

## Section 230 and the U.S Policy Debates Surrounding Content Moderation and Online Speech

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### Abstract:

This paper provides an overview of Section 230, a law that provides broad liability protection in the United States for online platforms regarding user-generated content, and the ongoing debates about the impact of the law, content moderation, and online speech. It begins by explaining the intended purposes of Section 230, discusses criticisms it currently faces, and reviews the potential consequences and policy concerns with many of the proposed changes. It concludes that Section 230 remains an important policy to continue free speech online and to encourage innovation by limiting risk from user speech for new online platforms.

**Keywords:** Section 230; intermediary liability protection; First Amendment; content moderation; online speech

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### Introduction

Section 230 is a U.S. law that provides broad liability protection for online intermediaries with regards to content that third-party users create or post on their service. It also provides protection for these same intermediaries to engage in content moderation if they feel the content is objectionable. This law has recently come to greater public attention in large part due to rising tensions between President Donald Trump and decisions regarding actions to label the president's content with fact-checking label and other content moderation actions on various social media platforms. In 2020, the President issued an executive order calling on reconsideration and significant reform to this important law and later called for including a repeal of the law in the National Defense Authorization Act. Internet platforms have become a way of giving rise to new voices on a wide range of issues and former new connections. As debates around online content and the moderation decisions of the largest platforms have grown, Section 230 has become a central element of the policy debate and been attacked by critics on both the political left and right. While much has focused on President Trump's eagerness to reform or repeal Section 230, prominent Democrats including President-elect Biden and Speaker of the House Nancy Pelosi have also called for changes to Section 230 that could limit or undo this legal protection for content moderation and user generated content.

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**To Cite This Article:** Huddleston, J. (2020). Section 230 and the U.S Policy Debates Surrounding Content Moderation and Online Speech. *Nordic Journal of Media Management*, 1(4), 575-581. DOI : 10.5278/njmm.2597-0445.6371

Ironically, this tension over content moderation decisions occur at a time when online connections thanks to many innovative platforms are increasingly important to many consumers while in-person connections are limited due to the COVID-19 pandemic. This explosion of user generated content opportunities has given the everyday citizen a voice, resulted in newfound influence and celebrity, and enabled politicians to connect directly with their audience. Some have questioned though, if for all the opportunities provided these platforms themselves have become gatekeepers in a way more akin to traditional media. Others are critical of the role that algorithmic recommendations may play in limiting the reach of certain information or leading users to radicalizing information. While there are broader debates around individual choices, for American companies, Section 230 provides a key liability protection to make content moderation decisions they feel best meet their users needs and has been key in the arrival of a large number of platforms on which users can share their content.

This paper explains the creation of Section 230, the nature of current criticisms of the law, and its continuing role in content moderation, speech, and innovation. It concludes that while users may disagree or have negative experiences with specific content moderation decisions, Section 230 allows a wide range of speech online while also enabling new intermediaries to provide platforms for user-generated content.

### **The History and Purpose of Section 230**

What is now commonly referred to as Section 230 began as a bipartisan effort in United States House of Representatives with the Internet Freedom and Family Empowerment Act, legislation, co-sponsored by Republican Chris Cox and Democrat Ron Wyden. It established that no interactive computer service would be treated as a publisher of user content and also provided legal certainty about their ability to engage in content moderation without the fear that such actions could result in legal liability. The proposal was part of the Communications Decency Act, which itself was a broader part of the Telecommunications Act of 1996. It was signed into law by President Bill Clinton in February 1996. Following legal challenges, the rest of the Communications Decency Act, which had sought to restrict online speech, was struck down as violating the First Amendment, but what is known as Section 230 was found constitutional. Over the years that followed, as various issues regarding user content and content moderation decisions led to lawsuits, the courts interpreted Section 230 as providing a broad liability protection for the content their users posted as well as decisions regarding moderating that content for a range of message boards, social media sites, and other online services. Still, there are a few notable exceptions to content that is not given liability protection by Section 230, including federal criminal actions and intellectual property. This approach recognizes that intermediaries provide users with many different options to connect with individuals, services, and information in ways that do not directly involve the intermediary service in developing such content. It also recognizes that on many content related issues there may be a wide range of acceptable options depending on the platform and its users or audience. The resulting ecosystem has allowed platforms to engage in content moderation without fear that it might result in them being found liable for their users' content for such involvement and allowed platforms to continue to adapt and respond to novel content issues that may arise.

Some critics have suggested that this broad interpretation is more expansive than intended, but this is not what the authors have indicated either during the initial debate or in the years since its passage. Former Representative Chris Cox and now Senator Ron Wyden have been very clear from the initial debate to today about the origins and purpose of Section 230. In a 2020 law review article, Rep. Cox describes the history and intentions of the law. He writes, "Section 230 focused on enabling user-created content by providing clear rules of legal liability for website operators that host it. Platforms that are not involved in content creation were to be protected from liability for content created by third-party users. This focus of Section 230 proceeded directly from our appreciation of what was at stake for the future of the internet" (Cox, 2020).

The authors of Section 230 saw the potential of the internet to be a new, dynamic tool for connection if it could flourish. In formally limiting liability, they provided a legal certainty to overcome potentially disruptive and innovation-detering litigation that had emerged in early court cases against companies such as Prodigy and CompuServe. Still, it is important to recognize that Section 230 is not the anomaly or “gift” to “Big Tech” that it is sometimes made out to be by critics. While early legal cases regarding online message boards and other platforms had arrived at mixed results around liability for user content if the platforms engaged in content moderation, there are also legal precedents for traditional media that distinguished liability for others’ content (Skorup & Huddleston, 2019). For example, U.S. courts had previously found that libraries and newsstands were not liable for content contained in the materials they carry (Skorup & Huddleston, 2019). For more traditional media, the “wire service defense” limited the liability for newspapers and radio stations regarding content generated by wire services or other third-party services (Skorup & Huddleston, 2019). In this way, Section 230 can be seen as an acceleration and clarification that prevented the potentially innovation-detering disruption that could have arisen if courts were merely relying on common law.

### **Criticisms of Section 230**

In the past few years, there have been a growing number of criticisms of Section 230 from both the left and the right. On the right, the most common complaints about Section 230 and content moderation allege that social media platforms and other online entities are abusing the broad permission to over-moderate and so silencing conservative voices. On the left, the complaints allege that because of the protection of Section 230, there is insufficient content moderation for hate speech or misinformation. While these concerns yield divergent policy solutions, both risk violating the First Amendment by inserting the government into private-speech decisions and could make the already difficult task of content moderation even more difficult. In many cases, such proposals misrepresent or misunderstand the intentions or requirements of Section 230 such as that it was intended to protect an infant industry or required neutrality from a platform to earn it.

Some of the loudest critics of Section 230 recently have been conservatives including President Donald Trump. These critics allege that internet platforms are engaging in content moderation to deliberately limit the reach of conservative voices. They often suggest that the purpose behind Section 230 required platforms to make content moderation decisions in a neutral fashion, but the law’s original authors have regularly debunked such claims. For example, in a 2019 interview, Sen. Ron Wyden stated, “You can have a liberal platform; you can have conservative platforms. And the way this is going to come about is not through government but through the marketplace, citizens making choices, people choosing to invest. This is not about neutrality” (Stewart, 2019). Many of the proposed policy changes would result in far more government intrusion with federal agencies serving as arbiters of what constitutes neutral (Harmon, 2019). The result would be the government inserting itself into private speech in a way that is likely to be found unconstitutional and would place new regulatory burdens on private entities’ decisions around content moderation (Szoka, 2020). Other policy changes to require neutrality would result in a policy akin to the “Fairness Doctrine.” The Fairness Doctrine was a previous policy enforced by the Federal Communications Commission (FCC) that theoretically required broadcasters to give equal time both points of view on controversial issues but could be used by administrations to limit the time given to certain viewpoints (Matzko, 2020). Based on the past enforcement of a similar policy, such an approach would likely further limit conservative voices rather than provide them the new opportunities yielded by the internet (Huddleston, 2018).

While many of the criticisms from the right focus on concerns about potential over-moderation, critics of Section 230 on the left have argued that the law does not encourage enough moderation around issues such as hate speech or misinformation. They argue that without the threat of liability, platforms are not properly incentivized to engage in moderation around such issues. These terms are

not clearly defined and are often context dependent, however. Given that the sheer volume of user content platforms must moderate continues to increase (Jenik, 2020), platforms may struggle to deal with the gray areas that could emerge in such categories. Even with improvements in technologies that can enable algorithms to assist in identifying problematic content, the rapid growth of content and the often context-dependent nature of the content inevitably means mistakes may occur. Without Section 230, this could result in silencing legitimate voices along with problematic ones out of an abundance of caution. As the speech in question in such scenarios, even when distasteful, has been found to be protected by the First Amendment, the enforcement of such requirements would require government intrusion into the decisions of private companies and likely be found unconstitutional in many cases (Feeney, 2020). Additionally, as existing carve-outs have shown, removing Section 230 protection even for speech or topics that are often widely agreed upon as distasteful can have unanticipated spillover effects that could impact a wide range of companies and silence other speech in the process. For example, following a law that removed Section 230 protection regarding content that was related to sex trafficking,<sup>1</sup> many websites that were not engaged in such awful practices found themselves forced to make choices to remove legal content out of fear it might lead to risky behavior or misperceptions that could increase their liability. While the concerning website, Backpage.com, was taken down prior to the bill being signed into law, the changes to Section 230 led to litigation against companies including Salesforce and MailChimp, as well as Craigslist removing its personal ads section, among other changes (Huddleston, 2020).

Regardless of where the criticism is coming from, it is also important to recognize that the debate around online content moderation also must take into consideration the First Amendment. In many of the discussions around online content, the content in question, such as a fact-checking label or even hate speech, is protected not by Section 230 but the First Amendment, limiting government regulation in speech. Furthermore, many of the complaints regarding content moderation decisions would have no cause of action for a lawsuit even if Section 230 did not exist, as the platform's decision not to carry certain content would be within its discretion and First Amendment rights (Huddleston, 2020). So while much of the conversation focuses on users' speech, it is important to remember that platforms also have speech rights protected by the First Amendment.

### **The Role of Section 230 in Contemporary Content Moderation**

While there are many benefits to Section 230, this section will focus on a few of the key ways the law continues to benefit users and innovators. First, it solves what is commonly referred to as the "Moderator's Dilemma." Second, it maintains low barriers to entry to that allow new platforms that carrier user-generated content to emerge. As a result of both of these, it has enabled otherwise marginalized communities to connect and for new opportunities for speech that might otherwise have gone unheard.

Without Section 230, platforms would have to be prepared for a potential onslaught of litigation regarding their users' content. While they may be vindicated in court because of their own First Amendment rights or legal precedents regarding distributor liability, they would still have to endure legal uncertainty and likely the costs of such litigation (Engstrom, 2019). This would give rise to a "moderator's dilemma," in which platforms are forced to choose between engaging in no moderation for fear that moderation would increase the likelihood of being found liable or engage extensive moderation and likely silencing or removing legitimate content to diminish the risks of litigation as much as possible. With Section 230, platforms can choose moderation structures that suit their users' needs and new platforms can emerge to serve audiences that they feel are not being served. Section 230 also allows platforms to develop for specific audiences and make content

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<sup>1</sup> Section 230 has never applied to federal crimes and this carveout was largely redundant for the actual concerns about sex trafficking.

moderation decisions that serve that market. This may allow marginalized communities or specific needs to connect online in ways that would be impossible offline. In this regard, policymakers must consider the impact that changes to Section 230 would have on users as well as platforms. (Easley, 2020). When faced with the moderator's dilemma, platforms might choose to avoid social movements or content that could be considered controversial such as the #metoo movement (Goldman, 2020).

Critics on both sides have argued that Section 230 is a special protection for large tech companies such as Facebook and Google. While Section 230 helped provide certainty for companies to safely embrace user-generated content, it impacts a wide range of companies well beyond social media and tech giants. Tech giants who must deal with a tremendous volume of international content may benefit from Section 230 as they encounter the difficulties of content moderation at scale, but Section 230 also provides critical protection for many smaller internet platforms such as review sites and bloggers (Feeney & Duffield, 2020). Because it provides a legal certainty around liability and an important legal shield, Section 230 also reduces the barriers to entry for new platforms. Because of the legal protections, a platform can carry user-generated content without needing to invest in costly legal services. This allows innovators to start in garages and dorm rooms and offer products more cheaply and directly to consumers while focusing on the product rather than potential litigation concerns. It allows services to gain popularity rapidly and innovators to adapt to changing demands and new markets. When considering changes to Section 230, the impact on small and mid-size platforms who are less likely to be able to absorb the costs that such a change would yield must be considered (Huddleston, 2020).

Far from having outgrown its usefulness, Section 230 continues to enable a wide range of innovative services to embrace user-generated content. At a time when there are many differing views on whether there needs to be more or less content moderation, Section 230 provides the necessary legal certainty to allow platforms to make different choices regarding the same content. As many seek to encourage new entrants that might compete with the current tech platforms, Section 230 plays a vital role in providing legal certainty that such platforms will not suffer potentially company-ending consequences as a result of what their users may do or their own content moderation decisions. Even when policymakers or users disagree with those decisions or feel certain platforms have grown "too powerful," providing legal certainty that platforms may engage in content moderation and not find themselves liable for their users' content is critical for allowing new platforms to emerge and provide alternatives to existing giants. The legal certainty provided by Section 230 has allowed speech and innovation to flourish benefiting both the American economy and individuals' opportunities to connect and express themselves. Policymakers and individuals have concerns about some of the information being shared or the ability of platforms to respond to information, however, in any efforts to address these concerns it is important to return to fundamental principles that restrict government involvement in speech and to consider the impact not only on existing giants, but also the ability of new players to emerge.

## **Conclusions**

Section 230 still provides many benefits to platforms of all sizes and to the users who have been able to gain a voice through them. Policymakers concerned about content moderation should consider not only the impact on existing tech giants but how changes to regulation could impact currently emerging platforms and users. Additionally, policymakers must also recognize the First Amendment rights associated with many content moderation decisions and consider that many of the proposed changes could result in unconstitutional government intrusion into speech. While users may disagree with individual content moderation decisions, Section 230 enables new innovators to come up with products that allow users to share their content and that expand the information accessible to all without the fear that a bad choice could end a successful business model that both entrepreneurs and consumers have found beneficial.



This review approaches Section 230 with regards to an American approach to free expression and is based on reviews of the literature. It presumes that existing approaches and precedence stays in place. Additionally, this review is based on existing literature and not new qualitative or quantitative research.

Future research could expand by examining the way different views on the limits of free expression could impact content moderation decisions in the global environment of the internet. Additionally, each specific proposed change has different consequences that deserve their own further examination. More research should also be done in interviews with startups and investors about the role certainty of liability protection impacts decisions to fund a new service that may carry user generated content.

### References

- Cox, C. (2020), *The Origins and Original Intent of Section 230 of the Communications Decency Act*. *University of Richmond Journal of Law & Technology*.
- Easley, B. (2020). *Revising the Law that Let's Platforms Moderate Content Will Silence Marginalized Voices*. Retrieved 2 Dec. 2020 from: <https://slate.com/technology/2020/10/section-230-marginalized-groups-speech.html>.
- Engstrom, E. (2019). *Primer: Value of Section 230*. Retrieved 2 Dec. 2020 from: <https://www.engine.is/news/primer/section230costs>.
- Feeney, M. (2020), *Leave Section 230 Alone*. *Newsweek*. <https://www.newsweek.com/leave-section-230-alone-opinion-1543041>.
- Feeney, M; Duffield, W. (2020). *A Year of Content Moderation and Section 230*. Retrieved 2 Dec. 2020 from: <https://www.cato.org/blog/year-content-moderation-section-230>.
- Goldman, E. (2020). *Section 230 Protects Hyperlinks in #MeToo "Whisper Network" – Comyack v. Giannella*. Retrieved 2 Dec. 2020 from: <https://blog.ericgoldman.org/archives/2020/04/section-230-protects-hyperlinks-in-metoo-whisper-network-comyack-v-giannella.htm>.
- Harmon, E (2019). *Sen. Hawley's "Bias" Bill Would Let the Government Decide Who Speaks*. Retrieved 2 Dec. 2020 from: <https://www.eff.org/deeplinks/2019/06/sen-hawleys-bias-bill-would-let-government-decide-who-speaks>.
- Huddleston, J. (2018). *The Problems with Calls for Social Media Fairness*. Retrieved 2 Dec. 2020 from: <https://techliberation.com/2018/09/06/the-problem-with-calls-for-social-media-fairness/>.
- Huddleston, J (2020). *Content Moderation, Section 230, and the First Amendment*. Retrieved 2 Dec. 2020 from: <https://www.americanactionforum.org/insight/content-moderation-section-230-and-the-first-amendment/>.
- Huddleston, J (2020). *Section 230 as Pro-Competition Policy*. Retrieved 2 Dec. 2020 from: <https://www.americanactionforum.org/insight/section-230-as-a-pro-competition-policy/>.
- Jenik, C. (2020). *A Minute on the Internet in 2020*. Retrieved 2 Dec. 2020 from: <https://www.statista.com/chart/17518>

Matzko, P. (2020). *The Radio Right: How a Band of Broadcasters Took on the Federal Government and Built the Modern Conservative Movement*.

Skorup, B; Huddleston, J. (2020), The Erosion of Publisher Liability in American Law, Section 230, and the Future of Online Curation. *Oklahoma Law Review*, 72(3).

Stewart, E. (2019). Ron Wyden wrote the law that built the internet. He still stands by it – and everything it’s brought with it. Retrieved 2 Dec. 2020 from: <https://www.vox.com>

Szoka, B. (2020). The First Amendment Bars Regulating Political Neutrality, Even Via Section 230. Retrieved 2 Dec. 2020 from: <https://www.techdirt.com/articles/20200724/11372744970/first-amendment-bars-regulating-political-neutrality-even-via-section-230.shtml>.



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### **Other:**

Received: 15 Nov 2020, Accepted: 28 Nov 2020

**Funding:** This research received no external funding.

**Acknowledgments:** Roslyn Layton for introductions that helped facilitate this opportunity.

**Conflicts of Interest:** The author declares no conflict of interest.