



**Testimony of**

**TechFreedom**

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*Platform Responsibility & Section 230*

*Filtering Practices of*

*Social Media Platforms: Hearing Before the House Committee on the Judiciary*

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## I. Introduction

If one law has made today's Internet possible, it is Section 230 of the Communications Decency Act of 1996 ("Section 230").<sup>2</sup> Drafted by Rep. Chris Cox (R-CA) and Sen. Ron Wyden (D-OR), that law ensured that websites would not be held liable for content created by their users except in very limited circumstances. Without that law, social media sites that allow users to post content of their own creation would never have gotten off the ground, given the impossibility of monitoring user content at the scale at which such sites operate today. Yet, in a recent hearing featuring Facebook CEO Mark Zuckerberg, Sen. Ted Cruz (R-TX) argued that Congress intended Section 230 to apply only to "neutral public platforms," asking Zuckerberg:

It's just a simple question. The predicate for Section 230 immunity under the CDA is that you're a neutral public forum. Do you consider yourself a neutral public forum, or are you engaged in political speech, which is your right under the First Amendment?"<sup>3</sup>

Cruz also asked, "Are you a First Amendment speaker expressing your views, or are you a neutral public forum allowing everyone to speak?"<sup>4</sup> Sen. Lindsay Graham (R-SC) took up the same message after the hearing: "[Website operators] enjoy liability protections because they're neutral platforms. At the end of the day, we've got to prove to the American people that these platforms are neutral."<sup>5</sup> Politico reports that Sen. Graham has previously proposed a task force made up of members of the Senate Commerce and Judiciary committees to investigate this issue and make concrete proposals.<sup>6</sup>

These Senators are dead wrong about how Section 230 works, and more important, about the wisdom of requiring such neutrality. The idea that government should police the "neutrality" of websites is, in effect, a Fairness Doctrine for the Internet. It is ironic that such a proposal should come from any Republican, especially one so proudly "conservative" as

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<sup>2</sup> 47 U.S.C. § 230.

<sup>3</sup> *Facebook, Social Media Privacy, and the Use and Abuse of Data: J. Hearing of S. Comm. on the Judiciary and S. Comm. on Commerce, Science, and Transp.*, 115th Cong. (2018) (statement of Sen. Ted Cruz, member, S. Comm. on Commerce, Science, and Transp.), available at <http://www.cruz.senate.gov/?p=video&id=3715>.

<sup>4</sup> *Id.*

<sup>5</sup> Li Zhou, *Morning Tech: Stephenson Goes after DOJ Arguments*, POLITICO (Apr. 20, 2018), <https://www.politico.com/newsletters/morning-tech/2018/04/20/stephenson-goes-after-doj-arguments-178514>.

<sup>6</sup> Elena Schor, *Graham seeks 9/11-style commission on social media vulnerabilities*, POLITICO (Nov. 2, 2017), <https://www.politico.com/story/2017/11/02/social-media-commission-lindsey-graham-244466>.

Cruz, given the intensity of opposition by Republicans to the Fairness Doctrine for generations for stifling conservative voices on radio and television. Indeed, it was President Reagan whose FCC finally abolished the Fairness Doctrine and Reagan himself who vetoed Democratic legislation to revive the doctrine.

Opposition to reinstatement of the Fairness Doctrine has been in every GOP platform since 2008.<sup>7</sup> In 2012, the GOP platform added this: “We insist that there should be no regulation of political speech on the Internet.”<sup>8</sup> In 2016, five years after the FCC, under a chairman appointed by President Obama took the last step in repealing the Fairness Doctrine (formally deleting the rule that had gone unenforced since 1987), the GOP Platform still (strangely) called “for an end to the so-called Fairness Doctrine,” and expressed “support [for] free-market approaches to free speech unregulated by government.”<sup>9</sup> In 2009, thirty-one Republican senators co-sponsored Sen. Jim DeMint’s (R-SC) “Broadcaster Fairness Act of 2009,” a one paragraph bill that would have barred the FCC from resurrecting the Fairness Doctrine.<sup>10</sup> Among these co-sponsors was Sen. Lindsay Graham (R-SC) — and it is difficult to imagine that Sen. Cruz would not have joined him had he been in the Senate at the time.

Why conservatives would suddenly embrace the Fairness Doctrine after decades of opposing it is simply baffling. Conservative talk radio was impossible before the Reagan FCC repealed the Fairness Doctrine, for example. The Fairness Doctrine suppressed heterodox viewpoints and enforced a bland orthodoxy in media. It would do the same for the Internet.

Concerns about Facebook’s potential slant are best addressed through other measures, starting with transparency and user empowerment. Ultimately, the best check on Facebook’s power today is the threat of a new Facebook disrupting the company’s dominance — just as many younger Internet users abandoned the site first for Instagram and then for Snapchat. Regulators should avoid creating vague legal liability, not least because, while it *might* be manageable for a company as large and well-resourced as Facebook, which has

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<sup>7</sup> Platform of the Republican Party (2008), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=78545> (We support freedom of speech and freedom of the press and oppose attempts to violate or weaken those rights, such as reinstatement of the so-called Fairness Doctrine.); 2012 GOP Platform (we oppose governmental censorship of speech through the so-called Fairness Doctrine or by government enforcement of speech codes, free speech zones, or other forms of "political correctness" on campus.)

<sup>8</sup> Les Brown, *Reported Political Use of Radio Fairness Doctrine Under Kennedy and Johnson Is Causing Concern*, N.Y. TIMES, Mar. 31, 1975, at 50. (<https://www.nytimes.com/1975/03/31/archives/reported-political-use-of-radio-fairness-doctrine-under-kennedy-and.html>)

<sup>9</sup> Platform of the Republican Party, 12, (2016), *available at* [https://prod-cdn-static.gop.com/media/documents/DRAFT\\_12\\_FINAL\[1\]-ben\\_1468872234.pdf](https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf)

<sup>10</sup> Broadcaster Freedom Act of 2009, S. 34, 111th Cong. (2009) (<https://www.congress.gov/bill/111th-congress/senate-bill/34/cosponsors>).

thousands of employees working just in content moderation,<sup>11</sup> it will be fatal to the startups seeking to become the *next* Facebook.<sup>12</sup>

Finally, imposing the Fairness Doctrine on the Internet would be grossly unconstitutional, whether enforced through statutory mandate or as a condition of eligibility for immunity under a revised version of Section 230. The original Fairness Doctrine survived First Amendment review solely because the Supreme Court singled out broadcast media for diminished First Amendment protection. But the Court has repeatedly declared that the Internet, including social media, deserve the full protection of the First Amendment.

## II. Law: What Congress Intended in Section 230

Sens. Cruz and Graham’s interpretation of Section 230 is diametrically opposed to the purpose of the law, which was to *encourage* websites to take down content as they see fit.

### A. Mis-Reading the Text & Legislative History of Section 230

Understanding Section 230 begins with the letter of the law. As the late Justice Scalia once admonished, “[f]or some, policy-driven interpretation is apparently just fine. But for everyone else, let us return to Statutory Interpretation 101. We must begin, as we always do, with the text.”<sup>13</sup> To start, Section 230(b)(2) declares that “It is the policy of the United States ... to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”<sup>14</sup> Given this language, it is impossible to read Section 230 as a mandate for regulation, yet that is precisely what those calling for requiring Facebook (or any other social media platform) to be a “neutral public forum” are doing.

Moreover, the operative provisions of Section 230 make clear that Congress intended to *encourage* website operators to exercise editorial discretion — the opposite of neutrality.

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<sup>11</sup> See Hayley Tsukayama, *Facebook adds 3,000 employees to screen for violence as it nears 2 billion users*, WASHINGTON POST (May 3, 2017), [https://www.washingtonpost.com/news/the-switch/wp/2017/05/03/facebook-is-adding-3000-workers-to-look-for-violence-on-facebook-live/?utm\\_term=.8d729c427ada](https://www.washingtonpost.com/news/the-switch/wp/2017/05/03/facebook-is-adding-3000-workers-to-look-for-violence-on-facebook-live/?utm_term=.8d729c427ada); Anita Balakrishnan, *Facebook pledges to double its 10,000-person safety and security staff by end of 2018*, CNBC (Oct. 31, 2017), <https://www.cnbc.com/2017/10/31/facebook-senate-testimony-doubling-security-group-to-20000-in-2018.html> (citing Congressional testimony by Facebook VP and General Counsel Colin Stretch).

<sup>12</sup> See D. Wakabayashi & A. Satariano, *How Looming Privacy Regulations May Strengthen Facebook and Google*, NEW YORK TIMES (April 28, 2018), <https://www.nytimes.com/2018/04/23/technology/privacy-regulation-facebook-google.html>.

<sup>13</sup> *Zuni Public School Dist. No. 89 v. Department of Educ.*, 550 U.S. 81, 109 (2007) (Scalia, J., dissenting) (internal citation omitted).

<sup>14</sup> 47 U.S.C. § 230(b)(2).

Section 230(c)(2) confers two kinds of “Protection for ‘Good Samaritan’ blocking and screening of offensive material”:

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;

(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).<sup>15</sup>

Far from being “neutral,” Congress intended website operators to have extremely broad discretion in deciding what material to take down. Nothing could be more inconsistent with this notion than the idea that the government should — as it did with the Fairness Doctrine — second-guess the decisions that website operators make about what speech is “obscene, lewd, lascivious, filthy, excessively violent, harassing, **or otherwise objectionable.**”<sup>16</sup>

The author of Section 230, Rep. Chris Cox (R-CA), was “inspired” to draft and introduce the legislation by *Stratton Oakmont, Inc. v. Prodigy Services Co.*, a 1995 trial court decision holding that website operators who assumed an editorial role with regard to customer content became “publishers” and thus could be held liable for defamatory material posted by their users.<sup>17</sup> The House Report on Section 230 makes the statute’s purpose clear:

[S]ection [230] provides ‘Good Samaritan’ protections from civil liability for providers ... of an interactive computer service for actions to *restrict* ... access to objectionable online material. One of the specific purposes of this section is to overrule *Stratton–Oakmont* [sic] v. *Prodigy* and any other similar decisions which have treated such providers ... as publishers or speakers of content that is not their own *because they have restricted access* to objectionable material.<sup>18</sup>

The Ninth Circuit said this about the statute’s legislative history:

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<sup>15</sup> *Id.* § 230(c)(2).

<sup>16</sup> *Id.* (emphasis added).

<sup>17</sup> *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995).

<sup>18</sup> H.R.Rep. No. 104–458 (1996) (Conf. Rep.), as reprinted in 1996 U.S.C.C.A.N. 10 (emphasis added).

While the Conference Report refers to this as “[o]ne of the specific purposes” of section 230, it seems to be the principal or perhaps the only purpose. The report doesn't describe any other purposes, beyond supporting “the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.”<sup>19</sup>

Congressman Cox thought it was “surpassingly stupid” that the *Prodigy* court had punished the platform for deleting a post for offensiveness.<sup>20</sup> He was right, and we can thank his forethought and careful lawyering for much of the flourishing of the Internet since 1996.

## **B. What Section 230 Immunity *Actually* Depends On**

Sen. Cruz is right about one thing: Section 230 immunity was never intended to be absolute.<sup>21</sup> But he misunderstands the limiting principles written into the statute. To start, Section 230(e) (“Effect on other laws”) does not “impair the enforcement of ... any ... Federal criminal statute.”<sup>22</sup> Two other key limiting principles qualify the immunity conferred upon website operators, but neither could be used to justify any kind of “neutrality” requirement.

### **1. Section 230 Does Not Protect Websites Responsible for the “Development” of Content**

The most important limit on Section 230 is also the least obvious, because it is built into the statute’s two key definitions: A website operator is only protected by Section 230, for liability regarding content created by another “Information content provider,” only insofar as it is an “Interactive computer service.” A website operator becomes an “Information content provider,” and thus gives up its immunity, whenever it becomes “responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”<sup>23</sup> Concretely, this means that Facebook is *not* protected by Section 230 for the content it creates, such as Facebook Watch, a program launched last year with a \$1 billion annual budget to create original video content to compete with other video platforms (*e.g.*, YouTube, Netflix, Amazon Streaming, and Apple

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<sup>19</sup> *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008).

<sup>20</sup> TechFreedom, *Armchair Discussion with Former Congressman Christopher Cox*, YOUTUBE (Aug. 10, 2017), <https://www.youtube.com/watch?v=iBEWXIn0JUY&t=3m55s> at 4:06.

<sup>21</sup> See *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009) (holding that the CDA does not declare “a general immunity from liability deriving from third-party content”); *Roommates.com*, 521 F.3d at 1164 (noting CDA was not “meant to create a lawless no-man's land on the Internet”).

<sup>22</sup> 47 U.S.C. § 230(e)(1).

<sup>23</sup> 47 U.S.C. § 230(f)(2) & (3).

Streaming).<sup>24</sup> Similarly, if Facebook created political content, that would not be protected by Section 230.

But Section 230(c)(1) immunity does not depend on whether an operator exercises its editorial discretion to favor one side of a political issue or another.<sup>25</sup> Instead, the immunity applies to all site operators, regardless of their neutrality, as long as they are not responsible for “developing” user content. Thus, a website can decide which user content to *feature*, for example, to suit its political agenda while remaining fully protected by Section 230(c)(1). What it may not do is help draft or edit that content in a way that changes its meaning. As the Ninth Circuit noted in its 2008 panel decision in *Fair Housing Council v. Roommates.com*: While “a website operator who edits user-created content ... retains his immunity for any illegality in the user-created content ... a website operator who edits in a manner that contributes to the alleged illegality ... is directly involved in the alleged illegality and thus not immune.”<sup>26</sup>

Beyond that, the courts have set aside Section 230 immunity only in very limited circumstances. The most important case on this issue is *Roommates*, where the website played middleman between would-be renters and those looking to rent out rooms. Each new user was required to answer basic demographic questions about their race, gender and sexuality, and their roommate preferences — questions that facilitated housing discrimination and thus were potentially illegal even to ask under the federal Fair Housing Act.<sup>27</sup> The court held that the site was “undoubtedly the ‘information content provider’ as to the questions and can claim no immunity for posting them on its website, or for forcing subscribers to answer them as a condition of using its services.”<sup>28</sup> In addition, the court found the site “responsible” for the development of profiles based on this information, and of search tools based upon this information.

Neither *Roommates* nor any of its progeny would suggest that a website operator could become “responsible” for “development” of user content, even by soliciting, or inferring, in-

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<sup>24</sup> Deepa Seetharaman, *Facebook Is Willing to Spend Big in Video Push*, WALL STREET JOURNAL (Sept. 8, 2017), <https://www.wsj.com/articles/facebook-is-willing-to-spend-big-in-video-push-1504863181>.

<sup>25</sup> In fact, were Section 230 immunity dependent upon on whether an operator exercises its editorial discretion in a politically neutral manner, it would very likely be held unconstitutional as a violation of the First Amendment. *See, e.g., Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989) (recognizing that expressive materials are entitled to presumptive First Amendment protection); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010) (holding that “political speech must prevail against laws that would suppress it, whether by design or inadvertence.”).

<sup>26</sup> *Roommates.com*, 521 F.3d at 1169.

<sup>27</sup> *Id.* at 1161-62.

<sup>28</sup> *Id.* at 1164.



formation about users' political interests or preferences.<sup>29</sup> The key thing about the *Roommates* decision is that the information collected from users was inherently illegal. Ultimately, in 2012, the Ninth Circuit decided that applying the Fair Housing Act to roommate rentals would raise serious constitutional concerns — despite the otherwise clear illegality of the content in question.<sup>30</sup> By contrast, not only is information about political preferences legal, it is the most highly protected form of free expression under the First Amendment.<sup>31</sup>

*Roommates* is notable for a second, more specific reason: it was the first court decision to discuss “neutrality” as part of the analysis of Section 230. (Several subsequent decisions have also mentioned the term, citing *Roommates*.<sup>32</sup>). However, in context, it is obvious that what the court was talking about had nothing whatsoever to do with political neutrality:

If an individual uses an ordinary search engine to query for a “white roommate,” the search engine has not contributed to any alleged unlawfulness in the individual’s conduct; providing neutral tools to carry out what may be unlawful or illicit searches does not amount to “development” for purposes of the immunity exception.<sup>33</sup>

In short, *Roommates*’ “neutrality” test is based on inducement of illegal activity, not the level of involvement or manipulation of content — for a political agenda, or otherwise.

## **2. Political Bias Alone Will Not Cause a Website to Lose Its Section 230(c)(2)(A) Immunity for “Good Faith” Content Moderation**

The overwhelming majority of Section 230 cases turn on the 230(c)(1) immunity from liability as publishers. A separate immunity, Section 230(c)(2)(A), protects decisions to “re-

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<sup>29</sup> *Roommates*, 521 F.3d at 1163–64 (noting “Congress sought to immunize the removal of user-generated content, not the creation of content: “[S]ection [230] provides ‘Good Samaritan’ protections from civil liability for providers ... of an interactive computer service for actions to restrict ... access to objectionable online material.”). See also *Fields v. Twitter, Inc.*, 200 F.Supp.3d 964, 969 (N.D. Cal. 2016) (citing *Barnes*, 570 F.3d at 1100–01) (recognizing that “section 230(c)(1) protects from liability only (a) a provider or user of an interactive computer service (b) that the plaintiff seeks to treat as a publisher or speaker (c) of information provided by another information content provider.”).

<sup>30</sup> *Fair Hous. Council v. Roommate.com, LLC*, 666 F.3d 1216, 1223 (9th Cir. 2012) (appeal after remand).

<sup>31</sup> See, e.g., *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365 (2010) (“No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”); *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223, 109 (1989) (noting the First Amendment “‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.”) (internal citations omitted).

<sup>32</sup> See *J.S. v. Village Voice Media Holdings*, 2015 WL 5164599 (Wash. Sup. Ct. Sept. 3, 2015); *Dyroff v. The Ultimate Software Group, Inc.*, 2017 WL 5665670 (N.D. Cal. Nov. 26, 2017).

<sup>33</sup> *Roommates*, 521 F.3d at 1169.

strict access to or availability of material that the provider ... considers to be ... objectionable.” This immunity only applies if the website acts “in good faith.”<sup>34</sup>

Because most cases are resolved on 230(c)(1) grounds, there is relatively little case law on the meaning of “good faith.” In 2011, Santa Clara Law Prof. Eric Goldman, having done an exhaustive survey of Section 230 case law, concluded that “no online provider has lost § 230(c)(2) immunity because it did not make a good faith filtering decision. Nevertheless, a few cases have given examples of some provider actions that may not be in good faith. For example, anticompetitive motivations might disqualify an online provider from § 230(c)(2).”<sup>35</sup> In another case, “the judge found that an online provider’s failure to articulate a reason for its blocking decision could be bad faith.”<sup>36</sup> Goldman concluded:

As these examples illustrate, the statute’s “good faith” reference invites judges to introduce their own normative values into the consideration. Fortunately, most judges do not introduce their own normative values into the statutory inquiry. Several § 230(c)(2) cases have held that good faith is determined subjectively, not objectively. In that circumstance, courts should accept any justification for account termination proffered by the online provider, even if that justification is ultimately pretextual.<sup>37</sup>

Having consulted with Prof. Goldman, we are not aware of any court decisions tying “good faith” in content moderation to political neutrality. While Section 230(c)(2)(A) is rarely invoked by litigation, it would, and should, protect Facebook, or any other website operator accused of removing content, or shutting down an account or user profile, because the operator found the content or account “objectionable” on purely political grounds. Attempting to read a political neutrality requirement into Section 230 would raise the First Amendment problems discussed below.<sup>38</sup>

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<sup>34</sup> 47 U.S.C. § 230(c)(2)(A).

<sup>35</sup> Eric Goldman, *Online User Account Termination and 47 U.S.C. §230(c)(2)*, 2 UC Irvine Law Rev. 659, 665 (2012), available at <https://ssrn.com/abstract=1934310>.

<sup>36</sup> *Id.* citing *Smith v. Trusted Universal Standards in Elec. Transactions*, No. 09-4567 (RBK/KMW), 2011 WL 900096, at \*25–26 (D.N.J. Mar. 15, 2011).

<sup>37</sup> *Id.* citing (on the subjectivity of good faith) *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169 (9th Cir. 2009); *e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605 (N.D. Ill. 2008). *But see Nat’l Numismatic Certification, LLC v. eBay, Inc.*, No. 6:08-cv-42-Orl-19GJK, 2008 WL 2704404 (M.D. Fla. July 8, 2008).

<sup>38</sup> *See infra* at 16-22.

### III. Policy: What *Should* Platforms Be Responsible For?

Weeks after his remarks at a Senate Commerce Committee hearing, insisting that Congress had intended Section 230 to apply only to “neutral public platforms,” Cruz appeared to change gears.<sup>39</sup> In an op-ed, he instead argued that Section 230 *should* work that way, announcing his intention to introduce legislation to amend Section 230 to that effect under the headline “Facebook has been censoring or suppressing conservative speech for years.”<sup>40</sup>

The recent House and Senate hearings with Facebook CEO Mark Zuckerberg were supposed to focus on Facebook’s failure to do enough to stop misuse of user data by Cambridge Analytica (to influence the 2016 election). Ironically, much of the questioning from lawmakers focused on the opposite problem: their concern that Facebook was doing *too much* to moderate user content on the site. The two concerns are not entirely inconsistent: greater transparency, for example, could help to address both concerns. But there is yet a jarring contradiction between the notions: in essence, that Facebook does too little to stop speech we don’t like and too much to stop speech we do like — or that comes from people who share our views.

In effect, those proposing to condition Section 230 immunity on political “neutrality” are arguing for a “Fairness Doctrine” for the Internet. Their focus on amending Section 230 may simply reflect the fact that imposing such a Fairness Doctrine would be obviously unconstitutional.

Many opponents of Internet regulation have compared “net neutrality” to the Fairness Doctrine. This is, at best, a very rough analogy, for reasons explained below. But requiring website operators to be neutral in their curation, moderation and presentation of user content would be a *very* close analogy to the original Fairness Doctrine — and a terrible idea for all the same reasons that the original Fairness Doctrine was, and many additional reasons unique to the lightning pace and unfathomable sale of the Internet.

#### A. A Brief History of the Fairness Doctrine

The Federal Radio Commission, established under the Radio Act of 1927, required broadcasters to give “ample play for the free and fair competition of opposing views” on issues of

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<sup>39</sup> Sen. Ted Cruz, *Facebook has been censoring or suppressing conservative speech for years*, FOX NEWS (Apr. 11, 2018), <http://www.foxnews.com/opinion/2018/04/11/sen-ted-cruz-facebook-has-been-censoring-or-suppressing-conservative-speech-for-years.html>.

<sup>40</sup> *Id.*

public importance.<sup>41</sup> The Federal Communications Commission (as the FRC was renamed in 1934 when Congress gave it broader powers) codified this general notion as the Fairness Doctrine in 1949: “the public interest requires ample play for the free and fair competition of opposing views, and the commission believes that the principle applies to all discussion of importance to the public.”<sup>42</sup> The FCC imposed two duties on broadcast licensees: (1) to “adequately cover issues of public importance” and (2) to ensure that “the various positions taken by responsible groups” were aired.<sup>43</sup> In practice, this meant that licensees were obligated to give air time on demand to anyone seeking to voice an alternative opinion, or to reply to an “attack.”<sup>44</sup>

In 1969, the Supreme Court upheld the fairness doctrine in *Red Lion Broadcasting Co. v. FCC*.<sup>45</sup> After journalist Fred Cook criticized Republican Presidential nominee Barry Goldwater during the 1964 campaign, a radio station owned by the Red Lion Broadcasting Corporation aired a program making several defamatory claims about Cook, most notably that he had been working for a Communist publication. The FCC’s personal attack rules made broadcasters responsible for giving the person attacked “a tape, transcript, or summary” of the broadcast to that public figure and offer that person a reasonable opportunity to reply — for free if necessary.<sup>46</sup> Justice White, writing for a unanimous court, emphasized the unique nature of broadcasting, as evident to Congress in enacting the Federal Radio Commission in 1927: “It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard.”<sup>47</sup> On this factual finding turned the outcome of the case: “Although broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to them.”<sup>48</sup>

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<sup>41</sup> Great Lakes Broad. Co., 3 F.R.C. ANN. REP. 32, 33 (1929).

<sup>42</sup> Report on Editorializing by Broadcast Licensees, 13 F.C.C.2d 1246 (1949).

<sup>43</sup> *Id.* at 1249; *accord* United Broad. Co., 10 F.C.C. 515, 517 (1945); Cullman Broad. Co., 40 F.C.C. 576, 577 (1963).

<sup>44</sup> Broadcast Procedure Manual, 49 F.C.C.2d at 6 (1974).

<sup>45</sup> *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969).

<sup>46</sup> Billings Broad. Co., 40 F.C.C. 518, 520 (1962).

<sup>47</sup> *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 376 (1969).

<sup>48</sup> *Id.* at 387.

## 1. How the Fairness Doctrine Was Repealed

In *Red Lion*, the Supreme Court cautioned that, “if experience with the administration of these doctrines indicates that they have the net effect of reducing, rather than enhancing, the volume and quality of coverage, there will be time enough to reconsider the constitutional implications.”<sup>49</sup> The FCC *did* study the issue and, in 1985, found just such chilling effects.<sup>50</sup> In 1987, the FCC effectively abolished the Fairness Doctrine.<sup>51</sup> Congress, then controlled by Democrats, passed legislation to restore the Fairness Doctrine.<sup>52</sup> President Reagan vetoed the bill, declaring, “This type of content-based regulation by the federal government is, in my judgment, antagonistic to the freedom of expression guaranteed by the First Amendment. In any other medium besides broadcasting, such federal policing of the editorial judgment of journalists would be unthinkable.”<sup>53</sup> Reagan continued:

The Supreme Court indicated in *Red Lion* a willingness to reconsider the appropriateness of the fairness doctrine if it reduced rather than enhanced broadcast coverage. In a later case, the Court acknowledged the changes in the technological and economic environment in which broadcasters operate. It may now be fairly concluded that the growth in the number of available media outlets does indeed outweigh whatever justifications may have seemed to exist at the period during which the doctrine was developed. The FCC itself has concluded that the doctrine is an unnecessary and detrimental regulatory mechanism. After a massive study of the effects of its own rule, the FCC found in 1985 that the recent explosion in the number of new information sources such as cable television has clearly made the “fairness doctrine” unnecessary. Furthermore, the FCC found that the doctrine in fact inhibits broadcasters from presenting controversial issues of public importance, and thus defeats its own purpose.<sup>54</sup>

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<sup>49</sup> *Id.* at 393.

<sup>50</sup> General Fairness Doctrine Obligations of Broadcast Licensees, Report, 50 Fed. Reg. 35418 (1985), available at <https://ia800204.us.archive.org/24/items/FairnessReport/102Book1FCC2d145.pdf>; see also Mark A. Conrad, *The Demise of the Fairness Doctrine: A Blow for Citizen Access*, 41 FED. COMM. L.J. 161, 176 (1989) (“Regarding the First Amendment, the 1985 report displayed doubts about the Doctrine’s constitutionality, believing it ‘chills’ speech and requires the government to act as a de facto censor.”).

<sup>51</sup> In Re Complaint of Syracuse Peace Council against TV Station WTVH Syracuse, N.Y., Memorandum Opinion and Order, 2 FCC Rcd. 5043, para. 82 (1987), recons. denied, 3 FCC Red. 2035 (1988), aff’d sub nom. *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990).

<sup>52</sup> Fairness in Broadcasting Act of 1987. H.R. 1937, 100th Cong., 1st Sess. (1987); S. 742, 100th Cong., 1st Sess. (1987).

<sup>53</sup> Veto of Fairness in Broadcasting Act of 1987, 133 Cong. Rec. 16989 (June 23, 1987), available at <http://www.presidency.ucsb.edu/ws/?pid=34456>.

<sup>54</sup> *Id.*

President Reagan made clear, as the FCC itself had done in its 1985 report, that the original rationale for the Fairness Doctrine rested on shaky constitutional foundations *regardless* of the scarcity of broadcast spectrum or the degree of competition on the airwaves:

Quite apart from these technological advances, we must not ignore the obvious intent of the First Amendment, which is to promote vigorous public debate and a diversity of viewpoints in the public forum as a whole, not in any particular medium, let alone in any particular journalistic outlet. History has shown that the dangers of an overly timid or biased press cannot be averted through bureaucratic regulation, but only through the freedom and competition that the First Amendment sought to guarantee.<sup>55</sup>

## 2. How the Fairness Doctrine Backfired — And Why It Was Repealed

To understand the dangers of creating a Fairness Doctrine for the Internet today, one should begin with the FCC's 1985 Report<sup>56</sup>, which identified two fundamental perverse results of the Fairness Doctrine:

While the fairness doctrine has the laudatory purpose of encouraging the presentation of diverse viewpoints, we fear that in operation it may have the paradoxical effect of actually inhibiting the expression of a wide spectrum of opinion on controversial issues of public importance. In this regard, our concern is that the administration of the fairness doctrine has unintentionally resulted in stifling viewpoints which may be unorthodox, unpopular or unestablished.

First, the requirement to present balanced programming under the second prong of *the fairness doctrine is in itself a government regulation that inexorably favors orthodox viewpoints...* [I]t is only "major" or "significant" opinions which are within the scope of the regulatory obligation to provide contrasting viewpoints. As a consequence, the fairness doctrine makes a regulatory distinction between two different categories of opinions: those which are "significant enough to warrant broadcast coverage [under the fairness doctrine]" and opinions which do not rise to the level of a major viewpoint of sufficient public importance that triggers responsive programming obligations. While the broadcaster in the first instance is responsible for evaluating the "viewpoints and shades of opinion which are to be presented" we are obligated to review the reasonableness of the broadcaster's evaluation. As a consequence, *the fairness doctrine in operation inextricably involves the Commission in the dangerous*

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<sup>55</sup> *Id.*

<sup>56</sup> *Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143 (1985).

*task of evaluating the merits of particular viewpoints.* This evaluation has serious First Amendment ramifications. As the Supreme Court has stated:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion...<sup>57</sup>

Second.... our own administrative enforcement of the doctrine provides some support for the contention that some “*controversial viewpoint [s] [are] being screened out in favor of the dreary blandness of a more acceptable opinion.*” Broadcasters who have been denied or threatened with a denial of the renewal of their licenses due to fairness doctrine violations have generally not been those which have provided only minimal coverage of controversial and important public issues. Indeed, some licensees that we have not renewed or threatened with non-renewal have presented controversial issue programming far in excess of that aired by the typical licensee. In a number of situations it was the licenses of *broadcasters who aired opinions which many in society found to be abhorrent or extreme which were placed in jeopardy due to allegations of fairness doctrine violations.* In conclusion, we are extremely concerned over the potential of the fairness doctrine, in operation, to interject the government, even unintentionally, into the position of favoring one type of opinion over another. To the extent that the doctrine has this effect it both disserves the interest of the public in an unencumbered marketplace of ideas and contravenes the fundamental purposes of the First Amendment.<sup>58</sup>

This, indeed, is precisely why conservatives had rallied against the Fairness Doctrine for decades: government policing of broadcast speech suppressed heterodox views—such as those of conservatives—in favor of bland orthodoxy. Indeed, enforcement of the doctrine was sometimes *intended* to enforce this orthodoxy. Most notably, President Kennedy’s FCC used the Fairness Doctrine to harass and intimidate right-wing broadcasters.<sup>59</sup>

## **B. The Practical Effect of Amending Section 230**

What would amending Section 230 to require platform neutrality mean in practice?

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<sup>57</sup> *Id.* (quoting *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943)).

<sup>58</sup> *Id.* (internal citation omitted)(emphasis added).

<sup>59</sup> See Adrian Cronauer, *The Fairness Doctrine: A Solution in Search of a Problem*, 47 FED. COMM’NS L. J. 50, 55 (1994), available at <http://www.repository.law.indiana.edu/fclj/vol47/iss1/6> (“Bill Ruder, an Assistant Secretary of Commerce under President Kennedy, told how Kennedy’s administration used the Fairness Doctrine to challenge and harass right-wing broadcasters, in the hope the challenges would be so costly that these broadcasters would find it too expensive to continue their broadcasts.”).

## 1. The Fairness Doctrine Is Inherently Arbitrary, as Companies Will Never Know What Is “Controversial” Until After the Fact.

In 1984, one dissenting FCC Commissioner recognized the essential problem with the Fairness Doctrine:

Even conceding that the [complainant] Peace Council’s definition of the issue in this proceeding is correct, however, I believe that the majority misallocates and misapplies the Peace Council’s burden to show that the identified issue was ‘controversial’ and of public importance. It is important here to note that it is not the licensee’s obligation to show the lack of controversiality or public importance. Likewise, it is not the Commission’s duty to read between the lines or assume that a particular issue is controversial. Rather, it is the complainant’s burden—and, by design, it is a substantial burden—to demonstrate the existence of a vigorous debate with substantial elements of the community in opposition to one another.<sup>60</sup>

In other words, broadcasters could never know in advance what issues would be sufficiently “controversial” to trigger the Fairness Doctrine’s right of reply. This uncertainty, and the fear of losing their broadcast license — the FCC’s death penalty — discouraged broadcasters from addressing issues that might have any chance of being considered controversial.

This problem will be far more severe on the Internet, for several reasons. Broadcasters had to decide which issues their employees should cover in a limited block of time. By contrast, website operators can facilitate the sharing of content on a staggering, almost infinite array of topics among literally billions of users — and the discourse among users can shift rapidly in a matter of minutes. Just contrast the broadcast era’s concept of hot news (the nightly headline) with Twitter or Facebook’s “trending topics,” which can shift many times a day and emerge out of nowhere.<sup>61</sup>

In practical terms, website operators will likely respond to a Fairness Doctrine for the Internet simply by squelching all political discussion. Losing what the Supreme Court hailed as early as 1997 as the “vast democratic forums of the Internet”<sup>62</sup> would, for all the recent hand-wringing about the potential for political manipulation online, be a great loss for America — and utterly contrary to the purposes of the First Amendment in maximizing,

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<sup>60</sup> Fairness Report, 48 F.C.C.2d 1, 12 (1974).

<sup>61</sup> Fred McConnell, *YouTube is 10 years old: The evolution of online video*, THE GUARDIAN (Feb. 13, 2015), <https://www.theguardian.com/technology/2015/feb/13/youtube-10-years-old-evolution-of-online-video> (300 Hours of video are uploaded every minute to YouTube).

<sup>62</sup> *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868 (1997).



rather than reducing, speech. It would also, ironically, very likely hurt the political right by restoring the dominance of a so-called “mainstream media” they decry. If Twitter had decided not to allow political candidates to use their forum, for fear of the legal obligations doing so would entail and the scrutiny they would receive regarding their “fairness” in handling such accounts, Donald Trump would undoubtedly never have become President. Whether this particular outcome would have been good or bad is immaterial; it is simply not for the government to decide.

## **2. Any Fairness Doctrine Will Be Subject to Political Manipulation.**

The above describes the unintended consequences of the Fairness Doctrine *assuming it was administered neutrally*, focusing on the problem of the inherent uncertainty that would face website operators. Even more disturbing is the potential for government actors to manipulate a Fairness Doctrine for the Internet to suit their own political ends.

Presumably, a Fairness Doctrine for the Internet would not be administered by the Federal Communications Commission, since websites, unlike broadcasters, are not licensed by the government. One might take some comfort in the notion that a Fairness Doctrine for the Internet would thus be administered by the courts, rather than political appointees. We find little comfort in this prospect — for the same reasons a right of access for newspapers would have been a bad idea in the 1970s. The powerful will always be at a significant advantage in using the courts to promote their own agenda. This is especially true for elected officeholders, and most true for the President. The fact that the current occupant of the White House has regularly threatened to use the courts against this critics, and in fact *has* used the courts to enforce non-disclosure agreements to silence those he does not want to speak, should give great pause to anyone considering empowering the government to force website operators to satisfy a standard so vague as “neutrality” regarding “controversial” matters (a category they cannot define in advance).

## **3. Small Companies and Startups Will Be Disadvantaged and Incumbents Like Facebook Will Be Protected from Competition.**

Finally, while justified primarily as a regulation needed because of the vast scale and importance of Facebook and, possibly, Twitter or YouTube, it is difficult to see how the Fairness Doctrine could be applied to just a handful of websites. Even if its initial application were limited to websites above a certain size threshold, that threshold would be inherently arbitrary and calls to lower it to cover more websites would be inevitable. Indeed, if the statute did not specify a particular size, the question of which websites would be subject to the Fairness Doctrine would be left to the courts, and thus could be applied quite widely.

Ironically, a Fairness Doctrine for social media would benefit the largest websites by insulating them against competition from smaller sites: large, well-funded companies like Facebook, Twitter and Google already have thousands of people handling content moderation issues and the resources to face litigation over how they administer their platforms. While they would surely resent having to administer such a vague and arbitrary standard, they would also be able to manage the burden, while the startups vying to become the *next* Facebook, Twitter or Google would not. Investors would be reluctant to invest in startups that face the risk of heavy legal liability for failing to comply with the Fairness Doctrine. Those startups that do get off the ground would be more likely to plan for acquisition by an existing tech giant than for building a successful, independent business. This is perhaps the most supreme irony of those concerned about the “power of Facebook.”

#### **IV. Constitutional Considerations**

A Fairness Doctrine for the Internet is not only a bad idea, it is also unconstitutional — whether enforced as a regulatory mandate or as a condition of Section 230 immunity.

##### **A. The First Amendment Bars Imposing the Fairness Doctrine on the Internet**

As noted above, the Supreme Court upheld the Fairness Doctrine in *Red Lion* (1969) because of “spectrum scarcity” and this unique technological limitation justified denying broadcasters full First Amendment rights. But just six years later, in *Miami Herald Publishing Co. v. Tornillo*, the Court refused to extend something like the Fairness Doctrine (specifically, a right of reply for political candidates criticized in newspaper) to newspapers:

Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably “dampens the vigor and limits the variety of public debate.”<sup>63</sup>

The Supreme Court has been crystal clear that the Internet cannot be denied the full protection of the First Amendment — *i.e.*, that it is more like newspapers than broadcasting. If anything, its decisions have implied that *Red Lion*’s refusal to grant full First Amendment

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<sup>63</sup> *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1975) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964)).

Rights to broadcasting may no longer be valid, due to technological change, and may *never* have been valid at all.

In *Reno v. ACLU*, the Court hailed the Internet as “a unique and wholly new medium of worldwide human communication”<sup>64</sup> Other than Section 230, the Court struck down all of the Communications Decency Act of 1996 — an Internet censorship statute that was bolted onto Rep. Cox’s stand-alone bill containing what is now Section 230 — as an unconstitutional violation of the First Amendment rights of both Internet users and website operators.<sup>65</sup> The Court clearly distinguished the Internet from broadcasting regulation on multiple grounds; most relevant here:

[T]he Commission's order [regulating broadcasting] applied to a medium which as a matter of history had "received the most limited First Amendment protection," in large part because warnings could not adequately protect the listener from unexpected program content. The Internet, however, has no comparable history. Moreover, the District Court found that the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material.<sup>66</sup>

In *Brown v. EMA*, the Court not only extended full First Amendment protection to video games, it made clear that it will do so for *all* new media:

Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world). That suffices to confer First Amendment protection. Under our Constitution, “esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.” *United States v. Playboy Entertainment Group, Inc.*, 529 U. S. 803, 818 (2000). And *whatever the challenges of applying the Constitution to ever-advancing technology, “the basic principles of freedom of speech and the*

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<sup>64</sup> *Reno v. ACLU*, 521 U.S. at 850.

<sup>65</sup> *Id.* at 874 (“We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.”).

<sup>66</sup> *Id.* at 867.

*press, like the First Amendment’s command, do not vary” when a new and different medium for communication appears.*<sup>67</sup>

Last year, a unanimous Court struck down a state law restricting how sex offenders could use social networking sites, declaring:

While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.

This case is one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet. As a result, the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.<sup>68</sup>

Indeed, the Court concluded that “to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights.”<sup>69</sup>

The Fairness Doctrine survived legal challenge in *Red Lion only* because broadcasting did not enjoy full First Amendment protection. There is simply no basis for expecting the courts to deny the full First Amendment protection to the Internet.

## **B. Social Media Companies Are Not State Actors.**

Some scholars have suggested that social media platforms, notably Facebook, may qualify as “state actors” under the Supreme Court’s 1946 decision in *Marsh v Alabama*,<sup>70</sup> and thus that their speech “regulations [must] be content-neutral or pass strict scrutiny.”<sup>71</sup>

Marsh, a Jehovah’s witness, was arrested for criminal trespassing while distributing religious literature on the sidewalk of a fully corporate town.<sup>72</sup> The Court found that this fully owned by a corporation town had all the characteristics of any other American town and

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<sup>67</sup> *Brown v. Entm’t Merchants Ass’n*, 564 U.S. 786, 790 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)) (emphasis added).

<sup>68</sup> *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (U.S. 2017).

<sup>69</sup> *Id.* at 1737.

<sup>70</sup> *Marsh v. Alabama*, 326 U.S. 501 (1946).

<sup>71</sup> Trevor Puetz, *Facebook: The New Town Square*, 44 Sw. L. Rev. 385 (2014).

<sup>72</sup> *Id.* at 502.

their actions in arresting Marsh were thus tantamount to “state action.”<sup>73</sup> Later Supreme Court developed its jurisprudence on this “public function” of private entities. In assessing a shopping mall’s squares as public spaces for protest in *Hudgens v. NLRB*, the Court held that merely being open to the public is not enough to qualify as performing a public function; the business must actually perform governmental functions, as in *Marsh*.<sup>74</sup>

It is extremely unlikely that any court would ever decide that Facebook, Twitter or such social networks are state actors under *Marsh*. The Court has interpreted *Marsh* so narrowly that it is hard to see how the decision could ever be applied to social media websites (other, perhaps, than those built for an obviously governmental purpose). Consider Justice Stewart’s opinion for the majority in *Hudgens v. NLRB* (1976), quoting Justice Black, who had written the Court’s opinion in *Marsh*, in a dissent from a subsequent decision extending *Marsh* to a shopping center:

“The question is, under what circumstances can private property be treated as though it were public? The answer that *Marsh* gives is when that property has taken on *all* the attributes of a town, *i.e.*, “residential buildings, streets, a system of sewers, a sewage disposal plant and a *business block’ on which business places are situated.*”

I can find nothing in *Marsh* which indicates that, if one of these features is present, *e.g.*, a business district, this is sufficient for the Court to confiscate a part of an owner’s private property and give its use to people who want to picket on it.<sup>75</sup>

The Supreme Court did nonetheless in 1980 uphold a provision of the California constitution that guaranteed the right to distribute pamphlets in privately owned shopping malls.<sup>76</sup> But that decision can be distinguished on each of its most important First Amendment grounds.

First, most notably, while shopping mall owners do have speech rights, just as any corporation does, they are obviously not in the business of facilitating speech, unlike website operators or newspapers.

Second, and relatedly, the Court emphasized that California shopping mall owners could “expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any spon-

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<sup>73</sup> *Id.* at 502-509.

<sup>74</sup> *Hudgens v. NLRB*, 424 U.S. 507, 519 (1976).

<sup>75</sup> *Id.* at 516.

<sup>76</sup> *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 88 (1980).

sorship of the message and could explain that the persons are communicating their own messages by virtue of state law.”<sup>77</sup> While it is possible to imagine such disclaimers for online content, actually implementing them would be *far* more complicated, given the nature of online content. Applying such labels on *all* content on the site would be enormously disruptive to the user experience, and also dilute the value of the disclosure. But applying the label only to content that the website specifically wishes to disavow would require a separate kind of label, a different design challenge. This might, ironically, require websites to be *more* aggressively non-neutral — by having to err on the side of labeling more content as objectionable (to avoid any potential association) than they might simply have taken down.

But perhaps most importantly, the *Pruneyard* court noted that it had, in *Tornillo* struck down a right of access to newspapers because the law might “dampe[n] the vigor and limi[t] the variety of public debate” but concluded that “[t]hese concerns obviously are not present here.”<sup>78</sup> That concern, about discouraging debate is very obviously “present here:” for all the reasons explained above, a Fairness Doctrine for the Internet would inevitably chill online discussion of controversial and political topics.

No one can really predict the development of technology, but as for foreseeable future, platforms like Facebook won’t be held to be equivalent to corporate towns or even shopping malls. Whatever their degree of control within their “community,” they are simply one way to reach a particular audience; there are always alternatives in a way that is not true of corporate towns, which have complete control of what happens within their borders. Furthermore, adjudicating every dispute over moderation of potentially objectionable content under First Amendment standards would, as noted above, be so impracticable that websites would simply close, or heavily restrict, the ability to discuss “controversial” issues — thus overwhelming any First Amendment interest in promoting “neutral” free expression.

### **C. Government May Not Require Speakers to Give Up Their First Amendment Rights in Exchange for a Benefit, Including Section 230 Immunity.**

Senators Cruz and Graham seem to be arguing, instead of mandating the Fairness Doctrine for online platforms, why could not the government simply require it as a condition of receiving the protections of Section 230 from liability for third party content?

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<sup>77</sup> *Id.* at 86.

<sup>78</sup> *Id.* at 88.

Courts have generally held that requiring speakers to give up their First Amendment rights in exchange for a privilege (be it Federal funding or any other type of Federal benefit) still triggers First Amendment scrutiny and have generally struck down such conditions as unconstitutional. For example, in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), the Court declined to revisit the scarcity rationale of *Red Lion* (but did reiterate that the FCC was free to do so); it did, however strike down, as an unconstitutional condition, the requirement that recipients of grants from the Corporation for Public Broadcasting refrain from all editorializing:

In sum, § 399's broad ban on all editorializing by every station that receives CPB funds far exceeds what is necessary to protect against the risk of governmental interference or to prevent the public from assuming that editorials by public broadcasting stations represent the official view of government. The regulation impermissibly sweeps within its prohibition a wide range of speech by wholly private stations on topics that do not take a directly partisan stand or that have nothing whatever to do with federal, state, or local government.<sup>79</sup>

Many other cases illustrate the same point: whether imposed through mandate or through condition upon receipt of a privilege, the government would have to meet the exacting standards of First Amendment review. As the Court noted in 1972:

For at least a quarter-century, this Court has made clear that, even though a person has no "right" to a valuable governmental benefit, and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interest, especially his interest in freedom of speech.<sup>80</sup>

While most such cases focus on conditioning eligibility for taxpayer subsidies, the court recognized that it applies to other privileges, such as employment and, most similar to the legal immunity conferred by Section 230, tax exemptions.<sup>81</sup> “The principle is more general than just trading a constitutional right in exchange for money. Professor Larry Tribe summarized the case law thusly: “government may not condition the receipt of its benefits upon the nonassertion of constitutional rights even if receipt of such benefits is in all other respects a 'mere privilege.’”<sup>82</sup>

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<sup>79</sup> See *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

<sup>80</sup> *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

<sup>81</sup> *Id.* (citing *Sherbert v. Verner*, 374 U.S. 398, 374,404-405 (1963)).

<sup>82</sup> L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 510 (1st. ed. 1978).

## V. Congress Botched the Recent Amendment of Section 230 (SESTA/FOSTA)

Last September, as Congress was considering amending Section 230 for the first time, TechFreedom said the following in a letter to Senate leadership:

We do not treat Section 230 as sacrosanct. We are open to a careful reassessment of the statute. But the rush to pass legislation as far-reaching as SESTA without a clear record of (a) how the bill would work or (b) what state prosecutions and civil suits are possible under current 230 case law understandably stokes the worst fears of Section 230 absolutists: that any amendment of the statute will wreak havoc on the Internet.<sup>83</sup>

Our worst fears were confirmed: despite the best efforts of this Committee, Congress, as a whole, demonstrated itself uninterested in taking the time to understand Section 230, let alone amend it in a thoughtful or tailored way.

What ultimately happened was the unfortunate result of good intentions mediated through an appallingly poor and rushed process: the Senate and the House bills were stitched together in the best tradition of Dr. Frankenstein. The House bill, “Allow State and Victims to Fight Online Sex Trafficking Act of 2017” (FOSTA),<sup>84</sup> surgically amended Section 230 and focused on creating a new federal crime designed to ease prosecution of websites like Backpage.com and ensure victims received restitution. That bill went through a very thoughtful review and editing by House Judiciary Committee, whose staff took the time to study and understand Section 230. That bill earned the support of TechFreedom and other organizations concerned with both online free speech *and* effectively protecting the victims of sex trafficking.

By contrast, the Senate Commerce Committee’s Stop Enabling Sex Traffickers Act of 2017 (SESTA)<sup>85</sup> bypassed both the Senate Judiciary Committee and the House Judiciary Committee before being attached to FOSTA on the House floor. SESTA reflected a profound misunderstanding of Section 230, and exposed legitimate website operators to broad civil liability and state prosecution in ways that created a perverse incentive to do less, rather than

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<sup>83</sup> TechFreedom’s Letter to Senate’s Leadership, *Congress Shouldn’t Rush SESTA, Amendments to Section 230* (September 11, 2017), available at [http://docs.techfreedom.org/TechFreedom Letter re SESTA 9-11-17.pdf](http://docs.techfreedom.org/TechFreedom%20Letter%20re%20SESTA%209-11-17.pdf).

<sup>84</sup> Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865, available at <https://judiciary.house.gov/wp-content/uploads/2017/12/ANS-HR-1865.pdf>.

<sup>85</sup> Stop Enabling Sex Traffickers Act of 2017, 115 S. 1693, 2017 S. 1693, 115 S. 1693, available at <https://www.congress.gov/bill/115th-congress/senate-bill/1693>.



more, and maybe nothing at all, to monitoring user activity on their sites and assist law enforcement.<sup>86</sup>

This Committee noted that SESTA, for all the problems it created, would likely fail to help prosecutors.<sup>87</sup> The Department of Justice called portions of the bill unconstitutional,<sup>88</sup> but it was too late. The horns were tooted, self-congratulatory press releases issued, and pats on the back self-administered. We are already seeing the negative effects of this rushed legislation. Websites are shutting down whole sections of content.<sup>89</sup> Meanwhile, what we said all along is becoming clear: law enforcement and civil plaintiffs already had the legal tools they needed to prosecute and sue bad actors *without* using SESTA.<sup>90</sup>

The House Judiciary Committee demonstrated remarkable thoughtfulness and mustered great expertise throughout this process. We hope this Committee will assert itself in any future discussion of Section 230 or regulating online platforms, as the Congressional Committee with subject matter expertise on issues impacting the judiciary. That will require assessing missteps made in passing the SESTA/FOSTA hybrid bill and the shortcomings of that bill. Above all, this experience highlights the need for lawmakers to proceed with extreme caution.

## **VI. A Word about “Net Neutrality” in Relation to “Platform Neutrality”**

TechFreedom has been a leading critic of the FCC’s attempts to regulate the Internet in the name of net neutrality — having, for instance, filed by far the longest set of comments in

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<sup>86</sup> TechFreedom’s Letter to Senate and House Leadership, Senate Commerce Committee, House Commerce Committee, Senate Judiciary and House Judiciary Committees on the SESTA-FOSTA Hybrid Bill (February 23, 2018), *available at* [http://docs.techfreedom.org/Letter\\_SESTA-FOSTA\\_Hybrid\\_2-23-18.pdf](http://docs.techfreedom.org/Letter_SESTA-FOSTA_Hybrid_2-23-18.pdf).

<sup>87</sup> H.R. Rep. No.115-572 on H.R.8165 Allow States and Victims to Fight Online Sex Trafficking Act of 2017, (Feb. 20, 2018), *available at* <https://goo.gl/ars2x5>.

<sup>88</sup> Letter from Department of Justice’s Assistant Attorney General Stephen E. Boyd to House Judiciary Committee Chairman Robert W. Goodlatte (February 27, 2018), *available at* <https://assets.documentcloud.org/documents/4390361/Views-Ltr-Re-H-R-1865-Allow-States-and-Victims.pdf>

<sup>89</sup> Craigslist, FOSTA, <https://www.craigslist.org/about/FOSTA> (last visited April 25, 2018 7 AM); Elizabeth Nolan Brown, *Hours After FOSTA passes, Reddit Bans “Escorts” and “SugarDaddy” Communities*, REASON (March 22, 2018), *available at* <https://reason.com/blog/2018/03/22/reddit-bans-escort-subreddits>; Samantha Cole, *Sex Workers Say Porn on Google Drive Is Suddenly Disappearing*, MOTHERBOARD (March 21, 2018, 3:07 PM), *available at* [https://motherboard.vice.com/en\\_us/article/9kgwnp/porn-on-google-drive-error](https://motherboard.vice.com/en_us/article/9kgwnp/porn-on-google-drive-error).

<sup>90</sup> Eric Goldman, *More Aftermath from the Worst of Both Worlds* FOSTA, TECHNOLOGY AND MARKETING LAW BLOG (April 23, 2018), *available at* <https://blog.ericgoldman.org/archives/2018/04/more-aftermath-from-the-worst-of-both-worlds-fosta.htm>.

the docket in 2014,<sup>91</sup> and again in 2017.<sup>92</sup> Indeed, we joined the legal challenge to the FCC's 2015 Open Internet Order as intervenors, with our Petition for Certiorari currently pending before the Supreme Court.<sup>93</sup> Our intervenor briefs formed the basis for the stinging dissents issued by Judges Kavanaugh and Brown from the D.C. Circuit's denial of rehearing in the case.<sup>94</sup> In short, we do not trust the FCC with broad discretion to regulate the Internet on the issue of net neutrality any more than we would trust the FCC (or any other agency, or even the courts) to implement a Fairness Doctrine for the Internet.

But our primary concern has always been the FCC's attempts to invent broad authority over the Internet — authority that would go far beyond net neutrality itself. Net neutrality principles, properly understood, have never been controversial and have always been supported by FCC Chairmen and lawmakers of both parties.<sup>95</sup> The question has always been first and foremost one of implementation, as Congress, rather than unelected bureaucrats, is best suited to answer these profound questions. To this end, we have supported legislation that would codify core net neutrality principles against blocking and throttling content without user consent, and to require transparency regarding network operations.<sup>96</sup>

Here, we simply note two key distinctions between “net neutrality” and the kind of “platform neutrality” being proposed. First, as a legal matter, Section 230 applies equally to both,<sup>97</sup> but as a practical matter, ISPs and social media platforms do fundamentally differ-

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<sup>91</sup> Comments of TechFreedom and the International Center for Law and Economics, *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, *Framework for Broadband Internet Service*, GN Docket No. 10-127, *Preserving the Open Internet*, GN Docket No. 09-191, and *Broadband Industry Practices*, WC Docket No. 07-52 (July 17, 2014), available at [http://docs.techfreedom.org/tf-icle\\_nn\\_legal\\_comments.pdf](http://docs.techfreedom.org/tf-icle_nn_legal_comments.pdf).

<sup>92</sup> Reply Comments of TechFreedom, *In the Matter of Notice of Proposed Rulemaking, Restoring Internet Freedom*, WC Docket No. 17-108 (Aug. 30, 2017), available at [http://docs.techfreedom.org/TechFreedom\\_Reply\\_Comments\\_on\\_Open\\_Internet\\_Order.pdf](http://docs.techfreedom.org/TechFreedom_Reply_Comments_on_Open_Internet_Order.pdf).

<sup>93</sup> See Brief for Intervenors for Petitioners at 30, *United States Telecom Ass'n v. FCC*, 825 F. 3d 674 (2016) (No. 15-1063); see also Reply Brief for Intervenors for Petitioners at 5, *United States Telecom Ass'n v. FCC*, 825 F. 3d 674 (2016) (No. 15-1063); Petition for Rehearing En Banc for Intervenors at 7, *United States Telecom Ass'n v. FCC*, 825 F. 3d 674 (2016) (No. 15-1063).

<sup>94</sup> See *United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, 855 F.3d 381, 387 (D.C. Cir. 2017) (“So understood, *Brand X* dictates rejecting our dissenting colleague's argument based on the major rules doctrine. ... (We note, though, that a group of intervenors led by TechFreedom makes such an argument.”)).

<sup>95</sup> See Timothy B. Lee, *A Republican proposal could be our best chance to save net neutrality*, VOX (April 27, 2017), <https://www.vox.com/new-money/2017/1/26/14383040/thune-net-neutrality-bill> (noting that, “In 2015, Sen. Thune introduced legislation that he co-authored with his House counterpart Fred Upton (R-MI) that would have codified this basic understanding of network neutrality into the law. The legislation would also have banned paid prioritization, in which a technology or content company pays a broadband provider to carry its traffic faster than the traffic of competitors.”).

<sup>96</sup> See Berin Szóka, *Only Congress, Not the FCC, Can Fix Net Neutrality*, WIRED (May 17, 2017), <https://www.wired.com/2017/05/congress-not-fcc-can-fix-net-neutrality/>.

<sup>97</sup> See Reply Comments of TechFreedom, *supra* note 92, at 40-47.

ent things. Namely, ISPs deliver connectivity to essentially the entire Internet, minus a very small number of websites deemed harmful. Social media sites, by contrast, are expected by their users to block all kinds of offensive material depending on the purpose of the site. How many users want pornography, neo-Nazi propaganda, ISIS beheadings, *etc.*, popping up in their Facebook newsfeed? Sites like Facebook invite users to report abusive or harmful content for removal. We are not aware of any ISP that does anything comparable.

Second, net neutrality regulation would not raise the kind of First Amendment concerns that a Fairness Doctrine for the Internet would raise, because even the 2015 Open Internet Order made clear that it applies only to sites that hold themselves out to their customers as providing connectivity to essentially the entire Internet.<sup>98</sup> By contrast, social media platforms clearly disclose to their users that they reserve the right to remove objectionable content, disable abusive accounts, *etc.*

Breaking a general promise to users — including a promise of “neutrality” — will *not* cause a website to lose its Section 230 immunity. In *Barnes v. Yahoo!*, the Ninth Circuit held that Section 230 did not preempt a claim for promissory estoppel that was based on a *specific promise* made by a Yahoo! employee that she would “personally walk the [plaintiff’s complaint] over to the division responsible for stopping unauthorized profiles and they would take care of it.”<sup>99</sup> However, the court made clear that its holding depended on having a clear and direct promise to an individual, and that promises made in a website’s terms of service, or in marketing materials, do not create an obligation to remove content; “a general monitoring policy, or even an attempt to help a particular person, on the part of an interactive computer service such as Yahoo! does not suffice for contract liability.”<sup>100</sup> Finally, the court was careful to limit its holding, stating that Section 230 did require dismissal of the plaintiff’s negligent undertaking claim, which was predicated upon Yahoo!’s failure to remove the profile after she notified the company that it was fake.<sup>101</sup> As the Ninth Circuit made clear, “a plaintiff cannot sue someone for publishing third-party content simply by changing the name of the theory from defamation to negligence,” and “[n]or can he or she escape sec-

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<sup>98</sup> *United States Telecom*, 855 F.3d at 389 (“While the net neutrality rule applies to those ISPs that hold themselves out as neutral, indiscriminate conduits to internet content, the converse is also true: the rule does not apply to an ISP holding itself out as providing something other than a neutral, indiscriminate pathway—i.e., an ISP making sufficiently clear to potential customers that it provides a filtered service involving the ISP’s exercise of ‘editorial intervention.’”).

<sup>99</sup> *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1098 (9th Cir. 2009).

<sup>100</sup> *Id.* at 1108.

<sup>101</sup> *Id.* at 1102-1103.

tion 230(c) by labeling as a ‘negligent undertaking’ an action that is quintessentially that of a publisher.”<sup>102</sup>

Fundamentally, net neutrality is about technical network functionality while platform neutrality is about the content that traverses the network. The two must be analyzed far differently, both under the First Amendment and in practical terms.

## VII. A Positive Agenda: Areas for Thoughtful Discussion

The framework of First Amendment analysis should always inform how lawmakers think about matters of online speech: clearly identify a government interest, assess what remedies might be narrowly tailored to achieve that interest, and ask what “less restrictive means” might be available to achieve that interest. Lawmakers concerned about the potential political bias of social media platforms should keep in mind the following less restrictive means to address the issue:

- **Avoid Regulations that Protect Current Platforms.** The most counter-productive thing lawmakers concerned with the power of existing tech platforms could do is to help entrench their current dominance by imposing vague legal liability that smaller companies are unable to manage. That applies not only to “neutrality” regulation but to *all* regulation. Lawmakers considering *any* Internet law or regulation, new or existing, should ask themselves, “What will this mean for the *Next* Facebook?” Most fundamentally, lawmakers should remember that, in the topsy-turvy world of the Internet, the most important dimension of competition is not to unseat an existing market leader, but to invent an entirely new paradigm for users. In other words, the real question to be asked is less about who might be the “next Facebook” than what kind of services will seem as important to us in the future as Facebook does today. Lawmakers must keep in mind that there will likely be a series of such “dominant” companies, just as there has been a series of leading web titans in the past, including Prodigy, CompuServe, AOL, GeoCities, Yahoo!, Friendster, and MySpace.
- **Actively Encourage Competition.** Data portability is the most commonly cited example of tools that could encourage more competition. Facebook, Twitter and Google already empower their users to export their data. That they did so without any regulatory mandate suggests that market forces are already working to promote user choice. Nonetheless, the precise details of how such tools work, how they could be improved, and how widespread they are is a legitimate topic for this Com-

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

mittee to study. Lawmakers should be careful, however, to remember the potential costs of data portability: every opportunity to remove data is itself a security vulnerability and requires authentication of the user, which means collecting *more* information.

- **Transparency.** Any discussion of governmental mandates should begin by asking to what degree increased transparency could address a perceived market failure. Transparency need not be a perfect solution to be preferable to prescriptive regulation. Most of the discussion around transparency in platform bias focuses on the nature of the moderation process and the ability to appeal a platform’s decision to take down certain content or accounts.

## VIII. Conclusion

Content moderation is an inevitable part of the Internet. Website operators will always have to make judgments about what content to take down and what to leave up, monitor and moderate objectionable content, promote effective counter-speech, educate their users, and generally create healthy, positive and dynamic online communities. This is itself a kind of innovation — no less important than the technical work of constantly improving the services themselves. The moderator’s race to stay ahead of bad actors online, or to strike the right balance between free expression and other values will never end. There is certainly plenty more that websites, in general, can do to improve *how* they moderate content, but there’s no one, right way to do it across the board, and it will evolve with new challenges. This is precisely why Section 230 was crafted as it is: to avoid having the government try to meddle with “vast democratic forums” of the Internet and remove disincentives against responsible self-policing.

How Congress handles Section 230 is among TechFreedom’s top priorities. We have long said that Section 230 is the law that made today’s Internet possible — and its importance is growing, not diminishing, as online platforms become more important to our economy, society and democracy. We would be glad to assist the Committee in its work in this area, just as we were happy to assist the Committee with its very thoughtful work in preparing its version of FOSTA.