WEAPONIZING SPEECH: ANALYZING DONALD TRUMP'S EXECUTIVE ORDERS ON SECTION 230

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I. INTRODUCTION: A NEW PUBLIC SQUARE

The entwining of social media and politics is not new. Modern political discourse has largely migrated from physical locations, such as a street or park, into cyberspace.[1] While traditional legal doctrine treats cyberspace as a "mere transmission medium that facilitates the exchange of messages sent from one . . . geographical location to another," trying to tie online transactions to physical locations can be troublesome.[2] In the legal analysis of multijurisdictional and cross-border electronic communications, many quandaries can be resolved by conceiving of cyberspace as a distinct "space."[3] Cyberspace has minimal territorially based boundaries as the cost and speed of message transmission is independent of any physical location.[4]

Within cyberspace, social media platforms, such as Facebook and Twitter, have become increasingly important political tools that allow candidates to reach mass audiences at low cost and activists to organize protests overnight.[5] Amid the ever-increasing economic

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1. Joshua A. Tucker et al., *From Liberation to Turmoil: Social Media and Democracy*, 28 J. DEMOCRACY 46, 47 (2017).

2. David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1378 (1996).

3. *Id.*

4. *Id.* This Comment acknowledges the fact that online censorship occurs in numerous parts of the world. However, with few exceptions, direct censorship of online content is prohibited by the First Amendment in the United States. *See* Brett M. Pinkus, *The Limits of Free Speech in Social Media,* ACCESSIBLE L. (Apr. 26, 2021), https://accessiblelaw.untdallas.edu/limits-free-speech-social-media.

5. Tucker et al., s*upra* note 1, at 50.

and political power of tech giants, both Democrats and Republicans question Big Tech's role in regulating free speech.[6]

During the 2020 U.S. presidential election, Twitter suggested that some of President Trump's tweets may lack factual basis and attached "fact check" warning labels to his content on mail-in ballot fraud.[7] In response, Trump accused Twitter of "interfering" with the election and "stifling" free speech.[8] To retaliate and crack down on companies like Twitter, Trump issued Executive Order 13925 Preventing Online Censorship[9] ("EO13925") on May 28, 2020, directing federal regulators to take away legal protections that shield platforms from liability for hosting content online.[10] In signing the order at the Oval Office, Trump told reporters that online platforms have "had unchecked power to censure, restrict, edit, shape, hide, alter virtually any form of communication between private citizens or large public audiences," and he "cannot allow that to happen."[11]

In Trump's EO13925, he stated that social media companies have ceased to function as "passive bulletin boards, and ought to be viewed and treated as content creators."[12] For example, he claimed some U.S. companies have helped "spread false information about China's mass imprisonment of religious minorities," "origins of the COVID-19 pandemic," and "undermined pro-democracy protests in Hong Kong."[13] Regardless of whether these claims are true, the sheer abundance of speech on the internet today has splintered society into a digital divide created by political polarization and mass misinformation. The spread of such information "can go viral in seconds, especially with the help of bots."[14] For instance, in the

6. Ellen L. Weintraub & Thomas H. Moore, *Section 230*, 4 GEO. L. TECH. REV. 625, 628 (2020).

7. Tim Wu, *Trump's Response to Twitter is Unconstitutional Harassment*, N.Y. TIMES (June 2, 2020), https://www.nytimes.com/2020/06/02/opinion/trump-twitter-executive-order.html.

8. *Id.*

9. Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020).

10. Maggie Haberman & Kate Conger, *Trump Signs Executive Order on Social Media, Claiming to Protect 'Free Speech,'* N.Y. TIMES (June 2, 2020), https://www.nytimes.com/2020/05/28/us/politics/trump-order-social-media.html.

11. *Id.*

12. Exec. Order No. 13,925, *supra* note 9.

13. *Id.* at 34080.

14. Thomas Ryan, *Is Truth Hanging on by a Thread?*, 54 UIC J. MARSHALL L. REV. 315, 317 (2021).

2018 midterm elections, bots contributed to retweeting a message supporting Ted Cruz more than 30,000 times within hours.[15]

The internet intermediary business model focuses on profit generation by using algorithms to increase engagement and advertisement.[16] By manipulating sentimental content, internet intermediaries gain profit for the time users spend on their screens.[17] Hence, the interests of these intermediaries and their users may not always align. However, the mere fact that the internet will continue to grow in chaotic and problematic ways does not necessarily "grant the president an alarming authority . . . to use the power of the state against speech with which he disagrees."[18]

The legal protection addressed in Trump's EO13925 is Section 230 of the Communications Decency Act of 1996 ("Section 230")—the main "liberating force that jolted the massive and sustained growth of the internet marketplace and the free and robust exchange of ideas online."[19] This Comment maintains that Trump's EO13925 targeting Section 230 is a form of political persecution that ultimately weaponizes free speech to wield political power.

Part II of this Comment discusses the background of First Amendment principles in cyberspace, Section 230, as well as its underlying issues and subsequent developments. Part III analyzes Section 230 pertaining to Trump's EO13925. On one hand, providing internet intermediaries the ability to take down certain harmful content is crucial, as they are often the "first responders" with the means to control such speech. On the other hand, holding intermediaries liable for being the host of certain types of content would undermine free speech because they may over-remove content that can be beneficial and therefore fail to preserve the vibrant free speech that we currently enjoy. Part IV proposes solutions to reconcile the existing tension between these two opposing views.

15. Bryan Casey & Mark A. Lemley, *You Might Be a Robot*, 105 CORNELL L. REV. 287, 289 (2020).

16. THE SOCIAL DILEMMA (Exposure Labs 2020).

17. *Id.*

18. Wu, *supra* note 7.

19. Kyler Baier, *Replacing What Works with what Sounds Good: The Elusive Search for Workable Section 230 Reform*, 26 ILL. BUS. L.J. 40 (2021).

II. BACKGROUND

This section explores cyberspace as the new "public sphere."[20] Within this realm, internet intermediaries have unsettled existing legal doctrines and prompted the creation of Section 230. This section discusses the benefits and challenges of Section 230 pertaining to freedom of speech on the internet.

A. Cyberspace as the New Public Sphere

The groundbreaking development of social media platforms over the past two decades has drastically transformed the landscape of traditional media and journalism.[21] In the past, radio, television, newspapers, and books formed the "old hegemony of state-structured and territorially-bound public life."[22] Nowadays, private social media platforms have gradually taken over this role as they evolved from direct electronic communications into a virtual gathering space.[23] The first online communication services, such as CompuServe, America Online, and Prodigy, emerged in the 1980s and 1990s and introduced users to digital communication via emails, online chatrooms, and bulletin board discussions.[24] In the following years, numerous social media platforms appeared, with Facebook spearheading the movement.[25] In 2021, Statista found that eighty-two percent of the U.S. population is on social media.[26] This percentage has steadily grown since 2008 as younger generations are more likely to use such networks than older generations.[27]

One of the most popular terms within contemporary studies of media and politics is the "public sphere."[28] The language of this

20. *See generally* John Keane, *Structural Transformations of the Public Sphere*, 1 COMM. REV. 1 (1995).

21. *Id.* at 1.

22. *Id.*

23. *The Evolution of Social Media: How Did it Begin, and Where Could It Go Next?*, MARYVILLE UNIV., https://online.maryville.edu/blog/evolution-social-media (last visited Mar. 23, 2022).

24. *Id.*

25. *Id.*

26. *Percentage of U.S. Population Who Currently Use Any Social Media from 2008 to 2021*, STATISTA, https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile (last visited Mar. 23, 2022).

27. *Id.*

28. Keane, *supra* note 20, at 1.

term was initially used as "a weapon in support of 'liberty of the press' and other publicly-shared freedoms" to guard against monarchs and courts from abusing their power and to protect the realm of life in which citizens could freely express their opinions and exchange ideas.[29] Townhall meetings, book clubs, and literary circles all formed small-scale, bottom-up micro-spheres for citizens to express themselves and form their identities.[30] Yet, with the ever-growing power of profit-calculating modern capitalist economies, the idea of the "public sphere" has shifted towards preventing "organized capitalism [and] advertising agencies" from controlling and manipulating digital platforms.[31]

Internet intermediaries largely fall into two categories: "(i) conduits, which are technical providers of internet access or transmission services; and (ii) hosts, which are providers of content services, such as online platforms (e.g., websites), caching providers and storage services."[32] This Comment mainly focuses on the latter—content providers such as online platforms. What distinguishes online platforms from traditional forms of media includes algorithmic interactivity, scale, and supervising abilities.[33] First, rather than passive conduits for users' communications, platforms provide users the ability to like, share, comment, and save the information that they see online. Moreover, "every 'like,' every share, every click of every user is tracked and analyzed by online companies."[34] Armed with their users' data, platforms can "leverage their market position to trade this information in ancillary or secondary markets . . . [and] design their platforms in ways that shape the form and substance of their users' content."[35] Second, platforms such as Facebook, Twitter, and Instagram act as macro-public spheres with the ability to reach hundreds of millions of

29. *Id.* at 1–2.

30. *Id.* at 9.

31. *Id.*

32. *What is an Internet Intermediary?*, MEDIA DEF., https://www.mediadefence.org/ereader/publications/introductory-modules-on-digital-rights-and-freedom-of-expression-online/module-2-introduction-to-digital-rights/what-is-an-internet-intermediary (last visited Apr. 14, 2022).

33. FED. TRADE COMM'N, A LOOK AT WHAT ISPS KNOW ABOUT YOU: EXAMINING THE PRIVACY PRACTICES OF SIX MAJOR INTERNET SERVICE PROVIDERS 4–6 (Oct. 21, 2021), https://www.ftc.gov/system/files/documents/reports/look-what-isps-know-about-you-examining-privacy-practices-six-major-internet-service-providers/p195402_isp_6b_staff_report.pdf.

34. Weintraub & Moore, *supra* note 6, at 629.

35. *Id.*

individuals across the globe instantaneously.[36] These platforms become "natural monopolies" in providing public forum venues.[37] Third, unlike a newspaper, due to the sheer amount of speech available on the internet, it is practically impossible for platforms to moderate and control every single piece of content they host. While most platforms use filtering software to block the use of harmful content, they nevertheless do not exercise as much editorial control as a newspaper.[38] These distinctions are vital as we turn to the discussion of free speech on the internet.

B. Freedom of Speech

i. The State Action Requirement

The First Amendment of the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[39]

The First Amendment generally restrains government action and protects private actors.[40] However, a state supreme court can still interpret its state constitution "to provide greater protection for individual liberties than the Supreme Court does under the Bill of Rights."[41] In *PruneYard Shopping Center v. Robins*, the U.S. Supreme Court affirmed the decision of the California Supreme Court and held that a privately-owned shopping center that had a policy prohibiting people from engaging in any "publicly expressive activity" could not exclude a group of peaceful high

36. Keane, *supra* note 20, at 8–9.

37. *Id.* at 7.

38. Olivier Sylvain, *Discriminatory Designs on User Data*, KNIGHT FIRST AMEND. INST. AT COLUMBIA UNIV. (Apr. 1, 2018), https://knightcolumbia.org/content/discriminatory-designs-user-data.

39. U.S. CONST. amend. I.

40. Michael I. Katz, *Free Speech and Social Media: The First Amendment Limits State Actors–Not Private Companies*, ORANGE CNTY. BAR ASS'N (July 2021), https://www.ocbar.org /All-News/News-View/ArticleId/6116/July-2021-Cover-Story-The-First-Amendment-Limits-State-Actors-Not-Private-Companies.

41. Gower, PruneYard Shopping Center v. Robins *(1980)*, FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/583/pruneyard-shopping-center-v-robins (last visited Mar. 23, 2022).

school students from protesting within its premises.[42] This case added jurisprudence addressing free speech on private property.[43]

PruneYard's reasoning should not extend to online platforms. In addition to providing goods and services, shopping malls generally provide people a venue for social gatherings, performances, and entertainment. As such, PruneYard's policy that prohibited people from engaging in "publicly expressive activity" fundamentally contradicted its own purpose.[44] While online platforms also provide users a venue for entertainment and public discourse, unlike shopping malls, platforms are "directly in the business of curating speech environments" as they provide users with terms of service for using their platforms.[45] These terms protect users from "harassment, cyberbullying, hate speech, or other conduct which, if allowed free reign, would make the platform less inviting and unsafe."[46] In turn, by contractually agreeing to such terms, users acknowledge that their freedom of speech is subject to such rules.[47] People do not typically sign such contractual agreements when entering a shopping mall. Extending the reasoning in *PruneYard* to platforms would not only "invite courts, i.e., the state, to decide what speech rules are appropriate" online, but it also contradicts "the very purpose of the state action doctrine," which is "to keep the state out of the business of regulating the speech of private actors."[48]

Private entities can still be regulated as state actors for speech purposes if they "perform a traditional, exclusive public function, such as running a company town in [*Marsh v. Alabama*]."[49] In *Marsh*, an individual "was convicted of criminal trespass for distributing literature without a license on a sidewalk in a town . . . owned by a private company."[50] The Supreme Court found that the private company acted akin to a municipal government because it "owned the streets, sidewalks, and business block, paid the sheriff,

42. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 77 (1980).
43. Gower, s*upra* note 41.
44. *PruneYard*, 447 U.S. at 77.
45. Katz, *supra* note 40.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*; *see also* Marsh v. Alabama, 326 U.S. 501 (1946).
50. JAMES GRIMMELMANN, INTERNET LAW: CASES & PROBLEMS 611 (10th ed. 2020).

privately owned and managed the sewage system, and owned the building where the United States post office was located."[51]

The definition of private actor can be murky when it involves an individual that assumes a government role.[52] For example, in *Campbell v. Reisch*, Missouri state representative Cheri Toalson Reisch blocked Mike Campbell, one of Reisch's constituents, on her Twitter account.[53] Campbell sued Reisch under 42 U.S.C. § 1983, claiming that she had violated his First Amendment right to speak on her account.[54] The Eighth Circuit held that "it is not enough that the defendant is a public official, because acts that public officials take in 'the ambit of their personal pursuits' do not trigger § 1983 liability."[55] Since Reisch used her account in private ways, such as a campaign newsletter, she did not intend her account to be like a public park and, therefore, could manage her page as she liked.[56]

Conversely, in *Knight First Amendment Institute at Columbia v. Trump*, the Second Circuit held that President Trump's Twitter account was unabashedly used for official purposes in part because he described his tweets as "official statements" of the president.[57] In essence, *Knight Institute* held that Trump could not block an individual for tweeting abuse at him because Trump was a state actor and the First Amendment applied.[58] However, Twitter could block the individual for tweeting abuse at Trump because it is a private actor and the First Amendment does not apply.[59]

ii. Platforms as Non-State Actors

The rationale behind ruling platforms as private actors in First Amendment jurisprudence is grounded in the landmark 1997 Supreme Court decision *Reno v. ACLU*, which challenged the Communications Decency Act ("CDA") as violating the First Amendment.[60] The CDA originally imposed criminal sanctions for

51. *Id.*
52. *See* Campbell v. Reisch, 986 F.3d 822, 825–26 (8th Cir. 2021).
53. *Id.* at 823.
54. *Id.*
55. *Id.* at 824.
56. *Id.* at 825.
57. Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 231–32 (2d Cir. 2019).
58. *See* Samantha Briggs, *The Freedom of Tweets: The Intersection of Government Use of Social Media and Public Forum Doctrine*, 52 COLUM. J.L. & SOC. PROBS. 1, 6–7 (2018).
59. GRIMMELMANN, *supra* note 50, at 132.
60. Reno v. Am. C.L. Union, 521 U.S. 844, 849 (1997).

the knowing transmission of obscene or indecent materials via the internet.[61] In *Reno*, the Supreme Court held that such criminal sanctions were unconstitutional.[62] The Supreme Court reasoned that the CDA's uncertainty and vagueness was problematic because content-based regulation on the internet would create a chilling effect on free speech.[63] While there are aforementioned differences between online platforms and traditional forms of media, the nature and quality of the internet has led the Supreme Court to regulate online speech akin to newspapers, books, and magazines and decline to regulate it as it did with radio and television in the First Amendment context.[64]

Traditional forms of media, such as newspapers, enjoy special constitutional protection because of their central role in democracy.[65] Similarly, bloggers and independent activists online are "invoking laws originally written for the benefit of reporters and institutional media."[66] Media shield laws, which have been enacted in forty-nine states, protect reporters from being required to turn over confidential information.[67] Media shield laws have even been extended to websites like Apple Insider, which is "devoted to rumors and leaks about forthcoming Apple products."[68] A California court in *O'Grady v. Superior Court* stated that "the open and deliberate publication on a news-oriented Web site of news gathered for that purpose by the site's operators" was "conceptually indistinguishable from publishing a newspaper."[69]

Unlike *PruneYard* and *Marsh*, platforms should not be considered state actors. Offering the public a forum to speak is not and should not be a function performed exclusively by the state. As mentioned previously, numerous private venues and local groups have existed for centuries without rigid government control.[70] Plus,

61. *Id.* at 859–860. The CDA originally imposed criminal sanctions for transmitting obscene or indecent messages to anyone under 18 years old (47 U.S.C. § 223(a)(1)(B)) and for sending or displaying of patently offensive material to anyone under 18 years old (47 U.S.C. § 223(d)).

62. *Reno*, 521 U.S. at 871–72, 882.

63. *Id.* at 871–72.

64. *Free Speech in the Modern Age*, 31 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 978, 989–90 (2021).

65. GRIMMELMANN, *supra* note 50, at 134.

66. *Id.*

67. *Id.*

68. *Id.* at 134–35.

69. O'Grady v. Superior Court, 44 Cal. Rptr. 3d 72, 99 (Ct. App. 2006).

70. *See* GRIMMELMANN, *supra* note 50, at 134–35.

even if some platforms assume certain governmental functions, from a regulatory standpoint, it would be difficult to draw the line between which ones should be considered state actors and which ones should not. A bright-line rule is necessary to make online speech easier to govern at its current stage.

Treating platforms as state actors merely because they provide a forum for public speech would significantly dilute the state action requirement.[71] Although the state action requirement is broad in the Fourth Amendment search and seizure context, First Amendment principles state that "restrictions on freedom of speech imposed through state action must not be vague, must be for important governmental reasons and must be narrowly tailored to the risk of harm."[72] Freedom of speech would substantially erode should the stringent state action requirement be eliminated. Thus, even if a platform's conduct has state action characteristics, there must be "a significantly close nexus between the State and the challenged action of [the private entity] so that the action of the latter may be fairly treated as the State itself."[73] As such, in *Manhattan Community Access Corp. v. Halleck*, the Supreme Court wrote that "[W]hen a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor. The private entity may thus exercise editorial discretion over the speech and speakers in the forum."[74]

C. Section 230

Section 230 of the CDA provides platforms robust immunity to allow and remove harmful content.[75] Section 230 was originally a small and overlooked fragment of a bill Congress passed to regulate the pervasiveness of obscene and indecent online speech.[76] Yet, it

71. Katz, *supra* note 40, at 25.

72. *See* GRIMMELMANN, *supra* note 50, at 593.

73. Cyber Promotions, Inc. v. Am. Online, Inc., 948 F. Supp. 436, 441 (E.D. Penn. 1996) (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)). The court held that AOL was not a state actor. *Id.*

74. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019).

75. *See generally* VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW (2021) (discussing the broad immunity provided by Section 230 of the CDA).

76. Baier, *supra* note 19, at 40.

has now become one of the most important pieces of legislation ever passed with respect to free speech on the internet.[77]

Section 230 states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[78] Under Section 230, internet intermediaries are not liable for (1) communications or content posted by people who use their services; (2) their services' design or structure, or whether and how to allow people to have accounts; or (3) discretionary decisions about removing or restricting access to certain objectionable content.[79] While several exceptions to the law exist, at its core, it is a simple policy indicating that users, instead of internet intermediaries, should be liable for the illegal content they post online.[80] Protected intermediaries include not only "Internet Service Providers (ISPs), but also a range of 'interactive computer service providers," including basically any online service that publishes third-party content."[81]

Section 230 immunity only applies to the extent that the internet intermediary or user is not also the information content provider of the content at issue.[82] The CDA defines an information content provider as any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the internet or any other interactive computer service.[83] By contrast, a search engine, such as Google, displaying information on third-party websites would be entitled to Section 230 immunity as it is merely an interactive service provider.[84] Sometimes, internet intermediaries can fill a dual role as an interactive service provider and an information content provider.[85] In such cases, courts engage in a highly fact-intensive determination.[86]

77. *Id.*

78. 47 U.S.C. § 230.

79. BRANNON & HOLMES, *supra* note 75, at 8–24.

80. *Id.* at 24–29 (discussing the exceptions provided by Section 230(e)).

81. *Section 230 of the Communications Decency Act*, ELEC. FRONTIER FOUND., https://www.eff.org/issues/cda230 (last visited Mar. 23, 2022).

82. BRANNON & HOLMES, *supra* note 75, at 4.

83. 47 U.S.C. § 230(f)(3).

84. Baier, *supra* note 19, at 42–43.

85. Jones v. Dirty World Entm't Recordings LLC, 755 F.3d 398, 408 (6th Cir. 2014).

86. *E.g.*, FTC v. LeadClick Media, LLC, 838 F.3d 158, 175–76 (2d Cir. 2016); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124–25 (9th Cir. 2003).

i. Publisher or Distributor

To determine whether an internet intermediary is an interactive service provider or information content provider, courts often look at whether the intermediary exercised editorial control over its content. For example, Section 230 was enacted in 1996 against the backdrop of the state defamation case *Stratton Oakmont, Inc. v. Prodigy Services Co.*[87] The New York court in *Stratton Oakmont* held that the internet intermediary moderated its forums by exercising "editorial control" and was therefore subject to liability for defamatory content posted on its website.[88] The *Stratton Oakmont* case stands in sharp contrast to *Cubby, Inc. v. CompuServe, Inc.*, which had an identical issue but a different outcome.[89] Since the internet intermediary in question did not moderate its content, the New York court in *Cubby* held that it was not a publisher but rather a distributor, which is subject to a more lenient liability standard.[90]

Following these two cases, in *Zeran v. America Online, Inc.*, the Fourth Circuit became the first appellate court to interpret Section 230.[91] The *Zeran* court ruled in favor of the internet intermediary and reasoned that imposing liability on ISPs with knowledge of defamatory statements would stifle free speech on the internet and create a disincentive for self-regulation of harmful content.[92] Due to the vast amount of questionable posts on the internet, it is extremely difficult for ISPs to manage their content efficiently and error-free. Hence, notice-based liability would, as the *Zeran* court noted, discourage self-regulation because any efforts as such would likely either lead to more frequent notice of potentially unlawful material or create a stronger basis for liability based on the knowledge acquired during this self-regulation.[93]

Courts today continue to construe the law broadly to confer sweeping immunity on internet intermediaries with very few

87. Baier, *supra* note 19, at 41; Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

88. *Stratton Oakmont, Inc.*, 1995 WL 323710, at *5.

89. Baier, *supra* note 19, at 41; Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991).

90. *Cubby Inc.*, 776 F. Supp. at 141.

91. Ashley Johnson & Daniel Castro, *The Exceptions to Section 230: How Have the Courts Interpreted Section 230?*, INFO. TECH. & INNOVATION FOUND. (Feb. 22, 2021), https://itif.org/publications/2021/02/22/exceptions-section-230-how-have-courts-interpreted-section-230.

92. *Id.* at 333.

93. *Id.*

exceptions.[94] An individual impacted from the existence or removal of online content is unlikely to recover damages from internet intermediaries.[95]

ii. Section 230(c)(1)

Section 230(c)(1) provides immunity for internet intermediaries that *allow* harmful content.[96] It bars any cause of action that treats intermediaries as a publisher or speaker for third-party content.[97] Intermediaries can exercise a publisher's traditional editorial functions, such as content publication, removal, postponement, or alteration.[98] Besides editorial functions, courts have also allowed intermediaries to decide whether to provide users with an account[99] and to determine when to demonetize user's postings on a video-sharing platform.[100]

iii. Section 230(c)(2)

Section 230(c)(2), on the other hand, provides immunity to intermediaries that *remove* harmful content.[101] The content must fall under one of the categories below.[102] This statute, entitled "Protection for 'Good Samaritan' blocking and screening of offensive material," states that:

> (2) No provider or user of an interactive computer service shall be held liable on account of—
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise

94. *E.g.*, Force v. Facebook, Inc., 934 F.3d 53 (2d Cir. 2019); Domen v. Vimeo, Inc., 433 F. Supp. 3d. 592, 603 (S.D.N.Y. 2020).

95. *See, e.g.*, *Domen*, 433 F. Supp. 3d at 607–08; Barnes v. Yahoo!, Inc., 579 F.3d 1096, 1105–06 (9th Cir. 2009).

96. 47 U.S.C. § 230(c)(1).

97. *Id.*

98. Zeran v. Am. Online, 129 F.3d 327, 330 (4th Cir., 1997).

99. Fields v. Twitter, 217 F. Supp. 3d 1116, 1123 (N.D. Cal. 2016).

100. Lewis v. Google LLC, 461 F. Supp. 3d 938, 954 (N.D. Cal. 2020).

101. 47 U.S.C. § 230(c)(2).

102. Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123 (9th Cir. 2003).

> objectionable, whether or not such material is constitutionally protected . . . .[103]

However, unlike Section 230(c)(1), Section 230(c)(2) has its limitations. In *Song Fi, Inc. v. Google Inc.*, the plaintiffs alleged, among other things, that YouTube's removal and relocation of their music video "Luv ya" violated the website's Terms of Service.[104] The video featured a little boy and girl who dressed up to go to a restaurant on Valentine's Day.[105] YouTube's Community Guidelines prohibit, "among other things, uploading videos with pornographic, obscene, or otherwise objectionable content."[106] YouTube removed the video and relocated it because it "determined that the view count for 'Luv ya' was inflated through automatic means, and thus violated its Terms of Service."[107] The court held that YouTube's Section 230(c)(2)(A) claim failed because it led to an "unbounded" reading of the term "otherwise objectionable," which would enable intermediaries to "block content for anticompetitive purposes or merely at its malicious whim."[108] Since the video itself was not objectionable—rather, the view count was—it did not fall under the meaning of Section 230(c)(2)(A).[109]

iv. No Good Samaritan Action Required

The CDA's primary intent under Section 230(c)(2) was to regulate the dissemination of harmful content on the internet.[110] However, most courts have held that intermediaries are not required to remove harmful content to enjoy Section 230 immunity.[111] In cases where intermediary defendants take advantage of the broad immunity, courts have nevertheless accepted that intermediaries are eligible for statutory immunity even when they do not adopt any of the self-policing policies that

103. 47 U.S.C. § 230(c)(2)(A).
104. Song Fi, Inc. v. Google, Inc., 108 F. Supp. 3d 876, 879 (N.D. Cal. 2015).
105. *Id.* at 880.
106. *Id.*
107. *Id.*
108. *Id.* at 884.
109. *Id.*
110. Exec. Order No. 13,925, *supra* note 9.
111. *See* Universal Commc'n Sys., 478 F.3d 413, 420 (2007); Green v. Am. Online, 318 F.3d 465, 472 (3d Cir. 2003); Zeran v. Am. Online, Inc., 129 F.3d 327, 332–33 (4th Cir. 1997); Barrett v. Rosenthal, 146 P.3d 510, 525 (Cal. 2006).

Congress had intended[112] and when they have actual notice of the allegedly objectionable content.[113]

D. Criticisms of Section 230

Criticisms of Section 230 are not new.[114] Due to the openness of the internet, defamatory statements, obscene photos, private conversations, and embarrassing information can be easily shared online. Content can quickly go viral due to cognitive biases and evolving algorithmic practices.[115] Silos of information and polarization of ideas act to reinforce preexisting beliefs. Microtargeted political advertising as well as inauthentic users and bots spread misinformation.[116]

The online marketplace of free ideas arguably no longer guarantees equality as certain voices are amplified while others are stifled.[117] Some private companies, such as Facebook, have de-platformed users and taken steps to police user content.[118] Filter bubbles are created to "prevent the counterspeech that First Amendment jurisprudence celebrates."[119] Additionally, "[t]he U.S. Intelligence Community confirmed that the 2016 presidential election faced disinformation threats online from Russian state actors in order to 'undermine the U.S.-led liberal democratic order.'"[120] The campaign spread a conspiracy theory known as "Pizzagate" against Democratic candidate Hilary Clinton by indicating that she was involved in a child sex ring and murdered children.[121] The misinformation led to an armed man appearing at a neighborhood pizza restaurant to investigate what he believed to be one of Clinton's underground vaults containing a child sex

112. *See* Blumenthal v. Drudge, 992 F. Supp. 44, 52 (D.D.C. 1998).

113. Jones v. Dirty World Entm't Recordings LLC, 755 F.3d 398, 407 (6th Cir. 2014); *Universal Commc'n Sys.*, 478 F.3d at 420; *Zeran*, 129 F.3d at 332.

114. *See* Patricia Spiccia, *The Best Things in Life Are Not Free: Why Immunity Under Section 230 of the Communications Decency Act Should Be Earned and Not Freely Given*, 48 VALPARAISO U. L. REV. 369, 393–96 (2013).

115. *See generally* Lili Levi, *Real "Fake News" and Fake "Fake News,"* 16 FIRST AMEND. L. REV. 232, 241 (2017).

116. Weintraub & Moore, *supra* note 6, at 627.

117. *See generally* Joan Donovan & Danah Boyd, *Stop the Presses? Moving From Strategic Silence to Strategic Amplification in a Networked Media Ecosystem*, 65 AM. BEHAV. SCI. 333, 339 (2019).

118. *Free Speech in the Modern Age*, *supra* note 64, at 991.

119. Weintraub & Moore, *supra* note 6, at 627.

120. Ryan, *supra* note 14, at 330.

121. *Id.* at 330–31.

ring.[122] Other widespread conspiracy theories include those surrounding QAnon, 9/11, Flat Earth theory, and the COVID-19 pandemic.[123]

Removing the questionable content often proves much more challenging. Since platforms are not treated as the publisher or speaker of any information provided by its users, they are, to a certain extent, immune to the illegal content published on their sites.[124] As mentioned previously, the law mainly punishes publishers, not distributors, of harmful content.[125] As a result, it provides "no incentive for [platform]s to remove defamatory and harassing content" to comply with notice and takedown orders.[126] Taken together, unlimited speech does not necessarily translate to more common good. Critics of Section 230 argue that traditional First Amendment principles are insufficient to address internet speech as it has become "a virtually untouchable space for ideas."[127]

III. ANALYSIS OF TRUMP'S EXECUTIVE ORDER

Executive orders have increasingly become a political tool for presidents to pass laws without going through the typical lengthy process.[128] This section discusses how Trump's EO13925 came into being and its implications on the freedom of speech.

A. Tensions Between Trump and Twitter

Tensions between Twitter and Trump had been escalating quickly around the time when Trump issued EO13925.[129] On May

122. *Id.*

123. Fortesa Latifi, *The 9 Most Popular Conspiracy Theories in Recent History*, TEEN VOGUE (June 23, 2021), https://www.teenvogue.com/story/most-popular-conspiracy-theories.

124. 47 U.S.C. § 230(c)(1).

125. Andrew Bolson, *The Internet Has Grown Up, Why Hasn't the Law? Reexamining Section 230 of the Communications Decency Act*, INT'L ASS'N OF PRIV. PROS. (Aug. 27, 2013), https://iapp.org/news/a/the-internet-has-grown-up-why-hasnt-the-law-reexamining-section-230-of-the.

126. *Id.*

127. *Free Speech in the Modern Age*, *supra* note 64, at 990.

128. *What is an Executive Order?*, A.B.A. (Jan. 25, 2021), https://www.americanbar.org/groups/public_education/resources/teacher_portal/educational_resources/executive_orders; *Executive Orders*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/statistics/data/executive-orders (Feb. 21, 2022).

129. Exec. Order No. 13,925, *supra* note 9; Kate Conger, *Twitter Had Been Drawing a Line for Months When Trump Crossed It*, N.Y. TIMES (May 30, 2020), https://www.nytimes.com/2020/05/30/technology/twitter-trump-dorsey.html.

29, 2020, Trump weighed in on the clashes between the police and protesters in Minneapolis by saying, "when the looting starts, the shooting starts."[130] In turn, a group of Twitter officials gathered and debated whether the "messaging system Slack and Google Docs . . . pushed people towards violence."[131] The Twitter officials soon decided that "Twitter would hide . . . Trump's tweet behind a warning label that said the message violated its policy against glorifying violence."[132] The company also added fact-checking labels and warnings to three other messages from Trump on Twitter, including one tweet regarding mail-in ballot fraud.[133]

B. Trump's Executive Order as a "Prior Restraint" on Speech

Different types of online speech are subject to varying standards.[134] Trump's EO13925 is essentially a prior restraint on speech.[135] The most stringent and exacting judicial test is used for prior restraints, which occurs "when a speaker must obtain permission from a government official before being allowed to speak at all."[136] Prior restraints of speech are presumptively unconstitutional.[137] Under prior restraint, the government controls what and how speech or expression can be publicly released.[138] Throughout American history, prior restraint has been viewed as a form of oppression, as the Founding Fathers specifically used language in the First Amendment to guard against such violation of fundamental democratic principles.[139]

The few exceptions to prohibitions against prior restraint include obscenity, injunctions on court documents, and national security.[140] The government has a compelling interest in keeping defense documents classified if they might jeopardize ongoing

130. Conger, *supra* note 129.
131. *Id.*
132. *Id.*
133. *Id.*
134. GRIMMELMANN, *supra* note 50, at 122.
135. Wu, *supra* note 7.
136. GRIMMELMANN, *supra* note 50, at 122.
137. *Id.*
138. Elianna Spitzer, *What Is Prior Restraint? Definition and Examples*, THOUGHTCO (June 30, 2019), https://www.thoughtco.com/prior-restraint-definition-4688890.
139. *Id.*
140. *Id.*

military action, particularly during wartime.[141] However, courts have determined that the government must prove an inevitable, direct, and immediate danger to justify reviewing and restricting publication in the name of national security.[142] Here, a private entity preventing Trump from inciting violence would serve the opposite of endangering national security, let alone qualify to fall under either of these exceptions. In other words, banning Trump from using his Twitter account was unlikely to result in any "inevitable, direct, and immediate danger."[143]

C. Trump's Executive Order as Political Persecution

To understand the political aspect of Trump's EO13925, we should first ask whether viewpoint discrimination by platforms poses a threat to free speech at all. In fact, no empirical study has shown that platforms control speech in a matter that is "systematically biased toward any particular viewpoint."[144] But even if such biases exist, the rules of engagement established by "each social media platform [would] constitute an exercise of free speech in their own right."[145]

One concern is that large social media platforms, such as Facebook, Instagram, and Twitter, to a certain degree monopolize and control channels of communication and even receive funding from political parties.[146] As recipients of government funding,[147] Big Tech companies may be more willing to promote certain political views than others. Following the U.S. Capitol riots on January 6, 2021, U.S. Senator Josh Hawley claimed that large social media platforms quickly silenced conservative voices.[148] In a matter of days, "Apple and Google refused to make Parler available on their app stores, and Amazon soon denied Parler access to its cloud computing service."[149]

141. *Id.*
142. *Id.*
143. *Id.*
144. Katz, *supra* note 40, at 24.
145. *Id.* at 25.
146. JOSH HAWLEY, THE TYRANNY OF BIG TECH 11 (2021).
147. *Id.* at 9.
148. *Id.*
149. *Id.*

Even if such claims were accurate, the platforms were merely doing so to comply with the law.[150] The FBI's website openly sought and continues to seek "the public's assistance in identifying individuals who made unlawful entry into the U.S. Capital and committed various other alleged criminal violations . . . on January 6, 2021."[151] Conservative platform Parler was under significant scrutiny because it had warned the FBI of "'specific threats of violence being planned at the Capitol' in advance of the January 6 riot."[152] For example, a Parler user claimed "he would be wearing body armor at a planned event on Jan. 6 and asserted it was 'not a rally and it's no longer a protest.'"[153]

Platforms typically have a Terms of Service to which all users must read and agree before posting content on their sites.[154] As mentioned previously in *Song Fi, Inc.*, Section 230(c)(2)(A) allows platforms to remove harmful content if it falls under one of the categories listed in the statute.[155] Here, the specific threats of violence at the Capitol on Parler can certainly qualify as "excessively violent" material that is subject to removal by the platforms.[156] Therefore, Apple, Google, and Amazon's ban on the Parler app met Section 230(2)(c)(A)'s requirement.[157]

On the contrary, Trump's EO13925 was directly aimed at stifling political opposition.[158] The main section that Trump had objected to in his EO13925 was subparagraph (c)(2) of Section 230 on the removal of harmful content.[159] In other words, Trump disagreed with Twitter's decision to include fact-check warning labels to his tweets and claimed to be the victim of censorship. Trump stated on Twitter that his controversial statements were "very simple" and "nobody should have any problem with this other

150. 47 U.S.C. § 2302(c)(2)(A).

151. *U.S. Capitol Violence*, FBI, https://www.fbi.gov/wanted/capitol-violence (last visited Mar. 5, 2022).

152. Matt Zapotosky, *Conservative Platform Parler Says It Warned FBI of 'Specific Threats of Violence' Ahead of Capitol Riot*, WASH. POST, Mar. 26, 2021, at A17, https://www.washingtonpost.com/national-security/parler-fbi-capitol-riot/2021/03/25/addba25a-8dae-11eb-a6bd-0eb91c03305a_story.html.

153. *Id.*

154. Sandra Braman & Stephanie Roberts, *Advantage ISP: Terms of Service as Media Law*, 5 NEW MEDIA & SOC'Y 422, 422 (2003).

155. 47 U.S.C. § 230 (c)(2)(A).

156. *Id.*

157. *See* 47 U.S.C. § 230(c)(2)(A).

158. Haberman & Conger, *supra* note 10.

159. Exec. Order No. 13,925, *supra* note 9.

than the haters, and those looking to cause trouble on social media."[160] This statement, coupled with EO13925, indicate Trump's intent to use the power of the state against speech with which he disagrees and speech that disagrees with him—namely, the fact-check warning labels.

Procedurally, executive orders cannot simply rewrite congressional statutes such as Section 230 without clearing significant hurdles.[161] Although a president may issue an executive order without consultation or permission from Congress, executive orders are subject to judicial review to ensure that they are within the limits of the Constitution.[162] Executive orders are akin to employment orders—agencies receive them from the president, but they are not legally obligated to follow.[163] The agency can challenge the president by indicating that the executive order is unconstitutional.[164] However, if the agency does comply with the order despite the fact that it was unconstitutional, a legally binding rule or interpretive rule emerges, and an injured plaintiff may have standing to sue through the court system.[165] Courts can strike down the executive order if they decide that the order is arbitrary and capricious.[166]

Although there are significant safeguards to prevent the executive branch from abusing executive orders, the extent of power agencies have in refusing to perform executive orders remains a mystery.[167] This is largely because there are very few publicized cases of such clashes.[168] If an agency repeatedly refuses to comply with a president's orders, they may have to pay a political price. For instance, Trump fired the Secretary of Defense, Mark

160. Conger, *supra* note 129.

161. Rachel Augustine Potter, *Why Trump Can't Undo the Regulatory State So Easily*, BROOKINGS INST. (Feb. 6, 2017), https://www.brookings.edu/research/why-trump-cant-undo-the-regulatory-state-so-easily.

162. *Executive Orders and the Supreme Court*, JURIST (Oct. 18, 2014), https://www.jurist.org/archives/feature/executive-orders-and-the-supreme-court.

163. *See* Potter, *supra* note 161.

164. *See* Scott Slesinger & Robert Weissman, *Ordering Agencies to Violate the Law*, REG. REV. (June 27, 2017), https://www.theregreview.org/2017/06/27/slesinger-weissman-ordering-agencies-violate-law.

165. Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1773 (2019).

166. *Id.* at 1811.

167. *See* Slesinger & Weissman, *supra* note 164.

168. *Id.*

Esper,[169] and the Secretary of State, Rex Tillerson, over political disagreements.[170]

Moreover, the president may actively appoint new agency heads who agree with his viewpoint and are likely to comply with his orders.[171] In Trump's EO13925, he requested the Federal Communications Commission ("FCC") and the Federal Trade Commission ("FTC") to take actions that would significantly erode Section 230.[172] The chairmen of both agencies were nominated by Trump.[173] In January 2017, Trump designated Ajit Pai as the FCC chairman and renominated him for another five-year-term.[174] In October of 2017, Trump nominated Joseph Simons to be the chairman of the FTC.[175] Taken together, agency decisions may succumb to political pressure.

In fact, Trump was not the only president who issued a large number of executive orders.[176] Since the Clinton administration, there has been a centralization of agency policy making.[177] Presidents can now affirmatively order agencies to act promptly. This phenomenon is alarming because the standard sixty-day notice and comment period before passing a final decision on a proposed rule is lost.[178] The public may therefore only hear about a new rule through news channels or press conferences as a done deal.[179] As such, overriding Section 230 via presidential executive orders is equivalent to the kind of government censorship that the Founding Fathers hoped to avoid under the First Amendment.

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169. Barbara Starr et al., *Trump Fires Secretary of Defense Mark Esper*, CNN (Nov. 9, 2020), https://www.cnn.com/2020/11/09/politics/trump-fires-esper/index.html.

170. *Trump Fires Rex Tillerson as Secretary of State*, BBC (Mar. 13, 2018), https://www.bbc.com/news/world-us-canada-43388723.

171. *See id.*

172. Exec. Order No. 13,925, *supra* note 9.

173. *See* Seth Fiegerman, *Trump's FCC Head Gets Another Outcry*, CNN (Oct. 2, 2017, 6:35 PM), https://money.cnn.com/2017/10/02/technology/business/ajit-pai-reappointed/index.html; *see also* Press Release, Fed. Trade Comm'n, Joseph Simons Sworn in as Chairman of the FTC, (May 1, 2018), https://www.ftc.gov/news-events/press-releases/2018/05/ joseph-simons-sworn-chairman-ftc.

174. Fiegerman, *supra* note 173.

175. *Id.*

176. Gerhard Peters & John T. Woolley, *Executive Orders*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/node/323876 (last updated Mar. 20, 2022).

177. Robert J. Duffy, *Regulatory Oversight in the Clinton Administration*, 27 PRESIDENTIAL STUD. Q. 71, 71–72 (1997).

178. MAEVE P. CAREY, CONG. RSCH. SERV., R42612, MIDNIGHT RULEMAKING: BACKGROUND AND OPTIONS FOR CONGRESS 2 (Oct. 4, 2016).

179. Exec. Order No. 14,043, 86 Fed. Reg. 50,989 (Sept. 9, 2021).

IV. PROPOSED SOLUTIONS

The cyberspace and Section 230 have significantly matured together over the past decade. Section 230, also known as "The Twenty-Six Words That Created the Internet,"[180] was initially designed to protect start-up, entrepreneurial, and fledgling internet companies from incurring liability when they monitored their user content, as these firms were essential for a competitive online marketplace.[181] Nowadays, such small-scale platforms are squeezed out by larger monopolies such as Facebook and Twitter.[182] With vast economic and political power, platforms such as Facebook and Twitter are much more capable than the little guys at regulating and removing harmful content.

Still, upholding Section 230 is crucial to ensure that platforms will not be penalized for Good Samaritan content moderation. Imposing strict tort or criminal liability on platforms would lead to either the over-policing of content and stifling of free speech or a hands-off approach in which platforms do nothing to avoid being perceived as a publisher or content creator. This section proposes several solutions to finding a middle ground between upholding Section 230 and curing its existing flaws.

A. Transparent Terms of Service

First, platforms should provide a transparent Terms of Service agreement to users. Unlike radio listeners, internet users must engage in active and informed participation. As websites become increasingly interactive through like, comment, subscribe, and repost features, very few sites on the internet act as a passive bulletin board. Platforms should require users to agree to their Terms of Service that permit them to remove user content. Users must also bear the responsibility of understanding and complying by the rules. Platforms should provide, in addition to the typical lengthy and complex Terms of Service, a simpler, more user-

180. *See, e.g.*, JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 2 (2019).

181. Weintraub & Moore, *supra* note 6, at 626.

182. Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 BERKELEY BUS. L.J. 39, 40 (2019).

friendly, and transparent disclosure of its filtering software, content moderation regulations, and user guidelines.

B. Filtering Software

Second, platforms should implement filtering software to regulate content even if the technology is imperfect. Due to the sheer amount of content that is being generated every second, algorithms that require platforms to review all content in detail before publication may ultimately fail due to their impracticality.[183] Moreover, relying on algorithms to review such content can also create an oversimplification of what is "good" and "bad" content. Any rating system that classifies or describes content depends on the subjectivity of the rater. While platforms aim to be entirely neutral, such technological neutrality may not exist. Filtering software that blocks harmful content may ignore the context in which the content was created and inevitably exclude beneficial content. Despite such challenges, existing filtering software is better than no review at all. Large platforms should continue to invest in filtering technology and upgrade their content review functionality to protect users. As the technology matures, the cost of such features may eventually decrease and become affordable to smaller platforms.

C. Notice-Based Liability Regime

Third, a notice-based liability regime should be implemented. As suggested by the *Zeran* court, to avoid notice-based liability, a platform should perform a careful but quick investigation of the circumstances surrounding the harmful content, form a legal judgement of the content's unlawful nature, and make an on-the-spot editorial decision regarding the risk of liability by allowing the publication of that content.[184] These three steps may be completed relatively easily by existing filtering software that quickly detects harmful content and posts warnings and disclaimers on such content. Platforms may also provide a "report" feature for content that gets left out by the software so that their users can submit the questionable content for a more in-depth

183. *Section 230 of the Communications Decency Act*, ELEC. FRONTIER FOUND., https://www.eff.org/issues/cda230 (last visited Mar. 23, 2022).

184. Zeran v. Am. Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997).

review. Although software and algorithms may not always have the legal expertise and human intelligence to process a piece of content in its entirely, their editorial decisions are nonetheless better than a hands-off do-nothing approach.

This notice-based liability regime should not erode the state action requirement. Under the state action requirement, injured plaintiffs must demonstrate that the state was responsible for the violation in order to have standing.[185] Platforms do not become state actors by following this regime. Instead, they should be given opportunity to temporarily disable the content from public view, evaluate the questionable content, and provide a reasonable explanation should they refuse to comply with takedown orders from an agency. As such, Section 230 may be reformed to include: Section 230(c)(1) "shall not apply unless the provider or user takes reasonable steps to prevent unlawful uses of its services."[186] Or that: Section 230(c)(1) "shall not apply if the provider or user does not expeditiously disable access to the information after being notified of its unlawful character."[187]

D. Reform California Law

Finally, due to the difficulty of reforming Section 230, an easier method may be to reform California law. Not only are Big Tech companies concentrated in California, but their users are also prolific there.[188] While federal law can preempt state law, it can also leave "state law largely untouched," or only preempt state laws that are "inconsistent with the federal scheme."[189] The Supreme Court has long held that Congress has the authority to regulate interstate commerce under the Commerce Clause,[190] while the Dormant Commerce Clause prohibits states from doing so.[191]

However, a state may regulate a platform even if the platform engages in interstate commerce. "Where [a] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental,

185. Lujan v. Defenders of Wildlife, 504 U.S. 560, 559–562 (1992).

186. GRIMMELMANN, *supra* note 50, at 627.

187. *Id.*

188. *Rankings: Overall Rankings in 2020*, MILKEN INST., http://statetechandscience.org/statetech.taf?page=state-ranking (last visited Mar. 20, 2022).

189. GRIMMELMANN, *supra* note 50, at 114.

190. U.S. CONST. art. 1, § 8, cl. 3.

191. *Id.*

it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[192] Concerns about national uniformity is not part of the balancing analysis.[193] Therefore, California may regulate platforms engaging in interstate commerce without violating the Dormant Commerce Clause.

To create incentives for platforms, the reformed law cannot be overly strict. Currently, platforms have powerful data harvesting mechanisms.[194] They inject collected user data into an algorithm that generates targeted advertisements and exploits the "basic human compulsion to react to material that outrages."[195] To combat unethical data harvesting practices, the California Consumer Privacy Act ("CCPA") may be reformed so that platforms are taxed on the amount of data that they harvest. This gives platforms the financial incentive to only collect the data that they need, not any data that they want. The tax rate cannot be too high; otherwise, platforms may eventually move out of California to avoid the heavy tax burden. Platforms may prefer to reside in California despite higher taxes due to its politically friendly climate as it is where most of their contributors and users reside.

V. CONCLUSION

In the new cyber public square, free speech is not truly free. Politicians use Section 230 to weaponize speech while Big Tech monopolies have stifled certain forms of speech. Yet, courts continue to provide platforms with broad immunity under Section 230 primarily because they are more than passive bulletin boards but less than content creators.[196] Even with highly interactive features, platform algorithmic content generation does not equate to a newspaper editor who selectively approves articles to be featured on the daily news. At most, it is a clever robot that feeds humans what we want to see.

192. Pike v. Bruce Church, 397 U.S. 137, 142 (1970).

193. Quik Payday, Inc. v. Stork, 549 F.3d 1302, 1303 (2008) (finding that the state did not violate any of these prohibitions, and therefore the regulation was constitutional).

194. Keith N. Hylton, *Digital Platforms and Antitrust*, 98 NEB. L. REV. 272, 276 (2019).

195. Weintraub & Moore, *supra* note 6, at 627.

196. Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003) (holding that the ISP could not be considered an information content provider "because no profile has any content until a user actively creates it").

Trump's EO13925 categorized platforms as content creators in order to severely erode the legal protections that Section 230 currently affords.[197] Furthermore, Trump's rationale behind issuing EO13925 arose from his dissatisfaction of being fact-checked on Twitter. In other words, Trump used the executive order to benefit his personal interests—a tremendous abuse of power by the executive branch.

While problems with Section 230 continue to exist, the law should not be repealed in its entirety. Instead, platforms should develop a new business model that focuses on corporate social responsibility rather than shareholder profitability. As social media content becomes more extreme, especially in areas of sex, violence, crime, and invasion of privacy, freedom of speech online should be harnessed. Harnessing Donald Trump's violent speech and preventing EO13925 from becoming law is essential to democracy because they are a blatant misuse of political power that put real lives in danger. It is antidemocratic to entice violence and manipulate politics to stifle opposing views. As first responders to such criminal activity and harmful content, platforms should take the front-line role in regulating, financing, and operating the constantly changing digital infrastructure. In turn, the cyberspace can become more democratized, people-oriented, and more socially responsive to the community's needs.

197. Exec. Order No. 13,925, *supra* note 9.