

## NOTE

### COMPELLING CODE: A FIRST AMENDMENT ARGUMENT AGAINST REQUIRING POLITICAL NEUTRALITY IN ONLINE CONTENT MODERATION

Lily A. Coad†

*The Internet's most important law is under attack. Section 230, the statute that provides tech companies with legal immunity from liability for content shared by their users, has recently found its way into the spotlight, becoming one of today's most hotly debated topics. The short but mighty provision ensures that tech companies can engage in socially beneficial content moderation (such as removing hate speech or flagging posts containing misinformation) without risking enormous liability for any posts that slip through the cracks. Without it, companies would be faced with the impossible task of screening every post, tweet, and comment for potential liability.*

*In spite of the essential role Section 230 plays in the modern Internet, lawmakers from across the political spectrum have condemned the statute—and the tech giants that it protects. While Democrats say social media companies should be held responsible for failing to quash the misinformation and radicalization on their platforms, many Republicans believe that social media is biased against conservative views.*

*In 2019, Senator Josh Hawley (R-Mo.) introduced a bill that exemplifies conservatives' criticisms of big tech and Section 230. The Ending Support for Internet Censorship Act seeks to eradicate the alleged "anti-conservative bias" on social media platforms by requiring large tech companies to maintain politically neutral content moderation algorithms and*

---

† B.A., Duke University, 2018; J.D., Cornell Law School, 2021; Publishing Editor, *Cornell Law Review*, Vol. 106. I am incredibly grateful to Professor Nelson Tebbe for his support and advice in the early stages of this Note, to Professor Michael Dorf for his thoughtful feedback, and to Tyler Valeska for challenging my thinking and helping me keep up with the ever-changing Section 230 landscape. Thank you to everyone who indulged me in conversations about Section 230 and the First Amendment over the course of the past year. A special thank you to my mom for making me the writer I am and the lawyer I will become. Finally, thank you to my fellow *Cornell Law Review* editors for their hard work in preparing this Note for publication.

*practices. This Note argues that requiring tech companies to maintain politically neutral content moderation algorithms is a form of compelled speech and is therefore presumptively unconstitutional under the First Amendment. Further, it argues that Senator Hawley’s bill cannot survive the applicable standard of strict scrutiny because eliminating alleged political bias by social media companies is not a compelling government interest, and, even if it were, the bill is not narrowly tailored to serving that interest.*

*With so many lawmakers calling for greater regulation of big tech, it is imperative now more than ever to defend the First Amendment rights of tech companies to their content moderation algorithms and to emphasize the importance of Section 230 to the Internet and its continued growth.*

INTRODUCTION . . . . . 458

I. THE PREQUEL: PASSING SECTION 230 . . . . . 468

II. AN IN-DEPTH LOOK AT THE ENDING SUPPORT FOR INTERNET CENSORSHIP ACT . . . . . 472

    A. Senator Hawley’s Political Neutrality Requirement . . . . . 472

    B. Immediate Backlash Against a Political Neutrality Requirement . . . . . 476

    C. What Does the Bill Mean, and Why Is It Worth Talking About? . . . . . 477

III. MORE THAN JUST A BAD IDEA: REJECTING A POLITICAL NEUTRALITY REQUIREMENT AS UNCONSTITUTIONAL . . . . . 483

    A. Yes, Content Moderation Algorithms Are Speech . . . . . 484

    B. Compelling the Message of Neutrality . . . . . 491

    C. Senator Hawley’s Bill Cannot Survive Strict Scrutiny . . . . . 492

    D. Unconstitutionality . . . and Beyond . . . . . 496

CONCLUSION . . . . . 498

INTRODUCTION

The Internet’s most important law is under attack from all angles. Even in an era when bridging the gap across a particularly polarized political aisle seems synonymous with “impossible,” support for the regulation of powerful technology companies has risen to the status of a bipartisan cause. Democrats and Republicans alike have been calling for greater accountability on the part of “Big Tech.”<sup>1</sup> Currently, large

---

<sup>1</sup> Both Senator Ted Cruz (R-Tex.) and House Speaker Nancy Pelosi (D-Cal.), among others, have called for stricter regulation of “big tech.” See, e.g., Emily

technology companies, including social media companies like Twitter and Facebook, generally cannot be held liable for their users' speech.<sup>2</sup> However, many Democrats have begun to argue that tech companies should be held responsible for the radicalization and misinformation that occurs on their platforms, while many Republicans claim that social media is biased against conservative voices.<sup>3</sup> No matter which side of the aisle these calls for change come from, they are misguided. Advocates for holding large technology companies liable for users' speech gravely underestimate the value of the immunity these companies currently enjoy. Without it, we jeopardize the continued growth of the internet industry and the robustness of the online marketplace of ideas.

At the center of the "Big Tech" debate is a single, twenty-six-word statute that protects "interactive computer service" providers, such as Google, Facebook, and Yelp, from liability for user-generated content.<sup>4</sup> The statute, Section 230 of the Communications Decency Act of 1996, states that "[n]o 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," even if the company voluntarily screens for "objectionable" content.<sup>5</sup> Therefore, while a traditional newspaper can be held liable for the defamatory speech it publishes,<sup>6</sup> Facebook cannot be held liable for a defamatory post by one of its users. As long as Facebook is merely the host of content created by others (its users) and does not have a role in creating the content, it is free and clear of liability.<sup>7</sup>

---

Birnbaum, *Pelosi Puts Tech on Notice with Warning of 'New Era' in Regulation*, HILL (Apr. 12, 2019, 1:48 PM), <https://thehill.com/policy/technology/438652-pelosi-warns-its-a-new-era-for-regulating-big-tech> [<https://perma.cc/ZDG8-UTHH>]; Madeline Osburn, *More Lawmakers Lean Toward Revoking Section 230 to Regulate Big Tech Companies*, FEDERALIST (July 11, 2019), <https://thefederalist.com/2019/07/11/lawmakers-weigh-revoking-section-230-regulate-big-tech-companies/> [<https://perma.cc/HMQ4-BQYM>]; Sen. Cruz, *Latest Twitter Bias Undermines Need for Big Tech Transparency*, CRUZ.SENATE.GOV (Aug. 16, 2019), [https://www.cruz.senate.gov/?p=press\\_release&id=4630](https://www.cruz.senate.gov/?p=press_release&id=4630) [<https://perma.cc/FC6C-85JT>] [hereinafter *Sen. Cruz: Latest Twitter Bias*].

<sup>2</sup> See 47 U.S.C. § 230 (2018).

<sup>3</sup> See *infra* notes 15–28 and accompanying text.

<sup>4</sup> See 47 U.S.C. § 230(c)(1); see also *id.* §§ 230(c)(2), (f)(2) (defining "interactive computer service").

<sup>5</sup> *Id.* §§ 230(c)(1), 230(c)(2).

<sup>6</sup> See Jeff Kosseff, *Defending Section 230: The Value of Intermediary Immunity*, 15 J. TECH. L. & POL'Y 123, 132 (2010) [hereinafter Kosseff, *Defending Section 230*].

<sup>7</sup> See *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008) (holding that Section 230 immunity does not

In both its language and purpose, Section 230 is highly protective of interactive computer service providers.<sup>8</sup> As a result, the statute is responsible for the development and continued survival of today's tech companies. In drafting Section 230 during the 1990s, Senator Ron Wyden (D-Or.) (then, Representative Wyden) and Representative Chris Cox (R-Cal.) set out to address the dark side of the Internet while promoting its beneficial aspects.<sup>9</sup> Together, they constructed Section 230 in an effort to simultaneously “spur unfettered growth of the Internet” and encourage companies to voluntarily moderate objectionable content.<sup>10</sup>

Still standing today, Section 230 allows tech companies to regulate content on their platforms in ways that the government, constrained by the First Amendment, may not.<sup>11</sup> For example, Facebook's “Community Standards” prohibit hate speech;<sup>12</sup> meanwhile, hate speech is protected under the First Amendment.<sup>13</sup> However, Section 230 neither requires companies to regulate content nor punishes companies that choose not to do so.<sup>14</sup> Content moderation policies and decisions regarding whether or not to take down content are entirely in the companies' hands.

Recently, a staggering spectrum of lawmakers, from Ted Cruz to Elizabeth Warren, have criticized Section 230 as a problematic legal shield bestowed upon undeserving tech com-

---

apply to an interactive computer service provider that materially contributes to the “alleged unlawfulness” of the content). Of course, someone who has been harmed by content posted on a platform may still pursue legal action against the individual who shared that content.

<sup>8</sup> See *infra* Part I.

<sup>9</sup> See Kosseff, *Defending Section 230*, *supra* note 6, at 130; 47 U.S.C. § 230(b) (“It is the policy of the United States . . . to promote the continued development of the Internet” while “remov[ing] disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material.”). In a 2019 interview, Senator Wyden emphasized the valuable role Section 230 plays in the development of the Internet, explaining, “My brief has never been for the big guy. It's always been about the startup, it's always been about innovation, the inventor, and competition. That is still my concern today.” Emily Stewart, *Ron Wyden Wrote the Law that Built the Internet. He Still Stands by It—and Everything It's Brought with It*, VOX: RECODE (May 16, 2019, 10:50 AM), <https://www.vox.com/recode/2019/5/16/18626779/ron-wyden-section-230-facebook-regulations-neutrality> [<https://perma.cc/7E7K-56W5>].

<sup>10</sup> Kosseff, *Defending Section 230*, *supra* note 6, at 130–31.

<sup>11</sup> See U.S. CONST. amend. I.

<sup>12</sup> *Hate Speech*, FACEBOOK: COMMUNITY STANDARDS, [https://www.facebook.com/communitystandards/hate\\_speech](https://www.facebook.com/communitystandards/hate_speech) [<https://perma.cc/RXA3-75KB>] (last visited June 4, 2020) (listing hate speech under “Objectionable Content”).

<sup>13</sup> See *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 391 (1992).

<sup>14</sup> See 47 U.S.C. § 230.

panies.<sup>15</sup> In 2019, House Speaker Nancy Pelosi called Section 230 a “gift” to tech companies and stated that, “for the privilege of 230, there has to be a bigger sense of responsibility on it. And it is not out of the question that that could be removed.”<sup>16</sup> Speaker Pelosi is hardly the lone Democratic voice calling for regulation of big tech. Ahead of the 2020 presidential primary election, several Democratic candidates questioned the future of the statute, including Senator Amy Klobuchar (D-Minn.),<sup>17</sup>

---

<sup>15</sup> See, e.g., Zak Doffman, *U.S. Senator Proposes Law to Remove Big Tech’s Legal Immunity Over User Content*, FORBES (June 19, 2019, 3:22 AM), <https://www.forbes.com/sites/zakdoffman/2019/06/19/facebook-and-google-under-threat-from-proposed-u-s-law-to-end-content-immunity/#55fcb69b385f> [<https://perma.cc/CL58-UN5K>].

<sup>16</sup> See Birnbaum, *supra* note 1; see also Eric Johnson, *Silicon Valley’s Self-Regulating Days ‘Probably Should Be’ Over, Nancy Pelosi Says*, VOX: RECODE (Apr. 11, 2019, 6:20 PM), <https://www.vox.com/podcasts/2019/4/11/18306834/nancy-pelosi-speaker-house-tech-regulation-antitrust-230-immunity-kara-swisher-decode-podcast> [<https://perma.cc/M78P-9KKH>]; Cristiano Lima, *How a Widening Political Rift Over Online Liability Is Splitting Washington*, POLITICO (July 9, 2019, 5:04 AM), <https://www.politico.com/story/2019/07/09/online-industry-immunity-section-230-1552241> [<https://perma.cc/4B48-9U3S>].

<sup>17</sup> See Elizabeth Nolan Brown, *Section 230 Is the Internet’s First Amendment. Now Both Republicans and Democrats Want to Take It Away.*, REASON (July 29, 2019, 8:01 AM), <https://reason.com/2019/07/29/section-230-is-the-internets-first-amendment-now-both-republicans-and-democrats-want-to-take-it-away/> [<https://perma.cc/T8AY-EHQA>] (stating that Senator Amy Klobuchar has called for holding social media platforms accountable for hate speech on their sites); Eric Johnson, *Sen. Amy Klobuchar, 2020 Presidential Candidate, Explains How She Would Regulate Big Tech if She Wins*, VOX: RECODE (Mar. 16, 2019, 10:00 AM), <https://www.vox.com/podcasts/2019/3/16/18267880/amy-klobuchar-2020-democratic-president-candidate-antitrust-privacy-kara-swisher-decode-podcast-sxsw> [<https://perma.cc/DQP2-K2QT>] (interviewing Senator Klobuchar, who said Section 230 “is something else that we should definitely look at as we look at how we can create more accountability”).

Andrew Yang,<sup>18</sup> and the election's ultimate victors, President Joe Biden<sup>19</sup> and Vice President Kamala Harris.<sup>20</sup>

Across the aisle, Republican politicians—including former President Donald J. Trump—have similarly advocated for cracking down on big tech.<sup>21</sup> Senator Ted Cruz (R-Tex.), who has been described as “one of the Senate’s loudest big tech critics,” has argued that “[b]ig tech’s power, bias, and censorship is profoundly dangerous, and it is a growing threat to our democracy.”<sup>22</sup> In May 2020, Donald Trump signed an execu-

---

<sup>18</sup> Cristiano Lima, *Yang, Gabbard Take Aim at Tech’s Legal Shield*, POLITICO (Nov. 14, 2019, 12:45 PM), <https://www.politico.com/news/2019/11/14/yang-gabbard-take-aim-at-techs-legal-shield-070925> [https://perma.cc/LQ8S-ZEMY] (describing Andrew Yang’s plan to “amend the Communications Decency Act to reflect the reality of the 21st century—that large tech companies are using tools to act as publishers without any of the responsibility”).

<sup>19</sup> Eric Boehm, *Joe Biden Has Officially Joined the Misguided Crusade Against Online Free Speech*, REASON (Nov. 13, 2019, 3:35 PM), <https://reason.com/2019/11/13/joe-biden-has-officially-joined-the-misguided-crusade-against-online-free-speech/> [https://perma.cc/GZH9-XK6B] (quoting Biden, who said, “I just think it’s a little out of hand . . . [a]nd I, for one, think we should be considering taking away the exception that they cannot be sued for knowingly . . . promoting something that’s not true”); Rachel Lerman, *Social Media Liability Law Is Likely to Be Reviewed Under Biden*, Wash. Post (Jan. 18, 2021, 8:00 AM), <https://www.washingtonpost.com/politics/2021/01/18/biden-section-230/> [https://perma.cc/9U9J-BBGJ].

<sup>20</sup> See Emily Birnbaum, *Harris Says Her Administration Would Hold Social Media Platforms ‘Accountable’ for ‘Hate’*, HILL (May 6, 2019, 9:52 AM), <https://thehill.com/policy/technology/442261-harris-says-her-administration-would-hold-social-media-platforms> [https://perma.cc/G9LJ-3K8W] (noting that, during the course of her presidential campaign, then-Senator Kamala Harris (D-Cal.) said, “We will hold social media platforms accountable for the hate infiltrating their platforms”); Brown, *supra* note 17.

<sup>21</sup> See Emily Cochrane, *Trump Accuses Social Media Firms of Discrimination Against Conservatives*, N.Y. TIMES (Aug. 18, 2018), <https://www.nytimes.com/2018/08/18/us/politics/trump-social-media-conservatives.html> [https://perma.cc/4JZM-CSDQ]; Margaret Harding McGill, Cristiano Lima & Steven Overly, *Trump Pushes Government Action Against ‘Terrible Bias’ at Social Media Summit*, POLITICO (July 11, 2019, 6:56 PM), <https://www.politico.com/story/2019/07/11/anti-tech-bill-sponsor-white-house-social-media-summit-1586902> [https://perma.cc/Q449-QJSK]; Stephanie Murray & Cristiano Lima, *Trump Accuses Social Media Giants of ‘Silencing Millions of People’*, POLITICO (Aug. 24, 2018, 8:30 AM), <https://www.politico.com/story/2018/08/24/donald-trump-social-media-censorship-795381> [https://perma.cc/CL8Q-EZXT] (“President Donald Trump accused social media platforms of ‘silencing millions of people’ in a tweet on Friday, again rebuking tech companies over their content moderation decisions.”); see also Jon Kyl, *Why Conservatives Don’t Trust Facebook*, WALL ST. J. (Aug. 20, 2019, 10:00 AM), <https://www.wsj.com/articles/why-conservatives-dont-trust-facebook-1156630960> [https://perma.cc/Z85X-NSCC] (finding, in a survey of conservative Facebook users, that conservatives believe Facebook’s algorithms are biased against their viewpoints).

<sup>22</sup> See Sean Moran, *Exclusive—Ted Cruz: Big Tech Is a ‘Growing Threat to Our Democracy’*, BREITBART (Nov. 7, 2019), <https://www.breitbart.com/politics/2019/11/07/exclusive-ted-cruz-big-tech-is-a-growing-threat-to-our-democracy/>

tive order seeking to prevent “online censorship” and calling on the FCC and FTC to clarify the scope of and scale back Section 230 protection.<sup>23</sup> Although some legal experts have called the order “a half-baked effort that will have few legal effects,”<sup>24</sup> “likely unconstitutional,”<sup>25</sup> “not enforceable,”<sup>26</sup> and “futile,”<sup>27</sup> it represents a growing tide of frustration with and opposition to Section 230. Even Justice Clarence Thomas has urged the Supreme Court to reconsider the scope of Section 230, arguing that courts have interpreted the provision to confer far greater immunity than it requires.<sup>28</sup>

---

[<https://perma.cc/9X3D-BXSN>]; see also *Sen. Cruz: Latest Twitter Bias*, *supra* note 1.

<sup>23</sup> Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020). The order was a direct response to Twitter’s unprecedented decision to flag two of Donald Trump’s tweets about mail-in ballots during the 2020 presidential election as “potentially misleading,” alongside a link to “[g]et the facts about mail-in ballots.” Brian Fung, *Twitter Labeled Trump Tweets with a Fact Check for the First Time*, CNN: BUS. (May 27, 2020, 4:39 AM), <https://www.cnn.com/2020/05/26/tech/twitter-trump-fact-check/index.html> [<https://perma.cc/BC9Z-JXP6>]. For further discussion of the executive order, see *infra* subparts II.C and III.C.

<sup>24</sup> Jon Swartz, *Trump Executive Order to Punish Social-Media Platforms is Largely Toothless, Legal Experts Say*, MARKETWATCH (May 29, 2020, 12:35 PM), <https://www.marketwatch.com/story/trump-executive-order-to-punish-social-media-platforms-is-largely-toothless-legal-experts-say-2020-05-28> [<https://perma.cc/4F3C-33JX>].

<sup>25</sup> *Id.* The Center for Democracy and Technology and voting rights organizations brought lawsuits challenging the order under the First Amendment. See Kate Conger, *Lawsuit Says Trump’s Social Media Crackdown Violates Free Speech*, N.Y. TIMES (June 2, 2020), <https://www.nytimes.com/2020/06/02/technology/trump-twitter-free-speech-lawsuit.html> [<https://perma.cc/QAH2-CWVL>]; *Voter Advocacy Orgs Sue Trump Administration for Executive Order Threatening Social Media Censorship*, ELECTRONIC FRONTIER FOUND. (Aug. 27, 2020), <https://www.eff.org/press/releases/voter-advocacy-orgs-sue-trump-administration-executive-order-threatening-social-media> [<https://perma.cc/D6VZ-KUC>].

<sup>26</sup> Shirin Ghaffary, *Trump’s Executive Order on Social Media is Legally Unenforceable, Experts Say*, VOX: RECODE (May 28, 2020, 8:05 PM), <https://www.vox.com/recode/2020/5/28/21273878/trump-executive-order-twitter-social-media-section-230-free-speech-implications> [<https://perma.cc/7DTF-MW2F>].

<sup>27</sup> John Bowers, *Trump’s Executive Order Is the Most Futile Attack on 230 Yet*, WIRED (May 30, 2020, 9:00 AM), <https://www.wired.com/story/opinion-trumps-executive-order-is-the-most-futile-attack-on-230-yet/> [<https://perma.cc/YGA5-WNPT>].

<sup>28</sup> See generally *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13 (2020) (Thomas, J., statement respecting the denial of certiorari); see also Mike Godwin, *Clarence Thomas Is Begging Someone to Sue Over Conservatives’ Most-Hated Internet Law*, SLATE (Oct. 16, 2020, 3:11 PM), <https://slate.com/technology/2020/10/clarence-thomas-section-230-cda-content-moderation.html> [<https://perma.cc/Z3SC-YYZT>] (analyzing Justice Thomas’s statement). In October 2020, the Supreme Court declined to hear a case regarding the proper scope of Section 230. *Malwarebytes, Inc.*, 141 S. Ct. 13. Although Justice Thomas agreed with the Court’s decision, he encouraged the Court to reexamine the statute in “an appropriate case.” *Id.* at 14.

Given the sheer number of lawmakers who have criticized the existing strong protections for tech companies, some kind of legislative action to amend (or even completely dismantle) Section 230 may seem inevitable. The presence of hate speech online, the frightening uptick in online radicalization and mass shootings,<sup>29</sup> and social media's role in the spread of misinformation surrounding events like the 2016 and 2020 elections and COVID-19<sup>30</sup> have all cued frustrations that large tech companies, which seem to run the world, appear to be beyond the reach of the law.

---

<sup>29</sup> See Daniela Hernandez & Parmy Olson, *Isolation and Social Media Combine to Radicalize Violent Offenders*, WALL ST. J. (Aug. 5, 2019, 5:44 PM), <https://www.wsj.com/articles/isolation-and-social-media-combine-to-radicalize-violent-offenders-11565041473> [<https://perma.cc/W7KR-MSYH>]; Charlie Warzel, *Mass Shootings Have Become a Sickening Meme*, N.Y. TIMES (Apr. 28, 2019), <https://www.nytimes.com/2019/04/28/opinion/poway-synagogue-shooting-meme.html?searchResultPosition=2> [<https://perma.cc/2R6E-HECT>]; see also *Number of Mass Shootings in the United States Between 1982 and February 2020*, STATISTICA (Nov. 3, 2020), <https://www.statista.com/statistics/811487/number-of-mass-shootings-in-the-us/> [<https://perma.cc/FE3W-BPTZ>] (showing an increase in recorded mass shootings since 1982). For an example of an anti-Section-230 effort concerned primarily with the incidence of online radicalization and hate speech (albeit a likely unconstitutional one), see Emily Birnbaum, *O'Rourke Proposes Holding Tech Platforms Accountable for Hate Speech*, HILL (Aug. 16, 2019, 2:28 PM), <https://thehill.com/policy/technology/457729-orourke-proposes-holding-tech-platforms-accountable-for-hate-speech> [<https://perma.cc/E3XL-BY8T>] (explaining that, in the wake of a mass shooting in his hometown of El Paso, Texas, then-presidential candidate Senator Beto O'Rourke (D-Tex.) proposed "remov[ing] Section 230 protections for platforms that do not make an effort to create and uphold policies against hate speech").

<sup>30</sup> See Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211, 212 (2017) ("Recent evidence [(as of Spring 2017)] shows that: 1) 62 percent of US adults get news on social media; 2) the most popular fake news stories were more widely shared on Facebook than the most popular mainstream news stories; 3) many people who see fake news stories report that they believe them; and 4) the most discussed fake news stories tended to favor Donald Trump over Hillary Clinton." (internal citations omitted)); Catherine Sanz, *Normalization of Vaccine Misinformation on Social Media Amid COVID 'a Huge Problem'*, ABC NEWS (Dec. 10, 2020, 6:00 AM), <https://abcnews.go.com/Health/normalization-vaccine-misinformation-social-media-amid-covid-huge/story?id=74585753> [<https://perma.cc/AJ2Y-R6R3>]. A recent national survey concluded that people who get their news from social media "are more likely to believe misinformation about coronavirus conspiracies, risk factors and preventative treatments." Stephanie Kulke, *Social Media Contributes to Misinformation About COVID-19*, NORTHWESTERN NOW (Sept. 23, 2020), <https://news.northwestern.edu/stories/2020/09/social-media-contributes-to-misinformation-about-covid-19/> [<https://perma.cc/3S3G-28CZ>]; MATTHEW A. BAUM ET AL., THE STATE OF THE NATION: A 50-STATE COVID-19 SURVEY — REPORT #14: MISINFORMATION AND VACCINE ACCEPTANCE, COVID CONSORTIUM FOR UNDERSTANDING THE PUBLIC'S POLICY PREFERENCES ACROSS STATES (2020), <http://www.kateto.net/covid19/COVID19%20CONSORTIUM%20REPORT%2014%20MISINFO%20SEP%202020.pdf> [<https://perma.cc/TWK4-HRCP>].



Indeed, Congress has already taken action to amend Section 230 by enacting the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA).<sup>31</sup> FOSTA marks an effort to combat sex trafficking online, particularly on online personals sites like Backpage.com.<sup>32</sup> “The law creates an exception to Section 230 that means platforms would be responsible for third-party content related to sex trafficking or conduct that ‘promotes or facilitates prostitution.’”<sup>33</sup> Although FOSTA was met with little contention in Congress<sup>34</sup> and has many supporters,<sup>35</sup> others, including those in the sex worker community, have expressed concern that the law will actually make sex workers less safe.<sup>36</sup> Some, including the Electronic Frontier Foundation, have called FOSTA “a win for censorship” that “does nothing to fight sex traffickers.”<sup>37</sup> Concerns regarding the potential chilling effect of the law immediately became a

---

<sup>31</sup> See Pub. L. No. 115-164, 132 Stat. 1253 (2018). For a full explanation of FOSTA’s history, see Eric Goldman, *The Complicated Story of FOSTA and Section 230*, 17 FIRST AMEND. L. REV. 279, 280–84 (2019).

<sup>32</sup> See Goldman, *supra* note 31, at 280–83; 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> [https://perma.cc/H4SR-YQ9Z]; Emily Stewart, *The Next Big Battle over Internet Freedom Is Here*, VOX (Apr. 23, 2018, 12:20 PM) <https://www.vox.com/policy-and-politics/2018/4/23/17237640/fosta-sesta-section-230-internet-freedom> [https://perma.cc/WHT5-BDJV]; see also Lura Chamberlain, Note, *FOSTA: A Hostile Law with a Human Cost*, 87 FORDHAM L. REV. 2171, 2189–90 (2019) (explaining that “Backpage.com had long been viewed as an internet scourge by many anti-trafficking and anti-sex-work advocates alike, who criticized the website’s complicity, if not active role, in operating as a clearinghouse for sexual advertisements, some of which featured minors and trafficked adults”).

<sup>33</sup> Stewart, *supra* note 32.

<sup>34</sup> Only Senators Wyden, who cowrote Section 230, and Rand Paul (R-Ky.) voted against the bill in the Senate. *Id.*

<sup>35</sup> See Romano, *supra* note 32.

<sup>36</sup> See, e.g., Amanda Arnold, *Here’s Whats Wrong with the So-Called Anti-Sex Trafficking Bill*, CUT (Mar. 20, 2018), <https://www.thecut.com/2018/03/sesta-anti-sex-trafficking-bill-fosta.html> [https://perma.cc/78W9-WM3M] (noting that many sex workers and advocates for trafficking victims have spoken out against FOSTA); Chamberlain, *supra* note 32, at 2175 (arguing that FOSTA “egregiously” missed the mark because it has not led to a decrease in sex trafficking and has created difficulties for law enforcement); Stewart, *supra* note 32 (“Some sex workers say it will actually put them in further danger and push illicit activity into even deeper corners of the internet, and free internet proponents worry that platforms might censor or pull content preemptively just to avoid risk.”). For a comprehensive study of the effects of FOSTA on sex workers, see generally HACKING//HUSTLING, ERASED: THE IMPACT OF FOSTA-SESTA (2020), <https://hackinghustling.org/wp-content/uploads/2020/01/HackingHustling-Erased.pdf> [https://perma.cc/69BE-MU49].

<sup>37</sup> Joe Mullin, *House Vote on FOSTA Is a Win for Censorship*, ELECTRONIC FRONTIER FOUND. (Feb. 27, 2018), <https://www.eff.org/deeplinks/2018/02/house-vote-fosta-win-censorship> [https://perma.cc/8RTS-FJAB] (“Facing huge

reality: in response to FOSTA, internet companies like Craigslist and Reddit took down sections of their websites not “because these sections . . . promoted prostitution, but rather because policing them against the possibility that someone else might advertise illegal services was an impossible task.”<sup>38</sup>

Lawmakers’ appetite for weakening Section 230 was hardly satiated by the passage of FOSTA. For many, regulation of big tech has a long way to go.<sup>39</sup> This Note examines one proposal to cut back on Section 230 immunity: The Ending Support for Internet Censorship Act.<sup>40</sup> Senator Josh Hawley (R-Mo.) proposed The Ending Support for Internet Censorship Act on June 19, 2019,<sup>41</sup> aiming to eradicate what several Republican politicians have called “anti-conservative bias” allegedly embedded in tech companies’ content moderation policies.<sup>42</sup> According to

---

new liabilities, the law will undoubtedly lead to platforms policing more user speech.”).

<sup>38</sup> Hannah Cox, *What Is Section 230 and Why Do Trump and His Allies Want to Repeal It?*, FOUND. FOR ECON. EDUC. (Dec. 26, 2020), <https://fee.org/articles/what-is-section-230-and-why-do-trump-and-his-allies-want-to-repeal-it/> [<https://perma.cc/2PD6-TSEB>]; see also Merrit Kennedy, *Craigslist Shuts Down Personals Section After Congress Passes Bill on Trafficking*, NPR (Mar. 23, 2018, 3:52 PM), <https://www.npr.org/sections/thetwo-way/2018/03/23/596460672/craigslist-shuts-down-personals-section-after-congress-passes-bill-on-trafficking> [<https://perma.cc/H4AT-DVGR>] (“‘Any tool or service can be misused,’ Craigslist said. ‘We can’t take such risk without jeopardizing all our other services, so we are regretfully taking craigslist personals offline. Hopefully we can bring them back some day.’”).

<sup>39</sup> See *supra* notes 15–23, 28 and accompanying text.

<sup>40</sup> S. 1914, 116th Cong. (2019).

<sup>41</sup> *Id.*; *Senator Hawley Introduces Legislation to Amend Section 230 Immunity for Big Tech Companies*, HAWLEY.SENATE.GOV (June 19, 2019), <https://www.hawley.senate.gov/senator-hawley-introduces-legislation-amend-section-230-immunity-big-tech-companies> [<https://perma.cc/QM99-JLDC>] [hereinafter *Senator Hawley Introduces Legislation*].

<sup>42</sup> See, e.g., Cochrane, *supra* note 21 (“‘Social Media is totally discriminating against Republican/Conservative voices,’ Mr. Trump wrote on Twitter, saying that ‘censorship is a very dangerous thing.’”); Mathew Ingram, *The Myth of Social Media Anti-Conservative Bias Refuses to Die*, COLUM. JOURNALISM REV. (Aug. 8, 2019), [https://www.cjr.org/the\\_media\\_today/platform-bias.php](https://www.cjr.org/the_media_today/platform-bias.php) [<https://perma.cc/E6G5-ZEYX>] (reporting that the White House “circulat[ed] drafts of a proposed executive order [in 2019] that would address allegations of anti-conservative bias by social media companies”); McGill, Lima & Overly, *supra* note 21 (including statements by Donald Trump (“We have terrible bias. We have censorship like no one has any understanding, nobody can believe.”) and Senator Hawley (“Google, Facebook, Twitter, they’ve gotten these special deals from government. They’ve gotten a special giveaway from government. They’re treated unlike anybody else . . . . If they want to keep their special deal here’s the bargain. They have to quit discriminating against conservatives.”) on the alleged anti-conservative bias online); Murray & Lima, *supra* note 21 (“President Donald Trump accused social media platforms of ‘silencing millions of people’ in a tweet on Friday, again rebuking tech companies over their content moderation decisions.”); *Senator Hawley Calls for Third-Party Audit of Twitter*, HAWLEY.SENATE.GOV (Apr. 3,

Senator Hawley, there is “a growing list of evidence that shows big tech companies making editorial decisions to censor viewpoints they disagree with.”<sup>43</sup> The Ending Support for Internet Censorship Act is currently one of the most concrete and far-reaching efforts to uproot Section 230 immunity. Specifically, the “legislation removes the immunity big tech companies receive under Section 230 unless they submit to an external audit that proves by clear and convincing evidence that their algorithms and content-removal practices are *politically neutral*.”<sup>44</sup>

This Note argues that requiring tech companies to maintain “politically neutral” content moderation algorithms and practices is unconstitutional under the First Amendment. Part I provides a brief overview of Section 230, including its history, substance, purpose, and enduring significance. Part II examines the language and implications of the Ending Support for Internet Censorship Act. Part III analyzes the constitutionality of the bill, arguing first that its imposition of a political neutrality requirement on big tech companies’ content moderation policies and algorithms amounts to compelled speech, and second that the bill cannot survive the applicable standard of strict scrutiny. Part III is followed by a Conclusion.

---

2019), <https://www.hawley.senate.gov/senator-hawley-calls-third-party-audit-twitter> [<https://perma.cc/D7B4-ZRWK>] (accusing Twitter of “repeatedly target[ing] pro-life organizations” after it suspended an “account affiliated with [a] pro-life film”); *Senators Hawley, Cruz, Cramer, and Braun Blast Facebook for Censoring Pro-Life Content*, HAWLEY.SENATE.GOV (Sept. 11, 2019), <https://www.hawley.senate.gov/senators-hawley-cruz-cramer-and-braun-blast-facebook-censoring-pro-life-content> [<https://perma.cc/E6ET-RK54>] [hereinafter *Censoring Pro-Life Content*] (explaining that Senator Hawley, with others, “sent a letter to Facebook CEO Mark Zuckerberg criticizing [Facebook’s] . . . censorship of [a] pro-life organization”); Mark Joseph Stern, *Josh Hawley Wants to Stop Internet Censorship by Censoring the Internet*, SLATE (June 19, 2019, 5:42 PM), <https://slate.com/technology/2019/06/josh-hawley-section-230-cda-internet-speech-conservatives.html> [<https://perma.cc/2S8M-JLVS>] (“Hawley believes [the alleged anticonservative bias] is so rampant that nothing less than federal legislation can end it.”); see also Donald J. Trump (@realDonaldTrump), TWITTER (May 3, 2019, 6:55 PM), <https://twitter.com/realdonaldtrump/status/1124447302544965634?lang=en> [<https://perma.cc/3JNA-CM2B>] (“I am continuing to monitor the censorship of AMERICAN CITIZENS on social media platforms. This is the United States of America—and we have what’s known as FREEDOM OF SPEECH! We are monitoring and watching, closely!”); Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 18, 2018, 7:23 AM), <https://twitter.com/realdonaldtrump/status/1030777074959757313> [<https://perma.cc/YKA6-AEZW>] (“Social Media is totally discriminating against Republican/Conservative voices. Speaking loudly and clearly for the Trump Administration, we won’t let that happen. They are closing down the opinions of many people on the RIGHT, while at the same time doing nothing to othersFalse . . .”).

<sup>43</sup> *Senator Hawley Introduces Legislation*, *supra* note 41.

<sup>44</sup> *Senator Hawley Introduces Legislation*, *supra* note 41 (emphasis added).

## I

## THE PREQUEL: PASSING SECTION 230

In 1996, Mark Zuckerberg was twelve years old and just starting to use programming computers at his middle school.<sup>45</sup> The Internet was dominated by companies like AOL, CompuServe, and Prodigy.<sup>46</sup> Americans spent less than thirty minutes on the web each month and still paid for Internet access by the hour.<sup>47</sup>

With the Internet on the rise, the dangers that accompanied it quickly came to light. In Congress's first attempt to regulate the Internet, it enacted the Communications Decency Act (CDA), primarily in order to criminalize online pornography.<sup>48</sup> Although much of the CDA was struck down by the Supreme Court within a year,<sup>49</sup> one provision has stood the test of time: Section 230.<sup>50</sup> The provision was included in the CDA in order to address what scholar and Section 230 expert Jeff Kosseff has called the "twin goals" of innovation and volun-

<sup>45</sup> See Mary Bellis, *Biography of Mark Zuckerberg, Creator of Facebook*, THOUGHTCO. (June 19, 2019), <https://www.thoughtco.com/mark-zuckerberg-biography-1991135> [<https://perma.cc/H7UH-6MPR>].

<sup>46</sup> See Farhad Manjoo, *Jurassic Web*, SLATE: TECH. (Feb. 24, 2009, 5:33 PM), <https://slate.com/technology/2009/02/the-unrecognizable-internet-of-1996.html> [<https://perma.cc/RF4N-ZZ5Q>].

<sup>47</sup> See *id.* (citing Jeff Pelline, *AOL May Offer Unlimited Net Access*, CNET (Oct. 4, 1996, 2:00 PM), <https://www.cnet.com/news/aol-may-offer-unlimited-net-access/> [<https://perma.cc/8HVP-F7UM>]). As of January 2018, Americans spend an average of about twenty-four hours online *each week*. See Jamie Condliffe, *The Average American Spends 24 Hours a Week Online*, MIT TECH. REV. (Jan. 23, 2018), <https://www.technologyreview.com/f/610045/the-average-american-spends-24-hours-a-week-online/> [<https://perma.cc/6DQ4-KWQC>].

<sup>48</sup> Eric Goldman, *The Ten Most Important Section 230 Rulings*, 20 TUL. J. TECH. & INTELL. PROP. 1, 1–2 (2017); see also Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 404 (2017) (calling the CDA a "broad attack on sexually explicit material"). The CDA was passed as part of the Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>49</sup> *Reno v. ACLU*, 521 U.S. 844, 882 (1997) (holding that "the CDA places an unacceptably heavy burden on protected speech, and that the defenses do not constitute the sort of 'narrow tailoring' that will save an otherwise patently invalid unconstitutional provision"); see also Citron & Wittes, *supra* note 48 ("Indeed, [the CDA] strayed so far from libertarian values that the U.S. Supreme Court in a landmark First Amendment case struck down several of its provisions."); *Section 230 of the Communications Decency Act*, ELECTRONIC FRONTIER FOUND., <https://www EFF.org/issues/cda230> [<https://perma.cc/4CRE-C6TK>] (last visited June 4, 2020) [hereinafter *EFF*] (noting that the Supreme Court struck down the "anti-free speech provisions" of the CDA after they were met with outrage from the Internet community).

<sup>50</sup> 47 U.S.C. § 230.

tary content moderation on the part of tech companies.<sup>51</sup> At the same time that it sought to address online pornography, Congress also aimed to “spur unfettered growth of the Internet.”<sup>52</sup> In fact, Congress recognized that the “Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity,”<sup>53</sup> and explicitly expressed its intention “to promote the continued development of the Internet.”<sup>54</sup>

In order to achieve those policy goals, Section 230 immunizes interactive computer service providers<sup>55</sup> from liability for content provided by others. Specifically, Section 230’s “safe harbor” provision states that “[n]o 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>56</sup> Though only twenty-six words, the provision provides the foundation for the Internet as we know it today.<sup>57</sup> Section 230 has been called “the most important law

<sup>51</sup> Jeff Kosseff, *The Gradual Erosion of the Law that Shaped the Internet: Section 230’s Evolution over Two Decades*, 18 COLUM. SCI. & TECH. L. REV. 1, 8 (2016) [hereinafter Kosseff, *Gradual Erosion*].

<sup>52</sup> Kosseff, *Defending Section 230*, *supra* note 6, at 130.

<sup>53</sup> 47 U.S.C. § 230(a)(3).

<sup>54</sup> *Id.* § 230(b)(1).

<sup>55</sup> The statute defines “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” *Id.* § 230(f)(2). This definition encompasses large Internet companies, such as Facebook and Google, as well as news organizations and small bloggers who host reader comments on their sites.

<sup>56</sup> *Id.* § 230(c)(1). The statute carves out several exceptions, including for violations of federal criminal law, intellectual property law, the Electronic Communications Privacy Act of 1986, and, after FOSTA, certain sex trafficking laws. *Id.* § 230(e); *see also* Kosseff, *Gradual Erosion*, *supra* note 51, at 3, 9–10 (stating the same).

<sup>57</sup> *See* Goldman, *supra* note 48, at 2; *see also* EFF, *supra* note 49 (claiming that Section 230 is “one of the most valuable tools for protecting freedom of expression and innovation on the Internet”); Brit McCandless Farmer, *YouTube CEO Susan Wojcicki and the Debate over Section 230*, CBS NEWS (Dec. 1, 2019), <https://www.cbsnews.com/news/youtube-ceo-susan-wojcicki-and-the-debate-over-section-230-60-minutes-2019-12-01/> [https://perma.cc/LB96-J6WM] (“[Section 230 has] basically enabled the internet as we know it,” [YouTube CEO Susan] Wojcicki said. “It’s enabled us to have people upload content, not have every single comment be reviewed, not every single video be reviewed. And so, it has enabled new types of communication, new types of community, new types of content that we just wouldn’t have had beforehand.”).

protecting free speech online,”<sup>58</sup> “the internet’s most important law,”<sup>59</sup> and “the law that gave us the modern internet.”<sup>60</sup>

Additionally, under Section 230’s “Good Samaritan”<sup>61</sup> provision, interactive computer service providers remain immunized even if they voluntarily and in good faith “restrict access to or availability of material” that they consider “objectionable,” even if “such material is constitutionally protected.”<sup>62</sup> In other words, engaging in content moderation does not strip an interactive computer service provider of its immunity. The addition of this provision was intended to encourage online platforms to *voluntarily* police their own sites for objectionable content without risking liability for failing to do so flawlessly.<sup>63</sup>

Two important court decisions in the years leading up to Section 230’s enactment further illuminate the statute’s purpose.<sup>64</sup> The first case involved a prominent early interactive computer service provider, CompuServe.<sup>65</sup> At the time, CompuServe made available to its paid subscribers a variety of forums dedicated to different topics. One such forum, which

<sup>58</sup> Elliot Harmon & Joe Mullin, *Congress Fails to Ask Tech CEOs the Hard Questions*, ELECTRONIC FRONTIER FOUND. (Oct. 29, 2020), <https://www.eff.org/deeplinks/2020/10/congress-fails-ask-tech-ceos-hard-questions> [<https://perma.cc/5JQE-QT3V>]; see also EFF, *supra* note 49.

<sup>59</sup> Adi Robertson, *Why the Internet’s Most Important Law Exists and How People Are Still Getting It Wrong*, VERGE (June 21, 2019, 1:02 PM), <https://www.theverge.com/2019/6/21/18700605/section-230-internet-law-twenty-six-words-that-created-the-internet-jeff-kosseff-interview> [<https://perma.cc/ZAD6-EBC5>] (interviewing Jeff Kosseff).

<sup>60</sup> Derek Khanna, *The Law that Gave Us the Modern Internet—and the Campaign to Kill It*, ATLANTIC (Sept. 12, 2013), <https://www.theatlantic.com/business/archive/2013/09/the-law-that-gave-us-the-modern-internet-and-the-campaign-to-kill-it/279588/> [<https://perma.cc/459J-QY22>] (capitalization altered).

<sup>61</sup> See Aaron Mackey, *Stop SESTA: Congress Doesn’t Understand How Section 230 Works*, ELECTRONIC FRONTIER FOUND. (Sept. 7, 2017), <https://www.eff.org/deeplinks/2017/09/stop-sesta-congress-doesnt-understand-how-section-230-works> [<https://perma.cc/22U9-SBN4>].

<sup>62</sup> 47 U.S.C. § 230(c)(2)(A) (2018); see also Kosseff, *Gradual Erosion*, *supra* note 51, at 9 (explaining that § 230(c)(2) prevents interactive computer service providers from losing their immunity when they make a good faith effort to edit or delete content they deem objectionable). For a thorough explanation of Section 230(c)(2), see Eric Goldman, *Online User Account Termination and 47 U.S.C. § 230(c)(2)*, 2 U.C. IRVINE L. REV. 659, 660–61 (2012).

<sup>63</sup> See 47 U.S.C. § 230(c)(2)(A); Citron & Wittes, *supra* note 48, at 403 (“Because regulators could not keep up with the volume of noxious material online, the participation of private actors was essential.”); Kosseff, *Gradual Erosion*, *supra* note 51, at 4 (“Congress initially passed the statute in an effort to encourage providers to prevent objectionable user-generated content.”).

<sup>64</sup> See Kosseff, *Gradual Erosion*, *supra* note 51, at 4 (“To understand the origins of Section 230, it is necessary to review [the] two Internet liability cases decided in the years before Section 230’s enactment [that] . . . prompted Congress to set the boundaries for Internet service provider liability.”).

<sup>65</sup> *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 137 (S.D.N.Y. 1991).

was managed by a company independent from CompuServe, published a daily newsletter called Rumorville USA. In 1991, a competitor of the newsletter sued CompuServe, seeking to hold the company liable for allegedly defamatory statements published in the Rumorville newsletter.<sup>66</sup>

In order to succeed on its claim that CompuServe was liable for defamation, the competitor was required to show that CompuServe was a *publisher*—similar to a traditional newspaper—of the content contained in the newsletter.<sup>67</sup> However, a federal district court in New York held that CompuServe, which exercised no editorial control over the content of the newsletter, was merely a *distributor*.<sup>68</sup> Under distributor liability, which is traditionally applied to booksellers and newsstands, the “distributor must have knowledge of the contents of a publication before liability can be imposed for distributing that publication.”<sup>69</sup> Without such a rule, “[e]very bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop.”<sup>70</sup> The district court explained that, much like a bookseller, CompuServe could not be expected to have knowledge of all of the content that it distributes.<sup>71</sup> Accordingly, in the absence of evidence that “CompuServe knew or had reason to know of Rumorville’s contents,” CompuServe could not be held liable for the allegedly defamatory statements published by Rumorville.<sup>72</sup>

Four years later, a New York state court handed down an influential decision, which, in combination with *Cubby*, prompted the enactment of Section 230. In *Stratton Oakmont, Inc. v. Prodigy Services Co.*, the court held that Prodigy, another interactive computer service provider that provided bulletin boards to its subscribers, was a *publisher*—not a distributor—of defamatory statements posted on one of those boards.<sup>73</sup> For this court, the key difference between Prodigy and CompuServe was that Prodigy exercised editorial control over the content on

---

<sup>66</sup> *Id.* at 137–38.

<sup>67</sup> *See id.* at 139.

<sup>68</sup> *Id.* at 140–41.

<sup>69</sup> *Id.* at 139; *see also* *Smith v. California*, 361 U.S. 147, 152–53 (1959) (invalidating an ordinance that made booksellers liable for obscene content in their stores whether or not the seller was aware of that content).

<sup>70</sup> *Cubby*, 776 F. Supp. at 139 (quoting *Smith*, 361 U.S. at 152–53).

<sup>71</sup> *Id.* at 140 (“CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so.”).

<sup>72</sup> *Id.* at 141.

<sup>73</sup> No. 31063/94, 1995 WL 323710, at \*4 (N.Y. Sup. Ct. May 24, 1995).

its bulletin boards, while CompuServe did not.<sup>74</sup> Specifically, the court wrote:

The key distinction between CompuServe and PRODIGY is two fold. First, PRODIGY held itself out to the public and its members as controlling the content of its computer bulletin boards. Second, PRODIGY implemented this control through its automatic software screening program . . . . By actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and “bad taste”, for example, PRODIGY is clearly making decisions as to content, and such decisions constitute editorial control.<sup>75</sup>

Taken together, the decisions in *Cubby* and *Stratton Oakmont* “had the odd impact of immunizing online service providers from liability if they take an entirely hands-off approach to user-generated content, but holding them liable if they take some steps to moderate content.”<sup>76</sup> Recognizing this dilemma, Congress enacted Section 230 in order to eliminate the strong disincentive to moderate content that had been created by the combination of these two decisions.<sup>77</sup>

Today, over two decades since its enactment, Section 230 is under attack.<sup>78</sup> Given the profound importance of the short but impactful statute, proposals to amend Section 230 should be met with great hesitation and careful scrutiny. Having presented a fuller picture of the language, history, and purpose of Section 230, Part II will examine in detail the Ending Support for Internet Censorship Act, Senator Hawley’s attempt to revoke Section 230 immunity from big tech companies that fail to maintain politically neutral content moderation policies.

## II

### AN IN-DEPTH LOOK AT THE ENDING SUPPORT FOR INTERNET CENSORSHIP ACT

#### A. Senator Hawley’s Political Neutrality Requirement

Within months of taking office as a Missouri Senator in January 2019, Senator Josh Hawley made a name for himself

---

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* (internal citations omitted).

<sup>76</sup> Kosseff, *Gradual Erosion*, *supra* note 51, at 6.

<sup>77</sup> *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (“Congress enacted § 230 to remove the disincentives to selfregulation created by the *Stratton Oakmont* decision.”).

<sup>78</sup> *See supra* notes 15–23 and accompanying text.



by taking on big tech.<sup>79</sup> According to his website, Senator Hawley is “one of the nation’s leading constitutional lawyers” who fought for religious freedom as a lead attorney in the Hobby Lobby case.<sup>80</sup> As Missouri’s Attorney General, he “stood up to big tech, launching investigations of the most powerful companies in the world—Google and Facebook—to protect Missourians, their data, and the First Amendment.”<sup>81</sup> Since be-

---

<sup>79</sup> Gilad Edelman, *A Conservative Senator’s Crusade Against Big Tech*, WASH. POST MAG. (Aug. 28, 2019), <https://www.washingtonpost.com/news/magazine/wp/2019/08/28/feature/a-conservative-senators-crusade-against-big-tech/> [<https://perma.cc/W23P-GYY4>] (“Josh Hawley, a 39-year-old Republican freshman senator from Missouri . . . has quickly become the face of the conservative side of the backlash against Silicon Valley.”). By January 2021, Senator Hawley rose to infamy for championing Donald Trump’s baseless claims that the 2020 presidential election was “stolen” from him due to widespread fraud—possibly with his own ambitions of running for president in 2024 in mind. See Catie Edmondson & Michael Crowley, *Hawley Answers Trump’s Call for Election Challenge*, N.Y. TIMES (Dec. 30, 2020), <https://www.nytimes.com/2020/12/30/us/politics/josh-hawley-trump-election-challenge.html> [<https://perma.cc/J7TK-PW8Q>] (reporting on Senator Hawley’s objection to the election results); Ann Gerhart, *Election Results Under Attack: Here Are the Facts*, WASH. POST (last updated Jan. 5, 3:50 PM), <https://www.washingtonpost.com/elections/interactive/2020/election-integrity/> [<https://perma.cc/9UEW-Z779>] (documenting, explaining, and debunking Trump’s claims of election fraud); Aaron Blake, *An Insurrection Sets an Ugly Stage for 2024 GOP Presidential Hopefuls*, N.Y. TIMES (Jan. 7, 2021, 12:01 PM), <https://www.washingtonpost.com/politics/2021/01/07/an-insurrection-sets-an-ugly-stage-2024-gop-presidential-hopefuls/> [<https://perma.cc/R35B-8VBZ>] (stating that, as of January 2021, Senator Hawley is “thought to harbor ambitions to run for president in 2024”). On January 6, 2021, just hours after a violent mob of Trump’s supporters stormed the Capitol, Senator Hawley (as well as Senator Ted Cruz and four others) formally objected to the certification of the election results. See Jenny Gross & Luke Broadwater, *Here Are the Republicans Who Objected to Certifying the Election Results*, N.Y. TIMES (Jan. 7, 2021, 12:49 PM), <https://www.nytimes.com/2021/01/07/us/politics/republicans-against-certification.html> [<https://perma.cc/HLD2-9LD9>]; see also Kimberly Dozier & Vera Bergengruen, *Incited by the President, Trump Supporters Violently Storm the Capitol*, TIME (Jan. 6, 2021, 3:07 PM), <https://time.com/5926883/trump-supporters-storm-capitol/> [<https://perma.cc/5XUZ-VVH7>] (describing the violent attack on the Capitol). The next day, Simon & Schuster cancelled the upcoming publication of Senator Hawley’s book *The Tyranny of Big Tech*, stating that the company could not “support Senator Hawley after his role in what became a dangerous threat.” Elizabeth A. Harris & Alexandra Alter, *Simon & Schuster Cancels Plans for Senator Hawley’s Book*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2021/01/07/books/simon-schuster-josh-hawley-book.html> [<https://perma.cc/TY4V-XFGK>].

<sup>80</sup> *Biography*, HAWLEY.SENATE.GOV, <https://www.hawley.senate.gov/biography> [<https://perma.cc/U7UF-84DX>] (last visited Nov. 28, 2020); see also *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 687 (2014) (listing Senator Hawley as counsel).

<sup>81</sup> *Biography*, *supra* note 80.

coming a senator, he has partnered with Democratic senators on data privacy legislation.<sup>82</sup>

In May 2019, Senator Hawley delivered a speech entitled “The Big Tech Threat” in which he suggested that “there is something deeply troubling, maybe even deeply wrong, with the entire social media economy.”<sup>83</sup> He lamented the “surge” in adolescent suicide rates and the correlation between depression and social media use.<sup>84</sup> In addition, he argued that social media is harmful to society and the economy in the long run and discouraged allowing social media platforms to “define our future economy”—a “social media economy.”<sup>85</sup>

Perhaps Senator Hawley’s foremost issue with “Big Tech” (and therefore with Section 230) stems from his belief that social media companies “censor” conservative viewpoints.<sup>86</sup> On this alleged bias, Senator Hawley has said:

With Section 230, tech companies get a sweetheart deal that no other industry enjoys: complete exemption from traditional publisher liability in exchange for providing a forum free of political censorship . . . . Unfortunately, and unsurprisingly, big tech has failed to hold up its end of the bargain. There’s a growing list of evidence that shows big tech companies making editorial decisions to censor viewpoints they disagree with. Even worse, the entire process is shrouded in secrecy because these companies refuse to make their protocols public. This legislation simply states that if the tech giants want to keep their government-granted immunity, they must bring transparency and accountability to their editorial processes and prove that they don’t discriminate.<sup>87</sup>

One month after his “Big Tech Threat” speech, Senator Hawley introduced the Ending Support for Internet Censorship

<sup>82</sup> Edelman, *supra* note 79; *see also Big Tech*, HAWLEY.SENATE.GOV, <https://www.hawley.senate.gov/issues/big-tech> [<https://perma.cc/WQ6U-VMYV>] (last visited June 4, 2020) (listing Senator Hawley’s efforts to take on “Big Tech”).

<sup>83</sup> Josh Hawley, *The Big Tech Threat*, FIRST THINGS (May 9, 2019), <https://www.firstthings.com/web-exclusives/2019/05/the-big-tech-threat> [<https://perma.cc/FR2R-4KCY>].

<sup>84</sup> *Id.* Senator Hawley also accused social media of “hijacking users’ neural circuitry to prevent rational decision-making” and blamed Facebook for dulling attention spans. *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *See Censoring Pro-Life Content*, *supra* note 42 (explaining that Senator Hawley, with others, “sent a letter to Facebook CEO Mark Zuckerberg criticizing [Facebook’s] . . . censorship of [a] pro-life organization”); Edelman, *supra* note 79; *Senator Hawley Introduces Legislation*, *supra* note 41; *Senator Hawley Calls for Third-Party Audit of Twitter*, *supra* note 42 (accusing Twitter of “repeatedly target[ing] pro-life organizations” after it suspended an “account affiliated with [a] pro-life film”).

<sup>87</sup> *Senator Hawley Introduces Legislation*, *supra* note 41.

Act.<sup>88</sup> He has framed the legislation as a measure necessary to “stop Big Tech’s assault on free speech.”<sup>89</sup> Under Senator Hawley’s bill, big tech companies<sup>90</sup> would lose the automatic immunity they currently possess under Section 230.<sup>91</sup> Instead, these companies would need to *earn* immunity by proving to the Federal Trade Commission “by clear and convincing evidence that their algorithms and content-removal practices are *politically neutral*.”<sup>92</sup>

Specifically, the bill states that Section 230 shall not immunize a big tech company unless the FTC certifies by supermajority vote “that the company does not moderate information provided by other information content providers in a manner that is biased against a political party, political candidate, or political viewpoint.”<sup>93</sup> “Politically biased” content moderation is defined as that which “is designed to negatively affect a political party, political candidate, or political viewpoint” or “disproportionately restricts or promotes access to, or the availability of, information from a political party, political candidate, or political viewpoint.”<sup>94</sup>

The company would bear the cost of the audit and would be required to reapply for immunity every two years.<sup>95</sup> Al-

<sup>88</sup> See S. 1914, 116th Cong. (2019); see also *Senator Hawley Introduces Legislation*, *supra* note 41 (announcing and describing the bill).

<sup>89</sup> Sean Moran, *Josh Hawley Bill Would ‘Stop Big Tech’s Assault on Free Speech’*, BREITBART (June 19, 2019), <https://www.breitbart.com/politics/2019/06/19/josh-hawley-bill-would-stop-big-techs-assault-on-free-speech/> [<https://perma.cc/4GN7-YQ7J>].

<sup>90</sup> The bill applies only to “big tech companies”—defined as any provider of an interactive computer service with “more than 30 million active monthly users in the U.S., more than 300 million active monthly users worldwide, or who have more than \$500 million in global annual revenue”—and not to small and medium-sized tech companies. See *Senator Hawley Introduces Legislation*, *supra* note 41. This limitation, however, fails to save the bill from its defects, discussed *infra* Part III.

<sup>91</sup> *Senator Hawley Introduces Legislation*, *supra* note 34; see also S. 1914.

<sup>92</sup> *Senator Hawley Introduces Legislation*, *supra* note 41 (emphasis added); see also S. 1914 § 2(a)(3)(B)(i)(III) (stating the same in more formal terms).

<sup>93</sup> S. 1914 § 2(a)(3)(A).

<sup>94</sup> *Id.* § 2(a)(3)(B)(ii)(I). The bill carves out exceptions to this definition for moderation practices that are “necessary for business,” or for speech not protected by the First Amendment, where there is “no available alternative that has a less disproportionate effect, and the provider does not act with the intent to discriminate based on political affiliation, political party, or political viewpoint.” *Id.* § 2(a)(3)(B)(iii)(I); see also Jess Miers, *Senator Hawley’s Proposal to End Support for Internet Speech*, MEDIUM (June 20, 2019), <https://medium.com/@jessmiers/senator-hawleys-proposal-to-end-support-for-internet-speech-86c167fcaeeb> [<https://perma.cc/9LCT-479J>] [hereinafter Miers, *Senator Hawley’s Proposal*] (calling the “business necessity exception” “perplexing” because “[c]ontent moderation is always a crucial business necessity”).

<sup>95</sup> *Id.* §§ 2(a)(3)(C)(i), (D)(i).

though Donald Trump praised Senator Hawley's efforts, calling the bill "very important legislation, because we have to do something about what's happening,"<sup>96</sup> most responses to Senator Hawley's proposal have not been as enthusiastic.<sup>97</sup>

## B. Immediate Backlash Against a Political Neutrality Requirement

The bill, which had no cosponsors,<sup>98</sup> attracted immediate criticism. On the day that Senator Hawley announced the bill and, in the days, weeks, and months that followed, news media and tech blogs came out in full force to criticize Senator Hawley's proposal as impractical, unwise, and an assault on the business models of Facebook, Twitter, Google, YouTube, and others.<sup>99</sup>

---

<sup>96</sup> *President Trump Praises Sen. Hawley's "Ending Support for Internet Censorship Act"*, HAWLEY.SENATE.GOV (July 11, 2019), <https://www.hawley.senate.gov/president-trump-praises-sen-hawleys-ending-support-internet-censorship-act> [<https://perma.cc/47UB-NGP6>]. Conservative news organization *Breitbart* reported in July 2019 that a poll "found that nearly a majority of American voters, or 48 percent, backed the senator's Ending Support for Internet Censorship Act. A majority of Republicans and Independents support the legislation, while 46 percent of Democrats favor the bill." Sean Moran, *Trump: Josh Hawley Has 'Very Important' Legislation to Stop Censorship*, BREITBART (July 11, 2019), <https://www.breitbart.com/politics/2019/07/11/trump-josh-hawley-has-very-important-legislation-to-stop-censorship/> [<https://perma.cc/2LKJ-27R5>]; see also Sean Moran, *Poll: 48% of Americans Back Josh Hawley's Ending Support for Internet Censorship Act*, BREITBART (July 11, 2019), <https://www.breitbart.com/politics/2019/07/11/48-americans-back-josh-hawleys-ending-support-internet-censorship-act/> [<https://perma.cc/AQ66-9NP6>].

<sup>97</sup> See *infra* part II.B.

<sup>98</sup> Edelman, *supra* note 79.

<sup>99</sup> See, e.g., Editorial Board, *How Congress Could Destroy Social Media*, WASH. POST: POST'S VIEW (July 13, 2019, 6:55 PM), [https://www.washingtonpost.com/opinions/how-congress-could-destroy-social-media/2019/07/13/bf69673a-a4d2-11e9-bd56-eac6bb02d01d\\_story.html](https://www.washingtonpost.com/opinions/how-congress-could-destroy-social-media/2019/07/13/bf69673a-a4d2-11e9-bd56-eac6bb02d01d_story.html) [<https://perma.cc/K6F9-SBSK>] ("Mr. Hawley's bill would push sites to discard systems crucial to making the Web a safer place . . . [o]therwise, they'd lose their immunity and risk being sued into bankruptcy."); Elliot Harmon, *Sen. Hawley's "Bias" Bill Would Let the Government Decide Who Speaks*, ELECTRONIC FRONTIER FOUND. (June 20, 2019), <https://www.eff.org/deeplinks/2019/06/sen-hawleys-bias-bill-would-let-government-decide-who-speaks> [<https://perma.cc/4S5X-J7N5>] ("Major online platforms' moderation policies and practices are deeply flawed, but putting a government agency in charge of policing bias would only make matters worse."); Peter Kafka, *Washington's First Attempt at Regulating Big Tech Is a Joke*, VOX: RECODE (June 21, 2019, 8:00 AM), <https://www.vox.com/recode/2019/6/21/18693505/facebook-google-twitter-regulate-big-tech-hawley-bill-congress> [<https://perma.cc/EN5V-XECB>] ("[I]t's a lousy idea."); Salvador Rodriguez, *Tech Industry Slams GOP Senator's Bill that Would Hold Companies Liable for User-Posted Content*, CNBC (June 19, 2019, 1:40 PM), <https://www.cnbc.com/2019/06/19/reactions-to-sen-hawleys-bill-that-would-overturn-section-230-of-cca.html> [<https://perma.cc/3AC2-XFLN>] (collecting criticism from figures in the tech industry); Daisy Soderberg-Rivkin, *Holding the Technology Industry Hostage*, WASH.

Even Senator Wyden, who cowrote Section 230, has criticized Senator Hawley’s bill as entirely inconsistent with the purpose and meaning of the statute.<sup>100</sup> “Section 230 is not about neutrality. Period. Full stop,” Senator Wyden told *Recode*, a subset of *Vox* that focuses on the tech industry.<sup>101</sup> “230 is all about letting private companies make their own decisions to leave up some content and take other content down.”<sup>102</sup> Senator Wyden further explained, “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.”<sup>103</sup> Later, he told *Reason* that there is “absolutely no weight to [the] argument” that Section 230 involves an “implicit ‘deal’ requiring platforms [to] take a neutral political stance.”<sup>104</sup>

### C. What Does the Bill Mean, and Why Is It Worth Talking About?

A question raised by the widespread condemnation of Senator Hawley’s proposal is whether the merits of requiring politically neutral content moderation are worth analyzing at all. Despite the criticism of the Ending Support for Internet Censorship Act so far, the bill is not a mere suggestion reduced to hypotheticals—it has been put into *real words* in a *real bill* and is supported by a *real U.S. senator* (and the President of the

---

TIMES (July 1, 2019), <https://www.washingtontimes.com/news/2019/jul/1/the-stop-internet-censorship-act-would-ironically-/> [<https://perma.cc/MHL4-EJV3>] (“Big brother is watching, and Josh Hawley is installing the cameras.”); Stern, *supra* note 42 (highlighting the irony of a Republican-backed bill that “empower[s] bureaucrats to interfere in the marketplace”); Jacob Sullum, *The Folly of Government-Imposed Social Media “Neutrality”*, REASON: SOC. MEDIA (July 17, 2019, 12:01 AM), <https://reason.com/2019/07/17/the-folly-of-government-imposed-social-media-neutrality/> [<https://perma.cc/8G3H-G6S3>] (“Although Hawley claims he is trying to promote freedom of speech, the upshot of such decisions would be more censorship, not less.”). Even one article on a conservative news website called the bill an “unwise, unconstitutional mess.” David French, *Josh Hawley’s Internet Censorship Bill Is an Unwise, Unconstitutional Mess*, NAT’L REV. (June 20, 2019, 6:30 AM), <https://www.nationalreview.com/2019/06/josh-hawley-internet-censorship-bill-unconstitutional/> [<https://perma.cc/87S4-3CND>] (capitalization altered).

<sup>100</sup> See Stewart, *supra* note 9.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Eric Boehm, *Sen. Ron Wyden: Conservatives Are ‘Totally Wrong’ About Political Neutrality Under Section 230*, REASON (June 25, 2019, 1:30 PM), <https://reason.com/2019/06/25/sen-ron-wyden-conservatives-are-totally-wrong-about-political-neutrality-under-section-230/> [<https://perma.cc/P4GN-MSUM>].

United States at the time),<sup>105</sup> making discussion of it automatically worthwhile. In August 2019, two months after introducing the bill, Senator Hawley stood by his proposal.<sup>106</sup> Regarding the fate of his bill, Senator Hawley told *WIRED Magazine*, “I’m hopeful that [we] will continue to build momentum here, and I’m hopeful that we’ll see a lot of tech legislation move forward. . . . Let’s do it one piece of legislation at a time, and I hope that they’ll start with the proposals that I put forward.”<sup>107</sup> Of course, support for the bill, even from the President, is merely a reason for discussion, not for constitutionality.

Furthermore, the Ending Support for Internet Censorship Act warrants discussion because Senator Hawley employs a common justification for amending Section 230. In particular, he argues that Section 230 is severely outdated and that “[i]t is time to enter the 21st century” and update the statute.<sup>108</sup> Similarly, scholars have argued that Section 230, which was passed when “the state of the Internet was significantly different than it is now,” is inappropriate and ill-equipped to cope with the challenges of the Internet in its modern form.<sup>109</sup>

However, as Jeff Kosseff explains, today’s Internet is in no way incompatible with the meaning or origin of Section 230:

Although Section 230 was written in the nascent days of the modern Internet, Congress intentionally drafted the statute to cover not only AOL and Prodigy bulletin boards, but also future technology that was not conceived at the time. This

---

<sup>105</sup> See *supra* note 96 (describing former President Trump’s support for the bill).

<sup>106</sup> See Matt Laslo, *Josh Hawley Says Tech Enables ‘Some of the Worst of America’*, *WIRED* (Aug. 16, 2019, 8:00 AM), <https://www.wired.com/story/josh-hawley-tech-enables-worst-of-america/> [<https://perma.cc/L4EN-427J>] (interviewing Hawley).

<sup>107</sup> *Id.*

<sup>108</sup> See Laslo, *supra* note 106 (interviewing Senator Hawley, who said that “[t]he state of the law . . . has changed a lot since the 1990s [so] we’ve got to deal with the reality that we live in and the needs of families and consumers now, not what they may have been, gosh, almost 30 years ago”).

<sup>109</sup> See Rachel Seaton, Comment, *All Claims Are Not Created Equal: Challenging the Breadth of Immunity Granted by the Communications Decency Act*, 6 *SETON HALL CIR. REV.* 355, 356–57 (2010) (arguing further that “the Internet has flourished to a point where such a broad concept of immunity under the CDA is not as imperative as it was in the Internet’s early stages”); see also Danielle Keats Citron & Benjamin Wittes, *The Problem Isn’t Just Backpage: Revising Section 230 Immunity*, 2 *GEO. L. TECH. REV.* 453, 455, 463–67 (2018) (arguing that courts “have extended this safe harbor far beyond what the provision’s words, context, and purpose support” and that the technology companies that Section 230 protects today are “immensely different” from what they were twenty-five years ago); Michal Lavi, *The Good, the Bad, and the Ugly Behavior*, 40 *CARDOZO L. REV.* 2597, 2658 (2019) (arguing that because “[t]his absolute immunity scheme was constructed when the internet was in its infancy,” it should be “refined”).

can be seen by its extraordinarily broad definition of “interactive computer services” that are entitled to the immunity. Such technology neutrality establishes general principles that are designed to endure, regardless of technological developments.<sup>110</sup>

In fact, Representative Cox and Senator Wyden had major Internet companies like America Online, which “trafficked in millions of user messages, emails, and posts each day,” in mind when they drafted Section 230.

Additionally, the Ending Support for Internet Censorship Act has already inspired a wave of executive, administrative, and legislative efforts to dismantle Section 230. Senator Hawley’s introduction of the bill was followed nearly a year later by former President Trump’s Executive Order on Preventing Online Censorship, which brought a new level of attention to the issue of alleged anticonservative bias and the future of tech companies’ legal shield.<sup>111</sup> Even if the order does not have a legal leg to stand on,<sup>112</sup> it served as a catalyst for serious discussion in Congress about amending the statute.

Following the order, FCC Chairman Ajit Pai pledged to reinterpret Section 230.<sup>113</sup> However, legal experts have expressed doubt over whether the agency has the authority to do so.<sup>114</sup> Senator Wyden and Representative Cox issued a statement explaining that Congress clearly “intended to keep the FCC out of

---

<sup>110</sup> Koseff, *Gradual Erosion*, *supra* note 51, at 38.

<sup>111</sup> See Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020); *supra* note 23 and accompanying text (describing the Executive Order).

<sup>112</sup> See *supra* note 24–27.

<sup>113</sup> Thomas M. Johnson Jr., *The FCC’s Authority to Interpret Section 230 of the Communications Act*, FCC (Oct. 21, 2020, 10:30 AM), <https://www.fcc.gov/news-events/blog/2020/10/21/fccs-authority-interpret-section-230-communications-act> [<https://perma.cc/F4PQ-SUSA>].

<sup>114</sup> See Sara Morrison, *What the FCC Can and Can’t Do to Section 230*, VOX: RECODE (Oct. 21, 2020, 4:325 PM), <https://www.vox.com/recode/21519337/section-230-trump-fcc-twitter-facebook-social-media-ajit-pai> [<https://perma.cc/T9AU-ACGD>] (explaining that “legal experts—former FCC commissioners and staff among them—don’t think the FCC is allowed to regulate the internet in this way”).

this area.”<sup>115</sup> Meanwhile, the Department of Justice conducted a review of Section 230 and published proposed reforms.<sup>116</sup>

The Ending Support for Internet Censorship Act also sparked a series of other bills, including several others introduced by Senator Hawley—a trend that is likely to continue.<sup>117</sup>

---

<sup>115</sup> Senator Ron Wyden & Representative Chris Cox, Reply Comments of Co-Authors of Section 230 of the Communications Act of 1934, In the Matter of National Telecommunications and Information Administration Petition for Rulemaking to Clarify Provisions of Section 230 of the Communications Act of 1934 (Sept. 17, 2020), <https://www.documentcloud.org/documents/7213938-2020-09-17-Cox-Wyden-FCC-Reply-Comments-Final-2.html> [<https://perma.cc/8Q3T-U7MQ>]; see also Ron Wyden (@RonWyden), TWITTER (Oct. 15, 2020, 3:40 PM), <https://twitter.com/RonWyden/status/1316826228754538496> [<https://perma.cc/6A9Q-ZS9X>].

<sup>116</sup> Isobel Asher Hamilton, *The DOJ Asked Congress to Erode Big Tech’s Legal Protections as Trump Accused Firms of Anti-conservative Bias and “Cancel Culture”*, BUS. INSIDER (Sept. 24, 2020, 5:52 AM), <https://www.businessinsider.com/doj-asks-congress-to-weaken-section-230-2020-9> [<https://perma.cc/944E-WF92>] (“Th[e DOJ’s proposed] legislation addresses concerns about online censorship by requiring greater transparency and accountability when platforms remove lawful speech,” [then-Attorney General William] Barr said.); see also DEP’T OF JUSTICE, SECTION 230—NURTURING INNOVATION OR FOSTERING UNACCOUNTABILITY?: KEY TAKEAWAYS AND RECOMMENDATIONS (2020), <https://www.justice.gov/file/1286331/download> [<https://perma.cc/W5ZN-XSSM>] (explaining the agency’s proposed Section 230 reforms and calling for greater transparency in content moderation in order to assess claims of bias).

<sup>117</sup> See Reps. Malinowski and Eshoo Introduce Bill to Hold Tech Platforms Liable for Algorithmic Promotion of Extremism, MALINOWSKI.HOUSE.GOV (Oct. 20, 2020), <https://malinowski.house.gov/media/press-releases/reps-malinowski-and-eshoo-introduce-bill-hold-tech-platforms-liable-algorithmic> [<https://perma.cc/7YNQ-KVPB>] (announcing the Protecting Americans from Dangerous Algorithms Act, which would amend Section 230 in order to address alleged facilitation of extremism by social media platforms); Elle Reynolds, *Exclusive: New Bill Would Slash Protections For Tech Companies Censoring Free Speech*, FEDERALIST (June 25, 2020), <https://thefederalist.com/2020/06/25/exclusive-new-bill-would-slash-protections-for-tech-companies-censoring-free-speech/> [<https://perma.cc/W8KP-NHZG>] (announcing the Stopping Big Tech Censorship Act, which would eliminate Section 230 immunity for “tech companies that restrict constitutionally protected speech”); Sen. Hawley Introduces Legislation to Curb Social Media Addiction, HAWLEY.SENATE.GOV (July 30, 2019), <https://www.hawley.senate.gov/sen-hawley-introduces-legislation-curb-social-media-addiction> [<https://perma.cc/B5A6-TNKL>] (announcing the SMART Act, aimed at “curb[ing] addictive and deceptive techniques that tech giants use to exploit users”); Senator Hawley Announces Bill Empowering Americans to Sue Big Tech Companies Acting in Bad Faith, HAWLEY.SENATE.GOV (June 17, 2020), <https://www.hawley.senate.gov/senator-hawley-announces-bill-empowering-americans-sue-big-tech-companies-acting-bad-faith> [<https://perma.cc/KF34-CW6S>] (announcing the Limiting Section 230 Immunity to Good Samaritans Act, an effort to require big tech companies to update their terms of service to include a duty of good faith and to uphold that duty in order to receive Section 230 protection); Senator Hawley Introduces Bill to Remove Section 230 Immunity from Behavioral Advertisers, HAWLEY.SENATE.GOV (July 28, 2020), <https://www.hawley.senate.gov/senator-hawley-introduces-bill-remove-section-230-immunity-behavioral-advertisers> [<https://perma.cc/2DH3-TKEE>] (announcing the BAD ADS Act, which seeks to “remove Section 230 immunity from Big Tech companies that display manipula-



One effort that gained particular prominence is the EARN IT Act, which would establish “best practices” for online platforms in order “to prevent, reduce, and respond to the online sexual exploitation of children,” has similarly been criticized.<sup>118</sup> Thus, if time has been any indication, Senator Hawley’s bill may have been one of the first attempts to limit Section 230 immunity, but it is far from the last. The bill and many of the efforts that have followed it so far demonstrate that even if Senator Hawley’s proposal is not the one that ultimately brings change to Section 230, allegations of anticonservative bias by social media platforms are likely to continue to drive Republican-backed efforts in this area.<sup>119</sup>

Therefore, in addition to deserving analysis standing alone, Senator Hawley’s bill also represents the need for a broader discussion of the legal and policy issues associated with *any* law requiring political neutrality in content moderation. First, it is worth considering that there may be legal arguments to support the constitutional viability of a law requiring politically neutral content moderation. Critics have commented that the Ending Support for Internet Censorship Act appears to be an attempt to revive the Fairness Doctrine, a Federal Communications Commission policy during the mid-twentieth century that required broadcast media to air fair and adequate coverage of opposing views on controversial issues.<sup>120</sup> Like the Fairness

---

tive, behavioral ads or provide data to be used for them”); Wicker, Graham, Blackburn Introduce Bill to Modify Section 230 and Empower Consumers Online, COMMERCE.SENATE.GOV (Sept. 8, 2020), <https://www.commerce.senate.gov/2020/9/wicker-graham-blackburn-introduce-bill-to-modify-section-230-and-empower-consumers-online> [<https://perma.cc/VVN3-P9P9>] (announcing the Online Freedom and Viewpoint Diversity Act, which would condition Section 230 immunity on a tech company’s “objectively reasonable belief” that the content it restricts “falls within a certain, specified category”).

<sup>118</sup> See EARN IT ACT, S. 3398, 116th Cong. (2020); Sophia Cope, Aaron Mackey & Andrew Crocker, *The EARN IT Act Violates the Constitution*, ELECTRONIC FRONTIER FOUND. (Mar. 31, 2020), <https://www.eff.org/deeplinks/2020/03/earn-it-act-violates-constitution> [<https://perma.cc/W3KR-TDVV>]; Joe Mullin, *Urgent: EARN IT Act Introduced in House of Representatives*, ELECTRONIC FRONTIER FOUND. (Oct. 2, 2020), <https://www.eff.org/deeplinks/2020/10/urgent-earn-it-act-introduced-house-representatives> [<https://perma.cc/2RMU-NLPK>] (raising concerns about the Act and explaining that the “best practices” were originally mandatory in order to receive Section 230 immunity, but that the bill was amended to make them advisory after widespread criticism).

<sup>119</sup> JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* 114 (2019) (explaining that Representative Cox intended to protect platforms like Google and Yelp).

<sup>120</sup> See Elizabeth Nolan Brown, *Josh Hawley Introduces Bill to Put Washington in Charge of Internet Speech*, REASON (June 19, 2019, 12:05 PM), <https://reason.com/2019/06/19/josh-hawley-introduces-bill-to-put-washington-in-charge-of-internet-speech/> [<https://perma.cc/Z4ST-FGFE>] (“Essentially, Hawley

Doctrine in the broadcast media context, a political neutrality requirement would require private companies to suppress their own viewpoints in order to maximize the opportunity for “controversial” voices to be heard.

Although the Fairness Doctrine was never explicitly declared unconstitutional, reliance on it in legitimizing a political neutrality requirement in content moderation is extremely weak given the profound differences between broadcast media and the Internet. In the broadcast context, the constitutionality of the Fairness Doctrine was largely based on the “scarcity of broadcast frequencies [and] the Government’s role in allocating those frequencies.”<sup>121</sup> Because the opportunities for communicating one’s message were severely limited by the inherent properties of broadcasting, the Supreme Court held that government intervention into public discourse in the broadcast medium was constitutional.<sup>122</sup> However, no such scarcity exists on the Internet.<sup>123</sup> After all, the beauty of the Internet is that there is room for everyone to speak, listen, and respond. Therefore, government intervention into private companies’ content moderation practices cannot be justified by comparison to the Fairness Doctrine. There is also something to be said for the fact that the FCC itself abandoned the Fairness Doctrine in 1987.<sup>124</sup>

Moreover, the Ending Support for Internet Censorship Act is just one piece of a larger dialogue about the future of Section 230 and content moderation that *certainly* deserves the attention of both the legal and tech communities. While current

---

wants to revive the old Fairness Doctrine—a policy that was roundly denounced by conservatives for its chilling effect on free speech and its propensity to further marginalize non-mainstream voices—and apply this cursed policy paradigm to anything online.”); Jane Coaston, *A Republican Senator Wants the Government to Police Twitter for Political Bias*, VOX (June 26, 2019, 3:30 PM), <https://www.vox.com/2019/6/26/18691528/section-230-josh-hawley-conservatism-twitter-facebook> [https://perma.cc/F9YZ-GD2Y]; Miers, *Senator Hawley’s Proposal*, *supra* note 56 (“Hawley’s bill is akin to a modern-day fairness doctrine, a policy once vehemently opposed by Republicans, now applied to social media companies.”); Stern, *supra* note 42; *see also* *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 400–01 (1969) (upholding FCC “Fairness Doctrine” regulations in the context of broadcast media). *But see* Osburn, *supra* note 1 (“It’s not the fairness doctrine. The fairness doctrine is the FCC monitoring speech. This is simply saying we’re not going to give you a special benefit that no one else enjoys,” [Senator Ted] Cruz said [of Hawley’s bill]. “This is ending a subsidy on big tech.”).

<sup>121</sup> *Red Lion Broad. Co.*, 395 U.S. at 367–77, 390, 400–01.

<sup>122</sup> *Id.* at 400–01.

<sup>123</sup> *See* Stern, *supra* note 42.

<sup>124</sup> *See* KATHLEEN ANN RUANE, CONG. RESEARCH SERV., R40009, FAIRNESS DOCTRINE: HISTORY AND CONSTITUTIONAL ISSUES 7 (2011), <https://fas.org/sgp/crs/misc/R40009.pdf> [https://perma.cc/3QKG-B7CE].

content moderation systems are surely imperfect,<sup>125</sup> their greatest asset is their freedom from government intervention into content, allowing for improvements that respect both users' and platforms' speech rights.

While some legislative change may be coming for Section 230—perhaps sooner rather than later—Part III will argue that the bill's unconstitutionality, in addition to its practical challenges and unwise policy, should prevent it (or any suggestion of a political neutrality requirement in content moderation) from becoming any real threat to the current state of Section 230 immunity.

### III

#### MORE THAN JUST A BAD IDEA: REJECTING A POLITICAL NEUTRALITY REQUIREMENT AS UNCONSTITUTIONAL

As appealing and quintessentially American as the goal of “ending censorship” may sound, the ironically-named Ending Support for Internet Censorship Act weaves government censorship into the fabric of the statutory backbone of today's Internet. At its core, the First Amendment prohibits the government from interfering in public discourse except in rare circumstances that satisfy the demanding standard of strict scrutiny.<sup>126</sup> Leaving aside any other potential constitutional

---

<sup>125</sup> See, e.g., Sue Halpern, *Facebook's False Standards for Not Removing a Fake Nancy Pelosi Video*, NEW YORKER (May 28, 2019), <https://www.newyorker.com/tech/annals-of-technology/facebooks-false-standards-for-not-removing-a-fake-nancy-pelosi-video> [<https://perma.cc/6EQG-LGU8>] (reporting that Facebook declined to remove a “demonstrably false” video of Speaker Pelosi because it did not violate the company's community standards); Paul Mozur, *A Genocide Incited on Facebook, with Posts from Myanmar's Military*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html> [<https://perma.cc/4JB6-SAUG>] (detailing the “systemic [misinformation] campaign” waged by Myanmar's military on Facebook against the Muslim Rohingya minority group); Steve Stecklow, *Why Facebook Is Losing the War on Hate Speech in Myanmar*, REUTERS (Aug. 15, 2018 10:00 AM), <https://www.reuters.com/investigates/special-report/myanmar-facebook-hate/> [<https://perma.cc/K6XR-J9TN>] (noting how Facebook's attempts to combat the hate speech against the Rohingya have failed). In recognition of the failures of current content moderation systems, organizations like the ACLU Foundation of Northern California, the Center for Democracy & Technology, and the Electronic Frontier Foundation have pushed for content moderation policies that promote transparency and respect for users' rights. See THE SANTA CLARA PRINCIPLES ON TRANSPARENCY AND ACCOUNTABILITY IN CONTENT MODERATION, <https://santaclaraprinciples.org> [<https://perma.cc/G84M-HP6Z>] (last visited Jan. 18, 2021). The implementation of those recommendations would be voluntary for the tech companies and enforced by user perception and moral and economic pressure rather than by the government.

<sup>126</sup> See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015); see also *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 579 (1995) (“Our

issues with the bill, this Part will argue (1) that a requirement that big tech companies use politically neutral content moderation practices is presumptively unconstitutional as a form of compelled speech, and (2) that such a requirement cannot survive strict scrutiny because it is not narrowly tailored to serving a compelling governmental interest.<sup>127</sup>

### A. Yes, Content Moderation Algorithms Are Speech

Proponents of amending Section 230 in order to reflect how “times have changed” since 1996<sup>128</sup> must also recognize that developing technology has produced a new form of “speech”—the content moderation algorithm. Although not *all* algorithms are necessarily “speech,” content moderation algorithms—which convey companies’ values, ethical standards, and editorial judgments<sup>129</sup>—are inherently expressive. For example,

---

tradition of free speech commands that a speaker who takes to the street corner to express his views in this way should be free from interference by the State based on the content of what he says.”)

<sup>127</sup> See *Reed*, 135 S. Ct. at 2226 (“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”).

<sup>128</sup> See, e.g., U.S. DEP’T OF COMMERCE, PETITION FOR RULEMAKING OF THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION 4 (2020), [https://www.ntia.gov/files/ntia/publications/ntia\\_petition\\_for\\_rulemaking\\_7.27.20.pdf](https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf) [<https://perma.cc/86E4-6ZZA>] (requesting, at former President Trump’s urging, that the FCC amend Section 230 because “times have changed, and the liability rules appropriate in 1996 may no longer further Congress’s purpose that section 230 further a “true diversity of political discourse”).

<sup>129</sup> Eugene Volokh and Donald M. Falk argue that search engine algorithms “inherently incorporate the . . . company engineers’ judgments about what material users are most likely to find responsive to their queries.” Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Search Results*, 8 J.L. ECON. & POL’Y 883, 884 (2012). Though Volokh and Falk discuss search engine algorithms rather than content moderation algorithms, both types of algorithms express the company’s views about the value of content—what gets to be seen and what does not. For an argument that newsfeed algorithms do not embody any particular viewpoint, see Sofia Grafanaki, *Platforms, the First Amendment and Online Speech: Regulating the Filters*, 39 PACE L. REV. 111, 146 (2018). However, Sofia Grafanaki’s argument—that such newsfeed algorithms “are designed to optimize user engagement” and do not reflect the views of the company—fails to consider situations like Facebook’s decision to ban “InfoWars founder and conspiracy theorist” Alex Jones. *Id.*; see Mike Isaac & Kevin Roose, *Facebook Bars Alex Jones, Louis Farrakhan and Others from Its Services*, N.Y. TIMES (May 2, 2019), <https://www.nytimes.com/2019/05/02/technology/facebook-alex-jones-louis-farrakhan-ban.html> [<https://perma.cc/JZZ9-CZQW>]. The decision to ban Alex Jones and other figures promoting hate has little, if anything, to do with optimizing engagement. According to a *New York Times* analysis, “[i]n the three weeks before the Aug. 6 bans, Infowars had a daily average of nearly 1.4 million visits to its website and views of videos posted by its main YouTube and Facebook pages.” Jack Nicas, *Alex Jones Said Bans Would Strengthen Him. He Was Wrong.*, N.Y. TIMES (Sept. 4, 2018), <https://>

Facebook’s policy of prohibiting hate speech and violent and graphic content expresses the company’s view that such content is “objectionable.”<sup>130</sup> On the whole, Facebook’s Community Standards, which it implements through its content moderation practices and algorithms, demonstrate that the company values discouraging violence<sup>131</sup> and intimidation.<sup>132</sup> In other words, content moderation algorithms are far more than just computer code.<sup>133</sup> They express to users, and to the entire world, that the company maintains a certain viewpoint about an idea or topic—or even a single word. As such, those algorithms are protected speech, guarded from government intervention and censorship.

The expressive nature of content moderation was made abundantly clear after Facebook announced that it would allow false political advertisements ahead of the 2020 election.<sup>134</sup> In announcing this policy, Facebook communicated its commitment to freedom of speech and individual autonomy in ascertaining fact from fiction.<sup>135</sup> Facebook CEO Mark Zuckerberg defended the policy, arguing that Facebook “should not be the one to make decisions about its users’ speech.”<sup>136</sup> In addition, Zuckerberg stated, “[w]hen [it’s] not absolutely clear what to do, we should err on the side of greater expression.”<sup>137</sup> Soon after

---

[www.nytimes.com/2018/09/04/technology/alex-jones-infowars-bans-traffic.html](http://www.nytimes.com/2018/09/04/technology/alex-jones-infowars-bans-traffic.html) [https://perma.cc/5LFW-2Y4U].

<sup>130</sup> *Part III. Objectionable Content*, FACEBOOK: COMMUNITY STANDARDS, [https://www.facebook.com/communitystandards/objectionable\\_content](https://www.facebook.com/communitystandards/objectionable_content) [https://perma.cc/5ZVH-DPR8] (last visited June 4, 2020).

<sup>131</sup> *Part I. Violence and Criminal Behavior*, FACEBOOK: COMMUNITY STANDARDS, [https://www.facebook.com/communitystandards/violence\\_criminal\\_behavior](https://www.facebook.com/communitystandards/violence_criminal_behavior) [https://perma.cc/Q5MP-VA3K] (last visited June 4, 2020).

<sup>132</sup> *Hate Speech*, *supra* note 12.

<sup>133</sup> For a similar argument in the context of end-to-end encryption, see Leonid Grinberg, *End-to-End Authentication: A First Amendment Hook to the Encryption Debate*, 74 N.Y.U. ANN. SURV. AM. L. 173, 199–204 (2018).

<sup>134</sup> Mike Isaac & Cecilia Kang, *Facebook Says It Won’t Back Down from Allowing Lies in Political Ads*, N.Y. TIMES (Jan. 9, 2020), <https://www.nytimes.com/2020/01/09/technology/facebook-political-ads-lies.html> [https://perma.cc/BTP6-ZFH2]. Later, in September 2020, Facebook announced that it would prohibit new political advertisements from running in the seven days before the general election. See Elizabeth Dwoskin, Craig Timberg & Isaac Stanley-Becker, *Facebook Tries to Head Off Election Turmoil, Angering Both Trump and Democrats*, WASH. POST (Sept. 3, 2020, 6:50 PM), <https://www.washingtonpost.com/technology/2020/09/03/facebook-political-ads/> [https://perma.cc/QSJ7-QW94].

<sup>135</sup> See *id.*

<sup>136</sup> See Lauren Feiner, *Twitter Bans Political Ads After Facebook Refused to Do So*, CNBC (Oct. 30, 2019, 4:05 PM), <https://www.cnbc.com/2019/10/30/twitter-bans-political-ads-after-facebook-refused-to-do-so.html> [https://perma.cc/XHG8-SX4B].

<sup>137</sup> *Id.*

Facebook's decision not to fact-check political advertisements, Twitter expressed *its own* message—that it does not want to contribute to the spread of misinformation—by implementing a contrary policy to prohibit all political advertisements.<sup>138</sup>

In late May 2020, Twitter made the unprecedented decision to flag two of Donald Trump's tweets as “potentially misleading.”<sup>139</sup> After Trump tweeted that “[t]here is NO WAY (ZERO!) that Mail-In Ballots will be anything less than substantially fraudulent,”<sup>140</sup> Twitter CEO Jack Dorsey took a public stand against Trump's use of the platform as a megaphone for his tenuous relationship with the truth. Two days later, Trump signed an executive order targeting “online censorship” in which he referenced Twitter six times.<sup>141</sup> The next day, in the aftermath of the killing of George Floyd by a Minneapolis police officer,<sup>142</sup> Trump infamously tweeted that Black Lives Matter protesters were “THUGS” and that he “[j]ust spoke to [Minnesota] Governor Tim Walz and told him that the Military is with him all the way. Any difficulty and we will assume control but,

---

<sup>138</sup> See *Political Content*, TWITTER, <https://business.twitter.com/en/help/ads-policies/prohibited-content-policies/political-content.html> [https://perma.cc/H2YW-2DAY] (last visited Jan. 20, 2021); see also Kate Conger, *Twitter Will Ban All Political Ads, C.E.O. Jack Dorsey Says*, N.Y. TIMES (Oct. 30, 2019, 4:05 PM), <https://www.nytimes.com/2019/10/30/technology/twitter-political-ads-ban.html> [https://perma.cc/X2RV-2K2U]; jack (@jack), TWITTER (Oct. 30, 2019), <https://twitter.com/jack/status/1189634360472829952> [https://perma.cc/LYR3-TKYK] (“We believe political message reach should be earned, not bought.”). In announcing the policy, Twitter CEO Jack Dorsey said, “it would be ‘not credible’ for Twitter to tell users it’s committed to stopping the spread of misinformation while allowing advertisers to target users with political ads just because they’ve paid Twitter to do so.” Feiner, *supra* note 136. Some Republicans viewed Twitter’s policy as “another attempt by the left to silence Trump and conservatives.” See, e.g., Brad Parscale (@parscale), TWITTER (Oct. 30, 2019, 5:33 PM), <https://twitter.com/parscale/status/1189656652250845184> [https://perma.cc/BP5U-KQY5].

<sup>139</sup> See Fung, *supra* note 23.

<sup>140</sup> Donald J. Trump (@realDonaldTrump), TWITTER (May 26, 2020, 8:17 AM), <https://twitter.com/realDonaldTrump/status/1265255835124539392> [https://perma.cc/QYD9-P7SY]; Donald J. Trump (@realDonaldTrump), TWITTER (May 26, 2020, 8:17 AM), <https://twitter.com/realDonaldTrump/status/1265255845358645254> [https://perma.cc/M73E-PF7W].

<sup>141</sup> See Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020); Ghaffary, *supra* note 26. The order claimed that Twitter “selectively decides to place a warning label on certain tweets in a manner that clearly reflects political bias.” Exec. Order No. 13,925.

<sup>142</sup> Neil MacFarquhar, Tim Arango & Manny Fernandez, *Ex-Officer Charged in Death of George Floyd in Minneapolis*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/us/minneapolis-police-george-floyd.html> [https://perma.cc/Q9L3-JBHG].

when the looting starts, the shooting starts.”<sup>143</sup> In spite of the recent executive order, Twitter hid the tweet from view, explaining that it “violated the Twitter Rules about glorifying violence.”<sup>144</sup>

Meanwhile, Mark Zuckerberg explained, “We have a different policy than, I think, Twitter on this . . . . I just believe strongly that Facebook shouldn’t be the arbiter of truth of everything that people say online.”<sup>145</sup> To CNBC, Zuckerberg said, “I think that’s kind of a dangerous line to get down to, in terms of deciding what is true and what isn’t. And I think political speech is one of the most sensitive parts of a democracy. And people should be able to see what politicians say.”<sup>146</sup> He explained that Facebook’s “policies are grounded in trying to give people as much voice as possible.”<sup>147</sup> The controversy surrounding false political advertisements and fact-checking and hiding a sitting president’s tweets elucidates the two very different “personalities” (or messages) of Twitter and Facebook. It is therefore quite apparent to users, through the companies’ content moderation decisions and the statements of their CEOs explaining such decisions, that Twitter is concerned with maximizing truth and minimizing hate, violence, and harassment, while Facebook is dedicated to near-absolute freedom of speech.

Social media companies’ content moderation decisions again took the spotlight in the aftermath of the attack on the U.S. Capitol on January 6, 2021. That day, as Congress met to certify the results of the 2020 presidential election, a violent mob of Donald Trump’s supporters—provoked by his unfounded claims that the election had been stolen from

---

<sup>143</sup> Donald J. Trump (@realDonaldTrump), TWITTER (May 29, 2020, 12:53 AM), <https://twitter.com/realDonaldTrump/status/1266231100780744704> [<https://perma.cc/H34R-6K4L>].

<sup>144</sup> *Id.*; see also Kate Conger, *Twitter Had Been Drawing a Line for Months When Trump Crossed It*, N.Y. TIMES (May 30, 2020), <https://www.nytimes.com/2020/05/30/technology/twitter-trump-dorsey.html> [<https://perma.cc/2P9L-WFYW>] (detailing the internal debate at Twitter that led to the decision to apply a warning label to Trump’s tweets). This was the first time that Twitter applied such a warning to any tweet by a public figure. See Conger, *supra*. The tweet remained accessible to viewers who opted to “View” the message.

<sup>145</sup> Casey Newton, *Why Twitter Labeled Trump’s Tweets as Misleading and Facebook Didn’t*, VERGE (May 29, 2020, 6:00 AM), <https://www.theverge.com/interface/2020/5/29/21273370/trump-twitter-executive-order-misleading-facebook-authoritarianism> [<https://perma.cc/3MS2-NPBZ>].

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

him—stormed the Capitol building.<sup>148</sup> Throughout the day, Trump “published a string of inaccurate and inflammatory messages” that prompted Twitter and Facebook to lock his accounts.<sup>149</sup> Initially, Twitter suspended his account for twelve hours;<sup>150</sup> two days later, however, it decided to permanently ban him from the platform “due to the risk of further incitement of violence.”<sup>151</sup> Facebook blocked Trump from its platforms at least through the end of his term (January 20, 2021).<sup>152</sup> Explaining the decision, which perhaps represents a

---

<sup>148</sup> See Dozier & Bergengruen, *supra* note 79 (describing the attack on the Capitol); Charlie Savage, *Incitement to Riot? What Trump Told Supporters Before Mob Stormed Capitol*, N.Y. TIMES (Jan. 10, 2021), <https://www.nytimes.com/2021/01/10/us/trump-speech-riot.html> [<https://perma.cc/9X2E-SRRU>] (documenting Donald Trump’s inflammatory messages to his supporters before the riot, including that they had to “fight much harder” and “show strength” and that if they didn’t “fight like hell, [they were] not going to have a country anymore”). Trump’s role in inciting the Capitol attack became grounds for his second impeachment. See Nicholas Fandos, *Trump Impeached for Inciting Insurrection*, N.Y. TIMES (Jan. 13, 2021), <https://www.nytimes.com/2021/01/13/us/politics/trump-impeached.html> [<https://perma.cc/3WD5-KVGH>]. As of the publication of this Note, Trump faces a Senate trial that could result in his prohibition from ever holding public office in the future. See *id.*

<sup>149</sup> See Kate Conger, Mike Isaac & Sheera Frenkel, *Twitter and Facebook Lock Trump’s Accounts After Violence on Capitol Hill*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/technology/capitol-twitter-facebook-trump.html> [<https://perma.cc/FHN3-L3FQ>]. Eventually, after hours of violence, Trump issued a lukewarm pre-recorded video message to his supporters telling them “we love you” but that it was time to “go home.” See Annie Karni & Maggie Haberman, *Trump Openly Condone Supporters Who Violently Stormed the Capitol, Prompting Twitter to Lock His Account*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/us/politics/trump-protesters.html> [<https://perma.cc/NQB3-9KRG>].

<sup>150</sup> Conger, Isaac & Frenkel, *supra* note 149.

<sup>151</sup> *Permanent Suspension of @realDonaldTrump*, TWITTER BLOG (Jan. 8, 2021), [https://blog.twitter.com/en\\_us/topics/company/2020/suspension.html](https://blog.twitter.com/en_us/topics/company/2020/suspension.html) [<https://perma.cc/776T-TXYW>]. The ban applied not only to the @realDonaldTrump account (Donald Trump’s personal Twitter account which he used throughout his time in office in an official capacity), but also to any tweets shared by him from other accounts, including the official @POTUS Twitter account. Kate Conger & Mike Isaac, *Twitter Permanently Bans Trump, Capping Online Revolt*, N.Y. TIMES (Jan. 8, 2021), <https://www.nytimes.com/2021/01/08/technology/twitter-trump-suspended.html> [<https://perma.cc/5H5G-E5QJ>].

<sup>152</sup> Mike Isaac & Kate Conger, *Facebook Bars Trump Through End of His Term*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2021/01/07/technology/facebook-trump-ban.html> [<https://perma.cc/JDK2-KH7J>]. Snapchat, YouTube, Twitch, and Reddit also limited the former president’s access to their platforms. Conger & Isaac, *supra* note 151. In the days that followed, Apple and Google removed Parler (a far-right social networking app notorious for its lack of content moderation and popular among Trump’s supporters, including some involved in the Capitol attack) from their app stores. See Jack Nicas & Davey Alba, *Amazon, Apple and Google Cut off Parler, an App that Drew Trump Supporters*, N.Y. TIMES (Jan. 9, 2021), <https://www.nytimes.com/2021/01/09/technology/apple-google-parler.html> [<https://perma.cc/MT4N-VNF7>]. Amazon also removed the platform from its web-hosting service (thus forcing the site temporarily offline) for



shift in Facebook’s content moderation “personality” over time,<sup>153</sup> Mark Zuckerberg said, “We believe the risks of allowing the president to continue to use our service during this period are simply too great.”<sup>154</sup>

The coronavirus pandemic also exposed the expressive power of content moderation, as tech companies worked in tandem to combat misinformation.<sup>155</sup> Facebook, Google, Twitter, YouTube, and other industry leaders issued a joint statement pledging to “work[] closely together on COVID-19 response efforts” to help “millions of people stay connected while also jointly combating fraud and misinformation about the virus, elevating authoritative content on our platforms, and sharing critical updates in coordination with government healthcare agencies around the world.”<sup>156</sup> In addition, Facebook has taken steps to interfere with anti-quarantine and social-distancing protests.<sup>157</sup> Donald Trump Jr. and Senator

---

permitting posts that encouraged violence. See *id.*; John Paczkowski & Ryan Mac, *Amazon Will Suspend Hosting for Pro-Trump Social Network Parler*, BUZZFEED NEWS (Jan. 9, 2021, 9:07 PM), [https://www.buzzfeednews.com/article/johnpaczkowski/amazon-parler-aws?bftwnews&utm\\_term=4ldqpgc#4ldqpgc](https://www.buzzfeednews.com/article/johnpaczkowski/amazon-parler-aws?bftwnews&utm_term=4ldqpgc#4ldqpgc) [https://perma.cc/W6BP-B2HL] (breaking the story). As of January 17, 2021, Parler was back online after finding a new hosting service but was still absent from the app stores. See Brian Fung, *Parler’s Website Shows Signs of Life with a Brief Message to ‘Lovers and Haters’*, CNN BUS. (last updated Jan. 18, 2021, 10:26 AM), <https://www.cnn.com/2021/01/17/tech/parler-back-online/index.html> [https://perma.cc/2TW6-B7UV]; *Parler’s Website Is Back Online, but App Still Not in Stores*, REUTERS (Jan. 17, 2021, 6:20 PM), <https://www.reuters.com/article/us-parler-website/parlers-website-is-back-online-but-app-still-not-in-stores-idUSKBN29M0QU> [https://perma.cc/V8EV-M4J4].

<sup>153</sup> See *supra* notes 142–144.

<sup>154</sup> Isaac & Conger, *supra* note 152.

<sup>155</sup> Jack Goldsmith & Andrew Keane Woods, *Internet Speech Will Never Go Back to Normal*, ATLANTIC (Apr. 25, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/what-covid-revealed-about-internet/610549/> [https://perma.cc/NZ5B-FSYV] (describing the collaboration by social media platforms to “censor harmful information related to the coronavirus” and warning, as has the Electronic Frontier Foundation, that the use of such practices after the crisis subsidizes risks intrusion into digital liberties and authoritarian control over digital speech).

<sup>156</sup> Google Public Policy (@googlepubpolicy), TWITTER (Mar. 16, 2020, 8:13 PM), <https://twitter.com/googlepubpolicy/status/1239706347769389056> [https://perma.cc/8LVW-DHY8].

<sup>157</sup> Elizabeth Culliford, *Facebook Removes Anti-Quarantine Protest Events in Some U.S. States*, REUTERS (Apr. 20, 2020, 3:16 PM), <https://www.reuters.com/article/us-health-coronavirus-usa-facebook/facebook-removes-anti-quarantine-protest-events-in-some-us-states-idUSKBN2222QK> [https://perma.cc/DW3T-WKGX] (“Unless government prohibits the event during this time, we allow it to be organized on Facebook,” said Facebook spokesman Andy Stone. “For this same reason, events that defy government’s guidance on social distancing aren’t allowed on Facebook.” . . . Mark Zuckerberg told ABC News on Monday that content suggesting social distancing would not be effective in stopping the virus’s spread would be removed as it would ‘classify as harmful misinformation.’”).

Hawley criticized these actions by Facebook.<sup>158</sup> Specifically, Trump Jr. tweeted, “Why is @Facebook colluding with state governments to quash people[']s free speech?”<sup>159</sup> and Senator Hawley tweeted, “Because free speech is now illegal America?”<sup>160</sup> In his tweet, Senator Hawley either misunderstands or misrepresents the fact that the removal of protest events from Facebook, a private actor, does not implicate users’ First Amendment rights at all. On the other hand, any attempt by the government to regulate Facebook’s ability to do so implicates the company’s First Amendment rights. Opinions on the wisdom of Facebook’s decision aside, it reflects Facebook’s own view that the protests were objectionable or harmful.

Although algorithms result in *automated* content moderation decisions, such “automation does not reduce the First Amendment protection afforded” them.<sup>161</sup> As Eugene Volokh and Donald M. Falk argue, algorithms remain protected by the First Amendment because they are written by humans who make decisions about the value of content.<sup>162</sup> Algorithms reflect “[t]hese human editorial judgments.”<sup>163</sup> Sofia Grafanaki has also argued that content moderation algorithms that “decide what content to censor or allow on the platform” and “perform a somewhat editorial role” are protected by the First Amendment.<sup>164</sup> Therefore, tech companies, as private actors,

---

<sup>158</sup> Steven Overly, *Republicans Attack Facebook as Network Shuts Down Anti-Lockdown Protests*, POLITICO (Apr. 20, 2020, 11:34 AM), <https://www.politico.com/news/2020/04/20/facebook-shuts-down-anti-quarantine-protests-at-states-request-196143> [<https://perma.cc/8M87-NMC7>] (“Donald Trump Jr. and Sen. Josh Hawley (R-Mo.) were among the conservatives blasting Facebook over its decision.”).

<sup>159</sup> Donald Trump Jr. (@DonaldJTrumpJr), TWITTER (Apr. 20, 2020, 1:08 PM), <https://twitter.com/DonaldJTrumpJr/status/1252283059845640192> [<https://perma.cc/TC9L-LMJ2>].

<sup>160</sup> Josh Hawley (@HawleyMO), TWITTER (Apr. 2020, 10:59 AM), <https://twitter.com/HawleyMO/status/1252250453221523456> [<https://perma.cc/9829-A6XC>].

<sup>161</sup> Volokh & Falk, *supra* note 129, at 888–89. For an argument that machine-learning renders algorithms *outside* First Amendment protection, see Grafanaki, *supra* note 129, at 145–46 (“The nature of machine-learning algorithms is such that they are constantly changing and adjusting to new inputs in ways that are so complex, that they often go beyond the comprehension of their designers. It would be very odd, to say the least, to grant the same protection we give to political speech to algorithmic processes and outputs that cannot even be explained by their own designers.”).

<sup>162</sup> Volokh & Falk, *supra* note 129, at 888–89.

<sup>163</sup> *Id.*

<sup>164</sup> Grafanaki, *supra* note 129, at 115.

have a First Amendment right to their content moderation algorithms.<sup>165</sup>

## B. Compelling the Message of Neutrality

The Ending Support for Internet Censorship Act impermissibly compels big tech companies to “speak” a certain message through their content moderation practices.<sup>166</sup> Notably, the absence of a political slant is a message in itself. Specifically, the bill would force companies that do not meet the criteria for FTC certification to modify their algorithms in order to ensure that they are devoid of all political bias. By imposing the requirement that content moderation be politically neutral, the bill disfavors companies whose moderation practices and algorithms have any ounce of a political slant—in either direction.<sup>167</sup> As a result, companies that fail to earn Section 230 immunity would face immense potential liability for user-generated content, risking “crippling lawsuits,” even if they ultimately prevail.<sup>168</sup> Alternatively, such companies would have to restructure their entire business models in order to comply with the criteria for immunity. Meanwhile, completely nonpolitical companies would receive immunity.

In short, Senator Hawley’s legislation favors politically neutral companies over ones that indicate any form of bias against “a political party, political candidate, or political viewpoint.”<sup>169</sup> The bill, which requires companies to project a message of neutrality in order to receive Section 230 immunity, is therefore presumptively unconstitutional.

---

<sup>165</sup> See *id.* at 136 (“[T]he idea that computer code is a type of speech has received considerable support.”); John Samples, *Why the Government Should Not Regulate Content Moderation of Social Media*, CATO INST. (Apr. 9, 2019), <https://www.cato.org/publications/policy-analysis/why-government-should-not-regulate-content-moderation-social-media> [https://perma.cc/5ASY-T72H] (“Social media are not government and hence are not constrained by the First Amendment. These platforms are protected by the First Amendment but need not apply it to speech by their users.”); see also *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (“The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable.”).

<sup>166</sup> See *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 61–62 (explaining that laws that have been declared unconstitutional are those which “dictate the content of the speech”).

<sup>167</sup> See Eric Goldman, *Comments on Sen. Hawley’s “[Ending] Support for Internet Censorship Act”*, TECH. & MARKETING L. BLOG (July 10, 2019), <https://blog.ericgoldman.org/archives/2019/07/comments-on-sen-hawleys-ending-support-for-internet-censorship-act.htm> [https://perma.cc/X35N-XZTD].

<sup>168</sup> See Stern, *supra* note 42.

<sup>169</sup> See *id.*; see also S. 1914, 116th Cong. (2019).

### C. Senator Hawley's Bill Cannot Survive Strict Scrutiny

Any regulation that restricts protected speech based on the content of the message expressed, or compels a speaker to express a certain message, must be narrowly tailored to serve a compelling governmental interest in order to pass constitutional muster.<sup>170</sup> Senator Hawley's bill fails both the compelling interest and the narrow tailoring requirements.

First, the asserted interest in ending the alleged suppression of conservative voices by big tech companies is not a compelling governmental interest. It is well-settled that "[d]isapproval of a private speaker's statement does not legitimize use of [government] power to compel the speaker to alter the message by including one more acceptable to others."<sup>171</sup> As previously argued, the government's interest in ensuring robust public discussion of controversial issues despite a scarcity of broadcast frequencies—asserted as justification for the Fairness Doctrine<sup>172</sup>—is inapplicable to the Internet context. Assuming that the scarcity inherent in broadcast was sufficient to justify government intervention into public discourse in spite of private broadcaster's own First Amendment rights, there is no comparable defense for government interference into speech on the Internet, where an infinite number of voices have unlimited space to speak. There is no need for the government to ensure that all viewpoints have an equal opportunity to express their message on the Internet—that assurance is inherent in the Internet itself. The Internet is boundless, and the government may not, for example, tell Facebook that it must host speech that it considers in violation of its Community Standards. Facebook is a private, nongovernmental actor, and no one is *entitled* to use its platform.

Second, the imposition of a political neutrality requirement on big tech companies' content moderation policies and algorithms is not narrowly tailored to achieving Senator Hawley's stated goal of eliminating anticonservative bias on social media. While such a requirement would appease Senator Hawley and his supporters by preventing companies from removing "conservative content"<sup>173</sup> (to the extent that they do so in the

---

<sup>170</sup> Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015).

<sup>171</sup> Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 581 (1995).

<sup>172</sup> See *supra* subpart II.C.

<sup>173</sup> See *supra* note 86 and accompanying text (explaining that Senator Hawley's primary concern regarding Big Tech is its alleged censorship of conservative viewpoints).

first place), the bill goes far beyond this. In part due to the extreme ambiguity of the undefined term “political viewpoint,” the bill has the potential to affect not only a company’s ability to remove political content but also its moderation of other objectionable content. For example, “[c]an Facebook no longer censor posts endorsing the Nazis—which are, after all, a political party?”<sup>174</sup> Must Facebook leave “bigoted ideas promoted by the National Fascist Party” and “violent ideas touted by the Communist Party” untouched?<sup>175</sup> In October 2020, Facebook updated its “hate speech policy to prohibit content that denies or distorts the Holocaust”<sup>176</sup>—would Senator Hawley’s bill force Facebook to rescind that policy in order to keep its immunity? If the bill had become law prior to the January 2021 Capitol insurrection, would social media companies have been required to sit back as Donald Trump and his armed supporters used their platforms to incite and coordinate violence and endanger United States Senators and Representatives, the Vice President, the city of Washington D.C., and American democracy?

Presumably, even if Congress adopted a “Fairness Doctrine for the Internet,” we would want to leave Facebook the ability to remove hate speech, including that posted by groups that may technically be “political parties” or represent a “political viewpoint.” Senator Hawley’s legislation would interfere with companies’ ability to remove extreme political figures whose speech they consider in violation of, for example, their policies against hate speech and violent content. Facebook could not, as it manages the platform that it wants its business to embody, ban Alex Jones under its hate speech policy (or remove or flag posts claiming election fraud and encouraging violence at the Capitol) *and* keep its Section 230 immunity at the same time. Therefore, the bill is not narrowly tailored; rather, it is severely overinclusive in that it implicates far more speech than is necessary to achieve its desired end.

Even a potentially less extreme version of Senator Hawley’s bill, such as one that left open an exception for content removal under hate speech, harassment, and similar policies, would

---

<sup>174</sup> Stern, *supra* note 42.

<sup>175</sup> *Id.*

<sup>176</sup> Monika Bickert, *Removing Holocaust Denial Content*, FACEBOOK (Oct. 12, 2020), <https://about.fb.com/news/2020/10/removing-holocaust-denial-content/> [https://perma.cc/7WMY-DNHU]; Matt O’Brien, *Facebook Bans Holocaust Denial Posts*, ASSOCIATED PRESS (Oct. 12, 2020), <https://apnews.com/article/election-2020-media-social-media-elections-mark-zuckerberg-14e8073ce6f7bd2a674c99ac7bbfc240> [https://perma.cc/9ZY5-TL39].

nonetheless fail strict scrutiny for lack of a compelling governmental interest. Although such a bill may be able to garner more political support from Senator Hawley's Democratic colleagues,<sup>177</sup> any bill transparently aimed at amplifying conservative viewpoints is likely to face significant political obstacles. In addition, a hate speech exception to a political neutrality requirement is unlikely to achieve Senator Hawley and his supporters' desired end, as tech companies could expand their hate speech policies and continue to remove "conservative content" under those provisions. Similarly, a more moderate version of the bill that required a greater showing of bias against a political party, candidate, or viewpoint might inch closer to narrow tailoring but would still fail. For example, even a version requiring a showing of highly targeted bias over a period of time would prevent platforms from removing hateful Nazi propaganda or long-term, politically-tinged harassment by a single person or group. Furthermore, that version would also lack a compelling governmental interest for the reasons described above.

A version of the political neutrality requirement that may come closest to satisfying strict scrutiny would be one that prevented platforms from removing content related to an upcoming election or to the candidates themselves. Under this highly limited version, a tech company would hypothetically lose its Section 230 immunity, for example, by removing content that opposed the company's favored candidate. This too, however, would fail to gain support from those concerned about election-related disinformation and misinformation, would stray from Senator Hawley's central objective of completely preventing platforms from censoring conservative viewpoints,<sup>178</sup> not just in an election year, and would run afoul of the tech companies' First Amendment rights by dictating the content that must appear on their sites.

Relatedly, former President Trump's May 2020 Executive Order on Preventing Online Censorship represents a *potentially* more feasible approach to scaling back social media companies' immunity, though one that is also motivated by notions of anticonservative bias.<sup>179</sup> A thorough critique of the order is an undertaking for another time and place. In short, however, the order narrowly interprets Section 230 as providing "limited lia-

---

<sup>177</sup> See *infra* notes 15–20 and accompanying text (explaining support from Democratic senators for cracking down on Big Tech).

<sup>178</sup> See Stern, *supra* note 42.

<sup>179</sup> See Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020).

bility ‘protection’” to online platforms and other interactive computer service providers that engage in “‘Good Samaritan’ blocking” of harmful content.<sup>180</sup> Misinterpreting and misconstruing the “Good Samaritan” provision in § 230(c)(2), the order claims that companies must make content moderation decisions in “good faith” in order to be considered within the statute’s safe harbor.<sup>181</sup> By contrast, platforms would lose their protection if they “engage in deceptive or pretextual actions (often contrary to their stated terms of service) to stifle viewpoints with which they disagree.”<sup>182</sup>

With the same end in sight as Senator Hawley’s bill, the order appears to be an expansion on Senator Hawley’s efforts, and, like the bill, it infringes on social media companies’ own First Amendment rights and has been similarly criticized as unconstitutional and unenforceable.<sup>183</sup> In fact, Justin Brookman, director of consumer privacy and technology policy for Consumer Reports, stated, “A fact check by Twitter is an editorial decision protected by the First Amendment.”<sup>184</sup> In the order itself, Trump acknowledged that content moderation decisions are “editorial conduct.”<sup>185</sup>

In sum, Senator Hawley’s legislation is presumptively unconstitutional because it compels speech on the part of tech companies, which would be forced to remove all semblance of political viewpoint from their content moderation practices and policies as well as rewrite their content moderation algorithms in order to obtain Section 230 immunity. Furthermore, the bill cannot survive strict scrutiny because it does not serve a compelling governmental interest, and—even if preventing anticonservative bias on social media *were* a compelling interest—the bill is not narrowly tailored to serve that interest. More generalized attacks on Section 230, such as the one taken in the executive order, as well as more demanding or “tailored” versions of Senator Hawley’s political neutrality requirement are similarly unconstitutional infringements upon tech companies’ First Amendment rights.

---

<sup>180</sup> Exec. Order No. 13,925. For a similar argument, see Citron & Wittes, *supra* note 48, at 416 (arguing that Section 230 “should be read to apply only to Good Samaritans envisioned by its drafters: providers or users engaged in good faith efforts to restrict illegal activity”).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> See *supra* note 24–27.

<sup>184</sup> Swartz, *supra* note 24.

<sup>185</sup> Exec. Order No. 13,925. The order uses this point to emphasize that platforms should be “exposed to liability like any traditional editor and publisher that is not an online provider.” *Id.*

#### D. Unconstitutionality . . . and Beyond

If the unconstitutionality of a political neutrality requirement under the First Amendment was not enough, the idea is deeply flawed in a number of other ways. At its threshold, Senator Hawley's bill is based on the erroneous—or at the very least unsubstantiated—belief that big tech companies are censoring conservative voices on their platforms. As many critics have noted, there is no evidence of such bias;<sup>186</sup> in fact, conservative news outlets tend to perform well on social media platforms. One journalist noted, “Fox News typically gets more engagement on Facebook than any other publisher.”<sup>187</sup> Another explained that “YouTube’s recommendation algorithm has been great for right-wing channels.”<sup>188</sup> Yet another argued that Google’s decision not to remove the right-wing news source *Breitbart* from its advertising program, despite internal emails showing that Google employees were “concerned that Breitbart was a source of hate speech and fake news . . . should tell us everything we need to know about Google’s anti-conservative bias.”<sup>189</sup> Given Senator Hawley’s unsupported yet vehement accusations against big tech, his bill seems to be more of an uninformed vendetta against big tech than a sincere effort to cure the genuine ills associated with the Internet.

In addition, “political neutrality” is a subjective determination that is especially inappropriate for the government to

---

<sup>186</sup> See Ingram, *supra* note 42 (calling the idea that big tech is biased against conservatives a “conspiracy theory” promoted by alt-right groups and mainstream conservatives “despite an almost total lack of evidence”); India McKinney & Elliot Harmon, *Platform Liability Doesn’t—and Shouldn’t—Depend on Content Moderation Practices*, ELECTRONIC FRONTIER FOUND. (Apr. 9, 2019), <https://www.eff.org/deeplinks/2019/04/platform-liability-doesnt-and-shouldnt-depend-content-moderation-practices> [<https://perma.cc/NQG8-ZCPN>] (“[W]e don’t see evidence of systemic political bias against conservatives. In fact, the voices that are silenced more often belong to already marginalized or less-powerful people.”); Casey Newton, *The Real Bias on Social Networks Isn’t Against Conservatives*, VERGE (Apr. 11, 2019, 6:00 AM), <https://www.theverge.com/interface/2019/4/11/18305407/social-network-conservative-bias-twitter-facebook-ted-cruz> [<https://perma.cc/AC2U-THNR>] (citing studies showing a lack of evidence of anticonservative bias on social media); Oscar Schwartz, *Are Google and Facebook Really Suppressing Conservative Politics?*, GUARDIAN: TECH. (Dec. 4, 2018, 6:00 AM), <https://www.theguardian.com/technology/2018/dec/04/google-facebook-anti-conservative-bias-claims> [<https://perma.cc/LC3X-UYJ4>] (quoting scholars who note that claims of anticonservative bias are “anecdotal,” and there is no reason to doubt companies’ emphatic denials of bias in their algorithms, which are “very complex and not at all intuitive”).

<sup>187</sup> Newton, *supra* note 186.

<sup>188</sup> Edelman, *supra* note 79.

<sup>189</sup> Sue Halpern, *The Search for Anti-Conservative Bias on Google*, NEW YORKER (Dec. 19, 2018), <https://www.newyorker.com/tech/annals-of-technology/the-search-for-anti-conservative-bias-on-google> [<https://perma.cc/N865-YCC4>].



make.<sup>190</sup> The idea that government officials—especially political appointees like FTC commissioners—have the final say on what constitutes “political bias” is a concept “wholly foreign to the First Amendment.”<sup>191</sup> Furthermore, enforcement of the bill’s political neutrality requirement poses significant practical difficulties, since it is “impossible to enforce an objective standard of ‘neutrality’ on social media.”<sup>192</sup>

Lastly, requiring politically neutral content moderation would return us to dilemma of the *Stratton Oakmont* era, in which interactive computer service providers were encouraged to “take an entirely hands-off approach to user-generated content” for fear that even the slightest effort to moderate content would open them up to enormous amounts of liability.<sup>193</sup> In understanding this key reason why politically neutral content moderation is such a detrimental policy choice, it is helpful to imagine digital life under a regime like Senator Hawley’s. Would Facebook be able to prevent a repeat of the disinformation crisis surrounding the 2016 election? Would tech companies have been able to work together to combat misinformation about the coronavirus?

Faced with the risk of running afoul of an ambiguous political neutrality requirement, and therefore of losing their Section 230 immunity, companies would be disincentivized from engaging in these voluntary, socially beneficial content moderation decisions and would likely refrain from moderating content at all.<sup>194</sup> The Electronic Frontier Foundation explains that

---

<sup>190</sup> See Coaston, *supra* note 120 (explaining that “there’s no blue-ribbon test for ‘political neutrality’” because it is a subjective determination and noting that FTC commissioners would be “unable” to analyze algorithms and “determine what could be considered ‘politically neutral’”—asking, for example, whether or not the fact that Trump lost the popular vote in 2016 is a “politically neutral” statement).

<sup>191</sup> See *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (“[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . .”).

<sup>192</sup> Harmon, *supra* note 99; see also Goldman, *supra* note 167 (arguing that political bias is not measurable because (1) “the term ‘political viewpoint’ is broad,” and it is “impossible to distinguish between ‘political viewpoints’ and other viewpoints,” and (2) the “disproportionate standard” assumes there is a neutral baseline to which content moderation practices could be compared); Miers, *Senator Hawley’s Proposal*, *supra* note 94 (stating that “neutral moderation is inherently impossible,” and “[t]here is no such thing as truly neutral content moderation”).

<sup>193</sup> Kosseff, *Gradual Erosion*, *supra* note 51, at 6.

<sup>194</sup> Brenda Dvoskin, *The Thorny Problem of Content Moderation and Bias*, CTR. DEMOCRACY & TECH. (July 3, 2019), <https://cdt.org/insights/the-thorny-problem-of-content-moderation-and-bias/> [<https://perma.cc/VUV4-RG3G>] (“This proposal could create a huge disincentive to moderate, which could lead to a proliferation of misinformation and diminished usefulness of many online services. . . .

“[f]aced with the impossible task of proving perfect neutrality, many platforms—especially those without the resources of Facebook or Google to defend themselves against litigation—would simply choose to curb potentially controversial discussion altogether and even refuse to host online communities devoted to minority views.”<sup>195</sup> As Eric Goldman has argued, “[i]n light of how much bad content is online despite the Internet services’ current best efforts, that prospect should terrify everyone.”<sup>196</sup>

### CONCLUSION

In the absence of Section 230 immunity, each and every user post, tweet, and comment would present “another small but real risk that [a] website could be sued out of existence.”<sup>197</sup> The sheer volume of user-generated content that floods platforms every day<sup>198</sup> would render it nearly impossible for companies to adequately screen for potential liability.<sup>199</sup> As Representative Chris Cox, one of the drafters of Section 230, remarked, “You absolutely need to have Section 230 to have a Facebook.”<sup>200</sup>

---

Mandated neutrality would make it harder for communities to shape their own house rules.”)

<sup>195</sup> McKinney & Harmon, *supra* note 186.

<sup>196</sup> Goldman, *supra* note 167; *see also* Noah Tischler, Note, *Free Speech Under Siege: Why the Vitality of Modern Free Speech Hinges on the Survival of Section 230 of the Communications Decency Act*, 24 TEMP. POL. & C.R. L. REV. 277, 279 (2014) (“Without the protection of § 230, the Internet as we know it would cease to exist and this metropolis of free expression would perish.”).

<sup>197</sup> KOSSEFF, *supra* note 119, at 121–22 (“The sites could not review the millions of words, pictures, and videos that were uploaded. And if they did not screen every bit of third-party content in advance, they could be liable for existential amounts of damages. [Without Section 230 and its current interpretation by courts], the websites could not exist in their current form.”). Section 230 immunity does not just benefit social media companies; other internet companies that host vast amounts of user-generated content face the same problem. Mike Godwin, the former general counsel of the Wikimedia Foundation, explained that without the protections of Section 230, sites like Wikipedia could not exist because “these laws are essential to making today’s robust online public squares possible, and they will likely be essential for the next generation of online entrepreneurs.” *Id.* at 139 (quoting Godwin).

<sup>198</sup> EFF, *supra* note 49 (stating that “Facebook alone has more than 1 billion users, and YouTube users upload 100 hours of video every minute”); Kosseff, *Gradual Erosion*, *supra* note 49, at 38 (“Twitter transmits approximately 200 billion tweets annually.”).

<sup>199</sup> *See* Kosseff, *Gradual Erosion*, *supra* note 51, at 38 (highlighting the impracticality of “expect[ing] Twitter—and other social media providers—to assume liability for their users’ posts”); *id.* at 3 (“Imagine if Facebook and Twitter were responsible for every user comment, or if Yelp was responsible for every restaurant review.”).

<sup>200</sup> KOSSEFF, *supra* note 119, at 140.

With calls for regulating big tech in vogue, it is imperative, now more than ever, to reiterate the importance of Section 230 and champion its ability to continue to support the development of the Internet. Since its enactment, Section 230 has allowed interactive computer service providers—first America Online, and now Facebook and Google—to police their platforms for and remove objectionable content. Importantly, Section 230 protects not only the social media giants who so often find themselves at the center of the conversation, but also Wikipedia, news organizations, and small bloggers who rely on or allow user-generated content and comments. Senator Wyden has explained, “My brief has never been for the big guy. It’s always been about the startup, it’s always been about innovation, the inventor, and competition. That is still my concern today.”<sup>201</sup> Senator Wyden continued, “If you unravel 230, then you harm the opportunity for diverse voices, diverse platforms, and, particularly, the little guy to have a chance to get off the ground.”<sup>202</sup>

Senator Hawley’s Ending Support for Internet Censorship Act is an unconstitutional attempt to revoke big tech companies’ Section 230 immunity. The bill imposes a requirement that big tech companies maintain content moderation practices and algorithms devoid of all political bias, thus forcing noncompliant companies to rewrite their algorithms in order to earn (and keep) Section 230 immunity. The regulation, as a form of compelled speech, is unconstitutional because it fails to satisfy the demanding standard of strict scrutiny. Further, the bill is based on the unsupported assumption of anticonservative bias on social media and is plagued by both practical difficulties and unwise policy. For Section 230, meaningful and long-lasting change may be coming—but a sound proposal for such change remains to be seen.

---

<sup>201</sup> Stewart, *supra* note 9.

<sup>202</sup> *Id.*