

Regulating Social Media:

The Fight Over Section 230 — and Beyond

PAUL M. BARRETT



NYU | STERN

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Author
Paul M. Barrett is the deputy director of the New York University Stern Center for Business and Human Rights.

Executive Summary

Recently, Section 230 of the Communications Decency Act of 1996 has come under sharp attack from members of both political parties, including presidential candidates Donald Trump and Joe Biden. The foundational law of the commercial internet, Section 230 does two things: It protects platforms and websites from most lawsuits related to content posted by third parties. And it guarantees this shield from liability even if the platforms and sites actively police the content they host. This protection has encouraged internet companies to innovate and grow, even as it has raised serious questions about whether social media platforms adequately self-regulate harmful content.

In addition to the assaults by Trump and Biden, members of Congress have introduced a number of bills designed to limit the reach of Section 230. Some critics have asserted unrealistically that repealing or curbing Section 230 would solve a wide range of problems relating to internet governance. These critics also have played down the potentially dire consequences that repeal would have for smaller internet companies. Academics, think tank researchers, and others outside of government have made a variety of more nuanced proposals for revising the law. We assess these ideas with an eye toward recommending and integrating the most promising ones. Our conclusion is that Section 230 ought to be preserved—but that it can be improved. It should be used as a means to push platforms to accept greater responsibility for the content they host.

There are ways of improving governance of social media platforms that go beyond revising Section 230. One promising idea is to create a specialized government agency to improve transparency and accountability without interfering in particular content decisions. Facebook has suggested that a government body could monitor the “prevalence” of harmful content on various platforms, set benchmarks for such content, and impose sanctions for failure to meet the benchmarks. To pass constitutional muster, such plans would have to steer clear of the First Amendment’s prohibition of government action “abridging the freedom of speech.” We also analyze these ideas in the pages that follow.

This is the sixth paper in a series published since November 2017 by the Center for Business and Human Rights at New York University’s Stern School of Business. The earlier reports examined serious challenges facing social media companies and the obligations the platforms have to address them.¹ In this paper, we turn our attention to the role government ought to play, primarily by adjusting the incentives created by Section 230 and establishing a Digital Regulatory Agency.

Summary of Our Recommendations

1 Keep Section 230

The law has helped online platforms thrive by protecting them from most liability related to third-party posts and by encouraging active content moderation. It has been especially valuable to smaller platforms with modest legal budgets. But the benefit Section 230 confers ought to come with a price tag: the assumption of greater responsibility for curbing harmful content.

2 Improve Section 230

The measure should be amended so that its liability shield provides leverage to persuade platforms to accept a range of new responsibilities related to policing content. Internet companies may reject these responsibilities, but in doing so they would forfeit Section 230’s protection, open themselves to costly litigation, and risk widespread opprobrium.

3 Create a Digital Regulatory Agency

There’s a crisis of trust in the major platforms’ ability and willingness to superintend their sites. Creation of a new independent digital oversight authority should be part of the response. While avoiding direct involvement in decisions about content, the agency would enforce the responsibilities required by a revised Section 230.

1. Introduction

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President Donald Trump and his Democratic opponent, Joe Biden, agree on at least one issue: the eradication of an arcane federal law — [Section 230](#) of the Communications Decency Act. “REVOKE 230!” Trump [tweeted](#) in May after signing an executive order aimed at making his exhortation a reality.² For his part, Biden has [told *The New York Times*](#): “Section 230 should be revoked, immediately.”³

That both presidential candidates have taken this emphatic position—though for different reasons—suggests the enormity of the stakes attached to the law’s future. But killing Section 230 wouldn’t resolve the problems agitating the candidates, and it could unleash a host of other complications.

Enacted in 1996, when the commercial internet was in its infancy, Section 230 became the foundational law of the social media industry. The provision does two things: First, it protects websites and digital platforms from most lawsuits related to content posted by third parties. This content could be posts on Facebook, photos on Facebook subsidiary Instagram, tweets on Twitter, or videos on YouTube, which is owned by Google. As its drafters intended, Section 230 allowed online service providers to innovate and grow without worrying about burdensome and costly litigation over user-generated content. The second thing Section 230 does is guarantee the liability shield even if platforms and sites actively moderate, meaning that they decide which user posts remain online and which get removed.

This second aspect of Section 230 gives internet companies the equivalent of editorial control without making them vulnerable in court when they inevitably slip up and allow harmful content to stay available.

The tech industry reveres Section 230. And why not? Internet companies “[enjoy a hidden subsidy](#) worth billions of dollars” by being exempted from liability for most of the speech on their platforms.⁴ Roughly speaking, the subsidy is comparable to spectrum licenses provided to broadcasters, rights of way to cable companies, and orbital slots to satellite operators.

Skeptics of Section 230 say the law allows internet businesses to make a profit from hosting misinformation and hate speech. This is the Biden position: that Section 230’s shield against lawsuits creates a disincentive for social media companies to remove harmful content. Trump, by contrast, contends that platforms like Twitter and Facebook hide behind the law’s encouragement of content moderation while supposedly censoring conservatives. Trump wants

more of a certain type of expression he favors. Biden wants less of another type he opposes. Despite their wholly different motivations, the candidates agree on the needed remedy: rescinding and replacing Section 230.

Trump and Biden aren't alone. Members of Congress recently have introduced a series of bills, some with bipartisan backing, designed to limit the reach of the law or impose new standards on online service providers. Various academics, policy analysts, and activists have added their own reform proposals to the cacophony. Caught up in a growing vortex of hostility toward Silicon Valley—reflected in a remarkable [Congressional grilling](#) the CEOs of Amazon, Apple, Facebook, and Google endured in late July 2020—Section 230 has arrived at a moment of reckoning.

Reexamining Government's Role

The law is the focal point in a heated debate about the U.S. government's role in regulating how social media sites handle content. The specific question at hand is whether to roll back a self-regulatory structure that has hugely benefited the tech sector—and not just Facebook, Instagram, YouTube, and Twitter. Start-ups, small online businesses, and digital publications that host user comments or reviews gain tremendously from Section 230. With \$71 billion in annual revenue, Facebook can afford to defend itself against the sort of litigation that likely would materialize in the absence of Section 230. Many less-well-financed internet operations cannot. Section 230 “makes sure that smaller internet platforms can actually get off the ground and not be stifled,” writes Mike Masnick, editor of the [TechDirt blog](#). *TechDirt's* survival, he adds, illustrates the point. “Facebook doesn't need” Section 230. “The rest of us do.”⁵ The law lets Yelp provide consumer reviews, allows Vimeo to host user-uploaded videos, and permits Wiki-

pedia to offer crowdsourced encyclopedia entries. More broadly, Section 230 has helped promote a digital economy that facilitates communication, education, and political activism, all while creating hundreds of thousands of jobs and trillions of dollars in shareholder value.

Still, a pro-industry law enacted years before today's social media giants were even founded, let alone had grown to their current immense size, deserves careful scrutiny. Some of the clearest assessments of Section 230 come not from lawmakers but policy analysts outside of government who have proposed a number of potentially useful amendments. The main thrust of these critiques is to prod internet companies to take more responsibility for reducing harmful content.

Revision of Section 230 is not the whole story, however. Various experts are debating other potential mechanisms that would help government push the platforms toward more effective content moderation. These proposals generally focus on promoting transparency as a way of improving company accountability. They typically rely on the creation of a specialized government agency to provide oversight, although not direct control over content. One intriguing concept comes from industry—specifically, from Facebook. The company has suggested that a government agency might usefully monitor the “prevalence” of harmful content on various platforms, in order to set benchmarks and impose sanctions if companies fail to improve their performance.

[Prior work](#) by the Center for Business and Human Rights on the social media industry has rested on the premise that government generally should not be in the business of regulating content because of the danger of official censorship. This danger is precisely what the Free Speech Clause of the First Amendment to the U.S. Constitution is designed to prevent. In light of this

limitation on U.S. government intervention, it's incumbent on the platforms to self-regulate, which is what Section 230 encourages them to do. We stand by this reasoning, even as we explore in this paper proposals for government involvement that does not cross the First Amendment line.

Internet companies need greater incentives to improve their operations. Amending Section 230 and creating a new regulatory body are means to that end. Ultimately, what's needed in the fight against harmful content is a combination of private sector and government action.

Word-for-Word: The Key Provisions of Section 230

- “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”
- “No provider or user of an interactive computer service shall be held liable on account of 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.”

2. The Origins and Evolution of Section 230



Section 230 is a product of a more optimistic time.

To many people in the mid-1990s, the advent of digital media represented individuality and self-expression. Few anticipated the sheer heft, predominance, or pervasiveness of today's social media behemoths—or the volume of deleterious material they would spread.



Debate about government's role in overseeing online content intensified after Russian operatives used Facebook, Instagram, and Twitter to interfere in the 2016 U.S. presidential election. But frustration over how the major social media platforms operate reflects more than just their reaction to the ongoing Russian threat.

In a [white paper](#) published in June 2020, the Transatlantic Working Group, a research project of the Annenberg Public Policy Center of the University of Pennsylvania, noted that social media companies have come under scrutiny “for enabling the viral spread of disinformation, hate speech, subversion by hostile states, election interference, cyber-bullying, genocide, terrorism, extremism, polarization, revenge pornography, and a litany of other ills.”⁶ To this list one can add the tsunami of online misinformation surrounding the coronavirus pandemic, as well as conspiracy theories and white supremacist content responding to nationwide racial justice protests. An independent civil rights audit of Facebook released in July 2020, slammed the social network for “allowing harmful and divisive rhetoric that amplifies hate speech and threatens civil rights.”⁷

In the digital era, social or political disruption offline inevitably provokes unrest online, which in turn makes more urgent the question of how to regulate internet platforms. More than 1,000 companies—Unilever, Coca-Cola, Ford Motor Company, and Starbucks among them—have tried this year to pressure the platforms, and especially Facebook, to do more to curb hate speech.

Spurred by outrage over the deaths of unarmed African Americans at the hands of police, these corporations have refused to buy online advertising for varying periods of time.⁸ It remains to be seen whether the [#StopHateForProfit](#) campaign will lead to real, lasting change. In the meantime, revoking or revising Section 230 has emerged as the main vehicle for changing government's role in affecting content moderation by the platforms.

‘The Shining Star of the Information Age’

Section 230 is a product of a more optimistic time. To many people in the mid-1990s, the advent of digital media represented individuality and self-expression. Few anticipated the sheer heft, predominance, or pervasiveness of today's social media behemoths—or the volume of deleterious material they would spread.

The architects of Section 230, then-Representatives [Ron Wyden](#) (D., Ore.) and [Chris Cox](#) (R., Calif.), shared in the optimism. In remarks on the House floor in 1995, Wyden called the internet “the shining star of the information age.”⁹ With Section 230, the lawmakers sought to shield nascent internet businesses

from onerous litigation while at the same time encouraging them to weed out unsavory content such as pornography. The provision began its legislative life as part of a larger anti-smut law, the Communications Decency Act, most of which the Supreme Court struck down on First Amendment grounds. Section 230 survived.

Two lower-court cases framed the drafting of Section 230. In 1991, a federal trial judge in New York [found](#) that a company called CompuServe should not be held liable for carrying allegedly defamatory content on an online discussion forum. The judge based his ruling on the facts that CompuServe hosted the material in question as a passive distributor and had no knowledge of the objectionable content.¹⁰ CompuServe was akin to a bookstore, which wouldn't be legally responsible for a defamatory book it sold.

In the second case, a New York state court [ruled](#) in 1995 that the online service Prodigy was liable for allegedly defamatory statements posted on its bulletin board. Unlike CompuServe, Prodigy exercised active supervision, deciding what should and should not appear on the bulletin board.¹¹ By this reasoning, Prodigy resembled a book publisher and was legally responsible for its editorial choices.

Taken together, the CompuServe and Prodigy decisions presented internet companies with an odd choice: They could insulate themselves from lawsuits by remaining passive, potentially allowing defamation, porn, and other detrimental material to populate their sites. Or they could try to weed out bad material and risk being held liable if something objectionable slipped through—an option that seemed likely to lead to overly aggressive policing of speech.

Addressing a Dilemma

Section 230 addressed this dilemma. It encouraged moderation while also guaranteeing a liability shield. The pro-moderation part of the law states that “interactive computer services,” which include today's social media

platforms, won't be held liable for “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.” The part of Section 230 pertaining to user-generated content states: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” In other words, since it's not regarded as a “publisher or speaker,” an internet company won't bear responsibility for content posted by a third party. Someone harmed by the content can sue only the author of the post. On the other hand, if the internet company itself creates the content in question, then it can be held legally responsible.

Certain exceptions apply to Section 230. The liability shield does not protect platforms against claims related to federal crimes or intellectual property violations. And in 2018, Congress allowed civil suits and criminal prosecutions alleging that tech companies have facilitated sex trafficking or prostitution.

Section 230 established a distinctly self-regulatory environment for online business and culture. This environment came to have virtually endless space for both creativity and hate speech, political activism and harassment, harmless entertainment and corrosive disinformation. Section 230 also helped create the framework for a social media industry that relies primarily on content produced for free by billions of users worldwide.¹²

In the years following the enactment of Section 230, judges interpreted the law broadly, heightening its effect. With some exceptions, this trend has continued. In one notable decision from 2019, the U.S. Court of Appeals for the Second Circuit in New York [held](#) that Section 230 shielded Facebook from claims that it unlawfully provided members of Hamas, a U.S.-designated terrorist organization, with a means

to organize lethal attacks in Israel. In a partial dissent, Judge Robert Katzmann wrote that the plaintiffs, including victims and victims' relatives, didn't seek to treat Facebook as a “publisher” of others' speech. “Instead, they would hold Facebook liable for its affirmative role in bringing terrorists together.” The majority, in Katzmann's view, stretched Section 230 too far.¹³

In another Second Circuit decision from 2019, the appellate court [affirmed](#) a trial judge's dismissal of a lawsuit filed by a man seeking damages from the gay dating site Grindr. The plaintiff's former boyfriend allegedly impersonated him on Grindr and sent a stream of more than 1,000 men to the plaintiff's apartment and workplace, seeking to have sex with him. After ignoring the plaintiff's numerous complaints, Grindr successfully asserted Section 230 as its defense against a claim that the site was negligently designed.¹⁴

A Self-Regulatory Regime

The wide latitude the judiciary has given internet businesses under Section 230 reinforced the self-regulatory regime the statute itself fostered. This stands in stark contrast to how other industries are treated by the government. For most of the 20th century, Congress and the Executive Branch collaborated on building a federal regulatory structure based on expert agencies overseeing particular industries:¹⁵ The Federal Communications Commission supervises radio and television; the Food and Drug Administration, pharmaceuticals; the Securities and Exchange Commission, Wall Street. The internet has been treated differently. There is no Federal Internet Commission. Section 230 represents the clearest expression of the laissez-faire system that Congress—with an assist from the courts—chose for online businesses.

Over time, the implications of self-regulation shifted. Encouraging the likes of CompuServe and Prodigy in the 1990s to determine for themselves what comments should appear on their message boards was one thing.

In 2020, showing the same deference to Facebook or Google seems like something else entirely. The internet has morphed from a realm of many and varied websites, blogs, and services to one dominated by a handful of monopolistic titans. Section 230 was drafted for an earlier time and hasn't been adjusted in response to profound changes since then.

Today, a large majority of Americans aren't happy with this self-regulatory arrangement, saying they don't trust tech companies to make the right decisions about what content appears on their sites or apps. More than eight in 10 respondents to a Knight Foundation/Gallup [poll](#) released in June 2020 said they trust companies "not much" (44 percent) or "not at all" (40 percent).

"People are sick of opaque content policy and take-down decisions that don't seem to make sense," says Daphne Keller, director of the Program on Platform Regulation at Stanford's Cyber Policy Center.¹⁶ Brendan Carr, a Trump appointee to the Federal Communications Commission, adds: "Big Tech has more control over more speech than any institution in history.... It's time to take a fresh look at 230."¹⁷

Europe's More Aggressive Regulation

Other countries have adopted versions of Section 230 but none provides platforms with as much protection. The European Union's [e-Commerce Directive](#), enacted in 2000, exempts platforms from liability, but only so long as they play "a mere technical, automatic, and passive" role toward the hosted content. Once they are made aware that any hosted content is illegal in a given EU country, platforms have "to act expeditiously to remove or to disable access to the information concerned."¹⁸

Europeans generally have shown a preference for more affirmative government oversight of the internet—an approach limited in the U.S. by the First Amendment. In the past three-plus years, more than a dozen national legislatures in Europe have considered or enacted measures to counter what's variously described as "fake news," "disinformation," or "hate speech."¹⁹ Nothing comparable has advanced in the U.S. Congress.

Under the influential 2018 German law known as [NetzDG](#), large platforms can be fined up to €50 million if they don't swiftly delete posts that violate German laws against hate speech and other offending expression. The top penalty, designed for cases of systematic neglect, hasn't been imposed so far. But the German government did fine Facebook €2 million in July 2019 for underreporting complaints about illegal content—an allegation Facebook denied.²⁰

In the U.K., a much-debated government framework described in a document called the "[Online Harms White Paper](#)" has prepared the way for a more far-reaching regulatory regime. If translated into law, it would impose a stringent "duty of care" under which internet companies would be held responsible for stopping the spread of toxic content ranging from hate speech to child pornography.

Among the more controversial ideas under consideration are giving British authorities the ability to "disrupt the business activities of a non-compliant company" and "impose liability on individual members of senior management."²¹

Compared to U.S. free-speech jurisprudence, European law generally tolerates more limits on expression, including to protect minorities and public order. But in June 2020, France's top constitutional court [struck down](#) key parts of that country's hate speech law, citing freedom-of-expression concerns. By following the German lead, the French government put too much of a burden on tech platforms to self-police content with short deadlines and potentially large penalties, the court concluded. The law required companies to remove hate speech within 24 hours of its being flagged by users, with a fine of up to €1.25 million for failure to comply.²²

The French ruling, while important in France, isn't likely to slow progress of an overhaul of EU law to be called the [Digital Services Act](#). The European Commission is expected by the end of 2020 to present proposals for consideration by the European Parliament. It is widely anticipated that the Commission will suggest creation of a centralized EU regulatory apparatus that will enforce new standards and procedures on illegal content, hate speech, and political advertising. Until now, the EU has relied primarily on voluntary self-regulation by tech companies. The Digital Services Act likely will introduce mandatory requirements backed up by financial sanctions for violators. Among other questions the measure is expected to address is whether the e-Commerce Directive's 20-year-old civil liability approach should be updated to incentivize more rigorous moderation.²³

3. Critiques of Section 230, Partisan and Bipartisan



Angry at Twitter, President Trump has launched a multi-agency assault on Section 230. Joe Biden, meanwhile, has intermingled his grim opinion of the law with pique at Facebook for failing to fact-check inaccurate Trump ads about him.



In the United States, the contention that the major internet platforms are abusing the self-regulatory arrangement they enjoy under Section 230 lies behind a range of attacks on the law from both Republicans and Democrats.

On May 28, 2020, President Trump signed an [“Executive Order on Preventing Online Censorship.”](#)²⁴ The president has feuded with the major social media platforms, maintaining that they are trying to “rig” the 2020 election against him. In the executive order, he singled out Twitter for having added warning labels to tweets in which he disparaged vote-by-mail arrangements as leading to fraud. Although its target was clearly Twitter, the order called for a multi-agency assault on Section 230. Trump dispatched the Commerce Department to go before the Federal Communications Commission to seek a narrower interpretation of the law. When Republican FCC member Mike O’Rielly expressed hesitations about the Trump initiative, the White House withdrew his nomination for a new term. The president also instructed the Federal Trade Commission to review whether the platforms engage in “unfair” or “deceptive” trade practices. And he directed Attorney General William Barr to convene his state counterparts to explore whether the tech companies are violating state consumer-protection laws.

There are several reasons why the executive order won’t—or at least shouldn’t—

have any formal effect. The FCC and FTC are independent agencies and don’t ordinarily follow instructions issued from the White House. Moreover, if President Trump wants to narrow or eliminate Section 230, he would have to persuade Congress to pass legislation that he could subsequently sign into law. At a more basic level, the entire exercise violates the Constitution, as the president is trying to use the full force of the government to punish Twitter for exercising its First Amendment right to comment on his tweets. The president seems to think the First Amendment protects him against Twitter, when in fact it’s the other way around.

In the wake of the executive order, the Department of Justice issued a separate 25-page [proposal](#) for legislatively rolling back Section 230. The DOJ recommendations include clearing the way for federal civil enforcement actions brought against platforms or websites. And the department proposes to strike language that currently grants platforms immunity for removal of a broad array of “otherwise objectionable” content. The DOJ would replace that open-ended term with “unlawful” and “promotes terrorism.”²⁵

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Republican Congressional
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230 are motivated by the
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the platforms.”

Elsewhere in Washington, more unusual ideas for changing Section 230 are cropping up. FCC Commissioner [Brendan Carr](#) believes users should be given more control over their internet experience, a notion that echoes prefatory language in Section 230 itself. As an illustration, Carr says the law could mandate that users have the ability to “turn off” content moderation and fact-checking functions, which “would make it possible to get a Wild Wild West version of Facebook,” free of alleged liberal bias.²⁶

In a strange twist, the Trump administration’s negotiation of international trade deals has cast a [cloud of ambiguity](#) over its stance on Section 230. At the behest of the president’s trade negotiators, the major trade agreement with Mexico and Canada that went into effect on July 1, 2020, includes a provision requiring signatory nations to enact laws resembling Section 230. The White House has said nothing publicly about this incongruity, which appears to reflect an extreme lack of coordination within the administration.²⁷

Republicans on Capitol Hill haven’t waited for the Trump administration to sort out its priorities. A number of GOP lawmakers have introduced Section 230 legislation, including Senator [Josh Hawley](#) (R., Mo.), who has put forward several bills seeking to remedy what he sees as platform bias against right-leaning users. “For too long, Big Tech companies like Twitter, Google, and Facebook have used their power to silence political speech from conservatives without any recourse for users,” Hawley asserted in a public statement in June 2020.²⁸

In fact, there’s scant evidence of systematic anti-right bias by the platforms, according to two analyses by [The Economist](#) and a third by a researcher at the [American Enterprise Institute](#). But Hawley’s legislation aims

at punishing the supposedly leftist platforms anyway. One of his bills, the [Limiting Section 230 Immunity to Good Samaritans Act](#), would allow users to file suit alleging that large online platforms are not moderating content consistently and in “good faith.” Hawley’s explicit invitation to sue could turn the bill, if enacted, into a jamboree of ideological litigation, especially from conservative users. In a separate bill introduced in July, Hawley is seeking to “remove Section 230 immunity from Big Tech companies that display manipulative behavioral ads or provide data to be used for them.”³⁰

‘A Gift to Them’

On the other side of the partisan divide, some leading Democrats have framed Section 230 as a windfall for which the major internet companies haven’t demonstrated sufficient gratitude. In an April 2019 [interview](#) with *Recode*, House Speaker Nancy Pelosi said: “It is a gift to them, and I don’t think that they are treating it with the respect that they should, and so I think that could be a question mark and in jeopardy.”³¹

In a December 2019 [session](#) with *The New York Times* editorial board, former Vice President Biden intermingled his grim opinion of Section 230 with pique at Facebook for failing to fact-check inaccurate Trump ads about him. The law, he said, “should be revoked because it is not merely an internet company. It is propagating falsehoods they know to be false.” He added: “There is no editorial impact at all on Facebook. None.”³² Biden’s mistake is urging revocation of Section 230 to punish Facebook when what he actually appears to want is that the company fact-check political ads. In May 2020, Biden’s presidential campaign said that the candidate stood by his call for revoking Section 230 and replacing it with legislation that would hold platforms more accountable for hosting harmful content.³³

Even if his remedy misses the mark, Biden’s concern about the taint of detrimental material online is warranted. Nearly a third of Americans say they have taken the trouble to request that a social media post be removed because they considered it harmful, according to the Knight Foundation/Gallup [poll](#) released in June 2020.³⁴ And 28 percent of Americans say they have experienced severe online hate and harassment this year, including sexual harassment, stalking, and physical threats, according to a [survey](#) by the Anti-Defamation League.³⁵ For millions of people, the online experience is not a healthy one.

Bipartisan Options

Two bipartisan Senate bills related to Section 230 have at least a chance of eventual passage, although it’s highly unlikely that Congress would act on such legislation prior to the 2020 election.

The [PACT Act](#) (Platform Accountability and Consumer Transparency), introduced in June by Senate Majority Whip [John Thune](#) (R., S.D.) and Senator [Brian Schatz](#) (D., Hawaii), focuses constructively on promoting platform transparency and accountability.



The bipartisan PACT Act would amend Section 230 with the goal of promoting platform transparency and accountability—for example, by requiring internet companies to explain their content moderation in more detail.



The act’s multiple components include a requirement that internet companies explain their content moderation policies to users and provide detailed quarterly statistics on items removed, down-ranked, or demonetized. An amendment of Section 230 would give larger platforms just 24 hours to remove content determined by a court to be unlawful. These platforms also would have to create complaint systems that notify users within 14 days of take-downs and provide for appeals. Echoing the DOJ proposal, another part of the bill would curb Section 230 to allow federal regulators to bring civil enforcement lawsuits against platforms.³⁶

More problematic is the [EARN IT Act](#) (Eliminating Abusive and Rampant Neglect of Interactive Technologies). This bill would remove platforms’ Section 230 immunity from legal claims and prosecutions related to child sexual exploitation, including those brought under federal civil law and state civil and criminal statutes. Sponsored by Senators [Lindsey Graham](#) (R., S.C.) and [Richard Blumenthal](#) (D., Conn.), the bill unanimously passed the Judiciary Committee in early July 2020. “There is no reason for these platforms to have blanket immunity, a shield against any accountability that is not enjoyed by any other industry in the same way,” Blumenthal said during the Judiciary Committee’s markup of the legislation.³⁷

Many [civil libertarians](#) warn, however, that the EARN IT Act would cause platforms, when seeking to expunge child pornography, to censor “all manner of constitutionally protected speech,” including “safety information for teens and other vulnerable groups, content created by LGBTQ individuals, and everything from social media apps to video game sites designed for minors and young adults.”³⁸ A major limitation of the bill is that, while it attempts to shine additional light on child pornography, it does nothing to improve the application of Section 230 more broadly.



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4. Reform Proposals from Civil Society

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‘Lawmakers could use Section 230 as leverage to encourage platforms to adopt a broader set of responsibilities.’ —
Ellen P. Goodman,
law professor at Rutgers University
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A number of academics, think tank researchers, and activists have contributed useful principles that might be applied to an overhaul of Section 230.

[Yaël Eisenstat](#), a visiting fellow at Cornell Tech’s Digital Life Initiative, begins with definitions. Companies that are true “providers” or “intermediaries” should remain immune from liability for user-generated content, she says. For example, SquareSpace, which offers software to build websites, should not be responsible for what a user produces with that software. But she asserts that companies like Facebook, YouTube, and Twitter are different. Their algorithms amplify or muffle content. These companies should be considered “digital curators,” she says, and their responsibilities under Section 230 should be considered afresh.³⁹

Quid Pro Quo

[Ellen P. Goodman](#), a law professor at Rutgers University specializing in information policy, approaches the problem from another angle. She suggests that Section 230 asks for too little—nothing, really—in return for the benefit it provides. “Lawmakers,” she writes, “could use Section 230 as leverage to encourage platforms to adopt a broader set of responsibilities.”⁴⁰ A 2019 [report](#) Goodman co-authored for the Stigler Center for the Study of the Economy and the State at the

University of Chicago’s Booth School of Business urges transforming Section 230 into “a quid pro quo benefit.”⁴¹ The idea is that platforms would have a choice: adopt additional duties related to content moderation or forgo some or all of the protections afforded by Section 230.

The Stigler Center report provides examples of quids that larger platforms could offer to receive the quo of continued Section 230 immunity. One, which has been considered in the U.K. as part of that country’s debate over proposed online-harm legislation, would “require platform companies to ensure that their algorithms do not skew toward extreme and unreliable material to boost user engagement.” Under a second, platforms would disclose data on what content is being promoted and to whom, on the process and policies of content moderation, and on advertising practices. Platforms also could be obliged to devote a small percentage of their annual revenue to a fund supporting the struggling field of accountability journalism. This last notion would constitute a partial pay-back for the fortune in advertising dollars the social media industry has diverted from traditional news media.⁴²

The quid pro quo approach has considerable merit as an organizing principle to which any number of important platform obligations could be attached. In a sense, it makes regulation optional, in that tech companies could refuse to accept new duties at the cost of sacrificing Section 230 immunity. But even the largest platforms, which might be able to tough out the lawsuits that come with the loss of the liability shield, would probably accept the new obligations for fear of stirring user resentment and the sort of advertiser boycott that Facebook has experienced in 2020 with the #StopHateForProfit campaign.

One more aspect of the quid pro quo strategy that deserves mention: It need not involve governmental discrimination according to viewpoint, which obviates First Amendment objections and may address conservative claims of censorship. Government could maintain viewpoint neutrality by restricting its demands to those aimed at improving platform transparency and accountability. With the exception of enforcing criminal laws, including bans on child pornography, government would have to avoid dictating what content may or may not appear.

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Professor Danielle K. Citron of Boston University would condition Section 230 immunity on a platform’s ability to show it had taken ‘reasonable steps to address unlawful uses of its service that clearly create serious harm to others.’
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Requiring ‘Reasonableness’

Another reform proposal comes from [Danielle K. Citron](#), a law professor at Boston University.⁴³ Citron reads the legislative history of Section 230 as indicating that the provision was meant to condition legal immunity on responsible content moderation. Unfortunately, she acknowledges, the statutory language isn’t clear on this point. This led to defense lawyers seeking sweeping immunity, far beyond what the drafters envisioned. “Courts took the bait” and “massively overextended” the liability shield, regardless of how grievous the harm alleged by plaintiffs, Citron writes. “Section 230 has been extended to protect sites whose business is [revenge porn](#), whose operators [choose to post defamation](#), and whose role is getting a [cut of illegal gun sales](#).”⁴⁴

Citron would amend Section 230 to include a “reasonableness” standard. This would mean conditioning immunity on “reasonable content moderation practices,” she writes, “rather than the free pass that exists today.”⁴⁵ The amended version would read as follows, with changes marked in bold:

“No provider or user of an interactive computer service **that takes reasonable steps to address unlawful uses of its service that clearly create serious harm to others** shall be treated as the publisher or speaker of any information provided by another information content provider **in any action arising out of the publication of content provided by that information content provider.**”⁴⁶

Reasonableness would be determined by a judge at a preliminary stage of a lawsuit—when a platform has made a pre-trial [motion to dismiss](#) based on Section 230. The judge would assess the reasonableness of a platform’s overall policies and practices, even if its actions fell short in the case at hand. The definition of reasonableness would

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Imposing a ‘reasonableness’ standard would incentivize platforms large and small to improve how they carry out content moderation, while denying liability protection to those with slipshod procedures.
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evolve in a common-law fashion, as judges articulated the new standard. While the term may seem vague, it is one that judges and lawyers are used to dealing with, especially in connection with tort law. Citron writes that she is “working with federal lawmakers, both Democrats and Republicans, on potential legislative changes to Section 230.”⁴⁷

Imposing a reasonableness standard would incentivize platforms large and small to improve how they carry out content moderation, while denying liability protection to those with slipshod procedures. It also would expand the opportunity for genuine victims of negligent platforms to seek recompense.

5. Beyond Section 230: The Creation of a Digital Regulatory Agency

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Any new regulatory body should police transparency as a means of achieving accountability, but content itself should be off limits. This is an important distinction, at least in the United States, because a regulator that tried to supervise content would run afoul of the First Amendment.”

Many regulatory experts express frustration over the commercial internet, especially the sizable social media companies. The annoyance stems from these companies' ability to operate secretly and with little oversight. It also stems from Section 230 having largely crowded out discussion of other regulatory ideas applicable to content moderation.

And there are other ideas. [Philip Verveer](#) would institute mandatory disclosure of platform spending on content moderation. “They spend a lot, probably, but it won't look like a lot compared to the top line [company revenue], and that could be a source of pressure,” says Verveer, a longtime Washington lawyer who served at the Federal Communications Commission and the State Department during the Obama administration. Congress, he adds, could even legislate that tech companies spend a certain percentage of their annual revenue on reducing harmful content.⁴⁸

Verveer and a number of others have studied another idea: the creation of a new federal agency specifically designed to oversee the digital platforms. Existing agencies on occasion have flexed their muscles on certain important aspects of digital governance. In 2019, the FTC imposed a record-setting \$5 billion penalty on Facebook for user-privacy violations.⁴⁹ The FTC currently is investigating Facebook on antitrust grounds, while the DOJ reportedly is getting close to accusing Google of separate antitrust infractions.⁵⁰ But no federal regulator has wrestled with the problem of harmful content.

Verveer co-authored a study released in August 2020 by the Harvard Kennedy School's Shorenstein Center on Media, Politics, and Public Policy that proposes formation of a Digital Platform Agency.⁵¹ The Harvard study recommends that the agency focus on promoting competition among internet companies and protecting consumers in connection with such issues as data privacy and portability. It does not directly address how, if at all, a new agency would grapple with problems related to content or content moderation.⁵²

Transparency and Accountability

The Annenberg-sponsored [Transatlantic Working Group](#) (TWG) has embraced a flexible oversight model, in which authorizing legislation could extend the jurisdiction of existing agencies or create new ones.⁵³ As possible examples of existing agencies, the TWG points to the U.S. Federal Trade Commission, the French Conseil supérieur de l'audiovisuel, and the British Office of Communications, or OFCOM. The Annenberg group also leaves open the possibility that an industry-constituted supervisory organization might be a workable second-best solution.

As a potential model for an industry association, the group cites the [Financial Industry Regulatory Authority](#) in the U.S. This private regulator oversees securities firms, licenses individual brokers, and sets ethical standards under the supervision of the U.S. Securities and Exchange Commission.

The TWG shares some of the goals of the drafters of the PACT Act—namely, greater transparency as a means to achieving accountability. But the TWG engages with these ideas more thoroughly. It envisions the digital regulatory body—whether governmental or industry-based—as requiring internet companies to clearly disclose their terms of service and how they are enforced, with the possibility of applying consumer protection laws if a platform fails to conform to its own rules. The TWG emphasizes that the new regulatory body would not seek to police content; it would impose disclosure requirements meant to improve indirectly the way content is handled. This is an important distinction, at least in the United States, because a regulator that tried to supervise content would run afoul of the First Amendment.

Under the TWG model, other categories of required company disclosure would include: data on content take-downs (and leave-ups), notification to users of what violation(s) led to content removal, and an effective redress process. Perhaps most controversial is the TWG’s notion that the regulatory body would have access to information regarding the development and deployment of algorithms used in content moderation, recommendation, and prioritization. This access would allow the regulator to assess, for example, whether algorithms are designed to promote sensationalized or violent content. Most companies would fight this last proposal with particular vigor, because they would regard it as intruding on their most valuable trade secrets.

In a [paper](#) written with Professor Goodman, [Karen Kornbluh](#), who heads the Digital Innovation and Democracy

Initiative at the German Marshall Fund of the United States, makes the case for a Digital Democracy Agency devoted significantly to transparency. “Drug and airline companies disclose things like ingredients, testing results, and flight data when there is an accident,” Kornbluh and Goodman observe. “Platforms do not disclose, for example, the data they collect, the testing they do, how their algorithms order news feeds and recommendations, political ad information, or moderation rules and actions.”⁵⁴ That’s a revealing comparison and one that should help guide reform efforts.

Transparency isn’t an end unto itself. It brings change by provoking public outcry or spurring journalistic or regulatory investigation, which occasionally leads to new legislation. “Transparency is fundamental because it enables evidence-based decision making,” [Susan Ness](#), a former Clinton-appointed member of the Federal Communications Commission and co-chair of the TWG, says.⁵⁵ It can even cause top corporate executives to experience a prick of conscience, leading them to adjust course.

The TWG examines other structures, as well. These include “social media councils” with members representing industry, government, civil society organizations, and academia. Independent of any one company, a social media council could make policy recommendations or even hear selected appeals from content moderation decisions by platforms throughout the industry. Facebook is putting together a one-company version of an appellate body it calls its [Oversight Board](#), which employs outside experts to preside over content appeals.

Facebook’s ‘Prevalence’ Agenda

For some time, Facebook’s founder and CEO, [Mark Zuckerberg](#), has publicly spoken about a need for more government oversight. In March 2019, he published an [op-ed](#) in *The Washington Post* that stated: “I believe we need a

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‘Transparency is fundamental because it enables evidence-based decision making,’ says Susan Ness, former member of the Federal Communications Commission and co-chair of the Transatlantic Working Group.

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more active role for government and regulators.” The article went on to propose the creation of “third-party bodies” that would “set standards governing the distribution of harmful content to measure companies against these standards. Regulations could set baselines for what’s prohibited and require companies to build systems for keeping harmful content to a bare minimum.”⁵⁶

Eleven months later, in a [white paper](#) titled, “Online Content Regulation: Charting a Way Forward,” [Monika Bickert](#), Facebook’s vice president for content policy, fleshed out Zuckerberg’s proposal. The “standards” he had vaguely referred to would concern the “prevalence” of harmful content, Bickert clarified. Facebook defines prevalence as the frequency with which deleterious material is actually viewed, even after moderators have tried to weed it out. Government would establish prevalence standards for comparable platforms. If a company’s prevalence metric rose above a preset threshold, Bickert wrote, it “might be subject to greater oversight, specific improvement plans, or—in the case of repeated systematic failures—fines.”⁵⁷

Structured properly, this approach would avoid government censorship of particular pieces of content. Instead, it would create incentives for companies to curtail categories of material they themselves have identified as detrimental. Facebook has begun to publish prevalence numbers for certain types of malign content. It derives these numbers from its own sampling of material flowing across its platform. In an August 2020 report, Facebook estimated the prevalence of violent and graphic content at no more than eight views per 10,000. Adult nudity and sexual activity came in at six views; child nudity and sexual exploitation at five.

In conversation, Facebook executives express pride in these numbers, claiming that they demonstrate that users encounter relatively little harmful content. Other companies don't publish comparable statistics, but Facebook almost certainly believes that its levels are lower—which helps explain the company's enthusiasm for comparing this particular category of data.

Some observers might be suspicious of the prevalence approach simply because it comes from Facebook. But this is a promising regulatory idea that deserves consideration. That said, measuring prevalence has certain risks. Absent some form of independent review, companies might be tempted to game the system by playing with definitions or purposely undercounting to minimize their prevalence totals.

But this type of evasive action is almost always a danger in economic regulation. Once again, transparency would be critical—in this instance, to allow regulators to look over the shoulders of platform employees as they do their prevalence calculations. The government agency overseeing prevalence measurement would need a degree of statistical sophistication and deep familiarity with the inner workings of Facebook and other platforms. These would be indispensable characteristics of any effective platform regulator, whatever its exact duties.

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Some observers might be suspicious of the ‘prevalence’ approach—which measures the frequency with which users view harmful content—simply because it comes from Facebook. But this is a promising regulatory idea that deserves consideration.

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Recommendations

We recommend preserving but improving Section 230. The controversial measure protects smaller platforms against crippling litigation and can be used more effectively to encourage diligent content moderation in exchange for immunity to liability. The benefit the law confers on platforms and websites ought to come at a price. To police the new obligations created by an improved Section 230, we urge the formation of a federal Digital Regulatory Agency, with technically savvy principals and staff capable of keeping up with a quickly evolving industry. Our detailed recommendations follow.

1 Keep Section 230

Section 230 was drafted for an internet different from the one we have today. Websites and platforms of the 1990s were much smaller, simpler, and more vulnerable than Facebook or Google have come to be. Section 230 provided legal shelter that helped thousands of online businesses and organizations to get started and thrive. Some eventually faded; others became, well, Facebook and Google. Protected by armies of defense lawyers, the largest players in the social media industry may no longer need Section 230 for their survival. But smaller outfits, with smaller bank accounts, do.

If Section 230 were swept away tomorrow, the internet would change, and on the whole, not for the better. It would slow down drastically, as platforms, websites, and blogs looked more skeptically at content posted by users, blocking more of it. Pointed political debate might get removed. Threats of litigation against internet companies would become more common, as would take-down demands, more of which would be successful, as nervous platforms and sites tried to avoid lawsuits. The internet could become a “closed, one-way street that looks more like a broadcaster or newspaper and less like the internet we know today,” writes Jeff Koseff in his [book](#), *The Twenty-Six Words that Created the Internet*.⁵⁸

To be fair, in a hypothetical post-Section 230 world, some people making take-down requests targeting such harmful content as bullying or defamation would be justified, as some are today. But others would try to silence corporate whistleblowers or activists seeking to build the next [#MeToo](#) or [#BlackLivesMatter](#) movement—and these efforts at squelching valuable speech would be more likely to succeed. Silicon Valley analyst [Anna Wiener](#) depicts an internet that, above all, would be thoroughly bland: “Social-media startups might fade away, along with niche political sites, birding message boards, classifieds, restaurant reviews, support-group forums, and comments sections. In their place would be a desiccated, sanitized, corporate Internet—less like an electronic frontier than a well-patrolled office park.”⁵⁹

Section 230’s original purposes—incentivizing content moderation and protecting digital sites from getting sued into oblivion—remain valid. The law should survive. But that doesn’t mean it ought to be preserved in amber. It’s time to revise and update Section 230 to reflect changes in the fast-moving digital arena it has helped shape.

2 Improve Section 230

Our call to improve Section 230 has two components: a structural adjustment and new substantive requirements.

Structurally, we embrace the quid pro quo concept proposed by Professor Goodman and other authors of the 2019 Stigler Center report. The benefits of Section 230 should be used as leverage to pressure platforms to accept a range of new responsibilities related to content moderation. Platforms may reject these responsibilities, but in doing so they would forfeit Section 230’s liability protection—and probably a good deal of user and advertiser loyalty. As a result, even tech companies with the deepest pockets are likely to cooperate with the quid pro quo arrangement.

Then there is the question of what new responsibilities Congress ought to push via the quid pro quo mechanism. Determining these requirements would necessitate serious legislative deliberation of a sort that too often has been lacking in recent years. Here are some possible new responsibilities that could be imposed, a list that we do not intend to be exhaustive:

We support the Stigler report’s idea of requiring that algorithms involved in content selection and recommendation not favor extreme and unreliable material in pursuit of user engagement. From the PACT Act, we endorse the broad concept of enhanced transparency and take it further.

(continued on p. 16)

Recommendation 2. Improve Section 230 (continued)

Platforms should have to explain publicly how their content moderation policies work and provide far more detailed statistics than they do now on items removed, down-ranked, or demonetized. It would also be useful to know what content is being promoted to whom and more about how platform advertising works in practice. Finally, for purposes of this partial list, we reiterate an idea that we've advocated before—that platforms remove, rather than merely label or down-rank, content that their fact-checkers have determined is demonstrably false. A record copy of removed content could be kept in a cordoned-off archive for research purposes. But material in the archive could not be shared or otherwise disseminated.⁶⁰

Legislators also should include language adopting Professor Citron's "reasonableness" requirement. This standard would condition immunity on a showing in court that a platform has taken "reasonable steps to address unlawful uses of its service." One such step ought to be that the platform has an effective procedure for responding to notices from users that it is hosting harmful content. While not without legal complications—chiefly, that judges, over time, would have to work out the precise meaning of "reasonable steps"—this is a requirement that platforms should willingly embrace. After all, they wouldn't be asked to show "extraordinary" practices; merely "reasonable" ones.

3 Create a Digital Regulatory Agency

The social media industry needs a regulator. Congress ought to create one.

This recommendation admittedly is in tension with the deregulatory spirit of Section 230. In 1995, on the floor of the House of Representatives, Chris Cox said of the bill he co-sponsored: "We do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the internet, because frankly, the internet has grown up to be what it is without that kind of help from the government."⁶¹

But now the internet does need help, and starting an independent agency should be part of the answer.

Crisis can spur regulatory invention. The 2008-2009 financial crash and Great Recession led to the creation in 2011 of the [Consumer Financial Protection Bureau](#). The CFPB got off to a good start going after predatory lenders, until the Trump administration did its best to disempower the watchdog.⁶² Today, there's a crisis of trust in the major social media platforms' willingness to superintend their sites. As noted, more than 80 percent of Americans say they trust the platforms "not much" or "not at all," according to the recent Knight Foundation/Gallup poll.⁶³

Creating a new independent digital agency is one way to address the trust gap and the corporate conduct that generates it. As an alternative, Congress could expand the jurisdiction of an existing agency, such as the FCC or FTC, to deal with problems related to content moderation. But as Phil Verveer, the former Obama administration official, puts it, the legacy agencies are "encrusted" by bureaucratic custom, as well as long-standing statutory interpretations heavily influenced by industry. Better to start fresh and build an organization that would be open-minded and agile enough to keep up with the internet sector. Our preference would be for the new Digital Regulatory Agency to have a bipartisan group of politically appointed, Senate-approved principals who are served by professional staff members paid well enough to attract top-flight people, including some with industry experience.

The Digital Regulatory Agency, among its other possible duties, would oversee and enforce the new platform responsibilities referred to in Recommendation No. 2. So, for example, if the goal is to assure that algorithms don't favor extreme and unreliable material in pursuit of user engagement, it would be up to the principals and staff of the new agency to figure out how to do it. This would be cutting-edge regulatory work, the sort of assignment that should attract some of the country's brightest technically oriented policy minds. Whether Congress ought to consolidate within the new agency jurisdiction over such subjects as digital privacy and competition is a question that deserves careful attention but one that is beyond the scope of this paper.

Some Washington veterans, including [Julie Brill](#), who served as a commissioner of the Federal Trade Commission during the Obama administration, fear that partisanship would paralyze a new Digital Regulatory Agency. "It would end up like the [FEC](#) [Federal Election Commission], tossed in the winds of political thinking that's going to go back and forth," says Brill, who now works at Microsoft as corporate vice president, deputy general counsel, and chief privacy officer.⁶⁴

Brill raises a serious concern. Getting a Digital Regulatory Agency aloft would require a level of congressional bipartisanship rarely seen lately and a president primarily devoted to governing, not stoking political and cultural division. Even if it came into existence, the agency could still encounter the sort of political storm Brill anticipates.

But the possibility of failure shouldn't preclude constructive experimentation. The current system is not working, and reforms are urgently needed. We must demand that Congress and the Executive Branch pursue these reforms with the seriousness they deserve. Proper governance of the internet is a cause that ought to be embraced not only by users, but by the society at large, which is now so profoundly shaped by online technology.

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NYU Stern Center for Business and Human Rights
Leonard N. Stern School of Business
44 West 4th Street, Suite 800
New York, NY 10012
+1 212-998-0261
bhr@stern.nyu.edu
bhr.stern.nyu.edu

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