

## MISMANAGING THE MARKETPLACE: THE ECONOMY OF THE ONLINE PUBLIC FORUM AND SECTION 230 LIABILITY

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Justice Holmes considered the free exchange of ideas to be a sufficient tool for balancing speech interests, stating, “the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which [the citizenry’s] wishes safely can be carried out.”<sup>1</sup> On its most basic level of operation, the marketplace of ideas (hereinafter “Marketplace”) is expected to be a model of free exchange where denizens contribute, and judges perfect the balance of competition by striking down threatening regulations.<sup>2</sup> Under the Marketplace construction, positing an idea will subject it to market forces engaging in an adversarial process.<sup>3</sup> When the majority takes part in this exchange, the result expects to inform and improve the political speech of those involved. This interplay between interests is similar to the invisible hand theory of marketplace competition where individual self-interest will lead to an accurate reflection of societal valuation.<sup>4</sup>

Appropriately, there is an ever-present concern that the regulation of the market “raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.”<sup>5</sup> The marketplace has been an omnipresent institution in American political discourse since our country’s inception and holds steadfast against efforts by government to chill dissenters and minority voices.<sup>6</sup> Perhaps then, there needs

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<sup>1</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>2</sup> *See* *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 592 (Rehnquist, J., dissenting) (considering the actual distinctions between the Marketplace and a marketplace for goods).

<sup>3</sup> *See* *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting); *see also* *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

<sup>4</sup> *See* ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (Edwin Cannan ed., U. Chi. Press 1976).

<sup>5</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992) (internal quotations omitted).

<sup>6</sup> For examples of government attempts to chill and suppress dissenting voices, *see, e.g.*, *Shaffer v. United States*, 255 F. 886 (9th Cir. 1919) (upholding conviction of mailing a “treasonable” book); *Debs v. United States*, 249 U.S. 211 (1919) (upholding conviction of a socialist for violating the Espionage Act of 1917).

to be a healthy balance of regulation by the government within the Marketplace. But, as technology introduces new forms of communication, contribution to the Marketplace begins to evolve beyond the model envisioned by Holmes. Specifically, the introduction of social media as a forum for exchange has presented unforeseen obstacles to the Marketplace's continued function and received none of the restrictions placed on other forms of media, despite being a considerable force in the trade of ideas. Social media has been elevated into this position, in large part, due to its uninhibited growth and protection under Section 230 of the Communications Decency Act of 1996.<sup>7</sup>

Part I of this Note will discuss Section 230, its interpretation in the courts, and the perspective of one of the bill's co-sponsors, Christopher Cox, as to the role he sees Section 230 playing in 2020 and beyond. It is within the context of his observations that this Note will assert that Section 230, in protecting Internet platforms from liability for information hosted on their platforms, too greatly contributes to the degradation of the Marketplace. When the Marketplace is placed under a strain of modern-day information-sharing in crisis, the social media apparatus exacerbates already-present issues beyond the Marketplace's control.

Part II will address where the cracks in the doctrine have emerged. The confluence of several abstract issues with Internet platforms (hereinafter "platforms") constitutes sufficient grounds to begin an expansion of the Section 230 liability doctrine, particularly as COVID-19 has now assigned substantial gravity to their ill-effects on the Marketplace.<sup>8</sup> Until this point, we have been content to allow the Marketplace's machinery to work overtime, but this particular load has been the result of a unique maelstrom of concerns, each of which has been apparent, but underrealized as to how much legislative or judicial action is needed to address its unwanted effects. In light of the COVID-19 pandemic's catalyzing of already-established issues within Section 230 doctrine, the potential for misuse of platforms has risen to a level that surely concludes its current existence within a permitted liability framework reflects too great a harm to the Marketplace, overshadowing most of the benefits it provides and

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<sup>7</sup> 47 U.S.C. § 230 (2018).

<sup>8</sup> The term "platforms" should be understood as any interactive technology which facilitates the creation or exchange of any information, ideas, interests, or other expressive form through the construction of connected virtual networks.

requiring change of its statutory protections for platform operation.

Part III considers changing the doctrine and whether alteration or outright abandonment of the Section 230 regime is the wisest course of action. As with any regulation of speech, there is always a chance that its enactment will chill the speech of good faith contributors and represent a slippery slope of First Amendment decay. Social media has undoubtedly invigorated the Marketplace with its presence. Given how the Marketplace has functioned in its absence, there may be a need to simply meet this unsavory speech with a concerted stream of counterspeech where the effects of that exchange reinvigorate the idea trade. Outright revocation of Section 230 would represent a stark change to nearly thirty years of jurisprudence and present new and daunting legal threats to platforms defending themselves from claims, likely prompting a tsunami of new litigation that would threaten platform operation. Part III will also examine some of the proposed solutions to the current doctrinal climate, combating misinformation, and how those solutions would take effect. While both the judiciary and legislature are equipped to influence Section 230, the choice of which actor is best suited for the job turns on several pivotal questions. Legal classifications for entities might prove to be as effective as a legislative amendment in some cases, while others might have an issue with standing and require special provisions for these types of claims.

Part IV will examine the potential policy issues with shrinking Section 230's protections for platforms as well as the legal obstacles in the path of relaxing its liability protections. At the forefront of the Section 230 problem lies the distinction between a public and private entity and the government's inability to affect the actions of privately-run entity. Of the solutions presented, a number stand out as potential antidotes, such as expanding the definition of what constitutes an information content provider. As of the writing of this Note, there appears to be no clear answer to the liability problem, but the solutions presented are certainly good first steps.

## I. INTRODUCTION TO THE COMMUNICATIONS DECENCY ACT OF 1996

The relevant part of the Communications Decency Act of 1996 (hereinafter “CDA”) prevents holding providers and users of an “interactive computer service” liable due to “any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.”<sup>9</sup> In effect, Section 230 operates in a way where platforms are generally not held liable for the content of third parties unless they are somehow taking part in developing the illegal content, which would render them culpable under criminal law.<sup>10</sup> The emergent issue of platform responsibility saw its first significant judicial development in *Stratton Oakmont, Inc. v. Prodigy Services Co.*<sup>11</sup> In *Stratton*, an allegation made on a Prodigy message board about Stratton Oakmont and its president engaging in criminal acts and fraud led to the firm responding with a lawsuit against Prodigy and the unnamed user for defamation.<sup>12</sup> While *Stratton* was a defamation case, Congress took concern with the holding that placed responsibility on platforms to control inappropriate material and its availability to minors.<sup>13</sup> Absent Section 230 protections, an entity who hosted particular speech over the Internet, even on their own platform, could be held liable for defamation even if they were not the author of the text or even aware of the statement.<sup>14</sup>

A co-sponsor of the CDA, Christopher Cox, considers the application of Section 230 to be a balancing act where content creators are liable for illegal activity while appropriately insulating content-hosting platforms from a deluge of claims.<sup>15</sup>

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<sup>9</sup> 47 U.S.C. § 230(c)(2)(A).

<sup>10</sup> *Id.* § 230(e)(1).

<sup>11</sup> *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct., Nassau Cty. May 24, 1995).

<sup>12</sup> *Id.*

<sup>13</sup> See *Batzel v. Smith*, 333 F.3d 1018, 1029 (9th Cir. 2003) (quoting S. REP. NO. 104-230, at 194 (1996)) (“One of the specific purposes of [Section 230] is to overrule *Stratton Oakmont v. Prodigy* and any other similar decisions . . . .”); H.R. CONF. REP. NO. 104-458, at 194 (1996).

<sup>14</sup> See, e.g., *Stratton Oakmont, Inc.*, at \*5; see also *Zehran v. America Online, Inc.*, 129 F.3d 327, 333-34 (4th Cir. 1997).

<sup>15</sup> Christopher Cox, *The Origins and Original Intent of Section 230 of the Communications Decency Act*, RICH. J.L. & TECH. BLOG (Aug. 27, 2020),

Despite never reaching the Supreme Court for review, courts have taken myriad approaches to the application and interpretation of the CDA. In *Zeran v. America Online*,<sup>16</sup> the United States Court of Appeals for the Fourth Circuit held that, “§ 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.”<sup>17</sup> Specifically, “§ 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role.”<sup>18</sup> The Fourth Circuit considered the statutory purpose of Section 230 again on the basis of the plain language, where Congress had recognized the threat lawsuits posed to a burgeoning Internet medium.<sup>19</sup> This consideration for the preservation of the Internet as a marketplace has not diminished in most courts since 1997, though there have been some situations where immunity might be withdrawn.<sup>20</sup>

In the past, the First Circuit has stood as the jurisprudential outlier in its analysis of Section 230, though its position has since come in line with the rest of the circuits.<sup>21</sup> In *Doe No. 1 v. Backpage.com*,<sup>22</sup> it held that “claims that a website facilitates illegal conduct through its posting rules *necessarily* treat the website as a publisher or speaker of content provided by third parties and, thus, are precluded by Section 230(c)(1).”<sup>23</sup> The First Circuit, citing *Zeran*, concluded the designation of “publisher” in Section 230(c)(1) extends to website policies that prescribe how to treat postings where features reflect choices about what content can appear on the website, and in what form.<sup>24</sup> However,

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<https://jolt.richmond.edu/2020/08/27/the-origins-and-original-intent-of-section-230-of-the-communications-decency-act>.

<sup>16</sup> 129 F.3d 327 (4th Cir. 1997).

<sup>17</sup> *Id.* at 330.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*; see also 47 U.S.C. § 230(b)(1)–(3).

<sup>20</sup> See generally *Zehran*, 129 F.3d 327 (4th Cir. 1997).

<sup>21</sup> See, e.g., *Domen v. Vimeo, Inc.*, 991 F.3d 66 (2d Cir. 2021); *Obado v. Magedson*, 612 F. App'x 90 (3d Cir. 2015); *Erie Ins., Co. v. Amazon.com, Inc.*, 925 F.3d 135 (4th Cir. 2019); *Diez v. Google, Inc.*, 831 F. App'x 723 (5th Cir. 2020); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316 (11th Cir. 2006); *Bennett v. Google, LLC*, 882 F.3d 1163 (D.C. Cir. 2018).

<sup>22</sup> 817 F.3d 12 (1st Cir. 2016).

<sup>23</sup> *Id.* at 22.

<sup>24</sup> *Id.* at 20–21 (citing *Zeran's* description of decisions whether to publish, withdraw, postpone, or alter content as “traditional editorial functions” and noting that a

in a re-pleading by three new plaintiffs, the First Circuit reconsidered that, where Backpage revised an advertisement by altering a word, it effectively made Backpage a content provider and therefore not protected under Section 230.<sup>25</sup> According to Mr. Cox, this reconsideration places the First Circuit back within the majority interpretation of Section 230 protections where the distinction between publisher and platform determines immunity from liability.<sup>26</sup>

Considered by Mr. Cox to be the landmark decision for the CDA, the Ninth Circuit in *Fair Housing Council of San Fernando Valley v. Roommates.com*<sup>27</sup> rejected blanket immunity under Section 230 when platforms participate in the content creation process or develop content created by others.<sup>28</sup> The court held that, when materially contributing to content's alleged unlawfulness, a website helping in the development of unlawful content falls within the exception of Section 230 and can therefore be held liable.<sup>29</sup> In doing so, the court considered their decision to be consistent with Congressional intent that the CDA serves to "preserve the free-flowing nature of Internet speech and commerce without unduly prejudicing the enforcement of other important state and federal laws."<sup>30</sup>

Since 1996, Mr. Cox still contends that one of the most convincing critiques about Section 230, namely that it was necessary to protect an industry in its infancy, is patently false.<sup>31</sup> Mr. Cox contends that, more than ever, Section 230 protections are necessary because the overwhelming amount of content that would need to be policed has made the potential consequences of publisher liability even more demanding for protections.<sup>32</sup> He argues that, when considering a new wave of speech regulation, "[r]ecalling its deep flaws, myriad unintended consequences, and dangerous threats to both free speech and the functioning of the

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website is classified as a publisher where they are the "speaker of material" posted by users on the site).

<sup>25</sup> Doe No. 1 v. Backpage.com, L.L.C., 2018 WL 1542056 at \*2 (D. Mass. Mar. 29, 2018).

<sup>26</sup> Cox, *supra* note 15, at 57.

<sup>27</sup> 521 F.3d 1157 (9th Cir. 2008).

<sup>28</sup> *Id.* at 1163–64.

<sup>29</sup> *Id.* at 1168.

<sup>30</sup> *Id.* at 1175.

<sup>31</sup> Cox, *supra* note 15, at 61.

<sup>32</sup> *Id.*

[I]nternet is a worthwhile reality check.”<sup>33</sup> Surely then, Section 230 stands as the sole bulwark against a tyrannical regulatory state where, in its absence, the online services on which we rely would languish and reemerge as tools of authoritarianism or result in the collapse of Internet services altogether.

There are compelling arguments for Mr. Cox’s position. The advent of social media certainly has heralded a golden opportunity for the Marketplace to grow.<sup>34</sup> Facebook, Twitter, Google, and others give each individual user the power to reach out to persons beyond their geographic location or socioeconomic class to discuss new ideas and subject old ones to an even greater bank of market forces.<sup>35</sup> In addition to exposure and discussion between Americans, platforms introduce ideas and persons from beyond the regulatory reach of the First Amendment to contribute to the Marketplace. This type of connection is unprecedented in human history. It is the preservation of this exchange that the Communications Decency Act of 1996 sought to ensure in governing the allocation of liability for platforms due to third-party content.<sup>36</sup>

## II. FAILURE TO AGE GRACEFULLY

There are three issue areas worth considering in the examination of Section 230’s antiquated presence when facing national security interests, placed in the context of the COVID-19 crisis. COVID-19 has presented a unique vacuum for study of the Marketplace’s machinations, where the accuracy of information, access to forum, and infliction of market forces becomes ever more heightened as a necessity for preserving national security, public health, and constitutional constructions amidst tumultuous circumstances. While presented distinctly, each issue bleeds over into the others by virtue of the sections

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<sup>33</sup> *Id.* at 67.

<sup>34</sup> Dawn C. Nunziato, *From Town Square to Twittersphere: The Public Forum Doctrine Goes Digital* 25 B.U. J. SCI. & TECH. L. 2–3 (2019); see also Jacob R. Straus & Matthew E. Glassman, *Social Media in Congress: The Impact of Electronic Media on Member Communications*, 8–9 (2016) <https://fas.org/sgp/crs/misc/R44509.pdf>.

<sup>35</sup> Nunziato, *supra* note 34, at 3.

<sup>36</sup> See H.R. CONF. REP. NO. 104-458 at 86–88 (1996) (discussing Congressional findings to support the protection for private block and screening of offensive material and noting that the Internet “offer[s] a forum for a true diversity of political discourse . . .” and “. . . [benefits from] a minimum of government regulation”).

enabling one another, often ensuring that a single solution will not suffice to meet the overall issue.

First is a question of whether the machinery of the Marketplace can even keep up with the high-speed inputs of millions of users, American or otherwise, contributing to the stream with dubious expectations for truth. In a crisis, the Marketplace still expects that actors have the time to rationally scrutinize the trustworthiness of sources, but COVID-19 has made a strong and deadly case that self-regulation of platforms is not enough to negate concerns about the presentation of information. This analysis considers what is at stake in the conversation about Section 230 protections for platforms and how the Marketplace's structure is beginning to wane as it fails to self-correct without some sort of negative cost. When consuming information on the Internet, how many Americans are consciously considering whether a source can serve as a trustworthy, actionable substratum with which to inform themselves?

Second is an investigation into whether the role platforms play in the Marketplace has far-exceeded the "economy" approach to illuminating truth in public discourse. When discussing the Marketplace, it is important to consider where the conversations are held, and which information is seen by participants. Functioning as informational monopolies, platforms have outgrown merely being hosts of user information as they actively contribute to mirroring of information while simultaneously settling in as a quasi-necessity in American life. The function of platforms gives the impression of freedom of speech as it should exist in the Marketplace but functions much differently in practice. This disconnect from the Marketplace's original role is exacerbated when elements of the public forum are injected into the discussion, leaving platforms just beyond the reach of the First Amendment's restrictions, but granting them ample protections from assuming responsibility for their ever-expanding roles in discourse. This displacement of cost has been key in enabling bad-faith actors to become ever-boldened in polluting discourse with outright disinformation, particularly in light of the COVID-19 pandemic.

Finally, there is a very real possibility that not all platforms will be subject to First Amendment protections or regulation, given their ownership by foreign actors, creating

potential for harms to users beyond the protections or remedies afforded to them by American courts and potentially invoking concerns of national security. There is a real cost to allowing harmful or untruthful speech to run unregulated across the Internet, especially when it is often beyond the reach of the consequences the Marketplace normally imposes for such behavior and the counter-speech of other voices. In allowing users easy access to an audience of their choice, platforms actively connect users to groups sharing ideas that are never subject to sufficient market forces to test their truthfulness, depriving the Marketplace of its infliction of cost on the speaker. This has allowed for groups with ideas already maligned or discouraged by society at large to espouse their promulgations at a volume unprecedented in modern conversation. Given both the inability of its userbase to discern the value of information and the dependence on a particular vacuum environment, social media does not operate in the same context as social discourse, where it is much harder to tailor one's audience and inputs.

Contrary to Mr. Cox's trivialization of the issue, Section 230 has enabled an unprecedented level of growth in an industry whose business model wholly revolves around the construction, maintenance, and exploitation of the Marketplace. These same platforms host information with uniform presentation, regardless of the legitimacy of the source material. Both formally and informally, individuals, groups, organizations, news sources, and a growing number of political figures utilize social media as a means of educating and communicating with Internet denizens across a wide array of topics.<sup>37</sup> To his credit, Mr. Cox could not have anticipated the level to which social media would play a role in the life of the everyday American in 1996; even more reason why Section 230's presence requires reconsideration.

#### *A. What Information is Worth Consuming?*

In his work, *Free Speech: A Philosophical Enquiry*, Frederick Schauer posits two assumptions about the Marketplace Theory and its reliance on the adversarial nature of free exchange of ideas as an exercise in divining truth.<sup>38</sup> First, the Marketplace

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<sup>37</sup> See Christine A. Lukes, *Social Media*, 58 AAOHN J. 415, 415–16 (2010).

<sup>38</sup> See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 16 (1982).

Theory assumes that the American public possesses the ability and resources to discern truthfulness.<sup>39</sup> When the public is using reason to make contributions and conclusions in the exchange, the Marketplace functions smoothly. However, there is an additional assumption at play here as to whether the public wants to conduct this analysis or even knows when to employ it. This is due to a blending of official and unofficial sources hosted in the same manner. When viewing a blend of news and entertainment on social media, users pay less attention to the sources of that information.<sup>40</sup> The jumbling of content together greatly diminishes the ability of the average person to distinguish what is to be taken seriously.<sup>41</sup> It does not help that the platforms themselves do not distinguish specific sources of information. On Facebook, for example, the color, font, size, and tags on a post from the *New York Times* reads the same as an ad for Hulu.<sup>42</sup> When the presentation of information to a user is already confusing, how is one supposed to even begin to address its validity? At the outset, there is already translation required to determine, from user-interface to actual, substantive information, exactly who is behind the information being presented to the user.

Providing further difficulty is the presence of “official” and “unofficial” sources being shared in the online marketplace. Official news sources, historically considered more meritorious, are comprised of traditional newsgathering entities, journalists, scientific studies, and the like. These are usually institutional, but certainly can present as much bias as any other source of speech. A hallmark of an official source is the inclusion of some expert in their respective industry with the ability to verify authorship on the information contained within. A story on disease symptoms and treatment, for example, should understandably have contributions from an immunologist or epidemiologist, given their expertise in the subject matter. Unofficial sources of news traditionally originate from users or unknown entities hosting content that may be unoriginal—such as memes,

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<sup>39</sup> See *id.* at 26.

<sup>40</sup> George Pearson, *Sources on Social Media: Information context collapse and volume of content as predictors of source blindness*, 20 *NEW MEDIA & SOCIETY* 3580, 3582–83 (2020).

<sup>41</sup> *Id.*; Hunt Allcott, *Social Media and Fake News in the 2016 Election*, 31 *J. ECON. PERSPECT.* 211, 214–26 (2017).

<sup>42</sup> See Lara O’Reilly, *Facebook wants to turn its mobile ad network into an even bigger business by running ‘native’ ads on other apps*, *BUSINESS INSIDER*, (May 6, 2015, 5:00pm) <https://www.businessinsider.com/facebook-audience-network-ads-native-ad-tools-2015-5>.

comments, and product promotions—all lack the authoritative presence found in official sources.

Regardless of classification, both official and unofficial sources have the capacity to be proved or disproved by objective evidence. A conscientious reader can take it upon themselves to verify the truthfulness of a study and peer through data bias. However, this type of gatekeeping analysis requires the user to continually monitor content quality, where credibility is a perception that can be manipulated, or even faked, when the proper characteristics are applied. However, one must ask whether this conscientious reader even exists and, if they do, whether they are able to conduct such an analysis while belabored by a deluge of information.

The second assumption requires the steady injection of ideas into the Marketplace, whether true or false. The Marketplace assumes idea erosion will shape and sift until society arrives at the best possible idea.<sup>43</sup> However, Schauer contends that a proper open debate resulting in a benefit is not always a guarantee.<sup>44</sup> Rather, “additional propositions can retard knowledge as well as advance it.”<sup>45</sup> He acknowledges there is inherent risk in the suppressing of certain speech but asserts the contrary is also true where failure to suppress a statement that requires action might result in harm.<sup>46</sup> In these situations, one must consider the benefit of the speech running free against the potential risk supposed by its suppression.<sup>47</sup>

Consider the historical context in which Justice Holmes wrote his dissent in *Abrams*, notwithstanding the influence of Milton or Mill on the raw concept itself.<sup>48</sup> In 1919, radio was the closest analogy to what social media has become, and its power pales in comparison to the reach of the Internet. Transmission by radio in 1919 required specific operational knowledge, complex

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<sup>43</sup> See Schauer, *supra* note 38, at 27.

<sup>44</sup> *Id.* at 33.

<sup>45</sup> *Id.*

<sup>46</sup> See *id.* at 29.

<sup>47</sup> *Id.*

<sup>48</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); see also JOHN MILTON, *AREOPAGITICA* (John W. Hales ed., Oxford University Press 1961); John Stuart Mill, *ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 13–48 (R. McCallum ed., 1946).

equipment, and the final product still only reached those who had some sort of access to the radio at the time of broadcasting.<sup>49</sup> In 2021, where around sixty-nine percent of American adults have Facebook, the number of daily posts accessible to a vast number of users is astronomical in comparison, and yet the Marketplace would have these users conduct the same analysis expected in 1919.<sup>50</sup> Simply put, the time necessary to consider and substantiate or refute an idea is not built into Holmes' original construction. If a single idea needs to be addressed by reason and valued accordingly in order to sustain the healthy trade of ideas, what hope does a single person have when confronted with hundreds of thousands of these calculations per day? Diversity of opinion begins to lose some of its value when there is immense difficulty in the selection process.

Unfortunately, the requisite media literacy required to navigate the Marketplace in 1919 is not the same in 2021 thanks to the presence of platforms. There are simply too many inputs to consider, far more than any reasonable user could identify and process in a day. To conceptualize the infeasibility of the task, it is appropriate to consider a more technical manner of valuing the utility of information. On average Americans have been found to consume around thirty-four gigabytes of data and information daily, a figure that has increased about 350 percent since 1980.<sup>51</sup> But what does this mean in practice for the Marketplace? Obviously, that's quite a bit more to consider than in 1919, but surely the wealth of information accessible to the average American is a boon to the Marketplace's function. Or rather that would be the case but for the nature of information consumption. Information is not plainly useful based on the amount of information and its accessibility. It also depends on whether that information can be internalized in such a significant quantity.

To provide a more usable measurement for this discussion, data analysts employ the use of a discipline called psychometrics, which concern the "quantification and measurement of mental attributes, behavior, performance, and

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<sup>49</sup> See Thomas H. White, *Broadcasting After World War One (1918-1921)*, U.S. EARLY RADIO HISTORY, <http://earlyradiohistory.us/sec016.htm> (last visited Mar. 29, 2021).

<sup>50</sup> John Gramlich, *10 Facts About Americans and Facebook*, PEW RSCH. CTR., (May 16, 2019) <https://www.pewresearch.org/fact-tank/2019/05/16/facts-about-americans-and-facebook/>.

<sup>51</sup> Nick Bilton, *Part of the Daily American Diet, 34 Gigabytes of Data*, N.Y. TIMES (Dec. 9, 2009) <https://www.nytimes.com/2009/12/10/technology/10data.html>.

the like.”<sup>52</sup> Employing psychometrics, a venture capital firm called Loup Ventures developed a formula for better understanding the “meaningfulness” of information communicated to the average person.<sup>53</sup> The base formula is rather simple and finds its roots in the seminal piece by C.E. Shannon, which details the communication of meaning on a mathematical level.<sup>54</sup> The exchange has two parts: (1) that a message is intentionally conveyed from speaker to consumer with an intended “meaning” and (2) the message must be interpreted by the consumer to discover the underlying meaning.<sup>55</sup> Here lies the difficulty with the number of inputs: to appreciate conveyed meaning, consumer interpretation must take place in some form to appreciate a type of marginal utility.<sup>56</sup> Without proper consumption, the meaning of the information is lost, and the consumer will not be as likely to utilize that source again. Loup Ventures notates their measure of information as the utility of information as equal to the value of the meaning interpreted by the consumer, opposite the time it takes to consume that information.<sup>57</sup> This metric’s relevance to the discussion of discourse in the online forum is merely its ability to illustrate the gravity of the issue with consumers’ ability to contribute to the Marketplace meaningfully in the Information Era. As its base conclusion, it represents the futility of any ordinary person attempting to properly engage with all the information available to them, a realization that directly implicates the efficacy of the Marketplace of Ideas. Where there is an overwhelming surplus of information, consumers tend to narrow the scope of their inputs or simply ignore new data altogether, ultimately leaving certain components necessary to

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<sup>52</sup> *Psychometrics*, AM. PSYCH. ASS’N DICTIONARY OF PSYCH., <https://dictionary.apa.org/psychometrics> (last visited Feb. 27, 2021).

<sup>53</sup> See Doug Clinton, *Defining the Future of Human Information Consumption*, LOUP VENTURES (Jun. 12, 2018) <https://loupventures.com/defining-the-future-of-human-information-consumption/>.

<sup>54</sup> See C.E. Shannon, *A Mathematical Theory of Communication*, 27 BELL SYSTEM TECH. J. 379, 379–86 (1948).

<sup>55</sup> *Id.* at 379–81.

<sup>56</sup> See Andrew Bloomenthal, *Marginal Utility*, INVESTOPEDIA (Jan. 8, 2021), <https://www.investopedia.com/terms/m/marginalutility.asp> (noting that marginal utility is a term from economics related to the satisfaction a consumer derives from consuming a particular product that will ultimately determine its utility and rate of future consumption).

<sup>57</sup> See Clinton, *supra* note 53.

the Marketplace's operation lacking.<sup>58</sup> This realization unfortunately makes very little difference to the platforms themselves.

Platforms profit on the confusing delivery and presentation of information on their sites via the way they impact human behavior. This is largely by design, as they are tailored to fulfill a performative desire, not the facilitation of a public forum.<sup>59</sup> Taking the time to fact-check an article, a meme, or even the assertion of friend or follower is a far less compelling use of one's time than simply disseminating the information to a personal "audience" accompanied with color commentary.<sup>60</sup> This "identity performance," in turn, encourages others to perform the same process according to their ideological identification.<sup>61</sup> Simply, users on social media want to be viewed positively by their peers and will act in furtherance of this goal, rather than take steps to ensure what they are posting is correct.<sup>62</sup> This cycle is antithetical to the idea of the Marketplace and requires neither the presence of a discerning informational consumer, nor a desire to unearth the truth. In certain cases, this clouding of information can pose a danger well beyond being misinformed.<sup>63</sup> In a speech to the World Health Organization in February 2020, during the COVID-19 pandemic, Tedros Adhanom Ghebreyesus recognized the threat of misinformation in the Internet sphere, emphasizing that "we're not just fighting

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<sup>58</sup> See Fred Douglass, *Information Overload, 140 Characters at a Time*, 13 INST. OF ELECTRICAL & ELECTRONICS ENGINEERS INTERNET COMPUTING 4, 4-5 (2009); Avery E. Holton, *News and the Overloaded Consumer: Factors Influence Information Overload Among New Consumers*, 15 CYBERPSYCHOLOGY, BEHAVIOR, AND SOCIAL NETWORKING, 619, 621-22 (2012).

<sup>59</sup> See *Twitter, Inc. Form S-3 Registration Statement*, SEC (June 5, 2015), [https://www.sec.gov/Archives/edgar/data/1418091/000156459015004890/twtr-s-3\\_20150605.htm](https://www.sec.gov/Archives/edgar/data/1418091/000156459015004890/twtr-s-3_20150605.htm) (noting that Twitter asserts their success based on user and ad engagement, supported by content contribution by users to expose them to ads).

<sup>60</sup> Casey Bond, *Posting on Social Media is not Activism (Sorry, Fellow White People)*, HUFFPOST (June 11, 2020), [https://www.huffpost.com/entry/social-media-not-activism\\_1\\_5ee151a7c5b6dd4f3be385c5](https://www.huffpost.com/entry/social-media-not-activism_1_5ee151a7c5b6dd4f3be385c5) (explaining the concept of performative allyship).

<sup>61</sup> Robert Elliott Smith, *My social media deeds look different from yours and it's driving political polarization*, USA TODAY (Sept. 2, 2019), <https://www.usatoday.com/story/opinion/voices/2019/09/02/social-media-election-bias-algorithms-diversity-column/2121233001/>.

<sup>62</sup> *Id.*

<sup>63</sup> *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last accessed Jan. 18, 2021) (stating that as of Jan. 15, 2021, there have been 397,612 American deaths due to COVID-19).

an epidemic; we're fighting an infodemic."<sup>64</sup> Americans have long recognized the issues with misinformation on social media, as some sixty-four percent of U.S. adults state fabricated news stories cause a great deal of confusion about the basic facts of issues and events.<sup>65</sup> COVID-19 has given the presence of misinformation on platforms serious weight, even more apparent as a threat to the Marketplace exchange, specifically with respect to the sharing of official information across platforms<sup>66</sup> and the distortion of that information therein.<sup>67</sup> In these conditions, the Marketplace cannot fulfill its proper functions, causing harm to the informational ecosystem.<sup>68</sup> Despite the grave cost of rampant misinformation, platforms recognize the benefits of exploiting the Marketplace even during a crisis and have done little in the way of stemming the flow of misinformation.<sup>69</sup>

Ultimately, conflicting information and the failure of the Marketplace to produce swift truth has unequivocally resulted in death due to the lack of vetting information across normal

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<sup>64</sup> Tedros Adhanom Ghebreyesus, *Munich Security Conference*, WHO (Feb. 15, 2020) <https://www.who.int/dg/speeches/detail/munich-security-conference>.

<sup>65</sup> Michael Barthel, Amy Mitchell & Jesse Holcomb, *Many Americans Believe Fake News is Showing Confusion*, PEW RSCH. CTR. (Dec. 15, 2016), <https://www.journalism.org/2016/12/15/many-americans-believe-fake-news-is-showing-confusion/> ("These results come from a survey of 1,002 U.S. adults conducted from Dec. 1 to 4, 2016.").

<sup>66</sup> *Id.* (showing that forty-two percent of respondents said that social media and search engines should bear responsibility for the spread of fake news).

<sup>67</sup> Matthew A. Braum et al., *The State of the Nation: A 50-State COVID-19 Survey Report #14: Misinformation and Vaccine Acceptance*, THE COVID STATES PROJECT (Sept. 23, 2020), <http://www.kateto.net/covid19/COVID19%20CONSORTIUM%20REPORT%2014%20MISINFO%20SEP%202020.pdf> (finding that of 21,000 individuals surveyed, around twenty-four to twenty-five percent believed inaccurate claims about COVID-19).

<sup>68</sup> See generally Dawn Nunziato, *Misinformation Mayhem: Social Media Platforms' Efforts to Combat Medical and Political Misinformation*, 19 FIRST AMEND. L. REV. 33 (2019).

<sup>69</sup> Jeff Horwitz, *Facebook Posts Revenue Growth Despite Pandemic*, WALL ST. J. (updated July 30, 2020), <https://www.wsj.com/articles/facebook-fb-2q-earnings-report-2020-11596138406> (noting, as of July 2020, Facebook had generated \$5.18 billion in the quarter); Queenie Wong & Jon Skillings, *Twitter's user growth soars amid coronavirus, but uncertainty remains*, CNET (Apr. 30, 2020), <https://www.cnet.com/news/twitters-user-growth-soars-amid-coronavirus-but-uncertainty-remains/> (noting that, in April, Twitter was up three percent on the year with accompanying a twenty-four percent increase of daily active users compared to the same time last year).

channels.<sup>70</sup> The presentation of information on platforms is stress-testing the Marketplace beyond its limits, threatening the jurisprudential doctrine it supports. This issue is amplified when the marketplace afforded by platforms begins to eclipse the other mediums of communication, creating a sort of informational monopoly directed by a few untouchable actors who control an ever-growing aspect of the public forum.

### *B. A Grossly Imperfect Economy*

In 2018, Pew Research recorded that social media sites were emerging as a prevalent resource for Americans seeking news, surpassing print newspapers.<sup>71</sup> Thirty-four percent of U.S. adults said they preferred to get news online, despite a majority of respondents (fifty-seven percent) who consume news on social media stating they expect the news they see on platforms to be largely inaccurate.<sup>72</sup> However, respondents in both the 18-29 and 30-49 age ranges receive a significant amount of their news on social media, with those in the 18-29 range being four times as likely than those 65+ to often get their news from social media.<sup>73</sup> This problematic trend of apathetically relying on an imperfect delivery of information elicits troubling conclusions about the exchange of information and ideas in the digital realm, especially where the forum is controlled by few and depended on by many.

Monopoly power over control of a market occurs when an entity possesses the ability to control a resource's pricing across competition levels without a grossly adverse effect on the controller.<sup>74</sup> Legally speaking, the determination of monopoly status depends on the presence of direct or indirect evidence of an entity's control over the market.<sup>75</sup> Direct evidence encompasses a showing of a firm's ability to reduce total market output and still raise the price of goods beyond the competitive

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<sup>70</sup> Amir Bagherpour & Ali Nouri, *COVID Misinformation is Killing People*, SCI. AM. (Oct. 11, 2020), <https://www.scientificamerican.com/article/covid-misinformation-is-killing-people1/>.

<sup>71</sup> Elisa Shearer, *Social media outpaces print newspapers in the U.S. as a news source*, PEW RSCH. CTR. (Dec. 10, 2018), <https://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/>.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> See *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

<sup>75</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001).

level.<sup>76</sup> However, when such direct proof is unavailable—it rarely is—courts will usually examine the market structure within the industry to search for circumstantial evidence.<sup>77</sup> Circumstantial evidence of monopoly formation consists of inferences concerning a firm’s possession of a dominant market share and whether entry barriers prevent new competition from responding to fluctuations in resource cost.<sup>78</sup> Indirect evidence is overwhelmingly present within the discussion of several platforms and their monopolistic control of access to discourse, supported by inelastic demand,<sup>79</sup> as the ubiquity of Facebook, Twitter, and few others within public discourse is as undeniable as their control of the market.<sup>80</sup> In its simplest iteration, the emerging informational monopoly seeks to subjugate perhaps the most vital resource in First Amendment jurisprudence: access to the public forum.

The Supreme Court addressed social media as the “modern public square” in a case concerning the constitutionality of a North Carolina statute criminalizing the act of a registered sex offender gaining access to particular websites, including Facebook and Twitter.<sup>81</sup> The Court’s use of this construction opens discussion of platforms as public spaces, girded with the appropriate First Amendment principles.<sup>82</sup> Chief among them in *Packingham*’s case is the basic rule of a right to speak in a public forum,<sup>83</sup> now contextualized within social media and the Internet. The Court considers cyberspace—social media in particular—as easing the task of locating a particular

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Facebook claims to reach 210 million consumers in the U.S. alone. *See Leading Countries Based on Facebook Audience Size As Of October 2020*, STATISTA (Oct. 2020), <https://www.statista.com/statistics/268136/top-15-countries-based-on-number-of-facebook-users/> (stating that Facebook reaches 190 million consumers in the U.S.); *see also @TwitterIR, Q2 2020 Letter to Shareholders*, TWITTER at 12 (Jul. 23, 2020), [https://s22.q4cdn.com/826641620/files/doc\\_financials/2020/q2/Q2-2020-Shareholder-Letter.pdf](https://s22.q4cdn.com/826641620/files/doc_financials/2020/q2/Q2-2020-Shareholder-Letter.pdf) (stating that Twitter averaged 36 million users for Q2 of 2020).

<sup>80</sup> *Packingham v. North Carolina*, 137 S.Ct. 1730, 1737 (2017) (noting that “seven in ten American adults use at least one Internet social networking service”).

<sup>81</sup> *Id.* at 1738.

<sup>82</sup> *Id.* at 1735.

<sup>83</sup> *Id.*

locale for exchanging ideas, calling cyberspace the “vast democratic forums of the Internet.”<sup>84</sup>

While there are issues with the Court’s public space dicta, such as the confusion it invites when applying a public forum analysis to a private digital arena, the Court has pressed the public forum beyond a sole physical location before. In *Rosenberger v. Rectors & Visitors of University of Virginia*,<sup>85</sup> the Court found the allocation of school funds to student activities qualified as the creation of a public forum where “[o]nce it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set.”<sup>86</sup> The Court went on to recognize that the fund is a “forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.”<sup>87</sup> However, a formidable legal distinction between the Court’s consideration of “metaphysical”<sup>88</sup> fora in *Rosenberger* and Internet space in *Packingham* suggests the unthinkable. Namely, an attempt at extending the public forum doctrine to platforms would press public forum rules into an exclusively private space, owned and operated by nongovernmental actors.

Nevertheless, the Court’s dicta in *Packingham* has invited further discussion into the concept of platforms as public fora within the context of the First Amendment. The *Packingham* Court recognized that sites like Twitter operated as a channel by which citizens could “petition their elected representatives and otherwise engage with them in a direct manner.”<sup>89</sup> Ultimately, *Packingham* introduced the question of public space on the Internet as a public forum but did not resolve the question itself.

Courts have already begun to hear arguments incorporating the *Packingham* dicta, like in *Knight First Amendment Institute v. Trump*,<sup>90</sup> where claimants argued that the presentation and operation of the President’s Twitter account echoed *Packingham*’s “modern public square” and applied it as

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<sup>84</sup> *Id.* at 1735 (citing *Reno v. ACLU*, 521 U.S. 844, 868 (1997)).

<sup>85</sup> 515 U.S. 819 (1995).

<sup>86</sup> *Id.* at 829.

<sup>87</sup> *Id.* at 830.

<sup>88</sup> *Id.*

<sup>89</sup> *Packingham*, 137 S.Ct. at 1735.

<sup>90</sup> 928 F.3d 226, 238 (2d Cir. 2019).

such to the public forum doctrine.<sup>91</sup> The Second Circuit affirmed district court's finding, concluding that President Trump had engaged in unconstitutional viewpoint discrimination by blocking certain users' access to his account.<sup>92</sup> Holding the First Amendment does not permit a public official's utilization of a social media account in an official capacity to exclude persons, due to the open dialogue the platform invites, the Court found President Trump had engaged in viewpoint discrimination by depriving these users of access to his social media account simply because he disagreed with their speech.<sup>93</sup> In summary, the President constructed what amounted to a digital town hall where he accommodated public discussion.<sup>94</sup> He also presented the speech within the forum in a way that was closely identified by the public as governmental.<sup>95</sup> It becomes readily evident the use of social media in this way was sufficiently controlled by the government to render this type of exchange subject to a forum analysis under normal circumstances.<sup>96</sup>

When the government's use of a private platform manifests a designated public forum in a way that it should require constitutional protections, it also carries consideration for the degree of scrutiny that restricting access to such forum places upon individual rights. The fact that a Twitter account can be construed as a communicative apparatus of the President of the United States should suffice to answer whether a privately controlled platform can overstep its role in facilitating communication. When construed in such a manner, the platform becomes undeniably linked to government ownership or control to some degree.

During COVID-19, platforms are becoming even more imperative to discourse, as their usage has risen between fifteen

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<sup>91</sup> See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983) (holding that "[o]pening an instrumentality of communication for indiscriminate use by the general public creates a public forum"); see also *Knight First Amend. Inst.*, 928 F.3d at 237.

<sup>92</sup> *Knight First Amend. Inst.*, 928 F.3d at 230.

<sup>93</sup> *Id.*

<sup>94</sup> See *Pleasant Grove v. Summum*, 555 U.S. 460, 480 (2009); see also *Knight First Amendment Inst.*, 928 F.3d at 239–40.

<sup>95</sup> See *Knight First Amendment Inst.*, 928 F.3d at 239–40 (citing *Summum*, 555 U.S. at 478).

<sup>96</sup> See *id.* (citing *Matal v. Tam*, 137 S. Ct. 1733, 1760 (2017)).

and twenty-seven percent during the first months of the pandemic.<sup>97</sup> Given this rapid rise in the face of lockdown orders and the cancellation of in-person events, COVID-19 represents the necessary concrete data to quell the naysayers who might argue social media still needs the liability protections afforded by Section 230. While COVID-19 might be an isolated and historically magnitudinous event, the increase in platform usage conclusively demonstrates when other avenues are closed, privately controlled social media platforms are the premier option for engaging in public discourse.

The lack of government control of platforms despite their use for official government speech, coupled with societal reliance on platform services, begins to manifest the shape of an informational monopoly exerting its influence on the public forum. The indirect evidence of an informational monopoly is clearly implicated in its evolution from supplementary channel to a nearly realized First Amendment public forum. At this moment in time, a large majority of Americans use social media across a small number of platforms to inject their speech into the marketplace. Those platforms are being utilized, even at the highest levels of government, as a means of imparting government speech to the citizenry and allowing for reciprocal interactivity, so much so that the President cannot constitutionally deny members access to his account on a private platform. Platforms are in a position where they hold the power to host both accurate and inaccurate data in the same channels and oversee the transactional exchange of information. In this role, platforms have reached a position of such utility that they can be considered public fora, with little hope of government regulation of these interactions.<sup>98</sup> Platforms stepping into this role effectively creates a microcosm of the Marketplace of Ideas where only the rules of the platform apply and are solely under their control, growing ever-immunized from affectation by market forces or other intervention.

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<sup>97</sup> Ella Koeze, *The Virus Change the Way We Internet*, N.Y. TIMES, (Apr. 7, 2020) <https://www.nytimes.com/interactive/2020/04/07/technology/coronavirus-internet-use.html>.

<sup>98</sup> See, e.g., Dawn C. Nunziato, *How (Not) to Censor: Procedural First Amendment Values and Internet Censorship Worldwide*, 42 GEO. J. INT'L L. 1123, 1131 (2011) (noting that the ultimate determination of illegality of any social media post must await judicial determination, since speech cannot be censored by a government official pursuant to the prior restraint doctrine).

This lack of interactivity is especially problematic when it insulates users from the truth-rearing effects of the Marketplace or when the forum itself does not consider allowing Marketplace function essential to its operation. The most valuable effect of the Marketplace is its power to affirm or deny a particular viewpoint, which in turn, will appropriately signal information to peripheral participants as valuable. What has been occurring, however, is users are endowed with the power to cultivate what market forces they are subject to when espousing a particular idea, backed by platforms' encouragement of information isolation.<sup>99</sup> Unfortunately, most consider the issue as something that can be passively addressed by letting the Marketplace work its "magic."<sup>100</sup> As an ongoing assertion of this piece, it should be noted the Marketplace only operates effectively when its members are engaging properly with a diversity of opinion.<sup>101</sup>

An appropriate illustration for foreshowing this issue exists in the deregulation of balanced information in traditional media. In 1949, the Federal Communications Commission enacted the Fairness Doctrine, which expanded requirements for news broadcasters holding them responsible for diversifying news offerings.<sup>102</sup> The Supreme Court, in *Red Lion Broadcasting Co. v. F.C.C.*,<sup>103</sup> held unanimously the Fairness Doctrine was constitutional, and diversity of opinion was essential to informing the electorate about controversial issues in a balanced manner.<sup>104</sup> The Court saw the necessity in the balancing of opinion and the encouragement of discourse as a means of dispelling the chilling effect caused by broadcasting

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<sup>99</sup> See Emily Bazelon, *The First Amendment in the Age of Disinformation*, N.Y. TIMES, (Oct. 13, 2020), <https://www.nytimes.com/2020/10/13/magazine/free-speech.html>.

<sup>100</sup> See Claudio Lombardi, *The Illusion of a "Marketplace of Ideas" and the Right to Truth*, 3 AM. AFFAIRS 198, 203–05 (2019); see also R.H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384, 384–89 (1974).

<sup>101</sup> See Clinton, *supra* note 53.

<sup>102</sup> In the Matter of the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 F.C.C.2d 1 (F.C.C. 1974); 39 Fed. Reg. 26.372, 26.374 (1974).

<sup>103</sup> 395 U.S. 367 (1969).

<sup>104</sup> *Id.* at 390–93.

organizations presenting listeners with only a single perspective, cultivating a skewed opinion in the electorate.<sup>105</sup>

Yet, the current state of traditional media's content cultivation stands in stark contrast to the objectives of the Fairness Doctrine, and the result is an ever-weakened Marketplace. Content produced and carried by news outlets no longer requires context on opposition, leaving traditional news media the power to isolate and immunize its audience from having to engage with contrary opinions.<sup>106</sup> Platforms seem poised to follow the same path of allowing users to bypass the Marketplace in favor of a cacophony of imbalanced information where one may stitch together an amalgam of a political opinion.

### ***C. Trolling Takes Lives: The National Security Interest in Platform Regulation***

This Subsection looks to how the structure of the platform's arena robs the Marketplace of its responsibility to inflict negative consequences on certain types of speech. The circumvention of Marketplace functionality is accomplished through the preservation of speaker anonymity and the lack of expense normally levied upon dangerous speech. In preventing the infliction of cost by preserving anonymity and facilitating connectivity among otherwise isolated persons, platforms enable bad-faith users to ensure their speech lands only on the ears of supporters. In contrast, where the ideas are submitted to a more public space, they are susceptible to counter-speech, peripheral consequence, or losing social capital on account of their unsavory opinion where they might not be heeded in the future. Americans recognize that misinformation is an issue but continue to indulge their cognitive preferences rather than process information with public interest in mind.<sup>107</sup> And they will continue to do so without some sort of cost to the absent-minded

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<sup>105</sup> *Id.* at 387 (noting the right of free speech of a broadcaster, the user of a sound truck, or any other individual does not include a right to snuff out the free speech of others).

<sup>106</sup> Kevin M. Kruse, *How Policy Decisions Spawned Today's Hyperpolarized Media*, WASH. POST (Jan. 17, 2019), <https://www.washingtonpost.com/outlook/2019/01/17/how-policy-decisions-spawned-todays-hyperpolarized-media/>.

<sup>107</sup> Kirsten Weir, *Why We Fall for Fake News: Hijacked Thinking Or Laziness*, AM. PSYCH. ASS'N (Feb. 11, 2020), <https://www.apa.org/news/apa/2020/02/fake-news>.

dissemination of false information.<sup>108</sup> Despite several gruesome and sobering events, there is a noticeable, widespread absence of fear associated with the consequences of misinformation.

For example, in June of 2016, Omar Mateen shot and killed forty-nine people in Pulse nightclub in Florida<sup>109</sup> after being radicalized on the Internet.<sup>110</sup> This attack prompted families of three of the victims to sue Facebook, Twitter, and Google, alleging that the platforms provided material support to the ISIS terror organization and sought civil remedy under the relevant provision of the Anti-Terrorism Act (ATA).<sup>111</sup> The families argued that the companies had hosted terrorist rhetoric and profited from the promulgation of terrorist propaganda by virtue of hosting this type of speech on their websites.<sup>112</sup> The U.S. District Court for the Northern District of California, in *Fields v. Twitter*<sup>113</sup> dismissed these claims under the liability protections of Section 230 and held publisher liability was shielded by the Act.<sup>114</sup> Due to Section 230 liability, there is scant legal incentive for platforms to police this kind of speech, though the issue might also be attributed to the very nature of the indirect communication taking place on platforms. The interconnectivity of the Internet and platform accommodations allows groups that were impossibly dispersed due to their geography the opportunity to communicate, recruit new members, and coordinate efforts to engage in terror.<sup>115</sup> Further complicating matters is the First Amendment preservation of association and advocacy, though First Amendment rights do not extend to

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<sup>108</sup> Amy Mitchell, *Many Americans Say Made-Up News Is a Critical Problem that Needs to Be Fixed*, PEW RSCH. CTR. (June 5, 2019), <https://www.journalism.org/2019/06/05/many-americans-say-made-up-news-is-a-critical-problem-that-needs-to-be-fixed/>.

<sup>109</sup> Dan Barry, *Realizing It's a Small, Terrifying World After All*, N.Y. TIMES, (June 16, 2016) <https://www.nytimes.com/2016/06/21/us/orlando-shooting-america.html>.

<sup>110</sup> Ed Pilkington, *FBI and Obama Confirm Omar Mateen Was Radicalized on the Internet*, GUARDIAN (June 14, 2016), <http://www.theguardian.com/us-news/2016/jun/13/pulse-nightclubattack-shooter-radicalized-internet-orlando>.

<sup>111</sup> 18 U.S.C. § 2333(a).

<sup>112</sup> *Fields v. Twitter, Inc.*, 200 F. Supp. 3d 964 (N.D. Cal. 2016).

<sup>113</sup> *Id.*

<sup>114</sup> *See id.* at 971–75.

<sup>115</sup> *See* U.N. COUNTER-TERRORISM IMPLEMENTATION TASK FORCE, COUNTERING THE USE OF THE INTERNET FOR TERRORIST PURPOSES—LEGAL AND TECHNICAL ASPECTS 31–32 (May 2011), [http://www.un.org/en/terrorism/ctitf/pdfs/ctitf\\_interagency\\_wg\\_compendium\\_legal\\_technical\\_aspects\\_web.pdf](http://www.un.org/en/terrorism/ctitf/pdfs/ctitf_interagency_wg_compendium_legal_technical_aspects_web.pdf) [<https://perma.cc/L6U9-RCWV>].

conduct that might serve to advance terror activities where violence is involved<sup>116</sup> such as the direct “incitement of imminent lawless action.”<sup>117</sup> Unfortunately, addressing these issues in a social media context requires that the Marketplace of Ideas move beyond the borders of the First Amendment.

The cross-border capabilities of platforms enable the efforts of bad actors and misinformers to inflict even international consequences on persons in a different continent, country or jurisdiction.<sup>118</sup> Platforms provide easy access to the tools of information dissemination and an audience to consume it, especially where it can be done with little expense to the speaker both with respect to resources and anonymity.<sup>119</sup> Up until this point, operational control of major platforms has been a solely American exercise.<sup>120</sup> However, given the inevitable growth of interconnectivity via social media, there is a major issue on the horizon that First Amendment jurisprudence has yet to face: What happens when American courts are no longer able to affect the behavior of a foreign-controlled platform?

In response to the widespread use of two social media entities gaining traction in the U.S., President Trump sought to exercise his powers under the International Emergency Economic Powers Act (IEEPA) to declare a national emergency to “deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States.”<sup>121</sup> On May 15, 2019, President Trump issued Executive Order 13873, under the IEEPA and the National Emergencies

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<sup>116</sup> Ashutosh Bhagwat, *Terrorism and Associations*, 63 EMORY L.J. 581, 617–18 (2014).

<sup>117</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>118</sup> See Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497, 521–31 (2009); Eric Posner, *ISIS Gives Us No Choice but to Consider Limits on Speech*, SLATE (Dec. 15, 2015), [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2015/12/isis\\_s\\_online\\_radicalization\\_efforts\\_present\\_an\\_unprecedented\\_danger.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/12/isis_s_online_radicalization_efforts_present_an_unprecedented_danger.html) [<https://perma.cc/6HZ7-TGYX>].

<sup>119</sup> See BRUCE HOFFMAN, *INSIDE TERRORISM* 197, 201–02 (2006) (“[T]he art of terrorist communication has evolved to a point which the terrorists themselves can now control the entire production process.”).

<sup>120</sup> H. Tankovska, *Global Social Networks Ranked by Number of Users 2021*, STATISTA (Feb. 8, 2021), <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> (As of 2020, four of the five most popular social networks by users are owned by American companies: Facebook, YouTube, WhatsApp, and Facebook Messenger).

<sup>121</sup> 50 U.S.C. § 1701(a); See *Marland v. Trump*, CIVIL ACTION NO. 20-4597 at 2 (E.D. Pa. Sep. 26, 2020) (internal quotations omitted).

Act,<sup>122</sup> with respect to the threat posed by foreign interests related to the United States' information and communication technology and services, finding that such entities were "increasingly creating and exploiting vulnerabilities . . . which store and communicate vast amounts of sensitive information . . ." <sup>123</sup> Under Executive Orders 13942<sup>124</sup> (the "TikTok Executive Order") and 13943<sup>125</sup> (the "WeChat Executive Order"), President Trump sought to address two named entities amidst concerns of the Chinese government's influence over ByteDance and Tencent, who oversaw the operation of the former and the latter respectively.<sup>126</sup> The Trump Administration pointed to the Chinese government's requirements that private Chinese companies assist in its intelligence and surveillance efforts<sup>127</sup> as rationale for banning the platforms from domestic operation. In *U.S. WeChat Users Alliance v. Trump*,<sup>128</sup> the U.S. District Court for the Northern District of California recognized that the government illuminated a threat that Tencent posed to national security, but ultimately found the government action was not narrowly tailored enough to address the government's national security interest.<sup>129</sup> Similarly, the U.S. District Court for the Eastern District of Pennsylvania, in *Marland v. Trump*,<sup>130</sup> found that the government's descriptions of a potential national security threat posed by TikTok were hypothetical based on ByteDance's "significant and close ties to the CCP which could potentially be leveraged to further [the CCP's] agenda."<sup>131</sup>

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<sup>122</sup> 50 U.S.C. § 1601.

<sup>123</sup> See Securing the Information and Communications Technology and Services Supply Chain, 84 Fed. Reg. 22,689 (May 15, 2019).

<sup>124</sup> See Addressing the Threat Posed by TikTok and Taking Additional Steps To Address the National Emergency With Respect to the Information and Communications Technology and Services Supply Chain, Exec. Order No. 13942, 85 Fed. Reg. 48,637 (Aug. 6, 2020).

<sup>125</sup> Exec. Order No. 13,943, 85 FR 48641 (Aug. 6, 2020).

<sup>126</sup> See 85 FR 48637; 85 FR 48641 (memorializing President Trump signing these orders under 50 U.S.C § 1701 et seq (the International Emergency Economic Powers Act) and 50 U.S.C. § 1601 et seq. (the National Emergencies Act) respectively).

<sup>127</sup> Memorandum for the Secretary, Ex. A to Costello Decl. – ECF No. 76-1 at 5–16 (alleging Tencent's history of assisting the Chinese government, WeChat's collection of and access to user data and personal information, its security vulnerabilities, its surveillance of users, its censorship of critiques about the Chinese government, and its provision of a platform to the Chinese government to espouse its propaganda).

<sup>128</sup> 488 F.Supp.3d 912, 917 (N.D. Cal. 2020).

<sup>129</sup> *Id.* at 927–30.

<sup>130</sup> *Marland v. Trump*, 2020 WL 6381397 \*13 (E.D. Pa. 2020).

<sup>131</sup> *Id.* at \*2.

Despite the Trump administration's efforts to ban the use of TikTok and WeChat falling short, the very existence of the suits acknowledges that national security interests could be associated with a platform's possession of personal information. A platform's potential role as an informant further reinforces the need for concern when discussing the power that social media platforms possess in society, both domestically and globally. Continually integrating and affecting discourse within the Marketplace, it is an inescapable fact that platforms hold infinitely more power than they did at the inception of Section 230. Whether that power lies in their control of data presentation in the marketplace, installing themselves as preferred arenas of discourse—rising even to that of a public forum—in their operation, or as a means of allowing bad faith actors and interests to circumvent the tests of the Marketplace and other fail-safes afforded by the justice system, it is time to place renewed pressure on the role of platforms.

### **III. SOLVING THE SECTION 230 PUZZLE (OR NOT)**

Before engaging with possible alterations or revocations to Section 230, it is prudent to summarize what exactly the solutions are required to address. Subsection (a) of Part II demonstrated that platforms profit on users ignoring the assumptions of the Marketplace of Ideas; users are not adept enough self-regulators to discern proper sources of information when obfuscated by platforms, and the sharing of false information has significant and fatal consequences in a time of crisis. Subsection (b) examined the construction of an informational monopoly where a few platforms have become installed as fundamental institutions of American discourse, rising to the level of being considered quasi-public fora under the public forum analysis, despite their status as private entities, and all but ensuring their place as gatekeepers of information. Finally, Subsection (c) demonstrated the considerable national security interest both future and realized when bad faith actors can use social media without consequence and the considerable power platforms have in controlling the information associated with these exchanges. This Section will begin with an examination of the lattice of issues that repealing Section 230 would implicate and then address several of the contemporary adjustments and developments concerning Section 230 doctrine. These developments include adjustments of jurisprudential interpretation in Section 230 liability cases, the proposed

statutory changes to the Section 230 by the former Trump Department of Justice, comments made by Twitter CEO Jack Dorsey during a Congressional hearing in October 2020 and the current state of tech's feelings toward Section 230 reform, and Justice Thomas' thoughts on the foreboding Section 230 issue that still has yet to be considered by the Supreme Court.

### *A. Obstacles in the Path Ahead*

The main concern with the elimination or restriction of Section 230 protections is one of scope, manifested in both the scope of monetary expenditures for operations and the scale of moderating such a large volume of inputs. When thinking of whether a company like Facebook should be punished for wrongdoing, Americans are quick to vilify social media platforms for issues only tangentially related to Section 230 liability. Some take issue with the policies of private entities as “censoring” free speech, while others take issue with the lack of censorship for content they observe to be false or offensive, but the negative perception of social media is not kept according to ideology.<sup>132</sup> During a survey conducted in July of 2020, Pew Research observed that sixty-four percent of Americans find social media to have a mostly negative effect on the country.<sup>133</sup> The logical conclusion is that given the immense power a company like Facebook has to affect public opinion, they should also suffer the consequences of wrongdoing or, at the very least, be forced to litigate a bit more often. However, an expansion of liability would likely result in increased costs to platforms in the form of legal fees, payout on damages, and other operational expenses that might still fail to solve the problem of affording greater protections to user.<sup>134</sup> While especially fatal to smaller

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<sup>132</sup> Emily A. Vogels, *Most Americans Think Social Media Sites Censor Political Viewpoints*, PEW RSCH. CTR., (Aug. 19, 2020), <https://www.pewresearch.org/internet/2020/08/19/most-americans-think-social-media-sites-censor-political-viewpoints/>.

<sup>133</sup> Brooke Auxier, *64% of Americans Say Social Media Have a Mostly Negative Effect on the Way Things Are Going In the U.S. Today*, PEW RSCH. CTR., (Oct. 15, 2020), <https://www.pewresearch.org/fact-tank/2020/10/15/64-of-americans-say-social-media-have-a-mostly-negative-effect-on-the-way-things-are-going-in-the-u-s-today/>.

<sup>134</sup> Roger McNamee, *Social Media Platforms Claim Moderation Will Reduce Harassment, Disinformation and Conspiracies. It Won't*, TIME, (June 24, 2020), <https://time.com/5855733/social-media-platforms-claim-moderation-will-reduce-harassment-disinformation-and-conspiracies-it-wont/>.

Internet startups without the capital to engage in high-cost lawsuits, large platforms might respond with a change in their revenue structures, moving from an ad-based model towards a subscription model to make-up for the increased operating costs.

Twitter CEO Jack Dorsey put the point rather bluntly, noting that “[e]roding the foundation of Section 230 could collapse how we communicate on the Internet, leaving only a small number of giant and well-funded technology companies.”<sup>135</sup> Assuming that only the mighty are left standing—and they likely would be—it would further concentrate power in the hands of a few sites that would begin to tighten their policies on community standards and censorship on their platforms to comply with new rules. In such a scenario, those remaining would be forced to decide between facilitating similar open forums like those we have been accustomed to or dropping their existing models to adopt a more risk-averse course of business.

Additionally, the scope issue does not end with a potential increase in monetary costs to users. It also implicates the benefits sought by users in contributing to social media in the first place. In the instance where platforms are compelled to reduce risk of litigation, they will certainly resort to increased censorship of contributions, effectively creating the chilling effect that the Marketplace seeks to prevent.<sup>136</sup> Platforms would be presented with the issue of how to develop standards for community content and the processes for how those standards develop over time, save for concerns that such standards might be imposed discriminately. This assumes that the platform in question could even approach such a task. Given the number of inputs in just twenty-four hours on a platform like Facebook, the amount of moderation needed to ensure that no offensive or harmful content would reach its target seems implausible, even given the vast wealth of resources at their disposal.<sup>137</sup> In these

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<sup>135</sup> Aaron Holmes, *Facebook, Twitter, and Youtube’s Business Models Could Get Crushed If a Law Called Section 230 Gets Repealed*, BUSINESS INSIDER, (Oct. 28, 2020), <https://www.businessinsider.com/congress-section-230-repeal-crush-social-media-facebook-twitter-google-2020-10> (internal quotations omitted).

<sup>136</sup> See Christopher Gao, *Social Media Censorship, Free Speech, and the Super Apps*, CALIF. L. REV. ONLINE (Oct. 2020), <https://www.californialawreview.org/social-media-censorship-free-speech>.

<sup>137</sup> H. Tankovska, *Facebook: Number of Active Daily Users Worldwide 2011-2020*, (Feb. 2, 2021), <https://www.statista.com/statistics/346167/facebook-global-dau/#:~:text=During%20the%20third%20quarter%20of,percent%20of%20monthly>

instances, it seems all-too-likely that a platform would rather just remove a particular voice from their space, rather than try to head off its problem statements, a presumed outcome that would fall in stark contrast to both the legislative intent of Section 230 and the operation of the Marketplace of Ideas.

### *B. Courts' Role in Protecting the Marketplace*

There are two jurisprudential shifts the courts could take if they determined that it was necessary to circumvent the legislature and render a new construction of Section 230 liability. First, the courts could affect Section 230 liability through the expansion of the *Brandenburg* doctrine as it relates to speakers.<sup>138</sup> Noted by Michael Sherman in his article, *Brandenburg v. Twitter*,<sup>139</sup> the Court has never actually defined the term “imminence” as a precise temporal measure but finds it sufficient to merely say whether the requirement threshold has been met.<sup>140</sup> Sherman takes note of the capacity by which one could communicate during the time period when *Brandenburg* had been decided, asserting the nature of imminence was much easier to understand as a concept in light of a person’s ability to reach a mass audience.<sup>141</sup> This same contention is noted by John Cronan, who argued that the imminence requirement “does not work with the vast majority of Internet communications, as words in cyberspace are usually ‘heard’ well after they are ‘spoken.’”<sup>142</sup> This solution seems practical on its face, especially given the harm that even the most innocuous comment can cause, but the question of imminence carries with it another consideration: At the time of incitement, did the speaker actually intend their speech to have a specifically desired effect on a

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%20active%20users.&text=With%20over%202.7%20billion%20monthly,most%20popular%20social%20network%20worldwide (finding that Facebook reported almost 1.82 billion daily users during the third quarter of 2020).

<sup>138</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that speech likely to incite imminent lawless action was not protected by the First Amendment).

<sup>139</sup> See Michael J. Sherman, *Brandenburg v. Twitter*, 28.2 GEO. MASON. U. C.R.L.J. 127, 128–36 (2019).

<sup>140</sup> See *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (finding that Hess’s speech asserting that “[w]e’ll take the fucking street again” was not sufficient to determine that Hess intended to incite lawless action or was likely to do so).

<sup>141</sup> Sherman, *supra* note 139, at 167.

<sup>142</sup> John P. Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 CATH. U. L. REV. 425, 428 (2002).

targeted audience? Sherman takes note of the chilling concern that this type of jurisprudential shift would create and recalls Justice Steven's language from *Claiborne Hardware* in its restriction of the freedom to make "spontaneous and emotional appeals" that are tied to this liability for any future reaction.<sup>143</sup> To Sherman, the elevation of a chilling concern raises a new concept of a heckler's veto where their speech is enshrined for perpetuity based on any given reaction to their speech.<sup>144</sup> Doing so would also require that prosecutors demonstrate these outbursts were intended to be recurring in their same form across myriad audiences with the same effect.

The inevitable question of this approach is clear at the outset, however, and, considering past efforts by the government to censor freedom of speech,<sup>145</sup> it is ultimately unpalatable as it significantly burdens any future speech on platforms. The possibility of a government using a crisis as a means of justification to restrict certain types of speech could easily balloon beyond its practical application and result in a catch-all justification for chilling speech in myriad circumstances deemed necessary by the government.<sup>146</sup> Consider this approach in the context of a post containing COVID-19 misinformation on social media, such as a post advocating against wearing a mask despite contrary guidelines from formal sources. In the instance where one could prove the intention of a post to be inciting lawlessness, it would certainly halt any sharing whatsoever, of even good-faith actors, for fear of being punished even if it was a just an impulsive posting. The force of Section 230 liability cannot be an authoritative test of truth, but rather should return discourse to Marketplace forces. If the courts suddenly construct some sort of litmus test for truth that acts as gatekeeping for speech, they have effectively created a means of chilling speech on a massive scale. The consequence of applying a test for truthfulness also raises questions about how the standard for truth or intent would be conducted. If left to judges, it might also result in any number of standards being applied that could lead to inconsistent results across jurisdictions. Additionally, this approach also does little

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<sup>143</sup> See *NAACP v. Claiborne Hardware*, 458 U.S. 886, 928 (1982).

<sup>144</sup> Sherman, *supra* note 139, at 171.

<sup>145</sup> See *Whitney v. California*, 274 U.S. 357, 371–73 (1927) (holding that, under the Criminal Syndicalism Act, the state can exercise its police power to punish utterances of words with bad tendency).

<sup>146</sup> See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (holding that the military necessity arising from the danger of espionage and sabotage warranted the evacuation and internment order that restricted the rights of Asian-Americans).

to affect platform control of discourse and the effects that it might have on the closing of other public fora. While imposing liability on platforms may be a part of an eventual solution, changing the way intention is interpreted on social media does not appear the wisest course, as it may quickly devolve into a jurisprudential mire of imprecise definitions and would likely chill more speech than it frees.

That's not to say that courts agree they are an improper arena for taking Section 230 to task. In a filing where the Supreme Court declined to review a case alleging an issue within the scope of Section 230, Justice Thomas released a statement arguing that lower courts need to be corrected in their interpretation of the protections conferred upon online platforms.<sup>147</sup> Justice Thomas notes that, since its inception, the liability doctrine of Section 230 has gone twenty-four years without interpretation of the civil immunity provision contained within.<sup>148</sup> Fixating on the Ninth Circuit's reliance on "policy and purpose" of Section 230 as grounds to conclude immunity is unavailable to plaintiffs alleging anticompetitive conduct, Thomas asserts that the emphasis on nontextual grounds by lower courts has resulted in questionable precedent that should be considered by the Supreme Court.<sup>149</sup> In typical fashion, Thomas argues that the legislative intention of Section 230 is clear on its face and serves to (1) allow the hosting and transmission of third-party content without being subject to liability and (2) direct immunity from some civil liability stemming from good-faith acts to restrict access or outright remove offensive content.<sup>150</sup> In considering the interpretation of the lower courts, Thomas observes that there are a number of issues with the expansion of Section 230 liability.

First, he identifies the holding in *Zeran* as particularly troublesome, as the lack of distinction between publisher and distributor liability has resulted in the conferring of immunity

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<sup>147</sup> *Enigma Software Grp. v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 13 (2020) (Thomas, J., statement on denial of certiorari); *see also* *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1222–26 (2021) (Thomas, J., concurring in denial of certiorari).

<sup>148</sup> *Malwarebytes, Inc.*, 141 S. Ct. at 13.

<sup>149</sup> *Id.* at 15.

<sup>150</sup> *Id.*

“even when a company distributes content that it knows is illegal.”<sup>151</sup> Thomas acknowledges that there is some overlap in this distinction, but ultimately this interpretation should be questioned based on the clear congressional intent contained within other areas of the CDA and a lack of congressional intent to carve out such an exception.<sup>152</sup>

Second, Thomas takes issue with the interpretation in *Fair Housing Council of San Fernando Valley*,<sup>153</sup> where the Ninth Circuit held that, in effect, Section 230 protection affords immunity to a platform’s own content.<sup>154</sup> Thomas asserts that a natural reading of the statute only grants publisher protections where content is “provided by *another* information content provider.”<sup>155</sup> Coupled with the provisions that allow for a publisher to host, withdraw, or alter content for presentation, Thomas’ construction of the lower courts’ interpretation suggests that even in the event of adding commentary or editing content the platforms may function without liability.<sup>156</sup>

Finally, Thomas contends that the immunity offered to platforms when they allow objectional content to persist only applies where the platforms unknowingly decline to perform editorial functions, where the current interpretation allows for companies to racially discriminate, host terror groups, and complicate tracking criminal activity.<sup>157</sup> While the manner in which one interprets the provisions of Section 230 liability might differ, Thomas’ concern about a lack of Supreme Court guidance

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 15 (noting that Congress uses the same categorial language as in § 230(c)(1) regarding the removal of content but refrained from doing so). *But see* § 230(c)(2).

<sup>153</sup> 521 F. 3d 1157 (9th Cir. 2008).

<sup>154</sup> *See id.* at 1165.

<sup>155</sup> *Malwarebyets, Inc.*, 141 S. Ct. at 14; *see Fair Housing Council of San Fernando Valley*, at 1165 (emphasis added).

<sup>156</sup> *Malwarebyets, Inc.*, 141 S. Ct. at 16; *see* § 230(f)(3) (suggesting that providers are liable for content in which they contribute to development); *see also* *Jones v. Dirty World Ent. Recordings LLC*, 755 F. 3d 398, 403, 410, 416 (6th Cir. 2014) (interpreting “development” narrowly to “preserv[e] the broad immunity th[at] §230 provides for website operators’ exercise of traditional publisher functions”).

<sup>157</sup> *Malwarebyets, Inc.*, 141 S. Ct. at 17; *Sikhs for Justice, v. Facebook, Inc.*, 697 F. App’x 526 (9th Cir. 2017), *aff’g* 144 F. Supp. 3d 1088, 1094 (N.D. Cal. 2015) (concluding that “any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune” under §230(c)(1)); *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 16–21 (1st Cir. 2016); *Force v. Facebook, Inc.*, 934 F. 3d 53, 65 (2d Cir. 2019) (granting immunity and reasoning that recommending content “is an essential result of publishing” even in the instance where a platform recommended content circulated by terrorists).

in lower court jurisprudence seems valid in context, given the absence of standards for review in the courts and the effects that such liberal constructions of Section 230 have wrought. Tightening the interpretation of the courts might not be the best origination for correcting the consequences of Section 230, but it is certainly not lost on the Supreme Court that action on Section 230 liability might be warranted in the future. For the policy reasons stated above, Justice Thomas' assertion that allowing the legal process to simply run its course by giving plaintiffs a chance to bring about claims in the first place would somehow accord balance to the Section 230 issue is practically incorrect. This is hardly the first instance of Justice Thomas taking aim at protections for speech and emblematic of Thomas' jurisprudential vision to rectify what he perceives as judicial activism.<sup>158</sup> However, Thomas' statement does suggest there is some significant consideration and appreciation for the legislature to return to the table on Section 230.

### *C. A Statutory Facelift for Section 230*

In September 2020, the Department of Justice proposed amending CDA Section 230 in the form of two changes: expanding the definition of what constitutes an information content provider and excluding decisions to “restrict access to or availability of material” from publisher immunity.<sup>159</sup> The DOJ summarized the need for reform in its cover letter to Congress, stating “[t]he proposed legislation accordingly seeks to align the scope of Section 230 immunities with the realities of the modern [I]nternet while ensuring that the [I]nternet remains a place for

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<sup>158</sup> See Zachary Tooman, *Fear and Loathing in the Court: Justice Thomas' Audience of One in McKee v. Cosby*, FIRST AMEND. L. REV., <https://firstamendmentlawreview.org/2020/01/17/fear-and-loathing-in-the-court-justice-thomass-audience-of-one-in-mckee-v-cosby/> (observing a trend in Thomas' jurisprudential tendencies where he advocates for overturning established First Amendment precedent on the basis that the states were capable of determining balance between encouraging public discourse and providing private remedy to libel in civil action).

<sup>159</sup> Compare Ramseyer Draft Legislative Reforms to Section 230 of the Communications Decency Act, U.S. DOJ (Sept. 23, 2020), <https://www.justice.gov/file/1319331/download> with 47 U.S.C. § 230(c)(1) (illustrating the differences between the DOJ's proposed changes of Section 230 and the statutory text itself).

free and vibrant discussion.”<sup>160</sup> The expansion of the definition would potentially cover actions of editorialization by platforms during online content-hosting. This directly affects the scope of immunity under Section 230(c)(1) that provides platforms are not held liable due to their hosting, rather than publication, of third-party speech.<sup>161</sup> The clarification proposed by the DOJ aims to prevent the use of Section 230 as a shield for platforms to escape liability.<sup>162</sup>

The second proposal grants immunity to platforms where they acted in “good faith” in restricting access or availability of material based on an objective standard that the content is deserving of removal or restriction.<sup>163</sup> Additionally, removal or restriction would be required to have an accompanying rationale for the editorialization and an opportunity for the aggrieved to respond to the platform’s decision.<sup>164</sup> In doing so, the DOJ intends platforms to be held liable for harms arising from specific material where the platforms are active in their modification or permission of such content. Like the first proposal, there is also a question of the effects it would have on the judicial system, albeit from the opposite side of the bench. Given the amount of content hosted on platforms each day, monitoring and attending to that volume of material would be astronomical, even for the largest providers, let alone the enormous burden it might place on smaller entities. However, in the space where the government and platforms might compromise, there could be a workable solution that imparts less substantial cost on the parties involved given the immense power concentrated among several of the more influential platforms.

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<sup>160</sup> *Office of the Attorney General Letter to the Honorable Michael R. Pence*, U.S. DOJ, at 2 (Sept. 23, 2020), <https://www.justice.gov/file/1319346/download>.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* (considering courts’ interpretations, it will likely clash with the already established CDA interpretation); *see also* 47 U.S.C. § 230 (c)(2)(A) (shielding from liability “any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable”); *see, e.g.*, *Batzel v. Smith*, 333 F.3d 1018, 1029 (9th Cir. 2003); *see, e.g.*, *Fair Housing Council of San Fernando Valley v. Roommates.com* 521 F.3d 1157, 1163–64 (9th Cir. 2008).

<sup>163</sup> *Ramseyer Draft Legislative Reforms to Section 230 of the Communications Decency Act*, *supra* note 159, at 5 (defining “good faith” as having four elements to satisfy its requirements when restricting access or availability of material).

<sup>164</sup> *Id.*

#### *D. What Do the Platforms Say?*

In a congressional hearing to the Senate Commerce Committee on October 28, 2020, Twitter CEO Jack Dorsey posited three suggestions concerning the expansion of Section 230: (1) requiring companies to publish information about how they moderate decisions, (2) making them offer a “straightforward” process for users to appeal those decisions, and (3) letting users select which algorithms dictate what content they view on online platforms.<sup>165</sup> Unfortunately, Dorsey did not expand upon how exactly his suggestions would be implemented, who would determine the standards for sufficient implementation and moderation, or who would hold platforms accountable for following through on their promises.

In the wake of the violence at the Capitol on January 6, 2021, tech companies have conceded the need to regulate their platforms.<sup>166</sup> As of March 2021, Facebook CEO Mark Zuckerberg has promised that he will come to Congress with a proposal that would revise the current federal internet regulations related to unlawful content.<sup>167</sup> In testimony to Congress before the House Energy and Commerce Committee, Zuckerberg offered that platforms “should only be shielded from [] liability in instances where they are have systems in place for identifying unlawful content and removing it.”<sup>168</sup> However, he added, platforms cannot be held liable for something that they fail to detect.<sup>169</sup> In a separate House Energy and Commerce Committee meeting, Google CEO Sundar Pichai stated he was “concerned” with the recent enthusiasm to reform or repeal

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<sup>165</sup> Christiano Lima, *Twitter CEO's Section 230 'expansion' Ideas Add to Signs Tech May Be Open to Changes*, POLITICO, (Oct. 28, 2020) <https://www.politico.com/news/2020/10/28/twitter-ceo-section-230-433320>.

<sup>166</sup> Abram Brown & Andrew Solender, *Social Media Reform Appears Stalled in Congress—Even As Zuckerberg And Dorsey Prepare To Testify About It*, FORBES, (Mar. 25, 2021), <https://www.forbes.com/sites/abrambrown/2021/03/25/section-230-social-media-facebook-twitter-zuckerberg-dorsey-congress/?sh=4a693bef50fe>.

<sup>167</sup> *Id.*

<sup>168</sup> Gina Heeb, *Zuckberg Says He Backs Controversial Section 230—Law Attacked By Trump That Protects Internet Companies*, FORBES, (Mar. 24 2021), <https://www.forbes.com/sites/ginaheeb/2021/03/24/zuckerberg-says-he-backs-changes-to-controversial-section-230-law-attacked-by-trump-that-protects-internet-companies/?sh=3b4dafbf13a2>.

<sup>169</sup> *Id.*

Section 230.<sup>170</sup> He noted the harm of both free expression and the ability of the platforms to act on their own accord to protect users.<sup>171</sup> Jack Dorsey did not directly mention Section 230 or specific reforms related to its provisions in his remarks to the Committee.<sup>172</sup>

In all honesty, without movement or cooperation from the platforms themselves, the situation quickly spirals into a sort of Nash equilibrium,<sup>173</sup> where neither party sees itself gaining some sort of unilateral advantage in the exchange. Platforms see the weakening of Section 230 liability or a change in perspective upon review to be a challenge to their bottom line and, as discussed above, they have no issue profiting off the effects of misinformation.<sup>174</sup> Alternatively, if former President Trump's frequent use of Twitter is to become the norm for leaders in the U.S. as a means of communicating with constituents, the increase in the impression of governmental action associated with that type of speech implicates public forum concerns.<sup>175</sup> Note that this interaction, while problematic in instances where politicians blocking dissident voices, is truly remarkable. Enhancing discourse through new technologies in the political sphere has seen its fair share of historical counterparts, such as Roosevelt's fireside chats by radio or the impact of the television on the dissemination of presidential debates.<sup>176</sup>

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<sup>170</sup> Katie Canales, *Mark Zuckerberg and Sundar Pichai said they're open to Section 230 reform, but some of their proposed changes look a lot like the protections tech firms already have*, BUSINESS INSIDER (Mar. 24, 2021), <https://www.businessinsider.com/facebook-google-twitter-testimonies-misinformation-hearing-2021-3>.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> The Nash Equilibrium principle, illustrated by the well-known example of the Prisoners' Dilemma, sees a strategic impasse where every person in a group makes the best decision for herself, based on what she thinks the others will do. No-one can do better by changing strategy: every member of the group is doing as well as they possibly can and thus there is no incentive to change tactics or divert attention elsewhere. *What is the Nash Equilibrium and Why Does It Matter?*, POLITICO (Sept. 7, 2016) <https://www.economist.com/the-economist-explains/2016/09/06/what-is-the-nash-equilibrium-and-why-does-it-matter>.

<sup>174</sup> Abby Ohlheiser, *This is How Facebook's Fake-News Writers Make Money*, THE WASH. POST, (Nov. 18, 2016), <https://www.washingtonpost.com/news/the-intersect/wp/2016/11/18/this-is-how-the-internets-fake-news-writers-make-money/>.

<sup>175</sup> At the time of this writing, former President Trump had not yet been de-platformed after his defeat in the 2020 presidential election to Joseph Biden.

<sup>176</sup> Drew Desilver, *From Telegrams to Instagram, A Look at Presidents and Technology*, PEW RSCH. CTR., (Feb. 13, 2015) <https://www.pewresearch.org/fact-tank/2015/02/13/from-telegrams-to-instagram-a-look-at-presidents-and-technology/>.

However, in opening the hearing with remarks about the reformation of Section 230 doctrine, one can make a simple assumption of platforms' understanding of their position in American discourse and First Amendment jurisprudence. Namely, Americans recognize that platforms are very difficult to live without in this moment. Mr. Dorsey's statement is an admission that he recognizes the American people and the United States government do not think highly of the platforms' current position to affect so much of life without some measure of assurance that abuses of such power in controlling information, controlling access to an almost imperative forum, enabling bad actors, and fighting against efforts to restrain them. Looking to the future, if American society is to live with the effects of social media, it must ask whether the price it pays to platforms is worth the damage caused to the institution of the Marketplace of Ideas.

#### IV. CONCLUSION

The advent of the COVID-19 pandemic has illuminated the already-present issues with allowing an antiquated liability doctrine to protect entities elevated beyond its legislative intent. There is an inherent tension between the interest in an individual minimizing the harms that social media might proliferate while still enjoying the benefits becoming evermore commonplace in American communication. Users rightly value their ability to take part in the process of discourse, where the interchange of ideas serves its most important function as a means of education through conflicting inputs. And in theory, social media should propel that interaction to its zenith.

However, COVID-19 has proven that users are not in a place to self-regulate, nor are platforms rushing to create scenarios where they might be subjected to liability or social consequences for their role. Conversely, the public largely fails in its role to recognize the issues with misinformation being shared absent proper scrutiny and correctly worries about its ill effects. Namely, it requires effort on the individual's part. In this period of uncertainty, the value of accurate information is imperative to the strength of democracy. Unfortunately, Americans have been convincingly reminded that the

Marketplace of Ideas requires maintenance from time to time through hardship and loss.

COVID-19 should serve as the most salient reminder that it is even more imperative to ensure that the cogs of the Marketplace's machinery for producing truth remain operational and strong to service democracy in such unprecedented peril. In effect, COVID-19 has provided the Marketplace a well-needed opportunity for introspection. Americans, seeking to engage in the public forum, are becoming increasingly reliant on private entities to provide them with outlets to engage in a more expedient manner. Even before the pandemic, there was already a growing sentiment within the American zeitgeist signaling social media's rise to a station of near necessity in everyday life. Being forced to work, communicate, and socialize during COVID-19 has hopefully catalyzed a new perspective on social media's role in our public discourse and, with that role, the weighty responsibilities associated with curating such a valuable resource. As it stands, Section 230 is inhibiting the development of these responsibilities, such that it may prove suffocating in the future. At the very least, there must be some credence to Justice Thomas' concern that Section 230 has gone twenty-four years without the attention of the Supreme Court to its liability principle. While the solution is uncertain, COVID-19 has brilliantly illuminated the ever-increasing role social media plays as an emergent quasi-forum and the consequences such an impossible position poses for the law.