

Regulation: Realities and Possibilities²⁸⁶

Sophia Reiss²⁸⁷

Modern communication technologies increasingly raise concern. This growing awareness prompts examination of the effectiveness of current regulation and consideration of possible changes. This article explores the possibility of using both previous American regulation and European regulation efforts as examples to frame improvements in communications governance. First, it evaluates the Fairness Doctrine and its role in regulation as part of the Federal Communications Commission (FCC) and the current Section 230 regulation. Next, the article reviews proposed amendments and alternative pathways for regulation before providing a recommendation based on these regulatory schemes.

I. Introduction

The Supreme Court heard two cases in early 2023 presenting questions of online speech regulation: *Gonzalez v. Google* and *Twitter v. Taamneh*.²⁸⁸ Both cases were brought by the families of American victims of the 2015 terrorist attacks in Paris. The families are suing the platforms for their role in allowing these terrorists to use their platforms in order to facilitate the attacks.²⁸⁹ These two cases reveal some of the

²⁸⁶ This article is adapted from an essay recognized for the 2023 Justice Louis D. Brandeis Essay Prize.

²⁸⁷ Brandeis University Graduate Class of 2023, Former *Editor-in-Chief* of the Brandeis University Law Journal.

²⁸⁸ Brian Fung, “Two Supreme Court Cases This Week Could Upend the Entire Internet | CNN Business,” CNN, February 20, 2023, <https://www.cnn.com/2023/02/20/tech/supreme-court-tech-platforms/index.html>.

²⁸⁹ “Twitter, Inc. v. Taamneh,” Oyez, <https://www.oyez.org/cases/2022/21-1496>.



profound harms that social media can facilitate and challenges the status quo of current American regulation of online platforms.

These cases illustrate how online hate and disinformation influence offline hate, violence, and distrust. The proliferation of social media platforms, especially the specialized platforms that appeal to those trafficking in conspiracies, allow people to fall deeper into the alternative reality of conspiracy theories, confirm their own implicit biases, and breed hate. Since social media platforms are run by private companies, where users are private individuals operating within a relationship with these companies, regulation is limited. This is particularly challenging in the United States given that current communications governance limits legal liability and public regulation.

Current communications governance heavily depends on the initial expectations of technology and communications growth potential at the outset of these new technologies' arrival on the marketplace. When the internet first began being marketed to the public, the U.S. government, specifically Congress, understood that innovation should be encouraged and could have positive, far-reaching implications. The unimaginable possibilities and opportunities of the internet promised the longed-for progress and growth. The internet connects people, inspires innovation, broadens access, and provides information. The focus of early legislation was to encourage this growth.

In considering new regulation, several tensions need to be balanced by legislators and regulators. The power and opportunity for change, growth, understanding, and constructive debate are fiercely protected by freedom of speech. There is no question that freedom of speech is a core value protecting, most centrally, political dissent.²⁹⁰ On the

²⁹⁰ *Whitney v. California* (1927); *Tinker v. Des Moines Independent School*



other hand, speech has the power and potential to cause emotional pain, physical violence, social alienation, and conflict. These emotional, physical, and social harms must be considered and balanced against the value of freedom of speech. Other harms exist as well, as speech and dissent can disrupt and even threaten governmental institutions. This online environment allows for us to have digital personas, versions of ourselves which exist online and are created from our digital actions and behavior. Beyond the offline harms that online platforms enable, digital personas and one's personal digital footprint can also be harmed.

One definition of the verb "balance," according to Merriam Webster, is "to bring into harmony or proportion" which speaks to a kind of equipoise and is the regulatory solution this article hopes to propose.²⁹¹ This is vital because the idea of balance helps to achieve "harmony." Through careful weighing of the before-mentioned tensions, regulation of new technologies should enable creativity, innovation, and positive change, while mitigating the potential for harm.

This article will propose a regulatory solution based on elements present in the Fairness Doctrine, Section 230, proposed amendments, consumer protection laws, and regulatory strategies in Europe like the GDPR. To do so, the article will first provide a background and history of each to delineate the components and precedence that can address the harms of social media that abound in our current digital climate. Upon this background, an explanation of a few potential regulatory responses that are currently being debated and explored will be offered. Finally, the paper will draw from the aforementioned regulations and responses to propose a new governance response which combines the benefits and best

District (1969)

²⁹¹ "Definition of BALANCE," February 22, 2023, <https://www.merriam-webster.com/dictionary/balance>.



techniques of each of the reviewed regulations and proposed approaches.

II. Background Regulations

A. Fairness Doctrine – Previous Regulation

First, the former regulation system of the Fairness Doctrine must be examined. The Fairness Doctrine was created by the Federal Communications Commission (FCC) in 1949 to regulate “the airwaves” as there was a “scarce supply” of stations that “were owned by the public, with TV and radio stations functioning as ‘public trustees.’”²⁹² The Fairness Doctrine lasted until its repeal by the FCC in 1987 and required broadcasters to present opposing views on important issues of public interest.²⁹³ The notion that broadcasting licenses serve the public interest derives from the existence of limited bandwidth and the FCC’s role in granting licenses with the public’s participation. The Fairness Doctrine’s requirement of a well-rounded and fair portrayal serves the public interest.²⁹⁴

²⁹² Tom Rosentiel, “Is the Fairness Doctrine Fair Game?,” *Pew Research Center* (blog), July 19, 2007, <https://www.pewresearch.org/2007/07/19/is-the-fairness-doctrine-fair-game>.

²⁹³ Dan MacGuill, “Did Ronald Reagan Pave the Way for Fox News?,” Snopes, January 26, 2018, <https://www.snopes.com/fact-check/ronald-reagan-fairness-doctrine/>; “Fairness Doctrine,” Ronald Reagan, <https://www.reaganlibrary.gov/archives/topic-guide/fairness-doctrine>; Dylan Matthews, “Everything You Need to Know about the Fairness Doctrine in One Post,” *Washington Post* (blog), August 23, 2011, https://www.washingtonpost.com/blogs/ezra-klein/post/everything-you-need-to-know-about-the-fairness-doctrine-in-one-post/2011/08/23/gIOAN8CXZJ_blog.html; Kathleen Ann Ruane, “Fairness Doctrine: History and Constitutional Issues.”

²⁹⁴ “Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969),” Justia Law, <https://supreme.justia.com/cases/federal/us/395/367/>.



The Doctrine specifically required “that every licensee devote a reasonable portion of broadcast time to the discussion and consideration of controversial issues of public importance.”²⁹⁵

The second component of the Doctrine specified “that in doing so, [the broadcaster must be] fair – that is, [the broadcaster] must affirmatively endeavor to make ... facilities available for the expression of contrasting viewpoints held by responsible elements with respect to controversial issues presented.”²⁹⁶ This required people on both sides not only to speak and express their opinions, but also to find the appropriate presenters to voice opposing viewpoints.²⁹⁷ While this may have enforced or enabled neutrality, or at least debate, it also could create false equivalencies, one of the concerns to be treated with caution for any discussions of reinstatement. The high efficacy appears clear throughout the Fairness Doctrine’s record and its continued support from the public and governmental institutions over the years until its removal. Regardless of its exact impact, the technique of incorporating fairness and balance into a doctrine where reasonable viewpoints must be presented provides a potential model for future regulation.

The Fairness Doctrine found support in Congress and the Supreme Court. The Supreme Court unanimously upheld the Fairness Doctrine due to its focus on the public interest in the 1969 case *Red Lion Broadcasting Co., Inc. v. Federal Communications Commission*.²⁹⁸ In its decision, “[t]he Court held that the FCC’s [F]airness [D]octrine regulations enhanced rather than infringed the freedoms of speech protected under

²⁹⁵ Ruane, “Fairness Doctrine: History and Constitutional Issues.”

²⁹⁶ Ruane, “Fairness Doctrine: History and Constitutional Issues.”

²⁹⁷ Ruane, “Fairness Doctrine: History and Constitutional Issues.”

²⁹⁸ Matthews, “Everything You Need to Know about the Fairness Doctrine in One Post”; “Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969).”



the First Amendment.”²⁹⁹ Further, they wrote that “the ‘public interest’ in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public.”³⁰⁰

In 1987, however, the Fairness Doctrine met its demise. This came about after the FCC decided that “the Fairness Doctrine was no longer necessary given the changes that had taken place in the media environment” and had failed to prove its efficacy.³⁰¹ While this may seem like definitive proof of its flaws, closer examination shows that may not be true. Additionally, the FCC’s statement about the Doctrine’s necessity can be questioned and the efficacy evaluation may have been biased and not thoroughly researched. The “1985 Fairness Report,” which the FCC relied on, was the first “empirical assessment as to the efficacy of this chosen regulatory mechanism to promote access by the public to the marketplace of ideas” and included public comment from many as part of its review process.³⁰² The report met criticism, including that it “lacked any systematic statistical analysis and relied too heavily on anecdotal examples by broadcasters.”³⁰³ Subsequent to this report, governance changes were implemented to improve data-gathering practices and the accuracy of regulatory mechanisms.³⁰⁴

²⁹⁹ “Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969).”

³⁰⁰ “Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969).”

³⁰¹ “Paradoxes of Media Policy Analysis: Implications for Public Interest Media Regulation - Document - Gale Academic OneFile Select,” https://go.gale.com/ps/i.do?p=EAIM&u=mmlin_m_brandeis&id=GALE%7CA191854511&v=2.1&it=r&ugroup=outside.

³⁰² “Paradoxes of Media Policy Analysis: Implications for Public Interest Media Regulation - Document - Gale Academic OneFile Select.”

³⁰³ “Paradoxes of Media Policy Analysis: Implications for Public Interest Media Regulation - Document - Gale Academic OneFile Select.”

³⁰⁴ “Paradoxes of Media Policy Analysis: Implications for Public Interest Media Regulation - Document - Gale Academic OneFile Select.”



B. Section 230 – Current Regulation

The next section of this paper centers on Section 230. First, this section will explore Section 230’s historical and legislative context. Second, the paper will examine the details of the law itself and Congress’ motivations for putting Section 230 in place. Third, the practical implications and impact of Section 230 will be evaluated in contrast to its development and textual priorities.

Section 230 came about through “[t]he Communications Decency Act of 1996 (CDA)” which “added Section 230 to the Communications Act of 1934, generally protecting online service providers from legal liability stemming from content created by the users of their services.”³⁰⁵ The law itself explains Congress’ original rationale for the law. Both its findings and policy objectives will be examined later in greater depth.³⁰⁶ Section 230 or “47 U.S.C. § 230” not only responded to the innovation of the internet, but attempted to resolve two prior conflicting cases.³⁰⁷

These cases, namely *Cubby, Inc. v. CompuServe, Inc.* and *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, both dealt with message board content and the question of whether platforms are “publishers” of this content.³⁰⁸ The first case, “*Cubby v. CompuServe* (1991),” featured the defendant, CompuServe, who maintained an information service which included special interest forms and found its way to court “[w]hen a columnist for one of the special-interest forums

³⁰⁵ Kathleen Ann Ruane, “How Broad A Shield? A Brief Overview of Section 230 of the Communications Decency Act” (Congressional Research Service, February 21, 2018).

³⁰⁶ “47 U.S. Code § 230 - Protection for Private Blocking and Screening of Offensive Material,” LII / Legal Information Institute, accessed March 25, 2023, <https://www.law.cornell.edu/uscode/text/47/230>.

³⁰⁷ “Section 230: Legislative History,” Electronic Frontier Foundation, September 18, 2012, <https://www.eff.org/issues/cda230/legislative-history>.

³⁰⁸ “Section 230.”



posted defamatory comments about a competitor, the competitor sued CompuServe for libel.”³⁰⁹ The U.S. District Court for the Southern District of New York, which heard the case, concluded that “CompuServe could not be held liable as the columnist’s distributor because CompuServe did not review any of the content on the forums before it was posted,” which meant they lacked “knowledge of the libel” and therefore “could not be held responsible for it.”³¹⁰

The Court wrote that “CompuServe’s CIS product is in essence an electronic, for profit library” which is “at the forefront of the information industry revolution,” and that allows individuals to have “instantaneous access to thousands of news publications across the world.”³¹¹ The Court continued that “CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so.”³¹²

The second case, *Stratton Oakmont Inc. v. Prodigy Servs. Co.*, happened four years after *CompuServe*, in 1995, and featured the New York Supreme Court with a differing opinion on online platforms’ responsibility.³¹³ The case involved Prodigy, “a web services company” that “hosted online bulletin boards.”³¹⁴ This case centered around actions Prodigy took, namely when “Prodigy moderated its online

³⁰⁹ Ashley Johnson and Daniel Castro, “Overview of Section 230: What It Is, Why It Was Created, and What It Has Achieved,” February 22, 2021, <https://itif.org/publications/2021/02/22/overview-section-230-what-it-why-it-was-created-and-what-it-has-achieved/>; “Section 230.”

³¹⁰ “Section 230.”; Castro, “Overview of Section 230.”

³¹¹ *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991), accessed March 25, 2023.

³¹² *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

³¹³ “Section 230.”

³¹⁴ “Section 230.”



message boards and deleted some messages for ‘offensiveness and ‘bad taste,’” which the Court found made Prodigy “akin to a publisher with responsibility for defamatory postings that made it onto the site.”³¹⁵ Given the multitude of posts on this platform, specifically “60,000 postings a day,” review of these for defamatory content would be quite a challenge.³¹⁶

The first case, *CompuServe*, appears to be a clearer and stronger application of precedents to a new technology. The Court’s comparison between the information service at issue in the case and a library presents one type of interwoven relationships and control within the online sphere, which frames the information service provider as a very hands-off and structural type of internet operator. The second case, *Stratton v. Prodigy*, dealing with a platform that actively moderated its content while still maintaining a large amount of content typical of internet services, would be responsible despite no clear legal precedent providing a background for this conclusion. This led to a conflict where one platform, CompuServe, would *not* be classified as a publisher, therefore void of any liability for the content on its platform, while another similar platform, Prodigy, *would* be classified as a publisher, leading them to be held liable and responsible for the content on its platform.

As a result, “Section 230 had two purposes: the first was to ‘encourage the unfettered and unregulated development of free speech on the internet,’ as one judge put it; the other was to allow online services to implement their own standards for policing content and provide for child safety.”³¹⁷ Section 230 consists of six sections.³¹⁸ Section 230 starts with Congress’ findings and the legislators framing of the context

³¹⁵ “Section 230.”

³¹⁶ “Section 230.”

³¹⁷ “Section 230.”

³¹⁸ “47 U.S. Code § 230 - Protection for Private Blocking and Screening of Offensive Material.”



which inspired the law's creation.³¹⁹ Congress explained the need for Section 230 as arising out of “[t]he rapidly developing array of Internet and other interactive computer services” which “represent an extraordinary advance in the availability of educational and informational resources to our citizens.”³²⁰ Congress explained that the goals of Section 230 were “to promote the continued development of the internet and other interactive computer services and interactive media...to preserve the vibrant and competitive free market... [and] to encourage the development of technologies that maximize user control over information.”³²¹

Through Section 230(c), Congress granted “Protection for ‘Good Samaritan’ Blocking and Screening of Offensive Material,” meaning that anyone using the internet sphere would be treated automatically as being well-intentioned or as “Good Samaritans.”³²² Good Samaritan laws rely on the concept of good public policy as being that which “limit[s] liability for those who voluntarily perform care and rescue in emergency situations.”³²³ The utilization of this principle in Section 230 exemplifies its wider application, encompassing situations where limited liability is enforced. Section 230 and the protections under the “Good Samaritan” header include “[n]o provider or user of an interactive computer service shall be held liable” given their “good faith to restrict access” to content.³²⁴ Further, “the good Samaritan law provides protection from claims of negligence for those who provide

³¹⁹ “47 U.S. Code § 230 - Protection for Private Blocking and Screening of Offensive Material.”

³²⁰ “47 U.S. Code § 230.”

³²¹ “47 U.S. Code § 230.”

³²² “47 U.S. Code § 230.”

³²³ Brian West and Matthew Varacallo, “Good Samaritan Laws,” in StatPearls (Treasure Island (FL): StatPearls Publishing, 2023), <http://www.ncbi.nlm.nih.gov/books/NBK542176/>.

³²⁴ “47 U.S. Code § 230 - Protection for Private Blocking and Screening of Offensive Material.”



care without expectation of payment,” which provides an interesting contradiction when applied to Section 230’s focus on “interactive computer service” providers and “information content provider[s],” who are monetizing their roles and actions.³²⁵ These providers are not considered “Good Samaritans.” Despite this inherent contradiction, the liability shield within Section 230(c)(1) removes these companies from liability “as publisher or speaker.”³²⁶

Section 230 continues in (c)(2) to state that “[n]o provider or user of an interactive computer service shall be held liable on account of” their actions taken either, “to restrict access to...material... whether or not such material is constitutionally protected...[or]...to enable or make available to information content providers.”³²⁷ The first part “means online services are not liable for defamatory or otherwise unlawful content their users post.”³²⁸ In contrast, Section 230(c)(2) “protects online services from liability for engaging in content moderation and enforcing their online standards” specifically for actions “taken in good faith.”³²⁹

Section 230(d) explains that providers should “notify such customers that parental control protections... [exist and] provide the customer with access to information identifying current providers of such protections.”³³⁰ This appears to indicate the legislator’s awareness that limited liability would result in children being left vulnerable absent these extra controls. Section 230 has minimal effect on other laws.³³¹ The definitions provide insight into how much the internet has

³²⁵ West and Varacallo, “Good Samaritan Laws.”; “47 U.S. Code § 230 - Protection for Private Blocking and Screening of Offensive Material.”

³²⁶ “47 U.S. Code § 230.”

³²⁷ “47 U.S. Code § 230.”

³²⁸ Johnson and Castro, “Overview of Section 230.”

³²⁹ Johnson and Castro, “Overview of Section 230.”

³³⁰ “47 U.S. Code § 230 - Protection for Private Blocking and Screening of Offensive Material.”

³³¹ “47 U.S. Code § 230.”



developed since Section 230 was implemented. Section 230(f) defines the “[i]nternet,” “interactive computer service,” “information content provider,” and “access software provider.”³³² The way the “interactive computer service” is defined is through a comparison to “services offered by libraries or educational institutions.”³³³ By continuing to uphold that image, serving in a similar way to libraries, allows these services to remain the subject of the limited liability that Section 230 provides.³³⁴

Section 230 also incorporates the way courts interpret and apply the law and its “[l]iability [s]hield.”³³⁵ Section 230 is applied broadly due to the interactive computer service definition and the information content provider definitions.³³⁶ Section 230 defines “interactive computer service” as “any information service, system or access software provider that provides or enables computer access by multiple users to a computer server.”³³⁷ First, the interactive computer service definition allows for the most broad liability shield which “[r]evolving courts have interpreted [the liability shield] to cover many entities operating online, including broadband Internet access service providers (e.g., Verizon FIOS and Comcast Xfinity), Internet hosting companies (e.g., DreamHost and GoDaddy), search engines (e.g., Google and Yahoo!), online message boards, and many varieties of online platforms.”³³⁸

³³² “47 U.S. Code § 230.”

³³³ “47 U.S. Code § 230.”

³³⁴ “47 U.S. Code § 230.”

³³⁵ Ruane, “How Broad A Shield? A Brief Overview of Section 230 of the Communications Decency Act.”

³³⁶ Ruane.

³³⁷ “47 U.S. Code § 230 - Protection for Private Blocking and Screening of Offensive Material.”

³³⁸ Ruane, “How Broad A Shield? A Brief Overview of Section 230 of the Communications Decency Act.”



The second definition in its application covers “when [providers] disseminate others’ allegedly unlawful content, but not when they are wholly or partially responsible for the production of such content,” or when they are acting as an “information content provider.”³³⁹ As a result, it allowed business models to proliferate which all “rely on a wide variety of user generated content” including making possible “user reviews and comments” through “the liability protection offered by Section 230.”³⁴⁰ So far the courts presented with this question have decided that editing content does not change the content enough to remove the platforms’ protection under Section 230’s liability shield.³⁴¹ The court’s choice to interpret editing compared to other actions of the platforms helps frame how Section 230 categorizes these online services as distinct from publishers or speakers.³⁴² Section 230 provides a liability shield for “traditional publishing functions” and editorial choices including publishing content and withdrawing such content.³⁴³

This aspect of Section 230 protects platforms even when they remove content, which enables “those same websites to filter out violent, or graphic content, harassment, misinformation, hate speech, and other objectionable content, thereby creating a better user experience.”³⁴⁴ While this appears to obligate platforms or services to keep users safe, the other protection specifically from liability for the third-party content means that there is no obligation to filter content.³⁴⁵ The obligation does not necessarily create the protective

³³⁹ Ruane.

³⁴⁰ Johnson and Castro, “Overview of Section 230.”

³⁴¹ Ruane, “How Broad a Shield? A Brief Overview of Section 230 of the Communications Decency Act.”

³⁴² Ruane.

³⁴³ Ruane, “How Broad a Shield? A Brief Overview of Section 230 of the Communications Decency Act.”

³⁴⁴ Johnson and Castro, “Overview of Section 230.”

³⁴⁵ Johnson and Castro, “Overview of Section 230.”



environment it appears to and as a result, judicial interpretation makes clear Section 230's exact scope including the extent and limits of its protections. As applied, Section 230 does not protect online platforms if they develop or induce illegal content, selectively repost content, breach contracts, fail to act in good faith, or fail to warn users of illegal activity hosted on their platform.³⁴⁶

Further judicial interpretation has pointed to areas where Section 230 is unclear, particularly in the face of a vast and new technology environment.³⁴⁷ This includes cases where algorithmic sorting was examined by the courts as it appears to be an unclear issue of immunity where algorithmic filters content particularly on social media platforms and searches.³⁴⁸ A District of Columbia Circuit Court held that a "search engine's tools did 'not distinguish' between different types of user content" and instead simply "translated all types of information, both legitimate and scam information, in the same manner."³⁴⁹

Overall, the practical implications and Section 230's legal interpretations result in an unregulated online environment where platforms maintain user agreements that hint to filters and where most content can be shared without repercussions. This environment raises questions about objectionable content that remains on their site, algorithms that spread this content, and the general growth and control of Big Tech. These questions and investigations are complex because Section 230 assumes that online actors act in "good faith" and

³⁴⁶ Daniel Castro and Ashley Johnson, "The Exceptions to Section 230: How Have the Courts Interpreted Section 230?," February 22, 2021, <https://itif.org/publications/2021/02/22/exceptions-section-230-how-have-courts-interpreted-section-230/>.

³⁴⁷ Valerie C Brannon and Eric N Holmes, "Section 230: An Overview," April 7, 2021, 58.

³⁴⁸ Brannon and Holmes, "Section 230: An Overview."

³⁴⁹ Brannon and Holmes, "Section 230: An Overview."



fully place the obligation for filtering content on the companies with no examination of how they do it or what content leaves and what content remains on the platforms.

Further, algorithms which are central to many platforms' business models are not addressed by Section 230. Social media algorithms "can be defined as technical means of sorting posts based on relevancy" in which the content that the user sees is prioritized including, at times, based on usage of the platform.³⁵⁰ The way algorithms curate user experiences would most likely fall into "editorial decisions," which platforms are expected to make in "good faith," but the public often has limited information or awareness of how the algorithms work and change their experiences.

This leaves people to deal with the consequences of the curated content without recourse, as the algorithms are made and run by the platforms who can hide behind Section 230's "liability shield." Lastly, the way Big Tech, the largest companies dominating the technology marketplace, grew and gained control over the online space was encouraged and enabled by Section 230, but the consequences of their actions and algorithms and these companies' relative power compared to that of users, regulators, and lawmakers may have been unforeseen. Indeed, some even argue that the debate over Section 230 has become a substitute for larger debates around speech and discussions about how a free marketplace of ideas can really function.³⁵¹ Further, these questions relate to who should be the ones' deciding how this marketplace should

³⁵⁰ Maria Alessandra Golino, "Algorithms in Social Media Platforms," April 24, 2021,

<https://www.internetjustsociety.org/algorithms-in-social-media-platforms>.

³⁵¹ Ovide, Shira. "What's Behind the Fight Over Section 230." *The New York Times*, March 25, 2021, sec. Technology.

<https://www.nytimes.com/2021/03/25/technology/section-230-explainer.html>.



work, what happens in response to any harms that ensue, and who should be responsible.³⁵²

III. Potential Responses

A. Proposed Changes to Section 230 – Potential Response 1

As a result of this unregulated technology and media environment, proposals abound for how to amend Section 230 to fix its flaws to achieve its policy objectives. Some proposed amendments make the liability protection conditional, others add “more exceptions” to the liability protection, in addition to more drastic proposals “to repeal Section 230 entirely,” or “more incremental rollbacks.”³⁵³ Internet companies joined the flurry of reform proposals with ideas of their own.³⁵⁴ The rationale for these reforms often goes along the lines of the need to regulate the vast power of big tech especially with regard to content removal and the impacts of algorithms on young people.³⁵⁵ These suggested reforms run counter to Section 230 proponents, who argue for the law’s preservation as “its myriad benefits outweigh its few flaws,” especially given the law’s major role in creating the online world.³⁵⁶

One proposal is the Platform Accountability and Consumer Transparency Act (PACT Act) which removes immunity for illegal content, and outlines procedures for

³⁵² Ovide, Shira. “What’s Behind the Fight Over Section 230.”

³⁵³ Ovide, “What’s Behind the Fight Over Section 230.”; Valerie C Brannon and Eric N Holmes, “Section 230: An Overview,” April 7, 2021, 58.

³⁵⁴ Ovide, “What’s Behind the Fight Over Section 230.”; Brannon and Holmes, “Section 230: An Overview.”

³⁵⁵ Brannon and Holmes, “Section 230: An Overview.”

³⁵⁶ Ashley Johnson and Daniel Castro, “Proposals to Reform Section 230,” February 22, 2021,

<https://itif.org/publications/2021/02/22/proposals-reform-section-230/>.



content removal.³⁵⁷ This proposal faced problems as it conflicts with the Digital Millennium Copyright Act (DMCA) that addresses copyright law violations where the law “provides a ‘safe harbor’ to cover providers who remove content after being notified that the content may” be in violation.³⁵⁸ The PACT Act may also be changing since “both the DMCA and the e-Commerce Directive [(a similar EU law)] have also been subject to debate and proposals for reform.”³⁵⁹ Another proposal is the “Stopping Big Tech’s Censorship Act” in which “providers and users may only claim immunity under Section 230(c)(1) if a service ‘takes reasonable steps to prevent or address the unlawful use’ of the service’ or publication of such illegal content.”³⁶⁰

The CASE-IT Act also removes platform immunity, but opts for a different approach.³⁶¹ The CASE-IT Act has “providers and users lose Section 230(c)(1) immunity for a year if they engage in certain activities, including permitting harmful content to be distributed to minors, if the harmful content “‘is made readily accessible to minors’” without the existence or use of systems to prevent this from happening.³⁶² Another similar proposal is “the Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms (SAFE TECH) ACT,” which would not provide immunity for platforms’ “ads or paid content, civil rights law, stalking or harassment laws, wrongful death actions, or human rights violations abroad” and failures to take down content in response to a court order.³⁶³ This bipartisan proposal is supported by advocacy groups including the Anti-Defamation

³⁵⁷ Brannon and Holmes, “Section 230: An Overview.”

³⁵⁸ Brannon and Holmes, “Section 230: An Overview.”

³⁵⁹ Brannon and Holmes, “Section 230: An Overview.”

³⁶⁰ Brannon and Holmes, “Section 230: An Overview.”

³⁶¹ Brannon and Holmes, “Section 230: An Overview.”

³⁶² Brannon and Holmes, “Section 230: An Overview.”

³⁶³ Johnson and Castro, “Proposals to Reform Section 230.”



League (ADL) and Muslim Advocates.³⁶⁴ Each of these content and activity carve-outs risk “over-enforcement” as they “require online services to determine what is legal or illegal,” and would likely lead them to remove grey area “to avoid liability.”³⁶⁵ This already took place in response to a similar carve-out for sex trafficking that passed in 2018.³⁶⁶ The over-enforcement resulted in a substantial share of material being removed that had no connection to sex trafficking harms.³⁶⁷ However, too many exceptions to Section 230 would, in effect, repeal the law entirely.³⁶⁸ Adding a multitude of exceptions to the liability shield would not only affect bad actors benefiting from illegal content, but platforms genuinely trying to prevent and remove illegal content.³⁶⁹

The Ending Support for Internet Censorship Act would require companies of a certain size, or with a particular level of revenue, “to prove to the Federal Trade Commission every two years that their algorithms and content moderation practices are politically neutral in order to receive Section 230 liability

³⁶⁴ Chris Riley and David Morar, “Legislative Efforts and Policy Frameworks within the Section 230 Debate,” *Brookings* (blog), September 21, 2021, <https://www.brookings.edu/techstream/legislative-efforts-and-policy-frames-within-the-section-230-debate/>; “Muslim Advocates Applauds New Bill to Enact Reforms to Section 230,” Muslim Advocates, February 5, 2021, <https://muslimadvocates.org/2021/02/muslim-advocates-applauds-new-bill-adding-reforms-to-section-230/>; “ADL Supports Reforming Section 230 of the Communications Decency Act to Hold Tech Companies Accountable, Prioritize Users and Protect Civil Rights | ADL,” accessed April 6, 2023, <https://www.adl.org/resources/press-release/adl-supports-reforming-section-230-communications-decency-act-hold-tech>.

³⁶⁵ Johnson and Castro, “Proposals to Reform Section 230.”

³⁶⁶ Johnson and Castro, “Proposals to Reform Section 230.”

³⁶⁷ Johnson and Castro, “Proposals to Reform Section 230.”

³⁶⁸ Johnson and Castro, “Proposals to Reform Section 230.”

³⁶⁹ Johnson and Castro, “Proposals to Reform Section 230.”



protection.”³⁷⁰ This is most clearly akin to the Fairness Doctrine given its emphasis on balanced presentation.³⁷¹ Another proposal focuses on algorithms by limiting federal immunity from liability for technology companies when their platform’s algorithms recommend third party content that “cause physical or emotional injury.”³⁷² Other proposals encourage the creation of “[b]ehavioral [s]tandards” for “sufficiently responsible behavior and establish enforcement mechanisms that evaluate compliance (while navigating First Amendment limits on government restriction of corporate speech).”³⁷³ This includes the Online Freedom and Viewpoint Diversity Act, the EARN IT Act, and a proposal by Mark Zuckerberg.³⁷⁴

Lastly, repeals of Section 230 are proposed to enforce accountability through liability and remove the protections of early innovations as it is no longer necessary to protect the early trial-and-error period of these companies. While there may be a concern that without Section 230 free speech and exchanges of ideas online would be restricted, government action and restrictions would still be limited by the First Amendment.³⁷⁵ Further, the First Amendment would provide background protections for speakers and publishers, like those offline, while there would be less consistent and vast immunity protections for the platforms.³⁷⁶

³⁷⁰ Johnson and Castro, “Proposals to Reform Section 230.”

³⁷¹ Johnson and Castro, “Proposals to Reform Section 230.”

³⁷² “H.R.5596 - 117th Congress (2021-2022): Justice Against Malicious Algorithms Act of 2021.” *Congress.gov*, Library of Congress, 18 October 2021, <https://www.congress.gov/bill/117th-congress/house-bill/5596>.

³⁷³ Riley and Morar, “Legislative Efforts and Policy Frameworks within the Section 230 Debate.”

³⁷⁴ Riley and Morar, “Legislative Efforts and Policy Frameworks within the Section 230 Debate.”

³⁷⁵ Brannon and Holmes, “Section 230: An Overview.”

³⁷⁶ Brannon and Holmes, “Section 230: An Overview.”



B. Consumer Protection Laws – Potential Response 2

Although Section 230 may appear as the only legal avenue through which platform regulation and the conversations around it is possible, there are other legal avenues through which online speech could be regulated to comply and fulfill the high expectations that these technology companies regularly set. For instance, these goals can be achieved through consumer protection laws; specifically, laws that prohibit Unfair, Deceptive Acts and Practices (UDAPS). Such laws particularly focus on upholding the public interest as the core expectation behind these companies actions and treatment of their users.

In addition to overseeing antitrust law, the Federal Trade Commission (FTC) monitors consumer protection violations.³⁷⁷ While “Section 5 does not define ‘unfair or deceptive acts or practices’” it does state that, “a practice is not ‘unfair’ unless it ‘causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.’”³⁷⁸ Beyond the federal law and its enforcement through federal agencies, “[s]tates have crafted their own consumer protection laws based on a handful of model acts (including the FTC Act)” which aim to protect consumers from unfair and deceptive acts and practices.³⁷⁹ These entities are all able to “bring similar lawsuits alleging

³⁷⁷ “Consumer Protection Laws,” LII / Legal Information Institute, accessed April 10, 2023,

https://www.law.cornell.edu/wex/consumer_protection_laws.

³⁷⁸ Eric N. Holmes, “Unfair or Deceptive Acts or Practices (UDAP) Enforcement Authority Under the Federal Trade Commission Act” (Congressional Research Service, November 4, 2022),

<https://crsreports.congress.gov/product/pdf/IF/IF12244>.

³⁷⁹ Canzona, “I’ll Know It When I See It.”



UDAP-based violations” to act in the public interest, as well as consumers or advocacy groups.³⁸⁰

In relation to social media regulation, consumer protection laws like UDAP provide an avenue for the public interest to be protected, given the special role these technology companies hold within society. As Jack M Balkin, Knight Professor of Constitutional Law and the First Amendment at Yale Law School, notes, “[s]ocial media companies and search engines have social and moral obligations to the public” that arise out of their role in society.³⁸¹ These companies often voluntarily categorize themselves as places “to promote public-spirited goals,” and therefore should “act according to public-regarding, professional norms.”³⁸² Given that their innovations often revolve around providing a space for positive developments like greater and stronger interconnection, access, and creativity; these companies, like other technology companies, provide a useful service to society.

When these companies choose to frame themselves in this way, act to provide such services, and take on such obligations as those Balkin discusses, they become legally obligated to hold themselves accountable to their own self-portrayal. The public should be able to expect that these companies are being honest with users and the public. The UDAPs do just that, holding the companies accountable to their public portrayal by prohibiting false promises and unfair and deceptive behavior. Social media companies illustrate this as they often declare in Congress how safe their platforms are and how they enforce their user agreements, while users and

³⁸⁰ Holmes, “Unfair or Deceptive Acts or Practices (UDAP) Enforcement Authority Under the Federal Trade Commission Act.”

³⁸¹ Balkin, Jack M., Free Speech is a Triangle (May 28, 2018). Columbia Law Review, 2018, Forthcoming, Yale Law School, Public Law Research Paper No. 640, <https://ssrn.com/abstract=3186205>

³⁸² Balkin, “Free Speech Is a Triangle.”



advocacy groups find that they still face the same unsafe behavior banned by these user agreements.

The FTC and State Attorneys General enforce consumer protection laws with regard to privacy and “[r]especting [c]onsumer [c]hoice” with respect to “[d]o-not-track settings on browsers which prevent advertisers from tracking consumers’ online activities.”³⁸³ Consumer protection laws and UDAPs, in particular, already protect consumers from financial injury, but the vital question here is whether courts will see these laws as fit to protect consumers from online companies.

In 2021, Muslim Advocates, a Muslim civil rights advocacy group, sued Facebook and Facebook executives for deception over their actions relating to the content on the platform.³⁸⁴ The lawsuit, using the D.C. Consumer Protection Procedures Act, or the DC CPPA, “allege[d] that Facebook ha[d] exaggerated how aggressively it remove[d] hate speech” in violation of the law.³⁸⁵ Facebook’s actions specifically violated the DC CPPA, as it states that “it is illegal for a company to make material misrepresentations about a good or service in the District of Columbia.” Muslim Advocates asked for Facebook to either “[s]top lying, or have your actions conform to your statements.”³⁸⁶ Importantly, Muslim Advocates’ assertions centered on the statements of Facebook executives and the user agreement’s community standards that frame users’ expectations of safety on their platform. While

³⁸³ Danielle Keats Citron, “The Privacy Policymaking of State Attorneys General,” *Notre Dame Law Review* 92, no. 2 (December 2016), https://go.gale.com/ps/i.do?p=EAIM&u=mlin_m_brandeis&id=GALE%7CA484155772&v=2.1&it=r&ugroup=outside.

³⁸⁴ Bobby Allyn, “Muslim Advocates Has Filed A Lawsuit Against Facebook,” *NPR*, April 8, 2021, sec. Religion, <https://www.npr.org/2021/04/08/985475645/muslim-advocates-has-filed-a-lawsuit-against-facebook>.

³⁸⁵ Allyn, “Muslim Advocates Has Filed A Lawsuit Against Facebook.”

³⁸⁶ Allyn, “Muslim Advocates Has Filed A Lawsuit Against Facebook.”



this method of using consumer protection laws is still being tested, given its efficacy and broad application elsewhere, it could provide a model for accountability and necessary enforcement to counteract failures to uphold one's duty to serve the public interest.

C. European Union's Solutions – Potential Response 3

In this section, the paper turns to the European Union because it stands out as a model given the promise shown in their active regulation of Big Tech with far-ranging impacts and strong popularity among the public.³⁸⁷ These impacts are apparent since when those companies are fined, they often improve their behavior and apply the changes required by the EU's regulation worldwide for ease of operation.³⁸⁸ The popularity of these regulations, which will be explained in this paragraph, derives from how the regulatory laws themselves are written, which often give citizens more information and control with regard to their own data and experience.³⁸⁹

The European Union seeks to meet the needs that arise out of these new technologies through a focus on privacy and data protection. The laws and regulation of privacy online, specifically data privacy protections, is known as the General Data Protection Regulation (GDPR). The GDPR went into effect in 2018, after passing in 2016, in order to give companies and countries time to prepare for this robust legislation.³⁹⁰ The GDPR grew out of the right to privacy

³⁸⁷ Silvia Amaro, "How Europe Became the World's Top Tech Regulator," CNBC, March 25, 2021, <https://www.cnbc.com/2021/03/25/big-tech-how-europe-became-the-worlds-top-regulator.html>.

³⁸⁸ Amaro, "How Europe Became the World's Top Tech Regulator."

³⁸⁹ Amaro, "How Europe Became the World's Top Tech Regulator."

³⁹⁰ "Data Protection in the EU," June 4, 2021, <https://commission.europa.eu/law/law-topic/data-protection/data-protection->



codified in the 1950 European Convention on Human Rights which states, “Everyone has the right to respect for his private and family life, his home and his correspondence.”³⁹¹

The GDPR is one of a series of new technology governance laws in which the EU worked to protect one’s right to privacy within legislation.³⁹² The way the GDPR functions with its definitions, and specification of both the rights and requirements for companies, enables a clear and comprehensive application. The burden of proof is placed on the company fulfilling GDPR requirements.³⁹³ Further, both national institutions within the European Union member states and international institutions exist that help enforce the regulations of the GDPR.³⁹⁴ One example of these international institutions is the European Data Protection Board (EDPB) which is an independent regulatory body charged with maintaining “the consistent application of data protection rules throughout the European Union” established by the GDPR and that includes representatives of the national entities, an EU supervisor, and non-voting involvement of the European Commission.³⁹⁵

Since the GDPR, the European Union has continued to focus on technology and is creating “[t]he Digital Services

[eu_en](#); “Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA Relevance),” 119 OJ L § (2016),

<http://data.europa.eu/eli/reg/2016/679/oj/eng>; “What Is GDPR, the EU’s New Data Protection Law?,” GDPR.eu, November 7, 2018,

<https://gdpr.eu/what-is-gdpr/>.

³⁹¹ “What Is GDPR, the EU’s New Data Protection Law?”

³⁹² “What Is GDPR, the EU’s New Data Protection Law?”

³⁹³ “What Is GDPR, the EU’s New Data Protection Law?”

³⁹⁴ “Data Protection in the EU,” June 4, 2021,

https://commission.europa.eu/law/law-topic/data-protection/data-protection-eu_en.

³⁹⁵ “Data Protection in the EU.”



package” which includes both the “Digital Services Act and Digital Markets Act.”³⁹⁶ In addition to this package, more regulation is being worked on to govern artificial intelligence.³⁹⁷ The European Commission states that “[t]he Digital Services Act and Digital Markets Act aim to create a safer digital space where the fundamental rights of users are protected and to establish a level playing field for businesses.”³⁹⁸ It appears to focus on the same kinds of companies as Section 230, with a similar overarching goal.

This prompts the question: what, if anything, is really different between Section 230 and the EU’s efforts? Perhaps the European Union learned from the mistakes of Section 230. Their laws came later, allowing for a stronger understanding of the technologies at play.³⁹⁹ Following their adoption in July 2022, these EU laws began taking effect by 17 February 2023, when the regulatory authorities categorized services into a size and type category that will frame the requirements that they need to meet.⁴⁰⁰ These newest pieces of regulation will be fully in place by 2024 and also include several checkpoints that technology companies need to meet along the way to ensure full compliance and incorporate accountability mechanisms.⁴⁰¹

³⁹⁶ “The Digital Services Act Package | Shaping Europe’s Digital Future,” February 9, 2023, <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>;

Amaro, “How Europe Became the World’s Top Tech Regulator.”

³⁹⁷ “The Digital Services Act Package | Shaping Europe’s Digital Future,” February 9, 2023,

<https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>;

Amaro, “How Europe Became the World’s Top Tech Regulator.”

³⁹⁸ “The Digital Services Act Package | Shaping Europe’s Digital Future,” February 9, 2023,

<https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>.

³⁹⁹ “The Digital Services Act Package | Shaping Europe’s Digital Future.”

⁴⁰⁰ “The Digital Services Act Package | Shaping Europe’s Digital Future.”

⁴⁰¹ “The Digital Services Act Package | Shaping Europe’s Digital Future.”



The Digital Services Act “proposed large fines for internet platforms like Facebook, Twitter [(now known as X)] and YouTube if they do not restrict the spread of certain illegal content like hate speech.”⁴⁰² This is similar to the GDPR’s large fines, which often make a big splash in the news.⁴⁰³ Widely, “GDPR fines are used to fund public services,” a model that would likely be replicated with these newer regulations.⁴⁰⁴ These fines, while quite substantial, are applied taking into account the companies’ size and offense so as to remain proportional.⁴⁰⁵ For the GDPR, “[t]here are two tiers of penalties which max out at \$20 million or 4% of global revenue (whichever is higher),” as well as enabling those harmed “to seek compensation for damages.”⁴⁰⁶ Further, composition, explanation, and implementation of these regulations takes into account all of the players involved: individuals, the technology companies, business users, and society.⁴⁰⁷ In these regulations, the EU often requires compliance to be built into the structure of companies. For example, the GDPR outlines implementation of data security training, specifies the responsibilities of data protection within

⁴⁰² Adam Satariano, “Big Fines and Strict Rules Unveiled Against ‘Big Tech’ in Europe,” *The New York Times*, December 15, 2020, sec. Technology, <https://www.nytimes.com/2020/12/15/technology/big-tech-regulation-europe.html>.

⁴⁰³ “Three Years of GDPR: The Biggest Fines so Far,” *BBC News*, May 24, 2021, sec. Technology, <https://www.bbc.com/news/technology-57011639>.

⁴⁰⁴ “Three Years of GDPR.”

⁴⁰⁵ “What Is GDPR, the EU’s New Data Protection Law?”

⁴⁰⁶ “What Is GDPR, the EU’s New Data Protection Law?”

⁴⁰⁷ “The Digital Services Act: Ensuring a Safe and Accountable Online Environment,” accessed April 13, 2023, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en.



teams, and details Data Protection Officer requirements for certain organizations.⁴⁰⁸

These regulations are met with what Dessislava Savova describes as ““a real willingness and wide political support in the EU to set the highest global standards when it comes to tech regulations.””⁴⁰⁹ She further notes that the Digital Services ““package will be a real game changer”” as “[i]t will create a single regulatory framework and will set up a foundation of a strong cooperation and a new governance structure in the EU, with tangible enforcement mechanisms and important sanctions.””⁴¹⁰ Further, the New York Times notes that these regulations, along with some national ones, “helped reinforce Europe as home to some of the world’s toughest policies toward the technology industry.”⁴¹¹

IV. New Plan Inspired by This History – This Paper’s

Solution

This section will present the pros and cons of each of the previously discussed regulations and how they could be combined in such a way that improves upon these regulatory schemes. First, this section will outline the positives of each regulatory method; second, it will address their limitations; third, it will offer a multipronged recommendation.

⁴⁰⁸ “What Is GDPR, the EU’s New Data Protection Law?”

⁴⁰⁹ Amaro, “How Europe Became the World’s Top Tech Regulator.”

⁴¹⁰ Amaro, “How Europe Became the World’s Top Tech Regulator.”

⁴¹¹ Satariano, “Big Fines and Strict Rules Unveiled Against ‘Big Tech’ in Europe.”



A. Favorable Aspects of these Regulations

The Fairness Doctrine proved effective at instilling balance in regulatory schemes by encouraging technological innovation while safeguarding the public's interest in being informed on issues of public concern and safety. Broadcast stations developed within the Fairness Doctrine's regulatory realm introduced and popularized these new technologies. At the same time, the Supreme Court endorsed the Fairness Doctrine's role in promoting free speech and an informed public.

Section 230 attempted to balance and incorporate similar interests through a different mechanism. Section 230 used an almost absolute liability shield that enabled online platforms and services to develop and grow tremendously. This enabled technology companies to create different strategies and approaches to content on their platforms, including algorithms. The Section 230 reforms present promising solutions. Consumer protection laws prove effective in other markets as they prevent misrepresentation and unfair treatment of consumers. The European Union's solutions promote accountability through massive fines and illustrate a strong protection-based approach.

B. Limitations of These Regulations

The Fairness Doctrine lacked enough meaningful buy-in from broadcasters as well as clear methods to maintain accountability as a regulation long-term because it became difficult to evaluate or prove its efficacy. Section 230 failed at maintaining balance because the interpretation of the liability shield prevented technology companies from being held accountable. Both the Section 230 reforms and the consumer protection laws remain relatively untested within the online



environment and technology companies at large. There are many Section 230 reforms proposed and many, while framed similarly, promote vastly different approaches. Despite some gaining momentum recently, it is unclear when and how they would be applied.

The European Union's solutions build more regulatory structures and focus on privacy, which distinguishes it from American regulations. Further, the strict protection of freedom of speech existing in the United States is unparalleled elsewhere, including in the EU, so the EU's solutions may not fit with American free speech absolutism. Also, there may be concerns amongst United States legislators about stopping the growth of technology companies through strict regulation.

C. The Outlined Recommendation

From this background, the new proposal is one which welcomes regulation not as a hindrance to growth, innovation, and freedom, but as something that enables and protects it. An informed public's access to information is no longer confined solely to news media. Thus, regulations regarding who is informing the public and how they are being informed must expand its range to include the context of online platforms. The standard should be elevated from a basic level of protecting the ability to hear both sides of a matter *to* consumers being informed about their privacy, their safety, and the accountability of the platforms they are on.

Strong understandings of technology companies and how their products work must be incorporated into the background of the new proposed regulation. The Fairness Doctrine lacked this element as it failed to understand the practical approaches it encouraged broadcasters to take and the challenges that came with that approach. There must be a careful understanding of the interests, innerworkings, and



particular context of the technology companies to avoid pushback from the companies. Following the Fairness Doctrine's balanced approach to speech, new regulation should promote free speech through providing content-neutral regulation and not tell companies what to regulate, but how to regulate content: evenly and fairly.

Parts of the regulations mentioned above fit this proposed framework. For instance, one of Section 230's proposed reforms, the SAFE TECH Act, illustrates how comprehension of technology companies and true accountability can be built into an American framework. Simply copying the effective methods of the European Union's regulation would not be ideal as the American context is just that: American. This distinction requires understanding and incorporation of respect for American ideals, including a broader protection for freedom of speech and the promotion of innovation. The EU's privacy law, the GDPR, should be incorporated to a certain extent, as we generally lack privacy laws and data protection. This is already starting in California, but beyond incorporating the GDPR and other EU laws, our approaches could be inspired by theirs. Our regulations could be more effective following the multipronged approach found in the European Union's regulations where rights are defined, expectations are outlined, compliance is formalized, compliance guidelines are clear, and meaningful fines are incorporated.

Together, the history and potential future of technology regulation show promise. Regulation promoting both the public interest in tandem with encouraging innovation has existed previously and continues to exist. Understanding the public interest, policy concerns, new technology, historical regulation, business impact, and the innovation and online environments is crucial to a successful and balanced regulatory approach.



Bibliography

- “ADL Supports Reforming Section 230 of the Communications Decency Act to Hold Tech Companies Accountable, Prioritize Users and Protect Civil Rights | ADL.” Accessed March 27, 2023.
<https://www.adl.org/resources/press-release/adl-supports-reforming-section-230-communications-decency-act-hold-tech>.
- Allyn, Bobby. “Muslim Advocates Has Filed A Lawsuit Against Facebook.” *NPR*, April 8, 2021, sec. Religion.
<https://www.npr.org/2021/04/08/985475645/muslim-advocates-has-filed-a-lawsuit-against-facebook>.
- Amaro, Silvia. “How Europe Became the World’s Top Tech Regulator.” *CNBC*, March 25, 2021.
<https://www.cnn.com/2021/03/25/big-tech-how-europe-became-the-worlds-top-regulator.html>.
- Anand, Meghan, Kiran Jeevanjee, Daniel Johnson, Quinta Jurecic, Brian Lim, Irene Ly, Matt Perault, et al. “All the Ways Congress Wants to Change Section 230.” *Slate*, March 23, 2021.
<https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html>.
- Balkin, Jack M., *Free Speech is a Triangle* (May 28, 2018). *Columbia Law Review*, 2018, Forthcoming, Yale Law School, Public Law Research Paper No. 640,
<https://ssrn.com/abstract=3186205>.
- Bambauer, Derek E. “How Section 230 Reform Endangers Internet Free Speech.” *Brookings* (blog), July 1, 2020.
<https://www.brookings.edu/techstream/how-section-230-reform-endangers-internet-free-speech/>.
- BBC News*. “Three Years of GDPR: The Biggest Fines so Far.” May 24, 2021, sec. Technology.
<https://www.bbc.com/news/technology-57011639>.
- Brannon, Valerie C, Nina M Hart, Eric N Holmes, and Chris D



- Linebaugh. “UPDATE: Section 230 and the Executive Order on Preventing Online Censorship,”
- Brannon, Valerie C, and Eric N Holmes. “Section 230: An Overview,” April 7, 2021, 58.
- Caitlin Bassett. “Section 230: What Is It and Why the Controversy?” *Mind Matters*, August 8, 2010.
<https://mindmatters.ai/2021/08/section-230-what-is-it-and-why-the-controversy/>.
- Castro, Daniel, and Ashley Johnson. “The Exceptions to Section 230: How Have the Courts Interpreted Section 230?,” February 22, 2021.
<https://itif.org/publications/2021/02/22/exceptions-section-230-how-have-courts-interpreted-section-230/>.
- Chung, Andrew. “As U.S. Supreme Court Weighs YouTube’s Algorithms, ‘Litigation Minefield’ Looms.” *Reuters*, February 17, 2023, sec. Legal.
<https://www.reuters.com/legal/us-supreme-court-weighs-youtubes-algorithms-litigation-minefield-looms-2023-02-17/>.
- Citron, Danielle Keats. “The Privacy Policymaking of State Attorneys General.” *Notre Dame Law Review* 92, no. 2 (December 2016).
https://go.gale.com/ps/i.do?p=EAIM&u=mlin_m_brandeis&id=GALE%7CA484155772&v=2.1&it=r&ugroup=outside.
- CNN, By Brian Fung and Tierney Sneed. “Supreme Court Hears Gonzalez v. Google Case against Big Tech.” CNN. Accessed February 25, 2023.
<https://www.cnn.com/business/live-news/supreme-court-gonzalez-v-google-2-21-23/index.html>.
- Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y. 1991). Accessed March 25, 2023.
- “Data Protection in the EU,” June 4, 2021.
https://commission.europa.eu/law/law-topic/data-protection/data-protection-eu_en.



- “Data Protection in the EU,” June 4, 2021.
https://commission.europa.eu/law/law-topic/data-protection/data-protection-eu_en.
- “Definition of BALANCE,” February 22, 2023.
<https://www.merriam-webster.com/dictionary/balance>.
- Electronic Frontier Foundation. “Section 230: Legislative History,” September 18, 2012.
<https://www.eff.org/issues/cda230/legislative-history>.
- Federal Communication Commission. *Fairness Report*, 1985.
<http://archive.org/details/FairnessReport>.
- “Finally, an Interesting Proposal for Section 230 Reform | WIRED.” Accessed March 27, 2023.
<https://www.wired.com/story/section-230-reform-safe-tech-act/>.
- Fung, Brian. “Two Supreme Court Cases This Week Could Upend the Entire Internet | CNN Business.” CNN, February 20, 2023.
<https://www.cnn.com/2023/02/20/tech/supreme-court-tech-platforms/index.html>.
- GDPR.eu. “What Is GDPR, the EU’s New Data Protection Law?,” November 7, 2018. <https://gdpr.eu/what-is-gdpr/>.
- Holmes, Eric N. “Unfair or Deceptive Acts or Practices (UDAP) Enforcement Authority Under the Federal Trade Commission Act.” Congressional Research Service, November 4, 2022.
<https://crsreports.congress.gov/product/pdf/IF/IF12244>.
- ISD. “Online Civil Courage Initiative (OCCI).” Accessed March 25, 2023.
<https://www.isdglobal.org/isd-programmes/online-civil-courage-initiative-occi/>.
- Johnson, Ashley, and Daniel Castro. “Overview of Section 230: What It Is, Why It Was Created, and What It Has Achieved,” February 22, 2021.
<https://itif.org/publications/2021/02/22/overview-section-230-what-it-why-it-was-created-and-what-it-has-achieved/>.



“Proposals to Reform Section 230,” February 22, 2021.

<https://itif.org/publications/2021/02/22/proposals-reform-section-230/>.

Justia Law. “Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969),”

<https://supreme.justia.com/cases/federal/us/395/367/>.

“Justice Department Issues Recommendations for Section 230 Reform,” June 17, 2020.

<https://www.justice.gov/opa/pr/justice-department-issues-recommendations-section-230-reform>.

LII / Legal Information Institute. “47 U.S. Code § 230 - Protection for Private Blocking and Screening of Offensive Material.” Accessed March 25, 2023.

<https://www.law.cornell.edu/uscode/text/47/230>.

LII / Legal Information Institute. “Consumer Protection Laws.” Accessed April 10, 2023.

https://www.law.cornell.edu/wex/consumer_protection_laws.

MacGuill, Dan. “Did Ronald Reagan Pave the Way for Fox News?” Snopes, January 26, 2018.

<https://www.snopes.com/fact-check/ronald-reagan-fairness-doctrine/>.

“Mark Zuckerberg, Joe Manchin, and ISIS: What Facebook’s International Terrorism Lawsuits Can Teach Us About the Future of Section 230 Reform - ProQuest.” Accessed March 27, 2023.

<https://www.proquest.com/docview/2607798213?pq-origsite=primo&parentSessionId=Qy8kWub2J%2BYn0ettX8QFudLPP8V4a8fOnSVuHXfNC6A%3D>.

Matthews, Dylan. “Everything You Need to Know about the Fairness Doctrine in One Post.” *Washington Post* (blog), August 23, 2011.

https://www.washingtonpost.com/blogs/ezra-klein/post/everything-you-need-to-know-about-the-fairness-doctrine-in-one-post/2011/08/23/gIQAN8CXZJ_blog.html.



- Muslim Advocates. “Muslim Advocates Applauds New Bill to Enact Reforms to Section 230,” February 5, 2021.
<https://muslimadvocates.org/2021/02/muslim-advocates-applauds-new-bill-adding-reforms-to-section-230/>.
- Ovide, Shira. “What’s Behind the Fight Over Section 230.” *The New York Times*, March 25, 2021, sec. Technology.
<https://www.nytimes.com/2021/03/25/technology/section-230-explainer.html>.
- Oyez. “Twitter, Inc. v. Taamneh,” (2023)
<https://www.oyez.org/cases/2022/21-1496>.
- “Paradoxes of Media Policy Analysis: Implications for Public Interest Media Regulation - Document - Gale Academic OneFile Select,” n.d.
https://go.gale.com/ps/i.do?p=EAIM&u=miln_m_brandeis&id=GALE%7CA191854511&v=2.1&it=r&ugroup=outside.
- Rash, Wayne. “Lawmakers Introduce Bipartisan Reforms Making Big Tech Liable As Supreme Court Considers Section 230.” *Forbes*. Accessed March 27, 2023.
<https://www.forbes.com/sites/waynerash/2023/02/28/section-230-reforms-introduced-into-us-senate-and-house-of-representatives/>.
- Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), 119 OJ L § (2016).
<http://data.europa.eu/eli/reg/2016/679/oj/eng>.
- Riley, Chris, and David Morar. “Legislative Efforts and Policy Frameworks within the Section 230 Debate.” *Brookings* (blog), September 21, 2021.
<https://www.brookings.edu/techstream/legislative-efforts-and-policy-frameworks-within-the-section-230-debate/>.
- Rodrigo, Chris Mills. “Facebook’s Zuckerberg Proposes



- Conditional Section 230 Reforms.” Text. *The Hill* (blog), March 24, 2021.
<https://thehill.com/policy/technology/544707-facebooks-zuckerberg-proposes-conditional-section-230-reforms/>.
- Roeven, Sanne. “Exploring the History of Section 230 of the Communications Decency Act of 1996 – Ballotpedia News.” Accessed March 25, 2023.
<https://news.ballotpedia.org/2021/06/08/exploring-the-history-of-section-230-of-the-communications-decency-act-of-1996/>.
- Ronald Reagan. “Fairness Doctrine,”
<https://www.reaganlibrary.gov/archives/topic-guide/fairness-doctrine>.
- Rosentiel, Tom. “Is the Fairness Doctrine Fair Game?” *Pew Research Center* (blog), July 19, 2007.
<https://www.pewresearch.org/2007/07/19/is-the-fairness-doctrine-fair-game/>.
- Ruane, Kathleen Ann. “Fairness Doctrine: History and Constitutional Issues,”———. “How Broad A Shield? A Brief Overview of Section 230 of the Communications Decency Act.” Congressional Research Service, February 21, 2018.
- Satariano, Adam. “Big Fines and Strict Rules Unveiled Against ‘Big Tech’ in Europe.” *The New York Times*, December 15, 2020, sec. Technology.
<https://www.nytimes.com/2020/12/15/technology/big-tech-regulation-europe.html>.
- “The Digital Markets Act: Ensuring Fair and Open Digital Markets.” Accessed April 13, 2023.
https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en.
- “The Digital Services Act: Ensuring a Safe and Accountable Online Environment.” Accessed April 13, 2023.
https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-a-safe-and-accountable-online-environment_en.



[s-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en.](https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package)

“The Digital Services Act Package | Shaping Europe’s Digital Future,” February 9, 2023.

[https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package.](https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package)

“The Justice Department Unveils Proposed Section 230 Legislation,” September 23, 2020.

[https://www.justice.gov/opa/pr/justice-department-unveils-proposed-section-230-legislation.](https://www.justice.gov/opa/pr/justice-department-unveils-proposed-section-230-legislation)

Totenberg, Nina. “Supreme Court Showdown for Google, Twitter and the Social Media World.” *NPR*, February 21, 2023, sec. Law.

[https://www.npr.org/2023/02/21/1157683233/supreme-court-google-twitter-section-230.](https://www.npr.org/2023/02/21/1157683233/supreme-court-google-twitter-section-230)

Washington Post. “Perspective | The Fairness Doctrine Won’t Solve Our Problems — but It Can Foster Needed Debate.” February 4, 2021.

[https://www.washingtonpost.com/outlook/2021/02/04/fairness-doctrine-wont-solve-our-problems-it-can-foster-needed-debate/.](https://www.washingtonpost.com/outlook/2021/02/04/fairness-doctrine-wont-solve-our-problems-it-can-foster-needed-debate/)

West, Brian, and Matthew Varacallo. “Good Samaritan Laws.” In *StatPearls*. Treasure Island (FL): StatPearls Publishing, 2023. [http://www.ncbi.nlm.nih.gov/books/NBK542176/.](http://www.ncbi.nlm.nih.gov/books/NBK542176/)

WNYC Studios. “How Did Talk Radio Get So Politically Lop-Sided? | On the Media.” Accessed March 21, 2023.

[https://www.wnycstudios.org/podcasts/otm/episodes/talk-radio-lopsided-on-the-media.](https://www.wnycstudios.org/podcasts/otm/episodes/talk-radio-lopsided-on-the-media)

Cases Cited

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

Gonzalez v. Google LLC, 598 U.S. __ (2023)



Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969)
Tinker v. Des Moines Independent Community School District,
393 U.S. 503 (1969)
Twitter, Inc. v. Taamneh, 598 U.S. ____ (2023)
Whitney v. California, 274 U.S. 357 (1927)

EU Codes Cited

The Digital Markets Act: Ensuring Fair and Open Digital Markets

The Digital Services Act: Ensuring a Safe and Accountable Online Environment Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), 119 OJ L § (2016).
<http://data.europa.eu/eli/reg/2016/679/oj/eng>

US Codes Cited

"H.R.5596 - 117th Congress (2021-2022): Justice Against Malicious Algorithms Act of 2021." *Congress.gov*, Library of Congress, 18 October 2021,
<https://www.congress.gov/bill/117th-congress/house-bill/5596>.

LII / Legal Information Institute. "47 U.S. Code § 230 - Protection for Private Blocking and Screening of Offensive Material." Accessed March 25, 2023.
<https://www.law.cornell.edu/uscode/text/47/230>.

LII / Legal Information Institute. "Consumer Protection Laws." Accessed April 10, 2023.
https://www.law.cornell.edu/wex/consumer_protection_laws.

