Mercer Law Review

Volume 73
Number 2 *Lead Articles Edition*

Article 7

3-2022

Social Media and Democracy after the Capitol Riot, or, A Cautionary Tale of the Giant Goldfish

Seth Oranburg

Social Media and Democracy after the Capitol Riot, or, A Cautionary Tale of the Giant Goldfish

Seth Oranburg*

Lately, people have been finding giant pet goldfish in lakes across America.[1] You may see these tiny fish swimming in bowls at the county fair, but left alone in a lake or large pond, where they are dropped perhaps by a well-meaning child, they can grow to 20 pounds or more—and destroy ecosystems.[2] The goldfish is a cautionary tale that has been told time and again in different forms, like Pandora's box.

On January 6, 2021, a somewhat organized group of rioters overran and briefly took control of the U.S. Capitol.[3] Social media clearly played a role in the riots at the Capitol that occurred on January 6, 2021.[4] Those riots were deeply troubling for all who love America and the freedoms for which it stands.[5] But the reactions by corporations to

*Associate Professor of Law, University of New Hampshire Franklin Pierce School of Law. University of Florida (B.A., 2006); University of Chicago School of Law (J.D., 2011). Member, State Bar of California; Member, District of Columbia Bar.

1. Caitlin O'Kane, *Giant, Invasive Goldfish are Taking Over Lakes and Ponds Around the Country. One Minnesota County Pulled out 100,000 Last Year*, CBS NEWS (Jul. 13, 2021), https://perma.cc/9QYT-4WGF.

2. *Giant Goldfish Problem in US lake Prompts Warning to Pet Owner*, BBC (July 13, 2021), https://perma.cc/B74D-RAAM.

3. *U.S. Capitol Riot*, THE NEW YORK TIMES, https://perma.cc/Q43P-7RQN.

4. Rory Cellan-Jones, *Tech Tent: Did Social Media Inspire Congress Riot?*, BBC (Jan. 8, 2021), https://www.bbc.com/news/technology-55592752 (discussing the theory that Donald Trump's own Twitter feed played a part in the Capitol attack as many of his tweets appear to instigate his supporters).

5. Emily Cochrane, Luke Broadwater, Ellen Barry, & Jason Andrew, *'It's Always Going to Haunt Me': How the Capitol Riot Changed Lives*, NEW YORK TIMES (Sept. 16, 2021), https://www.nytimes.com/interactive/2021/09/16/us/politics/capitol-riot.html

cancel social media accounts and even entire social media platforms is troubling, too.[6] We must now face the reality that we have entrusted some of the most fundamental civil liberties to corporations that have obligations only to their shareholders, not to democracy.[7] We the people are guaranteed freedom of speech in the public square.[8] But we do not enjoy those same freedoms on the private social media networks that have replaced the town hall.[9] As more and more of our communications and daily lives happen on private property—and make no mistake that Facebook's website is its private property—[10]we increasingly trust corporations to protect our "inalienable" rights. It may surprise many that Twitter, Facebook, Instagram, YouTube, TikTok, Reddit, Discord, and other social media platforms are not subject to First Amendment constraints, because they are not state actors.[11]

These platforms do not "censor" speech in the technical sense, because only governments can censor.[12] Private actors merely exercise editorial discretion, and they may do so virtually at will.[13] In fact, our federal government has effectively deputized social media corporations to censor speech on their platform—even when platforms do so for pure profit motives.

(covering interviews with individuals who experienced the Capitol siege firsthand and the lasting trauma it has inflicted upon them).

6. *See* Kevin J. Duffy & Richard H. Brown, *Shouting Fire! (or Worse) on Social Media: The Interplay of the First Amendment and Government Involvement in Efforts to Limit or Remove Social Media Content*, 33 Intell. Prop. & Tech. L.J. 3, 3 (2021).

7. David L. Hudson, *In the Age of Social Media, Expand the Reach of the First Amendment*, 43 Human Rights Magazine, no. 4, at 2. (discussing how private organizations that wield a lot of power and money can infringe upon civil rights of individuals as if they were actors of the state).

8. U.S. Const. amend. I.

9. *Compare* Stanley v. Georgia, 394 U.S. 557, 568 (1969) (legal for the owner of private property to possess obscene material on private property). This case stands for the proposition that citizens have the greatest rights of free speech when on their own private property) *with* R.A.V. v. City of St. Paul, 505 U.S. 377, 395–96 (1992) (third party has no right to burn a cross on someone else's property). The latter case stands for the principle that a third party's speech rights may be limited where the owner of the property on which the speech takes place disagrees with the speech. *R.A.V.*, 505 U.S. at 395–96.

10. Trevor Puetz, *Facebook: The New Town Square*, 44 SW. L. REV. 385, 394 (2014) (discussing how Facebook, a privately owned organization, assumes full control over the non-tangible website).

11. Duffy & Brown, *supra* note 6, at 3.

12. *See* U.S. Const. amend. I.

13. Manhattan Cmty. Access Corp. v. Halleck, 139 U.S. 1921, 1928 (2019) (discussing how private entities are not subjected to the restrictions that state actors are in regard to the first amendment and may exercise their own editorial discretion).

Social media platforms can exercise editorial discretion without incurring liability for third-party content (users' tweets, posts, grams, videos, hashtags, threads, etc.) thanks to so-called "Section 230 immunity," which provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[14] This means social media platforms like Twitter are not liable for defamatory or inflammatory tweets posted on their platforms.[15]

What, then, constrains social media platforms? Revenue and quarterly earnings reports drive corporate decision making. Platforms need to keep social media users plugged in, so users view as many advertisements as possible. Sometimes referred to simply as "eyeballs," users are targeted by armies of digital marketing teams whose only job is to keep things interesting. After the capitol riots, some cheered when Twitter suspended Donald J. Trump, or when Amazon suspended Parler from its web services. Parler has since sued Amazon, although Parler is likely to lose due to Amazon's immunity and discretion.[16]

But some worry about what this means for civil rights. The American Civil Liberties Union—an organization that called for Trump's impeachment—expressed concerns that these suspensions "should concern everyone when companies like Facebook and Twitter wield the unchecked power to remove people from platforms that have become indispensable for the speech of billions."[17] These actions are certainly counter to the "free and open internet" principles that Google, Amazon, Facebook, and other tech giants have espoused since their founding.[18] In fact, they argued that internet service providers should "treat . . . all

14. 47 U.S.C. § 230(c)(1) (2018).

15. Bobby Allyn, *As Trump Targets Twitter's Legal Shied, Experts Have a Warning*, NPR (May 30, 2020), https://perma.cc/VNM5-T87F.

16. Bobby Allyn, *Judge Refuses to Reinstate Parler After Amazon Shut it Down,* NPR (Jan. 21, 2021), https://perma.cc/ARY7-APK2 (discussing how a judge denied Parler's Motion for Temporary Restraining order to reinstate Amazon's web-hosting services to Parler).

17. Kevin Roose, *In Pulling Trump's Megaphone, Twitter Shows Where Power Now Lies*, THE NEW YORK TIMES (Jan. 9, 2021), https://www.nytimes.com/2021/01/09/technology/trump-twitter-ban.html.

18. These principles are perhaps best exemplified by Facebook CEO Mark Zuckerberg's opinion pieces on the topic. *E.g.*, *The Internet Needs New Rules. Let's Start in These Four Areas*, THE WASHINGTON POST (Mar. 30, 2019), https://perma.cc/92KV-ZCKE ("By updating the rules for the Internet, we can preserve what's best about it—the freedom for people to express themselves and for entrepreneurs to build new things."); Mark Zuckerberg, *Is Connectivity a Human Right?*, FACEBOOK (Aug. 21, 2013), https://perma.cc/3JP4-ZJ72 (arguing that society's goal should be to give internet access to the entire human population).

bits equally," giving the same bandwidth to C-SPAN (which broadcasts public hearings) and PewDiePie (a popular YouTube personality whose videos contain misogynist and racist slurs).[19]

Now that the tech giants won the battle (but not the war) for so-called "net neutrality," they are using their vast "editorial discretion" to decide which speech they promote, and which speech they silence.

On January 11, 2021, Adam Mosseri, Facebook's head of Instagram (yes, Facebook owns Instagram) tweeted, "We're not neutral. No platform is neutral, we all have values and those values influence the decisions we make."[20] This admission begs the question, what if social media corporations value wealth and power, and that influences their decisions as to who may speak and who may not?

And if so, how do we protect democratic freedoms in a world where speech is dominated by social media corporations? These are questions we will have to answer in the 2020s if American democracy is to survive. To answer this question, we first need to understand how we got to a legal status in which the world's largest social media corporations have privileges and immunities that exceed what traditional newspapers and reporters enjoy. Part I discussed below explains how the seeds of § 230 immunity were planted by the Supreme Court of the United States during the backlash against McCarthyism. Part II explains the inception and early development of § 230 itself, including its legislative intent. Part III discusses how the internet has changed radically since § 230 was promulgated in the 1990s, and why the law now distorts the market for social media and creates perverse incentives for social media corporations that make it less likely for these platforms to function as effective replacements for the public square. Part IV briefly concludes with a discussion on what a social media world without § 230 immunity might look like.

The Capitol Riot is America's giant goldfish moment. We have let social media grow too large by protecting the industry with § 230 immunity. We caught social media running amok in a big way in the Capitol Building. Crowd-think led people to believe they could save American democracy by trampling through its institutions. Twitter, the world's largest social media corporation, blamed President Donald Trump for instigating the rioters—and as a result banned the sitting President from the platform. Facebook followed suit. People called for

19. Thuy Ong, *Tech Giants Rally Today in Support of Net Neutrality*, THE VERGE (July 12, 2017), https://www.theverge.com/2017/7/12/15957800/day-of-action-protest-net-neutrality.

20. Adam Mosseri (@mosseri), TWITTER (Jan. 11, 2021, 2:27 PM), https://twitter.com/mosseri/status/1348713108127309824?lang=en.

the President of the United States to face charges for his tweets. Meanwhile, Facebook and Twitter are not liable for any harms caused by his viewpoints. In general, social media platforms are not liable for any views or obscenities expressed on their platforms, even if they are dangerous, because they are protected by § 230 immunity. This Article explores whether Facebook still merits this powerful immunity, or whether society would be better off if Facebook (now Meta) was responsible for spreading lies and hate.

Section 230 immunity began conceptually in 1959 as a protection for booksellers, who could never be expected to read all the books they sell, and thus gained immunity from obscenity code violations regarding any books in their store they did not know were obscene. In the 1990s, Congress reformed the Communications Act of 1934[21] to extend this immunity for third-party distributions of publications to internet social media platforms (Facebook, Twitter, etc.). Section 230 grants social media platforms immunity from harms caused by content posted on their site, just like *Smith v. California*[22] grants booksellers immunity from obscene books in their stores.[23]

The problem is the logic does not fit because, unlike booksellers, social media platforms can and do read all the content on their platforms, via algorithms. Moreover, social media platforms prioritize the display of this content and even remove content its human editors dislike. Even if the motive is not sinister, it is still designed solely to maximize ad revenue by selling "eyeballs" (social media users are referred to as eyeballs) to advertisers. Social media platforms are not designed to create a public forum for well-reasoned debate, no matter what they claim, because they all have shareholders who demand the business meet quarterly revenue targets.

We should not rest our faith in democracy upon social media platforms. Like the goldfish in the lake, social media platforms are overgrown because we have placed them in an under-competitive sanctuary via § 230 immunity from liability. Now the social media platforms have grown too large and are crowding out other less profitable (from the perspective of internet eyeball ad revenue) sources of news and discussion. The traditional print media sources have gone bankrupt or gone digital, and even the digital ones must literally beg users to turn off their ad blockers so their journalists can get some share of the ad revenue. Put simply, government regulation protected social media platforms (the goldfish in this story), which grew overlarge

21. Communications Act of 1934, 75 Pub. L. No. 97, 50 Stat. 189.

22. 361 U.S. 147 (1959).

23. *Id.* at 155.

and wrecked the ecosystem including the niche for traditional news media online.

The solution is to severely restrict and pull back on § 230 immunity for social media platforms. The law has created a set of incentives that led Facebook and Twitter to facilitate the Capital Riot and then totally escape any liability. With a liability regime like that, something similar is bound to happen again. And nothing like the Capital Riot should ever happen again. This Article attempts to explore where this immunity came from, whether it is still merited, and how we might move forward in this social media era.

I. THE FOUNDATION OF IMMUNITY FOR THIRD-PARTY PUBLISHERS

One of the fundamental principles of American democracy is freedom of the press. Protecting freedom of speech was one of the reasons America went to war against fascist Germany. But America's celebration of the triumph of democracy over Nazi fascism was short-lived. Although World War II technically ended in Europe around May 1945, the collapse of the Third Reich left a huge power vacuum in geopolitics. Thereafter, a temporary alliance between the Soviet Union and the United States persisted in the face of their common German enemy. The enemy's defeat undermined the basis for this tentative peace between the competing ideologies of Western Capitalism and Eastern Socialism. By the end of the 1950s, most of the Northern Hemisphere was divided into the North Atlantic Treaty Organization (NATO, which included the U.S. and its allies) on the one hand, and the Warsaw Treaty Organization (WTO, more commonly known as the Warsaw Pact, which included the Soviet Union and other socialist or communist states). Battle lines were drawn along the Iron Curtain, a barrier physically separating the WTO and NATO countries. The Cold War had begun.

Although the Iron Curtain limited physical movement between the East and West during the Cold War, ideas moved far more freely. America developed a deep fear that communist and socialist ideas would infiltrate and influence American society. With that fear came censorship, repression, and even persecution of left-wing individuals. The era, known as the Second Red Scare, [24] was most predominately

24. The color red was often associated with communism, perhaps because the flags associated with major communist revolts and revolutions were red, or perhaps because the movement claim to relate to the blood of workers everywhere. Palash Ghosh, *Why Is the Color Red Associated with Communism?*, INTERNATIONAL BUSINESS TIMES (Jun. 30, 2011), https://perma.cc/V2GL-FG9A (noting the irony that in modern America "red" states

characterized by U.S. Senator Joseph McCarthy (R-Wisconsin), whose ultra-aggressive efforts to root out communist influences in American government was compared to the Salem Witch Trials in Arthur Miller's play *The Crucible*.

Despite the promises of the First Amendment, which guarantees freedom of the press, members of the press were not immune to "McCarthyism," as the fervor for rooting out communists became known. In *Dark Days in the Newsroom: McCarthyism Aimed at the Press*,[25] Edward Alwood chronicles how Senator McCarthy and the House Committee for Un-American Activities (HCUA)[26] cast a spotlight on the press by holding public hearings that would "place the entire newspaper industry under an anti-Communist microscope, as McCarthy had threatened earlier."[27] In 1956, he caused four journalists to be indicted on federal charges—mainly related to obstruction of justice for refusing to reveal sources and to espouse other press workers as communists or sympathizers to the HCUA.[28] One of the indicted, Alden Whitman, an outspoken obituary columnist and known member of the Communist Party, argued that the HCUA was clearly infringing upon the freedom of the press:

> Can a Congressional committee, on pain of contempt, force a newspaper man to disclose the names of fellow newspaper men (and [Newspaper] Guild members) who, at some time in the past, may have shared what are now discredited political opinions? Since disclosures are followed by firings—among other consequences—it is clear that effective press freedom—the right of members of the press

---

are associated with right-wing as opposed to left-wing politics). Communist leader Mao Zedong promoted the phrase "The East is Red" [东方红], which was the title of an official communist anthem, available at https://youtu.be/OZiEVspHVDU. It was the second such scare, the first having occurred in response to the Bolshevik Revolution in which Vladamir Lenin's political party overthrew the Russian monarchy at the Winter Palace in Petrograd, on November 7, 1917—which accords to October 25 on the Julian calendar (which was in use in Russia at the time), hence the term "October Revolution" also refers to this coup.

25. Edward Alwood, *Dark Days in the Newsroom: McCarthyism Aimed at the Press,* TEMPLE UNIVERSITY PRESS (2007), https://www.jstor.org/stable/j.ctt14bt0fd.

26. The 79th Congress established The House Committee on Un-American Activities (HCUA) in 1945 to investigate disloyal and subservice activities by private citizens, especially those suspected of having communist or fascist connections. One of the more famous chapters of the HCUA involves the Hollywood Blacklist, where the HCUA's 1947 hearings on Hollywood's alleged communist influences resulted in more than 300 artists being boycotted by the movie studios.

27. Alwood, *supra* note 25, at 82.

28. Some alleged sympathizers included Alden Whitmen, Seymour Peck, Robert Shelton, and William Price. Alwood, *supra* note 25*,* at 122.

> to practice their profession without political restrictions—is abridged.[29]

It took Whitman over a decade to clear himself of the charges. Meanwhile, many of McCarthy's other charges had already fallen flat. American public support of McCarthy and his policies peaked in January 1954, when 50% of the public supported him and only 29% had an unfavorable opinion.[30] But his popularity and influence diminished as his sensational tactics (which smartly leveraged the newest communication technology of the day, television) appeared increasingly shameful. Famously, Special Counsel for the Army Joseph Nye Welch asked McCarthy on live television, "Have you no sense of decency, sir, at long last? Have you left no sense of decency?"[31] The political tide turned against McCarthy, with his political nadir fixed by an official condemnation by vote of the Senate (67 to 22) on December 2, 1954, on conduct "contrary to Senate traditions."[32]

It took a few more years for some of the McCarthy-era free-speech cases to matriculate to the Supreme Court, but when they did, those cases were met by Justices who were prepared to defend the Constitutional right to free speech in a series of cases dealing with freedom of expression.[33] Among the litany of critical cases from this post-McCarthy era of renewed emphasis of civil liberties, a seminal case in the history of § 230 immunity is *Smith v. California*.[34]

Smith involved a Los Angeles County city code that makes it unlawful "for any person to have in his possession any obscene or indecent writing, [or] book . . . in any place of business

---

29. Alwood, *supra* note, at 123.

30. Robert Griffith, THE POLITICS OF FEAR: JOSEPH R. MCCARTHY AND THE SENATE 263 (2d ed. 1987).

31. Britannica, The Editors of Encyclopedia, *Joseph McCarthy*, BRITANNICA ENCYCLOPEDIA, https://www.britannica.com/biography/Joseph-McCarthy (last visited: Feb. 19, 2022).

32. Britannica, The Editors of the Encyclopedia, *supra* note 31.

33. From 1955 through 1969, the Supreme Court made several decisions which restricted the ways in which the government could enforce its anti-communist policies, some of which included limiting the federal loyalty program to only those who had access to sensitive information, allowing defendants to face their accusers, reducing the strength of congressional investigation committees, and weakening the Smith Act. Alien Registration Act of 1940, 76 P.L. 670, 54 Stat. 670 (1940).
In Yates v. United States, 354 U.S. 298 (1957), and *Scales v. United States*, 367 U.S. 203 (1961), the Supreme Court limited Congress's ability to circumvent the First Amendment, and in *United States v. Robel*, 389 U.S. 258 (1967), the Supreme Court of the United States ruled that a ban on communists in the defense industry was unconstitutional.

34. *Smith*, 361 U.S. at 147.

where . . . books . . . are sold or kept for sale."[35] Eleazer Smith owned and operated a bookstore that sold, among many other books, the pulp fiction novel *Sweeter than Life* by Mark Tyrone.[36] The book about a ruthless lesbian businesswoman was deemed obscene by the City of Los Angeles, although Smith did not know that.[37] Nor had he ever read the book.[38]

The Appellate Department, Superior Court of California, upheld the conviction regardless of Smith's intentions in possessing the novel, opining:

> Until one of our supreme courts declares otherwise, we are of the opinion that a book seller may be constitutionally prohibited from possessing or keeping an obscene book in his store and convicted of doing so even though it is not shown he knows its obscene character, nor that he intends its sale. He may not, with impunity, adopt as his rule of conduct: "Where ignorance is bliss, 'Tis folly to be wise."
>
> Those who are engaged in selling articles of a particular class to the public, have the first and best opportunity to know or be on notice of their characteristics, even though possession and not sale is involved.[39]

The Supreme Court of the United States answered the Appellate Department with an 8-1 reversal and declaration that the L.A. Code was unconstitutional. Justice Brennan, writing for the Court, declared:

> The fundamental freedoms of speech and press have contributed greatly to the development and wellbeing of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. This ordinance opens that door too far. The existence of the State's power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power. It is plain to us that the ordinance in question, though aimed at obscene matter, has such a tendency to

35. *Id.* at 148.

36. People v. Smith, 327 P.2d 636 (1958).

37. Elizabeth R. Purdy, *Smith v. California (1959)*, THE FIRST AMENDMENT ENCYCLOPEDIA (2009), https://perma.cc/V8XY-HMYJ.

38. Purdy, *supra* note 47.

39. *Smith*, 327 P.2d at 640.

> inhibit constitutionally protected expression that it cannot stand under the Constitution.[40]

In rendering this decision, the Supreme Court laid the foundation for the legal principles that a third party should not be liable for the content of speech.[41] If a bookseller cannot be liable for the content of the books he sells, can a publisher be so liable? One might distinguish a traditional publisher like a newspaper from a bookstore because a newspaper might be assumed to have actual knowledge of the content its staff chooses to print on its presses, whereas a bookstore would not be expected to read and know the contents of all the books that come and go through its doors. But what if there was a publisher that was more like a bookstore in that the publisher did not have actual knowledge of what it published? If people could self-publish their ideas, should not the platform they publish on enjoy the same immunity from liability as the bookstore that sells the same publication?

For about thirty years, case law drew a clear line between publishers of content, like newspapers, who were presumed to be aware of the content published and thus to be liable for any harms caused by that content, and distributors of content, like bookstores, who were unaware of the content distributed and thus immune from any harms caused by the content thereof. This clear line between publishers and distributors, however, became hazy as a new modality of publishing emerged: the Internet.

II. IMMUNITY FOR THIRD-PARTY PUBLISHERS ON THE INTERNET

In the early 1990s, the world emerged from the Cold War with a renewed appetite for globalization and a new home for democracy across the world. The Iron Curtain officially opened on November 9, 1989, when East (Communist) German Lieutenant-Coloner Harald Jäger opened Bornholmer Straße border crossing, allowing families who had not seen each other for almost fifty years to reunite from East Berlin to West Berlin. It ceremoniously fell on June 13, 1990, when East German troops began demolishing the hodgepodge of walls, fences, gates, ditches, signal systems, and barriers that had divided a nation and indeed the entire western world for a generation.

Amid the zeitgeist of reunification and the apparent triumph of democracy over communism, an innovative technology emerged that would accelerate the connectivity of the world. The internet does not have a single birth place or a moment of inception, but the scale and

40. *Smith*, 361 U.S. at 155 (quoting Roth v. United States, 354 U. S. 484, 488 (1957)).
41. *Id.*

scope of the network that we know today as the World Wide Web (WWW) may have begun with the development of HyperText Transfer Protocol (HTTP) in the late 1980s. Scientist Tim Berners-Lee invented a web browser that allowed people of ordinary technical skill to access information on the internet in 1990, and websites for the general public became widely available by the mid-1990s.

The internet changed speech forever. Prior to the internet, most people could only share a message with their local community. A particularly avid person might holler from a soap box in the park, or even publish a "zine" or newsletter that could enjoy some limited distribution. Sometimes, however, a public pronouncement could result in jeers or even a beating from the police. It was not easy to get a message out to the wider world—except for the few who controlled the sources of information in the pre-internet era.

Remember that in the 1950s, Senator McCarthy attempted to stop communism by targeting members of the print media and the movie industry, and he did so by using his ability to get hundreds of hours of free airtime on one of just a few public television channels. In the pre-internet era, there were few enough choke points on news that repressive government officials from Senator McCarthy could limit the spread of information. Only the rich and powerful could access the airwaves and the mainstream press.

But the internet made it possible for just about anyone with a computer and a telephone line—or today, just a free smartphone and a cellular data plan—to speak to just about everyone else. From the perspective of a person who wants to repress "dangerous" speech, the internet opened Pandora's box. Suddenly, anyone could be heard.

Without getting too technical, the innovation that allowed the internet to transform from a tiny research network was called the WWW. The WWW is an information system where resources are identified by plain-text locators (URLs, such as http://www.oranburg.com). Users access these resources via web browsers, which display web pages. Web pages are written in HyperText Markup Language (HTML), which allows web pages to include text, images, videos, apps, and links to other resources. This system of identifiers and links became more accessible as search engines like AltaVista, Yahoo!, and Google devised increasingly more accurate ways to "crawl" the web, indexing the various pages, and better ways to search the results. These search engines, in turn, encouraged more people to create content on the web, since that content would potentially be seen by others. This made it possible for anyone with a computer and a phone line to develop a web page and post it on

the WWW, where it would get indexed and could be found by others through search.

In the early days of the WWW, several Online Service Providers (OSPs) carved out portions of the internet that could only be accessed by subscribers to that service. For example, CompuServe, one of the first major commercial OSPs in America offered users access to each other and to the WWW through its platform. Subscribers would log on to CompuServe, where they could access email, forums, and chat rooms hosted by CompuServe. Users could also access the WWW through the portal.

The first legal challenges against OSPs like CompuServe regarded the content hosted on the CompuServe platform itself. Plaintiffs who were upset about defamatory or libelous content on an OSPs' forum or chat room might sue the OSPs along with the creator of that content, as the OSPs often has deeper pockets than an individual subscriber. The early cases, however, created confusion that threatened to stop the growth of the nascent internet in its tracks, prompting congressional action.

In the early-to-mid 1990s, two similar legal challenges against web service providers for objectionable content that users posted on their websites came out differently. *Cubby, Inc. v. CompuServe Inc.*,[42] related to CompuServe's electronic library, which is a combination of several hundred forums that feature electronic bulletin boards on which users can post text, interactive online conference where people can meet and chat in real time, and topical database. Don Fitzpatrick Associates of San Francisco (DFA) created a forum on CompuServe called Rumorville, where he posted a daily newsletter reporting on journalism and journalists. DFA was simply a CompuServe subscriber that was not employed or paid by CompuServe in any way. DFA posted on this forum statements related to its competitor, Cubby, Inc. (which was doing business as Skuttlebut) describing Skuttlebut as a "scam." Cubby sued not only DFA but also CompuServe, arguing that CompuServe was vicariously liable for harm caused by DFA's statement because DFA is CompuServe's agent.[43] The United States District Court for the Southern District of New York held that DFA and CompuServe were not in any sort of agency relationship; therefore, the vicarious liability claim failed, and the court granted defendant CompuServe's motion for summary judgment.[44]

---

42. 776 F. Supp. 135 (S.D.N.Y. 1991).

43. *Id*. at 137–38.

44. *Id*. at 143.

Just a few years later, however, in *Stratton Oakmont, Inc. v. Prodigy Services Co.*,[45] a plaintiff succeeded in a similar case by presenting a different argument. Prodigy operated an online bulletin board, much like CompuServe's forums, where users could post content. An unidentified user posted on the "Money Talk" forum that Stratton Oakmont was a "cult of brokers who either lie for a living or get fired," along with other allegedly defamatory statements.[46] But instead of claiming that the unidentified user was Prodigy's agent (recalling that argument failed in *CompuServ*), the plaintiff of *Prodigy* argued that Prodigy acted as a publisher, not a distributor, of that content. In support of this claim, the plaintiff demonstrated three things. First, that Prodigy had "content guidelines" that allowed Prodigy to remove objectionable content. Second, that Prodigy employed a software screen to automatically prevent posting of offensive language. Third, that Prodigy employed people to monitor the forums and ensure the guidelines were observed, and that these monitors had a tool known as an "emergency delete function" whereby a monitor could delete an objectively false posting.[47]

Prodigy argued that it employed these policies, algorithms, and people to ensure it was cultivating a safe online environment.[48] Unfortunately for Prodigy, however, doing this proved to be the basis for the Supreme Court of New York, Nassau County to distinguish between Prodigy and CompuServe and to impose liability on the former.[49]

The key distinction between *CompuServe* and *Prodigy* is twofold. The *Prodigy* court explained:

> First, PRODIGY held itself out to the public and its members as controlling the content of its computer bulletin boards. Second, PRODIGY implemented this control through its automatic software screening program, and the Guidelines which Board Leaders are required to enforce. By actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and "bad taste", for example, PRODIGY is clearly making decisions as to content (*see, Miami Herald Publishing Co. v. Tornillo*, *supra*), and such decisions constitute editorial control. (Id.) That such control is not complete and is enforced both as early as the notes arrive and as late as a complaint is made, does not minimize or

45. 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995).
46. *Id.* at 1794.
47. *Id.*
48. *Id.*
49. *Id.*

> eviscerate the simple fact that PRODIGY has uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards. Based on the foregoing, this Court is compelled to conclude that for the purposes of plaintiffs' claims in this action, PRODIGY is a publisher rather than a distributor.[50]

This case caused a crisis on the nascent world wide web. If web services like CompuServe and Prodigy go from being immune distributors to liable publishers simply by moderating content, the clear incentive is for platforms not to engage in any content moderation. The results would be a web without rules, where anything goes. This was not the family friendly web that companies like CompuServe, Prodigy, and America Online wished to cultivate. The decision against Prodigy and in favor of Stratton Oakmont appeared even more dangerous and absurd when Stratton Oakmont was shut down for fraudulent trading practices in 1996. In 1999, its founders pled guilty to multiple counts of securities fraud. The "defamatory content" was true. Money Talk could have shed light on a sinister organization and saved people from being fleeced.

United States Representative Christopher Cox (R-California) felt that the *Prodigy* decision created a perverse incentive for web platforms to ignore user-posted content. "It struck me that if that rule was going to take hold then the internet would become the Wild West and nobody would have any incentive to keep the internet civil," Cox said.[51] Cox connected with United States Senator J. James Exon (D-Nebraska), who played a leading role in pushing through the Telecommunications Act of 1996. This includes as its Title V the Communications Decency Act of 1996, which related to the regulation of pornography, indecency, and obscenity on the internet by amending the Communications Act of 1934. This, in turn, was a New-Deal era statute that originally created the Federal Communications Commission to regulate wire, radio, telegraphy, telephone, and broadcast communication. Together, the two co-sponsored another amendment to the Communications Act, then known as Section 509 of the Telecommunications Act of 1996, and now found in the Code of Federal Regulations at Section 230 of the Communications Act of 1994, as amended. Section 230 has been called "the 26 words that made the internet," and it reads as follows: "No provider or user of an interactive computer service shall be treated as

---

50. *Id.*

51. Matt Reynolds, *The Strange Story of Section 230, the Obscure Law That Created Our Flawed, Broken Internet*, WIRED (May 24, 2019), https://perma.cc/L9K5-9ANN.

the publisher or speaker of any information provided by another information content provider."[52]

This rule meant that web service providers would no longer have to avoid moderating content to avoid liability. After the promulgation of § 230, the internet quickly expanded from about 16 million users (about the population of New York) to over 4 billion users.[53] Meanwhile, traditional media, which did not enjoy the same protections, dwindled. Newspaper revenues declined 62% from 2008 to 2018.[54] Employment at newspapers fell by 47% over that same period.[55] Circulation of newspapers—including digital editions—fell in 2018 to its lowest level since circulation numbers were recorded.[56]

From 1959 to 2020, the entire landscape of public discourse had dramatically changed. The situs on conversation had shifted from newspapers and bookstores to online web servers. The COVID-19 pandemic only hastened the demise of the public square, as nearly all of human social life moved online. Where once media moguls like Rupert Murdock stood at the epicenter of power over popular opinion, now a new class of social media "influencers" vied for attention from an increasingly fractured and fragmented America. The once nascent and novel concept of internet bulletin boards has become the dominant way in which Americans get news and share opinions. The questions we must ask now are, do these social media giants really need the immunities granted to them by § 230? Has § 230 accomplished its purpose of creating a more civil and honest internet? Or is it time to roll back some of the protections that these social media giants no longer need? The next section will discuss how § 230 played a significant role in creating the social media giants, and then this Article will conclude with some thoughts about how the internet might function without this immunity.

---

52. Reynolds, *supra* note 51; 47 U.S.C. § 230(c)(1).

53. Max Roser, Hannah Ritchie & Esteban Ortiz-Ospina, *The Internet's History Has Just Begun*, OUR WORLD IN DATA (2021), https://ourworldindata.org/internet.

54. Elizabeth Grieco, *Fast Facts About the Newspaper Industry's Financial Struggles as McClatchy Files for Bankruptcy*, PEW RESEARCH CENTER (Feb. 14, 2020), https://perma.cc/J54J-6KD7.

55. *Id*.

56. *Id*.

III. HOW § 230 CREATED THE SOCIAL MEDIA GIANTS

Whether the internet was a Pandora's box,[57] meaning something which appears good but is a curse, depends on one's point of view. One the one hand, a free and open internet makes it impossible to control an entire population's access to information. From the perspective of free speech, that is a good thing. On the other hand, some speech is dangerous. Screaming "fire" in a crowded theatre, for example, is illegal[58] because people could be trampled in the resulting rush to escape danger. Speech like this is directly harmful. Shouting those words in that place is likely to result in mayhem, chaos, and injury. Social media has amplified the ability to scream "fire" to a worldwide audience.

Let us assume that a person who wrongfully screams "fire" in a crowded theatre is liable for the resulting harms. Should the theatre also be liable? No, the theatre does not control what private people might shout on its premises. Then what if someone shouts "fire" in bookstore? Again, the bookstore should not be liable for this unexpected outburst. What happens if such an outburst occurs via the internet? For example, on January 6, 2021, thousands of people tuned to the social media platform DLive, where users made comments including "TRUMP GAVE YOU AN ORDER STORM THE CAPITOL NOW," "SMASH THE WINDOW," and "HANG ALL THE CONGRESSM[E]N."[59] Thousands of people, many of them armed, who gathered in protest on the Capitol steps that day, received these messages simultaneously.[60]

It is not difficult to associate the clear demands for violence, made via a medium designed to directly and immediately reach a radicalized and angry crowd of armed protestors, some of who were already attempting to breach or had already breached the Capitol building, with screaming "FIRE" in a crowded theatre.[61] In both cases, the speech is

57. Pandora's box from the Greek myth was originally from a large storage jar or pithos [πιθος]. The 16th century Dutch humanist philosopher Desiderius Erasmus Roterodamus changed it to "box" is his translation of proverbs, *Adagia* (1508).

58. Unless there is actually a fire, of course.

59. Rebecca Heilweil & Shirin Ghaffary, *How Trump's Internet Built and Broadcast the Capitol Insurrection*, VOX (Jan. 8, 2021), https://perma.cc/33UU-H7JW.

60. *See id*.

61. In fairness, the use of this analogy has itself come under fire. Trevor Timm, *It's Time to Stop Using the 'Fire in a Crowded Theater' Quote*, THE ATLANTIC (Nov. 2, 2012) ("Oliver Wendell Holmes made the analogy during a controversial Supreme Court case that was overturned more than 40 years ago."). Without taking a position on whether the statement is law, dicta, or merely a poetic turn of phrase, I use it here because it gets the point across that there are obvious limits to free speech when speaking impinges on other liberties of life.

not protected by the Constitution, pursuant to the Supreme Court of the United States' decision in *Brandenburg v. Ohio*,[62] which held that the government may prohibit speech advocating the use of force or crime if (1) the speech is "directed to inciting or producing imminent lawless action," and (2) the speech is "likely to incite or produce such action."[63] But the platforms that "distribute" this speech, however, remain immune from its harms thanks to § 230. Some scholars, such as Professor Eric Goldman, argue that this immunity remains essential because otherwise these platforms would "either not publish at all or they'd look for ways to turn over responsibility to other people."[64] This claim will be explored in the conclusion to this Article which explores what an internet without § 230 immunity might look like. Before that concluding conversation, however, it is important to understand how § 230 changed the future of the internet. The next section argues that § 230 created the social-media-heavy internet that we experience today. Understanding this will help us conclude on whether maintaining this immunity is likely to produce a better or worse internet from the perspective of civil society.

When Yahoo! debuted in 1994, there were 2,738 web sites and about 25,454,590 web users.[65] Google entered the search engine market in 1998, when the web had grown to 2,410,067 sites and 188,023,930 users.[66] Facebook (then called The Facebook) went online in 2004 amid 51,611,646 other sites and 910,060,180 users.[67] As of January 2021, over half (59.5%) of the world's population is online, where there are 4.66 billion web users[68] that, as of June 18, 2021, have access to over 1.86 billion web sites.[69]

In the early days of the internet, it made sense to analogize web servers like CompuServe and Prodigy to bookstores, who simply provided a place where others could publish their content. The lack of clarity around whether a web site was a "publisher," or a "distributor" needed clarification. Otherwise, web sites might be afraid to delete obscene, dangerous, vulgar, or simply inappropriate content for fear

62. 395 U.S. 444 (1969).

63. *Id*. at 447.

64. Reynolds, *supra* note 51, at 5.

65. *Total Number of Websites*, INTERNET LIVE STATS, https://perma.cc/RU5R-N5FY (last visited: Feb. 19, 2022).

66. *Total Number of Websites*, *supra* note 65.

67. *Total Number of Websites*, *supra* note 65.

68. Joseph Johnson, *Global Digital Population as of January 2021*, STATISTICA (Sept. 10, 2021), https://perma.cc/CY2N-3CRY.

69. Ogi Djuraskovic, *How Many Websites Are There?–The Growth of the Web (1990–2021),* FIRSTSITEGUIDE (Jul. 5, 2021), https://perma.cc/5VXD-5YAZ.

that maintaining a family friendly environment invited massive legal liability.

But the resulting clarification, in the form of § 230, did not fulfill the same purpose that *Smith* did. The point of *Smith* was not to impose an undue burden on distributors for the content of their distributions. Section 230, on the other hand, seemed to go much further, as it appears to be designed to motivate web platforms to moderate their content. Although much of the rhetoric around § 230 is about creating a "free and open internet," free from government control and political manipulation, so that political speech can occur online, in truth, the law was never designed to create a new public town square online. It was designed to create a sort of Disneyland version of the public square, a cleaned-up version of main street that was free of ugly ideas or uncomfortable perspectives. In other words, § 230 was never designed to promote content neutrality.[70] Rather, it was designed to promote moderation, which means the moderators will decide what speech gets heard and what gets suppressed.

Section 230 incentivized web platforms to moderate speech, not necessarily to promote free speech. If web platforms' incentives in displaying content were aligned with society's goal of having a place for free and fair discussion, then this moderation might generate desirable results. But web platforms are not primarily motivated by exposing people to new views with which they may disagree and challenging their priors with added information and arguments. Rather, web platforms are primarily motivated by revenue. Unlike the public square, these private for-profit companies must answer to shareholders by hitting revenue targets. Revenue on these "free" web platforms comes from advertising revenue. The platforms are paid to serve advertisements to people who are likely to be interested in the advertised products and services. That means the platform's goal is to get people online and keep them there, where they will see more advertisements and buy more product.

The results, unsurprisingly, are social media platforms that moderate content to maintain user engagement. It turns out that users

---

70. Adi Robertson, *Why the Internet's Most Important Law Exists and How People Are Still Getting it Wrong*, THE VERGE (Jun 21, 2019), https://perma.cc/XLN4-UX4Y (interviewing Jeff Kosseff, author of *The Twenty-Six Words that Created the Internet*, who said:

> But I spoke with both [§ 230 architects] Sen. Ron Wyden (D-OR) and former Rep. Chris Cox (R-CA) extensively, and I spoke with most of the lobbyists who were involved at the time. None of them said that there was this intent for platforms to be neutral. In fact, that was the opposite. They wanted platforms to feel free to make these judgments without risking the liability that Prodigy faced.)

like to hear their own views and beliefs reinforced more than they like to engage in a free exchange of ideas in pursuit of the truth. Groups form around conspiracy theories, like the absurd false claim that Bill Gates put microchips in the COVID-19 vaccines in order to track our thoughts, then Facebook profits by serving ads that members of those groups are likely to click, such as for-home remedies or firearms.[71] Facebook even allowed advertisers to bid on search key words such as "How to burn Jews," and it would serve ads that were designed to appeal to an anti-Semitic audience.[72] Traditional newspapers, which do not have the same immunity, are not able to post such proposal for hate and violence and then collect revenue from the subscribers who are interested in this sort of speech. This problematic effect is exacerbated by the echo chamber effect that is inherent to social media. By ranking content based on what the platform thinks the reader will like, readers tend to see an increase of things they already agree with, which compounds any prior views of being right in those convictions.[73]

Companies like Facebook and Twitter are using their immunity to moderate content without incurring liability for that content to become extraordinarily wealthy. Alphabet, Google's parent company, is the twenty-first largest company in the world by revenue in 2021.[74] Facebook is number eighty-six.[75] None of the traditional media companies even made the top, except for ViacomCBS, which ranked number 465 after its merger.[76] Put simply, social media has come to dominate the media sector, and the result is that news in our world comes from the echo chambers that are designed to keep us online where we will buy things.

Media moguls have long known that crime, sex, violence, and scandal sell newspapers.[77] The same is true online, where advertises gear commercials to the eighteen to thirty-four age group, who tend to be

---

71. Julia Carrie Wong, *Revealed: Facebook Enables Ads to Target Users Interested in 'Vaccine Controversies'*, THE GUARDIAN (Feb. 15, 2019), https://perma.cc/92Y9-RCXM.

72. Wong, *supra* note 71.

73. *See* Matteo Cinelli et al., *The Echo Chamber Effect on Social Media*, 118 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA (Mar. 2, 2021), https://doi.org/10.1073/pnas.2023301118.

74. *Global 500*, FORTUNE MAGAZINE (2021), https://fortune.com/global500/.

75. *Global 500*, *supra* note 74.

76. *Global 500*, *supra* note 74.

77. Seth Faison, *Politics May Be Serious but It's Crime and Sex that Sell Newspapers*, NEW YORK TIMES, Sec. A, p. 6 (Jun. 30, 1997), https://www.nytimes.com/1997/06/30/world/politics-may-be-serious-but-it-s-crime-and-sex-that-sell-newspapers.html.

attracted to content with strong sexual and violent content.[78] Making Twitter and Facebook immune from the explicit content they distribute incentivizes them to prioritize such content. Traditional media like television and newspapers cannot safely show this content, so the social media platforms have a competitive advantage. They do not bear the cost of liability, and so are incentivized to engage in the activity.

Social media corporations simply could not act in this way but for § 230 immunity. The extreme degree to which Facebook, Twitter, and the other platforms rank, moderate, screen, remove, ban, insert, upvote, and monetize content is clearly editorial in nature. The result is that the news has grown increasingly polarized because echo chambers keep people online and clicking ads. In retrospect, this result was inevitable. The question is, can and should we limit or repeal § 230 to reverse the social media reality distortion field? Or would removing § 230 immunity simply kill the internet?

IV. CONCLUSION: SOCIAL MEDIA WITHOUT § 230 IMMUNITY

In summary, the statutory immunity from publishers' liability that social media giants enjoy today stems from a real but outdated fear. Amid the Red Scare of the 1950s, government actors would censor and control the distribution of politically unpopular information. This censorship strikes at the heart of cherished First Amendment freedoms, which include the right to hold and share unpopular and even some "un-American" views. With so much free speech threatened by the spirit of McCarthyism, the United States Supreme Court in *Smith v. California* made it unconstitutional for third-party book resellers to be liable for the contents of books they had no reason to know about or read. This effectively granted booksellers and other distributors of content immunity from any harms caused by the content—unless, of course, they had knowledge of distributing something harmful.

In the early days of the WWW in the 1990s, the same immunity was applied to online service providers like CompuServe and Prodigy. In fact, the immunity for OSPs exceeded that of booksellers: § 230 granted immunity to OSPs for third-party content even if the OSPs had actual knowledge of those contents. But even though the immunity is similar, the reason for granting it was not. While *Smith* immunity is designed to prevent censorship, § 230 immunity is designed to encourage censorship. The statute's principal drafters acknowledged their

78. Romeo Vitelli, *Does Sex and Violence Really Sell Products,* PSYCHOLOGY TODAY (Jul. 27, 2015), https://perma.cc/XX5R-KHEH.

legislative intent was to allow and encourage OSPs to monitor, screen, and block obscene and inappropriate content.

Section 230 effectively deputizes OSPs to do the same censorship work in removing obscenity that the Los Angeles City code authorized its police to do. In this sense, *Smith*, which found the L.A. code unconstitutional, stands for the opposite of what § 230 does. Section 230 does not and was never designed to create a free and open internet, where the marketplace of ideas would reach new heights of equality, accessibility, and inclusion. Rather, § 230 was designed to keep the internet sanitary—and it delegated the definition of obscenity to the OSPs.

If OSPs were incentivized to create the most productive civic space possible, this might be a wonderful thing. But OSPs are for-profit corporations whose primary motivation is profit. Profits come from advertisements, and advertisements come from "eyeballs." To do this, OSPs need users to generate content that will be appealing to other readers. This alone generates a sort of echo chamber, since the system is designed to show people what they want to see from people who think and look like them. Echo chambers are good for ad revenue because they make it easy to find a common group of people who are likely to want a certain good or service. But echo chambers are bad for democracy because they prevent people from hearing new viewpoints and reinforce the idea that their own view is correct. OSPs use § 230 immunity to facilitate echo chambers where they serve advertisements to generate massive revenues.

There are no guarantees, however, that § 230 will make the internet safer or less obscene. Sometimes OSPs work to create a sanitized environment. Facebook, for example, seems authentically committed to getting rid of "fake news." And their ambition for a Facebook Kids channel requires them to find a way to police online communication even more effectively. But alternative social media channels, like Gab, Rumble, and 4chan, have a much spottier record of prohibiting hate speech.[79] Even worse, some social media channels now feature encryption. Extremist groups are flocking to Signal and Telegram, where law enforcement cannot monitor their hate speech. During the Capitol Riot, one of the insurrectionists used the walkie-talkie app Zello to coordinate the attack.

---

79. The Pittsburgh synagogue shooter, for example, posted anti-Semitic messages on Gab, which remained up until public pressure forced Gab to take them down. *See* Kevin Roose, *On Gab, an Extremist-Friendly Site, Pittsburgh Shooting Suspect Aired His Hatred in Full*, NEW YORK TIMES (Oct. 28, 2018), https://perma.cc/5MRL-2TLF.

At the end of the day, even with § 230 immunity, OSPs are free to become an "anything goes" channel. Some social media maps already advertise themselves in this way. Parler, for example, markets itself as the "free speech app," where no one will be "deplatformed" (kicked off or banned) because of their views.[80] If promoting extremist views or not banning obscene ones is profitable, then some OSPs will do it. Section 230 lets them do it.

Of course, § 230 also allows Wikipedia to exist. This crowdsourced dictionary runs on a shoestring budget. It would not be economically possible for Wikipedia to exist as an ad-free, subscription-free resource if the company was legally required to police its tens of millions of user-generated web pages (which are in dozens of languages). Many other small sites would likewise be destroyed quickly by lawsuits for defamatory content posted therein.

The solution cannot be to suddenly go back to the *CompuServe* days. Critics are correct that, without any immunity, web sites would not be able to edit content to ensure a safer web experience without risking legal liability. If social media platforms truly intend become stewards of a safe and public web, instead of simply mining view eyeballs for ad revenue profits, such platforms will need protection from legal liability as a means of subsidizing behavior that does not lead to revenue and profit. Otherwise, large and established tech companies, who can more easily afford the risk of litigation, will continue to dominate the social media space.[81] For this reason, many scholars do not necessarily support the total abolition of Section 230.Various intermediate solutions have been proposed, including a revenue limit on § 230 immunity, such that it would not apply to social media giants like Facebook and Twitter. The problem with any solution like this is it becomes hard to get the dollar amount exactly right. How big is too big? Moreover, whenever a regulation is designed around a sharp dollar cut off, it distorts behavior right around that amount.

A better solution is simply to reserve § 230 immunity for corporations who fulfill a social purpose of creating a public square. Ideally, such corporations would be non-profits, which are not subject to quarterly demands from shareholders to increase revenue. In this way, we would continue to have a free and open Internet. We would not have a

80. Laura Romero, *'Free Speech' Social Media Platform Parler is a Hit Among Trump Supporters, but Experts Say it Won't Last*, ABC NEWS (Nov. 17, 2020), https://abcnews.go.com/US/free-speech-social-media-platform-parler-hit-trump/story?id=74245251.

81. Seth C. Oranburg, *Encouraging Entrepreneurship and Innovation through Regulatory Democratization*, 57 SAN DIEGO L. REV. 757, 759 (2020).

hundred microcosms in the form of apps that feature echo chambers. And that may make it easier for us to finally hear each other.