. 10, 2017), <https://www.proquest.com/docview/1927363799?accountid=12384>.

The alt-right isn’t necessarily wrong when it claims, as its followers often do, that Silicon Valley is steeped in social liberalism. These are companies that emerged out of Bay Area counterculture, that sponsor annual floats in gay pride parades and hang “Black Lives Matter” signs on the walls of their offices. Silicon Valley’s policy preferences aren’t always liberal, but tech executives routinely side with progressives on hot-button social issues like immigration, the Paris climate accords, and President Trump’s recent decision to bar transgender people from military service. In today’s political climate, these are partisan positions, and it’s no big shock that they have drawn suspicions from the other side.

87. See Conger, *supra* note 77.

88. *Id.*

IV. IS THE SECTION 230 PARADOX JUSTIFIED?

As noted, although the First Amendment does not currently govern the actions of social media companies, they are governed by the CDA through § 230. The CDA was a transformative piece of legislation because it insulated social media platforms, Internet Service Providers (ISPs), and other internet intermediaries from liability—by providing that they not be treated as “publishers” or “speakers” for information posted on their websites by others.⁸⁹ Underlying this liability exemption is the theory that social media platforms are not publishers, but simply provide platforms on which others may post their thoughts and ideas.

In some respects, this liability exemption makes sense. Given the millions of items posted on social media platforms every day, it would be virtually impossible for social media companies to curate all posts to make sure that they do not contain objectionable material. Section 230 therefore helps facilitate internet discourse and has been described by the Electronic Frontier Foundation (EFF) as one of the “most influential laws” governing the Internet.⁹⁰ This exemption is praised for creating “a broad protection that has allowed innovation and free speech online to flourish,”⁹¹ and for creating a positive governing framework:

This legal and policy framework has allowed for YouTube and Vimeo users to upload their own videos, Amazon and Yelp to offer countless user reviews, craigslist to host classified ads, and Facebook and Twitter to offer social networking to hundreds of millions of Internet users. Given the sheer size of user-generated websites (for example, Facebook alone has more than 1 billion users, and YouTube users upload 100 hours of video every minute), it would be infeasible for online intermediaries to prevent objectionable content from cropping up on their site. Rather than face potential liability for their users’ actions, most would likely not host any user content at all or would need to protect themselves by being actively engaged in censoring what we say, what we see, and what we do online. In short, CDA 230

89. 47 U.S.C. § 230(c)(1) (“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.”). Section 230’s protections extend not only to social media companies, but also to Internet service providers (ISPs), and any online intermediary that hosts or republishes speech.

90. *CDA 230: The Most Important Law Protecting Internet Speech*, EFF, <https://www.eff.org/issues/cda230> (last visited Nov. 17, 2021) (“The Internet community as a whole objected strongly to the Communications Decency Act, and with EFF’s help, the anti-free speech provisions were struck down by the Supreme Court. But thankfully, CDA 230 remains and in the years since has far outshone the rest of the law.”).

91. *CDA 230: The Most Important Law Protecting Internet Speech*, *supra* note 90.

is perhaps the most influential law to protect the kind of innovation that has allowed the Internet to thrive since 1996.⁹²

Section 230 protects not only social media platforms, but also ISPs and bloggers who act as intermediaries when they host “comments on their blogs.”⁹³ Thus, “bloggers are not liable for comments left by readers, the work of guest bloggers, tips sent via email, or information received through RSS feeds. This legal protection can still hold even if a blogger is aware of the objectionable content or makes editorial judgments.”⁹⁴ Thus:

[O]nline 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 “interactive computer service providers,” including basically any online service that publishes third-party content.⁹⁵

Interestingly, the legal protections provided by CDA Section 230 are unique to the U.S. “European nations, Canada, Japan, and the vast majority of other countries do not have similar statutes on the books.”⁹⁶ While other countries have high levels of internet access, most online services are based in the U.S., “because CDA Section 230 makes the U.S. a safe haven for websites that want to provide a platform for controversial or political speech and a legal environment favorable to free expression.”⁹⁷

Even though § 230 is beneficial in many respects, the Good Samaritan Defense produces perverse results as well as a paradox. Not only does it shield social media companies from liability on the theory that they are not editors of content, but it explicitly allows them to edit and control content. So, these “non-editors” can effectively serve as editors, or to state it more accurately, censors, while claiming an exemption from liability for their curation. Part of the problem lies with the Good Samaritan exemption itself. As noted, it is both vague and overbroad, thereby giving social media companies broad authority to impose content restrictions on their websites.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

While § 230's protection against liability might be defensible and consistent with the nation's free speech tradition because it eliminates the potential liability that could be imposed for certain types of expression, the so-called Good Samaritan Defense corrupts the system by giving social media companies broad authority to censor speech on their websites, including the banning of "objectionable speech."⁹⁸

Of course, the problem is that a social media platform's views regarding "objectionable speech" may reflect its own views rather than societal views. Moreover, even if societal views are reflected, the general rule in the U.S. is that even offensive or objectionable speech is generally considered to be protected under the First Amendment. People are entitled to say offensive things if they do not constitute so-called "fighting words."⁹⁹ For example, in *Cohen v. California*,¹⁰⁰ a man was allowed to express his opposition to the military draft in vulgar terms ("F*** the Draft"), even though some were offended by his choice of words.¹⁰¹ As the United States Supreme Court recognized in *Cohen*, "while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric."¹⁰² The Court concluded that "because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."¹⁰³

Even if a majority of the U.S. public found a particular statement to be objectionable, it is not a basis for censoring the statement. We do not allow the majority to decide what people can, or cannot, say. As the Supreme Court recognized in *West Virginia State Board of Education v. Barnette*,¹⁰⁴

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and

98. See Cappetta, *supra* note 53.

99. See *Chaplinsky*, 315 U.S. at 573.

100. 403 U.S. 15 (1971).

101. *Id.* at 16.

102. *Id.* at 25.

103. *Id.*

104. 319 U.S. 624 (1943).

assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.¹⁰⁵

Further, social media platforms do not have in place solid mechanisms for censoring materials. Virtually all social media platforms attempt to control the use of their platforms through so-called “acceptable use” or “terms of service” policies,¹⁰⁶ providing broad authority to exclude various types of content or even terminate or limit service to particular users.¹⁰⁷ Facebook uses its policy to exclude content that it deems inappropriate or unacceptable,¹⁰⁸ and it employs a team of individuals who are authorized to take down content that they deem to be illegal or in violation of Facebook’s policy.¹⁰⁹

Until recently, it was difficult to gain insight into how social media platforms make decisions regarding which content to ban (or remove) because their content moderation guidelines were neither open nor transparent. Facebook has actively attempted to maintain secrecy regarding the content of its guidelines,¹¹⁰ but they failed when their guidelines became public in early 2017.¹¹¹ Facebook’s guidelines indicate that it will act against posts involving such things as hate speech, terrorist propaganda, graphic violence, adult nudity, sexual activity, child sexual exploitation, revenge porn, credible violence,

105. *Id.* at 638.

106. See Laura Sydell, *Corporations Are Drawn into WikiLeaks Controversy*, NPR (Dec. 13, 2010, 12:01 AM), <https://www.npr.org/2010/12/13/131979010/corporations-are-drawn-into-wikileaks-controversy>:

Clay Shirky, who teaches in the Interactive Telecommunications Program at New York University, says terms-of-service agreements give these companies too much power. “Every corporate counsel at every large organization is basically paid to write a Web terms of service, which reads: ‘We can do anything at any time with no announcement and no recourse,’ he said.”

107. See *PayPal Suspends WikiLeaks Donations Account*, REUTERS (Dec. 4, 2010), <https://www.reuters.com/article/wikileaks-paypal/paypal-suspends-wikileaks-donations-account-idUSN0415723720101204>.

108. Chen, *supra* note 71.

109. See Eyder Peralta, *Is Lying on the Internet Illegal?*, NPR (Nov. 15, 2011, 3:30 PM), <http://www.npr.org/blogs/thetwo-way/2011/11/15/142356399/is-lying-on-the-Internet-illegal>.

110. See Nick Hopkins, *Revealed: Facebook’s Internal Rulebook on Sex, Terrorism, and Violence*, THE GUARDIAN (May 21, 2017), <https://www.theguardian.com/news/2017/may/21/revealed-facebook-internal-rulebook-sex-terrorism-violence>; see also Margot Kaminski & Kate Klonick, *Facebook, Free Expression and the Power of a Leak*, N.Y. TIMES (Jun. 27, 2017), <https://www.nytimes.com/2017/06/27/opinion/facebook-first-amendment-leaks-free-speech.html>.

111. Hopkins, *supra* note 110.

suicidal posts, bullying, harassment, breaches of privacy, and copyright infringement.¹¹²

However, Facebook's guidelines suffer from both vagueness and ambiguity, and its policies on sexual content are "complex and confusing."¹¹³ There are other problems as well. For example, Facebook's guidelines suggest that a statement like "[s]omeone shoot Trump" should be deleted because it involves a reference to killing a governmental official,¹¹⁴ but a statement like "[t]o snap a bitch's neck, make sure to apply your pressure to the middle of her throat" is permissible.¹¹⁵ Facebook justifies leaving the latter post online by arguing that "people commonly express disdain or disagreement by threatening or calling for violence in generally facetious and unserious ways."¹¹⁶ Likewise, the statement "f*** off and die" need not be removed.¹¹⁷ Photos of children being subjected to bullying or non-sexual physical abuse need not be deleted unless there is a "sadistic or celebratory element."¹¹⁸ Videos of violent deaths are sometimes deleted, but attempts at self-harm need not be deleted. Although photos of animal abuse or mutilation are permissible, they should be marked as "disturbing."¹¹⁹ Such photos can be removed if they reveal "sadism" which the guidelines define as "enjoyment of suffering."¹²⁰ Child nudity is sometimes permissible but not in the context of the Holocaust.¹²¹

The ability to make good decisions regarding take downs is aggravated by the fact that Facebook's moderators are "overwhelmed" by the total volume of work.¹²² Purportedly, Facebook receives more than 6.5 million reports a week regarding allegations of fake or improper accounts, and Facebook's moderators are sometimes forced to

112. See Alex Hern & Olivia Solon, *Facebook Closed 583m Fake Accounts in First Three Months of 2018*, THE GUARDIAN (May 15, 2018), <https://www.theguardian.com/technology/2018/may/15/facebook-closed-583m-fake-accounts-in-first-three-months-of-2018>.

113. See Hopkins, *supra* note 110.

114. *Id.* The explanation given was that a head of state is in a protected category.

115. *Id.* The explanation given was that the threat could not be regarded as a "credible" threat.

116. *Id.*

117. *Id.* Again, it would not be regarded as a "credible threat."

118. *Id.*

119. *Id.*

120. See Kaminski & Klonick, *supra* note 110.

121. See Hopkins, *supra* note 110.

122. *Id.*

make decisions regarding the permissibility of content in as little as ten seconds.¹²³

One thing is clear: a large amount of content has been excluded from social media platforms. In the first three months of 2018, Facebook closed some 583 million accounts that it characterized as “fake,” and took “moderation action” against some 1.5 billion accounts.¹²⁴ Of these 1.5 billion moderation actions, Facebook removed some 2.5 million instances of hate speech, 1.9 million instances of terrorist propaganda, 3.4 million instances of graphic violence, and 21 million instances of adult nudity and sexual activity. YouTube deleted 8.3 million videos in a three-month period “for breaching its community guidelines.”¹²⁵

These moderation actions affect a large quantity of speech. For example, in response to WikiLeaks’ decision to release diplomatic communications stolen from the U.S. Government, some online companies decided (perhaps, after prompting from governmental officials) to cut their ties to WikiLeaks and its supporters,¹²⁶ and to discontinue carrying WikiLeaks’ website.¹²⁷ Amazon was one of the companies that decided to exclude WikiLeaks,¹²⁸ stating that it was concerned about how the documents being posted online had been

123. *Id.*

124. *See* Hern & Solon, *supra* note 112.

125. *Id.*

126. Sydell, *supra* note 106.

127. *Hackers Overwhelm WikiLeaks Servers*, NPR (Dec. 3, 2010, 3:00 PM), <https://www.npr.org/2010/12/03/131790969/Hackers-Overwhelm-WikiLeaks-Servers> (“Now if you’ve tried to see them for yourself at WikiLeaks.org, you might have run into some problems. In fact, you probably got an error message. That’s in part because all the files and website itself have been jumping around several different servers all over the world.”).

128. Charlie Savage, *Amazon Cites Terms of Use in Expulsion of WikiLeaks*, N.Y. Times (Dec. 3, 2010), <https://www.proquest.com/docview/815511802/1F8DFAA6A5074DA2PQ/1?accountid=12384>.

In a statement, Amazon – which rents server space to companies in addition to its better-known business of selling books, music and other products online – said that it had canceled its relationship with WikiLeaks not because of “a government inquiry,” but because it decided that the organization was violating the terms of service for the program.

obtained and the possible injury that could result.¹²⁹ WikiLeaks' website managed to stay online only by switching servers.¹³⁰

V. CONCLUSION

Section 230 is an anomaly. To encourage social media platforms to be more open and accepting of content, § 230 provides those platforms and others with exemptions from civil liability for content posted by others. It does so on the theory that social media platforms are not “editors” of content posted by others. However, § 230 also gives platforms the power to censor matters posted by others. As noted in this Article, this power of censorship goes well beyond the power that governments would be allowed to impose. One can argue that the government's decision to convey this censorial power on social media platforms, while simultaneously exempting them from civil liability, is inconsistent with the First Amendment.

It is not clear that there is an easy solution to the § 230 problem. Obviously, Congress can amend § 230 to limit the ability of social media platforms to censor speech. For one thing, it could prohibit them from exercising broad authority to censor any material that they regard as “objectionable.” This broad power can lead platforms to engage in viewpoint discrimination. However, an amendment to § 230 is unlikely to happen. In recent years, although numerous statutory changes to § 230 have been proposed,¹³¹ none of them have gained traction. These bills fall into various categories, including efforts to repeal § 230, limit its scope, impose new obligations (for example, a duty of care), or to alter the Good Samaritan Defense to prohibit political bias or censorship.¹³² For example, U.S. Congressman Gohmert of Texas introduced legislation designed to repeal § 230.¹³³

129. Savage, *supra* note 128 (“When companies or people go about securing and storing large quantities of data that isn’t rightfully theirs, and publishing this data without ensuring it won’t injure others, it’s a violation of our terms of service, and folks need to go operate elsewhere,” the company said.”).

130. *Hackers Overwhelm WikiLeaks Servers*, *supra* note 127; John Burns, *New Obstacles for WikiLeaks and Founder*, N.Y. TIMES (Dec. 6, 2010), <https://www.nytimes.com/2010/12/05/world/05paypal.html>.

131. See Kiran Jeevanjee, et al., *All the Ways Congress Wants to Change Section 230*, SLATE (Mar. 23, 2021), <https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html>.

132. Jeevanjee, *supra* note 131.

133. Abandoning Online Censorship Act, H.R. 874, 117th Cong. (2021) (“This bill repeals Section 230 of the Communications Act of 1934, which protects a provider or user of an interactive computer service (e.g., social media company) from liability for screening or blocking objectionable content.”).

Another proposed solution is to treat social media platforms as “common carriers.”¹³⁴ The term “common carrier” refers to a company that transports goods or passengers on regular routes at set rates, or that provides a public service like telecommunications facilities.¹³⁵ “A common carrier is legally bound to carry all passengers or freight as long as there is enough space, the fee is paid, and no reasonable grounds to refuse to do so exist.”¹³⁶ Indeed, a common carrier that unjustifiably refuses to carry a particular person or cargo may be sued for damages.¹³⁷ Some commentators believe that, as common carriers, social media platforms should not be allowed to engage in viewpoint discrimination.¹³⁸

Some have called for social media platforms to be regulated in the same way as “mainstream broadcasters and publishers.”¹³⁹ If social media platforms were regulated like radio and television, that would mean that an entity like the U.S. Federal Communications Commission (FCC) would oversee those platforms in the U.S.¹⁴⁰ Social media platforms argue against this approach on the basis that they are not like traditional media companies. As Monica Bickered, Facebook’s head of global policy management, argues, “[w]e build technology We don’t write the news that people read on the platform.”¹⁴¹ But, if social media platforms are going to exercise editorial authority over content posted on their websites, they are becoming much more like traditional media.

Despite the unlikelihood of that occurring, a preferred solution would be to amend § 230 to limit the censorial power of social media platforms if they choose to accept civil liability protections. Thus, they could choose to decline § 230 civil liability protections in exchange for the right to exercise censorial control over their platforms. However, if they choose to accept such protections, their censorial authority should only

134. See Phillip Hamburger & Clare Morell, *The First Amendment Doesn’t Protect Big Tech’s Censorship*, THE WALL STREET JOURNAL (Jul. 31, 2021, 11:31 AM), <https://www.wsj.com/articles/big-tech-twitter-facebook-google-youtube-sec-230-common-carrier-11627656722>.

135. See James H. Lister, *The Rights of Common Carriers and the Decision Whether to Become a Common Carrier or a Non-Regulated Communications Provider*, 53 FED. COMM’N. L.J. 91, 92 (2000).

136. *Common Carrier*, THE FREE DICTIONARY BY FARLEX, <https://legal-dictionary.thefreedictionary.com/common+carrier> (last visited Nov. 17, 2021).

137. *Common Carrier*, *supra* note 136.

138. See Hamburger & Morell, *supra* note 134.

139. Hopkins, *supra* note 110.

140. See generally Lister, *supra* note 135.

141. *Id.*

extend to material that government has the power to restrict under the First Amendment.