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Section 230 Immunity: How the Trump Era Has Exposed the Current Conflict Between the First Amendment and the Good Samaritan Clause in the Modern Public Square

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SECTION 230 IMMUNITY: HOW THE TRUMP ERA HAS EXPOSED THE CURRENT CONFLICT BETWEEN THE FIRST AMENDMENT AND THE GOOD SAMARITAN CLAUSE IN THE MODERN PUBLIC SQUARE

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"My use of social media is not Presidential—it's MODERN DAY PRESIDENTIAL."

Donald J. Trump, President of the United States[1]

I. INTRODUCTION

The claim above from the President of the United States in reference to his Twitter account is essentially the grounds for which the *Knight First Amendment Institute at Columbia Univ. v. Trump* brought forth a lawsuit.[2] The lawsuit brought issues on free speech, particularly those on social media platforms, to the forefront of First Amendment jurisprudence. Judge Buchwald ruled President Trump's use of the Twitter comment box was an interactive space in an intermediary platform and it created a designated public forum.[3] The government creates a designated public forum when it intentionally opens a nontraditional forum for public discourse.[4] As a result, the decision forced the President to unblock the seven twitter plaintiffs in the lawsuit "for barring them from viewing or responding to his tweets."[5]

This lawsuit has exposed the current conflict between the fundamental right to free speech under the First Amendment and the "Good Samaritan" clause within Section 230 of the Communications Decency Act when it

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1. Donald J. Trump (@realDonaldTrump), TWITTER (July 1, 2017, 5:41 PM), https://twitter.com/realdonaldtrump/status/881281755017355264?lang=en.

2. *See* Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541, 566 (S.D.N.Y. 2018).

3. *Id.* at 575.

4. Seattle Mideast Awareness Campaign v. King Cty., 781 F.3d 489, 496 (9th Cir. 2015).

5. Charlie Savage, *White House Unblocks Twitter Users Who Sued Trump, But Appeals Ruling*, N.Y. TIMES (June 5, 2018), https://www.nytimes.com/2018/06/05/us/politics/trump-twitter-account-lawsuit.html.

comes to regulating content published on the internet. The two provisions of the "Good Samaritan" clause within section 230 are as follows:

> (c)(1) No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.[6]
>
> (c)(2) 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 availability of material 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; or
> >
> > (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[7]

Under these provisions of the Communications Decency Act, Sections 230 (c)(1) & (2) grant immunity to interactive computer services on the internet.[8] Today, the most common interactive computer services are websites.[9] Some of the most popular websites are networking platforms like Twitter, Facebook, and Reddit,[10] which are intermediaries that connect users to each other through their platform.[11] They are absolved from liability of defamation because section 230 protects them from acting as publishers or distributors.[12]

Under the common law, "a person who publishes a defamatory statement by another bears the same liability for the statement as if he or she had initially created it."[13] Publishers have "the knowledge, opportunity, and abil-

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6. 47 U.S.C. § 230(c)(1) (1996).
7. *Id.* § 230(c)(2).
8. *See id.*
9. 47 U.S.C. § 230(f)(2) (1996) defines an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server."
10. Priit Kallas, *Top 15 Most Popular Social Networking Sites and [2020],* DREAMGROW, https://www.dreamgrow.com/top-15-most-popular-social-networking-sites/ (last updated Apr. 9, 2020).
11. KARINE PERSET, ORG. FOR ECON. CO-OPERATION AND DEV., THE ECONOMIC AND SOCIAL ROLE OF INTERNET INTERMEDIARIES 9 (2010), https://www.oecd.org/sti/ieconomy/44949023.pdf.
12. § 230(c)(1).
13. *Immunity for Online Publishers Under the Communications Decency Act*, DIGITAL MEDIA LAW PROJECT, http://www.dmlp.org/legal-guide/immunity-online-publishers-under-communications-decency-act, (last visited Aug. 2, 2020).

ity to exercise editorial control over the content of [their] publications."[14] A book publisher, newspaper, or social media publishing website can each be held liable for anything that appears within its pages.[15]

Moreover, that liability changes if the publisher becomes a distributor because distributor liability is more limited.[16] For example, if a grocery store assumes liability for having celebrity tabloid publications in its stores, then that grocery store would be liable to be sued for defamation by the celebrities, who appear in the tabloids. If this were the case, content like gossip magazines and books would likely never see distribution due to the threat of defamation lawsuits that would attach to the distributor.[17]

Similarly, if third-party publishers were to be held liable for the content of their users, then lawsuits would accrue even more rapidly than they already do.[18] To prevent these lawsuits, Congress enacted Section 230 of the Communications Decency Act in 1996, which granted immunity to third-party publishers.[19] Thus, section 230 was enacted to ensure robust free speech on the internet, "unfettered by Federal or State regulation."[20]

However, unforeseen consequences have emerged from websites and social media platforms on the internet as a result of section 230 immunity.[21] For example, the inability to shield children from harmful images is one consequence.[22] Also, there have been instances of censorship by Twitter banning viewpoints on their platform.[23] In essence, section 230 immunity has caused difficulty balancing factors between regulation and freedom of expression.[24]

This article will examine the legislative history of section 230 and how it affects the "modern public square"[25]—the internet. First, it will focus on

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14. *Id.*
15. *Id.*
16. *Id.*
17. *See id.*
18. 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, 481 (2010) ("[P]laintiffs continue to file lawsuits against intermediaries that are shielded by section 230.").
19. *See* 47 U.S.C. § 230(c)(1) (1996).
20. *See* 47 U.S.C. § 230(b) (2006).
21. Rob Frieden, *Invoking and Avoiding the First Amendment: How Internet Service Providers Leverage Their Status as Both Content Creators and Neutral Conduits*, 12 U. PA. J. CONST. L. 1279, 1295 (2010).
22. *Id.* at 1306–07 .
23. Matt Lamb*, Google, Twitter and Facebook Should Just Be Honest If They Don't Like Conservatives*, USA TODAY (Sep. 12, 2018), https://www.usatoday.com/story/opinion/2018/09/12/social-media-facebook-twitter-google-youtube-bias-conservatives-republicans-column/1250893002/.
24. *See* Ardia, *supra* note 18, at 410.
25. Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

the background and legislative history of section 230. This section will discuss two landmark cases that led to the creation of section 230—*Cubby v. CompuServe*[26] and *Stratton Oakmont v. Prodigy Services Co*.[27] Next, the article will examine the original legislative intent of Congressmen Cox and Wyden, who were the framers of the Good Samaritan clause and who authored it in a bipartisan manner.

Additionally, the article will examine the censorship double-standards on the internet, particularly on the Twitter platform, that have become so common. This article will provide several concrete examples of how ISP's have engaged in viewpoint discrimination against certain users by blocking them from their social media platforms and prohibiting those users from exercising their fundamental First Amendment right to free speech.

Finally, this article will propose a couple of solutions to bridge this conflict between the First Amendment and Section 230. The first of which would be a legislative solution where Congress would create an additional provision to the Good Samaratin Clause of Section 230 to make it clear that if ISP's want to keep their immunity from being liable for the content posted by their users, then they must remain content-neutral and allow the full protections of the First Amendment. The provision will make it put forth the notion that if ISP's engage in viewpoint discrimination by blocking content protected by the First Amendment, then the would have standing against the website for violating their fundamental right to freedom of expression under the First Amendment. Finally, this article will explain this solution would be consistent with the legislative intent of Congressman Cox and Wyden, Judge Buchwald's ruling in *Knight First Amendment Institute at Columbia University v. Trump*.

II. BACKGROUND

The Supreme Court has described the internet as a "vast number of documents stored in different computers all over the world."[28] The internet has become the medium where the most amount of information is exchanged, and where most people in society go for entertainment and to communicate with one another.[29] As a result, content that is shared on the internet should be protected from government regulation, unless the gov-

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

27. Stratton Oakmont v. Prodigy Servs. Co., INDEX No. 31063/94, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 26, 1995).

28. *Reno v. ACLU*, 521 U.S. 844, 852 (1997).

29. Jana Anderson & Lee Rainie, *The Positives of Digital Life*, PEW RESEARCH CENTER INTERNET AND TECHNOLOGY (July 3rd, 2018) https://www.pewresearch.org/internet/2018/07/03/the-positives-of-digital-life/.

ernment can present a compelling state interest for intervening.[30] Furthermore, the internet is operated by private companies, not the government, who are "building and selling access" to the various domains whereby all of this information is exchanged.[31]

Additionally, the most unique characteristic of the internet is its decentralized system, as it forces reliance amongst service providers, intermediaries, and third-party publishers.[32] A "service provider" is "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user sent or received."[33] Service providers are essential to internet connectivity because they facilitate the "instrumentalities that enable others to speak or act."[34] Thus, the interconnectivity between service provider networks is what essentially fuels the internet.[35]

Beginning in the 1990s, two New York state cases influenced the enactment of the Communications Decency Act and its section 230 provisions. In 1991, *Cubby v. CompuServe* was one of the first cases involving a website that was sued for defamation based on the statements of a third-party.[36] In that case, "CompuServe provided subscribers with access to . . . electronic 'forums' that were run by third parties."[37] Here, Cubby, Inc., the operator and developer of a computerized database brought a suit for libel, business disparagement, and unfair competition arising from CompuServe carrying in its database a publication containing allegedly defamatory statements about the plaintiffs.[38] Cubby, Inc. based its claim on statements that appeared in one of Compuserve's forums, arguing that it was a publisher of the statements.[39]

However, CompuServe, in defense, argued it should be treated as a distributor rather than a publisher because it did not screen content before it was posted. [40] The Court granted CompuServe's motion for summary judgment because the plaintiff failed to show that CompuServe "knew or had

30. Frieden, *supra* note 21, at 1306.

31. Nicholas P. Dickerson, Comment, *What Makes the Internet So Special? And Why, Where, How, and by Whom Should Its Content Be Regulated?*, 46 HOUS. L. REV. 61, 69 (2009).

32. Ardia, *supra* note 18, at 384–85 ("[I]ntermediaries play many different roles.").

33. 17 U.S.C. § 512(k)(1)(A)–(B) (2020); *see also* Costar Grp., Inc. v. Loopnet, Inc., 164 F. Supp. 2d 688, 701 (D. Md. 2001).

34. Ardia, *supra* note 18, at 393.

35. *Id.*

36. Cubby, Inc. v. Compuserve, Inc., 776 F. Supp. 135, 139 (S.D.N.Y. 1991); DIGITAL MEDIA LAW PROJECT, *supra* note 13.

37. DIGITAL MEDIA LAW PROJECT, *supra* note 12; *Cubby, Inc.*, 776 F. Supp. at 137.

38. *Cubby, Inc.*, 776 F. Supp. at 137–38.

39. *Id.*

40. *Id*. at 139.

reason to know" of the defamatory content.[41] The Court looked at two contributing factors to determine that CompuServe was a distributor rather than a publisher: (1) CompuServe's contract gave it no editorial control over content; and (2) CompuServe was mostly a "passive conduit."[42] Thus, CompuServe was not held liable as a distributor of the defamatory statements.[43]

However, in 1995, the New York Superior Court noted in *Stratton Oakmont v. Prodigy*, that Prodigy had the power to edit messages on its bulletin board forums.[44] In *Prodigy,* the plaintiffs filed a libel action against defendant internet service provider and alleged that defendant published information on a computer bulletin board.[45] Prodigy was a very similar service to CompuServe, and it was primarily a bulletin board forum.[46] However, the plaintiff in *Prodigy* argued that Prodigy was liable for the information because it had actually published the content.[47] Here, the Court held that the online service provider was a publisher rather than a distributor[48] because Prodigy exercised editorial control to filter content.[49]

Therefore, two New York courts, tasked with the same issue, came to different conclusions as to whether internet service providers were to be deemed publishers or distributors for liability purposes. The court in *CompuServe* held that the service provider was a distributor, and therefore, CompuServe could not be held liable for the defamatory comments posted in its forum unless they knew or had reason to know about the statements.[50] In contrast, the *Stratton Oakmont* court held that the service provider was a publisher because it exercised editorial control to filter content from its bulletin board forums.[51] The *Stratton Oakmont* New York court opined that as a publisher, the service provider could be held liable for defamatory comments posted on its bulletin board forum by a third party.[52]

Ultimately, the inconsistent rulings of *CompuServe* and *Stratton Oakmont* brought forth a need for legislation by Congress so that the internet could thrive and grow into a robust, marketplace of ideas. The resulting legislation is known as the "Good Samaritan Clause" under provisions (c)(1) &

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41. *Id*. at 137, 141–42.
42. Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARV. J. L. & TECH 253, 258–60 (2006).
43. *Cubby, Inc.*, 776 F. Supp. at 137.
44. Stratton Oakmont v. Prodigy Servs. Co., INDEX No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at *10 (N.Y. Sup. Ct. May 26, 1995).
45. *Id* at *1–2.
46. *Id.* at *2–3.
47. *Id.* at *6.
48. *Id.* at *10–11.
49. *Id.* at *3–5, 10.
50. Cubby, Inc. v. Compuserve, Inc., 776 F. Supp. 135, 140–41 (S.D.N.Y. 1991).
51. *Stratton Oakmont*, 1995 N.Y. Misc. LEXIS 229, at *10–11.
52. *Id.* at *6.

(2) in section 230 of the Communications Decency Act (CDA).[53] It was a reaction to the conflicting rationales in *CompuServe* and *Stratton Oakmont* regarding whether the ISP was liable as a publisher or distributor.[54] The legislature recognized a need for legislation that might bridge the gap between the two cases and create a standard which would allow the internet to grow.[55] So it enacted section 230 and immunized third-party publishers from liability for user content.[56]

After the enactment of the CDA, Congress amended the CDA to include sections (c)(1) & (2).[57] Congress labeled the CDA amendments as "Protection for Good Samaritan Blocking in Screening of Offensive Material." Essentially, if a distributor or publisher of information or content blocks or screens offensive material, section 230 gives it immunity.[58] Under Section 230, offensive material is defined as "any action . . . 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."[59] Because of this immunity, internet publishers are treated differently from publishers in print, television or the radio.[60]

Shortly after the CDA was passed, the Court addressed the constitutionality of the act in *Reno v. ACLU*. In *Reno*, the Court struck down many censorship provisions of the act. The Court found that (1) the CDA's vague provisions chilled free speech since speakers could not be certain if their speech was proscribed; (2) that many of the CDA's provisions criminalized legitimate protected speech as well as unprotected obscene speech, and thus were overinclusive; and (3) that the CDA was unconstitutional due to its overbreadth.[61] However, despite striking down some provisions of the act, the Court left Section 230 untouched.[62]

One way to illustrate how ISPs are afforded extra protections under Section 230 is to look at how platforms such as Facebook and Twitter are protected from liability from tortious claims unlike traditional forms of press such as the *New York Times*.[63] Section 230 enables social media platforms to connect more users now than ever before since they no longer have to be

53. 47 U.S.C. § 230(c) (1996).
54. *See Cubby, Inc.*, 776 F. Supp. 135; *see also Stratton Oakmont*, 1995 N.Y. Misc. LEXIS 229.
55. 47 U.S.C. § 230(b) (1996).
56. *Id.* § 230.
57. *See id.* § 230(c).
58. *See id.*
59. § 230(c)(2)(A).
60. Frieden, *supra* note 21, at 1307.
61. *Id.* at 849, 864, 870–72, 874, 879.
62. *Id*.
63. Frieden, *supra* note 21, at 1306–07.

worried about being liable for the content that is posted on their websites.[64] Some even argue that without Section 230, platforms like YouTube, Facebook, Twitter, Yelp or Reddit would not exist since they all "allow ordinary people to post opinions or write reviews."[65]

Lastly, it is important to understand that Congress did not enact section 230 without limitations.[66] The limitations contained in subsection 230(e) provide no immunity for federal crimes and intellectual property law violations.[67] For example, if a website blogger posts defamatory comments or threats that violate criminal or intellectual property laws, they can be criminally prosecuted and sued for civil damages because they are liable for the content.[68] This limitation provides insight into Congress's legislative intent when drafting section 230; it illustrates that the drafters were willing to draw certain brightline rules to avoid things such as criminal activity and trademark infringement.[69]

III. CONGRESSIONAL LEGISLATIVE INTENT FOR SECTION 230

In *New York Times v. Sullivan*, [70] the Court opined that the First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[71] Initially, section 230 of the CDA was not part of the original Senate legislative proposal, but was added in a proposed House Bill.[72] The legislative intent of section 230 was "to promote the continued development of the Internet and other interactive computer services and other interactive media [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[73]

Additionally, the act was passed because of the *CompuServe* and *Stratton Oakmont* odd outcomes on whether internet service providers that per-

64. 47 U.S.C. § 230(c)(1) (1996).

65. Alina Selyukh, *Section 230: A Key Legal Shield For Facebook, Google Is About to Change,* NPR (March 21, 2018), https://www.npr.org/sections/alltechconsidered/2018/03/21/591622450/section-230-a-key-legal-shield-for-facebook-google-is-about-to-change

66. Note, *Section 230 as First Amendment Rule*, 131 HARV. L. REV. 2027, 2043 (2018).

67. 47 U.S.C. § 230(e)(1)–(2).

68. *See id*.

69. *See Brands Must Police Trademark Infringement on eBay and Other Sites Themselves*, VORYS ECONTROL: MARKETPLACE SOLUTIONS BLOG (MARCH 31, 2016), https://www.onlinesellerenforcement.com/police-trademark-infringement/.

70. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

71. *Id.* at 270.

72. 140 CONG. REC. H8468 (daily ed. Aug. 4, 1995) (amendment offered by Rep. Cox), 140 Cong. Rec. H 8425, at *H8468–69.

73. 47 U.S.C. § 230(b)(1)–(2) (1996).

formed an editorial role regarding their customers, users, or subscribers, effectively became content publishers.[74] So, in 1996, Congress passed section 230 of the CDA in an effort led by Representatives Cox and Wyden to shield internet service providers or intermediaries from any legal responsibility when a third party created content that results in a tort.[75]

To further understand the legislative intent of Congress, we must first look to the case law. The first significant case to address section 230 of the CDA came from the United States Court of Appeals for the Fourth Circuit in *Zeran v. America Online, Inc*.[76] In *Zeran*, the plaintiff was a customer of the internet service provider, American Online (AOL), and sued it because of delay in pulling down defamatory messages.[77] The posting included the plaintiff's home phone number so that users would call and harass him.[78] In addition to suffering harassment, the plaintiff also received death threats.[79] The plaintiff argued that AOL might be held liable if the court found it to be a distributor rather than publisher.[80] AOL argued it was immune under the plain language set forth by section 230 because it was a third party that posted the content that created the controversy.[81] The court rejected the plaintiff's argument under the idea that distributor liability was the equivalent as publisher liability.[82]

Moreover, looking to the plain language of the statute, the court held that section 230 did in fact immunize AOL and similar other service providers (e.g., third-party publishers or intermediaries).[83] By providing this broad immunity to service providers like AOL, "the court effectively disincentivized the self-censorship that Congress intended when it passed section 230 and overturned *Stratton-Oakmont*."[84] Thus, ISPs have no incentive to expend their resources regulating and censoring user content because they are not liable for what their users or subscribers post on their websites.[85] The court reasoned that there are such a high number of posts to these ISPs that

74. Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1163 (9th Cir. 2008).

75. *See* Batzel v. Smith, 333 F.3d 1018, 1028 (9th Cir. 2003) (stating that "even though the CDA overall may have had the purpose of restricting content, there is little doubt that the Cox-Wyden amendment, which added what ultimately became § 230 to the Act, sought to further First Amendment and e-commerce interests on the Internet while also promoting the protection of minors").

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

77. *Id.* at 329.

78. *Id.*

79. *Id.*

80. *Id.* at 331.

81. *Id.* at 330.

82. *Zeran*, 129 F.3d at 332.

83. *Id.* at 330.

84. Joseph G. Marano, Note, *Caught in the Web: Enjoining Defamatory Speech that Appears on the Internet,* 96 HASTINGS L.J. 1311, 1318 (2018).

85. *Id.*

it would be practically impossible for the intermediary (i.e., AOL) to screen and censor them all.[86] Hence, it would be both impractical and counterintuitive to the legislative intent behind section 230 if ISPs like AOL were forced to choose what content to silence and restrict on their platforms. Such restrictions would inevitably lead to stifled rather than free speech on the internet.[87]

On the other hand, *Barnes v. Yahoo!, Inc.*, is an exemplary case where the court considered the legislative intent for the limits of section 230's reach.[88] In *Barnes,* the plaintiff was a former girlfriend who sued Yahoo! for failing to remove indecent content posted by the plaintiff's former boyfriend.[89] The plaintiff brought claims of negligent undertaking and promissory estoppel against Yahoo! for failing to remove the indecent content posted by her former boyfriend.[90] Similar to *Zeran*, the court had to consider whether the legislature intended to only "override publisher theories of liability."[91] In *Barnes*, the Ninth Circuit barred the plaintiff from bringing the negligent undertaking claim since ISPs could not be treated as publishers under Section 230 of the CDA.[92]

However, the court in *Barnes* did allow the plaintiff to bring her promissory estoppel claim since it did not seek to hold the ISP liable as a publisher or speaker of third-party content, but as a "counter-party to a contract" who promised to remove the content and then breached the promise.[93] Hence, a separate cause of action can be made for contract liability under Section 230 where ISPs could still be liable for user content.[94] This is because contract liability comes "not from [] publishing conduct, but from [the ISP's] manifest intent to be legally obligated to do something, which [in *Barnes*] happen[ed] to be removal of material from publication."[95] Thus, breach of contract and promissory estoppel claims are not precluded under Section 230.[96]

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86. *Zeran*, 129 F.3d at 333 ("[T]he sheer number of postings on interactive computer services would create an impossible burden in the Internet context.").

87. *Zeran*, 129 F.3d at 331.

88. Barnes v. Yahoo!, Inc., 570 F.3d 1096 (9th Cir. 2009).

89. *Id*. at 1098.

90. *Id.* at 1099, 1106.

91. Andrew P. Bolson, *Flawed but Fixable: Section 230 of the Communications Decency Act at 20*, 42 RUTGERS COMPUTER & TECH. L.J. 1, 12 (2016).

92. *Barnes*, 570 F.3d at 1102–03 ("The duty that plaintiff claimed the ISP violated in the negligent undertaking claim derived from the ISP's conduct as a publisher.").

93. *Id.* at 1107.

94. *Id.*

95. *Id*.

96. *Id.* at 1109.

Zeran was the first interpretation of section 230 where the court looked to the legislative intent of Congress to interpret section 230.[97] By narrowly construing the wording of section 230, the court held AOL was not liable.[98] Then ten years after *Zeran*, the *Barnes* court considered not only the legislative intent but also state-law theories of liability for internet service providers like Yahoo! that have immunity under section 230. [99] Thus, the court in *Barnes* considered the issue of immunity on a case-by-case basis.[100] Moreover, Rebecca Tushnet has explored the Congressional legislative intent behind the Good Samaritan provisions that grant immunity to intermediaries like Google, Facebook, and Twitter. Rebecca Tushnet is a professor specializing in First Amendment jurisprudence at Harvard University School of Law and is a foremost thinker in freedom of expression on the internet.[101] Regarding the legislative intent behind section 230, Tushnet says, "Congress believed that it needed to alter the common law, even more than it had been modified by the First Amendment, to give Internet intermediaries the chance to make their business models work."[102] This is to say: Congress needed to create such safe harbors for major internet service providers so that the internet could thrive and grow.[103] Therefore, the notion of promoting unfettered speech on the internet was the core intent of the legislators who drafted section 230.[104]

Furthermore, courts have illustrated that, in addition to state-based theories as a work around to circumvent section 230, there could also be a federal remedy. In *Fair Housing Council v. Roommates.com, LLC*, the Ninth Circuit considered whether section 230 granted immunity to a website that matched people to rent out spare rooms for people looking for a place to live.[105] Like some prominent intermediaries today, users filled out a profile, as well as described themselves and their desired roommate in an "open-ended essay" format.[106] The subscribers would choose from a level of services. Those who paid a monthly fee could also gain the ability to read

97. Zeran v. Am. Online, Inc., 129 F.3d 327, 335 (4th Cir. 1997).

98. *Id*.

99. *Barnes*, 570 F.3d at 1100–02.

100. *See generally id.*

101. *Rebecca Tushnet, Faculty Profiles*, Harvard Law School, https://hls.harvard.edu/faculty/directory/11412/Tushnet (last visited July 20, 2020).

102. Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986, 1008 (2008).

103. *Id.* at 1007–09.

104. *Id.* at 1010–11.

105. Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1161–62 (9th Cir. 2008).

106. *See id*. at 1161–62.

emails from other users.[107] The court held that the Roommates.com website was entitled to immunity because it was an information content provider.[108]

However, the part of the website that encouraged users to provide additional comments did not violate section 230.[109] So again, the court in *Roommates.com* turned to the legislative intent of section 230, stating in the opinion, "We believe that this distinction is consistent with the intent of Congress to preserve the free-flowing nature of Internet speech and commerce without unduly prejudicing the enforcement of other important state and federal laws."[110]

Furthermore, in the case *Packingham v. North Carolina*, the Supreme Court of the United States held that it would be unconstitutional for a state statute to prohibit registered sex offenders from accessing "commercial social networking Website[s]" that permit use by minors.[111] In its analysis, the Court denominated the internet, especially social media platforms such as Facebook and Twitter, "the modern public square."[112] Thus, users should be entitled to the First Amendment protections of freedom of speech and freedom of expression on the internet without the fear of censorship.[113]

IV. CONFLICT BETWEEN THE FIRST AMENDMENT AND SECTION 230

The CDA has had its fair share of scrutiny.[114] For example, Ryan J.P. Dyer points out that, although in *Barnes* section 230 immunity was upheld, the theory of state-based promissory estoppel was an effective remedy against Yahoo!.[115] Here, the emphasis on resolution through state-based means provided a potential solution because the court considered it separately. Thus, if the legislative intent of section 230 is analyzed on a case-by-case basis, this may be a more equitable solution when hearing new cases involving section 230.[116]

Although the early cases like *Zeran*, *Barnes,* and *Roommates.com* clarified some issues challenging internet service providers, it created others surrounding censorship. Most notably, these censorship issues have arisen

107. *See id*. at 1162.
108. *See id*. at 1174.
109. *Id.*
110. *Id.* at 1175.
111. 137 S. Ct. 1730, 1731 (2017).
112. *Id*. at 1737.
113. *Id*.
114. Ryan J.P. Dyer, Comment, *The Communication Decency Act Gone Wild: A Case for Renewing the Presumption Against Preemption*, 37 SEATTLE U. L. REV. 837, 839 (2014).
115. *Id*. at 857 (stating "the ninth circuit reversed a district court ruling that the CDA precluded a promissory estoppel claim after the defendant-website promised to remove a fake profile of the plaintiff but then failed to do so").
116. *See* Bolson, *supra* note 92, at 12.

from the decision in *Roommates.com* because the court held that website operators could be both a service provider and a content creator interchangeably.[117] However, a third-party publisher may exercise "traditional editorial functions" and still possess section 230 immunity.[118] Also, a publisher may edit and publish material posted by users[119] or encourage third parties to post content on its site.[120] And, as long as the third-party publisher does not encourage illegal content or materially change the meaning of its user content, then it is immune from liability.[121] Thus, third-party publishers do not lose immunity just because they help create the information by supplying a drop-down menu for the user to select preferences, unless those preferences are discriminatory like in *Roommates.com*.[122]

However, if a third-party publisher creates a drop-down menu that indicates discriminatory selections, and as such is illegal by state or federal laws, then it will lose the immunity granted forth by Section 230.[123] Also, third-party publishers do not have to pull down defamatory material unless they have received notice that the material is defamatory and promised to pull it down.[124] This is especially true if the user relies on the promise of the third-party publisher to remove the content, like in *Barnes*.[125]

Similar to the Roommates.com website, Facebook and Twitter are third-party publishers because they develop and display user preferences by publishing a profile page for each user on their websites. Once the third-party publisher publishes the user's profile, then it becomes an "information content provider."[126] "The term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."[127]

A fundamental notion in First Amendment jurisprudence is that "[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary

117. Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157,1162–63 (9th Cir. 2008).

118. Donato v. Moldow, 865 A.2d 711, 725–26 (N.J. Super. Ct. App. Div. 2005).

119. Batzel v. Smith, 333 F.3d 1018, 1031 (9th Cir. 2003).

120. Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1118 (W.D. Wash. 2004).

121. *See Fair Hous. Council, LLC*, 521 F.3d at 1175 (holding "[i]f you don't encourage illegal content, or design your website to require users to input illegal content, you will be immune")

122. *Fair Hous. Council, LLC*, 521 F.3d at 1171, 1175.

123. *Id*. at 1175.

124. *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

125. *Id*.

126. See 47 U.S.C. § 230(f)(3) (2018).

127. *Id.*

means to protect it."[128] But what if the information service provider, where millions of Americans receive their information, is controlled by editorial boards censoring viewpoints they deem objectionable?

Most often, content that is edited or banned by the information content provider is referred to as "hate speech."[129] Under the First Amendment, there is no unprotected category known as "hate speech,"[130] but because providers are private companies, there is no First Amendment violation. Instead of offering dispute resolution and describing the exact language considered offensive, intermediaries merely remove the content.[131] There is a "laundry list" of "content [that] could qualify as 'otherwise objectionable' under this utterly subjective test."[132] The vague terminology of "hate speech" act as a blanket excuse to club any speech the intermediary does not like.[133]

Certainly, it was not the legislative intent of section 230 to give companies a tool to silence speech.[134] The immunity as defined by Section 230 for third-party publishers is not to be used for silencing viewpoints.[135] Instead, the purpose of section 230 was just the opposite—it was intended to allow more speech than ever before. In hindsight, it would have been impossible for Representatives Cox and Wyden to imagine that the internet would become the massively intertwined conduit of information that it is today.

If the internet is "the modern public square,"[136] then section 230 provides the largest social media websites like Facebook and Twitter a "license [on] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."[137] Powerful platforms like Facebook and Twitter have billions of users worldwide, and so they can use their superior position when censoring. The United States Court of Appeals for the

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128. Citizens United v. FEC, 558 U.S. 310, 339 (2010).

129. *See, e.g.*, Ziad Reslan, *It's Time for Facebook and Twitter to Coordinate Efforts on Hate Speech*, TECHCRUNCH: EXTRA CRUNCH (Sept. 1, 2018, 4:36 PM), https://techcrunch.com/2018/09/01/its-time-for-facebook-and-twitter-to-coordinate-a-joint-response-to-hate-speech/.

130. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 436 (1992) (Stephens, J., concurring in judgment).

131. *See, e.g.*, Tanya Dua, *Vimeo Just Decided to Remove Content from InfoWars Conspiracy Theorist Alex Jones,* BUSINESS INSIDER (Aug. 12, 2018, 7:50 PM) https://www.businessinsider.com/vimeo-is-the-latest-platform-to-remove-content-from-infowars-conspiracy-theorist-alex-jones-2018-8.

132. Dickerson, *supra* note 31, at 82.

133. Ben Shapiro, *Facebook, YouTube, And Apple Ban Alex Jones. Here's Why They're Dead Wrong*, DAILY WIRE, (Aug. 6, 2018), https://www.dailywire.com/news/34101/facebook-youtube-and-apple-ban-alex-jones-heres-ben-shapiro.

134. Dickerson, *supra* note 31, at 82 ("Providing ISPs with such broad immunity from liability is unnecessary, illogical, and counterproductive to Congress's stated intent.").

135. Shapiro, *supra* note 133.

136. Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

137. R.A.V. v. City of St. Paul, 505 U.S. 377, 392 (1992).

Ninth Circuit thought future courts would not have difficulty applying neutral tools to determine whether censorship to a user was necessary.[138] But intermediaries did not filter as much speech then as they do today. There were not power platforms with editorial power over billions of users like there is with Google, Facebook, and Twitter.

For instance, consider the possibility that major platforms have a double-standard when censoring speech, such as in the case of Sarah Jeong and Candace Owens.[139] Jeong, an Asian-American female, was hired by the *New York Times* as a journalist after having prior racist tweets on her Twitter account. She tweeted comments such as, "Dumbass . . . white people marking up the Internet with their opinions like dogs pissing on fire hydrants,"[140] #CancelWhitePeople,"[141] "White men are bullshit,"[142] and "[I]t's kind of sick how much joy I get out of being cruel to old white men."[143] Also, she tweeted, "White people have stopped breeding you will all go extinct soon this was my plan all along."[144] Twitter never banned Sarah Jeong or even suspended her for a brief time.[145]

At the same time that Jeong was hired to the editorial board for the New York Times, Fox News correspondent Candace Owens copied and paraphrased the racist tweets of Jeong on the platform.[146] Owens replaced Jeong's tweets exactly, but changed the word "white" with the word "black" or "Jewish" and the word "men" with "women." She was subsequently banned by Twitter for twelve hours.[147] Her tweets were indistinguishable from Jeong's because they both included race and gender. Notably, Owens, like Jeong, is a woman of color and female member of the media. In this

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138. *See* Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1175 (2008) ("[T]here is no reason to believe that future courts will have any difficulty applying this principle. . . . We believe that this distinction is consistent with the intent of Congress to preserve the free-flowing nature of Internet speech and commerce without unduly prejudicing the enforcement of other important state and federal laws.").

139. *See generally* Aja Romano, *The "Controversy" Over Journalist Sarah Jeong Joining the New York Times, Explained*, VOX (Aug. 3, 2018, 8:33 PM), https://www.vox.com/2018/8/3/17644704/sarah-jeong-new-york-times-tweets-backlash-racism; *see also* Bret Stephens, *The Outrage Over Sarah Jeong*, N.Y. TIMES (Aug. 9, 2018), https://www.nytimes.com/2018/08/09/opinion/sarah-jeong-tweets-opinion-section.html.

140. Andrew Sullivan. *When Racism Is Fit To Print.* Intelligencer, (Aug. 3rd, 2018). https://nymag.com/intelligencer/2018/08/sarah-jeong-new-york-times-anti-white-racism.html

141. Natalia Mittelstadt, *Twitter Bans Candace Owens for 12 Hours but Not Sarah Jeong for Racist Tweets*, CNSNEWS (Aug. 7, 2018), https://www.cnsnews.com/news/article/natalia-mittelstadt/twitter-bans-candace-owens-12-hours-not-sarah-jeong-racist-tweets.

142. Stephens, *supra* note 139.

143. *Id.*

144. Mittelstadt, *supra* note 141.

145. *See* Sullivan, *supra* note 140.

146. Mittelstadt, *supra* note 141; *see also* Lamb*, supra* note 23.

147. Mittelstadt, *supra* note 141.

case, Owens was blocked and Jeong was not, presumably because one was of the same political affiliation as that of Twitter, while the other was not. After the banning, Owens released a video explaining that she had copied verbatim Jeong's tweets and replaced certain words to illustrate Twitter's censorship double-standard.[148] Twitter thereafter released her ban and issued an apology claiming they "made an error" when banning Owens.[149] The issue is that Twitter's censor editorial board considered Owens' language abusive or threatening most likely because of her political affiliation, but found Sarah Jeong's to be acceptable.

There are several other examples of social media companies using their censorship power to engage in viewpoint discrimination. One such example includes Twitter banning users for "misgendering" people by referring to a transgender individual by a different pronoun.[150] One argument is that in banning users stating a biological truth, Twitter is engaging in anti-scientific viewpoint discrimination.[151] Another argument is that it is cruel and offensive to deadname[152] a person.[153] This last argument is the defense Twitter uses to justify the banning of said users who offend the hateful conduct policy.[154] The hateful conduct policy includes the "targeted misgendering or deadnaming of transgender individuals."[155] Hence, a user can be banned from Twitter if the user deliberately refers to a transgender person with the wrong pronoun or calls the person by the person's pre-transition name.[156] In any case, it is dangerous to allow a censoring intermediary to govern biological fact. Thus, this is yet another clear example of viewpoint discrimination by Twitter, this time against scientific fact.[157]

A third example of viewpoint discrimination on Twitter was when Twitter banned conservative activist Jacob Wohl for using bots to influence an election; while left-wing activist Jonathon Morgan was not banned, even though he was doing the same thing in Alabama.[158] Here, Jacob Wohl was

148. Mittelstadt, *supra* note 141.

149. *See Id.*

150. Joe Rogan, *Joe Rogan Experience #1258 - Jack Dorsey, Vijaya Gadde & Tim Pool*, YOUTUBE (Mar. 5, 2019), https://www.youtube.com/watch?v=DZCBRHOg3PQ&t=1646s.

151. *Id.*

152. *See* Dictionary.com ("A *deadname* is the birth name of someone who has changed it. The term is especially used in the LGBTQ community by people who are transgender and elect to go by their chosen name instead of their given name.") https://www.dictionary.com/e/pop-culture/deadname/.

153. *Id.*

154. *Id.*

155. *Hateful Conduct Policy*, TWITTER, https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy (last visited Mar. 19, 2020).

156. *Id*.

157. Rogan, *supra* note 150.

158. *Id*.

rightfully banned from using the Twitter platform for spreading misinformation about the 2020 election and for his plan to use bots to to influence left-wing votes in the primaries towards candidates who he felt would be weaker compared with Trump.[159] However, Jonathon Morgan was not banned from Twitter for his use of bots to try to destabilize the campaign of Republican candidate Roy Moore in the 2018 midterm elections.[160] This is a situation where both individuals should have been banned from the platform for attempting to influence an election through the use of bots, but instead Twitter chose to censor only one side of the political spectrum.[161]

One final example of viewpoint discrimination on Twitter occurred when the *Proud Boys* alt-right conservative group was banned on the platform for violence and hate, while the far-left anarchist Antifa are still allowed to operate.[162] Here, Twitter banned the *Proud Boys* according to the platform's policy against violent extremist groups.[163] However, Twitter still allows many far-left Antifa groups to operate on its platform even though they engage in the exact same violent political activities as the *Proud Boys*.[164] This situation is further compounded by the fact that reporter Andy Ngo was actually violently attacked by members of Antifa who were counterprotesting during a *Proud Boys* rally.[165] Ngo was brutally attacked and beaten by a mob of Antifa to the point that he had to undergo neurophysical therapy and speech therapy because of the beating,[166] yet Antifa is still allowed to operate their violent group communication on Twitter.[167] Hence, this is just another instance where Twitter continues to selectively censor groups that it disagrees with politically, as opposed to having some neutral rule that would ban both groups for their violent and hateful acts.[168]

Silencing certain political viewpoints adverse to a platform's editorial board is not the legislative intent of section 230. But where do we draw the line for the regulation of speech on our largest free-speech platforms, Face-

159. Greg Evans, *Trump Supporter Jacob Wohl Banned from Twitter After Bragging About Plans to Interfere in 2020 Election*, INDEPENDENT (Feb. 27, 2019, 9:15 AM), https://www.indy100.com/article/jacob-wohl-twitter-ban-trump-2020-election-republican-8798926.

160. Scott Shane & Alan Blinder, *Secret Experiment in Alabama Senate Race Imitated Russian Tactics*, N.Y. TIMES (Dec. 19, 2018), https://www.nytimes.com/2018/12/19/us/alabama-senate-roy-jones-russia.html.

161. Rogan, *supra* note 150.

162. *Id.*

163. *Id.*

164. *Id.*

165. Tess Bonn, *Conservative Journalist Andy Ngo Says Assault Involving Antifa Resulted in Brain Injury*, HILL (July 25, 2019), https://thehill.com/hilltv/rising/454712-conservative-journalist-andy-ngo-says-antifa-attack-resulted-in-brain-injury.

166. *Id.*

167. Rogan, *supra* note 150

168. *Id.*

book and Twitter? Does society continue to let platforms censor speech they deem "otherwise objectionable"[169] when that effect undoubtedly was not the legislative intent of Congress?[170] Congress should precisely define the language in Section 230 to provide for a category of speech that comports with the First Amendment.

For now, intermediaries like Twitter and Facebook dictate the boundaries of speech on the internet based on their subjective interpretation of offensive or "otherwise objectionable."[171] The lack of neutrality issue is not something Congress anticipated when drafting section 230. This is an extremely frightening predicament in modern society where social media platforms and other ISPs have so much control over speech. Here, ISPs are essentially acting as agents of the government in the way that they are shaping the minds of the populace towards their own political agenda. Thus, section 230 and the First Amendment conflict the most because Congress' legislative intent was not to silence speech, but instead to encourage interactive computer services to "provide users *neutral* tools to post content online to police that content without fear that . . . they [third-party publishers] would become liable for every single message posted by third parties on their website."[172]

V. ISSUE

This essay is going to address the conflict between the fundamental right to free speech under the First Amendment and the Good Samaritan Clause of Section 230 in the Communications Decency Act. This is a prevalent issue today in the Trump-era where social media outlets have been taking advantage of the divisiveness present in society by controlling the narrative and censoring certain viewpoints so that they can push their own agenda to the public. This issue is an unintended one as the legislative intent of the Section 230 was to not only shield private ISPs from liability for the posts, but it was also actually supposed to encourage free speech and the flow of the marketplace of ideas since ISPs would no longer have to be fearful of being liable for the posts of their users. However, in reality it has had the exact opposite effect as social media outlets have used the Good Samaritan Clause to go beyond just shielding themselves from liability and into the realm of silencing certain viewpoints and controlling the ideas that are presented to their users.

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169. Dickerson, *supra* note 31, at 82.
170. *Id.*
171. *Id.*
172. Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1175 (9th Cir. 2008).

This is extremely problematic in today's society due to the prevalence of ISPs that have major censorship powers as a result of the rise of social media. The internet and ISPs have been around for decades, but it is the rise of social media as the modern public square where individuals express their personal and political views that has exposed the conflict between free speech and Section 230 when those social media platforms take it upon themselves to engage in viewpoint discrimination and censor the content of certain users. This is an extremely frightening predicament in modern society where social media platforms and other ISPs have so much control over the political narrative. Here, ISPs are basically acting as agents of the government in the way that they are shaping the minds of the populace towards their own political agenda. Both the courts and legislators have attempted to address this issue, with cases such as the *Knight First Amendment Institute v. Trump*, and the Mark Zuckerberg Senate hearings in April 2018. However, none of these options were sufficient in and of themselves, nor were they able to solve the conflict between the right to free speech under the First Amendment and the Good Samaritan Clause Section 230. Therefore, this essay is going to provide two possible solutions that would bridge this conflict of censorship by preventing social media outlets from engaging in viewpoint discrimination on their platforms.

VI. SOLUTION

In this case, the best possible solution to solve the conflict between Section 230 of the CDA and the First Amendment would be for Congress to introduce legislation that would amend the statute. Congress needs to pass legislation indicating that if ISPs engage in viewpoint discrimination and censor user content that is protected by the first amendment, then those injured users would have standing against the ISPs.

A legislative solution to resolving the issue of viewpoint discrimination on the internet is the default one. Here, Congress would address this issue by adding a provision into Section 230 of the Communications Decency Act that would grant a constitutional cause of action to all users who are victims of viewpoint discrimination on the internet. This added provision would make it clear that if ISPs engage in viewpoint discrimination by blocking user content that is protected by the First Amendment, then those very same users would be able to bring a cause of action against those website owners for violating their fundamental right to freedom of expression under the First Amendment. Thus, the immunity granted to ISPs from being held liable for third party content posted on their websites would be stripped away from them for each individual case that is brought against them where they engaged in viewpoint discrimination and censored user content that is protected by the First Amendment.

This added provision would align with the legislative intent of Congressman Cox and Wyden who originally drafted Section 230 of the Communications Decency Act in 1997. The legislative intent of Section 230 was to actually promote free speech on the internet by shielding ISPs from liability for third-party content posted on their websites.[173] However, the unintended consequence that the drafters didn't anticipate was that the Good Samaritan Clause of Section 230 actually enabled ISPs to engage in unnecessary regulation and viewpoint discrimination by censoring content from their users even though that content is protected by the First Amendment.

This solution would evolve the Good Samaritan Clause of Section 230 in a way that would help it accomplish its original goals of both shielding ISPs from liability for the content posted on their websites and promoting free speech on the internet. It would accomplish these goals by keeping the ISPs with censorship power such as the big social media companies honest by taking away their Section 230 immunity for each individual case in which they engage in viewpoint discrimination or censor user content that is protected by the First Amendment. The injured user who was unnecessarily blocked or censored may then pierce the shield of immunity provided by Section 230 and bring a First Amendment cause of action against the website.

The provision would also make it clear that an ISP would only be allowed to block or censor a user on their website if that user is posting content that is not protected by the First Amendment. It would explicitly state that an ISP can only block user content on their websites for the following unprotected content under the freedom of expression clause of the First Amendment: (1) Fighting Words; (2) Incitement to Imminent Lawless Action; (3) Obscenity; (4) Defamation (Libel/Slander); (5) True Threats; (6) Perjury; (7) Blackmail; and (8) Solicitation to Commit Crimes.[174]

This tweak to the Good Samaritan Clause of Section 230 would enable ISPs to keep their Section 230 immunity while at the same time rein in the amount of viewpoint discrimination that social media platforms engage in by opening them to suit and lifting their Section 230 immunity for each individual case where they censor user content that is protected by the First Amendment. The list of content that is unprotected by the First Amendment is expansive enough, and this added provision would ensure that the major social media companies would not be able to go beyond that list and engage in viewpoint discrimination without opening themselves up to liability.

Additionally, this added provision would be able to circumvent any arguments from the social media companies that state that they should be al-

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173. *See* 47 U.S.C. § 230(b)–(c) (2018).

174. *See Unprotected Speech Law and Legal Definition*, U.S. LEGAL, https://definitions.uslegal.com/u/unprotected-speech/ (last visited Mar. 19, 2020).

lowed to control the content on their privately-owned websites due to the Supreme Court comment in *Packingham v. North Carolina*, that labelled the internet as the "modern day public square."[175] Moreover, it would also be consistent with *Knight First Amendment Institute at Columbia University v. Trump*, referenced earlier, that ruled that President Trump's Twitter profile was a designated public forum and forced him to unblock users who criticized his policies.[176]

Thus, adding this provision to Section 230 would not only prevent viewpoint discrimination against certain users, but it would lead to the promotion of free speech on the internet, which was the original legislative intent of the drafters in the first place. Additionally, the provision would be consistent with recent Supreme Court rulings that have labelled the internet as the modern public square.

VII. CONCLUSION

In conclusion, Congress's legislative intent for section 230(c) was to promote speech on the internet in an unabridged fashion.[177] The Good Samaritan clause that Representatives Cox and Wyden authored together in a bipartisan manner was to provide immunity for third-party publishers against liability arising from a third party.[178] Additionally, it was supposed to "promote the continued development of the internet and other interactive computer services and other interactive media [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[179] Congress did not intend for section 230 to be used as a censor to silence viewpoints. However, contrary to the legislative intent, intermediaries, do just that.

The solution proposed in this article suggests that Congress should add a provision to Section 230 of the CDA that would open ISPs such as Facebook and Twitter up to liability if they engage in viewpoint discrimination by censoring user content protected by the First Amendment. This will achieve the original intent of the drafters of Section 230 by encouraging free speech on internet. Additionally, Solution A would align with the rulings in *Packingham v. North Carolina* and *Knight First Amendment Institute at Columbia University v. Trump* that labelled the internet as the modern pub-

175. Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).
176. Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541, 575 (S.D.N.Y. 2018).
177. *See* § 230(c)(1).
178. *See* § 230(c)(2).
179. *See* § 230(b).

lic square. Thus, if the solution above is followed, then the original intent of the drafters of section 230 can finally be realized.