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How Section 230 Enhances the First Amendment

Eric Goldman

The First Amendment says that Congress “shall make no law...abridging the freedom of speech, or the press.” This constitutional provision sets a floor, not a ceiling, on free speech protection in the United States. Legislatures can, and sometimes do, supplement the First Amendment with “speech-enhancing statutes” that facilitate or enhance free speech.¹

In 1996, Congress enacted one of its most important “speech-enhancing statutes” ever, 47 U.S.C. § 230 (Section 230), as part of the Communications Decency Act (CDA). Section 230 sets forward a straightforward policy: it categorically shields Internet services² from liability for publishing third-party content (also called “user generated content,” or “UGC”), subject to a few statutory exceptions, including intellectual property claims and federal criminal prosecutions.³

Together, Section 230 and the First Amendment have contributed to the Internet’s emergence as one of the most remarkable speech venues in human history. We’ve seen the emergence of valuable UGC services that never existed in the offline world, such as Wikipedia’s crowdsourced encyclopedia, consumer review websites like Yelp, and user-uploaded video sites like YouTube. These UGC services give Internet users an unprecedented ability to express themselves to a global audience. UGC services have also created many private benefits, including new jobs and wealth.

Those benefits are in extreme peril as regulators target Section 230 for drastic reform. Four

¹ Some examples of “speech-enhancing statutes” include shield laws that protect reporters from being obligated to disclose their confidential sources; defamation retraction-demand statutes that require plaintiffs to demand (and be denied) a retraction before bringing a defamation lawsuit; and anti-SLAPP laws that expedite the dismissal of lawsuits targeting socially beneficial speech that unhappy critics seek to censor, intimidate, or silence.

² The term “Internet service provider” can ambiguously refer to both websites and Internet access providers. Both types of services qualify for Section 230, but this Issue Brief focuses exclusively on the potential liability of publishers of third-party content.

³ 47 U.S.C. § 230(e).

recently introduced bills in the Senate (the EARN IT Act,⁴ the Limiting Section 230 Immunity to Good Samaritans Act,⁵ the PACT Act,⁶ and the Stopping Big Tech’s Censorship Act⁷) seek to functionally eliminate the law. Separately, the U.S. Department of Justice proposed an extensive list of radical changes designed to eviscerate the law.⁸ And both major parties’ presidential nominees, President Trump⁹ and former Vice President Joe Biden,¹⁰ have independently called to “revoke” Section 230. To further that objective, President Trump issued an executive order in May with a multi-pronged attack on Section 230.¹¹

The dark clouds gathering around Section 230 prompt an obvious question: if Section 230 fades into the background and the First Amendment takes over as the primary protection for the online republication of third-party content, what consequences would that have for the Internet now and in the future? Without Section 230, would the Internet look the same today? Without Section 230, will we still have Facebook? Twitter? WhatsApp? Yelp?

This Issue Brief explores how Section 230 interacts with the First Amendment. It begins by discussing Section 230’s substantive benefits, then discusses its procedural benefits, and concludes by arguing that proposals to eliminate Section 230 would create critical gaps in the law that the First Amendment would not adequately backfill. Losing Section 230 would substantially reshape the Internet for the worse. Yet, shockingly, that is exactly the direction so many of our political leaders apparently think we should go.

I. Section 230’s Substantive Benefits

This Part describes how Section 230 supplements the First Amendment’s substantive protections for free speech.

A. Section 230 Covers Claims That Don’t Receive First Amendment Protection

Section 230 has always applied to user-caused defamation. Because of that, Section 230 has inhibited the development of a First Amendment jurisprudence to defamation claims for UGC.

⁴ EARN IT Act of 2020, S.3398, 116th Cong. (2020). See Eric Goldman, *The EARN IT Act Partially Repeals Section 230, But It Won’t Help Children*, TECH. & MARKETING L. BLOG (Mar. 10, 2020).

⁵ *New Legislation Could Signal Critical Mass on Section 230*, LAW360 (June 17, 2020).

⁶ Platform Accountability and Consumer Transparency Act, S. ___, 116th Cong. (2020).

⁷ Stopping Big Tech’s Censorship Act, S.4062, 116th Cong. (2020).

⁸ U.S. DEP’T OF JUSTICE, SECTION 230 — NURTURING INNOVATION OR FOSTERING UNACCOUNTABILITY?, KEY TAKEAWAYS AND RECOMMENDATIONS (2020).

⁹ Donald Trump (@realDonaldTrump), TWITTER (May 29, 2020, 11:15 AM), <https://twitter.com/realDonaldTrump/status/1266387743996870656>.

¹⁰ Joe Biden, N.Y. TIMES (Jan. 17, 2020).

¹¹ Exec. Order No. 13925, 85 Fed. Reg. 34,079 (2020). See Eric Goldman, *Trump’s “Preventing Online Censorship” Executive Order Is Pro-Censorship Political Theater*, TECH. & MARKETING. L. BLOG (May 29, 2020).

We aren't sure exactly what First Amendment legal standard would have developed over time if Section 230 hadn't been adopted.¹²

The intersection of Section 230, the First Amendment, and defamation law only tells a small part of Section 230's story. Courts routinely interpret Section 230 to immunize all claims against Internet services based on third-party content (other than those referenced in Section 230's statutory exclusions), regardless of what causes of action the plaintiff actually alleges.¹³ For example, Section 230 has been successfully invoked in cases involving negligence; deceptive trade practices, unfair competition, and false advertising; common-law privacy torts; tortious interference with contract or business relations; intentional infliction of emotional distress; and dozens of other legal doctrines.¹⁴

Some non-defamation claims, such as privacy common law torts, have strong First Amendment defenses resembling the defamation jurisprudence. However, for other claims, such as tortious interference, First Amendment defenses have little or no effect. Section 230 equally immunizes all of these claims, so it clearly provides more substantive protection for those claims with limited or weak First Amendment defenses.

B. Section 230 Fully Protects Commercial Speech

Under the First Amendment, restrictions on free speech, generally, must satisfy strict scrutiny. This demanding review means that most restrictions do not survive judicial review and are struck down by the courts. By contrast, the First Amendment only requires a reduced level of scrutiny for restrictions on commercial speech, usually intermediate scrutiny (instead of strict scrutiny) applies for truthful commercial speech,¹⁵ and minimal or no First Amendment protection for false commercial speech.¹⁶ This less demanding review means that commercial speech restrictions have a significantly higher probability of surviving constitutional scrutiny.

Section 230 handles commercial speech differently than the First Amendment does. Section 230 does not distinguish between commercial speech and other types of speech, treating both types of speech equally. For example, Section 230 has protected Internet services from liability for

¹² For examples of cases that suggest how UGC liability principles might look without Section 230, see *Weigand v. NLRB*, 783 F.3d 889, 892 (D.C. Cir. 2015); *Vesely v. Armslist LLC*, 762 F.3d 661, 666 (7th Cir. 2014); *Roe v. Amazon.com*, 170 F. Supp. 3d 1028, 1040 (S.D. Ohio 2016); *Sandler v. Calcagni*, 565 F. Supp. 2d 184, 193 (D. Me. 2008); and *Lunney v. Prodigy Servs. Co.*, 94 N.Y.2d 242, 249 (N.Y. App. Div. 1999).

¹³ See, e.g., *Twitter, Inc. v. Superior Court for S.F.*, No. A154973, 2018 BL 516706, at *4 (Cal. Ct. App. Aug. 17, 2018).

¹⁴ 4 IAN C. BALLON, *E-COMMERCE AND INTERNET LAW* 37.05[1][C] (2d ed.), Westlaw (database updated Jan. 2019); David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 427–28 (2010).

¹⁵ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980); 2 RODNEY A. SMOLLA, *SMOLLA & NIMMER ON FREEDOM OF SPEECH* § 20:10, Westlaw (database updated Apr. 2019).

¹⁶ See SMOLLA & NIMMER, *supra* note 19, § 20:15.

publishing third-party online advertisements,¹⁷ and Section 230 has long protected online marketplace operators from liability for third-party listings of goods and services.¹⁸

By treating commercial and noncommercial speech equally, Section 230 negates the First Amendment commercial speech doctrine’s incoherency over the boundaries of what is and is not commercial speech. It also means that commercial speech gets more protection under Section 230 than it would under the First Amendment.

C. Scierer Is Irrelevant to Section 230

Section 230(c)(1)’s immunity does not vary with the Internet service’s scierer. If a plaintiff alleges that the defendant “knew” about tortious or criminal content, the defendant can still qualify for Section 230’s immunity.¹⁹

The First Amendment does not require this result. Instead, the presence of scierer (i.e. a defendant’s knowledge of third-party tortious or criminal content) can overcome any First Amendment defense and potentially expose defendants to liability.

For example, the First Amendment prevents strict liability for many defamation claims.²⁰ Sufficient scierer, however, can override First Amendment protection. For example, a plaintiff can win a defamation case involving matters of public concern and public figures—the defamation claims most strongly protected by the First Amendment—if it proves the defendant’s “actual malice.”²¹ In contrast, Section 230’s immunity applies even if the plaintiff alleges actual malice.²² By mooting inquiries into defendants’ scierer, Section 230 provides greater substantive protection for defendants in defamation cases.

Similarly, at common law, distributors of third-party defamatory content face liability when they have sufficient scierer, such as if the defendant knew or should have known of the defamation.²³ Had that been the prevailing law of the Internet, defamation would have become a notice-and-takedown regime that enabled a “heckler’s veto” in the parlance of constitutional jurisprudence. Simply by claiming that a particular content item was defamatory, a “heckler’s”

¹⁷ See, e.g., *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193 (N.D. Cal. 2009); *Ramey v. Darkside Prods., Inc.*, 2004 U.S. Dist. LEXIS 10107 (D.D.C. May 17, 2004); *Cisneros v. Yahoo! Inc.*, CGC-04-433518 (Cal. Super. Ct. Nov. 6, 2008).

¹⁸ See, e.g., *Stoner v. eBay Inc.*, No. 305666, 2000 WL 1705637 (Cal. Super. Ct. Nov. 1, 2000); *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703 (Cal. Ct. App. 2002). *But see* *HomeAway v. City of Santa Monica*, 918 F.3d 676 (9th Cir. 2019) (Section 230 does not apply to restrictions on booking transactions).

¹⁹ See, e.g., *Daniel v. Armslist, LLC*, 926 N.W.2d 710, 726 (Wis. 2019) (“Because § 230(c)(1) contains no good faith requirement, courts do not allow allegations of intent or knowledge to defeat a motion to dismiss.”).

²⁰ SMOLLA & NIMMER, *supra* note 19, § 23:1.

²¹ *Id.* § 23:3 & nn.14–15.

²² See, e.g., *Barrett v. Rosenthal*, 146 P.3d 510, 513 (Cal. 2006) (concluding that the defendant successfully defended on Section 230 grounds despite allegations that she acted maliciously).

²³ 2 RODNEY A. SMOLLA, LAW OF DEFAMATION § 4:92 (2d ed. 2007).

notice could confer scienter on the Internet service, effectively forcing the service to remove the content to avoid liability. In contrast, Section 230 categorically rejects notice-and-takedown, thus preventing a heckler's veto.²⁴

II. Section 230's Procedural Benefits

The prior section explained how Section 230 expands the First Amendment's substantive scope. This section explores how Section 230 provides procedural benefits to defendants. While the First Amendment sometimes mandates procedural as well as substantive rules,²⁵ Section 230 offers more procedural protections, and greater legal certainty, for defendants. These procedural benefits create speech-enhancing outcomes even in situations where the substantive scope of Section 230 and the First Amendment would be identical.

A. Section 230 Increases Litigation Efficiencies

A *prima facie* Section 230(c)(1) defense typically has three elements: (1) the defendant is a provider or user of an interactive computer service, (2) the claim relates to information provided by another information content provider, and (3) the claim treats the defendant as the publisher or speaker of the information.²⁶ Often, judges can resolve all three elements based solely on the allegations in the plaintiff's complaint.

Thus, courts can, and frequently do, grant motions to dismiss based on a Section 230(c)(1) defense.²⁷ In jurisdictions with anti-SLAPP laws (which provide a litigation "fast lane" to dismiss lawsuits seeking to suppress socially beneficial speech), courts can grant anti-SLAPP motions to strike based on Section 230 without allowing discovery in the case.²⁸

As discussed above, Section 230 does not depend on the defendant's scienter. If scienter were relevant to Section 230(c)(1), plaintiffs could allege scienter—with minimal or no factual support—and survive a motion to dismiss. This, in turn, would permit a plaintiff to get discovery and delay resolution of the case to summary judgment or later.

This dynamic occurs with Section 230(c)(1)'s sibling, Section 230(c)(2), which provides a safe harbor for a service's content-removal and content-filtering decisions. Unlike Section 230(c)(1),

²⁴ See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997) *cert. denied*, 524 U.S. 937 (1998) ("Liability upon notice would defeat the dual purposes advanced by § 230 of the CDA.").

²⁵ See *e.g.*, *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (stating the First Amendment requires that plaintiff bears the burden of showing falsity and fault in order to recover damages).

²⁶ See *e.g.*, *Bennett v. Google, LLC*, 882 F.3d 1163 (D.C. Cir. 2018).

²⁷ See BALLON, *supra* note 18, § 37.05[7] ("Courts increasingly have been willing to address CDA immunity (at least under section 230(c)(1)) at the outset of a case.").

²⁸ For cases that reach discovery, Section 230 may materially narrow the disputed facts and scope of discovery.

the Section 230(c)(2) safe harbor requires defendants to act in good faith.²⁹ Plaintiffs can allege the defendant's lack of good faith in their complaints, making courts reluctant to grant Section 230(c)(2) motions to dismiss.³⁰ Not surprisingly, Section 230(c)(2)'s higher litigation burdens discourage defendants from relying upon it.

Section 230(c)(1)'s early dismissals are valuable to defendants. They reduce the defendant's out-of-pocket costs to defeat an unmeritorious claim.³¹ For smaller Internet services, defending a single protracted lawsuit may be financially ruinous. Also, complex litigation can divert substantial managerial and organizational attention and mindshare from maintaining or enhancing the service. Thus, the ability of a defendant to resolve a case on a motion to dismiss (and avoid expensive discovery) protects small and low-revenue Internet services, which in turn enhances the richness and diversity of the Internet ecosystem.

Section 230(c)(1)'s early dismissals benefit society in several other ways. First, from a judicial economy standpoint, they save both parties from wasting valuable resources on doomed litigation. They take meritless litigation off court dockets, freeing up the courts to handle other cases more carefully or quickly.

Second, Internet services rarely make a lot of money from any single item of third-party content, so they lack financial incentives to stand behind individual items. Also, the services often lack the contextual information necessary to properly defend third-party content in court.³² Accordingly, the most economically rational decision for most Internet services is to capitulate

²⁹ The provision reads:

No provider or user of an interactive computer service shall be held liable on account of—
 (A) any action voluntarily *taken in good faith* to restrict access to or avail ability 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

47 U.S.C. § 230(c)(2) (2012) (emphasis added).

³⁰ See BALLON, *supra* note 18, § 37.05[4][B] (positing that defendants face “potential difficulty . . . obtaining dismissal of a claim pursuant to section 230(c)(2)(A), which requires a showing of good faith, voluntary action, which usually requires evidence from the defendant, either in support of a motion for summary judgment or, if controverted by evidence presented by the plaintiff, at trial”); see also Eric Goldman, *Online User Account Termination and 47 U.S.C. §230(c)(2)*, 2 U.C. IRVINE L. REV. 659, 666 (2012) (“Deferential courts may refuse to grant § 230(c)(2) immunity on a motion to dismiss if the plaintiff alleges a lack of good faith, which gives plaintiffs the chance to hunt for evidence and imposes additional advocacy and discovery costs on the defendant.”).

³¹ See ENGINE, SECTION 230: COST REPORT (getting into discovery raises Section 230 defense costs from a minimum of fifteen thousand dollars to a minimum of one hundred thousand dollars).

³² See Venkat Balasubramani & Eric Goldman, *In Its “Innocence of Muslims” Ruling, the Ninth Circuit Is Guilty of Judicial Activism—Garcia v. Google*, TECH. & MARKETING L. BLOG (Feb. 27, 2014) (“Google stood in the movie producer’s shoes trying to defend his behavior. But Google wasn’t a party to their conversations or their transactions, and Google’s interest isn’t in defending the movie but in avoiding liability for third party content.”); see also *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (en banc).

to any lawsuit over UGC—or avoid the lawsuit altogether by quickly removing third-party content in response to prelitigation demands, without any investigation or pushback.

This causes “collateral censorship”: the proactive removal of legitimate content as a prophylactic way to reduce potential legal risk and associated defense costs. The prophylactic removal of legitimate content is common in online copyright law³³ because the UGC copyright safe harbor (17 U.S.C. § 512(c)) is less favorable to defendants than Section 230. In contrast, Internet services routinely stand up to non-copyright legal threats, legal demands, and cease-and-desist letters targeting UGC because Section 230 provides legal certainty at a relatively low cost.³⁴

Unlike Section 230 disputes, constitutional litigation is rarely quick or cheap. Courts are reluctant to resolve constitutional arguments on motions to dismiss. Further, constitutional doctrines often raise factual questions requiring courts to wait until summary judgment (or later) before disposing of an unmeritorious case. Thus, Internet services expect it to cost less to defend UGC via Section 230 than the First Amendment, which makes the services more willing to stand up for their users. Assuming Section 230 and the First Amendment both equally dictate that the defense wins, society as a whole benefits from reaching that result as quickly and cheaply as possible.

Section 230 especially benefits content from marginalized communities, including minorities and disenfranchised communities.³⁵ Marginalized voices are more likely to be targeted by people in positions of power, and without Section 230, Internet services would routinely accede to these removal demands to avoid the legal risks associated with defending their content in courts. Instead, Section 230 emboldens Internet services to stand up for this content and for the marketplace of ideas that their service offers because any legal threats are empty. Thus, compared to the First Amendment, Section 230 helps keep more “at risk” legitimate content online.

B. Section 230 Is More Predictable for Litigants than the First Amendment

For defendants, there is a disproportionately large difference between one hundred percent confidence of victory and ninety-five percent confidence of victory. Ninety-five percent confidence means the defendant must calculate the potential economic risk (five percent chance of loss multiplied by a range of expected damages) and the expected defense costs through numerous litigation stages. If the five percent chance involves a potential total exposure of \$100 million, the case has a \$5 million expected value. When they face unlikely but massive financial

³³ *E.g.*, JENNIFER URBAN ET AL, NOTICE AND TAKEDOWN IN EVERYDAY PRACTICE 88, 116– 17 (2016)

³⁴ *See* Eric Goldman & Jessica M. Silbey, *Copyright’s Memory Hole*, 2019 BYU L. REV. ____ (forthcoming). Where available, anti-SLAPP laws help by increasing the odds the Internet service will get its attorneys’ fees paid. *See id.*

³⁵ Elliott Harmon, *In Debate Over Internet Speech Law, Pay Attention to Whose Voices Are Ignored*, HILL (Aug. 21, 2019).

exposure, many rational defendants will settle to ensure the business' survival, rather than "risk it all." This is a standard litigation risk faced by all businesses, but the consequences in this context can be the suppression of socially essential speech.

Meanwhile, it can be economically rational for plaintiffs' lawyers to bring cases with only a five percent chance of success. If a lawyer brings twenty of those cases, expecting to win one, the winnings from the single successful case could cover the costs of the nineteen failed cases. But plaintiffs' lawyers usually steer clear of a case that has a one hundred percent chance of failure.

First Amendment defenses may be ninety-five percent certain, but they are rarely one hundred percent certain. That minor difference will induce defendants to settle cases that are almost certainly unmeritorious. In contrast, a Section 230 defense sometimes is so obvious, backed by decades of precedent, that defendants will treat victory as one hundred percent assured. They are therefore less likely to settle those cases, even for a fraction of defense costs. This helps keep more UGC online.

C. Section 230 Inhibits Plaintiff Plead-Arounds

Usually, Section 230 immunizes all claims applicable to a set of facts, irrespective of the precise claims asserted by plaintiffs. Whether the plaintiff pleads defamation, negligence, tortious interference, unfair competition, or infliction of emotional distress, the defendant wins if the lawsuit is based on third-party content and Section 230's statutory exceptions do not apply.³⁶ The few common-law claims that Section 230 does not cover, such as promissory estoppel³⁷ or failure to warn,³⁸ typically fail on their prima facie elements.³⁹

In theory, the First Amendment works the same way. If a lawsuit targets the defendant's speech, the First Amendment should apply regardless of the plaintiff's claims. That's not what happens in practice. Each legal doctrine has its own First Amendment defense elements, and

³⁶ *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101–02 (9th Cir. 2009) (“[W]hat matters is not the name of the cause of action—defamation versus negligence versus intentional infliction of emotional distress—what matters is whether the cause of action inherently requires the court to treat the defendant as the ‘publisher or speaker’ of content provided by another. To put it another way, courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant’s status or conduct as a ‘publisher or speaker.’ If it does, section 230(c)(1) precludes liability.”); *accord* *Taylor v. Twitter, Inc.*, CGC 18-564460, 2019 Cal. Super. LEXIS 92, at *18–19, *28–29 (Cal. Super. Ct. Mar. 8, 2019) (saying that California courts look at the practical realities of plaintiffs’ allegations, not the specific cause of actions they assert).

³⁷ *Barnes*, 570 F.3d at 1109.

³⁸ *Doe 14 v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016); *Beckman v. Match.com*, 668 Fed. App’x 759, 760 (9th Cir. 2016).

³⁹ Both the *Doe 14* and *Beckman* cases ultimately failed on their elements. *Beckman v. Match.com, LLC*, 743 Fed. App’x 142 (9th Cir. 2018); *Doe No. 14 v. Internet Brands, Inc.*, 2:12-cv-03626, 2016 BL 498065 (C.D. Cal. Nov. 14, 2016); *accord* *Herrick v. Grindr LLC*, 306 F. Supp. 3d 579, 588 (S.D.N.Y. 2018); *Dyroff v. Ultimate Software Grp., Inc.*, No. 17-cv-05359-LB, 2017 WL 5665670, at *11–15 (N.D. Cal. 2017).

the defendant must navigate all these requirements to successfully defeat the lawsuit. This increases defense costs and reduces certainty of the outcome.

D. Section 230 Moots State-Level Conflicts of Laws

Many laws, such as defamation, privacy invasions, and unfair competition, have significant state-by-state differences. Because of these legal differences, the applicable First Amendment defenses (if any) are not nationally uniform.

Ordinarily, Internet services would incur substantial costs to identify these variations and then deploy state-by-state versions of their services, so they may rationally choose to comply with the lowest common denominator. Section 230 preempts conflicting state law⁴⁰ and moots these differences. Internet services can comply with a single national standard, increasing their legal certainty and reducing their legal compliance costs.⁴¹

E. Section 230 Facilitates Constitutional Avoidance

Courts try to avoid ruling on constitutional grounds and instead prefer to decide cases on any other ground if possible, a doctrine called “constitutional avoidance.”⁴² Among other reasons, constitutional interpretations can have unexpected consequences, and elected legislators are in a better position to anticipate and balance those considerations than unelected judges deciding a single case at bar. Furthermore, constitutional interpretations reduce legislators’ future scope of actions, so constitutional avoidance preserves the legislature’s power to superintend the law as society evolves.

This means that courts prefer to rely on statutory grounds like Section 230 instead of interpreting the First Amendment, even if the substantive results would be the same. To the extent Section 230 statutorily “codifies” constitutional principles, it enables courts to advance constitutional free speech interests while respecting constitutional avoidance. Inevitably, the availability of a statutory alternative to a constitutional ruling leads to more courts feeling confident enough that they can side with free speech, knowing that the legislature can statutorily fix any erroneous outcomes.

⁴⁰ 47 U.S.C. § 230(e)(3) (2012).

⁴¹ *See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007) (“While the scope of federal intellectual property law is relatively well-established, state laws protecting ‘intellectual property,’ however defined, are by no means uniform. Such laws may bear various names, provide for varying causes of action and remedies, and have varying purposes and policy goals. Because material on a website may be viewed across the Internet, and thus in more than one state at a time, permitting the reach of any particular state’s definition of intellectual property to dictate the contours of this federal immunity would be contrary to Congress’s expressed goal of insulating the development of the Internet from the various state-law regimes.”).

⁴² *See, e.g., Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

III. An Internet Without Section 230

Several commentators have claimed that the First Amendment and Section 230 reach the same substantive results.⁴³ This argument, if true, implies that Congress could reduce or eliminate Section 230 without materially changing the Internet. Though that line of thinking may be tempting, it is clearly wrong for several reasons.

First, commentators analyzing the Section 230/First Amendment overlap have almost exclusively focused on defamation law. However, as Part I(A) showed, Section 230 applies to a virtually infinite number of claims in addition to defamation. Thus, showing the theoretical convergence between the First Amendment's defamation doctrine and Section 230 ignores Section 230's much broader substantive reach.

Second, focusing on doctrinal overlap between the First Amendment and Section 230 ignores the critical procedural benefits that Section 230 provides, as enumerated in Part II. Without those procedural benefits, many Internet UGC publishers could not afford to defend their rights in court and would embrace less speech-friendly policies on their services. At minimum, many UGC publishers would find it cheaper to adopt a notice-and-takedown scheme under the First Amendment with the hope that such a policy would reduce the number of lawsuits to defend.

Section 230 derives much of its power from its "horizontal" application to disparate causes of action. Defendants benefit from litigating only a single defense rather than navigating multiple prima facie elements and defenses. If Congress excluded more causes of action from Section 230's coverage, it would increase defense costs, create more constitutional litigation with Internet services relying on the First Amendment as a primary defense rather than as a backup defense, and encourage plaintiffs to shoehorn their claims into the new exclusion.

Furthermore, Section 230's agnosticism about defendant scienter is a critical element of its success. Introducing scienter into Section 230, even just a little, functionally negates most of Section 230's procedural benefits. Without Section 230's procedural benefits, a First Amendment-only rule would make litigation more expensive and less certain.

In turn, this would implicitly favor incumbent Internet companies over startups because incumbents can better afford the cost and uncertainty of litigation. Section 230 therefore plays an important pro-competition role, and any Section 230 reductions are likely to unintentionally

⁴³ See, e.g., Brent Skorup & Jennifer Huddleston, *The Erosion of Publisher Liability in American Law, Section 230, and the Future of Online Curation*, 72 OKLA. L. REV. 635 (2020); Cary Glynn, Note, *Section 230 as First Amendment Rule*, 131 HARV. L. REV. 2027, 2028 (2018); Julio Sharp-Wasserman, Note, *Section 230(c)(1) of the Communications Decency Act and the Common Law of Defamation: A Convergence Thesis*, 20 COLUM. SCI. & TECH. L. REV. 195, 240 (2018); cf. Ardia, *supra* note 18, at 478 (suggesting that common law may protect defendants more than Section 230 does); Brian L. Frye, *The Possible Redundancy of §230*, LAW.COM (Nov. 10, 2017) (comparing Section 230 to defamation's republication rule).

diminish the competitive ecosystem and drive smaller players out of the industry.⁴⁴ Even if First Amendment doctrine converged on the current Section 230 rules, a common law approach would take years to develop the kind of certainty that defendants currently enjoy. Many of the current Internet players, particularly the smaller ones, could not survive this transition period, leading to a major washout of the industry and an industry restart significantly benefiting incumbents.

IV. The FOSTA Case Study

A recent case study illustrates the adverse consequences for the Internet when Section 230 is reduced. In 2018, Congress amended Section 230 through the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (“FOSTA”).⁴⁵ FOSTA purportedly sought to protect victims of sex trafficking by exposing online publishers to greater criminal and civil liability. Among other changes, FOSTA peeled back some of Section 230’s protections for third-party commercial sex advertising, including advertising that promotes sex trafficking victims.

While everyone supports the goal of reducing sex trafficking, Congress’ amendments to Section 230 completely missed the mark. FOSTA’s outcomes represent an unfortunate cascade of policy failures:⁴⁶

- Because it became harder to conduct online investigations, law enforcement departments reduced their efforts to rescue sex trafficking victims,⁴⁷ meaning that FOSTA counter-productively increased the likely harm suffered by those victims;
- With fewer opportunities to do online marketing, commercial sex workers adopted less-safe means of soliciting customers,⁴⁸ putting them in much-greater physical jeopardy and revitalizing the abusive control of pimps;⁴⁹

⁴⁴ See Eric Goldman, *Want to Kill Facebook and Google? Preserving Section 230 Is Your Best Hope*, BALKINIZATION (June 3, 2019).

⁴⁵ Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. 115-164, 132 Stat. 1253 (2018); see Eric Goldman, *The Complicated Story of FOSTA and Section 230*, 17 FIRST AMEND. L. REV. 279 (2018).

⁴⁶ See Eric Goldman, *Who Benefited from FOSTA? (Spoiler: Probably No One)*, TECH. & MARKETING L. BLOG (Jan. 29, 2019).

⁴⁷ Jordan Fischer, *Running Blind: IMPD Arrests First Suspected Pimp in 7 Months*, RTV6.COM (July 6, 2018); Taylor Goebel, *Sex trafficking: Backpage Gone, but Not the Problem*, DAILY TIMES (Feb. 7, 2019).

⁴⁸ David Eichert, *‘It Ruined My Life’: FOSTA, Male Escorts, and the Construction of Sexual Victimhood in American Politics*, 26 VA. J. SOC. POL’Y & L. 201 (2019); COYOTE-RI Impact Survey Results – 2018, SWOP SEATTLE (last visited May 12, 2020); DANIELLE BLUNT & ARIEL WOLF, HACKING//HUSTLING, ERASED: THE IMPACT OF FOSTA-SESTA & THE REMOVAL OF BACKPAGE (2020).

⁴⁹ Alexandra Villarreal, *Side Effect of Trafficking Law: More Street Prostitution?*, ASSOCIATED PRESS (Sept. 24, 2018); Ted Andersen et al, *The Scanner: Sex Workers Returned to SF Streets after Backpage.com Shut Down*, S.F. CHRON. (Oct. 15, 2018); *Why D.C. Sex Workers are Flocking to Logan Circle: 7 On Your Side Investigates*, WJLA (Nov. 4, 2019).

- As law enforcement redeployed from the online sex trafficking beat to other “vice” beats, commercial sex workers and their customers were arrested in greater numbers;⁵⁰
- Sex trafficking victims have not yet received any additional financial compensation due to FOSTA;⁵¹
- The Internet got smaller. The services supporting the sex worker community were devastated; many shut down entirely.⁵² Even if Congress targeted those services, many other general-purpose services were also negatively affected. The most prominent example was Craigslist, which shut down its entire “personals” category⁵³ even though most activity in that category was surely still legal after FOSTA. That kind of collateral censorship is common when legislatures attempt to regulate speech,

A good argument can be made that FOSTA benefited *no* constituents; it only harmed communities. If so, it would represent the worst kind of legislative policy; and repealing it would make communities better off without disadvantaging other communities.

Meanwhile, it remains unclear to what extent the First Amendment will protect the activity that FOSTA excluded from Section 230. A First Amendment challenge to FOSTA is working its way through the courts. After two years of litigation, all we know is that the plaintiffs have standing.⁵⁴

This lengthy litigation reinforces the transitional costs of migrating from Section 230 to the First Amendment. Even if eventually it becomes 100% certain that the First Amendment backfills FOSTA’s Section 230 reductions, we will not know that outcome for years. In the interim, many communities will suffer. Furthermore, the industry will reconfigure due to the legal uncertainty, wiping out an entire generation of entrepreneurs and innovative services. Perhaps those entrepreneurs and innovations will reemerge in the distant future if the First Amendment provides adequate protection for their activities. More likely, that entire generation of innovation will be permanently lost.

V. Conclusion

This Issue Brief reflects the broader dynamics of rules versus standards. Section 230 is a rule, and First Amendment defenses are often standards. If the First Amendment’s standards would always reach the same substantive result as Section 230, we should prefer the rule to increase predictability and reduce adjudication costs. But Section 230 substantively protects more speech

⁵⁰ Fischer, *supra* note 52; Goebel; *supra* note 52.

⁵¹ See Alex Yelderman, *New Civil FOSTA Lawsuits Push Expansive Legal Theories Against Unexpected Defendants (Guest Blog Post)*, TECH & MARKETING L. BLOG (Jan. 2, 2020).

⁵² Fischer, *supra* note 52.

⁵³ FOSTA, CRAIGSLIST.ORG (last visited May 12, 2020).

⁵⁴ Woodhull Freedom Found’n v. United States, 948 F.3d 363 (D.C. Cir. 2020).

than the First Amendment, and the First Amendment will not adequately backfill any reductions in Section 230's protections.

Section 230 provides a helpful insight into the value of legislatures adopting speech-enhancing statutes to supplement and enhance the First Amendment. As great as the First Amendment is, it does not provide as much protection for free speech as we might expect. It can therefore make a lot of sense for legislatures to statutorily enhance the First Amendment.

Section 230 proved to be an incredibly wise and prescient legislative accomplishment by Congress. Let's see if Congress is still wise enough not to destroy it.

About the Author

Eric Goldman is a Professor of Law at Santa Clara University School of Law, where he also co-directs the High Tech Law Institute. Goldman's research and teaching focuses on Internet, IP, and advertising law. He blogs on those topics at the Technology & Marketing Law Blog, <http://blog.ericgoldman.org>. Before joining the Santa Clara faculty, he was an assistant professor at Marquette University Law School in Milwaukee, Wisconsin. Prior to that, he practiced law for eight years in Silicon Valley, both in-house at an Internet company and for a private law firm. Goldman received his B.A., M.B.A., and J.D. from the University of California, Los Angeles.

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