

8-1-2022

Reading Section 230

Shlomo Klapper

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [First Amendment Commons](#), and the [Internet Law Commons](#)

Recommended Citation

Shlomo Klapper, *Reading Section 230*, 70 Buff. L. Rev. 1237 (2022).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol70/iss4/1>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

Buffalo Law Review

VOLUME 70

AUGUST 2022

NUMBER 4

Reading Section 230

SHLOMO KLAPPER[†]

In Gonzalez v. Google, the Supreme Court, for the first time, agreed to hear a case concerning the interpretation of Section 230 of the Communications Decency Act, the most important law governing the internet. As Justice Thomas and others have noted, judges have overlooked Section 230's text in interpreting the statute, relying instead on purpose. Yet scholars and critics, too, have eschewed the statutory text, relying on intent or consequences to favor alternate interpretations, but depriving the Court and litigants of the richness the statutory text offers.

This Article offers the first comprehensive analysis of Section 230's text and structure. Section 230 means what it says: it excludes from its protection entities that act as publishers rather than intermediaries; treats, by default, all intermediaries as distributors; and offers extra protection to certain intermediaries—"Computer Good Samaritans"—who actively clean up certain categories of objectionable content on

[†] Yale Law School, J.D., 2020. For helpful comments and conversations, the author is grateful to Jack Balkin, Patrick Barry, Sam Bray, Greg Dickinson, Josh Divine, Michael Francus, Raji Gururaj, Ben Johnson, Jeff Kosseff, Ela Leshem, Asaf Lubin, Myles Lynch, Steven Menashi, Avi Menter, Christina Mulligan, Lee Otis, Soren Schmidt, Ben Silver, Chaya-Bracha Walkenfeld, Evan Zoldan, and the participants at the 2022 Federalist Society Junior Scholars Colloquium.

the internet.

This Article has significant implications. It finds that judges have consistently misinterpreted Section 230; therefore, judges should alter the main doctrinal inquiries for whether Section 230 immunity attaches, the entities to which it attaches, and the nature of that immunity. This Article also informs current political debates because Section 230 already incorporates the substance of many proposed reforms: Section 230 does not need to be reformed or re-written, only re-read. And this Article contributes to the current scholarly reconceptualization of textualism and suggests a new avenue of research: the intersection between inequality and interpretation.

CONTENTS

CONTENTS	1239
INTRODUCTION	1240
I. SECTION 230: GENESIS, INTERPRETATION, CRITIQUE....	1245
A. <i>Genesis: “Computer Good Samaritans”</i>	1246
B. <i>Interpretation: Purposivism’s Dominance</i>	1252
C. <i>Critique: Intentionalism and Consequentialism</i>	1256
II. READING SECTION 230.....	1263
A. <i>Zeran’s Error: Revisiting Subsections (c)(1) and (c)(2)</i>	1264
B. <i>Where Section 230 Does Not Apply</i>	1274
C. <i>Section 230(c)(1)</i>	1280
1. “Publisher or speaker”	1282
2. Distributor Liability.....	1285
D. <i>Section 230(c)(2)(A)</i>	1290
1. Section 230(c)(2) Immunity Only Attaches in the Narrow Circumstances Outlined by Statute.....	1291
2. Section 230(c)(2) Only Applies to “Good Faith” Efforts to Moderate	1304
3. Section 230 Applies When There is a Nexus Between the Cause of Action and the Content Moderation	1310
E. <i>Section 230(c)(2)(B)</i>	1313
III. IMPLICATIONS: DOCTRINE, POLITICS, SCHOLARSHIP...	1317
A. <i>Doctrine: Reorienting Section 230 Immunity</i> ...	1318
1. Unresolved Doctrinal Questions.....	1318
2. Changing the Doctrine.....	1321
B. <i>Politics: Section 230 Is Already Reformed</i>	1326
C. <i>Scholarship: Interpretation & Inequality</i>	1329
CONCLUSION	1330

INTRODUCTION

In October 2022, the Supreme Court granted the petition for certiorari in *Gonzalez v. Google*, agreeing, for the first time, to hear a case regarding the interpretation of Section 230 of the Communications Decency Act.¹ Section 230 is the most important law governing the internet.² YouTube, Facebook, Reddit, Wikipedia, Twitter, eBay, Snapchat, Google, Yahoo, Amazon, TikTok—the websites and apps that govern so much of our lives—arguably owe their existence to Section 230.³ This is because these websites rely on content from third parties. Section 230, in turn, immunizes these intermediaries from lawsuits based on third-party content.⁴ For instance, if someone authors a defamatory diatribe on Facebook, Facebook is not liable for the post, security intermediaries (like CloudFare) or cloud computing platforms (like Amazon Web Services) are not liable for providing backend services, and broadband providers (such as Fios or Comcast) are not liable for permitting the traffic to flow through their networks.⁵

1. *Gonzalez v. Google LLC*, No. 21-1333, 2022 WL 4651229 (U.S. Oct. 3, 2022). The lower court decision is *Gonzalez v. Google LLC*, 2 F.4th 871 (9th Cir. 2021).

2. See generally JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* 3 (2019); *CDA 230: The Most Important Law Protecting Internet Speech*, ELECTRONIC FRONTIER FOUND., <https://www EFF.ORG/issues/cda230> (last visited June 9, 2022). See also Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2313 (2014) (“Section 230 immunity . . . ha[s] been among the most important protections of free expression in the United States in the digital age.”).

3. KOSSEFF, *supra* note 2, at 4.

4. See Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 433 (2009).

5. See Jack M. Balkin, *Free Speech Is a Triangle*, 118 COLUM. L. REV. 2011, 2037–40 (2018) (reviewing the three different parts of the internet “stack,” namely “basic internet services”—such as hosting services, the Domain Name System, broadband companies, and caching services—“payment services”—such as MasterCard, Visa, and PayPal—and “content curators”); see, e.g., *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003) (holding that GTE was not liable for an illegal

Recently, Section 230 has become the focus of bipartisan ire and widespread controversy.⁶ The left blames Section 230 for immunizing the spread of harmful misinformation.⁷ The right blames Section 230 for providing platforms carte blanche to censor conservative content or de-platform whomever they wish, even a sitting President.⁸ In opposition, Section 230's defenders argue that the statute has done more good than harm, and that any proposed alternatives would be unconstitutional, calamitous, or both.⁹ This debate, unsurprisingly, is premised on the judiciary's extraordinarily broad interpretation of Section 230.¹⁰

Yet this debate—and the judicial opinions on which it is based—have been conducted without the input of the statutory text.¹¹ In applying the law, judges have relied on purpose to apply the law.¹² Meanwhile, scholarly commentators have relied mostly on intention and consequences to argue for alternate interpretations.¹³ The

video); *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (holding that AOL was not liable for a defamatory statement posted by an AOL user).

6. See Gregory M. Dickinson, *The Internet Immunity Escape Hatch*, 47 *BYU L. REV.* 1435, 1436–37 (2022).

7. See *infra* notes 93–100 and accompanying text.

8. See *infra* notes 373–88 and accompanying text.

9. See, e.g., Derek E. Bambauer, *How Section 230 Reform Endangers Internet Free Speech*, *BROOKINGS* (July 1, 2020), <https://www.brookings.edu/techstream/how-section-230-reform-endangers-internet-free-speech> (“Some of these proposals [to reform Section 230] are not intended to become law. If they did, the courts would likely strike some down as violations of the protections for freedom of speech guaranteed by the U.S. Constitution’s First Amendment.”); Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 *FORDHAM L. REV.* 401, 410 (2017) (“Section 230’s most fervent supporters argue that it is ‘responsible for the “extraordinary Internet boom” and its evisceration would sound the death knell to innovation.”).

10. See *infra* notes 368–84 and accompanying text.

11. See *infra* notes 104–12 and accompanying text.

12. See *infra* Part I.B.

13. *Id.*

text, meanwhile, has been nearly absent.¹⁴ Indeed, scholars and Justice Thomas have explicitly called for a thorough analysis of Section 230's text because, while missing, it would be highly probative.¹⁵ These calls increase in importance as the Supreme Court is poised to interpret the statute for the first time in over a quarter century.

This Article offers the first comprehensive interpretation of Section 230's text and structure. The statute means what it says, and has a clear four-part structure. First, the statute excludes from protection entities that are properly understood to be publishers rather than intermediaries.¹⁶ Second, it treats, by default, all intermediaries as distributors.¹⁷ Third, it offers extra protection to certain intermediaries—"Computer Good Samaritans"—who clean up certain categories of objectionable content on the internet in good faith.¹⁸ Fourth, it offers the most protection to "Computer Good Samaritans" who permit individuals to moderate their own content; these intermediaries need not even act in good faith.¹⁹ This four-part structure fulfills the statute's tripartite goals of protecting free speech, encouraging moderation of content unsuitable for children, and enabling user choice.²⁰

14. See *infra* notes 104–12 and accompanying text.

15. See *infra* notes 104–12 and accompanying text.

16. See *infra* Part II.B; 47 U.S.C. §§ 230(f)(2)-(3).

17. See *infra* Part II.C; 47 U.S.C. § 230(c)(1).

18. See *infra* Part II.D; 47 U.S.C. § 230(c)(2)(A).

19. See *infra* Part II.E; 47 U.S.C. § 230(c)(2)(B).

20. Though these conclusions are unrecognized by the prevailing doctrine, many scholars have noted some of these conclusions. This Article differs in two respects. First, it differs in its comprehensiveness. Statutory interpretation is a holistic endeavor. By analyzing the statute in its entirety, this Article uncovers new insights unrecognized by others. Second, this Article differs in its focus on the text. It is one thing to note that a statute has exceeded its drafters' intentions or to catalogue its deleterious consequences; it is another to prove, with specificity, that judges have diverged from the statutory text and to illustrate a better way to read the text. In addition, the textual analysis provides a method to evaluate the merit of the various intentionalist critiques. Further, given the

This Article has dramatic ramifications for legal doctrine and political reforms. As to doctrine, this Article finds that judges have consistently misinterpreted the statute, and thus argues for altering the standard for when Section 230 immunity attaches, the entities to which it applies, and the nature of that immunity.

First, the current threshold test is precisely incorrect: it *requires* an entity to act or be treated as a publisher for Section 230 immunity to apply whereas, in fact, acting as a publisher removes an entity from Section 230 protection altogether.²¹ The correct inquiry focuses on content moderation: if the entity is an intermediary rather than a publisher, the question is whether the types of content it moderates aligns with the categories enumerated by Congress. The cases interpreting Section 230 must therefore be revisited.

Second, for internet entities to avail themselves of the Section 230 protections they currently enjoy, they must modify their community standards to align with the categories of content enumerated by Congress; otherwise, they might be potentially liable as distributors. Internet entities will also have an incentive to encourage decentralized or user-oriented methods of content moderation, which are currently underway but have remained underdeveloped, to avoid the “good faith”

rise of the new textualism, judges are more likely to be swayed by text-based arguments than by intentionalist or policy arguments. See Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L. J. 1 (2018) (“[A]ll federal courts have shifted toward more frequent use of textualist tools in recent decades”); JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION: CASES AND MATERIALS* 60 (Robert C. Clark et al. eds., 2d ed. 2013) (“Over the last quarter-century, textualism has had an extraordinary influence on how federal courts approach questions of statutory interpretation. When the Court finds the text to be clear in context, it now routinely enforces the statute as written.”).

21. This doctrinal test has led to absurd results: courts have held that entities making ex ante editorial decisions—the essence of publishing—are protected by Section 230. See *infra* Part II.C.

requirement.

Third, the nature of the immunity will change: by default, intermediaries will be immunized as publishers, but not as distributors. This reawakens currently dormant doctrinal questions, such as the scope and nature of distributor liability for internet entities.²²

For current political debates, many proposed reforms will be unnecessary under this Article because Section 230, properly understood, already incorporates the substance of many proposed reforms.²³ For instance, some have suggested withholding Section 230 immunity from bad actors, or “Bad Samaritans.” But Section 230, properly construed, already does that: the core of Section 230 immunity inheres in Section 230(c)(2), which contains a good faith requirement. Others have proposed that Section 230 immunity should not be extended to platforms restricting political opinions. Section 230 already does not privilege the moderation of such speech: Section 230(c)(2) immunity applies only to certain narrowly circumscribed categories of material that are inappropriate for children. If platforms moderate content beyond these categories, the extra protection of Section 230(c)(2) does not apply. Thus, in these respects, Section 230 doesn’t need to be re-formed or re-written. It need only be re-read.

For legal scholarship, this Article suggests that the effect of inequality on interpretation is ripe for further research.²⁴ Recently, scholars have focused on debates within textualism, rather than debates between textualism and

22. As discussed *infra* Part III.A, there are a number of ways to practically change the doctrine: the Supreme Court has granted certiorari on a case related to Section 230 (though the fact that the Court jointly granted certiorari to *Twitter, Inc. v. Taamneh* indicates the case might turn instead on the Anti-Terrorism Act), litigants can sue in state court, litigants can sue under Section 230(c)(2) (which courts have ignored), Congress can pass a declaratory statute, or the FCC can re-interpret the law using its rulemaking powers.

23. See *infra* Part III.B.

24. See *infra* Part III.C.

other interpretative methodologies, by questioning two aspects that are seen as core to textualism: first, the focus on context in interpretation; second, the attempt to discern the statute's original public meaning at the time of enactment. The driving force behind this reconceptualization is to align textualism to better respond to societal dynamics. Though not a sustained theoretical exercise, this Article contributes to this scholarly conversation by offering Section 230 as a case study where a stubborn originalism can be more socially responsive than a deliberate dynamism. Drawing on Marc Galanter's seminal theory, it speculates that this effect is due to the distributional inequalities of wealth and power inequality, because dynamism privileges more powerful repeat defendants over one-shot plaintiffs. The interaction of inequality and interpretation is ripe for further research.

This Article proceeds as follows. Part I introduces Section 230 and outlines the dominance of purpose in the courts and intention and consequences in the academy. Part II forms the core of the text-based analysis of Section 230. It illustrates the error of the prevailing judicial consensus, and offers a sustained text-based analysis of the four operative subsections. Part III cashes out this analysis by exploring implications for doctrine, politics, and scholarship.

I. SECTION 230: GENESIS, INTERPRETATION, CRITIQUE

This Section reviews the Section 230 status quo. Part I.A introduces the legal history behind Section 230's enactment: Section 230 was intended to solve the judicially-created "moderator's dilemma," which provided a perverse incentive to refrain from moderating objectionable content on the internet. Part I.B reviews how the federal courts have interpreted Section 230—broadly and purposively—by closely analyzing the seminal 1997 case *Zeran v. AOL*, the interpretative framework of which has been adopted by all twelve geographic federal circuit courts. Part I.C outlines some major criticisms, scholarly and popular, of the *Zeran*-dominated doctrine, yet criticizes these critiques insofar as

they employ intentionalist or consequentialist methods to the exclusion of textualist methods.

A. *Genesis: “Computer Good Samaritans”*

In 1996, Congress passed a raft of amendments to the Communications Act of 1934 with the intention of protecting children on the internet. These laws were known as the Communications Decency Act (CDA).²⁵ Among these provisions was Section 230, which was initially known as the Online Family Empowerment Act.²⁶ Section 230 was proposed by then-Representatives Chris Cox and Ron Wyden as an amendment to the House version of the CDA.²⁷

“Section 230 is a rule of intermediary liability. It gives Internet intermediaries like network providers and online service providers a privilege against certain lawsuits based on content provided by third parties.”²⁸ If someone authors a defamatory diatribe on Facebook, Facebook is not liable for the post, security intermediaries (like CloudFare) or cloud computing platforms (like Amazon Web Services) are not liable for providing backend services, and broadband providers (such as Fios or Comcast) are not liable for permitting the traffic to flow through their networks.²⁹ Familiar online platforms such as Google, Facebook, Twitter, and Craigslist are all protected by Section 230.³⁰ By

25. Pub. L. No. 104-104, 110 Stat. 133 (1996).

26. See 141 CONG. REC. 22,022 (1995).

27. H.R. 1555, 104th Cong. (1995). For an excellent history of the passage of Section 230, see KOSSEFF, *supra* note 2, at 57–76.

28. Balkin, *Future*, *supra* note 4, at 434. See, e.g., Ricci v. Teamsters Union Loc. 456, 781 F.3d 25, 28 (2d Cir. 2015) (“In short, a plaintiff defamed on the internet can sue the original speaker, but typically ‘cannot sue the messenger.’”) (quoting Chicago Laws.’ Comm. for Civil Rights Under L., Inc. v. Craigslist, Inc., 519 F.3d 666, 672 (7th Cir. 2008)).

29. See Balkin, *Free Speech*, *supra* note 5, at 2037–40.

30. See, e.g., Marshall’s Locksmith Serv. Inc. v. Google, LLC, 925 F.3d 1263, 1268 (D.C. Cir. 2019); Klayman v. Zuckerberg, 753 F.3d 1354, 1357 (D.C. Cir. 2014) (Facebook); Fields v. Twitter, Inc. 217 F. Supp. 3d 1116, 1121–29 (N.D. Cal.

protecting platforms or websites from intermediary liability, Section 230 protected the very third-party content on which the internet thrives.³¹ For this reason, Section 230 is known as “The Twenty-Six Words That Created The Internet,”³² or “The Most Important Law Protecting Internet Speech.”³³

Section 230 was Congress’ response to a conundrum known as the “moderator’s dilemma.”³⁴ This dilemma perversely imposed additional liability for good-faith efforts to moderate objectionable content on the internet.³⁵ The roots of the moderator’s dilemma are found in the common law and its differing treatment of publishers and

2016) (Twitter); *Chicago Laws.*, 519 F.3d at 671 (Craigslist).

31. See KOSSEFF, *supra* note 2, at 4 (“Consider the ten most popular websites in the United States as of 2018. Six—YouTube, Facebook, Reddit, Wikipedia, Twitter, and eBay—primarily rely on videos, social media posts, and other content provided by users. These companies simply could not exist without Section 230. Two of the other top ten websites—Google and Yahoo—operate massive search engines that rely on content from third parties. Even Amazon, a retailer, has become the trusted consumer brand it is today because it allows users to post unvarnished reviews of products. Only one of the top ten sites—Netflix—mostly provides its own content. Section 230 has allowed third-party content-based services to flourish in the United States.”).

32. KOSSEFF, *supra* note 2.

33. ELECTRONIC FRONTIER FOUND., *supra* note 2 (article title).

34. *The PACT Act and Section 230: The Impact of the Law that Helped Create the Internet and an Examination of Proposed Reforms for Today’s Online World: Hearing Before the Subcomm. on Comm’ns, Tech., Innovation, and the Internet of the U.S. Senate Committee on Com., Sci., and Transp.*, 116th Cong. 3 (2020) (statement of Chris Cox, former U.S. Rep.) (“Before the enactment of Section 230, internet platforms faced a terrible dilemma. If they sought to enforce even minimal rules of the road in order to maintain civility and keep their sites free from obscenity and obnoxious behavior, they became unlimitedly liable for all of the user-created content on their site. On the other hand, if the website followed an ‘anything goes’ business model, with no content moderation whatsoever, then it could completely avoid that liability. From the perspective of any internet platform that attempted to maintain a family-friendly site, it was a classic case of ‘no good deed goes unpunished.’”), <https://www.commerce.senate.gov/services/files/BD6A508B-E95C-4659-8E6D-106CDE546D71>; Michael A. Cheah, *Section 230 and the Twitter Presidency*, 115 NW. U. L. REV. ONLINE 192, 197 (2020) (the “moderator’s dilemma” [exists when] “service providers must choose between aggressively removing content or curtailing moderation activities so that they do not put themselves on notice of potential illegality”).

35. *Id.*

distributors.³⁶ The common law distinguishes between publishers (such as newspapers and book publishers), who exercise a high level of editorial control, and distributors (such as newsstands and bookstores), who disseminate information without editorial control.³⁷

With great editorial power comes great legal responsibility. Under the common law, publishers—who are seen as active participants in the creation of knowledge—are liable alongside authors for the defamatory or tortious information they publish.³⁸ In contrast, distributors—who are seen as passive conduits of information with limited control over the information content—are liable only if they have reason to know of the content's unlawful character.³⁹

36. *The PACT Act and Section 230: The Impact of the Law that Helped Create the Internet and an Examination of Proposed Reforms for Today's Online World: Hearing Before the Subcomm. on Commc'ns, Tech., Innovation, and the Internet of the U.S. Senate Committee on Com., Sci., and Transp.*, 116th Cong. 2 (2020) (statement of Jeff Kosseff, Assistant Professor, Cyber Science Department, U.S. Naval Academy) (“Lower courts generally adopted a rule, rooted in the common law and the First Amendment, that distributors cannot be liable for content created by others unless the distributors knew or had reason to know of the illegal content. This rule applies not only to criminal obscenity cases, but also to civil claims such as defamation.”), <https://www.commerce.senate.gov/services/files/444EFF87-84E3-46DB-B8DB-24DC9A424869>.

37. *See Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 at *3 (N.Y. Sup. Ct. May 24, 1995).

38. *See* RESTATEMENT (SECOND) OF TORTS § 578 (AM. L. INST. 1977) (Except as provided in § 578, “one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.”).

39. *See* RESTATEMENT (SECOND) OF TORTS § 581 (AM. L. INST. 1977) (Distributors are liable “if, but only if” the distributor “knows or has reason to know of its defamatory character.”). Further, increased liability on distributors would give rise to fears of collateral censorship. *See, e.g., Smith v. California*, 361 U.S. 147, 152–53 (1959) (“There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller . . . [f]or if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature . . . [a]nd the bookseller's burden would become the public's burden, for by restricting” the bookseller “the public's access to reading matter would be restricted.”).

So, for instance, under the common law, if the *New York Times* were to publish a defamatory op-ed, both the author and the *Times* would be liable for defamation, while a newsstand that merely sold the paper would not be liable for defamation.

The “moderator’s dilemma” arises (according to some courts) when these common-law principles are imported to the internet. While an interactive computer service has no duty to reduce the flow of offensive material online, once the service voluntarily undertakes such content moderation, it may be liable for imperfect content moderation by assuming the role of a publisher.⁴⁰ This means that if *some* content is moderated, the interactive computer service is liable for the content that was published on its platform that it did *not* moderate. Thus, the common law alone (again, according to some courts) creates a disturbing dilemma that forces the interactive computer service to choose between two different approaches: either (1) moderate content, be treated as a publisher, and accept liability for problematic content that the moderator might miss, or (2) decline to moderate and permit any third-party content, no matter how problematic, offensive, or unlawful the content might be.⁴¹

This “moderator’s dilemma” was instantiated by a New York trial court in the case *Stratton Oakmont* in 1995.⁴² The plaintiffs were Stratton Oakmont, an investment banking firm (and, incidentally, later the subject of *The Wolf of Wall*

40. See *Stratton Oakmont*, 1995 WL 323710, at *4 (holding that because it exercised editorial control, “PRODIGY is a publisher rather than a distributor”); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (“[S]uch regulation cast[s] the service provider in the role of the publisher.”). The moderator’s dilemma was not inevitable. See *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 135 (S.D.N.Y. 1991) (moderation insufficient to turn interactive computer service from distributor into publisher); see also *Kosseff*, *supra* note 36, at 2 (“This common law rule was first applied to an online service in 1991, in a defamation action against CompuServe, one of the earliest national online dial-up services.”).

41. See *Cheah*, *supra* note 344.

42. 1995 WL 323710.

Street), and its president Daniel Porush.⁴³ They sued PRODIGY, “an online service that exercised editorial control over the content of messages posted on its computer bulletin boards,” for defamation.⁴⁴ At issue were posts by an “an unidentified bulletin board user or ‘poster’ on PRODIGY’s ‘Money Talk’ computer bulletin board” in October 1994.⁴⁵ These posts claimed that the plaintiffs “committed criminal and fraudulent acts.”⁴⁶ The plaintiffs claimed that PRODIGY was liable for defamatory content posted by others because “PRODIGY exercised sufficient editorial control over its computer bulletin boards to render it a publisher with the same responsibilities as a newspaper.”⁴⁷

The court ruled for Stratton Oakmont. It agreed that “PRODIGY exercised sufficient editorial control over its computer bulletin boards to render it a publisher with the same responsibilities as a newspaper.”⁴⁸ It held that when a provider moderated the content on its website—for instance, “[b]y actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and ‘bad taste’ [] PRODIGY [was] clearly making decisions as to content” and “such decisions constitute editorial control.”⁴⁹ Because “PRODIGY has uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards,” the court was “compelled to conclude that for the purposes of Plaintiffs’ claims in this action, PRODIGY is a publisher rather than a distributor.”⁵⁰ As such, PRODIGY was therefore liable for content that remained on the

43. *Id.* at 1.

44. *Id.* at 2.

45. *Id.* at 1.

46. *Id.*

47. *Id.* at 3.

48. *Id.*

49. *Id.* at 4.

50. *Id.*

platform: “PRODIGY’s conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice.”⁵¹

Section 230 was specifically intended to “override” *Stratton Oakmont* and similar decisions that provided a disincentive for good-faith and good-will moderation efforts.⁵²

Congress solved the moderator’s dilemma by borrowing a concept from state-level Good Samaritan statutes. Good Samaritan statutes solved similar dilemmas, where doing a voluntary good deed gave rise to legal liability. At common law, a physician who volunteers to aid the victim of a roadside accident might thereby assume a duty of care and become subject to liability for injuries resulting from her failure to help effectively. In response, every state legislature has passed a Good Samaritan statute, which shields those who make “good faith” efforts at emergency care from tort liability.⁵³

In other words, Congress passed its own Good Samaritan

51. *Id.* at 5.

52. See H.R. REP. NO. 104-458, at 189 (1996) (Conf. Rep.) (“One of the specific purposes of this section is to overrule *Stratton Oakmont v. Prodigy* and any other similar decision which have treated providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.”); 141 CONG. REC. 22,045 (1995) (statement of Rep. Cox); Cox, *supra* note 34, at 3 (“The impetus for the Internet Freedom and Family Empowerment Act, today’s Section 230, was a New York Superior Court case [*Stratton Oakmont*] that I first saw reported in the Wall Street Journal in May 1995.”); *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016) (“The [CDA] was intended to overrule *Stratton [Oakmont]* and provide immunity for ‘interactive computer service[s]’ that make ‘good faith’ efforts to block and screen offensive content”).

53. See Danny R. Veilleux, Annotation, *Construction and application of “good samaritan” statutes*, 68 A.L.R. 4th § 2, at 300.

statute: Section 230.⁵⁴ It decided that an interactive computer service that decides to moderate content does not assume a duty of care and should not become subject to liability for content that it failed to moderate effectively.⁵⁵ In doing so, Congress tried to shield from unnecessary punishment intermediaries that perform good deeds and remove objectionable content from the internet.

B. *Interpretation: Purposivism's Dominance*

Currently, all federal appellate courts apply Section 230 broadly and purposively.⁵⁶ This breadth applies in three ways. First, Section 230 protects against a broad array of lawsuits because it “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.”⁵⁷ Second, immunity is not limited by the type of content: “[c]ourts have construed the immunity provisions in § 230 broadly in *all* cases arising from the publication of

54. Section 230(c) is expressly captioned “Protection for Good Samaritan blocking and screening of offensive materials.” 47 U.S.C. § 230(c). *See also* 141 CONG. REC. 22,045 (1995) (statement of Rep. Cox) (“[O]ur amendment will . . . protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet, let us say, who takes steps to screen indecency and offensive material for their customers. It will protect them from taking on liability such as occurred in the Prodigy case in New York that they should not face for helping us and for helping us solve this problem.”); Cox, *supra* note 34, at 3 (“By imposing liability on criminals and tortfeasors for their own wrongful communications and conduct, rather than shifting that liability to a website that did not in any way participate in the wrongdoing, it freed each website to clean up its corner of the internet. No longer would being a ‘Good Samaritan’ buy trouble.”).

55. 47 U.S.C. § 230(c)(2).

56. *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007) (“The other courts that have addressed these issues have generally interpreted Section 230 immunity broadly.”).

57. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (emphasis added); *see also Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1170–71 (9th Cir. 2008) (“[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230.”).

user-generated content.”⁵⁸ Third, Section 230 immunity is not limited by the squalid actions of the intermediary: “that a website operates through a meretricious business model is not enough to strip away those [Section 230] protections.”⁵⁹ In short, “[p]arties complaining that they were harmed by a Web site’s publication of user-generated content” may not sue “the interactive computer service that enabled them to publish the content online.”⁶⁰

The root of this broad, purposive interpretation of Section 230 lies in the 1997 Fourth Circuit case *Zeran v. America Online, Inc.*⁶¹ In that case, Kenneth Zeran sued AOL for failing to remove, upon notice, a false advertisement for “the sale of shirts featuring offensive and tasteless slogans” related to the 1995 Oklahoma City bombing, which listed Zeran’s home phone number in Seattle, Washington.⁶² “As a result of this anonymously perpetrated prank, Zeran received a high volume of calls, comprised primarily of angry and derogatory messages, but also death threats.”⁶³ After AOL removed that post, the unknown prankster “continued to post messages on AOL’s bulletin board, advertising additional items including bumper stickers and key chains with still more offensive slogans.”⁶⁴ As a result of this prank, “Zeran was receiving an abusive phone call approximately every two minutes.”⁶⁵ The threats intensified after “an announcer for Oklahoma City radio station KRXO . . . related the [prank] message’s contents on the air, attributed

58. *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) (emphasis added).

59. *Doe v. Backpage.com, LLC*, 817 F.3d 12, 29 (1st Cir. 2016), *superseded by statute*, Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA), Pub. L. No. 115-164, 132 Stat. 1253.

60. *Myspace*, 528 F.3d at 419.

61. 129 F.3d 327.

62. *Id.* at 329.

63. *Id.*

64. *Id.*

65. *Id.*

them to ‘Ken’ at Zeran’s phone number, and urged the listening audience to call the number.”⁶⁶

Zeran sued AOL “for defamatory speech initiated by a third party,” and “argued to the district court that once he notified AOL of the unidentified third party’s hoax, AOL had a duty to remove the defamatory posting promptly, to notify its subscribers of the message’s false nature, and to effectively screen future defamatory material.”⁶⁷ AOL pled Section 230 as an affirmative defense.

The Fourth Circuit held that Section 230(c)(1) precludes Zeran’s suit because the statute “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.”⁶⁸ Specifically, “§ 230 precludes courts from entertaining claims that would place a computer service provider in a publisher’s role.”⁶⁹ Thus, lawsuits like Zeran’s, “seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.”⁷⁰

Other than a cursory cite to the statutory text (but, significantly, not to either subsection (c)(2) or the statutory definitions), the *Zeran* court’s conclusion—that Section 230 “forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions”⁷¹—was largely based on the “purpose of this statutory immunity.”⁷² “Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and

66. *Id.*

67. *Id.* at 330.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 331.

72. *Id.* at 330.

burgeoning Internet medium.”⁷³ Given that “[i]nteractive computer services” had, in 1997, “millions of users”—leading to “staggering” amounts of information shared over the internet—the “specter of tort liability in an area of such prolific speech would have an obvious chilling effect.”⁷⁴ “It would be impossible for service providers to screen each of their millions of postings for possible problems.”⁷⁵ “Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted.”⁷⁶ To counter this, “Section 230 was enacted . . . to maintain the robust nature of Internet communication.”⁷⁷ Accordingly, the statute limited recourse of those aggrieved by online content only to the originator of that content, not to the intermediary. Congress made a policy choice to not “deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.”⁷⁸

In short, *Zeran* made a number of key interpretative moves. It viewed Section 230 as reducible to subsection (c)(1), ignoring subsection (c)(2). Because it focused only on subsection (c)(1), it applied a sweeping immunity to internet intermediaries, and did not limit this immunity by the content in fact moderated. Rather, it viewed the criterion of immunity as whether the intermediary undertook the activity of “publication.”⁷⁹ It then defined “publication” quite broadly, including within it the decision to “publish” or

73. *Id.*

74. *Id.* at 331.

75. *Id.*

76. *Id.*

77. *Id.* at 330.

78. *Id.* at 330–31.

79. *Id.* at 330 (“Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher’s role.”).

“alter” content.⁸⁰ Undergirding this broad interpretation was a purposive argument that Section 230’s goal was to promote “unfettered speech on the Internet.”⁸¹

Zeran’s interpretation of Section 230—that subsection (c)(1) is the operative section of the statute and the criterion for immunity is mere “publication”—is the consensus view throughout the federal courts.⁸² Every circuit has cited *Zeran*’s ruling as authoritative, and a number have expressly called it a “seminal” opinion.⁸³ In addition, judges routinely refer to Section 230’s “purpose” to apply it broadly.⁸⁴

C. Critique: Intentionalism and Consequentialism

The critiques of Section 230 doctrine have applied intentionalist or consequentialist methods, but have

80. *Id.* (Lawsuits “seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.”).

81. *Id.* at 334.

82. See Gregory Dickinson, *Towards Textual Internet Immunity*, 33 STAN. L. & POL’Y REV. ONLINE 1, 10–11 (Mar. 2022) (“Thus far, the story has been one of judicial lemmings citing other courts’ decisions as if maximal immunity inevitably flows from the words of the statute. It does not.”).

83. See *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007); *Force v. Facebook, Inc.*, 934 F.3d 53, 63 (2d Cir. 2019) (describing *Zeran* as “seminal”); *Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003); *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008); *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014); *Huon v. Denton*, 841 F.3d 733, 743 (7th Cir. 2016); *Johnson v. Arden*, 614 F.3d 785, 791–92 (8th Cir. 2010); *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003); *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006); *Bennett v. Google, LLC*, 882 F.3d 1163, 1166 (D.C. Cir. 2018) (describing *Zeran* as “seminal”). Professor Eric Goldman has called *Zeran* “the most important Section 230 case of all time.” Eric Goldman, *Want to Learn More About Section 230? A Guide to My Work*, TECH. & MKTG. L. BLOG (July 1, 2020), <https://blog.ericgoldman.org/archives/2020/07/want-to-learn-more-about-section-230-a-guide-to-my-work.htm>.

84. See, e.g., *Force*, 934 F.3d at 71; see also *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 14 (2020) (Thomas, J., statement respecting denial of certiorari) (The Ninth Circuit’s “decision to stress purpose and policy is familiar. Courts have long emphasized nontextual arguments when interpreting § 230.”).

neglected the statute's text.

Many critiques employ intentionalist methods, arguing that Section 230 doctrine has strayed from its origins. For instance, Professor Danielle Keats Citron, a prominent internet law scholar, and Ben Wittes, a well-respected journalist, have written that it “would seem absurd to the CDA’s drafters” to grant “immunity to platforms designed in part or in whole for illegal activity.”⁸⁵ Section 230 “was, after all, part of the Communications Decency Act.”⁸⁶ Section 230 “was by no means meant to immunize services whose business is the active subversion of online decency—businesses that are not merely failing to take ‘Good Samaritan’ steps to protect users from online indecency but are actually being ‘Bad Samaritans.’”⁸⁷ They argue that judicial interpretations of Section 230 have strayed far from the statute’s origins, and the consensus “overbroad interpretation” of Section 230 “has left victims of online abuse with no leverage against site operators whose business models facilitate abuse.”⁸⁸ Other scholars have made similar intentionalist arguments.⁸⁹ Citron and Mary Anne Franks, another internet law scholar, wrote that courts’ “indulgent approach to Section 230 veers far away . . . from the original intentions of Section 230’s sponsors.”⁹⁰ “Rather than treating

85. Danielle Keats Citron and Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 *FORDHAM L. REV.* 401, 409 (2017).

86. *Id.*

87. *Id.*

88. *Id.* at 404.

89. See Mary Graw Leary, *The Indecency and Injustice of Section 230 of the Communications Decency Act*, 41 *HARV. J.L. & PUB. POL’Y* 553, 565 (2018) (Section 230 “was never intended to provide a form of absolute immunity for any and all actions taken by interactive computer services.”); 1 *RODNEY A. SMOLLA, LAW OF DEFAMATION* § 4:86 (2d ed. 2019) (“[C]ourts have extended the immunity in § 230 far beyond anything that plausibly could have been intended by Congress); Michael L. Rustad & Thomas H. Koenig, *Rebooting Cybertort Law*, 80 *WASH. L. REV.* 335, 342–343 (2005) (“Courts, however, have expanded § 230 far beyond Congress’s original intent by immunizing ISPs and websites from distributor liability and virtually every other tort action.”).

90. Citron & Franks, Danielle Keats Citron & Mary Anne Franks, *The*

Section 230 as a legal shield for responsible moderation efforts, courts have stretched it far beyond what its words, context, and purpose support. Section 230 has been read to immunize from liability platforms that: knew about users' illegal activity, deliberately refused to remove it, and ensured that those users could not be identified; solicited users to engage in tortious and illegal activity; and designed their sites to enhance the visibility of illegal activity while ensuring that the perpetrators could not be identified and caught."⁹¹

Arguments employing consequentialist methods abound as well, both for and against Section 230. In the political sphere, Section 230's detractors point to the statute's harmful consequences, arguing that the statute purportedly protects the publication and dissemination of damaging content and conduct.⁹² For instance, one proposed Congressional reform to Section 230—the Justice Against Malicious Algorithms Act—punishes social media platforms that “actively amplify content that endangers our families, promote conspiracy theories, and incite extremism.”⁹³ Similarly, another proposed reform to Section 230—the SAFE TECH Act—is based on the notion that “Section 230 has provided a ‘Get Out of Jail Free’ card to the largest platform companies even as their sites are used by scam artists, harassers and violent extremists to cause damage and injury.”⁹⁴

Internet as a Speech Machine and Other Myths Confounding Section 230 Reform, 2020 U. CHI. LEGAL F. 45, 61 (2020).

91. *Id.* at 50–51.

92. Such activity is protected by the First Amendment. *See United States v. Alvarez*, 567 U.S. 709, 729–30 (2012) (striking down the Stolen Valor Act of 2005 and thereby holding that lies qualify as protected speech).

93. Press Release, House Comm. On Energy & Comm., E&C Leaders Announce Legislation to Reform Section 230, (Oct. 14, 2021) <https://energycommerce.house.gov/newsroom/press-releases/ec-leaders-announce-legislation-to-reform-section-230>.

94. Press Release, Warner, Hirono, Klobuchar Announce the SAFE TECH Act to Reform Section 230, Off. of Sen. Mark Warner (Feb. 5, 2021),

Similarly, in the academy, a number of scholars have pointed out Section 230's harmful consequences. A number write that Section 230 enables harmful content to proliferate and jeopardizes the right to free speech. For instance, Citron and Wittes are "skeptical that § 230, as currently interpreted, is really optimizing free speech. It gives an irrational degree of free speech benefit to harassers and scofflaws but ignores important free speech costs to victims. Individuals have difficulty expressing themselves in the face of online assaults."⁹⁵ Additionally, Citron and Franks write that "[t]he overbroad interpretation of Section 230 means that platforms have scant legal incentive to combat online abuse. Rebecca Tushnet put it well a decade ago: Section 230 ensures that platforms enjoy 'power without responsibility.'"⁹⁶ "At the same time," they write, "Section 230 has subsidized platforms whose business is online abuse and the platforms who benefit from ignoring abuse. It takes away the leverage that victims might have had to get harmful content taken down."⁹⁷ Meanwhile, Section 230, they claim, has "undermined equal opportunity in employment, politics, journalism, education, cultural influence, and free speech."⁹⁸ Professor Olivier Sylvain has written that "[t]he problem with prevailing Section 230 doctrine today is not only that it protects online services that amplify and deliver misleading or dangerous information by design."⁹⁹ Rather, "the principal problems . . . are the ways in which powerful online application and service designs harm people for whom hard-fought public-law consumer protections (such as civil-rights laws or rules against unfair

https://www.warner.senate.gov/public/index.cfm/pressreleases?ID=55514D_D4-7824-40A9-A482-64121A033266.

95. Citron & Wittes, *supra* note 855, at 420.

96. Citron & Franks, *supra* note 90, at 52.

97. *Id.* at 54.

98. *Id.* at 56.

99. Olivier Sylvain, *Platform Realism, Informational Inequality, and Section 230 Reform*, YALE L. J. F. 475, 500 (2021).

or deceptive trade practices) are essential.”¹⁰⁰

In contrast, Section 230’s champions argue that Section 230’s consequences are, on balance, more positive than harmful. They write that Section 230 provides “a form of protection against frivolous lawsuits” that will suffocate upstart challengers to the dominant technology incumbents should Section 230 be revoked.¹⁰¹ Therefore, “reductions to Section 230’s scope pose serious risks to Internet speech” because “Section 230 derives a lot of its strengths from its ‘horizontal’ application to disparate causes of action.”¹⁰² “If Congress excludes more causes of action from Section 230’s coverage, it increases defense costs, creates more constitutional litigation (as defendant [sic] now turn to the First Amendment as a backup defense), and encourages plaintiffs to shoehorn their claims into the new exclusion.”¹⁰³

While intentionalism and consequentialism are widespread, the statute’s text is remarkably absent. Recently, scholars and judges have noted this absence.

100. *Id.*

101. Mike Masnick, *Those Who Don’t Understand Section 230 Are Doomed To Repeal It*, TECHDIRT, <https://www.techdirt.com/2021/12/29/those-who-dont-understand-section-230-are-doomed-to-repeal-it/> (“Again, the key benefit to Section 230 is not that it removes all liability, but rather that it gets cases dismissed very early on, cases that would have almost no chance if they went through the full litigation process. In other words, it’s a form of protection against frivolous lawsuits, and the main mechanism involved is getting cases dismissed earlier, rather than years [and millions of dollars later]. That helps smaller companies way more than it helps Facebook. Facebook has all the money in the world and it can afford to litigate these cases all the way through. It would cost the company pocket change, but the company would likely still win in the end.”); *see also* Cox, *supra* note 34, at 3 (“In an imagined future world without Section 230, where websites and internet platforms again face enormous potential liability for hosting content created by others, there would again be a powerful incentive to limit that exposure. Online platforms could accomplish this in one of two ways. They could strictly limit user-generated content, or even eliminate it altogether; or they could adopt the ‘anything goes’ model that was the way to escape liability before Section 230 existed.”).

102. Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33, 45 (2019).

103. *Id.* at 45.

In the academy, Professor Gregory Dickinson has noted the absence of the statute's text and lamented that the judicial "glosses" of Section 230 doctrine have "swallow[ed] the text to form a doctrine untethered from the statute that gave it life."¹⁰⁴ "By taking a statute targeted to promote internet publication and the censorship of indecent material and pressing it into service as an internet-freedom cure-all, courts have created an expansive doctrine of immunity that is ill-suited for the modern internet, yet now cemented in precedent across the country."¹⁰⁵ Professor Dickinson has called for a renewed focus on the statute's text, and called for judges to "put their judicial laboratories of democracy to work to tailor a textual solution suited for the modern internet."¹⁰⁶ Other academics have noted that the Section 230 doctrine has expanded beyond what the text supports—which is the correct conclusion—but have offered no concrete analysis of the text.¹⁰⁷

In the judiciary, Justice Thomas noted that the gap between the statutory text and its judicial gloss has become a chasm.¹⁰⁸ Justice Thomas questioned the consensus interpretation, writing that lower courts' Section 230 decisions that confer "sweeping immunity on some of the largest companies in the world" constitute "questionable precedent," given that these courts have "emphasized nontextual arguments" and have strayed from the statute's original meaning.¹⁰⁹ "Adopting the too-common practice of reading extra immunity into statutes where it does not belong," Justice Thomas wrote, "courts have relied on policy

104. Dickinson, *Towards Textual Internet Immunity*, *supra* note 82, at 5.

105. *Id.* at 8.

106. *Id.* at 10.

107. See Danielle Keats Citron & Benjamin Wittes, *The Problem Isn't Just Backpage: Revising Section 230 Immunity*, 2 GEO. L. TECH. REV. 453, 454–55 (2018).

108. See generally *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13 (2020).

109. *Id.* at 13–14.

and purpose arguments to grant sweeping protection to Internet platforms.”¹¹⁰ Justice Thomas concluded that “in an appropriate case, it behooves” the Court to decide “the correct interpretation of § 230.”¹¹¹

These calls for greater textual analysis are useful, and there is more work to be done. Professor Dickinson’s approach lacks specifics, and provides only two broad predictions about where a text-focused approach would lead—that “tech companies” would be somehow considered “responsible for’ the content they host” and “would limit online entities’ ability to assert immunity in lawsuits not directly related to publication.”¹¹² To be fair, the lack of specifics is to be expected for a call for greater inquiry. Justice Thomas, in contrast, provides a number of detailed critiques. He highlighted four areas where lower courts have departed from a “modest understanding” of the statute, critiquing the courts that have (1) “discarded the longstanding distinction between ‘publisher’ liability and ‘distributor’ liability,”¹¹³ (2) “departed from the most natural reading of the text by giving Internet companies immunity for their own content,”¹¹⁴ (3) “eviscerated the narrower liability shield [of Section 230(c)(2)] Congress included in the statute” and “have curtailed the limits Congress placed on decisions to remove content,”¹¹⁵ and (4) erroneously “extended § 230 to protect companies from a broad array of traditional product-defect claims.”¹¹⁶

Though Justice Thomas offers compelling arguments in each issue, his treatment is also limited. First, the statement analyzes each issue in isolation, without considering the

110. *Id.* at 15.

111. *Id.* at 18.

112. Dickinson, *supra* note 82, at 9.

113. *Malwarebytes*, 141 S. Ct. at 15.

114. *Id.* at 16.

115. *Id.* at 16, 17.

116. *Id.*

interrelation between Section 230's subsections. Second, it is incomplete, as it misses a number of issues. Third, it skirts a deeper question: are these arguments signs that the "consensus" is fundamentally correct but needs a few course-corrections, or is the "consensus" fundamentally wrong? Given the pervasive discussion surrounding Section 230, it seems that there *is* something fundamentally wrong about how Section 230 has been interpreted. But Justice Thomas does not explain this fundamental error. Fourth, the implications for technology companies are unclear from his statement alone.¹¹⁷ To be fair, Justice Thomas's statement is not intended to be comprehensive, and it usefully illuminates a path forward.

This Article argues that there exists a fundamental error in *Zeran*: that it focused on Section 230(c)(1) to the exclusion of Section 230(c)(2). With this paradigm shift in mind, a textual interpretation of Section 230 does not mean a repeal of the statute and the ensuing uncertainty. Rather, a textual interpretation will lead to a far richer and more complex application of the statute than the current doctrine offers. The text, in other words, is not only an avenue for critiquing Section 230. It is also an avenue for a constructive interpretation of the statute. The next Part will show how.

II. READING SECTION 230

This Part conducts an in-depth analysis of the text and structure of Section 230 to elucidate the statute's meaning and to illustrate a statutory scheme. Part II.A illustrates the fundamental category error of the *Zeran* "consensus": that it sees Section 230(c)(1) as the operative section granting intermediary immunity whereas, in truth, Section 230(c)(2) is the operative section that provides immunity beyond the common law. Part II.B introduces an often-overlooked

117. The lack of clear implications for technology companies is perhaps the reason why Justice Thomas was not joined by any other of the Court's seven textualists, despite the strength of his textualist arguments.

threshold inquiry for Section 230: that, contra *Zeran*, its protections do not extend to entities that perform traditional publisher activities; rather, Section 230 protects only intermediaries. Part II.C analyzes Section 230(c)(1), which states a baseline rule that an “interactive computer service”—which is an entity that either serves or moderates information—is a distributor of that information, and shall not be treated as a publisher. That much reaffirms the common law. Part II.D analyzes Section 230(c)(2)(A), which states that “Computer Good Samaritans” who actively clean up the internet get *additional* protection—they are not liable as publishers or distributors. Part II.E analyzes Section 230(c)(2)(B), which states that if an intermediary permits others to restrict access to the content themselves, either through user tools or decentralized protocols, the “good faith” requirement does not apply. This four-part structure fulfills the statute’s tripartite goals of protecting free speech, encouraging moderation of certain specific types of content unsuitable for children, and enabling user choice.

A. *Zeran’s Error: Revisiting Subsections (c)(1) and (c)(2)*

The first step in a textual interpretation is to determine which part of the statute to analyze.¹¹⁸ Judges analyzing Section 230, however, have largely interpreted the wrong subsection. After *Zeran*, it is universally assumed that Section 230(c)(1) is the section that creates some sort of liability shield for internet intermediaries: the only debate is how far it extends. *Zeran*, ignoring Section 230(c)(2), cited only Section 230(c)(1) as the basis for sweeping intermediary immunity.¹¹⁹ The federal courts have unquestioningly

118. See Anya Bernstein, *Before Interpretation*, 84 U. CHI. L. REV. 567, 572–73 (2017); see VICTORIA NOURSE, *MISREADING LAW, MISREADING DEMOCRACY* 42 (Harvard Univ. Press, 2016).

119. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (“By its plain language, [Section 230(c)(1)] 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. Specifically, [Section 230(c)(1)] precludes courts from

followed suit.¹²⁰ In the words of a popular book, it is the “Twenty-Six Words” of Section 230(c)(1) “[t]hat [c]reated [t]he [i]nternet” by providing intermediaries immunity from suit.¹²¹ And even those who criticize the sweeping interpretation of Section 230 assume that it is Section 230(c)(1) that provides immunity from suit.¹²²

As this section shows, this assumption is incorrect. Section 230(c)(1) does not *create* a liability shield—that task falls to Section 230(c)(2)—but rather *reaffirms* the liability protections that already existed at common law. It says that an “interactive computer service”—defined either as a passive conduit or an intermediary that moderates content—*shall* not “be treated as the publisher” of the information it makes available. Section 230(c)(1) reaffirms the previously-recognized rule that websites that make no moderation efforts are treated as distributors, not publishers. Section 230(c)(1) does nothing to overturn *Stratton Oakmont* or solve the moderator’s dilemma.

Rather, it is Section 230(c)(2) that overrules *Stratton Oakmont* and creates intermediary immunity by stating that, under certain circumstances, content moderation efforts do not turn websites from distributors into publishers. In contrast to Section 230(c)(1), which provides no new legal liabilities or rights, Section 230(c)(2) creates new legal immunities: it is captioned “civil liability” and states that an

entertaining claims that would place a computer service provider in a publisher’s role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.”).

120. Even sophisticated courts have erred. *See, e.g., Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1174 (9th Cir. 2009) (“Section 230(c)(1) is directly aimed at the problem created by the *Stratton* decision.”); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009) (“Subsection (c)(1), by itself, shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties”).

121. KOSSEFF, *supra* note 2.

122. Indeed, the text of many current Congressional Section 230 reforms explicitly amend subsection (c)(1). *See e.g., Justice Against Malicious Algorithms Act*, H.R. 5596, 117th Cong. § 2 (2021).

intermediary shall not “be held liable” for all content that the moderator either fails to moderate or chooses not to moderate. Though Section 230(c)(2) has been ignored, it is the true legal workhorse of the statute.

Section 230(c)(1) reads:

Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.¹²³

Meanwhile, Section 230(c)(2) states that:

No provider or user of an interactive computer service shall be held liable on account of . . . 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.¹²⁴

Section 230(c)(1) applies as a default rule in the ordinary course: when a “provider or user of an interactive computer service” serves “information provided by another information content provider,” it “shall” not “be treated as the publisher or speaker” of that information. That is a reasonable rule, and aligns with the common law rule stated that an intermediary conduit is not considered a publisher.¹²⁵ In this way, subsection (c)(1) reaffirms the (perceived) holding of *Cubby*, which held that internet intermediaries are

123. 47 U.S.C. § 230(c)(1).

124. 47 U.S.C. § 230(c)(2)(A).

125. See RESTATEMENT (SECOND) OF TORTS § 577 (AM. L. INST. 1977); Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710 at *3 (N.Y. Sup. Ct. May 24, 1995) (“[D]istributors such as book stores and libraries may be liable for defamatory statements of others only if they knew or had reason to know of the defamatory statement at issue.”); *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 139 (S.D.N.Y. 1991) (“New York courts have long held that vendors and distributors of defamatory publications are not liable if they neither know nor have reason to know of the defamation.”).

distributors.¹²⁶

However, special protection is given to entities that take action to control the flow of objectionable material on the internet: “any action voluntarily taken . . . to restrict access to or availability of . . . obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable” material shall not give rise to *any* liability—either for the material that is actually moderated or for the material that is not moderated. After all, the statute wants to protect Computer Good Samaritans; the last thing Congress wants to do is to hold them liable for a good deed.

126. See *Cubby*, 776 F. Supp. at 140–41. Though *Cubby* is often invoked as a foil to *Stratton Oakmont*—that the former dealt with when an entity did not exert control over the contents of the forum, whereas the latter did—that is not true. CompuServe had robust community guidelines—as did every internet service provider at the time. As stated in the second paragraph of the *Cubby* opinion, CompuServe contracted with a company to “manage, review, create, delete, edit and otherwise control the contents’ of the Journalism Forum ‘in accordance with editorial and technical standards and conventions of style as established by CompuServe.” *Id.* at 137 (“CompuServe has no opportunity to review Rumorville’s contents before DFA uploads it into CompuServe’s computer banks, from which it is immediately available to approved CIS subscribers.”).

Stratton Oakmont attempted to distinguish *Cubby* in two ways; neither is availing. “First, PRODIGY held itself out to the public and its members as controlling the content of its computer bulletin boards.” *Stratton Oakmont*, 1995 WL 323710, at *4. But for the purposes of liability, a company’s marketing materials do not matter; its actions do. It is the substance of the actions taken, not the superficial characterizations, that are of legal import. “Second, PRODIGY implemented this control through its automatic software screening program, and the Guidelines which Board Leaders are required to enforce.” *Id.* But whether the moderation happens automatically or manually is of no import. In addition, CompuServe also had community guidelines.

The common-law rule, as encapsulated by *Cubby*, comports with the law of distributors: just as newspaper stands remove content that is not “good for business” but do not thereby lose their status as distributors, so too internet entities remove content that is not “good for business” but would thereby not lose their status as distributors. They would only not be subject to the additional protections of Section 230, which protect even against distributor liability to reward the moderation of obscene or offensive content. The relevant distinction is not between a passive, “anything-goes” conduit and an active, moderating conduit, but rather between *ex ante* and *ex post* editorial judgments. So long as websites do not make *ex ante* editorial judgments, they are not considered publishers.

Confirming this straightforward reading of the plain statutory text are a number of indications, using the traditional tools of statutory interpretation, that this is the correct reading.

First, absent from Section 230(c)(1) is any discussion of “immunity,” or any other phrase that would indicate the granting of legal rights.¹²⁷ This stands in contrast to Section 230(c)(2), which offers a grant of immunity in writing that “no provider or user of an interactive computer service shall be held liable.”¹²⁸ The canon of meaningful variation—“that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute”—states that this difference is meaningful.¹²⁹ But this is not even the ordinary invocation of the canon of meaningful variation, which often “assumes a perfection of drafting that, as an empirical matter, is not often achieved.”¹³⁰ This variation occurs within the *same subsection*. To assume that Congress did not mean anything by this difference would be to assume that Congress was asleep at the wheel to the extent that it would make any statutory interpretation impossible.¹³¹ Indeed, the meaningful difference canon extends to other sections of

127. See Chi. Laws.’ Comm. For Civ. Rts. Under L. v. Craigslist, Inc., 519 F.3d 666, 669 (7th Cir. 2008) (“Subsection (c)(1) does not mention ‘immunity’ or any synonym.”); City of Chicago v. StubHub!, Inc., 624 F.3d 363, 366 (7th Cir. 2010) (“[S]ubsection (c)(1) does not create an ‘immunity’ of any kind. It limits who may be called the publisher of in-formation that appears online.”).

128. 47 U.S.C. § 230(c)(2).

129. Hamdan v. Rumsfeld, 548 U.S. 557, 578 (2006); see generally ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* § 25 (2012) (“Presumption of Consistent Usage”).

130. SCALIA & GARNER, *supra* note 129 at 170.

131. See Lindh v. Murphy, 521 U.S. 320, 330 (1997) (“[N]egative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted.”); Field v. Mans, 516 U.S. 59, 75 (1995) (“The more apparently deliberate the contrast, the stronger the inference, as applied, for example, to contrasting statutory sections originally enacted simultaneously in relevant respects . . .”).

Section 230, and the CDA in which it was initially a part, both of which contain sections that provide immunity from liability.¹³² Given that the difference is meaningful, interpreters should “refrain from reading a phrase into the statute when Congress has left it out.”¹³³

Second, the headings indicate that Section 230(c)(2) is the operative subsection. In general, as the Supreme Court has observed, “the title of a statute or section can aid in resolving an ambiguity in the legislation’s text.”¹³⁴ And courts have stressed the importance of captions and headings in interpreting Section 230, writing that “the substance of section 230(c) can and should be interpreted consistent with its caption.”¹³⁵ First, consider the individual captions of each subsection. It is Section 230(c)(2), not Section 230(c)(1), that is captioned “Civil Liability,” which indicates that immunity inheres in subsection (c)(2), not (c)(1).¹³⁶ In addition, Section 230 is titled “Protection for private blocking and screening of offensive material,” which clearly references subsection (c)(2)—the section that contains the words “offensive” and “material,” and which, then, presumably provides the “[p]rotection for private blocking and screening” of this

132. See 47 U.S.C. § 230I(3) (“No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”); 47 U.S.C. § 223(f)(1) (“No cause of action may be brought in any court or administrative agency against any person . . .”).

133. *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993).

134. *INS v. National Ctr. For Immigrants’ Rights, Inc.*, 502 U.S. 183, 189 (1991); see generally SCALIA & GARNER, *supra* note 129, § 35, at 221–24 (“Title-and-Headings Canon”).

135. *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008); see also *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003) (“§ 230(c)—which is, recall, part of the ‘Communications Decency Act’—bears the title ‘Protection for ‘Good Samaritan’ blocking and screening of offensive material’, hardly an apt description if its principal effect is to induce ISPs to do nothing about the distribution of indecent and offensive materials via their services. . . . Why not . . . harmonize the text [of Section 230] with the caption?”). And while “a statute’s caption must yield to its text when the two conflict,” *id.*, here, there is no conflict: both the text and the caption indicate that it is Section 230(c)(2), not Section 230(c)(1), that deals with immunity from liability.

136. Section 230(c)(1) is captioned “Treatment of publisher or speaker.”

“offensive material,” which is the entire point of the statute.¹³⁷

Third, the *Zeran* reading obliterates Section 230(c)(2) from the statute. The canon against surplusage states that “a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.”¹³⁸ Even those who doubt the canon against surplusage would not favor an interpretation of one subsection that eliminated an *entire* other subsection.¹³⁹ But that is precisely what the *Zeran* reading does. *Zeran* leaves no room for Section 230(c)(2): if Section 230(c)(1) is truly a “prophylaxis”¹⁴⁰ under which internet companies are not held liable for third-party or user-generated information, Section 230(c)(2) is superfluous.¹⁴¹ If all internet entities are

137. *See Force v. Facebook, Inc.*, 934 F.3d 53, 80 (2d Cir. 2019) (Katzmann, C.J., concurring in part and dissenting in part) (“Indeed, the conference committee summarized § 230 by stating that it ‘provides ‘Good Samaritan’ protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material’—a description that could just as easily have applied to § 230(c)(2) alone.”) (quoting S. Rep. No. 104-230, at 194). Indeed, this description *did* “appl[y] to § 230(c)(2) alone.” *Id.*

138. *Clark v. Rameker*, 573 U.S. 122, 131 (2014). *See generally* SCALIA & GARNER, *supra* note 129, § 26 (“Surplusage Canon”).

139. Especially given, as in this case, that the purportedly superfluous section is longer and more detailed, which indicates that Congress did not at all intend for it to be superfluous. *See* SCALIA & GARNER, *supra* note 129, at 175–76 (“Lawyers rarely argue that an entire provision should be ignored,” but in one of the rare instances when it did happen, “[t]he court correctly rejected this argument”) (citing *Fortec Constructors v. United States*, 760 F.2d 1288 (Fed. Cir. 1985)).

140. *Doe v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016).

141. *See Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 16 (2020) (“The decisions that broadly interpret § 230(c)(1) to protect traditional publisher functions also eviscerated the narrower liability shield Congress included in the statute.”); *e-ventures Worldwide, LLC v. Google, Inc.*, No. 14-cv-646, 2017 WL 2210029, *3 (M.D. Fla. Feb. 8, 2017) (“But interpreting the CDA this way results in the general immunity in (c)(1) swallowing the more specific immunity in (c)(2).”); *Petition for Writ of Certiorari at 29, Jane Doe v. Facebook, Inc.*, 2021 WL 4441272, (“The sweeping interpretation of Section 230(c)(1) advanced by the Texas Supreme Court effectively reads Section 230(c)(2) out of the statute.”).

not considered the publisher of user-generated materials, then there is no reason why they should be liable for removing information. Indeed, the dominance of *Zeran* is likely why there has been vanishingly little litigation surrounding Section 230(c)(2): all the cases are disposed of on Section 230(c)(1) grounds.¹⁴² But *Zeran*'s approach removes Section 230(c)(2) from the statute, which is an incorrect way to interpret a statute.¹⁴³

Fourth, the words “information” and “material” are strong intratextual clues as to the meanings of subsections (c)(1) and (c)(2).¹⁴⁴ In Section 230, “information” seems to refer to the pro-social, beneficial knowledge that we do receive (and should want to receive): Congress applauds that the internet “represent[s] an extraordinary advance in the availability of educational and *informational* resources to our citizens,”¹⁴⁵ appreciates that the internet “offer[s] users a great degree of control over the information that they receive,”¹⁴⁶ and aims “to encourage the development of technologies which maximize user control over what *information* is received by individuals, families, and schools.”¹⁴⁷ In contrast, “material” seems to refer to matters

142. Indeed, most decisions about taking down content—which is, according to most courts, the sole province of subsection (c)(2)—are decided on (c)(1) grounds. *See, e.g.*, *Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 601 (S.D.N.Y. 2020) (“Vimeo is entitled to immunity under either (c)(1) or (c)(2)” for its takedown decision); *Riggs v. MySpace, Inc.*, 444 F. App’x 986, 987 (9th Cir. 2011) (analyzing MySpace’s decision to “delete . . . user profiles” under subsection(c)(1)); *Ebeid v. Facebook, Inc.*, No. 18-cv-07030, 2019 WL 2059662, at *5 (N.D. Cal. May 9, 2019) (“[D]efendant’s decision to remove plaintiff’s posts undoubtedly falls under ‘publisher’ conduct” under 230(c)(1)).

143. Nor is it the best reading of the statute: if either section is to eliminate the other, the lengthier and more detailed section—Section 230(c)(2)—should be given priority.

144. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 796 (1999) (Intratextualism is a tool that finds significance when “various words and phrases appear and recur in the document[.]”).

145. 47 U.S.C. § 230(a)(1) (emphasis added).

146. 47 U.S.C. § 230(a)(2) (emphasis added).

147. 47 U.S.C. § 230(b)(3) (emphasis added).

that are offensive and objectionable. By passing Section 230—titled “Protection for private blocking and screening of offensive *material*”—Congress sought to “remove disincentives” to the “blocking and filtering” of “objectionable or inappropriate online *material*.”¹⁴⁸ It did so by extending “Good Samaritan” protection for “blocking and screening of offensive *material*” and by mandating interactive computer services to notify parents about the options to “limiting access to *material* that is harmful to minors.”¹⁴⁹ “Information” only appears in subsection (c)(1); “material” only appears in subsection (c)(2). This indicates that when the internet operates as intended—when it becomes the “extraordinary advance in the availability of educational and informational resources” it is meant to be, and there is no need to clean away anything offensive—then (c)(1) applies.¹⁵⁰ But when the uglier parts of the internet rear their head, and an internet entity is forced to clear away such “offensive material,” you are sure that they are protected in doing so because (c)(2) applies. Thus, this intratextual argument supports the plain reading that the distinction between subsections (c)(1) and (c)(2) is whether the internet entity is an active or passive conduit.

Fifth, the concept of “good faith” also indicates that Section 230(c)(2) is what overrules *Stratton Oakmont*. In passing Section 230(c)(2), Congress solved the moderator’s dilemma by borrowing a concept from the Good Samaritan laws. This is why Section 230(c) is expressly captioned “Protection for Good Samaritan blocking and screening of offensive materials.”¹⁵¹ Every state legislature has passed a Good Samaritan statute, which protects against a similar

148. 47 U.S.C. § 230(b)(4) (emphasis added).

149. 47 U.S.C. § 230(d).

150. 47 U.S.C. § 230(a)(1) (emphasis added).

151. The *Fair Hous.* And *GTE* courts have stressed the importance of the caption. See *supra* note 135 and accompanying text. Indeed, that Section 230 is the Internet Good Samaritan statute extends throughout the uncontroverted legislative history. See *supra* note 54.

“dilemma” created by the common law. At common law, a physician who volunteered to aid the victim of a roadside accident might thereby assume a duty of care and become subject to liability for injuries resulting from her failure to help effectively. Similarly, under the common law, it was assumed that internet entities who volunteered to moderate objectionable content on the internet might assume a duty of care for the content they did not moderate and thus become subject to liability for injuries resulting from their failure to moderate effectively. In response, state Good Samaritan statutes shield those who make “good faith” efforts at emergency care from tort liability.¹⁵² Congress passed its own Good Samaritan statute—Section 230—to solve the moderator’s dilemma.¹⁵³ Section 230(c)(1) states the baseline principle that there is no publisher liability for not moderating content—just as there is no assumed liability for not getting involved in an emergency. But if one *does* get involved in cleaning up the internet, then Section 230(c)(2) shields those who make “good faith” moderation efforts from tort liability—just as Good Samaritan statutes shield those who make “good faith” emergency care efforts from tort liability. The fact that Section 230(c)(2) contains a “good faith” clause and otherwise parallels the operative part of a Good Samaritan law indicates that it is subsection (c)(2) that is the operative part of the Section 230 “Computer Good Samaritan” law.¹⁵⁴

Sixth, though “a law’s scope often differs from its genesis,” Section 230(c)(2) did not stray far from its genesis.¹⁵⁵ The enumerated terms of the statute—“obscene, lewd, lascivious, filthy, excessively violent, [and] harassing”—parallel the types of content that PRODIGY—

152. See Veilleux, *supra* note 533, § 2, at 299–300.

153. See *supra* note 544 (reviewing statutory caption and uncontested legislative history).

154. See *supra* note 54 (“Computer Good Samaritans”).

155. Chi. Laws.’ Comm. For Civ. Rts. Under L. v. Craigslist, Inc., 519 F.3d 666, 671 (7th Cir. 2008).

the internet service provider at issue in *Stratton Oakmont*—in fact moderated.¹⁵⁶ For instance, PRODIGY removed notes that “harass other members” and prohibited notes “containing obscene, profane or sexually explicit language.”¹⁵⁷ *Stratton Oakmont* held that restricting such harassing or obscene material imputed liability to PRODIGY; Section 230(c)(2) overruled that decision by holding that an entity shall *not* “be held liable” for restricting “harassing,” “obscene,” or “otherwise objectionable” material.¹⁵⁸ The parallel enumerated terms indicate, therefore, that Section 230(c)(2) overrides *Stratton Oakmont*.

For these reasons, subsection (c)(2) is the operative part of the statute.¹⁵⁹ *Zeran* was incorrect in finding that immunity inheres in subsection (c)(1).

B. Where Section 230 Does Not Apply

The first Section 230 inquiry is a threshold one: it determines whether Section 230 applies at all.

By its terms, Section 230 protections apply to entities that are intermediaries (i.e. “interactive computer services”), not to publishers (“information content providers”).¹⁶⁰ Examples of “interactive computer services” are “systems

156. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 at *2 (N.Y. Sup. Ct. May 24, 1995) (PRODIGY’s community guidelines state, in part that posts “that harass other members or are deemed to be in bad taste or grossly repugnant to community standards, or are deemed harmful to maintaining a harmonious online community, will be removed when brought to PRODIGY’s attention.”).

157. See Exhibit H, Prodigy Community Guidelines at 4–5, *Stratton Oakmont, Inc. v. Lusby*, No. 0031063/1994, (N.Y. Sup. Ct. Nassau Cnty. filed Dec. 2, 1994) (copy on file with author).

158. It stands to reason that the PRODIGY community guidelines are a “safe harbor” for the materials contained in “otherwise objectionable,” see *infra* Part II.D (discussing the scope of “otherwise objectionable”).

159. Courts continue to err. See, e.g., *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851–52 (9th Cir. 2016) (“The core policy of section 230(c)(1) . . . is to provide [p]rotection for “Good Samaritan” blocking and screening of offensive material.”).

160. 47 U.S.C. §§ 230(c)(1)-(2).

operated or services offered by libraries or educational institutions.”¹⁶¹ Imagine a library computer circa 1996. Much like the library itself is a gateway into knowledge created by others, so too library computers or other “interactive computer services” are a gateway into knowledge created by others.¹⁶² In contrast, an “information content provider” is one who is “responsible, in whole or in part, for the creation or development” of the material on the internet.¹⁶³ The “information content provider” is creative and active: its activities are the “creation or development of information.” If the “interactive computer service” is the library, then the “information content provider” is the author and creator of the books in the library. The “information content provider” creates the content to which the “interactive computer service” provides a gateway.¹⁶⁴

In many ways, courts have correctly interpreted this provision. First, courts have held that if an internet entity acts as an “information content provider,” then Section 230 does not apply.¹⁶⁵ This conclusion is correct and mandated by

161. 47 U.S.C. § 230(f)(1).

162. *See* *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 139 (S.D.N.Y. 1991) (“CompuServe’s CIS product is in essence an electronic, for-profit library that carries a vast number of publications and collects usage and membership fees from its subscribers in return for access to the publications.”).

163. 47 U.S.C. § 230(f) (“The term ‘information content provider’ means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”).

164. *See* *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1266 (9th Cir. 2016) (quoting *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1195 (10th Cir. 2009)) (“The prototypical service qualifying for [CDA] immunity is an online messaging board (or bulletin board) on which Internet subscribers post comments and respond to comments posted by others.”).

165. *See* *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (Section 230’s “grant of immunity applies only if the interactive computer service provider is not also an ‘information content provider,’ defined as someone who is ‘responsible, in whole or in part, for the creation or development of the offending content.”) (quoting 47 U.S.C. § 230(f)(3)); *see also* *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 175 (2d Cir. 2016) (“LeadClick is not entitled to Section 230 immunity because it is an information content

the text.¹⁶⁶ Second, courts have correctly held that this is a contextual inquiry, not an inherent one: the same internet entity can, at different times, be considered either an “interactive computer service” or an “information content provider” depending on the capacity in which the entity acts.¹⁶⁷ This conclusion is supported by the text of Section 230(c)(1), which states that an “interactive computer service” is not the publisher of information provided by “another information content provider,” implying that the interactive computer service *can*, at least at some points, be an

provider with respect to the deception at issue”); *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 408–09 (“[A] website may be immune from liability for some of the third-party content it publishes but be subject to liability for the content that it is responsible for as a creator or developer.”); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (“[T]he scope of § 230 immunity turns on whether that person’s actions also make it an ‘information content provider.’”); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (“Under the statutory scheme, an ‘interactive computer service’ qualifies for immunity so long as it does not also function as an ‘information content provider’ for the *portion* of the statement or publication at issue.”).

166. *Zeran* thus erred in not addressing the definitions section, but instead provided its own definitions. *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (Functionally defining the actions of an “interactive computer service” as a “publisher,” which means “deciding whether to publish, withdraw, postpone or alter content”). *Zeran* also got the causal arrow backwards: instead of not treating an “interactive computer service” as a publisher and thus limiting the statute to the activities of an “interactive computer service,” *Zeran* assumed that all publisher functions on the internet are protected. The statute does not bear that meaning.

167. *Fair Hous.*, 521 F.3d at 1162 (“A website operator can be both a service provider and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that it creates itself, or is ‘responsible, in whole or in part’ for creating or developing, the website is also a content provider.”); *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) (“The reference to ‘another information content provider’ . . . distinguishes the circumstance in which the interactive computer service itself meets the definition of ‘information content provider’ with respect to the information in question.”); *Jones*, 755 F.3d at 409 (“[A] website may be immune from liability for some of the third-party content it publishes but be subject to liability for the content that it is responsible for as a creator or developer.”); *Carafano*, 339 F.3d at 1123 (“Under the statutory scheme, an ‘interactive computer service’ qualifies for immunity so long as it does not also function as an ‘information content provider’ for the *portion* of the statement or publication at issue.”) (emphasis added).

information content provider.¹⁶⁸ Third, the dominant doctrinal test to determine the meaning of “development” is the “material contribution” test. It focuses on whether the entity developed what is allegedly unlawful about the content, distinguishing between actions “that are necessary to the display of unwelcome and actionable content”—which do not suffice to turn an entity into an “information content provider”—“and, on the other hand, responsibility for what makes the displayed content illegal or actionable”—which does suffice to turn an entity into an “information content provider.”¹⁶⁹ “Neutral tools” do not remove an entity from Section 230 immunity.¹⁷⁰ The material contribution test is a permissible construction of the statute.¹⁷¹ The Supreme Court assumes that Congress reads a proximate cause requirement into the law.¹⁷² The same can be said of proximate responsibility. Otherwise, under a literal interpretation of the terms, given the interconnectedness of the economy, nearly every party could be “responsible . . . in part” for the “development” of information.¹⁷³

In other ways, courts have misinterpreted this provision.

168. 47 U.S.C. § 230(c)(1).

169. *Jones*, 755 F.3d at 413–14.

170. *Marshall’s Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1271 (D.C. Cir. 2019) (“Those algorithms are ‘neutral means’ that do not distinguish between legitimate and scam locksmiths in the translation process.”).

171. *Fair Hous.*, 521 F.3d at 1167.

172. *See, e.g., Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014) (“[W]e generally presume that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute.”); *see In re Am. Express Anti-Steering Rules Antitrust Litig.*, 19 F.4th 127, 139–40 (2d Cir. 2021) (reviewing the “first step” principle in many areas of law).

173. Textualism is not literalism. Strict constructionism is “a degraded form of textualism that brings the whole philosophy into disrepute.” Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 23 (Amy Gutmann, ed., 1997); *see also id.* at 24 (“[T]he good textualist is not a literalist.”); Amy Coney Barrett, *Assorted Canards of Contemporary Legal Analysis: Redux*, 70 *CASE W. RES. L. REV.* 855, 857–59 (2020) (criticizing literalism).

Specifically, ex ante decisions to publish material makes an entity an information content provider, a point that courts have missed. Consider that an information content provider is one who is “responsible, in whole or in part, for the creation” of information. This includes ex ante decisions to publish on the internet, because that is the “creation” of the information for the sake of the internet. The ordinary meaning of a text includes not only its semantic content—that is, “the meaning of the words and phrases as combined by the rules of syntax and grammar”—but also its “pragmatic enrichment,” or “the contribution that context makes to meaning.”¹⁷⁴ Thus, the “full communicative content” results from both the semantic and the pragmatic meaning.¹⁷⁵ As a pragmatic matter, sometimes “what is said implicitly includes something else that is closely related. For example, if I say ‘Jack and Jill are married,’ this frequently communicates some additional information, which could have been stated explicitly as follows: ‘Jack and Jill are married [to each other].’”¹⁷⁶ Here, when the statute states that information is “creat[ed],” the implication is that the material is “created” on the internet, which is done by deciding to publish it.¹⁷⁷

Courts applying this interpretation have created absurd results. By holding that ex ante publication decisions are not protected under the statute, one can *never* sue the author because the author would be the “user” of an interactive computer service. This is clearly not the statute’s intent.

174. Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 488 (2013).

175. *Id.*

176. Lawrence B. Solum, *Contractual Communication*, 133 HARV. L. REV. F. 23, 28 (2019) (describing “implicature”).

177. *Batzel v. Smith*, 333 F.3d 1018, 1033 (9th Cir. 2003) (implicitly making a similar argument insofar as that “provided” indicates that the material must be provided “for use on the internet,” not simply “provided” in general); see Barrett, *Assorted Canards*, *supra* note 173, at 859 (“[T]extualism isn’t a mechanical exercise, but rather one involving a sophisticated understanding of language as it’s actually used in context.”).

After all, the cold comfort to many spurned plaintiffs is that they can sue the publisher of the defamatory message, as *Zeran* and other courts mention.¹⁷⁸ Yet courts have created precisely this holding, which is opposed to both the text and spirit of the statute.

Consider the case of *Batzel v. Smith*.¹⁷⁹ In that case, “sometime-handyman Robert Smith was working for Ellen Batzel, an attorney licensed to practice in California and North Carolina, at Batzel’s house in the North Carolina mountains.”¹⁸⁰ Smith, apparently, was also a sometime-detective. “Smith recounted that while he was repairing Batzel’s truck, Batzel told him that she was ‘the granddaughter of one of Adolf Hitler’s right-hand men.’”¹⁸¹ “Smith also maintained that as he was painting the walls of Batzel’s sitting room he overheard Batzel tell her roommate that she was related to Nazi politician Heinrich Himmler.”¹⁸² “According to Smith, Batzel told him on another occasion that some of the paintings hanging in her house were inherited.”¹⁸³ To Smith the sometime-detective, “these paintings looked old and European.”¹⁸⁴ Assembling these clues, Smith assumed that Batzel owned “paintings were looted during WWII and are the rightful legacy of the Jewish people.”¹⁸⁵ Smith emailed his unsubstantiated hunches to

178. *Doe v. Myspace, Inc.*, 528 F.3d 413, 419 (5th Cir. 2008) (“Parties complaining that they were harmed by a Web site’s publication of user-generated content have recourse; they may sue the third-party user who generated the content, but not the interactive computer service that enabled them to publish the content online.”); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (“None of this means, of course, that the original culpable party who posts defamatory messages would escape accountability.”).

179. 333 F.3d 1018 (9th Cir. 2003).

180. *Id.* at 1020.

181. *Id.* at 1020–21.

182. *Id.* at 1021.

183. *Id.*

184. *Id.*

185. *Id.*

“the Museum Security Network,” which “maintains both a website and an electronic e-mailed newsletter about museum security and stolen art.”¹⁸⁶ Tom Cremers, the operator of the Network, “published Smith’s e-mail message to the Network . . . on the Network listserv” and “also posted that listserv, with Smith’s message included, on the Network’s website.”¹⁸⁷ The Ninth Circuit incredibly held that Cremers, who made an *ex ante* publication decision, was not an “information content provider.”¹⁸⁸ This is an untenable interpretation of the statute, and is a direct result of the *Zeran* approach of protecting publication activities.

C. *Section 230(c)(1)*

Section 230(c)(1) reads:

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.¹⁸⁹

As mentioned above, courts have erroneously viewed subsection (c)(1) as the central part of the statute. However, the plain words of Section 230(c)(1) and an analysis of the statutory structure both indicate that Section 230(c)(1) does not create independent legal immunity but rather reaffirms the common law rule against distributor liability. The common law rule stated that an intermediary is not considered a publisher.¹⁹⁰ That is precisely the same rule

186. *Id.*

187. *Id.* at 1022.

188. *Id.* at 1031 (“Cremers cannot be considered the content provider of Smith’s e-mail for purposes of § 230.”).

189. 47 U.S.C. § 230(c)(1).

190. See RESTATEMENT (SECOND) OF TORTS § 577 (AM. L. INST. 1977); *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 at *3 (N.Y. Sup. Ct. May 24, 1995) (“[D]istributors such as book stores and libraries may be liable for defamatory statements of others only if they knew or had reason to know of the defamatory statement at issue.”); *Cubby, Inc. v. Compuserve Inc.*, 776 F. Supp. 135, 139 (S.D.N.Y. 1991) (“New York courts have long held that

that Section 230(c)(1) states: that the intermediary (“interactive computer service”) shall not “be treated as the publisher or speaker of any information” that the authors (“information content provider”) write, produce, create, or develop.¹⁹¹ Section 230(c)(1) does not grant immunity; it is rather “definitional.”¹⁹² It does not contain any independent legal obligations, but rather piggybacks on distributor liability and reaffirms the common law.¹⁹³

To say Section 230(c)(1) isn’t central is not to say it is useless. Section 230(c)(1) updates the terminology (not the rule) of the common law for the computer age. Audiences in 2022 might consider the terms “interactive computer service” and “information content provider” quaint. But in 1996, the updating of terminology was useful and novel: not many judges or scholars had given thought to this issue, and it was useful to put the common-law rule in technology terms so that courts (who generally lag in the technological adoption curve) could avoid confusion.¹⁹⁴ Section 230(c)(1) updated the common law’s front-end interface, not the back-end code.

In this way, Section 230 is very close to a declaratory statute.¹⁹⁵ This is not unusual. Many statutes “merely

vendors and distributors of defamatory publications are not liable if they neither know nor have reason to know of the defamation.”).

191. Judge Easterbrook made a similar suggestion in *GTE. See Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003) (“On this reading, an entity would remain a ‘provider or user’—and thus be eligible for the immunity under § 230(c)(2)—as long as the information came from someone else; but it would become a ‘publisher or speaker’ and lose the benefit of § 230(c)(2) if it created the objectionable information.”). This is correct insofar as it concludes that the active-passive distinction is the test of whether Section 230(c)(1) applies; it is incorrect insofar as it assumes that an active entity loses the protections of Section 230(c)(2).

192. *Id.* at 660 (“Why not read § 230(c)(1) as a definitional clause rather than as an immunity from liability, and thus harmonize the text with the caption?”). An excellent idea: it would not only “harmonize the text with the caption,” it would harmonize the text *with the text. Id.*

193. *See supra* note 126 (analyzing *Cubby*).

194. After all, *Stratton Oakmont* and *Cubby* were the only two cases to deal with this issue before Congress passed Section 230.

195. It is “definitional.” *GTE*, 347 F.3d at 660.

reaffirm and reiterate the common law liability of a public service corporation” rather than create new rights.¹⁹⁶ Indeed, inasmuch as Section 230 is a federal tort statute,¹⁹⁷ the most famous federal tort statute—the Federal Tort Claims Act (FTCA)—likewise “did not create a new species of liability; it merely adopted the standards of tort law as applied to private individuals.”¹⁹⁸ The same has been stated regarding the Federal Rules of Criminal Procedure,¹⁹⁹ the Occupational Safety and Health Act,²⁰⁰ and other federal²⁰¹ and state statutes.²⁰²

1. “Publisher or speaker”

There are two ways to interpret the provision “publisher or speaker”: it can refer to the action (i.e., the legal cause of action) or the activity (i.e., the nonlegal activity that gives rise to a legal cause of action). If “publisher or speaker” refers to the nature of the legal cause of action, then Section 230(c)(1) protects against publisher torts, like defamation and false light, which rely on publisher liability, but would not protect against distributor liability. If the focus, however, is on the nature of the activity that gives rise to the cause of action, Section 230(c)(1) protects from all “lawsuits seeking to hold a service provider liable for its exercise of a

196. *Cole v. Ariz. Edison Co.*, 53 Ariz. 141, 150 (Ariz. 1939).

197. See *infra* notes 203–38 and accompanying text (discussing the extent of the word “publisher”).

198. *Wetherill v. Geren*, 616 F.3d 789, 793 (8th Cir. 2010).

199. See, e.g., *United States v. Pitt*, 193 F.3d 751, 757 (3d Cir. 1999) (“Therefore, the Rule does not alter the common law requirements.”).

200. See, e.g., *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 709 (5th Cir. 1981) (OSHA “neither enlarges nor diminishes ‘common law or statutory rights, duties, or liabilities.’”).

201. See, e.g., *Ball v. Kotter*, 723 F.3d 813, 823 (7th Cir. 2013) (“The Rules, however, do not establish a separate duty or cause of action, and they are not an independent font of liability.”) (internal quotations omitted).

202. See, e.g., *Tubbs v. Nicol*, 675 F. App’x. 437, 439 (5th Cir. 2017) (“Under Texas law, IIED is a ‘gap-filler’ tort [that was] never intended to supplant or duplicate existing statutory or common-law remedies.”).

publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content.”²⁰³

Starting with *Zeran*, courts have interpreted subsection (c)(1)'s language of “publisher or speaker” to describe the *activity* of publishing rather than causes of action based on one's role as a publisher.²⁰⁴ This holding is necessary to justify the conclusion that subsection (c)(1) carries the entire immunity of Section 230.²⁰⁵ In applying (c)(1) this way, courts have dismissed, on Section 230 grounds, lawsuits on a broad array of causes of action, including sex trafficking of minors,²⁰⁶ prostitution,²⁰⁷ housing discrimination,²⁰⁸ securities fraud and cyberstalking,²⁰⁹ terrorism,²¹⁰ harassment,²¹¹ intentional assault,²¹² and the illegal sale of guns.²¹³

The better reading of Section 230(c)(1) is the more limited one protecting against publisher torts.²¹⁴ All the

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

204. *See, e.g.*, *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009); *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 174 (2d Cir. 2016); *City of Chicago v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010); *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 139 (4th Cir. 2019); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.D.C. 2014); *Doe v. Backpage.com, LLC*, 817 F.3d 12, 20 (1st Cir. 2016).

205. *See Zeran*, 129 F.3d at 330.

206. *Backpage*, 817 F.3d at 22; *see generally* *M.A. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011).

207. *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 967–69 (N.D. Ill. 2009).

208. *Chi. Laws.' Comm. for Civ. Rts. Under L., Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669–72 (7th Cir. 2008).

209. *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d at 418–22.

210. *See generally* *Gonzalez v. Google LLC*, 2 F.4th 871 (9th Cir. 2021); *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116 (N.D. Cal. 2016).

211. *Herrick v. Grindr, LLC*, 17-CV-932, 2017 WL 744605, at *2–4 (S.D.N.Y. Feb. 24, 2017).

212. *See generally* *Klayman v. Zuckerberg*, 753 F.3d 1354 (D.D.C. 2014).

213. *Gibson v. Craigslist, Inc.*, No. 08 Civ. 7735, 2009 WL 1704355, at *3–4 (S.D.N.Y. June 15, 2009).

214. This argument has been expertly made from a torts perspective by

functions of a publisher mentioned by *Zeran*—“deciding whether to publish, withdraw, postpone or alter content”²¹⁵—would make subsection (c)(1) inapplicable. If an entity was “deciding whether to publish,” Section 230 would not apply at all—that kind of ex ante decision-making would make an entity an information content provider and thus Section 230 would not apply.²¹⁶ Ditto with the decision to “alter content”—in that case, the entity would be an information content provider because it would be “responsible . . . in part” for the “development” of the information.²¹⁷

Rather, the more natural reading is to give the term its legal meaning. Textualism gives well-accepted legal terms their “ordinary” legal meaning.²¹⁸ So when a text speaks of being “treated” as a “publisher or speaker,” this refers to *legal* treatment based on causes of action based on one’s status as a publisher or speaker. In addition, the cause-of-action reading of “publisher or speaker” also comports better with the statutory words under the anti-surplusage canon: it gives meaning to both “publisher” and “speaker” because there are different causes of action that relate to speaker or publisher liability.²¹⁹ The *Zeran* approach, in contrast,

Professors Zipursky and Goldberg. See JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* 330–37 (Harvard Univ. Press, 2020); Benjamin C. Zipursky, *The Monsanto Lecture: Online Defamation, Legal Concepts, and the Good Samaritan*, 51 Val. Univ. L. Rev. 1, 40–52 (2016). This Section aims to forward arguments from a statutory interpretation perspective.

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

216. See *supra* Part II.B.

217. 47 U.S.C. § 230(f)(3).

218. See *generally* SCALIA & GARNER, *supra* note 129, at 73 (an interpreter must consider the “specialized meaning” that the law gives to certain words, for instance, the “presumption that *person* in legal instruments denotes a corporation and other entity, not just a human being”) (emphasis in original). See *also* *United States v. Scott*, 990 F.3d 94, 128 (2d Cir. 2021) (en banc) (Menashi, J., concurring in part and concurring in the judgment) (“The ultimate objective is to determine the meaning the law assigns to the text and therefore its legal effect.”).

219. See SCALIA & GARNER, *supra* note 129 (reviewing anti-surplusage canon).

ignores the role of the word “speaker.”²²⁰ Overall, this conclusion is forced by its strained interpretation of Section 230. It must expand the meaning of “publisher or speaker” beyond the natural meaning of referring to torts based on one’s status as a “publisher or speaker” to refer to the act of publishing.

Cases that rely on subsection (c)(1)’s “publisher or speaker” clause to protect any publishing activity therefore are incorrect.²²¹ This is not to say that these courts reached the wrong conclusions. Entities have broader immunity under Section 230(c)(2), which states without explicit limitation that entities shall not be held liable (and the fact that limitations are provided in Section 230(e) indicates that Section 230(c)(2) alone does not have such limitations). But such immunity does not come from Section 230(c)(1)’s “publisher or speaker” provision, which covers only limited causes of action. Courts are forced to stretch “publisher or speaker” to cover all causes of action because, following *Zeran*, they stuff all of Section 230(c) into subsection (c)(1) rather than giving effect to the entire statute.

2. Distributor Liability

The fact that the intermediary immunity shifts from subsection (c)(1) to subsection (c)(2)—and that subsection (c)(1) can be properly interpreted to refer to publisher-based torts rather than to causes of action based on the activity of publishing—reopens a doctrinal issue that has been buried for decades: whether Section 230(c)(1) covers distributor

220. Beyond this, the expansive reading of “publisher or speaker” is internally inconsistent with the *Zeran* opinion itself, which viewed “publisher,” in one sense, as indicating the ordinary, nonlegal meaning (for publisher liability) and also super-specialized legal meaning (for distributor liability).

221. See, e.g., *Gonzalez v. Google LLC*, 2 F.4th 871, 891 (9th Cir. 2021) (“The Gonzalez Plaintiffs’ characterization of their claim as asserting a ‘duty not to support terrorists’ overlooks that publication itself is the form of support Google allegedly provided to ISIS.”); *Force v. Facebook, Inc.*, 934 F.3d 53, 65 (2d Cir. 2019) (the “alleged conduct by Facebook falls within the heartland of what it means to be the ‘publisher’ of information under Section 230(c)(1)”).

liability. In the wake of *Zeran*'s dominance, few have claimed that subsection (c)(1) includes distributor liability; after all, *Zeran* extended immunity based on the *activity* of publishing, which would include distributor liability as well.²²² Though many judges and scholars have correctly pointed out that this conclusion is not correct from the perspective of tort law, it is also incorrect as a matter of statutory interpretation.²²³ Now that the brush is cleared from subsection (c)(1), this conclusion can be seen more clearly.

Zeran forwards two arguments in support of its conclusion that Congress intended to remove interactive computer services from defamation liability *entirely*. The first was a textual argument. The *Zeran* court interpreted "publisher" in reference to a hyperspecialized legal meaning: under the republication rule in the law of torts, being a publisher is "a necessary element in a defamation action," and "only one who publishes can be subject to this form of tort liability."²²⁴ In other words, both a publisher and a

222. After *Zeran*, there have been no cases stating that distributor liability attaches on the internet.

223. See, e.g., *Barrett v. Rosenthal*, 5 Cal. Rptr. 3d 416, 428 (Cal. Ct. App. 2003) (*Zeran* "ignored the complementary common law rule described in section 581(1) of the Restatement, which is that "one who . . . transmits defamatory matter published by a third person is subject to liability *if, but only if*, he knows or has reason to know of its defamatory character."). *Barrett* cites dozens of law review articles from the turn of the 21st century that discussed this issue. The fact that there have been hardly any recent articles on this subject testifies to *Zeran*'s dominance.

224. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997); see also *id.* ("It is undoubtedly true that mere conduits, or distributors, are subject to a different standard of liability. As explained above, distributors must at a minimum have knowledge of the existence of a defamatory statement as a prerequisite to liability. But this distinction signifies only that different standards of liability may be applied *within* the larger publisher category, depending on the specific type of publisher concerned."). But see *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 15–16 (2020) ("Congress enacted § 230 just one year after *Stratton Oakmont* used the terms 'publisher' and 'distributor,' instead of 'primary publisher' and 'secondary publisher.' If, as courts suggest, *Stratton Oakmont* was the legal backdrop on which Congress legislated, one might expect Congress to use the same terms *Stratton Oakmont*

distributor are both considered “publishers” in the law of torts.²²⁵ Second, *Zeran* forwarded an argument from purpose.²²⁶ The best way to conceptualize *Zeran*’s textual argument is that “publisher” is a term of art with a specialized legal meaning, and this specialized term of art includes “distributor” liability.²²⁷ This argument has theoretical heft and persuasive force. After all, statutes are a legal artifact, and they are written in the language of the law.²²⁸

But this argument fails for a few reasons. The clearest counterargument is from text and structure. As the above analysis shows, subsection (c)(1) limits liability based on publisher-based torts and states that a distributor shall not be treated as a “publisher or speaker.” The text means what it says: there is no basis for reading in additional immunity. The canon of *inclusio unius* (and common sense) indicates as

used.”) (citation omitted).

225. *Zeran*, 129 F.3d at 332 (“To the extent that decisions like *Stratton* and *Cubby* utilize the terms ‘publisher’ and ‘distributor’ separately, the decisions correctly describe two different standards of liability. *Stratton* and *Cubby* do not, however, suggest that distributors are not also a type of publisher for purposes of defamation law.”).

226. *Id.* at 333 (“Liability upon notice would defeat the dual purposes advanced by § 230 of the CDA,” because “liability upon notice reinforces service providers’ incentives to restrict speech and abstain from self-regulation. If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement—from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information’s defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context Because the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230’s statutory purposes,” the court concluded that it “will not assume that Congress intended to leave liability upon notice intact.”) (citations omitted).

227. *See id.* at 331 (citing PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 810 (W. Page Keeton, et al. eds., 5th ed. 1984)).

228. *See supra* note 218.

much²²⁹: “when Congress said ‘publisher,’ it meant ‘publisher,’ and not distributor.”²³⁰ It would be odd indeed to read “publisher” as “publisher and distributor” when those two entities are subject to significantly different liability regimes. This is especially compelling given the comparison between subsections (c)(1) and (c)(2). Congress knows how to provide broader immunity, and explicitly does so in the very next subsection. So “had Congress wanted to eliminate both publisher and distributor liability, it could have simply created a categorical immunity in § 230(c)(1): No provider ‘shall be held liable’ for information provided by a third party.”²³¹ “After all, it used that exact categorical language in the very next subsection,” Section 230(c)(2).²³² “Where Congress uses a particular phrase in one subsection and a different phrase in another, we ordinarily presume that the difference is meaningful.”²³³

Second, *Zeran* misapprehended the legal meaning at hand. Even for those who say that the legal meaning of a text should be primary, Congressional intent is still the touchstone—Congress writes against the backdrop of the common law and therefore the legal meaning is the meaning Congress intended. Here, “publisher” had a well-accepted legal meaning: it is a status under the law of torts that stands in contrast to a “distributor.” And given that Section 230’s authors were reading *Stratton Oakmont*, not *Prosser on Torts*, and that *Stratton Oakmont* used “publisher” as opposed to “distributor,” the term “publisher” stands in contrast to the term “distributor.” “Congress enacted § 230

229. See SCALIA & GARNER, *supra* note 129, § 10, at 107–11 (“Negative-Implication Canon”).

230. David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147, 168–69 (1997).

231. *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 16 (2020).

232. *Id.*

233. *Id.* (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)).

just one year after *Stratton Oakmont* used the terms ‘publisher’ and ‘distributor,’ instead of ‘primary publisher’ and ‘secondary publisher.’ If, as courts suggest, *Stratton Oakmont* was the legal backdrop on which Congress legislated, one might expect Congress to use the same terms *Stratton Oakmont* used.”²³⁴ This interpretation hews closer to Congressional intent (insofar as it parallels the terms in *Stratton Oakmont*), but still adheres to the legal meaning of the term.

Third, given that Congress imposed distributor liability in the CDA, it would be “odd to hold, as courts have, that Congress implicitly eliminated distributor liability in the very Act in which Congress explicitly imposed it.”²³⁵ Fourth, this interpretation contrasts with *Zeran*’s approach of interpreting “publisher” according to its ordinary meaning in terms of exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content.”²³⁶ The text cannot both refer to the term’s ordinary meaning and to a hyperspecialized legal meaning. For these reasons, the commentators, who have overwhelmingly argued that *Zeran* was wrong to exclude distributor liability, are correct.²³⁷

In sum, the text does not contemplate a limitation on distributor liability. By stating that a conduit should not be treated as a “publisher,” under the canon of *inclusio unius*, and common sense, the statute did not intend to remove “distributor” liability.

234. *Id.* at 15–16 (citation omitted).

235. *Id.* at 15.

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

237. *See supra* note 223; *see also* *Doe v. America Online*, 783 So. 2d 1010, 1025 (Fla. 2001) (Lewis, J., dissenting) (collecting commentaries).

D. *Section 230(c)(2)(A)*

Section 230(c)(2)(A) states that:

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 or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.²³⁸

As discussed in Part II, subsection (c)(2) applies if an entity takes action to moderate content, or otherwise “restrict[s] access to or availability of” certain categories of objectionable material, stating that such entities are not to “be held liable” for the materials it did *not* moderate.²³⁹ Some voices today have called for internet companies to be held liable as publishers of *all* content on their sites simply because the companies moderate *some* content.²⁴⁰ Such calls are squarely rejected by the very core of Section 230(c)(2). Within subsection (c)(2), subsection (c)(2)(A) applies when an entity takes action itself; subsection (c)(2)(B) applies when the entity provides the tools to others to take such action. Each will be analyzed in turn, though for this Section, “subsection (c)(2)” refers to subsection (c)(2)(A).²⁴¹

Section 230(c)(2) is highly protective. There are two ways in which Section 230(c)(2) is broader than Section 230(c)(1). First, unlike Section 230(c)(1), which is restricted to the

238. 47 U.S.C. § 230(c)(2)(A).

239. *Id.*

240. *See, e.g.,* Cornelius v. DeLuca, 709 F. Supp. 2d 1003, 1022 (D. Idaho 2010) (“SI03 asserts that because Bodybuilding.com appointed moderators on the Forum, and allowed the moderators to censor the content of the Forum, Bodybuilding.com is a speaker or publisher for every objectionable statement.”).

241. This is because § 230(c)(2)(B) refers to § 230(c)(2)(A), and because most cases would fall into § 230(c)(2)(A).

treatment of an intermediary as a “publisher or speaker,”²⁴² Section 230(c)(2) contains no such limiting language, but rather states that the interactive computer service shall not “be held liable.”²⁴³ Though the precise contours of the scope of this immunity are up for debate, Section 230(c)(2)’s protections are broader than Section 230(c)(1). This more expansive language would certainly protect against, say, distributor liability.

Second, Section 230(c)(2) protects against “material,” whereas Section 230(c)(1) protects against “information.” By the plain meaning of the terms, “material” is broader than “information.” “Material” would cover videos and images, which have no informative content *per se*. “Information,” rather, by its very terms, covers content that informs. This would include the content of text, as well as information contained within videos or displayed within images. By protecting “material” beyond “information,” Section 230(c)(2) sweeps more broadly than Section 230(c)(1).

However, just as Good Samaritan laws are not limitless, Section 230(c)(2) is not limitless either. There are three clear limitations on and three open questions regarding Section 230(c)(2)’s scope.

1. Section 230(c)(2) Immunity Only Attaches in the Narrow Circumstances Outlined by Statute

Section 230(c)(2) protects technology companies only in narrow and well-defined situations. It protects “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.”²⁴⁴ While the enumerated list of categories are well-defined and familiar legal categories, the term “otherwise objectionable” is

242. 47 U.S.C. § 230(c)(1).

243. *Id.* § 230(c)(2).

244. *Id.* § 230(c)(2)(A).

ambiguous.

There are two ways to read the catch-all term “otherwise objectionable”: an “unconstrained” reading does not constrain the catch-all phrase “otherwise objectionable” with the preceding list of enumerated terms, but rather states that a company enjoys Section 230(c)(2) immunity as long as it legitimately “considers” the removed material “objectionable.”²⁴⁵ Alternatively, a “constrained” reading states that the catch-all term “otherwise objectionable” in this provision is constrained by the previously enumerated terms and does not provide an unbounded license to remove content for any reason.

Though there are a number of arguments for the “unconstrained” reading, the “constrained” reading is the better reading of the statute, because the “unconstrained” reading conflicts with a number of principles of statutory interpretation.²⁴⁶

245. Cf. *Smith v. Trusted Universal Standards in Elec. Transactions, Inc.*, Civil No. 09-4567, 2010 WL 1799456, at *6 (D.N.J. May 4, 2010) (“Congress included the phrase ‘or otherwise objectionable’ in its list of restrictable materials, and nothing about the context before or after that phrase limits it to just patently offensive items.”); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 631 (D. Del. 2007) (§ 230 provides broad “immunity” for “editorial decisions regarding screening and deletion”); *Pallorium, Inc. v. Jared*, No. G036124, 2007 WL 80955, at *7 (Cal. Ct. App. Jan. 11, 2007) (same); Eric Goldman, *Online User Account Termination and 47 U.S.C. § 230(c)(2)*, 2 U.C. IRVINE L. REV. 659, 667 (2012).

246. There are a number of arguments for the “unconstrained” reading. The strongest argument is that the “constrained” approach does not even overrule *Stratton Oakmont* because the material that PRODIGY moderated (including hate speech) does not fall into any of the enumerated categories. See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 at *2 (N.Y. Sup. Ct. May 24, 1995) (citing PRODIGY’s community guidelines). Hate speech, however, is inappropriate for children, and therefore would fall within the catchall phrase “otherwise objectionable.” In addition, one can claim that the term “otherwise” is ambiguous: it can mean similarly or dissimilarly. If Congress wanted to limit the catch-all terms to the preceding enumerated terms, it should have used the term “similarly objectionable” instead of “otherwise objectionable.” “Otherwise objectionable” indicates a desire to cover the field of what an entity might consider objectionable. At best, the term “otherwise” is ambiguous (in the narrow, linguistic sense) insofar as it can refer to two separate meanings. Nonetheless, ambiguity alone, at best, negates an argument from plain meaning. The arguments for the constrained approach do not rely solely on plain meaning;

First, had Congress intended the “unconstrained” reading, it would have simply used the term “objectionable” without enumerating categories because the statute would still apply to material that is obscene, lewd, lascivious, filthy, excessively violent, or harassing because any material possessing those qualities would also be objectionable. The presence of these more specific terms, therefore, shows that Congress limited the scope of “otherwise objectionable” by inserting the preceding terms.

Second, the canon of meaningful variation and a comparison with subsection (c)(1) supports the constrained reading. Section 230(c)(1) protects those who distribute “any” information.²⁴⁷ Section 230(c)(2) protects the moderation of material that is “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.”²⁴⁸ Congress knows how to write expansively: it did so in Section 230(c)(1). The fact that Congress limited the material discussed in the statute indicates that Section 230(c)(2) is meant to have a narrower, limited construction.

Third, the canon against superfluity states that “a court should give effect, if possible, to every clause or word of a statute.”²⁴⁹ The “unconstrained” reading offends this canon: it renders superfluous not just one enumerated category, but *every* enumerated category. It deletes “obscene, lewd, lascivious, filthy, excessively violent, harassing” from the statute. This is not the best reading of the statute. The presence of terms indicate they have meaning.²⁵⁰ “These words cannot be meaningless, else they would not have been used.”²⁵¹

therefore, this potential ambiguity does not dampen their persuasive force.

247. 47 U.S.C. § 230(c)(1) (emphasis added).

248. *Id.* § 230(c)(2).

249. *Moskal v. United States*, 498 U.S. 103, 104 (1990).

250. *Yates v. United States*, 574 U.S. 528, 545–46 (2015) (“Had Congress intended the latter ‘all encompassing’ meaning, we observed, ‘it is hard to see why it would have needed to include the examples at all.’”).

251. *United States v. Butler*, 297 U.S. 1, 65 (1936); *Williams v. Taylor*, 529 U.S.

Fourth, the canon of *ejusdem generis* instructs that we interpret catch-all terms in light of the common denominators that connect the preceding statutory terms. “[W]hen a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows.”²⁵² *Ejusdem generis* applies here: we should not interpret the catch-all term “otherwise objectionable” in isolation.²⁵³ Rather, its meaning is moored to the preceding terms.

Last, the next subsection—(c)(2)(B)—indicates that Congress thought that the list could not be boiled down to the term “objectionable.” In that subsection, Congress writes that an interactive computer service will not be liable for “any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (A).”²⁵⁴ So when

362, 404 (2000) (The rule against superfluity dictates that courts “give effect, if possible, to every clause and word of a statute.”).

252. *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 586 (2008); *see also* *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001) (holding that the phrase “any other class of workers engaged in . . . commerce” is limited by preceding references to “seamen” and “railroad employees”) (“[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.”) (internal quotations omitted); *Yates*, 574 U.S. at 546 (“Had Congress intended ‘tangible object’ in § 1519 [which refers to ‘any record, document, or tangible object’] to be interpreted so generically as to capture physical objects as dissimilar as documents and fish, Congress would have had no reason to refer specifically to ‘record’ or ‘document.’”).

253. *Ejusdem generis* and the anti-surplusage canon often work in tandem. *See* *CSX Transp., Inc. v. Ala. Dep’t of Revenue*, 562 U.S. 277, 295 (2011) (“We typically use *ejusdem generis* to ensure that a general word will not render specific words meaningless.”); *Yates*, 574 U.S. at 546 (“The Government’s unbounded reading of ‘tangible object’ would render those words misleading surplusage.”); *Cir. City Stores*, 532 U.S. at 114 (“[T]here would be no need for Congress to use the phrases ‘seamen’ and ‘railroad employees’ if those same classes of workers were subsumed within the meaning of the . . . residual clause.”); *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (“If . . . the term ‘assessment,’ by itself, signified [t]he entire plan or scheme fixed upon for charging or taxing, . . . the TIA would not need the words ‘levy’ or ‘collection’; the term ‘assessment,’ alone, would do all the necessary work.”).

254. 47 U.S.C. § 230(c)(2)(B).

Congress does refer to the categories enumerated in subsection (c)(2)(A) but does so with brevity, it does not refer to them by stating the catch-all term “objectionable” but rather makes a conscious cross-reference. This indicates that Congress thought that the enumerated list could not be condensed to the term “objectionable.”²⁵⁵

Courts have recognized this point—that content removed for being “otherwise objectionable” must bear *some* relationship to the categories Congress enumerated in Section 230.

One may find an array of items objectionable; for instance, a sports fan may find the auction of a rival team’s jersey objectionable. However, Congress provided guidance on the term “objectionable” by providing a list of seven examples and a statement of the policy behind Section 230. Accordingly, the Court concludes that “objectionable” content must, at a minimum, involve or be similar to pornography, graphic violence, obscenity, or harassment.²⁵⁶

255. The “constrained” view also answers a question that has plagued the *Zeran* approach. The *Zeran* approach cannot easily account for one of the stated purposes of Section 230: “to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.” 47 U.S.C. § 230(b)(5). Congress has been forced to resort to declaratory amendments such as SESTA and FOSTA to override some of the more egregious post-*Zeran* decisions. However, § 230(b)(5) makes perfect sense under the “constrained” approach: it limits, rather than extends, the protections of Section 230 to entities that *remove* “obscenity.”

256. Nat’l Numismatic Certification, LLC v. eBay, Inc., No. 08-CV-42-Orl-19GJK, 2008 WL 2704404, at *25 (M.D. Fla. July 8, 2008). *see also* Song fi Inc. v. Google, Inc., 108 F. Supp. 3d 876, 883 (N.D. Cal. 2015) (“Given the list preceding ‘otherwise objectionable,’—‘obscene, lewd, lascivious, filthy, excessively violent, [and] harassing . . .’—it is hard to imagine that the phrase includes, as YouTube urges, the allegedly artificially inflated view count associated with ‘Luv ya.’”); *Sherman v. Yahoo! Inc.*, 997 F. Supp. 2d 1129, 1138 (S.D. Cal. 2014) (declining “to broadly interpret ‘otherwise objectionable’ material to include any or all information or content”); *Goddard v. Google, Inc.*, No. C 08-2738, 2008 WL 5245490, at *6 (N.D. Cal. Dec. 17, 2008) (applying “the canon of ejusdem generis” and concluding that Google’s “requirements relate to business norms of fair play and transparency and are beyond the scope of § 230(c)(2)”; *Google, Inc. v. MyTriggers.com, Inc.*, No. 09CVH10-14836, 2011 WL 3850286, at *4 (Ohio Ct. Com. Pl. 2011) (“The examples preceding the phrase ‘otherwise objectionable’

As “icing on a cake already frosted,”²⁵⁷ Rep. Christopher Cox (the co-author of Section 230) has explicitly endorsed the constrained reading of “otherwise objectionable”:

The “otherwise objectionable” coda extends the half-dozen specifically listed categories in subsection (c)(2) to include other categories, pursuant to the well-established rule of statutory interpretation (of *ejusdem generis*) that when general words follow specific words in a law, the general words embrace things similar in nature Nor is Section 230 immunity automatically provided on account of moderation or curation policies that restrict access to or availability of content on the basis of political viewpoint. Only if the moderated content falls within the ambit of Section 230(c)(2), including the “*specific categories or categories similar in nature*,” does immunity attach.²⁵⁸

Therefore, internet entities are immune from suit if they remove content that they consider “obscene,” “lewd,” “lascivious,” “filthy,” “excessively violent,” “harassing,” or “otherwise” similar to these “objectionable” categories.²⁵⁹ Beyond that, the internet companies are not immune from suit under subsection (c)(2).²⁶⁰

clearly demonstrate the policy behind the enactment of the statute and provide guidance as to what Congress intended to be ‘objectionable’ content.”); *see also* *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1178 (9th Cir. 2009) (Fisher, J., concurring) (“[E]xtending immunity beyond the facts of this case could pose serious problems if providers of blocking software were to be given free license to *unilaterally* block the dissemination of material by content providers under the literal terms of § 230(c)(2)(A).”) (emphasis in original).

257. *Yates*, 574 U.S. at 557 (Kagan, J., dissenting).

258. CHRISTOPHER COX, RESPONSES TO WRITTEN QUESTIONS SUBMITTED BY THE HONORABLE JOHN THUNE at 7 (last visited Aug. 2, 2022), <https://netchoice.org/wp-content/uploads/2020/08/2020-08-21-Chris-Cox-Responses-Majority-QFRs.pdf> (emphasis added). This is not conclusive evidence on its own, but rather is “icing on a cake already frosted.” *Yates*, 574 U.S. at 557.

259. 47 U.S.C. § 230(c)(2).

260. This rule would apply regardless of the substantive views expressed in the removed content. Under the popular understanding of § 230, a technology company would be immune from suit for removing religious content if it considers the religion objectionable and for removing content related to sexual orientation if it considers the sexual orientation objectionable. For example, eHarmony initially allowed profiles only for heterosexual couples and excluded gay couples. It extended its service to gay couples to settle civil rights lawsuits. *See* Neil Clark Warren, *eHarmony Founder, Says Gay Marriage “Damaged His Company,”*

The enumerated terms have clear legal meanings. The first four adjectives in subsection (c)(2)—“obscene, lewd, lascivious, filthy”—are terms that often appear together.²⁶¹ The term “excessively violent” does not appear elsewhere in the U.S. Code, but the Communications Decency Act regulated “violent” content.²⁶² “Harassing” refers to actions that are impermissible insofar as they are inappropriately targeted or directed at an individual: “harassment . . . is directed toward an individual rather than toward the public in general.”²⁶³ Spam would naturally fall into “harassing”

HUFFINGTON POST (updated Feb. 2, 2016), https://www.huffpost.com/entry/neil-clark-warren-eharmon_n_2694711; Rachel Gordon, *EHarmony Settles Lawsuit Over Gay Matchmaking*, S.F. CHRONICLE (Jan. 27, 2010) (noting that eHarmony “didn’t offer gay, lesbian and bisexual matchmaking services on its primary Web site, eHarmony.com, until last spring”).

261. For instance, the string of terms is found in the federal criminal laws outlawing the transportation of obscenity and in numerous state statutes. 18 U.S.C. §§ 1462(a)-(b) (outlawing the transportation of “any obscene, lewd, lascivious, or filthy” book or photograph); *see also* United States v. Limehouse, 285 U.S. 424, 425 (1932) (stating that “Section 211 of the Criminal Code [18 USCA § 334] declares unmailable ‘every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, print, or other publication of an indecent character’”). Similar strings are found in federal regulation of cable programming. 47 U.S.C. § 532(h) (“Any cable service . . . shall not be provided . . . if such cable service . . . is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent.”).

262. Subtitle B of the CDA was entitled “Violence.” Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 139. Section 551(b)(1) required a rating system for “video programming that contains sexual, violent, or other indecent material” to permit parents to be “informed before it is displayed to children.” *Id.* at 140. The FCC then used this authority to require televisions to allow blocking technology. *See* Amy Fitzgerald Ryan, *Don’t Touch That V-Chip: A Constitutional Defense of the Television Program Rating Provisions of the Telecommunications Act of 1996*, 87 GEO. L.J. 823, 825 (1999).

263. *People v. Todaro*, 26 N.Y.2d 325, 330 (1970). *See also* *Harassment*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“Words, conduct, or action (usu. repeated or persistent) that, being *directed at a specific person*, annoys, alarms, or causes substantial emotional distress”); N.Y. PENAL LAW § 240.25 (McKinney 2022) (“A person is guilty of harassment in the first degree when he or she intentionally and repeatedly harasses another person”); MASS. GEN. LAWS ANN. ch. 258E, § 1 (West 2022) (defining “harassment”) (“[three] or more acts of willful and malicious conduct *aimed at a specific person* committed with the intent to cause fear, intimidation, abuse or damage to property”); STATE BAR OF ARIZONA, REVISED ARIZONA JURY INSTRUCTIONS (CRIMINAL) 340 (5th ed. 2019),

of objectionable content rather than to *viewpoints* with which the service provider might disagree. At the very least, the context indicates that for a service provider to receive immunity for restricting access to speech that is “otherwise objectionable,” the objection must be based on the *category* of speech rather than the *viewpoint* of the speech.²⁶⁵

Second, as Eugene Volokh and Adam Candeub write, the term “otherwise objectionable” is limited “to material that was traditionally viewed as regulable in electronic communications media—and was indeed regulated by the Communications Decency Act of 1996, as part of which § 230 was enacted.”²⁶⁶ Under this view:

“otherwise objectionable” might thus cover other materials discussed elsewhere in the CDA, for instance anonymous threats (§ 502), unwanted repeated communications (§ 502), nonlewd nudity (§ 506), or speech aimed at “persuad[ing], induc[ing], entic[ing], or coerc[ing]” minors into criminal sexual acts (§ 508).²⁶⁷

This is a persuasive interpretation given the “whole act” canon states that “plain meaning of the statute” is ascertained by looking to “the language and design of the statute as a whole.”²⁶⁸ It therefore makes sense to look to the

265. Indeed, “the other CDA provision that facilitated parental control via blocking and filtering technologies was the provision for violence and sex ratings of television programs (§ 551), which expressly *rejected* attempts to restrict ‘objectionable’ political speech.” Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. § 230(C)(2)*, 1 J. OF FREE SPEECH 175, 184 (2021) (emphasis in original). “Section 551 said that the FCC should ‘prescribe guidelines and recommended procedures for the identification and rating of video programming that contains sexual, violent, or other indecent material about which parents should be informed before it is displayed to children: Provided, That nothing in this paragraph shall be construed to authorize any rating of video programming on the basis of its political or religious content.’” *Id.* 184–85 (emphasis in original). Congress would not have permitted discrimination based on “political or religious content” in one section while explicitly prohibiting it in another.

266. *Id.* at 175.

267. *Id.* at 184. The last category would be precluded by the explicit provision in (e)(1).

268. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (“In ascertaining the plain meaning of the statute, the court must look to the particular statutory

whole CDA as a source of meaning for the specific enumerated terms and the catch-all provision of “otherwise objectionable.”

Third, the terms preceding “otherwise objectionable”—“obscene, lewd, lascivious, filthy, excessively violent, harassing”—refer to types of content that are inappropriate for or harmful to children because of their graphic or targeted nature.²⁶⁹ This common denominator is consistent with “[t]he text and legislative history of the statute,” which “shout to the rafters Congress’s focus on reducing children’s access to adult material.”²⁷⁰

The statute uses the word “objectionable” in declaring a statutory purpose “to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to *objectionable* or inappropriate online material.”²⁷¹

language at issue, as well as the language and design of the statute as a whole.”). See generally SCALIA & GARNER, *supra* note 129, § 24, at 167–69 (“Whole-Text Canon”).

269. Protecting children from inappropriate content is a well-recognized compelling government interest. See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (noting that prior cases “recognize the obvious concern on the part of parents . . . to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech”); *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (“We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors.”). This interest extends to shielding minors from the influence of literature that is not obscene by adult standards.”); *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978) (“[T]he government’s interest in the ‘well-being of its youth’ and in supporting ‘parents’ claim to authority in their own household’ justifi[y] the regulation of otherwise protected expression.”) (quoting *Ginsberg v. New York*, 390 U.S. 629, 639–40 (1968)).

270. *Force v. Facebook, Inc.*, 934 F.3d 53, 65 (2d Cir. 2019) (Katzmann, C.J., concurring in part and dissenting in part).

271. 47 U.S.C. § 230(b)(4) (emphasis added). The statute also identifies a purpose “to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.” *Id.* § 230(b)(5). It is significant both that Congress codified these purposes and used the statutory term “objectionable” in doing so. See SCALIA & GARNER, *supra* note 129, at 35 (a statute’s enumerated statement of purpose is relevant when interpreting a text); Kevin M. Stack, *The Enacted Purposes Canon*, 105 IOWA L. REV. 283, 285 (2019) (The Supreme Court “has long relied on enacted purposes to

Consistent with this purpose, Section 230 is captioned “Protection for ‘Good Samaritan’ blocking and screening of *offensive* material.”²⁷² These intratextual considerations indicate that the statute protects service providers that aid parents by blocking content that is “objectionable” because it is vulgar or inappropriate.²⁷³ In the words of one district court, “[a] plain reading of the statute indicates protection is intended only for the ‘blocking and screening of offensive material.’”²⁷⁴

Such an interpretation would also comport with the intended purposes of the statute. As the Ninth Circuit wrote, “[t]he primary goal of the Act was to control the exposure of minors to indecent material”²⁷⁵ and Section 230 was enacted “to control the exposure of minors to indecent material” on the Internet.²⁷⁶ As Judge Katzmann wrote, “[t]he legislative history illustrates that in passing § 230 Congress was focused squarely on protecting minors from offensive online material.”²⁷⁷ The specific purpose of Section 230 was to

exclude interpretations inconsistent with those purposes.”); Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. CHI. L. REV. 669, 712 (2019) (“Enacted findings and purposes should be properly understood as part of the statutory text, and they should be treated like other enacted text for purposes of interpretation. A theory of interpretation that accounts for them is therefore simply a more complete version of the whole act rule.”).

272. 47 U.S.C. § 230(c) (emphasis added).

273. The statute explains that Congress’s concern was restricting “children’s access to objectionable or inappropriate online material,” 47 U.S.C. § 230(b)(4), and deterring “stalking” and “harassment by means of computer,” 47 U.S.C. § 230(b)(5). That Congress included harassing materials along with graphic materials to accomplish this second purpose does not preclude the application of *ejusdem generis* because graphic and predatory material both threaten children and indicate the sort of indecent material that Congress deemed objectionable.

274. *Sherman v. Yahoo! Inc.*, 997 F. Supp. 2d 1129, 1137 (S.D. Cal. 2014).

275. *Batzel v. Smith*, 333 F.3d 1018, 1026 (9th Cir. 2003).

276. *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1173 (9th Cir. 2009).

277. *Force v. Facebook, Inc.*, 934 F.3d 53, 79 (2d Cir. 2019) (Katzmann, C.J., concurring in part and dissenting in part); *see also* 141 CONG. REC. 22,045 (1995) (statement of Rep. Christopher Cox) (“As the parent of two, I want to make sure that my children have access to this future and that I do not have to worry about what they might be running into on line. I would like to keep that out of my house

overturn decisions, such as *Stratton Oakmont*, that created disincentives for service providers to remove objectionable content that was inappropriate for children.²⁷⁸ Congress removed that disincentive by providing that a service provider cannot be held liable on account of its acting in good faith to remove content that is inappropriate for children and by “empowering parents to determine the content of communications their children receive through interactive computer services.”²⁷⁹

One potential counterargument is that the statute permits the provider to restrict material it “*considers* to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable,” which might permit providers to censor material that it *considers* objectionable

and off my computer. . . . We can make sure that [the internet] operates more quickly to solve our problem of keeping pornography away from our kids, keeping offensive material away from our kids, and I am very excited about it.”); *id.* (statement of Rep. Ronald Wyden) (“We are all against smut and pornography, and, as the parents of two small computer-literate children, my wife and I have seen our kids find their way into these chat rooms that make their middle-aged parents cringe.”).

278. Such decisions held that when a provider exercised “editorial control” over the content on its platform, it was acting as a “publisher” and was therefore liable for content that remained on the platform. See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 at *4 (N.Y. Sup. Ct. May 24, 1995) (“By actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and ‘bad taste,’ for example, PRODIGY is clearly making decisions as to content, and such decisions constitute editorial control. . . . PRODIGY has uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards. Based on the foregoing, this Court is compelled to conclude that for the purposes of Plaintiffs’ claims in this action, PRODIGY is a publisher rather than a distributor.”) (internal citations omitted).

279. See H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.) (“One of the specific purposes of this section is to overrule *Stratton Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of *empowering parents to determine the content of communications their children receive through interactive computer services.*”) (emphasis added).

even if the material is not objectively objectionable.²⁸⁰

But “considers” merely expands the bullseye; it does not move the target. Even though “considers” broadens what a provider, in good faith, has a privilege to censor, the privilege is limited to material that the service provider considers in good faith to resemble the statutory categories. It would permit a provider to limit speech it considers “obscene, lewd, lascivious, filthy, excessively violent, [or] harassing.”²⁸¹ It would not allow the provider to create new and different categories. Nor would it privilege censorship based on viewpoint rather than the type of content.²⁸²

In sum, taken together, the text and history of Section 230 of the Communications Decency Act lead to three conclusions about the scope of the phrase “otherwise objectionable.”

First, Congress’s inclusion of the term alongside its identification of types of content cannot be understood to protect censorship on the basis of viewpoint.²⁸³ Second, “material that was traditionally viewed as regulable in electronic communications media—and was indeed regulated by the Communications Decency Act of 1996, as part of which § 230 was enacted”—is considered “objectionable.”²⁸⁴ And third, the material can be “objectionable” in the sense expressed by the preceding

280. 47 U.S.C. § 230(c)(2) (emphasis added).

281. *Id.*

282. To say otherwise would be to permit a Humpty-Dumpty approach to legal interpretation, where parties are permitted to imbue words with their favored idiosyncratic meanings. See LEWIS CARROLL, *ALICE IN WONDERLAND AND THROUGH THE LOOKING-GLASS* 198 (Julian Messner ed., 1982) (1871) (“‘When I use a word,’ Humpty Dumpty said, in rather a scornful tone, ‘it means just what I choose it to mean—neither more nor less.’”).

283. This is no surprise, given that one of the enacted “findings” in Section 230 was that “[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse.” 47 U.S.C. § 230(a)(3). Congress would not laud viewpoint diversity in one section while, in the next section, permit internet entities to squelch it.

284. Candeub & Volokh, *supra* note 265, at 175.

terms: that it is not “family-friendly.”²⁸⁵

The phrase “otherwise objectionable” extends the scope of Section 230 protection beyond the specific terms that precede it. One might debate, for example, whether Section 230 extends to the removal of material that is inappropriate for children because it is vulgar in a way that is unrelated to sex, violence, or harassment. But “otherwise objectionable” must be moored to the preceding terms and the statutory purpose codified in Section 230(b).

2. Section 230(c)(2) Only Applies to “Good Faith” Efforts to Moderate

Second, Section 230(c)(2) immunity attaches only to “good faith” efforts to moderate content. Three potential meanings of “good faith” emerge: (1) no “bad faith” or illegal efforts; (2) “good faith” belief that the content requires moderation; and (3) “good faith” effort to moderate the objectionable content.²⁸⁶

First, entities are not protected for actively encouraging illegal activity.

Though “good faith” is difficult to define, one meaning of the term is clear: it excludes “bad faith” activities. And “bad

285. This answers one of the main criticisms that can be levied against the “constrained” approach: that the “constrained” approach would not even overrule *Stratton Oakmont* because it would not protect PRODIGY’s terms of service. But interpreting “otherwise objectionable” as protecting decisions to remove material that is not family-friendly would protect PRODIGY’s removal decisions.

286. This is an inexhaustive list. Courts have properly held that defendants acted in bad faith by striking and censoring a plaintiff’s videos and channel, where “videos ‘were in full compliance with YouTube’s Terms of Use and Community Guidelines,’ and had appeared on Plaintiff’s accounts for months or even years without Defendants raising any concerns about their content”; “Plaintiff sought guidance from Defendants regarding how to comply with their expectations and interpretation of the Terms of Use, but Defendants refused to assist”; and “Defendants refused to provide Plaintiff with a coherent explanation as to why they were striking Plaintiff’s videos and terminating its accounts.”. *Enhanced Athlete Inc. v. Google LLC*, 479 F. Supp. 3d 824, 831 (N.D. Cal. 2020). “Good faith” is intentionally undefined as to include cases like these. However, the three definitions above are certainly part of a subset of cases that fall outside of “good faith.”

faith” includes activities that actively encourage illegal activity (rather than merely failing to limit illegal activity). This use of “good faith” is consistent with other uses in the U.S. Code, where the term is meant to exclude illegal activity.²⁸⁷

If an internet entity actively encourages illegal activity on its platform, then its activities are not protected by Section 230. For this reason, courts have held that “good faith” does not protect anticompetitive behaviors. For example, the Ninth Circuit held that “good faith” does not protect “blocking and filtering decisions that are driven by anticompetitive animus.”²⁸⁸ Similarly, the Middle District of Florida found that a removal decision “based upon anti-competitive motives” would not qualify as a “good faith” decision.²⁸⁹

The “good faith” limitation highlights the casualties of the *Zeran* approach: by relying on subsection (c)(1) alone, courts have read out the “good faith” requirement of Section 230. Thereby, many bad-faith actors now avail themselves of Section 230 protections.

The notorious *Backpage* case should have been decided under subsection (c)(2). If it had, the court would have held that the statute does *not* protect “a website” that “facilitates illegal conduct through its posting rules.”²⁹⁰ In that case, three victims of human trafficking sued the website

287. *See, e.g.*, 18 U.S.C. § 48(d)(2) (“Good-faith distribution”) (“This section does not apply to the good-faith distribution of an animal crush video to—(A) a law enforcement agency; or (B) a third party for the sole purpose of analysis to determine if referral to a law enforcement agency is appropriate.”).

288. *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1050 (9th Cir. 2019). Though that decision improperly read the “good faith” exception into subsection (c)(2)(B), where it notably does not exist.

289. *e-ventures Worldwide, LLC v. Google, Inc.*, 188 F. Supp. 3d 1265, 1274 (M.D. Fla. 2016). Ultimately, the court ruled that Google’s actions were protected First Amendment speech. *See e-ventures Worldwide, LLC v. Google, Inc.*, No. 14-cv-646, 2017 WL 2210029, *4 (M.D. Fla. Feb. 8, 2017) (“The First Amendment protects Google’s actions and precludes all of e-ventures’ claims.”).

290. *Doe v. Backpage.com, LLC*, 817 F.3d 12, 22 (1st Cir. 2016).

Backpage, claiming that it “engaged in a course of conduct designed to facilitate sex traffickers’ efforts to advertise their victims on the website,” which “led to their victimization.”²⁹¹ The victims claimed that “Backpage selectively removed certain postings made in the ‘Escorts’ section (such as postings made by victim support organizations and law enforcement ‘sting’ advertisements) and tailored its posting requirements to make sex trafficking easier.”²⁹² Cabined by the *Zeran* framework, the appellants were forced to argue that Backpage did not act as a publisher of the ads. The court disagreed. Its hands tied by precedent, the court 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).”²⁹³ However, had *Backpage* been decided under subsection (c)(2)—as it should have been—the “good faith” exception would have found that its facilitation of “illegal conduct” would not have been subject to Section 230 protection.²⁹⁴

Beyond excluding illegal activity and deception, the contours of the meaning of “good faith” are unclear. Congress does not define the term in this statute. This is likely intentional, as Congress wanted the term to apply to a broad range of situations.

State-level Good Samaritan statutes can provide guidance. Section 230 was clearly modeled on state-level “Good Samaritan” statutes, and “good faith” is “a very

291. *Id.* at 16.

292. *Id.*

293. *Id.* at 22.

294. *Id.* In fact, such facilitation would also likely make Backpage an “information content provider,” given that it is “responsible, in whole or in part, for the . . . development” of the materials, so Section 230 wouldn’t apply at all. *See* 47 U.S.C. § 230(f). Regardless, *Backpage* was superseded by FOSTA, which clarified that Section 230 “was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution.” Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA), Pub. L. No. 115-164, 132 Stat. 1253.

common requirement in Good Samaritan laws.”²⁹⁵ “Thirty-eight states require a rescuer to act in good faith.”²⁹⁶ It thus makes sense to look at state Good Samaritan statutes for guidance for interpreting Section 230.²⁹⁷

From the comparison to state statutes, two additional meanings of “good faith” emerge: a “good faith” opinion that a situation is an emergency, and a “good faith” effort in responding to that situation. In other words, “good faith” applies both to the diagnosis of the situation and to the response given that diagnosis. These meanings can be imported to the context of content moderation: a moderator must objectively believe that the content requires moderation, and he must make a good faith effort to moderate the objectionable content.

In Good Samaritan statutes, “good faith” often refers to the accuracy of a responder’s belief that they are responding to an emergency. For instance, only two states—Pennsylvania and Hawaii—actually define “good faith” in their Good Samaritan statutes. Pennsylvania defines “good faith” as “a reasonable opinion that the immediacy of the situation is such that the rendering of care should not be postponed until the patient is hospitalized.”²⁹⁸ Similarly, Hawaii defines “good faith” as “a reasonable opinion that the immediacy of the situation is such that the rendering of care should not be postponed.”²⁹⁹

In other words, these definitions mean that one who responds to an emergency must have a “reasonable opinion”

295. Eric A. Brandt, *Good Samaritan Laws-The Legal Placebo: A Current Analysis*, 17 AKRON L. REV. 303, 318 (1983).

296. *Id.*

297. *See* *Brissett v. Ashcroft*, 363 F.3d 130, 133 (2d Cir. 2004) (“Where, as here, there is no extant body of federal common law in the area of law implicated by the statute, we may use state law to inform our interpretation of the statutory language.”).

298. 42 PA. STAT. AND CONS STAT. ANN. § 8331 (West 2022).

299. HAW. REV. STAT. § 663-1.5 (2022).

that they are, in fact, responding to an emergency.³⁰⁰ So the would-be Good Samaritan who performs CPR on a snoring citizen recumbent on a park bench likely does not have a “good faith” basis to believe the citizen is having a heart attack.

In addition, the term “reasonable”—used in both the Pennsylvania and Hawaii statutes—plainly refers to an objective standard (i.e., it’s judged by what a hypothetical reasonable person would do) rather than a subjective standard (i.e., what the responder *actually* thought). This makes sense: the overzealous yet delusional would-be Good Samaritan likely personally *believes* that there is an emergency. Yet because these beliefs are objectionably unreasonable, the law does not immunize his actions against tort liability.

In the context of moderating objectionable content, this meaning of good faith refers to the accuracy of a moderator’s belief that they are, in fact, removing content that is objectionable rather than unobjectionable. So, for instance, if a website removes content that they deem “harassing” (which must be impermissibly targeted) but in truth this content simply is a general statement expressing a viewpoint with which it disagrees, then the accuracy of that moderation would not suffice for “good faith” because they do not have a “good faith” belief that this information is indeed “harassing.” Of course, the platform may have the right to engage in viewpoint discrimination, but that right must come from a different source—for instance, the contract between the provider and its users. Section 230 does not immunize the provider from suit for such inaccurate apprehensions.³⁰¹

A third meaning of “good faith” is that it refers to a

300. See, e.g., *Bryant v. Bakshandeh*, 226 Cal. App. 3d 1241, 1247 (Ct. App. 1991) (“[W]hether Bakshandeh had a reasonable, good faith belief that he was responding to an emergency situation.”).

301. See, e.g., *Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 604 (S.D.N.Y. 2020).

standard of care, as in the common phrase “good faith effort.”

In Good Samaritan statutes, “good faith” is often the only required standard of conduct. “In nine states the only standard of care required of a physician rendering emergency aid at the scene of an accident is that of good faith.”³⁰² “This in effect gives a doctor immunity for any aggravated misconduct short of intentional harm.”³⁰³ “One Nebraska statute has neither a minimal standard of conduct requirement nor a good faith requirement; this gives the rescuer a veritable license to act as he pleases.”³⁰⁴

In other words, one must attempt to respond to a situation with a “good faith” effort, the same way one cannot respond to an emergency with recklessness or gross negligence. “Displacing a neck fracture in an effort to do rescue breathing might be malpractice in the emergency room, but it is not bad faith on the roadside. Trying an unnecessary tracheostomy just for the practice would be bad faith.”³⁰⁵ So if someone is having a heart attack, but the doctor performs a tracheotomy, that would be a “bad faith” effort.

A similar definition of “good faith” is used in the FTCA context. The FTCA makes the United States liable “in the same manner and to the same extent as a private individual under like circumstances.”³⁰⁶ As the Supreme Court held in *Indian Towing Co. v. United States*, under “hornbook tort law . . . one who undertakes to warn the public of danger and thereby induces reliance must perform his ‘good Samaritan’ task in a careful manner.”³⁰⁷ This is “good faith” as in a “good

302. Brandt, *supra* note 295, at 320.

303. *Id.*

304. *Id.*

305. Professor Edward Richards, Good Samaritan Laws, PUBLIC HEALTH LAW MAP – BETA 5.7 (last updated Apr. 19, 2009), <https://biotech.law.lsu.edu/map/GoodSamaritanLaws.html>.

306. 28 U.S.C. § 2674.

307. 350 U.S. 61, 64–65 (1955).

faith effort.”

In the context of content moderation, this means that the content moderation cannot be totally out of proportion to the stated goals, either in being under- or over-inclusive.³⁰⁸ If an entity states that it restricts obscenity but permits clearly pornographic material on its homepage, it is not taking a “good faith” effort to limit such material because its efforts are clearly underinclusive. Alternatively, if an entity states that it restricts materials that are excessively violent, but then restricts material that is unrelated to that goal (say, by de-platforming the Girl Scouts of America), that would not be a good-faith effort either because its efforts are clearly over-inclusive.

3. Section 230 Applies When There is a Nexus Between the Cause of Action and the Content Moderation

The phrase “on account of” indicates that there must be a nexus between the cause of action and the content moderation. The Supreme Court has interpreted the phrase “on account of” to mean “because of,” thereby “requiring a causal connection between the term that the phrase ‘on account of’ modifies and the factor specified in the statute at issue.”³⁰⁹ In other words, the plaintiff must seek to hold the defendant entity liable *on account of* its moderation decisions based on a shortened version of the PRODIGY argument: that the entity is liable for what it did *not* moderate because it did moderate some content.

This means that Section 230(c)(2) immunity applies only to cases where the entity would have otherwise been held

308. “Good faith” does not mean is that the decision is altruistic. This is why courts have held that allegations that filtering decisions may have been “motivated by profit” are insufficient to show “an absence of good faith” under Section 230(c)(2). *Holomaxx Techs. v. Microsoft Corp.*, 783 F. Supp. 2d 1097, 1105 (N.D. Cal. 2011) (citing *e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605, 609 (N.D. Ill. 2008)). This wouldn’t make sense: CompuServe and PRODIGY both had commercial interests, yet the purpose of Section 230 was to protect such interactive computer services.

309. *Rousey v. Jacoway*, 544 U.S. 320, 326 (2005).

liable *because of* the moderation decisions. The moderation must be essential to the alleged liability; it cannot be incidental. An example of such a nexus appears in the *Stratton Oakmont* case, where the court held (erroneously) that the moderation made PRODIGY a publisher. But the nexus appears often.³¹⁰ In fact, this nexus analysis is highly similar to the “publisher” analysis courts currently perform under subsection (c)(1).

However, the “nexus” requirement excludes protection in several lawsuits. For instance, in products liability suits, where the liability has nothing to do with the editing of the content, Section 230(c)(2) would not apply.³¹¹ A but-for test can be helpful: when the lawsuit would proceed regardless of whether the content was moderated, Section 230(c)(2) does not apply; but when the lawsuit, in order to proceed, requires that the content have been moderated, Section 230(c)(2) does apply.

Consider the case of *Lemmon v. Snap*. In that case, “the surviving parents of two boys who died in a tragic, high-speed car accident” sued Snap “alleging that it encouraged their sons to drive at dangerous speeds and thus caused the boys’ deaths through its negligent design of its smartphone application Snapchat.”³¹² The allegations surrounded the

310. *See, e.g., Doe v. Twitter, Inc.*, 555 F. Supp. 3d 889, 930 (N.D. Cal. Aug. 19, 2021) (“These flaws, in essence, seek to impose liability on Twitter based on how well Twitter has designed its platform to prevent the posting of third-party content containing child pornography and to remove that content after it is posted.”).

311. Similarly, a local statute that deals with the product rather than the content is not preempted. *See, e.g., HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 683 (9th Cir. 2019) (Because the Santa Monica ordinance did not “proscribe, mandate, or even discuss the content of the [website] listings” and required only that the website’s transactions involve licensed properties, Section 230 immunity did not apply). Failure to warn suits might also similarly proceed. *See, e.g., Doe v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th Cir. 2016) (The “actual knowledge by Internet Brands from an outside source of information about criminal activity” is not an allegation regarding “mishandling the removal of third party content” or failing “to adequately regulate access to user content.”).

312. *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1087 (9th Cir. 2021).

design of a “Speed Filter,” which “enables Snapchat users to ‘record their real-life speed.’”³¹³ “Many of Snapchat’s users suspect, if not actually ‘believe,’ that Snapchat will reward them for ‘recording a 100-MPH or faster [s]nap’ using the Speed Filter.”³¹⁴ According to plaintiffs, the Speed Filter was “incentivizing young drivers to drive at dangerous speeds.”³¹⁵

The court permitted the suit to proceed, reaching the right conclusion for the wrong reasons. The court held that Snap is not protected under (c)(1) and “the Parents’ amended complaint does not seek to hold Snap liable for its conduct as a publisher or speaker.”³¹⁶ The court should have first applied subsection (c)(2), not (c)(1), because Snap moderates content.³¹⁷ It should have then determined whether the suit seeks to hold Snap liable “on account of” its content moderation decisions. A products liability lawsuit does not rely on content moderation decisions. The but-for test makes that clear: if Snap’s community guidelines were different or did not exist, the lawsuit would proceed nonetheless. The content moderation was not a but-for cause of the lawsuit; therefore, the lawsuit did not seek to hold Snap liable “on account of” its content moderation decisions and would be permitted to proceed.³¹⁸

313. *Id.* at 1088.

314. *Id.* at 1089.

315. *Id.*

316. *Id.* at 1092.

317. See *Community Guidelines*, SNAP, INC. (Updated: January 18, 2022), <https://snap.com/en-US/community-guidelines>.

318. Similarly, Professor Dickinson proposes a content-moderation burden test. See Gregory Dickinson, *Rebooting Internet Immunity*, 89 GEO. WASH. L. REV. 347, 353 (2021). Such a test is already implicit in the statute.

E. *Section 230(c)(2)(B)*

Though Section 230(c)(2)(A) is often ignored,³¹⁹ Section 230(c)(2)(B) is *entirely* ignored.³²⁰ The only cases that quote it are those dealing with virus protection software that give users the ability to limit spam.³²¹

This is a mistake. Section 230(c)(2)(B) offers intermediaries a potential loophole in Section 230: because it does not have the “good faith” requirement of Section 230(c)(2)(A), decentralized methods of content moderation can provide greater protection to internet entities. However, all this depends on the difference between “access” and “availability.”

Section 230(c)(2)(B) reads:

No provider or user of an interactive computer service shall be held liable on account of . . . any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (A).³²²

There is a strong argument that Section 230(c)(2)(B) provides greater protection for internet entities than Section 230(c)(2)(A). While Section 230(c)(2)(B) is limited to the “material” described in Section 230(c)(2)(A)—namely, “material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable”³²³—noticeably absent is Section

319. *See, e.g., supra* note 160.

320. *See, e.g., Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1175 (9th Cir. 2009) (Section 230(c)(2)(B) “presents a different problem, and a statutory provision with a different aim, from ones we have encountered before.”).

321. *See, e.g., id.* at 1170 (Kaspersky, a firm that “distributes software that helps filter and block potentially malicious software,” “invoked the protection of § 230(c)(2)(B)”); *Asurvio LP v. Malwarebytes, Inc.*, No. 18-cv-05409, 2020 WL 1478345, at *1 (N.D. Cal. Mar. 26, 2020) (“Malwarebytes moves to dismiss the SAC, asserting among other things that it is entitled to immunity under section 230(c)(2)(B)”).

322. 47 U.S.C. § 230(c)(2)(B).

323. *Id.* § 230(c)(2)(A).

230(c)(2)(A)'s "good faith" requirement. Several courts have argued that this distinction is intentional, and therefore this subsection applies even if the restriction of material was not undertaken in "good faith."³²⁴ "By its own terms . . . Section 230(c)(2)(B) has no good faith requirement."³²⁵ This is correct.

There are excellent reasons for this exception. First, it would be unfair to hold interactive computer services liable for the actions of "information content providers or others," where the interactive computer service does not have control over the other parties' activities.³²⁶ Second, this interpretation dovetails with Section 230's express and enacted purpose of user self-help. Section 230 aimed to encourage the control of users (i.e., "information content providers") over the content they receive. The enacted policies in Section 230(b) expressly mention two goals. First, the goal of encouraging "technologies which maximize user control" over information they receive on the internet. Second, "removing disincentives" for "blocking and filtering technologies that empower parents to restrict their children's

324. PC Drivers Headquarters, LP v. Malwarebytes, Inc., No. 18-CV-234, 2018 WL 2996897, at *3 (W.D. Tex. Apr. 23, 2018); Enigma Software Grp. USA, LLC v. Malwarebytes Inc., No. 17-cv-02915, 2017 WL 5153698, at *3 (N.D. Cal. Nov. 11, 2019); Mail Abuse Prevention Sys. LLC, v. Black Ice Software, Inc., No. CV 788630, 2000 WL 34016435, at *10 (Cal. Super. Ct. Oct. 13, 2000).

325. Zango, Inc. v. Kaspersky Lab, Inc., No. C07-0807, 2007 WL 5189857, at *4 (W.D. Wash. Aug. 28, 2007), *aff'd*, 568 F.3d 1169.

326. 47 U.S.C. § 230(c)(2)(A). An analogy can be made to the avoidance of transfers made to subsequent transferees; the Bankruptcy statute has a lower burden of proof for subsequent transferees than initial transferees because surveillance costs increase as one proceeds further down the line. *See, e.g.*, Bonded Fin. Servs., Inc. v. Eur. Am. Bank, 838 F.2d 890, 897 (7th Cir. 1988) ("Section 550(b)(1) implements a system well known in commercial law, in which a transferee of commercial paper or chattels acquires an interest to the extent he purchased the items without knowledge of a defect in the chain. These recipients receive protection because monitoring of earlier stages is impractical, and exposing them to risk on account of earlier delicts would make commerce harder to conduct. Benefits to the commercial economy, and not to the initial transferors (who may be victims of fraud), justify this approach.").

access to objectionable or inappropriate online material.³²⁷ One enacted finding was that interactive computer services “offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.”³²⁸ It is no surprise that Section 230 was initially titled the “Online Family Empowerment Act,” as it aims to empower end users to control what they see on the internet.³²⁹ And Section 230(d) further illustrates the goal of user self-help by mandating that interactive computer services notify customers of “parental control protections (such as computer hardware, software, or filtering services) . . . that may assist the customer in limiting access to material that is harmful to minors.”³³⁰ All this shouts to the rafters that Section 230 prefers for users to be in control of the information they receive. That policy is furthered by not reading a “good faith” requirement into Section 230(c)(2)(B).

This implication—that Section 230(c)(2)(B) is not limited by a “good faith” requirement—becomes even more relevant as platforms turn to decentralized methods of content moderation. Such decentralized methods—such as Twitter’s BlueSky program, federated social networks (like Mastodon and Diaspora), community-run moderation (like Slashdot, Reddit, and Stack Overflow), peer-to-peer social networks (like Scuttlebutt), and blockchain projects—operate without centralized control.³³¹ Many have argued they are a superior

327. 47 U.S.C. § 230(b)(4).

328. 47 U.S.C. § 230(a)(2).

329. See *Why Decentralisation Of Content Moderation Might Be The Best Way To Protect Freedom Of Expression Online*, ARTICLE 19 (March 30, 2020), <https://www.article19.org/resources/why-decentralisation-of-content-moderation-might-be-the-best-way-to-protect-freedom-of-expression-online/>.

330. 47 U.S.C. § 230(d).

331. Amy X. Zhang has written thoughtfully in this area. See generally Amy X. Zhang, REFEREED CONFERENCE AND JOURNAL ARTICLES, <https://homes.cs.washington.edu/~axz/publications.html>. Jay Graber, the head of Bluesky, has a fantastic presentation on the subject. See generally Jay Graber, *Ecosystem Review*, (Jan. 2021), <https://ipfs.io/ipfs/Qm>

method of content moderation, given the success of decentralized protocols in fixing email spam. Fortunately, such efforts are directly in the core of Section 230(c)(2)(B)'s protection: an interactive computer service like Twitter would "enable or make available to information content providers or others the technical means to restrict access" to material that the *users*, not the platform, considers objectionable.³³² So long as an internet entity (1) outsources content moderation to a decentralized protocol, program, or community, (2) states that the decentralized program should only moderate "material described in" Section 230(c)(2)(A); and (3) has no control over the moderation, it will garner the additional subsection (c)(2) immunity.³³³

All this analysis, however, depends crucially on the difference between "access" and "availability." Note as well that Section 230(c)(2)(B) refers only to restricting "access," rather than "availability," whereas Section 230(c)(2)(A) protects *both* the restriction of "access" and "availability." The anti-surplusage canon would indicate that each word be given meaning. It is not readily apparent what the difference between the two words is. One potential difference is that "access" refers to restricting the user whereas "availability" means restricting the material. "Access" in other parts of the statute refers to limiting user access rather than material availability; for instance, the statute speaks of limiting "children's access to objectionable or inappropriate online material"³³⁴ or "limiting access to material that is harmful to minors."³³⁵ In these cases, the material still exists, but certain users are prevented from accessing it. Such a reading of Section 230(c)(2)(B)—as limited to preventing user access rather than limiting the availability of the material—would

dFrru4PyHzXGZztEPnYToBR3QovD7fkC1HSyty22LzfD.

332. 47 U.S.C. § 230(c)(2)(B).

333. *Id.*

334. 47 U.S.C. § 230(b)(4).

335. 47 U.S.C. § 230(d).

also dovetail with the statutory purpose of protecting family-friendly services like PRODIGY that limit children's access to objectionable materials.

That said, the anti-surplusage canon is at its nadir when it is discussing the surplusage of individual words rather than (as aforementioned) entire clauses or sections.³³⁶ That applies with special force here where the words "access" and "availability" appear to be synonyms with no apparent difference.

In sum, the commentators' conclusion about Section 230's "mission creep" is correct, but for the wrong reasons: they miss that it is Section 230(c)(2), not Section 230(c)(1), that overturns *Stratton Oakmont*.³³⁷ Viewing intermediary immunity as emanating from Section 230(c)(2) also leads to significant limitations on this immunity.

III. IMPLICATIONS: DOCTRINE, POLITICS, SCHOLARSHIP

This Article's findings have a number of implications for doctrine, politics, and scholarship.

336. See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2161–62 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)) ("Judges say that we should not interpret statutes to be redundant. But humans speak redundantly all the time, and it turns out that Congress may do so as well. Congress might do so inadvertently. Or Congress might do so intentionally in order to, in Shakespeare's words, make 'double sure.' Either way, statutes often have redundancies, whether unintended or intended. The anti-redundancy canon nonetheless tells us to bend the statute to avoid redundancies, at least to the extent we reasonably can. But if one statute says 'No dogs in the park' and another one says 'No animals in the park,' I believe we should generally assume that the drafter wanted no animals in the park and really wanted to make sure that there were no dogs in the park. The anti-redundancy canon instead would have judges try to find some meaning of "animals" that excludes dogs and thereby avoids the redundancy. Such an exercise is little more than policymaking and, in my view, often quite wrongheaded.").

337. It is not correct, therefore, that "Congress grabbed a bazooka to swat the *Stratton-Oakmont* fly." *Force v. Facebook, Inc.*, 934 F.3d 53, 65 (2d Cir. 2019) (Katzmann, C.J., concurring in part and dissenting in part).

A. *Doctrine: Reorienting Section 230 Immunity*

This Article has a number of doctrinal implications. Most fundamentally, it changes the main doctrinal inquiry of whether Section 230 immunity attaches. The current question is whether the entity acted or is treated as a publisher.³³⁸ This is not the correct inquiry.³³⁹ Rather, the correct inquiry is, if Section 230 applies, whether the entity moderated the content, and whether that type of content moderation is privileged by the statute. The cases interpreting Section 230 must therefore be revisited.

This Article also has a number of implications for intermediaries who seek Section 230 protection. First, this Article has implications for how internet entities conduct content moderation. For internet entities to avail themselves of the Section 230 protections they currently enjoy, they must fall under the subsection (c)(2). This means that entities must modify their community standards to align with the categories of content enumerated by Congress; otherwise, they will be potentially liable as distributors. Further, internet entities will have an incentive to encourage decentralized or user-oriented methods of content moderation, which are currently underway but have remained underdeveloped, to avoid the “good faith” requirement of subsection (c)(2).

1. Unresolved Doctrinal Questions

This Article opens a number of unresolved doctrinal questions.

First, in shifting the focus from subsection (c)(1) to (c)(2), this Article opens the door to distributor liability. Many have argued that Section 230 does not limit distributor liability. This Article argues that this is correct—at least concerning entities that do not attain subsection (c)(2) protections. This

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

339. *See supra* Parts II.B–II.E.

requires a further investigation into the nature and liability of online distributors, which is worthy of an article of its own.

Another open question is whether Section 230(c)(2) protects only against common-law torts, or also protects against other causes of action. For instance, if a website removed all lewd posts of one certain ethnic minority, would that be violative of the civil rights statutes? The statute is unclear. There are arguments in favor of the more expansive reading.³⁴⁰ Yet there are counter-arguments in favor of a narrower reading.³⁴¹ In this Article's opinion, Section

340. First is the canon of meaningful difference. Notably, unlike Section 230(c)(1), which is restricted to the treatment of an intermediary as a “publisher or speaker,” Section 230(c)(2) contains no such limiting language, but rather states that the interactive computer service shall not “be held liable,” full stop. The canon of meaningful difference would therefore state that Section 230(c)(2) immunity is not limited to publisher liability, but rather covers a broad range of causes of action. Second is the canon of *inclusio unius*. The specifications in Section 230(e)—which state that Section 230(c) does not have any effect on “criminal law,” “intellectual property law,” “communications privacy law,” or “sex trafficking law”—indicate, via *inclusio unius*, that Section 230(c)(2) is meant to protect from other kinds of law. *See, e.g.*, Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d 532, 539 (E.D. Va. 2003), *aff'd*, 2004 WL 602711 (4th Cir. Mar. 24, 2004) (rejecting argument that “§ 230 immunity does not apply to claims brought under federal civil rights statutes” because Section 230 is “limited only by specific statutory exclusions, none of which is applicable here.”).

341. Under this view, Section 230(c)(2) does not provide independent protections for content moderation decisions if these content moderation decisions violate the law, but only protects against causes of action based in common-law torts. Consider the legal reasons one would be liable for “restrict[ing] access to or availability of” objectionable “material”: one would be held liable as a *publisher* for material that should have been, but was not, censored. Therefore, the legal mechanism that Congress amended was publisher liability only, and the mechanism did not plausibly affect other types of liability. In addition, the enumerated categories could cut the other way. Congress already indicated in Section 230 that the limitation on immunity was absolute, but rather did not apply to criminal, trademark, or privacy law. And in writing these provisions, Congress took a belt-and-suspenders approach: by specifying that Section 230 did not limit certain types of laws, it did not mean to indicate that anything else goes. Indeed, the further passing of FOSTA after Section 230 was enacted indicates that Congress intended to limit Section 230 protections, and Congress cannot be expected to state all the laws that Section 230 does not influence. In addition, one could argue that Congress does not “hide elephants in mouseholes.” *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001) (Congress does not “alter the fundamental details of a regulatory scheme

230(c)(2) immunity sweeps broadly. It's clear that Section 230(c)(1) protects against being held as a "publisher or speaker" for "information"-based torts. Section 230(c)(2) could have easily incorporated this limitation, but it did not. Rather, though Section 230(c)(2) applies in fewer circumstances than Section 230(c)(1) (which sets a default rule that applies to "any" information), when Section 230(c)(2) *does* apply, it is a formidable shield. That said, there are conflicting textual indicators. Courts would need to determine Section 230(c)(2)'s scope regarding the civil rights laws' applicability.

One final open question is whether Section 230(c)(2) protects de-platforming, namely the removal of a user rather than the removal of material. On the one hand, Section 230(c)(2) protects "*any* action." "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"³⁴² "Congress did not add any language limiting the breadth of that word."³⁴³ And so we must read Section 230(c)(2) as referring to all types of actions used to "restrict access to or availability of material."³⁴⁴ Courts have nearly uniformly held as such.³⁴⁵ On the other hand, Section 230 immunizes from suit actions

in vague terms or ancillary provisions."). Immunity from the civil rights laws would be quite an elephant to hide in a mousehole, especially given that there was no discussion of such immunity. Rather, Section 230 was meant to protect only against tort liability. Further, state Good Samaritan statutes are not protections against civil rights violations. Similarly, Section 230—the internet Good Samaritan statute—was meant to be a protection only against tort liability.

342. *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (1976)).

343. *Id.*

344. 47 U.S.C. § 230(c)(2).

345. See Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. OF FREE SPEECH L. 191, 191 (2021) (reviewing "a dataset of U.S. judicial opinions involving Internet services' user account terminations and content removals," and finding that "[t]he Internet services have prevailed in these lawsuits, which confirms their legal freedom to enforce their private editorial policies ('house rules')."); *id.* at 221–24 (Appendix B) (listing only five cases where account termination claims have prevailed).

“to restrict access to or availability of *material*,” and does not protect providers’ actions to terminate users’ *accounts*.³⁴⁶ Further, as to the argument that terminating a user from the platform is just another way of restricting access to objectionable material, there is a background legal principle that says that silencing a speaker *entirely* is an unacceptable way to regulate speech, even if the speech is regulable. Rather, blocking an account resembles a prior restraint, which is considered odious.³⁴⁷

2. Changing the Doctrine

Even though the *Zeran* approach has swept the federal appellate courts, there are several ways for the doctrine to change.

First, the Supreme Court can address the meaning of Section 230. For the first time in the over twenty-five years that Section 230 has been on the books, the Supreme Court has granted a petition for certiorari to a Section 230 case, as Justice Thomas has urged.³⁴⁸ The Supreme Court should interpret the statute because the issue is of nationwide importance, and therefore silence by the Supreme Court prevents “percolation” in the lower courts because any individual court is, justifiably, reluctant to break with many other courts.³⁴⁹ For instance, the Supreme Court of Texas

346. 47 U.S.C. § 230(c)(2) (emphasis added).

347. *Cf.* Balkin, *supra*, note 5, at 2017–19 (“If end users are blocked, or their speech is taken down, they do not get to speak until somebody in the infrastructure company decides that they have permission In this way, our twenty-first-century digital world has recreated the prior restraints of the sixteenth and seventeenth centuries, offering a twenty-first-century version of administrative prior restraint.”).

348. *Gonzalez v. Google LLC*, No. 21-1333, 2022 WL 4651229 (U.S. Oct. 3, 2022); *see Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 14 (2020); *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring in the denial of certiorari) (“We will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms.”).

349. *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting).

“agree[d] that Justice Thomas’s recent writing [in *Malwarebytes*] lays out a plausible reading of section 230’s text,” yet did not address the issue because the meaning of Section 230 “is a question the U.S. Supreme Court may soon take up.”³⁵⁰

Second, Congress has the option of passing a declaratory or expository statute. This statute would essentially state that Section 230 means what it meant in 1996, thus overriding contrary interpretations. Such a declaratory statute might have a higher chance of passing, considering that it is not clear how it would shift costs or burdens.

Third, the FCC can interpret Section 230 through notice and comment rulemaking. The FCC has the jurisdiction to interpret Section 230. Section 230 was passed as part of the Telecommunications Act of 1996 and inserted into the Communications Act of 1934.³⁵¹ Section 201(b) of the Communications Act empowers the FCC to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.”³⁵² The Supreme Court has confirmed that this provision grants FCC the authority to promulgate rules to carry out the Telecommunications Act of 1996.³⁵³ There is no reason why

350. *In re Facebook, Inc.*, 625 S.W.3d 80, 91 (Tex. 2021).

351. Section 230 was Section 509 of the Communications Decency Act, which was Title V of the Telecommunications Act of 1996. Section 1(b) of that Act stated that, unless otherwise provided, the 1996 Act’s provisions were to be inserted into the Communications Act of 1934. Section 509 stated that “Title II of the Communications Act of 1934 . . . is amended by adding at the end the following new section: Section 230.” Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 137.

352. 47 U.S.C. § 201(b).

353. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999) (“We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the ‘provisions of this Act,’ which include §§ 251 and 252, added by the Telecommunications Act of 1996”); *City of Arlington v. FCC*, 569 U.S. 290, 293 (2013) (“Section 201(b) of that Act empowers the Federal Communications Commission . . . to ‘prescribe such rules and regulations as may be necessary in the public interest to carry out [its] provisions.’ Of course, that rulemaking authority extends to the subsequently added portions of the Act.”) (internal

Section 230 would be exempted from the rest of the 1996 Act.

Fourth, there is room for changing the doctrine through litigation, even though scholars have argued that “a court-centered approach to reforming Section 230 will not suffice.”³⁵⁴ Litigants can bring a case under subsection (c)(1) and attempt to have a particularly sympathetic federal circuit court review its precedent *en banc*.³⁵⁵ Given that every federal circuit has adopted the *Zeran* approach, litigants can pick the circuit they believe will be most sympathetic to their claims. Litigants can also sue in state courts, which are not bound by the judgements of the federal circuit courts.³⁵⁶ If the highest court of a state disagrees with the consensus view, it raises the likelihood that the Supreme Court will accept a case.

In addition, litigants can sue under Section 230(c)(2), which has been universally ignored by courts. Because most courts have not addressed this subsection, federal courts will be free to rule without being encumbered by contrary precedent.³⁵⁷

An indicator that this approach might lead to victories for plaintiffs is the case of *Domen v. Vimeo*—and its curious history in the Second Circuit. Vimeo operates a YouTube-like

citations omitted).

354. Sylvain, *Platform Realism*, *supra* note 99, at 477.

355. *En banc* review is necessary because statutory precedents receive a “super-strong presumption of correctness,” see William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L. J. 1361, 1362 (1988), because courts expect Congress to pass an expository statute if the Courts are wrong in a way they do not expect a constitutional amendment to pass. *But see* Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 327–51 (2005) (criticizing this practice at the circuit level).

356. *See* *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 n.21 (1997) (noting that “the stare decisis effect of [a federal district] court’s ruling was distinctly limited” because it was “not binding on the Arizona state courts.”); *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) (“[N]either federal supremacy nor any other principle of federal law requires that a state court’s interpretation of federal law give way to a (lower) federal court’s interpretation.”).

357. *See, e.g., supra* note 142.

online video platform. Jim Domen, the president of a group called Church United, uploaded five videos to Vimeo's platform. These videos spoke to the plausibility of sexual orientation change efforts (SOCE). Vimeo "instructed Domen to remove the videos" because "Vimeo does not allow videos that promote [SOCE]" because "Vimeo does not allow videos that harass, incite hatred, or include discriminatory or defamatory speech."³⁵⁸ If Domen did not remove the videos, Vimeo warned, "Vimeo might remove the videos or the entire account."³⁵⁹ Domen did not remove the videos. Vimeo removed the videos and deleted Domen's account.

Domen sued, claiming that though Vimeo adhered to its terms of service, Vimeo's terms of service violated state anti-discrimination laws because Vimeo discriminated against Domen on the basis of religion and sexual orientation. Vimeo cited Section 230 to bar an inquiry on the merits given that "Section 230 immunity, like other forms of immunity, is generally accorded effect at the first logical point in the litigation process."³⁶⁰

The Second Circuit issued *three* separate opinions. On March 11, 2021, a panel of the Second Circuit agreed with Vimeo, writing that so long as the provider "consider[s]" the content "objectionable," the internet provider can remove content without having to respond to allegations that in doing so the provider illegally discriminated against a user or violated its own contractual obligations.³⁶¹ Then, on July 15, 2021, the panel granted the petition for rehearing and withdrew its opinion.³⁶² On July 21, 2021, it issued a new opinion.³⁶³ But this opinion was odd. Fundamentally, it still

358. *Domen v. Vimeo, Inc.*, 991 F.3d 66, 69 (2d Cir. 2021) (Domen I).

359. *Id.*

360. *Id.* at 73 ("Section 230 immunity . . . is an immunity from suit rather than a mere defense to liability").

361. *Id.* at 72.

362. *Domen v. Vimeo, Inc.*, 2 F.4th 1002 (2d Cir. 2021).

363. *Domen v. Vimeo, Inc.*, 6 F.4th 245 (2d. Cir. 2021) (Domen II).

reached the same outcome, but instead of reaching this result through “otherwise objectionable,” it mystifyingly chose “harassing” as its textual hook. In other words, the panel held that because Vimeo considered Domen’s videos “harassing,” Vimeo comes under the protection of Section 230(c)(2).³⁶⁴ It is plainly implausible for Domen’s videos to be considered “harassing”: given the well-established meaning of “harassing” as describing impermissibly targeted conduct, videos aimed at a general audience and not at a specific person or specific group cannot be considered “harassing.”³⁶⁵ Perhaps recognizing this, on September 23, 2021, the panel withdrew this second opinion.³⁶⁶ Finally, on September 24, 2021, the Second Circuit panel released a *third* opinion, not ruling on the Section 230 claims but rather on 12(b)(6) stating that Domen failed to state a claim.³⁶⁷

This story shows that a panel of the Second Circuit was not confident that the “unconstrained” reading was correct. Whether they came to this conclusion through introspection and being convinced by further and persuasive briefing, or whether they were concerned about being overruled (either by the Second Circuit sitting *en banc* or by the Supreme Court), is a matter we may never discover. But what it does show is that Section 230(c)(2) arguments are strong enough to convince a panel of the Second Circuit to withdraw an opinion, not once but twice, indicating that these arguments might find purchase.

364. *Id.* at 252.

365. A generally-available video speaking in general terms of matters of general concern is not “harassing.” “Harassing” has a well-established meaning: it refers to actions that are impermissible insofar as they are inappropriately targeted or directed at an individual. *See supra* note 263.

366. *Domen v. Vimeo, Inc.*, 20-616-cv, 2021 WL 4399692, at *1 (2d Cir. Sept. 23, 2021).

367. *Domen v. Vimeo, Inc.*, No. 20-616-cv, 2021 WL 4352312, at *4 (2d Cir. Sept. 24, 2021) (Domen III) (“Appellants’ complaint fails to state a claim on which relief may be granted.”).

B. *Politics: Section 230 Is Already Reformed*

This Article has a number of implications for political reforms: the substance of many reforms is already contained in the statute, which makes certain reforms unnecessary.

For instance, reforms to exclude “Bad Samaritans” who act in bad faith are already included in the statute. Scholars, commentators, citizens, and activists have objected to the protections given to internet entities that are bad-faith actors, insofar as they knowingly facilitate illegal or objectionable activity.³⁶⁸ Courts have ruled that Section 230 protects platforms that encourage such objectionable content as cyber bullying or revenge porn.³⁶⁹ Indeed, courts had held that web platforms are not liable for enabling or encouraging criminal conduct, such as human trafficking—even though Section 230 clearly states that it should not impair the enforcement of criminal law.³⁷⁰ Many have therefore

368. Citron & Wittes, *supra* note 855, at 417 (Section 230 “immunity should not apply to platforms designed to host illegality or sites that deliberately choose to host illegal content.”); Citron & Franks, *supra* note 90, at 70 (“Another effective and modest adjustment would involve amending Section 230 to exclude bad actors from its legal shield.”); *Holding Big Tech Accountable: Targeted Reforms to Tech’s Legal Immunity*, Before the U.S. H.R., Comm. on Energy & Com., Subcomm. on Commc’ns & Tech., 117th Cong. 16 (2021) (statement of Carrie Goldberg, Founder, C.A. Goldberg, PLLC) (proposing “Bad Samaritan” carve-out), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Witness%20Testimony_Goldberg_2021.12.01.pdf; U.S. DEPT OF JUST., SECTION 230—NURTURING INNOVATION OR FOSTERING UNACCOUNTABILITY? KEY TAKEAWAYS AND RECOMMENDATIONS 14–15 (2020), <https://www.justice.gov/file/1286331/download>. Rep. Bob Latta has proposed a “Bad Samaritan carve out,” see *Discussion Draft Bill*, 117th Cong. § 2 (2021), <https://republicans-energycommerce.house.gov/wp-content/uploads/2021/07/5-Latta-Sec-230-Illegal-Content.pdf>.

369. See DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 173–75 (Harvard Univ. Press ed. 2014); Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 368 (2014).

370. *Doe v. Backpage.com, LLC*, 817 F.3d 12, 29 (1st Cir. 2016) (“[T]hat a website operates through a meretricious business model is not enough to strip away those [Section 230] protections.”); see Kendra Albert, et al., *FOSTA In Legal Context*, 52 COLUM. HUM. RIGHTS L. REV. 1084, 1099 n.65 (2021) (“This was emphasized in particular through the film *I Am Jane Doe*, which documented the

suggested a “Bad Samaritan” carve-out where Section 230 does not protect those who encourage illegal activity.³⁷¹ But because the operative part of Section 230 is subsection (c)(2), the “good faith” requirement is operative whenever entities moderate their own content. It would therefore exclude entities that operate in bad faith.³⁷² This is a reform that is proposed by scholars and legislators—but it is already included in the statute.

In addition, reforms to exclude decisions to moderate content based on political viewpoint from Section 230 protections are similarly unnecessary. Conservative politicians have suggested reforms to punish intermediaries for alleged anti-conservative bias. Towards the end of his term, President Trump issued an Executive Order on Preventing Online Censorship, which stated that “Section 230 was not intended to allow a handful of companies to grow into titans controlling vital avenues for our national discourse under the guise of promoting open forums for debate, and then to provide those behemoths blanket immunity when they use their power to censor content and silence viewpoints that they dislike.”³⁷³ Similarly, Senator Josh Hawley has proposed a number of measures that aim “to eradicate what several Republican politicians have called ‘anti-conservative bias’ allegedly embedded in tech companies’ content moderation policies.”³⁷⁴ Other conservative politicians have proposed similar measures.³⁷⁵

plaintiffs’ stories and highlighted the effect of § 230 in their cases. The film was released in February 2017 and screened for Congress. FOSTA was drafted that same year.”) (citing I AM JANE DOE (50 Eggs Films 2017)).

371. *See supra* note 368.

372. In addition, a Bad Samaritan would be “responsible” at least “in part” for the “development” of information. *See supra* notes 290–294 and accompanying text.

373. Exec. Order No. 13925, 85 Fed. Reg. 34,079, 34,080 (June 2, 2020).

374. Lily Coad, *Compelling Code: A First Amendment Argument Against Requiring Political Neutrality in Online Content Moderation*, 106 CORNELL L. REV. 457, 466 (2021).

375. Press Release, Cathy McMorris Rodgers, E&C Republicans Announce

Such moderation may be protected by the First Amendment or by the entity's terms of service. But, as described above, they are not privileged by Section 230, as they do not fall within the enumerated terms of subsection (c)(2)(A) and are not sufficiently similar to these terms.³⁷⁶ In addition, this Article would state that the various state-level laws that prohibit viewpoint discrimination are not preempted by Section 230, though they might still face stiff First Amendment challenges.³⁷⁷

In addition, should Congress pass an amendment to Section 230 beyond these two areas, it would be critically important to not specify subsection (c)(1). The language of many proposed reforms only amend subsection (c)(1)—after all, this is the subsection that courts have implemented. However, if this Article is correct that the operative subsection is (c)(2), then these reforms would be ineffectual.

C. *Scholarship: Interpretation & Inequality*

This Article also contributes to the theory of statutory interpretation by suggesting that the interaction between interpretation and inequality is ripe for further research.

Next Phase of Their Effort to Hold Big Tech Accountable (July 28, 2021), <https://republicans-energycommerce.house.gov/news/press-release/ec-republicans-announce-next-phase-of-their-effort-to-hold-big-tech-accountable/>.

376. These decisions are most likely protected by the entity's terms of service. *See supra* notes 257, 263–264 and accompanying text.

377. *See* NetChoice, LLC v. Paxton, 21-CV-840, 2021 WL 5755120, at *2 (W.D. Tex. Dec. 1, 2021) (Texas HB 20 “is preempted under the supremacy clause by the Communications Decency Act, 47 U.S.C. § 230.”); NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082, 1089–90 (N.D. Fla. 2021) (Florida SB 7072 preempted); Chi. Laws.’ Comm. For Civ. Rts. Under L. v. Craigslist, Inc., 461 F. Supp. 2d 681, 697 (N.D. Ill. 2006) (“And because it is something less than an absolute grant of immunity, state legislatures may be able to enact, consistent with Section 230, initiatives that induce or require online service providers to protect the interests of third parties (under *Zeran’s* holding, states cannot enact such initiatives because they would be inconsistent with the statute and thus preempted under Section 230(e)(3)).”); Candeub & Volokh, *supra* note 265, at 189 (“[I]f states choose to protect platform users against discrimination based on ideological viewpoint, they could indeed limit platform power that way, without running afoul of § 230(c)(2).”).

One drawback of a dynamic interpretation is that it might privilege parties who can muster the resources to pay the expense of litigation and influence the judiciary. In other words, to apply Marc Galanter's seminal theory, originalism is to be preferred because dynamism privileges the "haves" over the "have-nots": it favors more powerful repeat defendants over one-shot plaintiffs.³⁷⁸

The story of Section 230's misinterpretation by the judiciary bears out this hypothesis. Nearly every Section 230 case consists of one-shot plaintiffs—often with sympathetic stories but few resources—fighting against wealthy and well-represented technology companies, who are repeat players who litigate many such cases. It is an unequal playing field. As such, the dynamic interpretations offered by judges perhaps privileged the more powerful parties who were better able to muster resources to craft narratives around the impact of a given decision.³⁷⁹ A focus on a text's original approach would not further exacerbate the existing inequalities by adding a further opportunity for more powerful parties to change the law in their favor.

If this is true, then even those who would not be disposed towards originalism might be disposed towards adopting a "sliding scale" of originalism based on the relative inequality of the parties. More generally, it would advocate for more constraint for judges in cases of inequality between the parties, for instance, in antitrust or securities fraud cases (two areas with both notoriously flexible standards and inequality between the parties). Thus, this Article—and the story of Section 230—illustrates that the interaction between inequality and interpretative method is ripe for further

378. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95, 103 (1974).

379. As Professor Jeff Kosseff has shown, these decisions implicitly embody the notion that the "internet is different" and that judicial decision-making must be responsive to this social dynamic. See KOSSEFF, *supra* note 2, at 77–78 (Noting these cases that applied Section 230 expansively were based on a notion that "[t]he internet is different.").

research.

CONCLUSION

This Article has argued that Section 230 has been consistently misinterpreted, and that a thorough reading of the text, instead of relying solely on purpose and intention, leads to a contrary—and superior—interpretation. It has outlined the broad implications of this argument, and offered some constructive paths forward to implement these insights.

This analysis is highly timely. The Supreme Court is poised to “consider whether the text of this increasingly important statute aligns with the current state of immunity enjoyed by Internet platforms.”³⁸⁰ Hopefully, this Article will help guide the Court and litigants in giving the proper attention to the text of this ever-important statute.

380. *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 14 (2020).