READING SECTION 230 AS WRITTEN

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Section 230 of the Communications Decency Act gives internet platforms legal protection for content moderation. Even though the statute is 25 years old, courts have not clearly stated which provision within section 230 protects content moderation. Some say section 230(c)(1), others section 230(c)(2). But section 230(c)(1) speaks only to liability arising from third-party content, codifying common carriers' liability protection for delivering messages.

And while section 230(c)(2) addresses content moderation, its protections extend only to content moderation involving certain types of speech. All content moderation decisions for reasons not specified in section 230(c)(2), such as based on material being considered "hate speech," "disinformation," or "incitement," stand outside section 230's protections. More important, because section 230(c)(2) regulates both First Amendment protected and unprotected speech, it does raise constitutional concerns, but they may not be fatal.

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Introduction

Those who want the dominant internet platforms to impose greater restrictions on expression often claim, "Freedom of speech is not freedom of reach."[1] The slogan asks social media platforms to refrain from amplifying hurtful, threatening, or otherwise injurious speech. The slogan's supporters do not appear to call for censorship—but only for social media to limit the ability to spread ideas they find dangerous or objectionable through the platforms' content moderation and promotion policies.

An alternative vision posits that democratic deliberation needs an agora, a place where citizens can discuss views in a free and open way, approaching each other as equals. Social media is, as the Supreme Court has declared, the "public square"[2] and therefore should afford a place for all citizens to engage in political debate *with a relatively equal opportunity for reach*. Dominant social media firms that have the power to control public discourse should refrain from censoring controversial or threatening ideas. Otherwise, political discussion devolves into something analogous to Karl Wittfogel's "beggar's democracy," in which we are free to discuss only

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[1] *See, e.g.*, Renee Diresta, *Free Speech Is Not the Same As Free Reach*, WIRED (Aug. 30, 2018), https://tinyurl.com/ysfcrddx; Andrew Pulver, *Sacha Baron Cohen: Facebook Would Have Let Hitler Buy Ads for 'Final Solution,'* THE GUARDIAN (Nov. 22, 2019), https://tinyurl.com/ec33e3ed.

[2] Packingham v. North Carolina, 137 S. Ct. 1730, 1732 (2017) ("Social media . . . are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.").

those matters about which the Big Tech oligarchs care little.[3]

Section 230 of the Communications Decency Act limits platforms' legal liability for the content moderation policies they impose. How courts apply this provision will advance one, or the other, vision of the internet.

Even though the statute is 25 years old, courts disagree as to which provision in section 230 protects content moderation. Some conclude that section 230(c)(1) provides such protection.[4] But section 230(c)(1) speaks only to liability arising from third-party content, codifying common carriers' liability protection for the messages they deliver. Its text says nothing about platforms' *own* moderation. In his statement concerning a denial of certiorari, the only Supreme Court statement on section 230 to date, Justice Thomas has recognized how interpreting section 230 to cover content moderation departs from the statutory text.[5]

Rather, section 230(c)(2) protects content moderation, but only content moderation involving speech of the types it lists. As is argued in *Interpreting 47 U.S.C. § 230(c)(2)* (published in this volume),[6] this list should be read under the *ejusdem generis* canon of statutory construction and refers to categories of speech considered regulable in 1996, the year Congress wrote the statute. Restrictions based on justifications not specified in section 230(c)(2)—such as that certain posts constitute "hate speech," "disinformation," or "incitement" which do not reach the level of criminal behavior—stand outside section 230's protections.

Reading section 230(c)(2) as written poses a question that courts have ignored,

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[3] KARL WITTFOGEL, ORIENTAL DESPOTISM, A COMPARATIVE STUDY OF TOTAL POWER 125–26 (1957).

[4] *See, e.g.*, Levitt v. Yelp! Inc., No. C-10-1321 EMC, 2011 WL 5079526, at *6 (N.D. Cal. Oct. 26, 2011), *aff'd*, 765 F.3d 1123 (9th Cir. 2014); *see* ERIC GOLDMAN, INTERNET LAW: CASES & MATERIALS 298 (2021), https://perma.cc/KVX9-7ENN

[5] Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 16 (2020) (Thomas, J., respecting the denial of certiorari) ("Courts have also departed from the most natural reading of the text by giving Internet companies immunity for their own content. Section 230(c)(1) protects a company from publisher liability only when content is 'provided by another information content provider.' . . . But from the beginning, courts have held that § 230(c)(1) protects the 'exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content.'").

[6] Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. § 230(c)(2)*, 1 J. FREE SPEECH L. 175 (2021).

largely because most content moderation cases have been decided under section 230(c)(1): Is Section 230(c)(2) an unconstitutional, content-based regulation of speech? This Article provides some tentative answers to that question.

The article proceeds as follows. Part I describes the well-known history that led to section 230's passage. Drawing on this history, as well as a textual analysis, Part II sets forth the most natural understanding of sections 230(c)(1) and (c)(2): the former limits platform liability for third party content and the latter limits platform liability for content moderation. This section critiques courts that have expanded section 230(c)(1) to include content moderation protection. Part III examines the relationship between sections 230(c)(1) and (f)(3). Parts IV and V set forth textual analyses of sections 230(c)(1) and (c)(2) respectively. (Part V briefly summarizes the analysis from *Interpreting 47 U.S.C. § 230(c)(2)*.) Part VI analyzes the constitutionality of section 230(c)(2), first under a non-*ejusdem generis* reading and then an *ejusdem generis* reading. Given precedent's lack of clarity, the Article concludes tentatively that even in the unlikely event that section 230 is ruled unconstitutional, severability would be the best remedy.

I. Section 230 and Congressional Purpose

Congress passed section 230 as part of the Communications Decency Act of 1996 (CDA), an effort to control pornography and other non-family-friendly material on the internet. As opposed to the outright speech bans in the CDA that were struck down in *Reno v. ACLU*,[7] section 230 aimed to empower parents to control internet content. It did so, in part, by overruling a New York state case, *Stratton Oakmont v. Prodigy*.[8] Early platforms, such as Prodigy and its numerous bulletin boards, claimed they could not offer porn-free environments because of *Stratton Oakmont*. Developing the common law of defamation, the court had ruled that Prodigy was a "publisher" for all statements on its bulletin board (and thus potentially liable for those statements) because it content-moderated posts to render its forum "family friendly."

Stratton Oakmont's legal conclusion created a Hobson's choice for platforms' content moderation: either moderate content and face liability for all posts on your bulletin board, or don't moderate and have posts filled with obscenity or naked images. That legal rule was hardly an incentive for platforms to create family-friendly

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[7] Reno v. ACLU, 521 U.S. 844, 859 n.25 (1997).

[8] 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

online environments.

Congress came to the rescue with section 230(c)(2),[9] which states that all internet platforms "shall not be held liable" for editing to remove content that they consider to be "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[10] Congress eliminated the Hobson's choice: when platforms content-moderate for these specific reasons, they would no longer be held liable for everything on their site.

Notice what section 230's text does *not do:* give platforms protection for content moderation for any reason not specified in section 230(c)(2). That would include "disinformation," "hate speech," "misgendering," "religious hatred," or for that matter the traffic prioritizations the platforms perform to give people content they want. Yet, some courts have blessed such an untextual expansion,[11] which is only possible under an all-inclusive reading of "otherwise objectionable" that seems implausible.[12]

Not only is the text silent about content moderation for such a broad range of reasons, but the legislative history is too. Representatives Christopher Cox and Ron Wyden floated a bill, titled "Internet Freedom and Family Empowerment Act,"[13]

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[9] 47 U.S.C. § 230(c)(2); 141 Cong. Rec. S8310–03 (daily ed. June 14, 1995) (statement of Sen. Coats) ("I want to be sure that the intent of the amendment is not to hold a company who tries to prevent obscene or indecent material under this section from being held liable as a publisher for defamatory statements for which they would not otherwise have been liable . . . . Am I further correct that the subsection (f)(4) defense is intended to protect companies from being put in such a catch-22 position? If they try to comply with this section by preventing or removing objectionable material, we don't intend that a court could hold that this is assertion of editorial content control, such that the company must be treated under the high standard of a publisher for the purposes of offenses such as libel."); 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox, referring to *Stratton* decision as "backward"); 141 Cong. Rec. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte, criticizing *Stratton* decision).

[10] The question of whether "otherwise objectionable" should be understood as an open-ended term is examined in Candeub & Volokh, *supra* note 6.

[11] See, e.g., Fed. Agency of News LLC, et al. v. Facebook, Inc., 395 F. Supp. 3d 1295 (N.D. Cal. 2019) (dismissing discrimination claims under Title II and 42 U.S.C. § 1983); Sikhs for Justice "SFJ", Inc. v. Facebook, Inc., 144 F. Supp. 3d at 1095–96 (N.D. Cal. 2015) (holding that section 230 bars discrimination claims).

[12] *See* Candeub & Volokh, *supra* note 6.

[13] Internet Freedom and Family Empowerment Act, H.R. 1978, 104th Cong. (1995–96).

that became section 230.[14] It was an alternative to Senator J. James Exon's bill that criminalized the transmission of indecent material to minors, which was codified in section 223.[15] Both became part of the Communications Decency Act, but the Supreme Court struck down Senator Exon's portion, leaving section 230.[16]

In comments on the House floor, Representative Cox explained that section 230 would reverse *Stratton Oakmont* and advance the regulatory goal of allowing families greater power to control online content, protecting them from "offensive material, some things in the bookstore, if you will that our children ought not to see. . . . I want to make sure that my children have access to this future and that I do not have to worry about what they might running into online. I would like to keep that out of my house and off of my computer. How should we do this?"[17] He stated that "[w]e want to encourage [internet services] . . . to everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see."[18]

In fact, the comments in the Congressional record from *every* supporting legislator—and it received strong bipartisan support—reveal an understanding that the Online Family Empowerment amendment, now codified as section 230, was a

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[14] Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 69 (1996).

[15] *Id.*; Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293, 316 (2011); 141 Cong. Rec. H8468–69 (daily ed. Aug. 4, 1995). The Supreme Court declared unconstitutional Senator Exon's part of the CDA. *See* Ashcroft v. ACLU, 535 U.S. 564, 564 (2002) ("This Court found that the Communications Decency Act of 1996 (CDA)—Congress' first attempt to protect children from exposure to pornographic material on the Internet—ran afoul of the First Amendment in its regulation of indecent transmissions and the display of patently offensive material. That conclusion was based, in part, on the crucial consideration that the CDA's breadth was wholly unprecedented.").

[16] Reno v. ACLU, 521 U.S. 844, 859 n.24 (1997) ("Some Members of the House of Representatives opposed the Exon Amendment because they thought it 'possible for our parents now to childproof the family computer with these products available in the private sector.' They also thought the Senate's approach would 'involve the Federal Government spending vast sums of money trying to define elusive terms that are going to lead to a flood of legal challenges while our kids are unprotected.' These Members offered an amendment intended as a substitute for the Exon Amendment, but instead enacted as an additional section of the Act entitled 'Online Family Empowerment.'").

[17] 141 Cong. Rec. H8469 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

[18] *Id.* at H8470.

non-regulatory approach to protecting children from pornography and other material perceived to be harmful that the federal government *already* regulated.[19]

II. THE RELATIONSHIP BETWEEN SECTIONS 230(C)(1) & 230(C)(2)

Both section 230's text and congressional intent target a narrow set of harms: pornography, indecency, and other material considered regulable at the time. This understanding undermines the claim that section 230 claims must be read "broadly" as a seminal charter of online internet immunity carefully considered by Congress. Certain legislators, decades later, may make claims to that effect.[20] And some commentators have echoed these post hoc claims.[21] But, as the Supreme

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[19] 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Wyden) ("We are all against smut and pornography . . . . [rather] than give our Government the power to keep offensive material out the hands of children . . . We have the opportunity to build a 21st century policy for the Internet employing . . . the private sector"); 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Danner) ("I strongly support . . . address[ing] the problem of children having untraceable access through on-line computer services to inappropriate and obscene pornography materials available on the Internet"); 141 Cong. Rec. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. White) ("I have got small children at home. . . . I want to be sure can protect them from the wrong influences on the Internet."); *id.* (statement of Rep. Lofgren) ("[The Senate approach] will not work. It is a misunderstanding of the technology. The private sector is out giving parents the tools that they have. I am so excited that there is more coming on. I very much endorse the Cox-Wyden amendment"); *id.* (statement of Rep. Goodlatte) ("Congress has a responsibility to help encourage the private sector to protect our children from being exposed to obscene and indecent material on the Internet"); *id.* (statement of Rep. Markey) (supporting the amendment because it "deals with the content concerns which the gentlemen from Oregon and California have raised"); *id.* (statement of Rep. Fields) (congratulating the legislators for "this fine work").

[20] Ron Wyden, *I Wrote This Law to Protect Free Speech. Now Trump Wants to Revoke It*, CNN BUSINESS PERSPECTIVES (June 9, 2020), https://tinylink.net/4KNX2 ("Republican Congressman Chris Cox and I wrote Section 230 in 1996 to give up-and-coming tech companies a sword and a shield, and to foster free speech and innovation online. Essentially, 230 says that users, not the website that hosts their content, are the ones responsible for what they post, whether on Facebook or in the comments section of a news article. That's what I call the shield. But it also gave companies a sword so that they can take down offensive content, lies and slime—the stuff that may be protected by the First Amendment but that most people do not want to experience online."); JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 64 (2019) (quoting a June 2017 interview with Ron Wyden, in which he says, "We really were interested in protecting the platforms from being held liable for the content posted on their sites and being sued out of existence").

[21] As an example, Jeff Kosseff's THE TWENTY-SIX WORDS THAT CREATED THE INTERNET

Court says, "Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation."[22]

While section 230(c)(2) dominated the legislative discussion, section 230(c)(1) has dominated judicial decisions.[23] Section 230(c)(1) eliminates internet platforms' "publisher or speaker" liability for the third-party user content they post. It 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."[24] In short, it treats internet platforms as conduits, such as the telephone or telegraph companies. Unlike publishers, these entities do not face strict liability under common law for the content they carry.

And section 230(c)(1), though *not* the focus of legislative attention as evidenced from the legislative history, makes good sense as written. Early platforms, such as AOL and Prodigy, would have been crushed with the legal liability of having to review all posts. Section 230(c)(1) said they were not liable for third party content—and Section 230(c)(2) said they would not become so even if they edited such content for certain, enumerated reasons. Thus, Section 230(c)(1) ratified and expanded on *Cubby v. Compuserve*, an early internet opinion that ruled that because Compuserve did not moderate or edit content, Compuserve had no liability for user posts.[25]

In a manner roughly analogous to the liability protections extended to conduits and common carriers, such as telegraphs and telephones,[26] section 230(c)(1)

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recounts the legislative history of section 230, arguing that its motivation was to counter pornography and duly footnoting the legislative history. However, when the book goes on to claim that Section 230 sought to protect online actors from crushing liability, it cites to post-enactment claims by legislators. See *id.* ch. 3 ("Chris and Ron Do Lunch") and accompanying footnotes.

[22] Bruesewitz v. Wyeth LLC, 562 U.S. 223, 242 (2011).

[23] *See* Elizabeth Banker, Internet Ass'n, *A Review of Section 230's Meaning & Application Based on More Than 500 Cases* (July 27, 2020), https://perma.cc/4B7B-U88S.

[24] 47 U.S.C. § 230(c)(1).

[25] Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y. 1991).

[26] Telegraph companies generally had no liability for the statements they transmitted, but they could be liable if they acted with malice or with knowledge that the sender was not privileged to make the statement. *See* RESTATEMENT (SECOND) OF TORTS § 612(2); Mason v. Western Union Tel. Co., 125 Cal. Rptr. 53, 56 (1975); Figari v. New York Tel. Co., 303 N.Y.S.2d 245, 259 (1969); Western

removes liability for causes of action that include, in their elements, treating the "interactive computer service," *i.e.,* platform, as a publisher or speaker of another's words. The classic example is defamation: A Facebook user posts a defamatory statement, and the defamed plaintiff sues Facebook on the theory that, by allowing the post to stay up on its site, Facebook acted as a publisher of the post. The plaintiff's cause of action would include an element that treats the platform as "a publisher or speaker" of the user's words. Section 230(c)(1) would bar the action against Facebook, leaving the only action available to the plaintiff to be one against the user. Section 230(c)(1) thereby allowed AOL and Prodigy to run bulletin boards without the potential liability risk that hosting millions of user generated posts presents.

Taken together, both section 230's text and legislative history point to the same interpretation: Section 230(c)(1) allows platforms to accept posts from their users without liability for such speech, i.e., the situation in *Cubby*. It generally shields platforms for liability created by speech that the platform hosts. Section 230(c)(2), in turn, protects platforms that want to content-moderate, giving them protection when removing, editing, or blocking third-party, user-generated content for certain enumerated reasons:[27]

Union Tel. Co. v. Lesesne, 182 F.2d 135, 137 (4th Cir. 1950); Von Meysenbug v. Western Union Tel. Co., 54 F. Supp. 100, 101 (S.D. Fla. 1946); O'Brien v. Western Union Tel. Co., 113 F.2d 539 (1st Cir. 1940); Klein v. Western Union Tel. Co., 13 N.Y.S.2d 441, 443 (App. Div. 1939); Peterson v. W. Union Tel. Co., 65 Minn. 18, 23 (1896); Annotation, *Liability of Telegraph or Telephone Company for Transmitting or Permitting Transmission of Libelous or Slanderous Messages*, 91 A.L.R.3d 1015 (1979).

It is often said that telephone companies have absolute immunity. Cases support this claim, *see* Anderson v. New York Tel. Co., 320 N.E.2d 647 (1974), and the Restatement of Torts also reaches this conclusion. RESTATEMENT (SECOND) OF TORTS § 581 cmt. b (1976). *Anderson* reasons that because telephone companies have an obligation to carry all messages, they should not be liable for them. But common carriage law predating *Anderson* and comprehensive public utility regulation took a different approach, reasoning that, because companies have the right to refuse unlawful messages, they are liable for their *knowing* transmission. Godwin v. Carolina Tel. & Tel. Co., 136 N.C. 258, 48 S.E. 636, 637 (1904); Application of Manfredonio, 183 Misc. 770, 770–71, 52 N.Y.S.2d 392, 392 (Sup. Ct. 1944); Lesesne v. Willingham, 83 F. Supp. 918, 924 (E.D.S.C. 1949); Bruce Wyman, *Illegality As an Excuse for Refusal of Public Service*, 23 HARV. L. REV. 577, 584–85 (1910); *see also* O'Brien v. W.U. Tel. Co., 113 F.2d 539, 543 (1st Cir. 1940) (so suggesting).

[27] This view of section 230(c)(1) has been explored in greater detail elsewhere. *See* Adam

Section	Legal Protection
230(c)(1)	No liability as publishers based on third-party posts
230(c)(2)	No liability for content-moderating obscene, lewd, lascivious, filthy, excessively violent, and harassing content, and similar content
Not covered	No immunity for liability (if some cause of action so provides) for content-moderating types of speech not mentioned in 230(c)(2)

Some courts have taken a different approach, holding that section 230 bars "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content."[28] That language has been quoted extensively.[29]

The language comes from the influential *Zeran* case, but many courts forget the *immediately preceding* language. To quote *Zeran* fully, section 230

> creates a federal immunity to any cause of action that would make service providers *liable for information originating with a third-party user of the service*. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.[30]

The "traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content" are examples of third-party content decisions that section 230 protects. It does not protect platform as to their *own* editorial decisions or judgments.

When quoted out of context, the "its" would seem to suggest that section 230 immunizes the platform's publisher role. But this is an example of sloppy drafting and an imprecise pronoun antecedent, as the sentence prior speaks of "information

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Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230,* 22 YALE J. L. & TECH. 391, 429 (2020); Edward Lee, *Moderating Content Moderation: A Framework for Nonpartisanship in Online Governance*, 70 AM. U. L. REV. 913, 945–62 (2021).

[28] Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

[29] According to a Westlaw search, at least 98 cases quote the language directly from *Zeran*. That count probably underestimates the influence of the language, because the quotation appears in other cases that are themselves quoted.

[30] Barrett v. Rosenthal, 146 P.3d 510, 516 (Cal. 2006) (quoting *Zeran*, 129 F.3d at 330) (emphasis added).

originating with a third-party user of the service."

Numerous courts mischaracterize the *Zeran* language and interpret section 230 as immunizing platforms' *own editorial decisions.* To take a typical example, in *Levitt v. Yelp!,* the plaintiff alleged that Yelp! "manipulate[d] . . . review pages—by removing certain reviews and publishing others or changing their order of appearance."[31] The *Levitt* plaintiffs argued that Yelp!'s behavior constituted unfair or fraudulent business under Cal. Bus. & Prof. Code § 17200. But the elements of the unfair or fraudulent business practices law have nothing to do with speaking or publishing third party content. Rather, they ask whether Yelp! engaged in an "unlawful, unfair or fraudulent business act or practice" or an "unfair, deceptive, untrue or misleading advertising and any act."

Ignoring this straightforward analysis, the court ruled that section 230(c)(1) immunized Yelp!'s conduct, supporting its conclusion by quoting the "traditional editorial functions" language of *Zeran*.[32] But notice the court's confusion here: Yelp! allegedly made changes and conscious re-arrangements to reviews in violation of its representations to users and customers—plaintiffs sought to make Yelp! accountable for *its own* editorial decisions and false representations.

The *Levitt* court's reading of section 230(c)(1) would protect platforms from contract, consumer fraud or even civil rights claims, freeing them to discriminate against certain users and throw them off their platforms. Courts are thus relying upon Section 230 to immunize platforms for their own speech and actions—from

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[31] Levitt v. Yelp! Inc., No. C-10-1321 EMC, 2011 WL 5079526, at *6 (N.D. Cal. Oct. 26, 2011), *aff'd*, 765 F.3d 1123 (9th Cir. 2014).

[32] *Id.*

contract liability with their own users,[33] their own consumer fraud,[34] their own violation of users' civil rights,[35] and even assisting in terrorism.[36]

The only statement by a Supreme Court Justice on section 230 recognized the error of reading section 230(c)(1) to include a platform's "editorial functions." In his statement respecting the denial of certiorari, Justice Thomas strongly criticized "construing § 230(c)(1) to protect any decision to edit or remove content." He realized that, for instance, "[w]ith no limits on an Internet company's discretion to take down material, § 230 now apparently protects companies who racially discriminate in removing content."[37]

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[33] Caraccioli v. Facebook, Inc., 167 F. Supp. 3d 1056, 1066 (N.D. Cal. 2016) (stressing that "the immunity bestowed on interactive computers service providers by § 230(c) prohibits all of Plaintiff's claims [including contract claims] against Facebook"), *aff'd*, 700 F. App'x 588 (9th Cir. 2017); Lancaster v. Alphabet Inc., No. 15-CV-05299-HSG, 2016 WL 3648608, at *5 (N.D. Cal. July 8, 2016) (finding that, where "plaintiff[s] asserting breach of the implied covenant of good faith and fair dealing sounding in contract," "CDA precludes any claim seeking to hold Defendants liable for removing videos from Plaintiff's YouTube channel"); Fed. Agency of News LLC v. Facebook, Inc., 395 F. Supp. 3d 1295, 1307–08 (N.D. Cal. 2019) (asserting that CDA "immunizes Facebook from . . . the fourth cause of action for breach of contract [between plaintiff and Facebook]").

[34] Gentry v. eBay, Inc., 99 Cal. App. 4th 816, 836 (2002) (interpreting that "Appellants' UCL cause of action is based upon . . . [the claim] that eBay misrepresented the forged collectibles offered for sale in its auctions").

[35] Sikhs for Justice "SFJ", Inc., 144 F. Supp. 3d 1088, 1094–95 (N.D. Cal. 2015).

[36] Force v. Facebook, Inc., 934 F.3d 53, 57 (2d Cir. 2019).

[37] Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 17 (2020). Goldman & Miers collect cases "show[ing] that Internet services have won essentially all of the lawsuits to date brought by terminated/removed users. Accordingly, Internet services currently have unrestricted legal freedom to make termination/removal decisions." Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH L. 191, 192 (2020). It is worth observing that most of the removals in the dataset have been under section 230(c)(1), supporting Justice Thomas's concern that this provision has been overread; the text is clear that section 230(c)(2) controls removals. Judges across the country are expressing misgiving similar to Justice Thomas's. *See* In re Facebook, Inc., __ S.W.3d __, 2021 WL 2603687, at *7 (Tex. June 25, 2021) ("We agree that Justice Thomas's recent writing lays out a plausible reading of section 230's text."); Force v. Facebook, Inc., 934 F.3d 53, 77 (2d Cir. 2019) (Katzman, C.J., dissenting) ("Instead, we today extend a provision that was designed to encourage computer service providers to shield minors from obscene material so that it now immunizes those same providers for allegedly connecting terrorists to one another. Neither the impetus for nor the text of § 230(c)(1) requires such a result.").

Similarly, in a recent statement, the Ninth Circuit in *Lemmon v. Snap* made clear that section 230(c)(1) only protects against claims that include speaking or publishing third party content and does not protect against claims merely involving a platform's "editorial functions." Clarifying the applicable law, the *Lemmon* court stated that section 230 only protects a defendant internet platform if the claims seek to treat the platform, "*under a state law cause of action, as a publisher or speaker . . . of information provided by another information content provider.*"[38] This makes clear that section 230(c)(1) only applies to causes of action which contain as elements publishing or speaking third party information, such as defamation and criminal threat.

Last, reading section 230(c)(1) to protect content moderation reads section 230(c)(2) out of the statute. If section 230(c)(1) protects "editorial functions," that includes the removals and content moderation that section 230(c)(2) addresses. Reading one provision of a statute to render another superfluous violates the canon against surplusage, a basic rule of statutory construction. As the Supreme Court has held, "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."[39] The Court emphasizes that the canon "is strongest when an interpretation would render superfluous another part of the same statutory scheme."[40] Here, the expansive *Zeran* reading of section 230(c)(1) renders superfluous section 230(c)(2), the immediately succeeding provision. Justice Thomas has recognized this point.[41]

III. THE RELATIONSHIP BETWEEN SECTIONS 230(C)(1) & 230(F)(3)

Section 230(f)(3) as well as section 230(c)(2) constrains the scope of section 230(c)(1), a point Justice Thomas recognized in *Malwarebytes*.[42] But courts have

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[38] Lemmon v. Snap, Inc., 995 F.3d 1085, 1091 (9th Cir. 2021) (emphasis added) (quoting Dyroff v. Ultimate Software Grp., Inc., 934 F.3d 1093, 1097 (9th Cir. 2019), and Barnes v. Yahoo !, Inc., 570 F.3d 1096, 1100–01 (9th Cir. 2009)).

[39] Corley v. United States, 556 U.S. 303, 314 (2009) (quoting Hibbs v. Winn, 542 U.S. 88, 101 (2004)).

[40] Marx v. Gen. Revenue Corp., 568 U.S. 371, 386 (2013).

[41] Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 17 (2020) (Thomas, J., respecting the denial of certiorari) (citing e-ventures Worldwide, LLC v. Google, Inc., 2017 WL 2210029, *3 (M.D. Fla. Feb. 8, 2017) (rejecting the interpretation that § 230(c)(1) protects removal decisions because it would "swallow[] the more specific immunity in (c)(2)").

[42] *Id.* at 16–19.

not carefully explained the relationship between these sections, as the recent *Gonzales* case (discussed below) indicates. A proper understanding of section 230(f)(3) would limit a platform's protections under section (c)(1) against liability for third-party content, although concededly the statutory text does not define a sharp line between the provisions.

Section 230(f)(3) defines an "internet content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information."[43] The term "interactive computer service" is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."[44] Section 230(c)(1) only protects "interactive computer services," and internet content providers do not receive section 230(c)(1) protection. Putting these provisions together, if an interactive computer service creates "in whole or part" content then it becomes an internet content provider, at least with respect to that content—and stands outside section 230(c)(1) protection.

While the mere deletion of a comment here or there likely does not constitute content creation or development, some types of content moderation do. Moderating and editing which, pursuant to a distinct plan or policy, change or shape the nature of online discussion likely cross the line into content creation. As a starting principle, an anthology editor does create or develop content when he selects certain works to publish or promote. Similarly, an editor that moderates content pursuant to a clear plan or bias creates content. For example, Thomas Bowdler developed content when he moderated the content of Shakespeare's plays to make them more acceptable to Victorian audiences.

Analogously, imposing complex content moderation regimes for acceptable posting very well might be closer to bowdlerizing than to deleting the odd comment. This would be particularly the case if the content moderation regime had biases that promoted or retarded certain types of discussions even in subtle ways—as social media critics allege. And, if so, then the platforms, when they engage in content moderation, are internet content providers that lack section 230(c)(2)

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[43] 47 U.S.C. § 230(f)(3).

[44] 47 U.S.C. § 230(f)(2).

protections because they are content creators under section 230(f)(3).

But the line between editing a few comments and Thomas Bowdler is not clear, and very few courts have attempted to draw the line. Courts have proposed differing tests, most influentially in the Ninth Circuit in *Fair Housing Council of San Fernando Valley v. Roommates.Com*. There, the court found that "[b]y requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information."[45] The court reasoned that, by requiring information from users that other users could use to make discriminatory judgments, the platform became a content creator and potentially liable under anti-discrimination laws. Other courts reason that a platform that makes a "material contribution" to online material becomes an internet content provider, leaving much vagueness as to how to define "material contribution."[46]

A recent case, *Gonzalez v. Google LLC*,[47] demonstrates the difficulty—and indeed perils—of drawing the line. The case involved allegations that internet platforms contributed to or promoted terrorist activity in violation of the Anti-Terrorism Act (ATA).[48] Plaintiffs alleged that "Google uses computer algorithms to match and suggest content to users based upon their viewing history. . . . [I]n this way, Google has 'recommended ISIS videos to users' and enabled users to 'locate other videos and accounts related to ISIS,' and that by doing so, Google assists ISIS in spreading its message."[49]

In *Gonzales*, over a vigorous and insightful dissent, the court distinguished *Roommates* on the grounds that "The Roommates website did not employ 'neutral tools'; it required users to input discriminatory content as a prerequisite to accessing its tenant-landlord matching service."[50] Rather, in *Gonzales*, "the algorithms do not treat ISIS-created content differently than any other third-party created content, and thus are entitled to § 230 immunity."[51]

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[45] 521 F.3d 1157, 1166 (9th Cir. 2008).

[46] Huon v. Denton, 841 F.3d 733, 742 (7th Cir. 2016).

[47] 2 F.4th 871 (9th Cir. 2021).

[48] 18 U.S.C. § 2333.

[49] *Gonzalez*, 2 F.4th at 881.

[50] *Id.* at 894.

[51] *Id.*

This claim is strange. Platforms use algorithms to allow them to selectively distinguish, with ever greater power and specificity, different content for different users. If users type in searches of type X, they will receive promoted content of type X; if users type in searches of type Y, they will receive promoted content of type Y. The business model of these platforms requires them to identify different preferences of consumers and precisely match them to (i) content that will keep their attention focused on the platform and (ii) advertisers interested in sending them advertisements.

The problem with the *Gonzales* court's reading is that it is far from clear that there are "neutral" algorithms or even that the term is coherent. The court never defines "neutrality" and asserts, without justification, that "algorithms do not treat ISIS-created content differently than any other third-party created content, and thus are entitled to § 230 immunity." But, of course, platforms treat different content differently. That is their *raison d'etre*, as the more precise distinctions among users and their content leads to more effective matching for advertisers.

Indeed, Big Tech's defenders, at least when arguing against non-discrimination requirements, use this evident fact to argue that social media "neutrality" is impossible. For instance, Kir Nuthi explains that "[n]ondiscrimination is a central feature of traditional common carriers, but it is not a feature of social media. Unlike the railroads and communications companies of the Gilded Age, social media relies on the ability to contextualize and discriminate between different content."[52]

Section 230(f)(2) implies there is a point at which content moderation becomes content creation. The provision does not state where that point is, and courts have yet to provide useful tests to locate it. While this article does not suggest a test, a textual reading of section 230 must not read section 230(f)(2) out of the statute, and must recognize that the interactive computer services that cross a line into content provision lose their protection as to the content that they provide.

IV. Interpreting Section 230(c)(1)

Section 230(c)(1) 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.[53]

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[52] Kir Nuthi, *Conservatives Want Common Carriage. They're Not Going to Like It.*, TechDirt (June 8, 2021), https://tinyurl.com/32sdp82r.

[53] 47 U.S.C. § 230(c)(1).

The first appellate decision interpreting this provision, *Zeran v. AOL,*[54] read the word "publisher" to include what the common law would consider "distributor" liability as well as "publisher" liability. Its opinion was extremely influential and, with perhaps one exception,[55] the courts of appeals have followed *Zeran,* conceding what can only be viewed as a first mover advantage. But as the recent statement from Justice Thomas points out, it is far from clear that this interpretation is correct.

At common law, a person is subject to "publisher" liability if he makes "an affirmative act of publication to a third party."[56] This "affirmative act requirement" ordinarily "depict[s] the defendant as part of the initial making or publishing of a statement."[57] A "distributor," under common law, in contrast, is "one who only delivers or transmits defamatory matter published by a third person."[58]

Publishers or speakers are subject to a higher liability standard, traditionally strict liability, although that standard is rarely imposed given the constitutional limits on libel law set forth in *New York Times v. Sullivan* and *Gertz.*[59] By contrast, distributors, which do not exercise editorial control, face liability only when they have knowledge or constructive knowledge that the content they are transmitting is illegal.[60]

Following this common law understanding, the word "publisher" is ambiguous because it sometimes references initial publication and other times subsequent

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[54] Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997).

[55] Chicago Lawyers' Committee For Civil Rights Under Law v. Craigslist, 519 F.3d 666, 668–669 (7th Cir. 2008) ("Subsection (c)(1) does not mention 'immunity' or any synonym. Our opinion in *Doe* explains why § 230(c) as a whole cannot be understood as a general prohibition of civil liability for web-site operators and other online content hosts").

[56] Benjamin C. Zipursky, *Online Defamation, Legal Concepts, and the Good Samaritan*, 51 VAL. U. L. REV. 1, 18 (2016); RESTATEMENT (SECOND) OF TORTS § 558 (1977) (listing a statement and publication as separate elements of defamation).

[57] Zipursky, *supra* note 56, at 19.

[58] RESTATEMENT (SECOND) OF TORTS § 581.

[59] *See* W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON TORTS § 113, at 810–11 (5th ed. 1984); *compare* RESTATEMENT (SECOND) OF TORTS § 581(1) *with* New York Times Co. v. Sullivan, 376 US 254 (1964), *and* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[60] *See generally* Smith v. California, 361 U.S. 147, 152–54 (1959).

distribution of content.[61] Because a "distributor" can be thought of as a type of "publisher," the word "publisher" has developed a generic sense, referring to publishers and distributors, as well as a specific sense, referring to the "initial" maker of the statement.

It is not clear whether Congress intended the generic or the specific meaning of publisher. Like the term "congressman," which refers to both senators and representatives, but usually refers to representatives, "publisher" refers both to those who "actually publish" and those who republish or distribute.

Recognizing this textual ambiguity, Justice Thomas has written that "To be sure, recognizing some overlap between publishers and distributors is not unheard of. Sources sometimes use language that arguably blurs the distinction between publishers and distributors. One source respectively refers to them as 'primary publishers' and 'secondary publishers or disseminators,' explaining that distributors can be 'charged with publication.'"[62]

Nonetheless, because a distributor is a type of publisher, the *Zeran* court ruled that section 230(c)(1) protects against both types of liability. And the results of that decision have been dramatic—essentially eliminating any platform responsibility for the content they carry.

The *Zeran* court's textual reasoning is not solid. It simply states that distributors are a type of publisher and assumes Congress intended the generic, not specific, meaning. It ignores textual evidence in the statute that points in the opposite direction: If Congress wanted to eliminate both publisher and distributor liability, it would have created a categorical immunity in § 230(c)(1), stating that "No provider shall be held liable for information provided by a third party" and would not have used language that explicitly limited its protection to speaking and publishing third-party content. In fact, when Congress wants to use categorical language to block liability on any theory (and not just on a speaker-or-publisher theory), it does so—using such categorical language in the very next subsection, Section

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[61] *See, e.g.,* RESTATEMENT (SECOND) OF TORTS § 578 ("Except as to those who only deliver or transmit defamation published by a third person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.").

[62] *See* Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 15 (2020) (Thomas, J., respecting denial of certiorari) (quoting KEETON ET AL., *supra* note 59, at 799, 803).

230(c)(2).[63]

Second, as Justice Thomas recently observed in a statement respecting the denial of certiorari, "Congress expressly imposed distributor liability in the very same Act that included § 230. Section 502 of the Communications Decency Act makes it a crime to 'knowingly . . . display' obscene material to children, even if a third party created that content. This section is enforceable by civil remedy. It is odd to hold, as courts have, that Congress implicitly eliminated distributor liability in the very Act in which Congress explicitly imposed it."[64] If the Act follows consistent usage throughout the statute, section 230 would not affect distributor liability.

The *Zeran* court also relied on policy arguments, worrying that,

> If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement—from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory character, and an on-the spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context.[65]

This policy concern may have had some force in 1996. However, in today's world of AI and automated takedowns—and the large platforms' moderating teams that number well into the tens of thousands—the concern seems misplaced. And imposing distributor liability on mid-sized or small web firms would not force them to hire armies of staff to review allegations of libel or similar unlawfulness: Rather, as with data breach obligations and other cybersecurity duties, reasonable behavior for dealing with notices could be scaled to firm size and resources. Under current law, the myriad internet data breach obligations found in statutes such as HIPAA[66]

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[63] "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." 47 U.S.C. § 230(c)(2).

[64] *Enigma Software Grp.*, 141 S. Ct. at 15 (emphasis in original) (citing 47 U.S.C. § 223(d)).

[65] Zeran v. Am. Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997).

[66] Fero v. Excellus Health Plan, Inc., 236 F. Supp. 3d 735, 763 (W.D.N.Y. 2017), *on*

and title V of the Gramm-Leach-Bliley Act have premised and scaled liability for unlawful behavior on the capacities of small firms to follow best practices.[67] While this is not the forum to spell out the details, small firms could be exempted or best practices could be developed for what constitutes "knowledge" for distributor liability.[68] Such a burden is hardly crushing—after all, both small and large websites already have takedown obligations under the Digital Millennium Copyright Act.[69]

There is another problem: Websites will have to determine whether something is, in fact, libelous. Or, more realistically, they will have the obligation to assess the risk of libel associated with certain statements and gauge whether to accept such risk. This problem was addressed in distributor liability for telegraph liability. Courts solved this problem by only assigning liability if the libel was "apparent on the face" of the message."[70] Under this rule, only the most egregious types of speech would incur liability, as well as speech previously adjudged libelous or unlawful, which some courts have ruled section 230(c)(1) protects.[71] And, again, the accuracy of judgment to which a platform is to be held could scale to its resources, and best practices or safe harbors could be created either by courts or the Federal Communications Commission.

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reconsideration, 304 F. Supp. 3d 333 (W.D.N.Y. 2018), *order clarified*, 502 F. Supp. 3d 724 (W.D.N.Y. 2020) (in lawsuit for data breach for HIPAA-regulated entity, "both the breach of contract claim and implied covenant claim arise out of the Excellus Defendants' failure to protect the confidentiality of Plaintiffs' personal information and to comply with policies, industry standards, and best practices for data security").

[67] Title V of the GLBA states that "each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information." 15 U.S.C. § 6801(a); *see also* Board of Governors of the Federal Reserve System, *Interagency Guidelines Establishing Information Security Standards [Small-Entity Compliance Guide]* (Aug. 2, 2013), https://tinyurl.com/5d43nb3z ("To achieve these objectives, an information security program must suit the size and complexity of a financial institution's operations and the nature and scope of its activities.").

[68] This idea resonates with Kyle Langvardt's *Can The First Amendment Scale?*, 1 J. FREE SPEECH L. 273 (2021), which suggests that traditional publisher and distributor categories may need to soften in the face of changing technology.

[69] 17 U.S.C.A. § 512(c).

[70] *See* sources cited in note 26.

[71] Hassell v. Bird, 5 Cal. 5th 522, 532 (2018).

V. INTERPRETING SECTION 230(C)(2)

Title 47 U.S.C. § 230(c)(2) states:

> 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."

The provision's scope turns on how the final "otherwise objectionable" should be interpreted. There are two choices: (i) an *ejusdem generis* reading in which the term refers to those objectionable things that are similar to the rest of the list and (ii) a non-*ejusdem-generis* reading in which "otherwise objectionable" is read "in the abstract" referring to literally any other objectionable thing. (Under the canon of *ejusdem generis*, "Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[72])

Courts have had difficulty in determining what is the "similar nature" that unites the section 230(c)(2) list. *Interpreting 47 U.S.C. § 230(c)(2)*[73] shows that all these terms referred in the 1990s to areas of then-permitted, or commonly believed to be permitted, types of telecommunications regulation. "Obscene, lewd, lascivious, and filthy" speech had been regulated on cable television and in telephone calls—and of course in broadcasting.[74] "Harassing" telephone calls had also long been seen by Congress as regulable, and continue to be regulated to this day.[75] "Excessively violent" speech was considered regulable content, like indecent content, in the context of regulating over-the-air broadcasting.[76]

An *ejusdem generis* reading would constrain the legal immunities in section 230(c)(2). If section 230's content moderation protections are found *only* in section 230(c)(2), not section 230(c)(1), then platforms receive such immunity only when moderating the types of speech section 230(c)(2) enumerates.

Of course, courts may ignore statutory canons even if there is a convincing

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[72] Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115 (2001).

[73] Candeub & Volokh, *supra* note 6.

[74] *Id.* at 180–83.

[75] 47 U.S.C. § 223.

[76] Candeub & Volokh, *supra* note 6, at 182.

argument for their application—and the canons sometimes can point in opposite directions.[77] Without *ejusdem generis*, "otherwise objectionable" would be interpreted in the abstract—*and not refer* to the list at all but rather to any possible objectionable content. This reading would provide immunity for virtually any content-moderation decision that a platform deems appropriate.

The *ejusdem* and non-*ejusdem* readings are subject to different constitutional analyses. The former is content-based. The latter is likely not. The following section examines the constitutionality of section 230(c)(2) under each interpretation.

VI. THE CONSTITUTIONALITY OF SECTION 230(C)(2)

The *ejusdem generis* reading of section 230(c)(2) seems less likely to survive First Amendment scrutiny than the non-*ejusdem-generis* reading, though the matter is not certain.

A. Non-Ejusdem Generis Reading

Under a non-*ejusdem* interpretation, section 230(c)(2)'s "otherwise objectionable" catchall term assumes an "in abstract" meaning, referring to any content objectionable in the platform's view. The statute's use of the phrase "material that the provider or user considers" to be objectionable bolsters this interpretation. The word "considers" suggests a subjective, or at least, individualized judgment.

Yet, even a non-*ejusdem-generis*, "in abstract" reading of "otherwise objectionable" has ambiguity. It could be read in a subjective way which would allow *any* objectionable material—or in an objective way which would refer to the category of speech people would likely find objectionable. The following examines the provision's constitutionality (1) under an objective reading and (2) under a subjective reading. An objective reading is likely content-based while a subjective reading could be content-neutral.

1. "Otherwise objectionable": objective reading

The "objective" interpretation has several arguments for it. First, "objectionable" has a meaning that describes and categorizes speech independent of individual's particular judgments. For instance, "otherwise religious" in the phrase "Christian, Hindi, Jewish, or otherwise religious" has a distinct content—and if section 230(c)(2) were to be so read, it would be clearly content-based.

Second, Congress intended "otherwise objectionable" to refer to a distinct set

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[77] KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 521–35 (1960).

of speech. The statute's clear purpose was to combat certain speech in media, such as indecency and profanity. In other words, Congress likely intended to catch other types of speech it thought to be regulable in telecommunications media in 1996. There is no evidence from the legislative history that Congress intended a purely subjective understanding of "objectionable." The evidence suggests that Congress intended to impose some sort of community standards even if imposed via individual internet platforms.

Third, when Congress wants individual subjective judgments about particular content be controlling, it does so explicitly. For instance, the statute banning "pandering advertisements in the mails" "provides a procedure whereby any householder may insulate himself from advertisements that offer for sale 'matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative.'"[78] Under Post Office procedure, which the Supreme Court has upheld, the Post Office must accept *any* advertisement as qualifying under the statute that a mail householder judges arousing or provocative. If Congress had wanted a subjective reading, it would have used language similar to that found in this statute, *i.e.*, used words like "sole discretion." The use of the word "consider" does not convey subjectivity in such a definitive way.

An "objective" reading of "otherwise objectionable" would be subject to a constitutionality analysis similar to that of an *ejusdem generis* reading,[79] as both are content-based and refer to a similar set of things.

2. "Otherwise objectionable": subjective reading

On the other hand, a purely subjective reading is also reasonable and probably the better of the two readings (assuming one rejects the *ejusdem generis* approach, which I think is the best reading of all). As mentioned above, the text references what the platform "considers" to be objectionable, suggesting a subjective approach. Also, even if what everyone considers to be objectionable could be defined in some theoretical way as a distinct set of speech, this category is fuzzy and amorphous—suggesting that in practice the statute refers to whatever a platform subjectively deems objectionable.

A purely subjective reading of section 230 does not at first blush appear to be a

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[78] Rowan v. U.S. Post Office. Dep't, 397 U.S. 728, 729–30 (1970).

[79] *See* Part VI.B.1.

regulation of speech at all. A platform can choose to moderate content according to the factors in section 230(c)(2) or not. Section 230 does not mandate or compel any particular type of speech, nor does it punish any particular type of speech. The statute does not define objectionable but leaves the definition and application to individuals.

Yet it could still be a regulation of speech, even if a content-neutral one. Section 230 favors the expression of a certain type of speech—those that interactive computer services would likely find objectionable. "Even if the hypothetical measure on its face appeared neutral as to content and speaker, its purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional."[80] Certainly, Congress *intended* restrictions on the flow of speech.

Further, by encouraging private censorship, Congress successfully made certain types of information more difficult to obtain. "'[T]he Court long has recognized that by limiting the availability of particular means of communication, content-neutral restrictions can significantly impair the ability of individuals to communicate their views to others.'"[81]

In order to justify a content-neutral regulation, the government must demonstrate, among other things, that "it furthers an important or substantial governmental interest [and that] the governmental interest is unrelated to the suppression of free expression."[82] Courts typically do not require a "least restrictive means" test, requiring instead that the means be narrowly tailored and leave ample alternative outlets.[83] But the government still "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals."[84] We must identify the content-neutral governmental goal of section 230 and see whether section 230 is narrowly tailored to that goal.

Identifying neutral interests supporting section 230 is not an easy inquiry. Most of its stated policy goals are quite content-based. Congress sought to empower

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[80] Sorrell v. IMS Health Inc., 564 U.S. 552, 566 (2011).

[81] City of Ladue v. Gilleo, 512 U.S. 43, 55 n.13 (1994) (quoting Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 57 (1987)).

[82] United States v. O'Brien, 391 U.S. 367, 377 (1968).

[83] See Ward v. Rock Against Racism, 491 U.S. 781, 797–99 (1989).

[84] McCullen v. Coakley, 573 U.S. 464, 486 (2014).

parents' power to limit children's access to "objectionable and inappropriate"[85] speech and further "vigorous enforcement of obscenity and harassment."[86] Similarly, as discussed below, the legislative history as it exists suggests that the justifications for Congress passing the statute were content-based.

On the other hand, the stated justifications include some neutral justifications, such as to "promote the continued development of the Internet and other interactive computer services," "preserve the vibrant and competitive free market," and "encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools."[87]

This ambiguity could lead to a finding of neutrality because the Court allows itself flexibility in determining statutory justification. For instance, in *Turner*,[88] the Court ruled on the constitutionality of the "must carry" obligations of the 1992 Cable Television Consumer Protection and Competition Act.[89] This law required cable systems to carry over-the-air television broadcasting. As some of the justices recognized, this appeared to be a content-based regulation.[90] Congressmen, ever solicitous to the local broadcaster who carries their political advertisements and whose news shows cover politicians' deeds, granted broadcasters favors by forcing cable systems to carry their content.[91]

The Court looked past this obvious purpose and found that the law's stated

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[85] 47 U.S.C. § 230(b)(4).

[86] 47 U.S.C. § 230(b)(5).

[87] 47 U.S.C. § 230(b)(1)-(3).

[88] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994).

[89] 47 U.S.C. §§ 534(b)(1)(B), (h)(1)(A), 535(a).

[90] 512 U.S. at 677 (O'Connor, J., dissenting) ("Preferences for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content. They may not reflect hostility to particular points of view, or a desire to suppress certain subjects because they are controversial or offensive. They may be quite benignly motivated. But benign motivation, we have consistently held, is not enough to avoid the need for strict scrutiny of content-based justifications."); *id.* at 680 ("But when a content-based justification appears on the statute's face, we cannot ignore it because another, content-neutral justification is present.").

[91] Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1767 (1995) ("What was the purpose of the must-carry rules? This is a complex matter. A skeptic, or perhaps a realist, might well say that the rules were simply a product of the political power of the broadcasting industry. Perhaps the broadcasting industry was trying to protect its economic interests at the expense of cable.").

justification was to preserve free, over-the-air television. The Court ruled that the regulation, in simply specifying the source of programming to be carried, was not content-based.[92]

The Court could follow the *Turner* approach in interpreting section 230. The statute's stated purposes of "promot[ing] the continued development of the Internet and other interactive computer services" and "encourag[ing] the development of technologies which maximize user control over what information is received by individuals, families, and schools" might serve as content-neutral justifications.[93] One could say that limiting liability for content moderation furthers these goals by lowering the cost of blocking and moderation technologies. If you want to create markets in what is essentially private censorship, then lowering liabilities associated with creating tools for censorship is a good idea.

While this argument might very well win the day, there are a few caveats. First, *Turner* explicitly recognized the market power of the cable systems as justifying, in part, must-carry.[94] Given the market power of cable, it had the power to silence others, and therefore access was required. In contrast, section 230(c)(2) affects Twitter as well as your personal website—the big and the little. It is possible that the Court's willingness to find a content-neutral justification—which would be more likely to be upheld—stemmed from its overall greater willingness to accept regulation of dominant firms than smaller actors.

Second, the provision favors certain types of expression—namely forwarding a set of opinions and views through editing, amplifying, muting, shaping, and content-moderating posters' comments. It is perhaps odd to think of comment deletion as expression or speech. But, it can be, for reasons similar to those discussed in Part III in relation to section 230(f)(3). A comment thread subject to a strict content

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[92] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 663 (1994) ("[T]he importance of local broadcasting outlets 'can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.' The interest in maintaining the local broadcasting structure does not evaporate simply because cable has come upon the scene.").

[93] 47 U.S.C. § 230(b)(1)–(3).

[94] *Turner*, 512 U.S. at 632–33 ("In brief, Congress found that the physical characteristics of cable transmission, compounded by the increasing concentration of economic power in the cable industry, are endangering the ability of over-the-air broadcast television stations to compete for a viewing audience and thus for necessary operating revenues.").

moderation policy certainly expresses something different than a comment thread that is not so subject—just as a bonsai tree, which is pruned to control its growth, is different from a tree than is allowed to develop freely.

By adopting content moderation policies, platforms can promote (or hide) ideas and control discussion. They become the anthologists of the internet, editing discussion to create versions of expression they prefer. Similarly, they become, in a sense, book publishers.[95] They promise to provide a free service—access to their platforms—in exchange for producing speech that they like. The exchange is analogous to an advance that a book publisher would give an author.

Third, even though stated in broad language, Congress's policies in section 230 cannot be plausibly read to support massive private censorship on any topics that the platforms please, which is what section 230 as interpreted by many courts today protects. To the degree section 230 allows the dominant internet firms to impose their own censorship rules—rules that can promote anything—section 230 minimizes "user control over what information is received." Congress never even considered section 230 as protecting giant internet platforms, which did not exist in 1996 and which, with the other "FAANG" companies, now enjoy close to 22% of the S&P's total market capitalization.[96]

Finally, it may be that a subjective section 230 in fact subverts the goals of "promoting the continued development of the Internet and other interactive computer services" and "encourag[ing] the development of technologies which maximize user control over what information is received by individuals, families, and

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[95] Daphne Keller speaks of "amplification," which she defines "to encompass various platform features, like recommended videos on YouTube or the ranked newsfeed on Facebook, that increase people's exposure to certain content beyond that created by the platform's basic hosting or transmission features." Daphne Keller, *Amplification and Its Discontents: Why Regulating the Reach of Online Content Is Hard*, 1 J. FREE. SPEECH L. 227, 231 (2021). This seems to be a type of publication, in which the platform acts like an anthologist selecting messages to be repeated and shaping and directing discourse. It is not simply transmitting messages, and therefore falls outside section 230(c)(1). Ashutosh Bhagwat makes the argument that such editorializing is constitutionally protected. Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. FREE SPEECH L. 97, 111–23 (2021). If so, however, such editorializing is the *platform's speech* and thus not within section 230(c)(1).

[96] Sergei Klebnikov, *Apple, Microsoft, Amazon, Google and Facebook Make up a Record Chunk of the S&P 500. Here's Why That Might Be Dangerous*, FORBES.COM (July 24, 2020), https://tinyurl.com/cy49pkr9.

schools"—particularly given the ill-defined line between interactive computer services and internet content providers set forth in sections 230(c) and 230(f)(3).

If one combines the subjective reading of "otherwise objectionable" with a highly restrictive view of section 230(f)(3), as some courts appear to have done, then platforms would be free to content-moderate in ways that could undermine users' willingness to express themselves online. Comments or arguments can be deleted, specially segregated, or, under some understandings of "content moderation," tagged with warnings. If these types of content moderation do not qualify as content provision under section 230(f)(3), then section 230(c)(2) would protect all such efforts. Exposing comments to such treatment does not further the goals of "user control" or the "growth of the internet."

B. Ejusdem Reading

The arguments for an *ejusdem generis* reading are discussed in *Interpreting 47 U.S.C. § 230(c)(2)*. An *ejusdem* reading likely renders section 230 content-based, as the terms in § 230(c)(2) refer to a distinct type of content: speech Congress thought regulable because it was inappropriate for children and families. The next question is whether a content-based section 230 is constitutional. To survive strict scrutiny, a content-based regulation of speech must be narrowly tailored to serve a compelling governmental interest, and that is a difficult test to pass.

On the other hand, classifying a provision as content-based does not necessarily doom it to strict scrutiny.[97] In particular, viewpoint-neutral (even though content-based) speech restrictions may not need to be subjected to strict scrutiny in certain contexts, particularly in designated public fora.

1. Section 230 as content-based restriction on protected speech

Under the *ejusdem* reading, section 230(c)(2) covers matters Congress thought

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[97] In *Denver Area,* arguably the case closest on point, the Court refrained from specifying what level of scrutiny should be applied to decency regulation on cable television. *See* Denver Area Educ. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 741–42 (1996) (plurality opin.) ("But no definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes. That is not to say that we reject all the more specific formulations of the standard—they appropriately cover the vast majority of cases involving government regulation of speech. Rather, aware as we are of the changes taking place in the law, the technology, and the industrial structure related to telecommunications, see, *e.g.*, Telecommunications Act of 1996 . . ., we believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now.")

regulable in 1996. In particular, it explicitly disfavors a whole category of speech that now receives full or near full First Amendment protection under the Supreme Court's decision in *Brown v. Entertainment Merchants Association*.[98] In that case, the Court used strict scrutiny to strike down a restriction on the sale of violent video games to minors without parental permission.

And section 230 places a much higher burden on violent speech than does the California statute, which didn't restrict access to violent video games by adults or by minors who had adults who were willing to get the games for them. Section 230 limits the amount of violent content available to everyone, including adults.

While section 230's limit on speech is permissive and incentivizing—platforms do not have to block but are also not required to do so—the Court has found similar laws to be unconstitutional restrictions of speech. For instance, the Court ruled unconstitutional a statute giving permissive authority to cable systems to censor indecent material in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*.[99] More generally, the Court has rejected for First Amendment reasons laws that place special burdens, legal or financial, on certain types of speech or speakers.[100]

Denver Area is probably the case most on-point to the question of whether content-based pro-decency regulation on the internet is constitutional. Yet it is a fractured opinion that by design does not offer clear precedent, as the Justices could not agree on the applicable constitutional standard or even if there should be one. Each of the three challenged provisions received different votes—with the plurality opinion failing to win a majority for any provision. Arguably, however, the guidance that it does provide suggests that section 230 is unconstitutional, though just barely.

The case involved three provisions of the Cable Television Consumer Protection and Competition Act of 1992 (Cable Act), a statute that dealt with leased access of cable channels and public, educational, and government (PEGs) cable channels. Section 10(a) required cable systems to lease channels to local programmers as a way of providing competition to the large cable programming networks and

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[98] 564 U.S. 786 (2011).

[99] 518 U.S. 727 (1996).

[100] Leathers v. Medlock, 499 U.S. 439, 447 (1991); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987).

encouraging the creation of local content; section 10(c) required cable systems to carry (for free) public, educational, and government channels, which give free access for community programming, school programs, government meetings, and the like; and section 10(b) required cable systems to segregate indecent material on specific cable channels.[101]

Section 10(a), which applies to "leased access channels," reversed prior law by permitting cable operators to allow or prohibit "programming" that they "reasonably believe[s] . . . depicts sexual . . . activities or organs in a patently offensive manner." Section 10(c) gives cable operators the same authority over PEGs. Under section 10(b), which applies only to leased access channels, operators must segregate "patently offensive" programming on a single channel, block that channel from viewer access, and unblock it (or later reblock it) upon subscriber's written request.[102]

Sections 10(a) and 10(c) permit cable systems to proscribe content depicting "sexual activities or organs in a patently offensive manner." The plurality opinion—and the other opinions—understood this language as including unprotected obscenity as well as the indecent programming covered in *Pacifica.*[103]

There was disagreement about the theory of state action, the first step in any First Amendment analysis. Justice Breyer in his plurality recognized that the government mandates to carry certain cable channels were a type of state action. He did not go so far as Justice Kennedy to find a public forum, but found the channel set-aside to be sufficient government action for First Amendment purposes.

Given this type of government action, the plurality concluded, the First Amendment required a free speech balancing between speakers (PEG and leased

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[101] 47 U.S.C. §§ 532(h), 532(j), and note following § 531.

[102] *Id.*

[103] *Denver Area*, 518 U.S. at 744 (plurality opin.) ("[T]he problem Congress addressed here is remarkably similar to the problem addressed by the FCC in *Pacifica*, and the balance Congress struck is commensurate with the balance we approved there. In *Pacifica* this Court considered a governmental ban of a radio broadcast of 'indecent' materials, defined in part, like the provisions before us, to include 'language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.'" (quoting FCC v. Pacifica Found., 438 U.S. 726, 732 (1978)).

access channels) against cable operators.[104] In contrast, Justice Kennedy, joined by Justice Ginsburg, went further and considered the public access cable channels to be designated public fora—in which the First Amendment would prohibit virtually any restriction on speakers' expression.[105]

In elaborating upon his balancing test, Justice Breyer pointed out that cable operators have monopoly power, allowing them to engage in private censorship if unchecked; they are extraordinarily involved with government regulation on a local level; and, as a realistic matter, their First Amendment interests as editors are weak.[106] Given these considerations, Breyer ruled that for section 10(a), the balance tipped in favor of the cable operators, permitting them to limit indecent speech. In addition, section 10(a) simply restores the rights that cable operators once had over leased access channels.[107]

On the other hand, with section 10(c), Justice Breyer found that the expressive rights of speakers predominated and therefore, the plurality found it unconstitutional. Unlike section 10(a), section 10(c) does not give back to cable operators the editorial rights that they once enjoyed. The countervailing cable operator's First Amendment interest is nonexistent, or at least much diminished, because these channels were meant for public access,[108] and cable operators did not historically exercise editorial control over them.[109] Last, local boards and commissions and other governmental or quasi-governmental groups typically oversee public access channels. These supervisory regimes presumably would control offensive content consistent with community standards

The peculiar facts of *Denver Area*—government-required cable channel set-asides—do not permit a clear application to section 230. But section 230 is closer to section 10(c) than 10(a), which suggests it may be unconstitutional.

First, the Cable Act targets indecent speech of approximately the sort *Pacifica* permitted to be regulated, and indeed likely just a subset of indecent speech, closer

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[104] *Id.* at 744–47.

[105] *Id.* at 792 (Kennedy, J., dissenting).

[106] *Id.* at 738, 760–61 (Breyer, J., plurality opin.).

[107] *Id.* (citing 47 U.S.C. § 532(c)(2)).

[108] *Id.* at 761.

[109] *Id.*

to obscenity.[110] The speech section 230 covers (even under the *ejusdem generis* reading) is much broader than that in *Pacifica*, because it includes fully First Amendment protected "excessively violent" speech. If it is unconstitutional for government even to permit a cable operator to censor regulable *indecent* speech, on its own volition on a quasi-governmental channel, then constitutional concerns seem present when the government disadvantages *protected* unregulable speech on the entire internet. This factor weighs against section 230's constitutionality.

Second, the interest in protecting children from indecent programming supported the Court's ruling that section 10(a) is constitutional. The government interest in protecting children from fully First Amendment-protected speech is *less* powerful than the interest in protecting them from unprotected speech, such as obscenity. Here, section 230 regulates fully protected speech, i.e., speech that is excessively violent. This factor weighs against section 230's constitutionality.

Third, the plurality opinion balances the interests of the cable operators and the public, finding that the cable operators' interests predominated in section 10(a), but making the opposite determination in section 10(c).[111] The interests the Court identified as determinative were cable operators' historical rights of control over leased access and section 10(a)'s viewpoint neutrality. Significantly, section 10(a) only returned cable operators the discretion they once had.

This factor probably cuts against section 230. Congress, in the CDA, was responding to *Stratton Oakmont*, a case that determined whether an internet bulletin board was more like a telephone company or bookstore, which had limited liability for third party content, or like a newspaper, which is generally liable for the content it prints. *Stratton Oakmont* said that platforms that edit are more like newspapers. In reversing *Stratton Oakmont,* if Congress had simply imposed carrier liability, *i.e.*, only passed section 230(c)(1), not (c)(2), Congress could have been said to have "restore[d]" internet platforms to their rightful protection against liability. Instead, Congress created an entirely new, content-based regime that has no obvious precedent in United States communications law.

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[110] *Id.* at 749, 755, 761–51.

[111] *Id.* at 743–44 ("The First Amendment interests involved are therefore complex, and require a balance between those interests served by the access requirements themselves (increasing the availability of avenues of expression to programmers who otherwise would not have them) and the disadvantage to the First Amendment interests of cable operators and other programmers (those to whom the operator would have assigned the channels devoted to access)").

But these observations are speculative. The unusual facts of *Denver Area* and its hesitance to announce a level of scrutiny for regulations on cable television—let alone the internet—diminish its precedential force for section 230.

The strongest argument for section 230's unconstitutionality is probably its inclusion of the "excessively violent" term, which targets unregulatable, constitutional protected speech. Striking the phrase from the statute would help solve that problem, and the power of the federal judiciary to partially invalidate a statute in that fashion has been firmly established since *Marbury v. Madison*.[112]

When Congress includes an express severability clause in the relevant statute, courts generally follow it.[113] The Communications Act, which section 230 is part of, has an express severability clause.[114] Lower courts have relied upon this clause for statutes aimed at indecency in almost exactly the same situation presented in section 230. In *Carlin Commc'ns, Inc. v. FCC*,[115] the court had to interpret section 223(b) of the Federal Communications Commission Authorization Act of 1983, which prohibits "obscene and indecent" telephone communications. The court reasoned that, . . . "[w]ere the term 'indecent' to be given meaning other than *Miller* obscenity, we believe the statute would be unconstitutional. . . . [T]he words 'or indecent' are separable so as to permit them to be struck and the statute otherwise upheld.[116]

2. Viewpoint-neutral but content-based regulation and section 230

Another way of analyzing the *ejusdem generis* reading of section 230(c)(2) is as a viewpoint-neutral but content-based regulation.

As an initial matter, it is not clear that section 230(c) is viewpoint-neutral, although it seems likely. Protecting platforms' ability to ban types of speech Congress

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[112] Barr v. Am. Ass'n of Political Consultants, Inc, 140 S. Ct. 2335, 2350 (2020).

[113] *Id.* at 2349.

[114] 47 U.S.C. § 608 ("If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby."). The "chapter" referred to in the severability clause is Chapter 5 of Title 47, which includes sections 151 through 700 of Title 47, a group of provisions of which section 230 is part.

[115] 837 F.2d 546 (2d Cir. 1988).

[116] Carlin Commc'ns, Inc. v. FCC, 837 F.2d 546, 560–61 (2d Cir. 1988) (citing Regan v. Time, Inc., 468 U.S. 641, 652–53 (1984)).

thought regulable in telecommunications media in 1996, section 230 does not, for instance, target speakers advocating obscenity or advocating against it—it applies to all who distribute obscenity, whether they think obscenity sexually liberating, find it sexist and objectifying, or aren't trying to express any viewpoint at all. Like the FCC's regulation of "obscene, indecent, and profane" broadcast programming, or prohibitions on loud speakers in public parks, section 230 is viewpoint-neutral, as it prohibits speech regardless of one's view on these matters.

On the other hand, the line between viewpoint-neutral and viewpoint-based regulations is "is not a precise one."[117] The Court has held that a statute is viewpoint-based if it "distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation."[118] In *Brunetti*, the Supreme Court found that the PTO's exclusion of "immoral or scandalous" trademarks from the trademark registration system did precisely that.

Following *Brunetti*, section 230 arguably forwards a "sense of propriety,"[119] and "distinguishes between two opposed sets of ideas": those types of speech considered so "objectionable" and so likely to 'provoke offense" in 1996 as to justify regulation in telecommunications media versus those types of ideas that were sufficiently acceptable that would not be considered regulable.

The strength of this argument rests on whether one thinks "regulable in 1996" speech is truly a discernible viewpoint in the same way that "immoral" or "scandalous" is. Given that very few people would even know what "regulable in 1996" encompasses, it likely refers to a "set of ideas" that is theoretical at best. This argument may simply point to the fuzziness of the viewpoint-based/viewpoint-neutral distinction rather than to a practical legal barrier.

Conclusion

Section 230 sets forth the immunity regime for internet content. Courts sometimes erroneously read section 230(c)(1), not section 230(c)(2), as immunizing content moderation decisions. And, similarly, courts ignore that section 230(f)(2) limits the immunity that the statute provides for content moderation. This misreading has expanded section 230 protections in ways that ignore the text and

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[117] Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 831 (1995).

[118] Iancu v. Brunetti, 139 S. Ct. 2294, 2300 (2019).

[119] *Id.* (internal quotation marks omitted).

congressional intent.

Identifying section 230(c)(2) as the source of liability protection raises constitutional concerns, particularly under an *ejusdem generis* reading. However, it is not clear that these concerns render the provision unconstitutional; and to the degree constitutional concerns are present, severability may offer the best solution.