Normalizing De-Platforming: The Right Not to Tolerate the Intolerant

by

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Following the attack on the U.S. Capital in January 2021 tens of thousands of accounts, including the Facebook and Twitter accounts of then-President Donald Trump, were suspended or deleted. Section 230 of the Communications Decency Act grants online digital platforms immunity from liability for not only allowing third parties to post information online but also for decisions to remove that content. Since the "Great De-Platforming" of 2021, the viability of § 230 immunity has been called into question. This paper explores the legal boundaries in which online digital platforms operate. It argues that robust online speech requires that platforms must continue to enjoy immunity for their decisions on which content and users must be removed in order to ensure that intolerant speech does not squelch all other speech.

Never in history has there been an intermediary for human expression with either the scale or role of Facebook.[1]

I. Introduction

It was called the Great De-Platforming.[2] Following the January 6, 2021, attack on the U.S. Capital, former President Trump was banned from Twitter[3] and suspended by Facebook,[4] scores of accounts and posts and videos were removed from Facebook, Twitter, and YouTube,[5] and Amazon Web Services refused to continue to host the social media site Parler.[6] The "Great De-Platforming" revealed that online digital platforms have unrestricted authority over the content posted on their sites. "Facebook and other large internet companies can monitor every word users share and instantly delete anything they don't like. No communications medium in human history

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[1] Emily Bell, *The Unintentional Press: How Technology Companies Fail as Publishers, in* THE FREE SPEECH CENTURY 235, 238 (Lee C. Bollinger & Geoffrey R. Stone, eds. 2019); *see also* Jeffrey Rosen, *Google's Gatekeepers*, N.Y. TIMES (Nov. 28, 2008), https://www.nytimes.com/2008/11/30/magazine/30google-t.html ("As more and more speech migrates online, to blogs and social-networking sites and the like, the ultimate power to decide who has an opportunity to be heard, and what we may say, lies increasingly with Internet service providers, search engines and other Internet companies . . . .").

[2] *See, e.g.*, Aaron Mak, *Where MAGA Insurrectionists and QAnon Followers Will Post Now*, SLATE (Jan. 13, 2021, 5:34 PM), https://slate.com/technology/2021/01/twitter-facebook-parler-gab-telegram-maga-qanon.html; Barry Ritholtz, *Silicon Valley De-Platforming: Freedom & Censorship*, THE BIG PICTURE (Jan. 13, 2021, 10:00 AM), https://ritholtz.com/2021/01/de-platforming-trump-freedom-censorship/.

[3] *See, e.g.*, Brian Fung, *Twitter Bans President Trump Permanently*, CNN (Jan. 9, 2021, 9:19 AM), https://www.cnn.com/2021/01/08/tech/trump-twitter-ban/index.html.

[4] Makena Kelly, *Facebook Bans Trump "Indefinitely"*, MSN (Jan. 7, 2021), https://www.msn.com/en-us/money/other/facebook-bans-trump-indefinitely/ar-BB1cyDSV; *see also infra* text accompanying notes 233-236 (discussing Facebook's Oversight Board upholding the ban, but criticizing its "indefiniteness").

[5] *See, e.g.*, Mak, *supra* note 2; Jillian C. York, *Everything Pundits Are Getting Wrong About this Current Moment in Content Moderation: An Ongoing List*, JILLIAN C. YORK (Jan. 10, 2021), https://jilliancyork.com/2021/01/10/everything-pundits-are-getting-wrong-about-this-moment-in-platform-regulation-an-ongoing-list/.

[6] *See, e.g.*, Annie Palmer, *Amazon Drops Parler from Its Web Hosting Service, Citing Violent Posts*, CNBC (Jan. 11, 2021, 8:24 AM), https://www.cnbc.com/2021/01/09/amazon-drops-parler-from-its-web-hosting-service.html.

has ever worked this way."[7] Commentators are wondering whether large digital platforms with commercial self-interests are shaping political discourse and outcomes.[8] This paper explores the legal boundaries in which online digital platforms operate.

Section 230(c) of the Communications Decency Act,[9] a once-obscure provision of the Telecommunications Act of 1996, grants online digital platforms nearly unlimited immunity from liability for content posted by users. Section 230(c) also provides online digital platforms a "safe harbor" immunity from liability for removing content from their sites.[10] As social and political communications have migrated to online digital platforms, particularly Facebook, Twitter and YouTube, various commentators—including politicians and even a Supreme Court Justice—have expressed concern regarding the control these platforms have over speech. A vexing conundrum has arisen: should online digital platforms aggressively moderate their sites for misleading information that can potentially have real-world consequences (e.g., sway elections; encourage insurrection; impact health and safety) and, at the same time, should those platforms be limited in who and what they can remove from their sites?

Central to a discussion of online content is the notion of free speech. For example, Supreme Court Justice Clarence Thomas is concerned that so much speech, including political speech, is controlled by private entities outside the reach of the First Amendment.[11] Those private online digital platforms have an unfettered right to remove anything or anyone from their sites that they deem in violation of their own content standards. That is a power many fear and some argue has been abused.[12] As a result, there have been efforts to eliminate or restrict the broad immunity granted to online digital platforms with respect to third-party content.[13]

"Changes in technology and the growth of the internet have resulted in a revolution in the infrastructure of free expression. The private platforms that created and control that infrastructure are the New Governors in the digital era."[14] We must therefore not only allow, but encourage, online digital platforms to remove the worst of the worst content on their sites in order to avoid the *paradox of tolerance*: "Unlimited tolerance must lead to the disappearance of tolerance. If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them."[15]

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[7] Daphne Keller, *Who Do You Sue?: State and Platform Hybrid Power Over Online Speech* 1 (Hoover Institution, Aegis Series Paper No. 1902, 2019). *See generally*, Jennifer Cobbe, *Algorithmic Censorship by Social Platforms: Power and Resistance*, PHIL. & TECH. (2020), https://doi.org/10.1007/s13347-020-00429-0 (arguing that algorithmic censorship could allow social platforms to exercise an unprecedented degree of control over both public and private communications and that commercial priorities would be inserted further into the everyday communications of billions of people).

[8] *See* Keller, *supra* note 7, at 2; *see also* Gabe Kaminsky, *GOP Rep. Blasts Big Tech Oligarchs for Exploiting Children: 'Your Platforms Are My Biggest Fear as a Parent'*, FEDERALIST (Mar. 25, 2021), https://thefederalist.com/2021 (reporting that Representative Cathy McMorris Rodgers (R-Wa.) accused big tech platforms of having failed to promote the battle of ideas and free speech and censored political viewpoints they disagree with).

[9] Pub. L. No. 104-104, § 509, 110 Stat. 56, 137–39 (1996) (codified at 47 U.S.C § 230).

[10] *See infra* Part II.

[11] Biden v. Knight First Amendment Inst. at Columbia Univ., 141 S. Ct. 1220, 1227 (2021) (mem.) (Thomas, J., concurring). ("[T]he right to cut off speech lies most powerfully in the hands of private digital platforms.").

[12] *See infra* note 273 and accompanying text.

[13] *See infra* Part IV.A.

[14] Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1663 (2018) (internal quotation marks and footnote omitted).

[15] KARL POPPER, I THE OPEN SOCIETY AND ITS ENEMIES 265 n.4.

This paper is organized as follows. Part II reviews § 230(c) of the Communications Decency Act, exploring the near-total immunity from liability for online digital platforms for content posted by third-party users, as well as the near-total immunity from liability for the platforms for removing content. Part III examines First Amendment issues associated with political speech posted on and controlled by digital platforms. While there are some instances in which First Amendment free speech protections are triggered when state actors use online digital platforms as public forums, for the most part the First Amendment does not protect online speech. Part IV reviews efforts to regulate content on online digital platforms, whether through revisions to § 230, state legislation, or self-regulatory moderation. At present, no viable or constitutional federal or state regulation appears imminent, leaving the power to control online content entirely in the hands of digital platforms. Part V concludes with an analysis emphasizing that online digital platforms must have full capacity to self-moderate without fear of liability in order to remove the intolerant in order to preserve tolerance.

II. Online Digital Platform Immunity Through Section 230(c) of the Communications Decency Act

In 1996, there was no Google, YouTube, Facebook, or web-based email. Netscape, founded in 1994, supplied the dominate web browser, Navigator.[16] Although Amazon.com and Yahoo existed, people who accessed the internet spent most of their time in subscriber-based online communities such as America Online (AOL), CompuServe, and Prodigy.[17] "[T]he internet was young and few of us understood how it would transform American society."[18]

The subscriber-based communities allowed their users to post content online, which immediately raised the question of who would be liable if a user's post was defamatory—the platform and the user, or just the user? That issue quickly moved into the courts. For example, in *Cubby, Inc. v. CompuServe, Inc.*,[19] the plaintiff sued CompuServe for libel based on content published on CompuServe by an independent third party.[20] The Southern District for the District of New York described CompuServe as "an on-line general information service or 'electronic library' that subscribers may access from a personal computer or terminal[,]" with access to thousands of information sources.[21] In deciding CompuServe's motion for summary judgment, the court focused on whether CompuServe should be considered a distributor (as argued by CompuServe) or as a publisher (as argued by the plaintiff).[22] The court concluded CompuServe was the former: "CompuServe has no more editorial control over . . . 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

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[16] *See Netscape*, WIKIPEDIA, https://en.wikipedia.org/wiki/Netscape (last edited Jan. 23, 2021). Microsoft released its first version of Internet Explorer in 1996. *See The Web Back in 1996–1997*, SOLARWINDS PINGDOM, https://www.pingdom.com/blog/the-web-in-1996-1997/.

[17] *See* Farhad Manjoo, *Jurassic Web: The Internet of 1996 Is Almost Unrecognizable Compared with What We Have Today*, SLATE (Feb 24, 2009, 5:33 PM), https://slate.com/technology/2009/02/the-unrecognizable-internet-of-1996.html.

[18] Lemmon v. Snap, Inc., No. 20-55295, 2021 WL 1743576, at *3 (9th Cir. May 4, 2021).

[19] 766 F. Supp. 135 (S.D.N.Y. 1991).

[20] *See id.* at 137.

[21] *Id.*

[22] *See id.* at 139.

other distributor to do so."[23] Based on the First Amendment, "a distributor must have knowledge of the contents of a publication before liability can be imposed for distributing that publication."[24] The court concluded the plaintiffs had not set forth any specific facts showing there is a genuine issue as to whether CompuServe knew or had reason to know of the relevant content.[25]

However, in *Stratton Oakmont, Inc. v. Prodigy Services Co*.,[26] a New York Supreme Court in 1995 used a similar analysis but reached a different conclusion. In *Stratton*, the plaintiff sued Prodigy after anonymous and allegedly libelous postings appeared on Prodigy's network, seeking to hold Prodigy liable as a publisher.[27] The critical issue the court addressed was whether Prodigy "exercised sufficient editorial control over its computer bulletin boards to render it a publisher with the same responsibilities as a newspaper."[28] The *Stratton* court distinguished Prodigy from CompuServe because: (1) Prodigy held itself out to the public and its members as controlling the content of its computer bulletin boards, and (2) it implemented this control through automatic software screening and enforceable content guidelines.[29] "By actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and 'bad taste', . . . [Prodigy] is clearly making decisions as to content, and such decisions constitute editorial control."[30]

At the same time, Congress recognized the convergence of what were once disparate forms of media and communication—radio, television, and telephone—into digital telecommunications.[31] The result was the Telecommunications Act of 1996.[32] But very little of the Act addressed the internet directly, except in Title V, under the Communications Decency Act (CDA).[33] The CDA added a subsection (d)(1) to 47 U.S.C. § 223 making it illegal to:

> (A) use[] an interactive computer service to send to a specific person or persons under 18 years of age, or

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[23] *Id.* at 140.

[24] *Id.* at 139. The court cited Smith v. California, 361 U.S. 147 (1959) (striking down an ordinance imposing strict criminal liability on booksellers possessing obscene material):

> Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience. And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded.

Id. at 153–54 (internal quotation marks and citation omitted).

[25] *See CompuServe*, 766 F. Supp. at 141.

[26] 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (unreported decision).

[27] *See id.* at *1.

[28] *Id*. at *3.

[29] *See id.* at *4.

[30] *Id.* (citation omitted).

[31] *See generally* ANGELE A. GILROY, CONG. RSCH. SERV., 96-223 E, THE TELECOMMUNICATIONS ACT OF 1996 (P.L.104-104) (1996); Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 49 FED. COMM. L.J. 1 (1996).

[32] Pub. L. No. 104-104, 110 Stat. 56 (codified as amended at scattered sections of 47 U.S.C.).

[33] *Id.*, §§ 501–561, 110 Stat. at 133–43 (amending and adding to 47 U.S.C. § 223).

(B) use[] any interactive computer service to display in a manner available to a person under 18 years of age,

any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication[.][34]

This portion of the CDA was almost immediately ruled unconstitutional.[35] But another section of the CDA survives to at least this day—Section 230.[36] In particular, § 230(c): (1) prohibits providers and users of an "interactive computer service" from being classified as a "publisher or speaker of any information provided by another information content provider[;]"[37] and (2) grants immunity to interactive computer services from civil liability for monitoring content.[38] An "interactive computer service" is defined 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."[39] Twenty-first century online digital and social media platforms such as Facebook, Twitter, and YouTube are considered interactive computer services for purposes of § 230(c).[40]

How did Congress wind up granting interactive computer services sweeping immunity at time when its primary concern with the Telecommunications Act of 1996 was local and long-distance telephone competition and the internet was considered just a "shiny new object?"[41] Two U.S. Representatives, Chris Cox (R-Ca.) and Ron Wyden (D-Or.), were aware of the *Stratton Oakmont* decision and were concerned about its implications.[42] In 1995, they introduced the "Internet

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[34] *Id.* § 502(2)(d)(1), 110 Stat. at 133–34 (codified at 24 U.S.C. § 223(d)(1)).

[35] *See* Reno v. ACLU, 521 U.S. 844, 877–78 (1997) ("The breadth of the CDA's coverage is wholly unprecedented. . . . The general, undefined terms 'indecent' and 'patently offensive' cover large amounts of nonpornographic material with serious educational or other value. Moreover, the 'community standards' criterion as applied to the Internet means that any communication available to a nation wide audience will be judged by the standards of the community most likely to be offended by the message.") (footnotes omitted); *see also* Krattenmaker, *supra* note 31, at 24 ("Literally, these provisions would appear to criminalize transmission over the Internet (or any other pathway to a personal computer accessible to anyone under eighteen) of countless novels, poems, photographs, or motion pictures. Adults appear to be required to converse, through their interactive computers, in language fit for a nine-year-old.") (footnote omitted).

[36] Pub. L. No. 104-104, § 509, 110 Stat. 56, 137–39 (codified at 47 U.S.C § 230).

[37] 47 U.S.C. § 230(c)(1). This language expressly rejects the holding in Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). *See* Shiamili v. Real Estate Grp. of N.Y., Inc., 952 N.E.2d 1011, 1016 (N.Y. 2011); S. Rpt. 104-230, at 194 (1996).

[38] 47 U.S.C. § 230(c)(2) ("CIVIL LIABILITY.—No provider or user of an interactive computer service shall be held liable on account of—'(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or '(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).").

[39] Pub. L. No. 104-104, § 509(e)(2), 110 Stat. 56, 1339 (codified at 47 U.S.C § 230(f)(2)).

[40] *See, e.g.*, Klayman v. Zuckerberg, 753 F.3d 1354, 1357 (D.C. Cir. 2014), *cert. denied*, 574 U.S. 1012 (2014); Caraccioli v. Facebook, Inc., 167 F. Supp. 3d 1056, 1065 (N.D. Calif. 2016); Baldino's Lock & Key Serv., Inc. v. Google, Inc., 88 F. Supp. 3d 543, 547 (E.D. Va. 2015); Kimzey v. Yelp Inc., 21 F. Supp. 3d 1120 (W.D. Wash. 2014).

[41] *See* JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 61 (2019).

[42] *See* id. at 59–60.

Freedom and Family Empowerment Act,"[43] which contained the basic provisions of § 230 and was incorporated in the CDA portion of the Telecommunications Act of 1996.

Cox and Wyden drafted the immunity provisions of § 230(c) to have two components: blanket immunity that could potentially protect a company even if it knew or should have known of illegal or defamatory third-party content;[44] and a "good faith" provision to encourage interactive computer services to set their own user content standards.[45] In summary, under § 230(c) online digital platforms "will not be considered to be the speakers or publishers of third-party content, and they will not lose that protection only because they delete objectionable posts or otherwise exercise good faith efforts to moderate user content."[46]

To establish § 230(c) immunity, courts (particularly in the Ninth Circuit) blend three factors (referred to as the *Barnes* test): "(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat. . . as a publisher or speaker (3) of information provided by another information content provider."[47] If all three elements are met, the platform will be granted immunity under § 230(c). And that immunity is granted at the pleadings stage.[48]

Section 230(c) immunity is broad[49] and it is deep.[50] For example, in a lawsuit brought against Google for violation of California consumer protection laws by offering video games allegedly containing features illegal under California gambling laws, Google sought dismissal based on §

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[43] H.R. 1978, 104th Cong. (1995).

[44] *See* 47 U.S.C. § 230(c)(1); KOSSEFF, *supra* note 41, at 65.

[45] *See* 47 U.S.C. § 230(c)(2); KOSSEFF, *supra* note 41, at 65.

[46] KOSSEFF, *supra* note 41, at 66. Section 230 does not, however, exempt platforms from laws relating to obscenity, sexual exploitation of children, sex trafficking, intellectual property, communications privacy, or any federal criminal statute. *See* 47 U.S.C. § 230(e). "This means that every internet service provider, search engine, social networking platform, and website is subject to thousands of laws, including child pornography laws, obscenity laws, stalking laws, and copyright laws." Klonick, *supra* note 14 at 1636 n.265.

[47] Barnes v. Yahoo, Inc., 570 F.3d 1096, 1100–01 (9th Cir. 2009) (footnote omitted).

[48] *See, e.g.*, Domen v. Vimeo, Inc., 991 F.3d 66, 73 (2nd Cir. 2021) ("Section 230 immunity. . . is an immunity from suit rather than a mere defense to liability.") (alterations and internal quotation marks omitted); Fyk v. Facebook, Inc., No. C 18-05159 JSW, 2019 WL 11288576, at *1 (N.D. Calif. June 18, 2019) (stating same).

[49] *See, e.g.*, *Domen*, 991 F.3d at 71 (noting § 230 immunity is broad) (citing FTC v. LeadClick Media, LLC, 838 F.3d 158, 173 (2nd Cir. 2016)); Perfect 10, Inc. v. CCBill LLC, 481 F.3d 751, 767 (9th Cir. 2007) ("The majority of federal circuits have interpreted the CDA to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.") (internal quotation marks omitted); Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1321 (11th Cir. 2006) (stating same); *see also* Ramey v. Darkside Prods., Inc., No. 02–730 (GK), 2004 WL 5550485, at *7 (Dist. D.C. 2004) (holding defendant immune from liability even though it printed its website address on every advertisement it publishes, placed a watermark on photos used, and categorized advertisements by subject matter, because such alterations did not constitute "creation or development" of the advertisements in question); Blumenthal v. Drudge, 993 F. Supp. 44, 51–52 (Dist. D.C. 1998) (holding AOL immune from liability for content created by third party, even though AOL exercised editorial control over some of the content and promoted the content); Michael L. Rustad & Thomas H. Koenig, *Rebooting Cybertort Law*, 80 WASH. L. REV. 335, 368–75 (2005) (examining numerous cases granting immunity under § 230 and criticizing "[a]n activist judiciary. . . [that] has radically expanded § 230 by conferring immunity on distributors"); *infra*, text accompanying notes 212–222 (summarizing Justice Thomas's complaints about the extent of immunity granted to digital platforms by the courts).

[50] *See, e.g.*, *Barnes*, 570 F.3d at 1101–02 (noting that while the genesis of § 230(c) immunity may have been defamation, "what matters is not the name of the cause of action—defamation versus negligence versus intentional infliction of emotional distress—what matters is whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another"); Baldino's Lock & Key Serv., Inc. v. Google, Inc., 88 F. Supp. 3d 543, 546–47 (E.D. Va. 2015) (holding Google and other search engines immune from Racketeer Influenced and Corrupt Organizations Act liability arising from listing services of unlicensed locksmiths because information displayed was provided by third parties).

230(c) immunity.[51] The plaintiff argued that § 230(c) offers protection only to publishers of "speech," and that because the content published in this case is video game apps, the statute does not apply.[52] The District Court for the Northern District of California dismissed this argument, concluding that § 230(c) immunity does apply to apps.[53] The plaintiff also attempted to hold Google liable, not as a "publisher" of another's content but for permitting and facilitating illegal gambling.[54] The court concluded that the plaintiff did not allege conduct that goes beyond Google's role as a publisher of third party content.[55]

Coffee v. Google, discussed above, involved application of § 230(c)(1).[56] Section 230(c)(2) was applied in *Domen v. Vimeo, Inc.*, in which the plaintiff and his Church United sued Vimeo alleging that Vimeo discriminated against them on the basis of their religion and sexual orientation by deleting Church United's account from Vimeo's online video hosting platform.[57] The district court had granted Vimeo's motion to dismiss on the ground that § 230 immunizes Vimeo from the lawsuit, concluding that Vimeo deleted Church United's account because of its violation of one of Vimeo's content policies barring the promotion of sexual orientation change efforts on its platform, and that this policy, in turn, fell within the confines of the good-faith content policing immunity that the CDA provides to interactive computer services.[58] The *Domen* court noted that not only does § 230(c)(2) immunize from liability providers and users of interactive computer service who voluntarily make good faith efforts to restrict access to material they consider to be objectionable,[59] its provision explicitly provides protection for restricting access to content that providers *consider* objectionable, even if the material would otherwise be constitutionally protected, granting significant subjective discretion.[60] Finally, the statute does not require providers to use any particular form of restriction—i.e., removal of only objectionable videos versus deletion of the entire account.[61] "Vimeo was entitled to enforce its internal content policy . . . and delete Church United's account without incurring liability."[62]

While construction of § 230(c)'s grant of immunity is broad, it is not unlimited.[63] For example, Amazon now relies on third party vendors for over half of its product sales on Amazon.com.[64] As consumers are allegedly injured by defective products sold by those third-party vendors, it is

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[51] Coffee v. Google, LLC, No. 20-cv-03901-BLF, 2021 WL 493387, at *1 (N.D. Calif. Feb. 10, 2021).
[52] *See id*. at *6.
[53] *See id*. (citing Evans v. Hewlett-Packard Co., No. C 13–02477 WHA, 2013 WL 5594717, at *4 (N.D. Calif. Oct. 10, 2013)).
[54] *See id*.
[55] *See id*. at *7.
[56] See *id.* at *4; *see also* FTC v. LeadClick Media, LLC, 838 F.3d 158 (2nd Cir. 2016); Barnes v. Yahoo, Inc., 570 F.3d 1096 (9th Cir. 2009); Perfect 10, Inc. v. CCBill LLC, 481 F.3d 751, 767 (9th Cir. 2007).
[57] 991 F.3d 66, 68 (2nd Cir. 2021).
[58] *See id.*
[59] *See id.* at 73.
[60] *See id.* 72.
[61] *See id.*
[62] *Id.*
[63] "Congress has not provided an all purpose get-out-of-jail-free card for businesses that publish user content on the internet. . . ." Doe v. Internet Brands, Inc., 824 F.3d 846, 853 (9th Cir. 2016) (refusing to apply § 230(c) immunity to a failure to warn claim under California law).
[64] *See* Robert Sprague, *It's a Jungle Out There: Public Policy Considerations Arising from a Liability-Free Amazon.com*, 60 SANTA CLARA L. REV. 253, 255 (2020) (noting that in 2018, fifty-eight percent of Amazon's physical gross merchandise sales were through third-party sales on its website).

uncertain to what extent Amazon is liable under traditional strict products liability laws.[65] One defense Amazon has raised is immunity under § 230(c).[66] While § 230(c) will not provide Amazon immunity for harms suffered due to negligence or a breach of warranty claim, it will provide immunity for a negligent failure to warn since information about the product in question was posted by the third-party vendor, not Amazon.[67]

In a different type of products liability lawsuit, the Ninth Circuit Court of Appeals has held that digital platforms can face liability associated with content-neutral tools they provide, as long as the plaintiff is not seeking to hold them liable for third party content.[68] Snapchat allows users to overlay a "speed filter" on photos or videos they capture through Snapchat that records their "real-time speed" at that time.[69] Shortly before their vehicle crashed into a tree after reaching speeds of up to 123 mph and killing all three occupants, one of the vehicle's passengers opened the Snapchat app and activated the speed filter; allegedly because the passengers believed Snapchat would reward them for reaching a speed greater than 100 mph.[70] Parents of two of the passengers subsequently filed a negligent design lawsuit against Snap.[71]

The Central District for the District of California initially ruled that Snap was immune from liability under § 230(c).[72] Stating that it was following Ninth Circuit precedent, it was unwilling to impose liability unless there was clear evidence Snap "directly participated" in developing the alleged illegality."[73] The Ninth Circuit reversed because the plaintiffs were seeking to hold Snap liable for allegedly negligently designing a product, *not* for its conduct as a publisher or speaker.[74] And while it is true that providing content-neutral tools does not render a platform a "creator or developer" of the downstream content that its users produce with those tools, platforms can still

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[65] *See generally id.* (analyzing Amazon's potential liability under strict products liability laws for defects in products sold by its third-party vendors on the Amazon.com website).

[66] *See, e.g.*, McDonald v. LG Electronics USA, Inc., 219 F. Supp. 3d 533, 536 (D. Md. 2016).

[67] *See, e.g.*, *id.* at 537–38; *see also* Erie Ins. Co. v. Amazon.com, 925 F.3d 135, 139–40 (4th Cir. 2019) ("While the Communications Decency Act protects interactive computer service providers from liability *as a publisher of speech*, it does not protect them from liability as the seller of a defective product.") (emphasis in original); Oberdorf v. Amazon.com, 930 F.3d 136, 153 3d Cir. 2019) ("[T]o the extent that [the plaintiff]'s negligence and strict liability claims rely on Amazon's role as an actor in the sales process, they are not barred by the CDA. However, . . . failure to warn claims are barred by the CDA."); State Farm Fire & Casualty Co. v. Amazon.com, 390 F. Supp. 3d 964, 973–74 (W.D. Wis. 2019) ("Amazon's active participation in the sale, through payment processing, storage, shipping, and customer service, is what makes it strictly liable. This is not activity immunized by the CDA.").

[68] *See* Lemmon v. Snap, Inc., No. 20-55295, 2021 WL 1743576, at *6 (9th Cir. May 4, 2021).

[69] *See id.* at *2.

[70] *See id.*

[71] *See id.* at *3.

[72] *Lemmon*, 440 F. Supp. 3d 1103 (C.D. Cal. 2020).

[73] *Id.* at 1112–13 (concluding § 230(c) immunity applies because "Plaintiffs' allegations appear to amount to 'enhancement by implication or development by inference[.]'" (quoting Fair Housing Council of San Fernando Valley v. Roomates.com, LLC, 521 F.3d 1157, 1174–75 (9th Cir. 2008)). *Contra* Maynard v. Snapchat, Inc., 816 S.E.2d 77 (Ga. Ct. App. 2018) (holding § 230(c) immunity does not apply because "there was no third party content uploaded to Snapchat at the time of the accident and the [Plaintiffs] do not seek to hold Snapchat liable for publishing a Snap by a third-party that utilized the Speed Filter. Rather, the [Plaintiffs] seek to hold Snapchat liable for its own conduct, principally for the creation of the Speed Filter and its failure to warn users that the Speed Filter could encourage speeding and unsafe driving practices.").

[74] *See Lemmon*, 2021 WL 1743576, at *5 ("That Snap allows its users to transmit user-generated content to one another does not detract from the fact that the [Plaintiffs] seek to hold Snap liable for its role in violating its distinct duty to design a reasonably safe product.").

"face the prospect of liability, even for their 'neutral tools,' so long as plaintiffs' claims do not blame them for the content that third parties generate with those tools."[75]

And in *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*,[76] Enigma sued Malwarebytes for false advertising alleging Malwarebytes configured its software to block users from accessing Enigma's software in order to divert Enigma's customers.[77] The District Court for the Northern District of California had dismissed the action as barred under § 230(c) immunity.[78] The Ninth Circuit Court of Appeals reversed. Noting that Congress expressly provided that the CDA aims "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services" and to "remove disincentives for the development and utilization of blocking and filtering technologies,"[79] the court refused to grant immunity for anticompetitive blocking.[80]

Ultimately, though, § 230(c) will provide immunity for digital platforms whenever third party-provided content is at issue:

> [B]road construction [of § 230(c)] recognizes that websites that display third-party content may have an infinite number of users generating an enormous amount of potentially harmful content, and holding website operators liable for that content would have an obvious chilling effect in light of the difficulty of screening posts for potential issues. The obverse of this proposition is equally salient: Congress sought to encourage websites to make efforts to screen content without fear of liability. Such a hands-off approach is fully consistent with Congress's avowed desire to permit the continued development of the internet with minimal regulatory interference.[81]

As discussed above, § 230(c)'s broad and deep grant of immunity not only allows online digital platforms to be free from liability for the content posted by third parties on their platforms, but also be free from liability when they moderate that content. But a number of individuals who have had their content moderated—or who have been de-platformed—claim they have been deprived of their right to free speech by the platforms involved.

III. First Amendment Speech Issues Associated with Online Digital Platform Content

At first glance, it may seem obvious there is no First Amendment protection for online digital platform speech.[82] The First Amendment prohibits Congress, *not* private enterprises, from abridging the freedom of speech.[83] But there is growing concern that the "fate of millions of

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[75] *Id.* at *6.
[76] 946 F.3d 1040 (9th Cir. 2019), *cert. denied sub nom.* Malwarebytes, Inc., v. Enigma Software Group USA, LLC, 141 S. Ct. 13 (2020).
[77] *See id.* at 1044.
[78] *See id.* at 1044–45.
[79] *Id.* at 1050–51 (9th Cir. 2019) (quoting 47 U.S.C. §§ 230(b)(2) & (3)).
[80] *See id.* at 1051.
[81] Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 19 (2016) (internal quotation marks and citations omitted).
[82] References in this paper to the First Amendment are limited to its free speech provision: "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. CONST. amend. I.
[83] *See id.*; *see also* Parler, LLC v. Amazon Web Servs., Inc., No. 2:21-cv-0031-BJR, 2021 WL 210721, at *1 (W.D. Wash. Jan. 21, 2021) (noting claims "asserting a violation of any First Amendment rights. . . exist only against a governmental entity, and not against a private company").

people's speech is now in the hands of a small number of private companies" that can and do "dictate what speech is worthy of posting and who has access to key platforms."[84]

In *Packingham v. North Carolina*,[85] the Supreme Court characterized "cyberspace—the 'vast democratic forums of the Internet'"—as the most important place for the exchange of views.[86] Therefore, "the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium."[87] Although the Supreme Court was addressing a state statute that prevented convicted sex offenders from accessing the Internet, its dicta might resonate in today's de-platforming environment: "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights."[88]

If, as the *Packingham* concurring justices argue, the Supreme Court majority was equating the internet to public streets and parks,[89] then government actions which limit expressive activity would be sharply circumscribed.[90] "In order to survive First Amendment scrutiny, a government restriction on speech in such a forum must be necessary to serve a compelling state interest and be narrowly tailored to achieve that interest."[91] The result could "arguably entitl[e] speech by users of social media networking platforms and internet-related sites to robust First Amendment protection."[92]

The degree to which First Amendment rights apply in online digital platforms depends on who is controlling the narrative.[93] It was perhaps easy for the *Packingham* Court to wax expansively on the role of online digital platforms in civic discourse since its analysis was limited to a state statute prohibiting convicted sex offenders from accessing *any* online social media. Courts have found First Amendment free speech rights associated with social media accounts created and maintained by government actors.[94] And the U.S. Second Circuit Court of Appeals has ruled that President Trump violated citizens' First Amendment rights when he blocked them from his Twitter feed because the then-President used his Twitter account as a public forum.[95] But when private

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[84] *See* Anne E. Conroy, Developments, *The First Amendment's Role on the Internet Governed by Private Actors: Disclosure Requirements as the "Best of Disinfectants"*, 27 GEO. MASON L. REV. 381, 388 (2020).
[85] 137 S. Ct. 1730 (2017).
[86] *Id.* at 1735 (2017) (quoting Reno v. Am. Civil Liberties Union, 521 U.S. 844, 868 (1997)).
[87] *Id.* at 1736.
[88] *See id.* at 1737.
[89] *See id.* at 1738 (Alito, J., concurring) (criticizing the majority's "undisciplined dicta"; "The Court is unable to resist musings that seem to equate the entirety of the internet with public streets and parks.").
[90] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) ("In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed.").
[91] Kathleen McGarvey Hidy, *Social Media Use and Viewpoint Discrimination: A First Amendment Judicial Tightrope Walk with Rights and Risks Hanging in the Balance*, 102 MARQ. L. REV. 1045, 1056 (2019) (citing *Perry Educ. Ass'n*, 460 U.S. at 45).
[92] *Id.* at 1057.
[93] In cases in which an individual brings a free speech claim under the U.S. Constitution's First Amendment against a state actor, they must bring their action under 42 U.S.C. § 1983 and establish that "they were deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law." Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49–50 (1999) (noting further that § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful).
[94] *See infra* Part III.A.
[95] Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226 (2nd Cir. 2019), *reh'g en banc denied*, 953 F.3d 216 (2nd Cir. 2020), *cert. granted, vacated, and remanded with instructions to dismiss as moot sub nom.* Biden v. Knight First Amendment Inst. at Columbia Univ., 141 S. Ct. 1220 (2021) (mem.); *see also infra* Part III.B.

citizens or even public servants are blocked from an online digital platform or their posts are deleted because of their viewpoints, there is no First Amendment protection unless the silenced individuals can establish the digital platforms were engaging in some form of state action.[96]

A. Accounts Established and Maintained by Government Agencies as Limited Public Forums

The Supreme Court has acknowledged that a unit of government can create a limited public forum for private speech.[97] Regardless of whether the forum is spatial, geographical, or metaphysical, although some content- and speaker-based restrictions may be allowed, "viewpoint discrimination" is forbidden.[98] In other words, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[99]

Just before the *Packingham* decision, the District Court for the Eastern District of Virginia addressed whether a resident's First Amendment rights had been violated after his posts were deleted and he was blocked from a Facebook page maintained by the Loudoun County Commonwealth Attorney's Office.[100] Noting that "[t]he government. . . may police the boundaries of a limited public forum it has created[,]"[101] the district court stated that if the resident's speech falls within the designated category for which the forum was opened, strict scrutiny would apply.[102] However, "[i]f the speech restricted falls outside the bounds of the designated forum, the Court need determine only whether the speech restriction applied is viewpoint neutral and reasonable in light of the purpose of the forum."[103] With respect to the deleted comment, the district court concluded that the plaintiff's First Amendment rights were not violated because the "comment did not comport with the purpose of the forum, and the restriction justifying its removal was both viewpoint neutral and reasonably related to the purpose of the forum."[104] However, with respect to blocking the plaintiff from further Facebook posts, the district court concluded "that any First Amendment right Plaintiff might have had to continue posting comments on Defendant's Facebook page, notwithstanding his repeated violations of the Loudoun County Social Media Comments Policy, was not clearly established at the time Defendant blocked him[,]" (though the Defendant was entitled to qualified immunity.)[105]

The same plaintiff brought a separate lawsuit against the Loudoun County Board of Supervisors after the Chair of the Board of Supervisors blocked the plaintiff from her Facebook

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[96] *See infra* Part III.C.
[97] *See* Matal v. Tam, 137 S. Ct. 1744, 1763 (2017).
[98] *See id.*
[99] Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).
[100] Davison v. Plowman, 247 F. Supp. 3d 767 (E.D. Va. 2017), *aff'd* 715 Fed. App'x 298 (4th Cir. 2018).
[101] *Id.* at 776.
[102] *See id*.
[103] *Id.*
[104] *Id.* at 778.
[105] *Id.* at 780, 781; *see also* Morgan v. Bevin, 298 F. Supp. 3d 1003, 1013 (E.D. Ky. 2018) (denying temporary restraining order for plaintiffs blocked on Kentucky Governor's Facebook page and Twitter account because plaintiffs did not have a Constitutional right to be heard by the Governor in this specific format; also noting that plaintiffs' "actual success on the merits remains open"). *But see* Leuthy v. LePage, No. 1:17-cv-00296-JAW, 2018 WL 4134628, at *15 (D. Me. Aug. 29, 2018) (concluding that plaintiffs plausibly stated a claim for violation of their free speech rights under the First Amendment after the Maine Governor deleted their posts and blocked them from the Governor's Facebook page).

page for twelve hours.[106] In this case, however, the Fourth Circuit Court of Appeals affirmed the District Court for the Eastern District of Virginia's holding that the plaintiff's First Amendment rights were violated because the Chair engaged in viewpoint discrimination by banning the plaintiff from her Facebook page.[107] While the district court characterized the consequences of the defendant's actions as "fairly minor," it nevertheless concluded that it "cannot treat a First Amendment violation in this vital, developing forum differently than it would elsewhere simply because technology has made it easier to find alternative channels through which to disseminate one's message."[108]

The Fifth Circuit Court of Appeals undertook a similar analysis in *Robinson v. Hunt County, Texas,*[109] in which the plaintiff claimed a First Amendment violation by the Sheriff's Office (HCSO) after her "inappropriate" post was deleted and she was banned from the HCSO's Facebook page.[110] Robinson alleged HCSO deleted her Facebook comment and banned her from its Facebook page because of her viewpoint.[111] The court agreed with Robinson that HCSO's actions constituted viewpoint discrimination regardless of whether HCSO was motivated by her criticism of the HCSO or a determination that her comment was otherwise "inappropriate."[112] "Official censorship based on a state actor's subjective judgment that the content of protected speech is offensive or inappropriate is viewpoint discrimination."[113] The Fifth Circuit also assumed that HCSO's Facebook page was a forum subject to First Amendment protection but the court stated that ultimately the First Amendment forbids the state from viewpoint discrimination "even when the limited public forum is one of its own creation."[114]

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[106] Davison v. Randall, 912 F.3d 666, 675–76 (4th Cir. 2019), *aff'g sub nom.* Davison v. Loudoun Cnty. Bd. Supervisors, 267 F. Supp. 3d 702 (E.D. Va. 2017).

[107] *See id.* at 687 ("Put simply, Randall unconstitutionally sought to "suppress" Davison's opinion that there was corruption on the School Board."). In yet a third lawsuit filed by Davison, this time because, in part, he was blocked from posting by a school board's Facebook page, the District Court for the Eastern District of Virginia dismissed his claims on the basis of res judicata, sovereign immunity, and jurisdictional grounds. *See* Davison v. Rose, No. 1:16cv0540 (AJT/IDD), 2017 WL 3251293, at *1 (E.D. Va. Mar. 19, 2017). The court also questioned whether a First Amendment right was a clearly established in this situation. *See id.* at *10.

[108] Davison v. Loudoun Cnty. Bd. Supervisors, 267 F. Supp. 3d 702, 718 (E.D. Va. 2017) ("The ban lasted a matter of hours, spanning only a single night. During that time, Plaintiff was able to post 'essentially the same thing on multiple pages.' There is little indication that Plaintiff's message was suppressed in any meaningful sense, or that he was unable to reach his desired audience.") (citation to transcript omitted).

[109] 921 F.3d 440 (5th Cir. 2019).

[110] *See id.* at 445–46.

[111] *See id.* at 447.

[112] *See id.* ("'It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'") (quoting Street v. New York, 394 U.S. 576, 592 (1969)).

[113] *Id.*; *see also id.* n.2 (noting that HCSO "does not appear to contest that Robinson's Facebook comment is protected speech").

[114] *See id.* at 448 (internal quotation marks omitted); *see also* Attwood v. Clemons, No.: 1:18cv38-MW/MJF, 2021 WL 1020449, at *11 (N.D. Fla. Mar. 17, 2021) (concluding that member of Florida's House of Representatives' Facebook page was a public forum and Representative impermissibly blocked plaintiff because the Representative disagreed with his viewpoint).

B. First Amendment Ramifications of Individual State Actors Blocking Citizens

Former President Trump considered his @realDonaldTrump Twitter account as an official account.[115] In 2017, then-President Trump President blocked individuals from his account as a result of their criticisms.[116] As a result, the individuals were "unable to view the President's tweets, to directly reply to these tweets, or to use the @realDonaldTrump webpage to view the comment threads associated with the President's tweets."[117] The Second Circuit Court of Appeals concluded that "the First Amendment does not permit a public official who utilizes a social media account for all manner of official purposes to exclude persons from an otherwise–open online dialogue because they expressed views with which the official disagrees."[118]

In reaching its conclusion, the Second Circuit determined that Trump's Twitter account was a public forum because it "was intentionally opened for public discussion when the President, upon assuming office, repeatedly used the [a]ccount as an official vehicle for governance and made its interactive features accessible to the public without limitation."[119] As such, viewpoint discrimination within the account is prohibited by the First Amendment.[120]

The government argued that the blocking did not "ban or burden anyone's speech."[121] The court rejected this argument. While the individual plaintiffs had no right to require the President to listen to their speech, "once he opens up the interactive features of his account to the public at large he is not entitled to censor selected users because they express views with which he disagrees."[122] The government argued the plaintiffs were not censored because there were various "workarounds" to still be able to view the then-President's tweets.[123] Noting that "burdens to speech as well as outright bans run afoul of the First Amendment[,]"[124] the court stated that "[w]hen the government has discriminated against a speaker based on the speaker's viewpoint, the ability to engage in other speech does not cure that constitutional shortcoming[,]"[125] and the fact that the plaintiffs retain some ability to work around the blocking does not cure the constitutional violation.[126]

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[115] *See* Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 231–32 (2nd Cir. 2019), *reh'g en banc denied*, 953 F.3d 216 (2nd Cir. 2020), *cert. granted, vacated, and remanded with instructions to dismiss as moot sub nom*. Biden v. Knight First Amendment Inst. at Columbia Univ., 141 S. Ct. 1220 (2021) (mem.).
[116] *See Knight*, 928 F.3d at 232.
[117] *Id*.
[118] *Id.* at 230. The Second Circuit specifically noted that it was *not* deciding "whether an elected official violates the Constitution by excluding persons from a wholly private social media account[, n]or . . . whether private social media companies are bound by the First Amendment when policing their platforms." *Id.* The Supreme Court granted certiorari in order to remand the case with instructions to dismiss the judgment as moot because of the change in administration. *See Biden*, 131 S. Ct. 1220. Therefore, the Second Circuit's substantive analysis still stands. *But see id.* at 1221 (Thomas, J., concurring) ("[I]t seems rather odd to say that something is a government forum when a private company has unrestricted authority to do away with it.").
[119] *Knight*, 928 F.3d at 237.
[120] *See id*.
[121] *See id.* at 238.
[122] *Id*.
[123] *See id.* (describing workarounds such as creating new accounts, logging out, and using Twitter's search functions).
[124] *Id*.
[125] *Id.* at 239.
[126] *See id*.

Finally, the government argued that Trump's Twitter account represented government speech and was therefore not required to maintain viewpoint neutrality.[127] But due to the interactive features of Twitter, it was not just the then-President's speech that was involved. "The contents of retweets, replies, likes, and mentions are controlled by the user who generates them and not by the President, except to the extent he attempts to do so by blocking."[128] In other words, there was additional speech by others associated with Trump's Twitter account and it was that non-governmental speech that contained disfavored viewpoints that was being squelched when Trump blocked users.[129]

In *Felts v. Reed*, the individual plaintiff claimed the President of the St. Louis Board of Aldermen violated her First Amendment rights by blocking her from his Twitter account in an act of viewpoint discrimination in a designated public forum.[130] First noting that when the government provides a forum for speech, the government may be constrained by the First Amendment,[131] the court concluded that the interactive component of a public official's social media account is susceptible to forum analysis,[132] and that the defendant's Twitter account bore the hallmarks of a public forum.[133] The defendant also argued that his Twitter account is controlled by Twitter and therefore not susceptible to forum analysis.[134] The court dismissed this argument. Noting that the plaintiff was suing the defendant and not Twitter, the court stated: "It makes no difference that Twitter itself is a private company. The First Amendment protects 'access to public property or to *private property dedicated to public use*.'"[135]

In *Campbell v. Reisch*, however, the Eighth Circuit Court of Appeals reversed a lower court's judgment in favor of an individual who brought a First Amendment claim against a state legislator after the individual was blocked from the legislator's Twitter account because the legislator was acting in a private capacity and not under the color of state law.[136] *Campbell* turns on what constitutes acting under color of state law, particularly for purposes of 42 U.S.C. §1983.[137] Reisch, the state representative, argued she was not acting under any power of state law that granted her the right to block Campbell—it was something anyone could have done.[138] Campbell, on the other hand, argued Reisch's actions need only be "fairly attributable" to the State.[139]

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[127] *See id.* ("It is clear that *if* President Trump were engaging in government speech when he blocked the Individual Plaintiffs, he would not have been violating the First Amendment.") (emphasis added).
[128] *Id*.
[129] *Cf. id.* at 239–40. In denying a rehearing *en banc*, the Second Circuit panel elaborated on this point with an analogy:

> [A]t a town hall meeting held by public officials, statements made by the officials are protected government speech. If, however, public comment is allowed at the gathering—as it is on any tweet posted to [Trump's Twitter account]—the officials may not preclude persons from participating in the debate based on their viewpoints.

Knight, 953 F.3d 216, 221 (2nd Cir. 2020) (en banc).
[130] No. 4:20-CV-00821 JAR, 2020 WL 7041809, at *1 (E.D. Mo. Dec. 1, 2020).
[131] *See id.* at *2 (citing Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019)).
[132] *See id.* at *4.
[133] *See id*.
[134] *See id.* at *5.
[135] *Id.* (quoting Cornelius v. NAACP Legal Def. and Educ. Fund, 473 U.S. 788, 801 (1985)) (emphasis added by court); *see also* Garnier v. O'Connor-Ratcliff, No. 3:17-cv-02215-BEN-JLB, 2021 WL 129823, at *1 (S.D. Calif. Jan. 13, 2021) (discussing "growing number" of cases applying the First Amendment to the activities of elected officials on social media platforms).
[136] 986 F.3d 822 (8th Cir. 2021).
[137] *See supra note* 93.
[138] *See Campbell*, 986 F.3d at 825.
[139] *See id*.

The court declined to decide on the side of either argument,[140] concluding instead that Reisch's Twitter account was not an "organ of official business but rather a continuation of Reisch's candidacy for office:[141] "The overall theme of Reisch's tweets[were]that's she's the right person for the job."[142] "Running for public office is not state action; it is a private activity."[143] The court acknowledged that some of Reisch's tweets did involve government business, such as discussing pending legislation. But the court concluded that the "occasional stray messages that might conceivably be characterized as conducting the public's business are not enough to convert Reisch's account into something different from its original incarnation"—what the court likened to a campaign newsletter.[144]

The dissent in *Campbell* viewed Reisch's tweets differently, particularly after she was elected to office. From that point forward, the dissent noted, Reisch's tweets did not focus on campaigning, but on official business.[145] While it is true, the dissent acknowledged, that public officials acting purely in pursuit of personal interests do not do so "under color of state law[,] that does not also mean that an official whose challenged conduct is closely related to her official responsibilities cannot act 'under color of state law' simply because her actions simultaneously further personal goals or motives."[146] Having concluded that Reisch was acting under color of state law, the dissent concluded Reisch's Twitter account was a public forum.[147] Therefore, blocking Campbell because of his viewpoint, the dissent believed, violated Campbell's First Amendment rights.[148]

C. Online Digital Platforms as State Actors Under Section 230(c) Immunity

Some plaintiffs who have been blocked online have attempted to establish that § 230(c) immunity amounts to the government's endorsement of the platform's censorship. Under the so-called state-action doctrine, a private entity may be considered a state actor when (1) the private entity exercises a function traditionally exclusively reserved to the State, (2) the government compels the private entity to take a particular action, or (3) the government acts jointly with the private entity.[149] In *Manhattan Community Access Corp. v. Halleck*, the Supreme Court applied the state-action doctrine when television producers alleged their First Amendment rights had been violated by a public access cable channel.[150] The *Halleck* producers argued the relevant public function was not simply the operation of public access channels on a cable system, but rather the operation of a public forum for speech and that operation of a public forum for speech is a traditional, exclusive public function.[151]

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[140] *See id*.
[141] *See id.* at 826.
[142] *Id*.
[143] *Id.* at 825.
[144] *Id.* at 827.
[145] *See id.* at 828–29 (Kelly, C.J., dissenting) (noting Reisch's tweets reported on new laws, provided information on the legislature's work, and described Reisch's own official activities).
[146] *Id.* at 829 (Kelly, C.J., dissenting).
[147] *See id.* at 830 (Kelly, C.J., dissenting) ("[T]he interactive component of Reisch's Twitter account—including the space below each tweet where users could reply to Reisch and engage with other members of the public who might have been responding to her—constituted a designated public forum.").
[148] *See id.* at 831 (Kelly, C.J., dissenting).
[149] *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019).
[150] *See id.* at 1927.
[151] *See id.* at 1930.

Writing for the 5-4 majority, Justice Kavanaugh summarily dismissed this argument: "Providing some kind of forum for speech is not an activity that only governmental entities have traditionally performed. Therefore, a private entity who provides a forum for speech is not transformed by that fact alone into a state actor."[152] Justice Kavanaugh concluded that "merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints."[153]

Halleck has subsequently been used as foundational authority to deny First Amendment claims against online digital platforms. For example, in *Prager University v. Google LLC*,[154] the Ninth Circuit Court of Appeals, citing *Halleck*, flatly rejected a private, non-profit education and media company's First Amendment claim against YouTube for restricting its videos.[155] Similarly, in *Freedom Watch v. Google*, the plaintiff alleged Google, Facebook, Twitter, and Apple conspired to suppress conservative political views in violation of, inter alia, the First Amendment.[156] The plaintiff claimed that because these digital platforms provide an important forum for speech, they are engaged in state action.[157] That allegation alone, without any additional factors, "fails to state a viable First Amendment claim."[158]

But online digital platforms do not merely host public forums, they receive a grant of immunity under § 230(c) of the CDA in doing so. Does § 230(c) immunity move platforms out of *Halleck*'s first category (exercising a function traditionally exclusively reserved to the State) and possibly into one of the remaining categories (the government compels the private entity to take a particular action, or the government acts jointly with the private entity)?[159] For example, in *Divino Group LLC v. Google LLC*,[160] the plaintiffs alleged "that, despite YouTube's purported viewpoint neutrality, defendants have discriminated against plaintiffs based on their sexual or gender orientation, identity, and/or viewpoints by censoring or otherwise interfering with certain videos

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[152] *Id*. Perhaps because *Halleck* was addressing public access cable channels and not online social media platforms, there is nary a mention of *Packingham* in the Court's majority and dissenting opinions.

[153] *Id.* at 1930–31 ("If the rule were otherwise, all private property owners and private lessees who open their property for speech would be subject to First Amendment constraints and would lose the ability to exercise what they deem to be appropriate editorial discretion within that open forum. Private property owners and private lessees would face the unappetizing choice of allowing all comers or closing the platform altogether.").

[154] 951 F. 3d 991 (9th Cir. 2020).

[155] *See id.* at 996–97 ("[M]erely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints.") (quoting *Halleck,* 139 S. Ct. at 1930). The Ninth Circuit also cited numerous previous cases that had held the same. *See id.* at 997 n.3; *see also* Fed. Agency of News LLC v. Facebook, Inc., 432 F. Supp. 3d 1107, 1121 (N.D. Cal. 2020) (ruling corporation organized under laws of Russian Federation had no First Amendment claim against Facebook after account was removed because First Amendment only applies to government actors, not private corporations or persons) (internal quotation marks omitted); Tulsi Now, Inc. v. Google LLC, No. 2:19-cv-06444-SVW-RAO, 2020 WL 4353686, at *1–2 (C.D. Calif. Mar. 3, 2020) (rejecting claims by campaign for 2020 presidential candidate Tulsi Gabbard that Google violated its "First Amendment rights by temporarily suspending its verified political advertising account for several hours shortly after a Democratic primary debate[;]" concluding the plaintiff had failed "to establish . . . how Google's regulation of its own platform is in any way equivalent to a governmental regulation of an election"); Belknap v. Alphabet, Inc., No. 3:20-cv-1989-SI, 2020 WL 7049088, at *2–3 (D. Or. Dec. 1, 2020) (rejecting plaintiff's First Amendment claim because Google and YouTube are not state actors).

[156] 816 F. App'x 497, 499 (D.C. Cir. 2020), *cert. denied*, 2021 WL 1240927 (Apr. 5, 2021).

[157] *See id.*

[158] *See id.* at 499–500 ("'[A] private entity who provides a forum for speech is not transformed by that fact alone into a state actor.'") (quoting Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019)).

[159] *See Halleck*, 139 S. Ct. at 1928.

[160] No. 19-cv-04749-VKD, 2021 WL 51715 (N.D. Cal. Jan. 6, 2021).

that plaintiffs uploaded to YouTube.[161] With respect to their First Amendment claim, the plaintiffs asserted "that the availability of protections under Section 230 of the CDA amounts to government endorsement of defendants' alleged discrimination."[162] The District Court for the Northern District of California rejected this claim: "nothing about Section 230 is coercive. [In fact], Section 230 reflects a deliberate *absence* of government involvement in regulating online speech."[163] In particular, "Section 230 does not require private entities to do anything, nor does it give the government a right to supervise or obtain information about private activity."[164] Finally, "YouTube is not a government-regulated entity charged with providing public broadcasting services."[165]

D. The First Amendment's Role in Online Speech

Has the First Amendment, as Tim Wu suggests, "become a bystander in an age of aggressive efforts to propagandize and control online speech[?]"[166] "At the very moment that our economic and social lives are increasingly dominated by information technology and information flows, the First Amendment seems increasingly irrelevant to the key free speech battles of the future."[167] How do we protect and promote a healthy political speech environment in the modern age of online social media platforms?[168] The courts have so far rejected claims of any state action on the part of online digital platforms, leaving "[t]he duty of the state . . . to preserve the integrity of public debate"[169] to private actors—the platforms themselves. This, Molly Land argues, results in "privatized censorship":

> States have moved beyond attempting to control private platforms to deputizing them—delegating to these private actors the responsibility and authority to police and govern internet content. . . .This shift constitutes not a privatization of the internet, for private actors have long controlled the internet. Rather, it constitutes a privatization of speech regulation. States increasingly rely on private actors to make decisions about who is allowed to speak and, in the process, insulate this exercise of public authority from both national and international accountability mechanisms.[170]

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[161] *Id*. at *3.
[162] *Id.* at *5.
[163] *Id*. at *6.
[164] *Id. But see* Moran Yemini, *The New Irony of Free Speech*, 20 COLUM. SCI. & TECH. L. REV. 119, 175–76 (2018) ("CDA § 230(c)(2) actively delegates to [online intermediaries] the authority to regulate online speech, without imposing any significant corresponding responsibility for their actions, and provides a formal statutory incentive to filter constitutional content.").
[165] *Divino*, 2021 WL 51715, at *7.
[166] Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 568 (2018).
[167] Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 427 (2009).
[168] *See* Wu, *supra* note 166, at 568.
[169] *See* Owen M. Fiss, Essay, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1416 (1986).
[170] Molly K. Land, *Against Privatized Censorship: Proposals for Responsible Delegation*, 60 VA. J. INT'L L. 363, 365 (2020); *see also* Thorsten Busch, Fair Information Technologies: The Corporate Responsibility of Online Social Networks as Public Regulators 71 (2013) (Ph.D. Dissertation, University of St. Gallen), https://www.alexandria.unisg.ch/228863/1/dis4139.pdf ("Since . . . companies like Facebook and Twitter have more users than most countries have citizens, the term 'quasi-governmental' offers an apt description of the way they regulate their respective online spaces. Online social networks might therefore be the most obvious examples of private [platform] companies fulfilling a public regulatory role, since they provide the technical and legal infrastructure upon which networked publics engage in discussions, exchange information, and produce networked goods.").

Online digital platforms such as Facebook, Twitter, and YouTube dictate the terms by which a substantial amount of speech is distributed.[171] "Whether they admit it or not, online speech intermediaries perform critical public functions in facilitating public access to and participation in information and speech, and in curating public opinion through their community guidelines and individualized results and feeds."[172] Despite controlling much of society's information flow, they are free of speech-based regulation and bear no First Amendment obligations.[173]

Though considering the power of cable television operators, the Supreme Court's concerns appear especially apt for online social media platforms:

> [S]imply by virtue of its ownership of [an] essential pathway for [online] speech, a [platform] can prevent its subscribers from obtaining access to [information] it chooses to exclude. A [platform], unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.
>
> *The potential for abuse of this private power over a central avenue of communication cannot be overlooked*. The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.[174]

Supreme Court Justice Clarence Thomas recently echoed this sentiment.[175] He is concerned that while digital platforms provide avenues for historically unprecedented amounts of speech, there is simultaneously unprecedented concentrated control of speech in the hands of a few private parties such as Facebook, Twitter, and YouTube.[176] In *Knight*, President Trump was barred from blocking a few users from his account.[177] In contrast, Twitter still had the much broader power to remove then-President Trump's entire account, which it ultimately did.[178]

Justice Thomas believes some digital platforms are sufficiently akin to common carriers or places of accommodation to be regulated as such—in other words, their right to exclude could be restricted (as long as the restriction does not prohibit the company from speaking or force the company to endorse the speech).[179] He analogizes the traditional telephone company to digital platforms. The former laid physical wires to create a network connecting people; the latter lay information infrastructure.[180] And similar to utilities, dominant digital platforms derive much of their value from network size. It does not matter to Justice Thomas that these platforms are not the sole means for distributing speech or information. What matters is whether the alternatives are

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[171] *See* Asaf Wiener, *A Speaker-Based Approach to Speech Moderation and First Amendment Analysis*, 31 STAN. L. & POL'Y REV. 187, 228 (2020).
[172] *Id.* at 228, 232.
[173] *See id.* at 228–29.
[174] Turner Broad. Sys. v. FCC, 512 U.S. 622, 656–57 (1994) (emphasis added) (citation omitted).
[175] Biden v. Knight First Amendment Inst. at Columbia Univ., 141 S. Ct. 1220 (2021) (mem.) (Thomas, J., concurring).
[176] *See id.* at 1221.
[177] Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 231–32 (2nd Cir. 2019), *reh'g en banc denied*, 953 F.3d 216 (2nd Cir. 2020), *cert. granted, vacated, and remanded with instructions to dismiss as moot sub nom*. *Biden*, 141 S. Ct. 1220.
[178] *See Biden,* 141 S. Ct. at 1222 ("Any control Mr. Trump exercised over the account greatly paled in comparison to Twitter's authority, dictated in its terms of service, to remove the account 'at any time for any or no reason.' Twitter exercised its authority to do exactly that.").
[179] *See id.* at 1223–24.
[180] *See id.* at 1224.

comparable. And to Justice Thomas, for many of today's digital platforms, there are no comparable alternatives.[181]

Justice Thomas believes the similarities between some digital platforms and common carriers or places of public accommodation may give legislators strong arguments for similarly regulating digital platforms. Therefore, regulating digital platforms could pass constitutional muster—again, as long as a regulation restricting a digital platform's right to exclude does not appreciably impede the platform from speaking.[182] With no action from Congress,[183] Justice Thomas believes some First Amendment jurisprudence may be justified: "As Twitter made clear, the right to cut off speech lies most powerfully in the hands of private digital platforms. The extent to which that power matters for purposes of the First Amendment and the extent to which that power could lawfully be modified raise interesting and important questions."[184]

While commentators and Justice Thomas express consternation over the amount of power online digital platforms can wield over content posted on their sites, the First Amendment, as Tim Wu points out, does not necessarily obligate the government to ensure a pristine speech environment.[185] And as revealed below, a "pristine speech environment" appears well beyond any regulatory or self-moderation efforts.

IV. Efforts to Regulate and Self-Moderate Online Digital Platform Content

As this paper's analysis has revealed, § 230(c) not only makes online digital platforms immune from liability for the content posted on their sites by third parties, they are also immune from liability for their decisions to remove content or block users. A number of groups have accused online digital platforms of arbitrarily censoring content they simply do not agree with. Congress, the White House, and some state legislatures have recently attempted to rein in the near-absolute immunity afforded online digital platforms. Alternatively, some online digital platforms have offered solutions through their own self-moderation. This Part reviews and discusses these efforts.

A. Regulation

Efforts to repeal or amend § 230 began in earnest in 2019.[186] The 116th Congress unsuccessfully sought to repeal § 230 through the "Abandoning Online Censorship Act."[187] Efforts to make various amendments to § 230 also failed.[188] In particular, Senator Josh Hawley (R-Mo.)

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[181] *See id.* at 1224–25.

[182] *See id.* at 1226. Justice Thomas did note that an unintended consequence of applying common-carrier regulations to digital platforms might be expanded opportunities to sue government officials that are not currently permissible using the public-forum rationale. *See id.* at 1225.

[183] *See infra* Part IV.A.

[184] *Biden,* 141 S. Ct. at 1227.

[185] *See* Wu, *supra* note 166, at 578.

[186] The only successful amendment of § 230, to date, added § 230(e)(5) with respect to sex trafficking. *See* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253.

[187] H.R. 8896, 116th Cong. (2020) (introduced by Louie Gohmert, Jr., R-Tex.).

[188] *See* S. 4066 (Platform Accountability and Consumer Transparency Act), 116th Cong. (2020) (adding § 230(c)(3) making an interactive computer service liable for not removing content or activity that it knows is illegal); S. 4758 (See Something, Say Something Online Act of 2020), 116th Cong. (2020) (adding § 230(e)(6) with respect to loss of liability protection for failure to submit a suspicious transmission activity report); S. 5012, 116th Cong. (2020) (adding § 230(e)(6) with respect to sexual exploitation and other abuses of children laws); S. 4828, H.R. 7808, 116th Cong. (2020), and H.R. 4027 116th Cong. (2019) (amending § 230(c) to "stop censorship");.

introduced a bill to add § 230(c)(3) which would remove immunity under §§ 230(c)(1) and (2) unless social media companies obtained certification from the Federal Trade Commission (FTC) that they do not moderate information on their platforms in a manner that is biased against a political party, candidate, or viewpoint.[189] The bill defined "politically biased moderation" as occurring if:

> (I) the provider moderates information provided by other information content providers in a manner that—
>
> (aa) is designed to negatively affect a political party, political candidate, or political viewpoint; or
>
> (bb) disproportionately restricts or promotes access to, or the availability of, information from a political party, political candidate, or political viewpoint; or
>
> (II) an officer or employee of the provider makes a decision about moderating information provided by other information content providers that is motivated by an intent to negatively affect a political party, political candidate, or political viewpoint.[190]

In all likelihood, Senator Hawley's bill, had it become law, would not have survived constitutional scrutiny.[191]

On May 28, 2020, then-President Trump issued an executive order accusing online platforms of engaging in selective censorship that is "harming our national discourse" and of otherwise "invoking inconsistent, irrational, and groundless justifications to censor or otherwise restrict Americans' speech."[192] According to the executive order:

> Section 230 was not intended to allow a handful of companies to grow into titans controlling vital avenues for our national discourse under the guise of promoting open forums for debate, and then to provide those behemoths blanket immunity when they use their power to censor content and silence viewpoints that they dislike.[193]

The executive order directed the Secretary of Commerce to request the Federal Communications Commission to propose regulations to clarify the interaction between §§ 230(c)(1) and (2) and to clarify the conditions under an action restricting access to or availability of material is not "taken in good faith" within the meaning of § 230(c)(2)(A).[194] The executive order also called upon the FTC to investigate whether online platforms are engaging in deceptive trade practices by restricting speech under § 230 "in ways that do not align with those entities' public representations about those practices."[195]

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[189] S. 1914, 116th Cong. (2019).

[190] *Id.* § (3)(B)(ii).

[191] *See, e.g.*, 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. . . ."). *See generally* Lily A. Coad, Note, *Compelling Code: A First Amendment Argument against Requiring Political Neutrality in Online Content Moderation*, 106 CORNELL L. REV. 457 (2021) (arguing Hawley's bill would have required presumptively unconstitutional compelled speech).

[192] Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020).

[193] *Id.*

[194] *Id.*

[195] *Id.* President Biden subsequently revoked this executive order. *See* Briefing Room, *Executive Order on the Revocation of Certain Presidential Actions and Technical Amendment*, WHITE HOUSE (May 14, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/14/executive-order-on-the-revocation-of-certain-presidential-actions-and-technical-amendment/.

The 117th Congress continues to offer amendments to (or repeal of) § 230. Representative Gohmert reintroduced his repeal of § 230,[196] and Senator Schatz (D-Hi.) reintroduced the Platform Accountability and Consumer Transparency Act,[197] while Representative Scott DesJarlais (R-Tenn.) introduced the "Protecting Constitutional Rights from Online Platform Censorship Act,"[198] Representative Gregory Steube (R-Fla.) introduced the "Curbing Abuse and Saving Expression In Technology" (CASE-IT) Act,[199] and Representative Ted Budd (R-N.C.) introduced the "Limiting Section 230 Immunity to Good Samaritans Act."[200]

In addition, Senators Mark R. Warner (D-VA), Mazie Hirono (D-HI) and Amy Klobuchar (D-MN) introduced the "Safeguarding Against Fraud, Exploitation, Threats, Extremism and Consumer Harms" (SAFE TECH) Act.[201] Essentially, the SAFE TECH Act would carve out exceptions to § 230(c) immunity so that it has no effect on actions relating to: ads and paid content; injunctive relief; enforcement of civil rights laws; antitrust violations; stalking/cyber-stalking or harassment and intimidation on the basis of protected classes; international human rights laws; and wrongful death.[202]

State legislatures have also begun considering regulating online digital platforms. For example, as originally introduced, Colorado legislation would have required digital platforms to register with a newly created digital communications division.[203] It originally empowered the division to investigate digital platforms that, inter alia, "promote hate speech; undermine election integrity; disseminate intentional disinformation, conspiracy theories, or fake news; or authorize, encourage, or carry out violations of users' privacy[.]"[204] The re-engrossed version of the bill has been amended to merely study digital platforms' existing policies and practices addressing the use of such platforms for promoting violence, undermining election integrity, disseminating intentional disinformation, or directly attacking protected groups.[205] On March 30, 2021, the Texas Senate approved a bill that would prohibit social media companies with at least 100 million monthly users from blocking, banning, demonetizing or discriminating against a user based on their viewpoint or their location within Texas.[206] The legislation would also require platforms to disclose their content moderation policies, publish regular reports about the content they remove, and create an appeals process for user content that has been taken down.[207]

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[196] H.R. 874, 117th Cong. (2021). In addition, a new version of the "See Something, Say Something Online Act" was introduced. S. 27, 117th Cong. (2021).
[197] S. 797 117th Cong. (2021).
[198] H.R. 83, 117th Cong. (2021).
[199] H.R. 285, 117th Cong. (2021).
[200] H.R. 277, 117th Cong. (2021).
[201] S. 299, 117th Cong. (2021).
[202] *See id.* (adding to 230(c)(3)).
[203] S.B. 21-132 (73rd Gen. Assembly, Colo.), https://leg.colorado.gov/bills/sb21-132.
[204] *Id.*
[205] *See id.*
[206] S.B. No. 12, https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=SB12; *see also* Shawn Mulcahy, *Texas Senate Approves Bill to Stop Social Media Companies from Banning Texans for Political Views*, TEX. TRIB. (Apr. 1, 2021), https://www.texastribune.org/2021/03/30/texas-soical-media-censorship/. Two organizations representing platforms including Google and Facebook have filed suit alleging the legislation violates the platform's constitutional rights. *See* Adi Robertson, *Industry Groups Sue to Stop Florida's New Social Media Law*, THE VERGE (May 27, 2021, 4:18 PM), https://www.theverge.com/2021/5/27/22457200/ccia-netchoice-lawsuit-florida-social-media-law-unconstitutional.
[207] S.B. No. 12; *see also* Mulcahy, *supra* note 206.

On May 24, 2021, Florida Governor Ron DeSantis signed legislation that bans social media from knowingly de-platforming Florida political candidates.[208] The law also requires platforms to publish and consistently apply their de-platforming policies[209] and includes a private right of action for violations, with statutory damages of up to $100,000.[210] Commentators were quick to suggest that Florida's new law is most likely unconstitutional.[211]

Supreme Court Justice Clarence Thomas has also expressed concern over the broad immunity afforded online digital platforms, particularly taking issue with the way courts have interpreted § 230(c).[212] First, he believes courts have "discarded the longstanding distinction between 'publisher' liability and 'distributor' liability."[213] More specifically, according to Justice Thomas, although § 230(c)(1) immunizes only "publisher" or "speaker" liability, courts are conferring "immunity even when a company distributes content that it *knows* is illegal."[214] Similarly, although § 230(c)(1) protects a company from publisher liability only when content is provided by another information content provider, Justice Thomas argues that courts are still granting immunity even when companies "exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or *alter* content."[215]

Justice Thomas notes further that § 230(c)(1) "protect[s] companies when they unknowingly *decline* to exercise editorial functions to edit or remove third-party content," while § 230(c)(2)(A) protects companies "when they *decide* to exercise those editorial functions in good faith[.]"[216] Justice Thomas argues that "by construing § 230(c)(1) to protect *any* decision to edit or remove content, courts have curtailed the limits Congress placed on decisions to remove content."[217] "With no limits on an Internet company's discretion to take down material, § 230 now apparently protects companies who racially discriminate in removing content."[218] Finally, Justice Thomas takes issue with courts that have granted internet sites § 230(c) immunity for their own misconduct, citing examples including allegations of facilitating illegal human trafficking,[219] recommending content by terrorists,[220] defectively designing a dating application that lacked basic safety features to

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[208] SB 7072, § 2(2) (Fla.), https://flsenate.gov/Session/Bill/2021/7072/?Tab=BillHistory.
[209] *See id.* § 4.
[210] *See id.* § 4(6). The law also exempts companies that operate theme parks within the state. *See id*. § 4(1)(g)(4)(b).
[211] *See* David McCabe, *Florida, in a First, Will Fine Social Media Companies that Bar Candidates*, N.Y. TIMES (May 24, 2021), https://www.nytimes.com/2021/05/24/technology/florida-twitter-facebook-ban-politicians.html; John D. McKinnon, *Florida's New Law Bars Twitter, Facebook and Others from Blocking Political Candidates*, WALL ST. J. (May 25, 2021, 12:00 AM), https://www.wsj.com/articles/florida-governor-signs-bill-to-bar-twitter-facebook-and-others-from-blocking-political-candidates-11621915232.
[212] Malwarebytes, Inc., v. Enigma Software Group USA, LLC, 141 S. Ct. 13 (2020) (mem) (Thomas, J., concurring).
[213] *Id.* at 15.
[214] *Id.* (alteration in original) (citing Zeron v. Am. Online, Inc., 129 F.3d 327, 331–34 (4th Cir. 1997)).
[215] *Id.* at 16 (internal quotation marks omitted; alteration in original).
[216] *Id.* at 17 (alterations in original).
[217] *Id.* (alteration in original) (citing Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1105 (9th Cir. 2009); e-ventures Worldwide, LLC v. Google, Inc., No. 2:14–cv–646–FtM–PAM–CM, 2017 WL 2210029, at *3 (M.D. Fla. Feb. 8, 2017)).
[218] *Id.* (citing Sikhs for Justice, Inc. v. Facebook, Inc., 697 F. App'x 526 (9th Cir. 2017), *aff'g* 144 F. Supp. 3d 1088, 1094 (N.D. Cal. 2015)).
[219] *Id.* (citing Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 16–21 (1st Cir. 2016)).
[220] *Id.* (citing Force v. Facebook, Inc., 934 F.3d 53, 65 (2nd Cir. 2019), *cert. denied*, 140 S. Ct. 2761 (2020)).

prevent harassment and impersonation,[221] and defectively designing a product by creating a feature that encouraged reckless driving.[222]

Justice Thomas concludes by asserting that "in an appropriate case, it behooves" the Court to decide the correct interpretation of § 230(c).[223] One commentator has suggested that "Justice Thomas's blueprint may prompt lower courts to begin curtailing the reach of Section 230[.]"[224] So far, however, courts have not done so.[225] Unless or until courts begin to heed Justice Thomas's call for limiting the scope of § 230(c) immunity, or Congress amends the law, online digital platforms are left with their own self-moderation efforts.

B. Self-Moderation

Without any judicial or legislative constraints on digital platforms' moderation practices, the platforms themselves have suggested alternative approaches. For example, in his March 25, 2021, testimony before the House of Representative's Committee on Energy and Commerce's Subcommittees on Consumer Protection & Commerce and Communications & Technology, Facebook CEO Mark Zuckerberg assured the Subcommittee that "Facebook stands ready to be a productive partner in the discussion about Section 230 reform."[226] Mr. Zuckerberg suggested that any amendments to Section 230 should provide that the scope of immunity should not be curtailed but should be conditioned on platforms' demonstrating that they have systems, designed by third parties, in place for identifying unlawful content and removing it.[227] At the same hearing Alphabet's[228] CEO suggested that rather than repeal or modify § 230, platforms should focus on ensuring transparent, fair, and effective processes for addressing harmful content and behavior.[229]

The major online digital platforms generally post their content standards.[230] Facebook has also created an "independent" Oversight Board "to promote free expression by making principled,

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[221] *Id.* (citing Herrick v. Grindr LLC, 765 F. App'x 586, 591 (2nd Cir. 2019), *cert. denied*, 140 S. Ct. 221 (2019)).
[222] *Id.* at 17–18 (citing Lemmon v. Snap, Inc., 440 F. Supp. 3d 1103, 1107, 1113 (C.D. Cal. 2020)). Of course, *Lemmon v. Snap* was overruled after Justice Thomas's concurrence. *See Lemmon*, No. 20-55295, 2021 WL 1743576 (9th Cir. May 4, 2021); *supra* text accompanying notes 67–75 (discussing the Ninth Circuit Court of Appeals' denial of § 230(c) immunity against a negligent design claim). *See also* Maynard v. Snapchat, Inc., 816 S.E.2d 77 (Ga. Ct. App. 2018) (holding same; not cited by Justice Thomas).
[223] *Malwarebytes*, 141 S. Ct. at 18.
[224] *See* Scott Wilkins, *Justice Thomas Lays Blueprint for Supreme Court to Limit Section 230 In a Future Case*, WILEY REIN LLP (Oct. 15, 2020), https://www.jdsupra.com/legalnews/justice-thomas-lays-blueprint-for-67566/
[225] *See, e.g.*, J.B. v. G6 Hospitality, LLC, No. 19-cv-07848-HSG, 2020 WL 7260057, at *1 (N.D. Calif. Dec. 10, 2020) (stating Justice Thomas's comments are "far from showing a change in or clarification of controlling law meriting reconsideration"); Lewis v. Google, Inc., No. 20-1784, 2021 WL 211495, at *2 (W.D. Penn. Jan. 21, 2021) ("In this case, the contexts questioned by Justice Thomas are not implicated . . . .").
[226] *Disinformation Nation: Social Media's Role in Promoting Extremism and Misinformation: Hearing Before the H. S. Comms. on Commc'ns & Tech. and Consumer Prot. & Com.*, 117th Cong. 8 (2021) [hereinafter *Disinformation Nation*] (statement of Mark Zuckerberg, Facebook CEO), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Witness%20Testimony_Zuckerberg_CAT_CPC_2021.03.25.pdf.
[227] *See id.* at 7.
[228] Alphabet owns Google, which owns YouTube.
[229] *See Disinformation Nation*, *supra* 226 at 11 (statement of Sundar Pichai, Alphabet CEO), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Witness%20Testimony_Pichai_CAT_CPC_2021.03.25.pdf.
[230] *See, e.g.*, *Community Standards*, FACEBOOK, https://www.facebook.com/communitystandards/ (last visited May 10, 2021); *Twitter Rules and Policies*, TWITTER, https://help.twitter.com/en/rules-and-policies (last visited May 10,

independent decisions regarding content on Facebook and Instagram [owned by Facebook] and by issuing recommendations on the relevant Facebook company content policy."[231] Since its inception in October 2019, the Oversight Board has issued ten decisions,[232] including a May 5, 2021, decision regarding Facebook's indefinite suspension of former President Trump's account.[233] While the Oversight Board upheld Facebook's decision to indefinitely suspend the account, it also insisted that within six months, "Facebook review this matter to determine and justify a proportionate response that is consistent with the rules that are applied to other users of its platform."[234] The Board accused Facebook of "applying a vague, standardless penalty and then referring this case to the Board to resolve, . . . seek[ing] to avoid its responsibilities."[235] In its first major test of self-moderation in the U.S., it appears Facebook has fallen well short of demonstrating that it can do so.[236]

Content moderation, though, goes beyond just what a politician might say or be prevented from saying. What moderators have to contend with is "that there are just truly awful human beings in the world."[237] The reality of content moderation is that some posts so disturbing that there is concern for considerable psychological risks to the moderation employees.[238] Online digital platforms are used not only for specific and purposeful misinformation campaigns,[239] but simple human nature seems to also be at play. One study has found that users are still likely to share content that they themselves do not believe is accurate,[240] reminding us that content does not passively sit on digital platforms but is continually circulated by their users—even when users

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2021; *Community Guidelines*, YOUTUBE, https://www.youtube.com/howyoutubeworks/policies/community-guidelines/ (last visited May 10, 2021).

[231] *Oversight Board*, https://oversightboard.com/ (last visited May 10, 2021). Some commentators have questioned the independence of the Oversight Board since it is funded by Facebook at its members were selected by the company. *See, e.g.*, Kara Swisher, *Inside the Decision on Trump's Facebook Fate*, N.Y. TIMES (May 7, 2021), https://www.nytimes.com/2021/05/07/opinion/sway-kara-swisher-alan-rusbridger.html.

[232] *See Board Decisions*, https://oversightboard.com/decision/ (last visited May 10, 2021).

[233] *See Case decision 2021-001-FB-FBR* (May 5, 2021), https://oversightboard.com/decision/FB-691QAMHJ/.

[234] *See id.*

[235] *Id.*

[236] *See, e.g.*, Shannon Bond, *In 1st Big Test, Oversight Board Says Facebook, Not Trump, Is the Problem*, NPR (May 7, 2021), https://www.npr.org/2021/05/07/994436847/what-we-learned-about-facebook-from-trump-decision.

[237] *See* Steven Johnson, *Why Cloudflare Let an Extremist Stronghold Burn*, WIRED (Jan. 16, 2018 6:00 AM), https://www.wired.com/story/free-speech-issue-cloudflare/.

[238] *See, e.g.,* Andrew Arsht & Daniel Etcovitch, *The Human Cost of Online Content Moderation*, JOLT DIGEST (Mar. 2, 2018), https://jolt.law.harvard.edu/digest/the-human-cost-of-online-content-moderation.

[239] *See, e.g.*, Shannon Bond, *Just 12 People Are Behind Most Vaccine Hoaxes On Social Media, Research Shows*, NPR (May 14, 2021, 11:48 AM), https://www.npr.org/2021/05/13/996570855/disinformation-dozen-test-facebooks-twitters-ability-to-curb-vaccine-hoaxes (reporting on research revealing that just 12 people are responsible for the bulk (65% of shares) of the misleading claims and outright lies about COVID-19 vaccines that proliferate on Facebook, Instagram and Twitter); Emma Brown et al., *The Making of a Myth*, WASH. POST (May 9, 2021), https://www.washingtonpost.com/investigations/interactive/2021/trump-election-fraud-texas-businessman-ramsland-asog/tigations/interactive/2021/trump-election-fraud-texas-businessman-ramsland-asog/ (reporting on the origins of a misinformation campaign of how the 2020 presidential election was stolen); Tim Mak, *Senate Report: Russians Used Social Media Mostly to Target Race in 2016*, NPR (Oct. 8, 2019, 2:50 PM), https://www.npr.org/2019/10/08/768319934/senate-report-russians-used-used-social-media-mostly-to-target-race-in-2016 (reporting on a Senate Intelligence Committee report detailing Russia's use of social media to try to influence the 2016 presidential election).

[240] *See* Gordon Pennycook et al., *Shifting Attention to Accuracy Can Reduce Misinformation Online*, 592 NATURE 590 (Mar. 17, 2021), https://psyarxiv.com/3n9u8/.

doubt the veracity of what they are sharing. In addition, the entire moderation process appears to be secret and intentionally opaque.[241]

Compounding self-moderation efforts is that fact that most online digital platforms, particularly Facebook and YouTube, have business models that depend on serving advertisements to users of their platforms. Therefore, the more a platform keeps a user "engaged," the more ads that are served and the greater the revenue generated. But the algorithms used by platforms to determine which content and which ads will be presented apparently exacerbate the moderation issue:

> Two features of social media platforms—the user networks and the algorithmic filtering used to manage content—can contribute to the spread of misinformation. Users can build their own social networks, which affect the content that they see, including the types of misinformation they may be exposed to. Most social media operators use algorithms to sort and prioritize the content placed on their sites. These algorithms are generally built to increase user engagement, such as clicking links or commenting on posts. In particular, *social media operators that rely on advertising placed next to user-generated content as their primary source of revenue have incentives to increase user engagement*. These operators may be able to increase their revenue by serving more ads to users and potentially charging higher fees to advertisers. Thus, algorithms may amplify certain content, which can include misinformation, if it captures users' attention.[242]

Critics of self-moderation argue that it can never be functionally achieved when the business model is based on maximizing engagement.[243] We are left with online digital platforms through which a significant portion of modern communications passes, with those platforms facing almost no legal consequences for the nature or consequences of those communications. Although they are private entities with theoretical full control over the content posted on their sites, at the same time most

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[241] *See* Arsht & Etcovitch, *supra* note 238*; see also* Catherine Buni & Soraya Chemaly, *The Secret Rules of the Internet: The Murky History of Moderation, and How It's Shaping the Future of Free Speech*, THE VERGE, https://www.theverge.com/2016/4/13/11387934/internet-moderator-history-youtube-facebook-reddit-censorship-free-speech (last visited May 10, 2021).

[242] Jason A. Gallo & Clare Y. Cho, CONG. RSCH. SERV., R46662, SOCIAL MEDIA: MISINFORMATION AND CONTENT MODERATION ISSUES FOR CONGRESS (Jan. 27, 2021) (emphasis added); *see also* Ann Bartow, *Online Harassment, Profit Seeking, and Section 230*, 95 B.U. L. REV. ANNEX 101, 102 (2015) ("Section 230 enables large ISPs to disclaim any legal or moral responsibility for the harms that online speech can inflict all the way to the bank."); Tarleton Gillespie, *Platforms Are Not Intermediaries*, 2 GEO L. TECH. REV. 198, 202 (2018) ("Content moderation is part of how platforms shape user participation into a deliverable experience. Platforms moderate (through removal, filtering, and suspension); they recommend (through news feeds, trending lists, and personalized suggestions); and they curate (through featured content and front-page offerings). Platforms use these three levers together to actively and dynamically tune the participation of users in order to generate the 'right' feed for each user, the 'right' social exchanges, and the 'right' kind of community. 'Right' in these contexts may mean ethical, legal, and healthy, but it also means whatever will promote engagement, increase ad revenue, and facilitate data collection.")

[243] "When you're in the business of maximizing engagement, you're not interested in truth. You're not interested in harm, divisiveness, conspiracy. In fact, those are your friends[.] . . . They always do just enough to be able to put the press release out. But with a few exceptions, I don't think it's actually translated into better policies. They're never really dealing with the fundamental problems." Karen Hao, *How Facebook Got Addicted to Spreading Misinformation: The Company's AI Algorithms Gave It an Insatiable Habit for Lies and Hate Speech. Now the Man Who Built Them Can't Fix the Problem*, MIT TECH. REV. (Mar. 11, 2021), https://www.technologyreview.com/2021/03/11/1020600/facebook-responsible-ai-misinformation/ (quoting Hany Farid, University of California, Berkeley, professor who collaborates with Facebook with respect to misinformation on the platform).

platforms are either technically unable or commercially disincentivized to actually control that content.[244] Meanwhile, despite numerous proposed bills, Congress has yet to substantively alter § 230(c) immunity,[245] while Justice Thomas, one of the staunches critics of legislating from the bench,[246] is calling for the Supreme Court to grant *certiorari* to a case that can rein in online digital platform immunity.[247]

V. Concluding Analysis: The Danger In Tolerating the Intolerant

Online digital platforms are replete with toxic conspiracy theories and misinformation, where enragement equals engagement;[248] where algorithms lead rational humans into a lost world of lies and deceit;[249] a virtual world of "trolling and revenge pornography, terrorist recruitment via social media, and the pervasive use of classified websites by sex traffickers[;]"[250] a home for a variety of U.S.-based extremist groups, including those advocating a violent overthrow of the U.S. government:[251]

> [S]ocial media platforms have made it easier than ever for extremists to recruit new adherents and push their fringe beliefs into the mainstream. This was on full display on January 6, [2021,] when militant white nationalists groups that have primarily used the internet to organize—the Proud Boys, the Three Percenters, and the Oath Keepers—stormed the Capitol alongside MAGA moms, QAnon adherents, and other groups brought together in recent years by their love of conspiracy theories and Donald Trump. Many members of all these groups had met online before the event, and their attack on the Capitol showed their alarming capacity for offline violence.[252]

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[244] *See, e.g.*, Cobbe, *supra* note 7 (asserting that commercial priorities of digital platforms will be inserted further into the everyday communications of billions of people).
[245] *See supra* notes 187–202 and accompanying text.
[246] *See, e.g.*, Terry Atlas, *Bush Chooses Conservative for Supreme Court: Judge's Views on Abortion May Hold Key*, CHI. TRIB., July 2, 1991, at 1 (reporting that one of Bush's main considerations in nominating Thomas was his not legislating from the bench).
[247] *See supra* notes 212–224 and accompanying text.
[248] *Cf.* Kara Swisher, *Trump May Start a Social Network. Here's My Advice.*, N.Y. TIMES (Mar. 25, 2021), https://www.nytimes.com/2021/03/25/opinion/trump-social-network.html.
[249] *See, e.g.*, Kwame Anthony Appiah, *YouTube Videos Brainwashed My Father. Can I Reprogram His Feed?*, N.Y. TIMES (Apr. 21, 2021), https://www.nytimes.com/2021/04/20/magazine/youtube-radicalization.html (responding to a reader whose father began watching religious programs on YouTube, whose algorithms eventually steered him toward conservative media so that he became obsessed with right-wing extremist politics and refused the COVID-19 vaccine).
[250] KOSSEFF, *supra* note 41, at 208.
[251] *See, e.g.*, A.C. Thompson, Lila Hassan, & Karim Hajj, *The Boogaloo Bois Have Guns, Criminal Records and Military Training. Now They Want to Overthrow the Government*, PROPUBLICA (Feb. 1, 2021 11:00 AM), https://www.propublica.org/article/boogaloo-bois-military-training (describing the Boogaloo movement"—a decentralized, very online successor to the militia movement of the '80s and '90s—whose adherents are fixated on attacking law enforcement and violently toppling the U.S. government[,]" which began coalescing online in 2019 when its members found each other on Facebook).
[252] Adam Clark Estes, *How Neo-Nazis Used the Internet to Instigate a Right-Wing Extremist Crisis*, VOX (Feb. 2, 2021 2:10 PM), https://www.vox.com/recode/22256387/facebook-telegram-qanon-proud-boys-alt-right-hate-groups; *see also* Maik Fielitz & Holger Marcks, *Digital Fascism: Challenges for the Open Society in Times of Social Media* 1 (Berkeley Center for Right-Wing Studies Working Paper Series, 2019), https://escholarship.org/content/qt87w5c5gp/qt87w5c5gp.pdf?t=puq7xb ("With the proliferation of interactive social media, [far-right actors] have entered a new phase of mobilization, using the extended freedom of expression to spread their illiberal ideas.").

Is § 230(c) immunity to blame?[253] Should the government get into the business of regulating online speech? There are strong constitutional arguments against Congress attempting to control what speech is or is not allowed online—particularly with respect to regulating one political view over another.[254] And one court has reminded us, "if the First Amendment means anything, it means that the best response to disfavored speech on matters of public concern is more speech, not less."[255]

But there are strong arguments for less, not more, speech. Though not rising (or sinking) to the level of fascism (neo- or otherwise), Tim Wu recognizes that "disinformation techniques are a serious threat to the functioning of the marketplace of ideas and democratic deliberation."[256] The "paradox of tolerance," credited to Karl Popper, advises that tolerance of the intolerant leads to intolerance.[257] There may be no single, all-encompassing definition of extremists, but it could certainly include those "who advocate the destruction of democratic institutions and who would, if successful, ruthlessly suppress the speech of those with whom they disagree,"[258] as well as Neo-fascism, "which combines ultra-nationalism with nativism and celebrates racial hierarchy, as well as the desirability of inequality and privilege."[259] Although the Supreme Court has extended First Amendment protection to extremists,[260] there is nothing that compels online digital platforms to do so, nor should they:

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[253] *See* KOSSEFF, *supra* note 41, at 209 ("One of the strongest and most pervasive criticisms of Section 230 is that by protecting *all* speech, it encourages some of the most vile, sexist, and oppressive words and images.").

[254] *See, e.g.*, *supra*, note 191 and accompanying text (discussing the potential unconstitutionality of proposed legislation banning "politically biased moderation").

[255] Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 240 (2nd Cir. 2019), *reh'g en banc denied*, 953 F.3d 216 (2nd Cir. 2020), *cert. granted, vacated, and remanded with instructions to dismiss as moot sub nom*. Biden v. Knight First Amendment Inst. at Columbia Univ., 141 S. Ct. 1220 (2021) (mem.).

[256] Tim Wu, *Disinformation in the Marketplace of Ideas*, 51 SETON HALL L. REV. 169, 170 (2020). The "Stop the Steal" campaign, which led to the siege of the U.S. Capitol on January 6, 2021, is perhaps the epitome of the dangers of a disinformation campaign. *See, e.g.*, Hannah Gais & Freddy Cruz, *Far-Right Insurrectionists Organized Capitol Siege on Parler*, S. POVERTY L. CTR. (Jan. 8, 2021), https://www.splcenter.org/hatewatch/2021/01/08/far-right-insurrectionists-organized-capitol-siege-parler. Many believe the conspiracy theory that the November 2020 election was stolen from Donald Trump; and some people believe we live within a digital simulation. *See, e.g.*, David Pescovitz, *Now streaming: Glitch in the Matrix, a New Documentary About People Who Think We're Living in a Simulation*, BOINGBOING (Feb. 5, 2021, 10:43 AM), https://boingboing.net/2021/02/05/now-streaming-glitch-in-the-matrix-a-new-documentary-about-people-who-think-were-living-in-a-simulation.html. *But see* Complaint at 9, ¶ 1, Smartmatic USA Corp. v. Fox Corp. (N.Y. Sup. Ct. Feb. 4, 2021), https://www.smartmatic.com/uploads/Smartmatic_Complaint_Against_Fox_Corporation.pdf ("The Earth is round. Two plus two equals four. Joe Biden and Kamala Harris won the 2020 election for President and Vice President of the United States. The election was not stolen, rigged, or fixed. These are facts. They are demonstrable and irrefutable."). The *Smartmatic* 287-page complaint seeks $2.7 billion in damages not only from Fox Corporation and Fox News Networks, but also from five individuals, Lou Dobbs, Maria Bartiromo, Jeanine Pirro, Rudolph Giuliani, and Sydney Powell. *See* Off the Rails: *Episode 3: Descent Into Madness*, AXIOS (Feb. 2, 2021), https://www.axios.com/newsletters/axios-sneak-peek-a6e7bef4-8a75-42d5-a026-e80e453f1b57.html (reporting Sydney Powell and others advised then-President Trump that a foreign conspiracy to steal the election involved a coordinated cyberwarfare attack from China, Russia, Iran, Iraq and North Korea).

[257] *See* POPPER, *supra* note 15.

[258] Michel Rosenfeld, *Extremist Speech and the Paradox of Tolerance*, 100 HARV. L. REV. 1457, 1457 (1987) (reviewing LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986)).

[259] Bart Cammaerts, *The Neo-fascist Discourse and Its Normalisation Through Mediation*, 15 J. MULTICULTURAL DISCOURSES 241, 241 (2020).

[260] *See, e.g.,* Smith v. Collin, 436 U.S. 953 (1978); Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43 (1977); Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523,

> It is of course possible to maintain that toleration of extremist anti-democratic speech would tend to invigorate the proponents of democracy and hence ultimately strengthen rather than weaken democracy. Be that as it may, toleration of anti-democratic views is not logically required for purposes of advancing self-governing democracy. For example, advocacy of violent overthrow of democratically elected government and establishment of a dictatorship need not be protected to ensure vigorous debate on all plausible alternatives consistent with democracy.[261]

Many of the people who have had their online content deleted or who have been de-platformed claim a violation of the right of free speech.[262] As explained above in Part III, First Amendment free speech rights may come into play when government actors transform an online digital platform into a public forum, but there is no First Amendment issue when the complaint of censorship is against the platforms themselves. And while the availability of other means of speech will not cure a First Amendment violation,[263] alternative methods of expression remain available to all who claim to have been "silenced" by online digital platforms.[264] Renee Diresta reminds us that "free *speech* does not mean free *reach*. There is no right to algorithmic amplification. In fact, that's the very problem that needs fixing."[265]

If the current state of the online world is unacceptable, how could or should it be remedied? The suggestions start with eliminating § 230 altogether.[266] Would online digital platforms be able to exist without the immunity provided by § 230? Yes, argues Ann Bartow—Facebook, Twitter,

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1537 (2003) ("If one case has come to symbolize the contemporary political and constitutional response to hate speech in the United States, it is the *Skokie* case in the late 1970s. This case arose out of a proposed march by Neo-Nazis in full SS uniform with swastikas through Skokie, a suburb of Chicago with a large Jewish population, including thousands of Holocaust survivors. The local municipal authorities took measures—including enacting new legislation—designed to prevent the march, but both state and federal courts eventually invalidated the measures as violative of the Neo-Nazis' free speech rights.").

[261] *Rosenfield, supra* note 260, at 1533 n.36.

[262] *See, e.g.*, John Hendel, *How Trump's Fights with Tech Transformed Republicans' Beliefs on Free Speech*, POLITICO (Jan. 18, 2021), https://www.politico.com/news/2021/01/18/trump-free-speech-big-tech-459833.

[263] *See supra* text accompanying notes 125–126.

[264] *See, e.g.*, Farhad Manjoo, *Josh Hawley and Donald Trump Haven't Been "Silenced"*, N.Y. TIMES (May 6, 2021), https://www.nytimes.com/2021/05/06/opinion/facebook-josh-hawley-trump.html ("I was on my iPhone the other day when I heard the first furtive whispers about Big Tech's silencing of Senator Josh Hawley. Since Jan. 6, when the Missouri Republican was photographed fist-pumping his support for some of the very fine people who would later storm the United States Capitol, Hawley has been all but banished from the media. Other than his frequent appearances on some of the most popular cable news shows in the country, his biting Twitter account, the Instagram account where he posts family snapshots and clips from cable hits, and his YouTube page collecting his nearly every utterance on the Senate floor, Hawley has suffered the worst fate known to a modern American politician: cancellation."). *Contra* Drew Harwell & Josh Dawsey, *Trump Is Sliding Toward Online Irrelevance. His New Blog Isn't Helping*, WASH. POST (May 21, 2021, 4:09 PM), https://www.washingtonpost.com/technology/2021/05/21/trump-online-traffic-plunge/ ("On the Internet, former president Donald Trump is sliding toward something he has fought his entire life: irrelevance. Online talk about him has plunged to a five-year low. He's banned or ignored on pretty much every major social media venue. In the last week, Trump's website—including his new blog, fundraising page and online storefront—attracted fewer estimated visitors than the pet-adoption service Petfinder and the recipe site Delish.").

[265] Renee Diresta, *Free Speech Is Not the Same as Free Reach*, WIRED (Aug. 30, 2018), https://www.wired.com/story/free-speech-is-not-the-same-as-free-reach/.

[266] *See, e.g.*, H.R. 874, 117th Cong. (2021) (repealing § 230 altogether).

YouTube, and many other platforms all operate in countries that do not have § 230 equivalents.[267] Section 230 just merely saves the platforms money.[268] In contrast, Christian Dippon found that the loss of safe harbor provisions[269] would cost the U.S. 4.25 million jobs and reduce GDP by nearly half a trillion dollars over a decade, stifle innovation, and raise consumer costs while worsening the online experience.[270]

Millions of Americans turn to online digital platforms on an almost daily basis for all sorts of communications. Section 230(c)(1) immunity makes this possible. Congress may have appeared to have made a Faustian bargain by enacting § 230—a present gain of encouraging and expanding online communications without regard to the future cost. But eliminating or even limiting that immunity can very well stifle speech. Fear of (particularly anti-conservative) bias has motivated proposed and enacted legislation,[271] and even a Presidential Executive Order,[272] to limit § 230(c) immunity. But these claims of bias have been shown to be unfounded.[273] It may be messy and discordant, but without § 230(c)(1) immunity no one would be able to publish anything on platforms such as Facebook, Twitter, or YouTube.[274]

Since what is posted online is often obscene, offensive, traitorous, racist, intolerant, or just plain gross, online digital platforms must be able to self-moderate under § 230(c)(2) without fear of liability. They cannot follow Facebook's approach—avoiding moderating[275] or passing off its responsibilities to an Oversight Board (which exists to double-check Facebook's applications of its policies, not enforce them on behalf of Facebook).[276] Instead, online digital platforms can

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[267] *See* Bartow, *supra* note 242, at 103–04. *But compare* Adam Satariano & Oleg Matsnev, *Russia Raises Heat on Twitter, Google and Facebook in Online Crackdown*, N.Y. TIMES (May 26, 2021), https://www.nytimes.com/2021/05/26/technology/russia-twitter-google-facebook-censorship.html (reporting Russia's internet regulator increased demands for platforms to remove online content that it deems illegal or restore pro-Kremlin material that had been blocked), *with* Florida SB 7072, *supra* notes 208–211 and accompanying text.

[268] *See* Bartow, *supra* note 242, at 103.

[269] Not only under § 230 but also under § 512 of the Copyright Act.

[270] *See* CHRISTIAN M. DIPPON, ECONOMIC VALUE OF INTERNET INTERMEDIARIES AND THE ROLE OF LIABILITY PROTECTIONS (Internet Assoc. 2017), https://internetassociation.org/wp-content/uploads/2017/06/Economic-Value-of-Internet-Intermediaries-the-Role-of-Liability-Protections.pdf.

[271] *See supra* text accompanying notes 189–191, 206–211.

[272] *See supra* text accompanying notes 192–195.

[273] *See, e.g.*, Mathew Ingram, *The Myth of Social Media Anti-Conservative Bias Refuses to Die*, COLUM. JOURNALISM REV. (Aug. 8, 2019), https://www.cjr.org/themediatoday/platform-bias.php (noting the almost total lack of evidence that Facebook, Twitter, and Google are biased against alt-right groups and mainstream conservatives); India McKinney & Elliot Harmon, *Platform Liability Doesn't—and Shouldn't—Depend on Content Moderation Practices*, ELEC. FRONTIER FOUND. (Apr. 9, 2019), https://www.eff.org/deeplinks/2019/04/platform-liability-doesnt-and-shouldnt-depend-content-moderation-practices (noting the lack of evidence of systemic political bias against conservatives by online platforms).

[274] *See, e.g.*, KOSSEFF, *supra* note 41, at 121 ("Without Section 230, each user who posted a comment, photo, or video to a website would represent another small but real risk that the website could be sued out of existence. . . . [M]ultiply that small risk by billions of user contributions. . . .").

[275] *See, e.g.*, Craig Silverman et al., *Facebook Knows It Was Used to Help Incite the Capitol Insurrection*, BUZZFEED NEWS (Apr. 22, 2021, 10:38 AM), https://www.buzzfeednews.com/article/craigsilverman/facebook-failed-stop-the-steal-insurrection (reporting that a Facebook internal investigation revealed that "Facebook failed to stop a highly influential movement from using its platform to delegitimize the election, encourage violence, and help incite the Capitol riot"); Kara Swisher, *Mark Zuckerberg's "Evolving" Position on Holocaust Denial*, N.Y. TIMES (Oct. 14, 2020), https://www.nytimes.com/2020/10/14/opinion/facebook-holocaust-denial.html (reporting an interview with Mark Zuckerberg, Facebook CEO, who stated, "at the end of the day, I don't believe that our platform should take that [Holocaust denial posts] down because I think there are things that different people get wrong").

[276] *See supra* text accompanying notes 231–236.

increase transparency in moderation policies and possibly even subject their moderation practices to regular audits.[277] There will always be a tension between revenue-generating content and its moderation. But that revenue model has propelled online communications to scale to an unprecedented extent. Boundaries are set by both § 230(e)[278] and the platforms' own standards.[279] Section 230(c)(1) provides the foundation for the vast array of online speech. But not all of that speech deserves to be there. The only way to ensure that the lewd, lascivious, obscene, extremist and intolerant speech does not overwhelm "free" speech is to preserve platforms' freedom to de-platform when necessary.

[277] *See, e.g.,* Gillespie, *supra* note 242, at 213–216.
[278] Excluding immunity for certain illegal activities, particularly intellectual property theft or infringement or sex trafficking. *See supra* note 46.
[279] *See supra* note 230.