



Section 230 and Regulation of Speech: Is Content Moderation Censorship or Accountability?

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Who should be accountable for internet publication of information seen as harmful, i.e., hate speech, terrorism, harassment, or false information? Should platforms be free to decide who gets to “speak” and about what? Is there/should there be a difference between government content regulation and private regulation?

What Section 230 does:

Designed to address the “moderator’s dilemma” by defining content providers as “distributors” and leaving them free to do nothing about users’ content or to set own rules

Kosseff, Jeff, The 26 Words That Created the Internet, <https://www.jeffkosseff.com/home>

Electronic Frontier Foundation, Section 230, infographic, <https://www.eff.org/files/cda230.jpg>

Electronic Frontier Foundation, Section 230 is Good, Actually, <https://www.eff.org/deeplinks/2020/12/section-230-good-actually>

Goldman, Eric,¹ An Overview of the United States’ Section 230 Internet Immunity (December 1, 2018). The Oxford Handbook of Online Intermediary Liability (Giancarlo Frosio, ed.) (Forthcoming), Santa Clara Univ. Legal Studies Research Paper, Available at SSRN: <https://ssrn.com/abstract=3306737> or <http://dx.doi.org/10.2139/ssrn.3306737>

Goldman, Eric, Why Section 230 Is Better Than the First Amendment (November 1, 2019). Notre Dame Law Review, Vol. 95, No. 33, 2019, Available at SSRN: <https://ssrn.com/abstract=3351323> or <http://dx.doi.org/10.2139/ssrn.3351323>

Why Change?

Left and right are proposing changes designed to address their perception of what is wrong. Some are concerned about publication of misinformation and false information, some are

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Goldman’s Guide to his writing on 230: <https://blog.ericgoldman.org/archives/2020/07/want-to-learn-more-about-section-230-a-guide-to-my-work.htm>

concerned about privacy protections, some believe that their views (and only their views) are being censored (although there is a dearth of evidence of such).

Sen. Mark R. Warner, *Potential Policy Proposals for Regulation of Social Media and Technology Firms*, July 2018,

<https://assets.documentcloud.org/documents/4620765/PlatformPolicyPaper.pdf>

Sen. Ted Cruz, *Sen. Ted Cruz: Facebook Has Been Censoring or Suppressing Conservative Speech for Years*,

FOXNEWS.COM, Apr. 11, 2018, <https://www.foxnews.com/opinion/sen-ted-cruz-facebook-has-been-censoring-orsuppressing-conservative-speech-for-years>.

Goldman, Eric, *Dear President Biden: You Should Save, Not Revoke, Section 230* (January 12, 2021). *Bulletin of the Atomic Scientists*, Santa Clara Univ. Legal Studies Research Paper, Available at SSRN: <https://ssrn.com/abstract=3765247>

American Civil Liberties Union, *Dear Congress: Platform Accountability Should Not Threaten Online Expression* <https://www.aclu.org/news/free-speech/dear-congress-platform-accountability-should-not-threaten-online-expression/> “The desire on the part of policy makers to do more to create platform accountability is understandable. The ACLU shares that goal and has long advocated for strong consumer privacy protections at the federal and state level for that very reason. We have also pressed the platforms to provide transparency and meaningful review processes for their content moderation practices. However, we should be wary of proposals that risk harming online expression and be skeptical of focusing on Section 230 as a method of requiring platform accountability. Section 230 protects people’s ability to create, communicate, and build community online. The ACLU will remain vigilant in ensuring that the internet continues to be a place for self-expression and creation for all. We urge members of Congress to do the same, particularly as they examine proposals to amend Section 230.”

Bambauer, Derek, *How Section 230 Reform Endangers Free Speech*,

<https://www.brookings.edu/techstream/how-section-230-reform-endangers-internet-free-speech/>

Arnold and Porter: *Beyond the Headlines: Analysis of the Executive Order on Preventing Online Censorship and the Potential Impact on Section 230 Policy*

<https://www.arnoldporter.com/en/perspectives/publications/2020/06/analysis-of-the-eo-on-preventing-online-censorship>

What the courts have said:

Goldman, Eric, *The Ten Most Important Section 230 Rulings* (August 1, 2017). *Tulane Journal of Technology & Intellectual Property*, Vol. 20, 2017, Santa Clara Univ. Legal Studies Research Paper, Available at SSRN: <https://ssrn.com/abstract=3025943>

Electronic Frontier Foundation, Key Legal Cases, <https://www.eff.org/issues/cda230/legal>;
Electronic Frontier Foundation, Internet Law Treatise,
https://ilt.eff.org/Defamation_CDA_Cases.html

While encouraging self-regulation, Section 230 “does not require [information content providers] to restrict speech; rather, it allows [them] to establish standards of decency without risking liability for doing so.” *Green v. American Online, Inc.*, 318 F.3d 465, (3rd Cir. 2003); *see also Blumenthal*, 992 F. Supp. at 52 (“Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted.”); *Barrett*, 40 Cal. 4th at 34 (Section 230’s protection “applies even when self-regulation is unsuccessful, or completely unattempted”).

Herrick v Grindr, LLC, 18-396 (2d Cir. Mar. 27, 2019) U.S., No. 19-192, petition for review denied 10/7/19.

Why section 230 of the communications decency act must be fixed,
<https://www.lawfareblog.com/herrick-v-grindr-why-section-230-communications-decency-act-must-be-fixed>

EPIC Amicus: <https://epic.org/amicus/230/grindr/>