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# Why Section 230 Is Better Than the First Amendment

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# WHY SECTION 230 IS BETTER THAN THE FIRST AMENDMENT

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*47 U.S.C. § 230 ("Section 230") immunizes Internet services from liability for third-party content. This immunity acts as a crucial legal foundation for the modern Internet. However, growing skepticism about the Internet has placed the immunity in regulators' sights.*

*If the First Amendment mirrors Section 230's speech protections, narrowing Section 230 would be inconsequential. This Essay explains why that is not the case. Section 230 provides defendants with more substantive and procedural benefits than the First Amendment does. Because the First Amendment does not backfill these benefits, reductions to Section 230's scope pose serious risks to Internet speech.*

## INTRODUCTION

In 1996, Congress enacted a major free speech law, Section 230.[1] Section 230(c)(1) says Internet services categorically are not liable for third-party content,[2] subject to a few statutory exceptions including intellectual property claims and federal criminal prosecutions.[3]

Since 1996, the Internet has emerged as one of the most important innovations ever. The Internet has created valuable, new user-generated content (UGC) services that never existed in the offline world, such as Wikipedia's crowdsourced encyclopedia, consumer review websites like Yelp,[4] and user-uploaded video sites



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1 47 U.S.C. § 230 (2012). *See generally* JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET (2019).

2 *See* Eric Goldman, *An Overview of the United States' Section 230 Internet Immunity*, *in* THE OXFORD HANDBOOK OF ONLINE INTERMEDIARY LIABILITY (Giancarlo Frosio ed., forthcoming).

3 *See* 47 U.S.C. § 230(e).

4 *See* Eric Goldman, *The Regulation of Reputational Information*, *in* THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 293, 294 (Berin Szoka & Adam Marcus eds., 2010).

like YouTube. These UGC services provide Internet users with an unprecedented ability to express themselves to a global audience. UGC services have also created many private benefits, including new jobs[5] and wealth.[6]

The emergence of UGC services, and their beneficial impact on society, prompts an interesting counterfactual question: Did UGC succeed because of Section 230, or would the First Amendment's powerful protections for free speech have produced similar outcomes without Congress's intervention?

Recently, there has been some valorization of the counterfactual, as commentators have argued that Section 230 is redundant with the First Amendment (at least in part).[7] If so, this implies Congress could modify Section 230 without jeopardizing the Internet because the First Amendment would backfill gaps in Section 230's immunity.[8] Indeed, Congress recently reduced Section 230's immunity[9] and seems destined to reduce it more.[10]

However, the counterfactual is almost certainly not true. The First Amendment and Section 230 are not substitutes for each other. This Essay explains how Section 230 provides significant and irreplaceable substantive and procedural benefits beyond the First Amendment's free speech protections.[11] Because the First Amendment does not backfill these benefits, reducing Section 230's immunity poses major risks to online free speech and the associated benefits to society.[12]

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5 *Cf.* Christian M. Dippon, *Economic Value of Internet Intermediaries and the Role of Liability Protections*, NERA ECONOMIC CONSULTING (June 5, 2017), https://cdn1.internetassociation.org/wp-content/uploads/2017/06/Economic-Value-of-Internet-Intermediaries-the-Role-of-Liability-Protections.pdf.

6 *Cf.* David Post, *A Bit of Internet History, or How Two Members of Congress Helped Create a Trillion or So Dollars of Value*, WASH. POST: VOLOKH CONSPIRACY (Aug. 27, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/27/a-bit-of-internet-history-or-how-two-members-of-congress-helped-create-a-trillion-or-so-dollars-of-value/.

7 See, e.g., Cary Glynn, Note, *Section 230 as First Amendment Rule*, 131 HARV. L. REV. 2027, 2028 (2018); Julio Sharp-Wasserman, Note, *Section 230(c)(1) of the Communications Decency Act and the Common Law of Defamation: A Convergence Thesis*, 20 COLUM. SCI. & TECH. L. REV. 195, 240 (2018); *cf.* David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 478 (2010) (suggesting that common law may protect defendants more than Section 230 does); Brian L. Frye, *The Possible Redundancy of §230*, LAW.COM (Nov. 10, 2017), https://www.law.com/therecorder/sites/therecorder/2017/11/10/the-possible-redundancy-of-%C2%A7230/ (comparing Section 230 to defamation's republication rule).

8 *E.g.*, Sharp-Wasserman, *supra* note 7, at 198 ("[I]f § 230(c)(1) were repealed in reaction to those applications, intermediaries' exposure to defamation liability, in particular, would not change measurably.").

9 *See* Eric Goldman, *The Complicated Story of FOSTA and Section 230*, 17 FIRST AMEND. L. REV. 279, 280 (2019).

10 Goldman, *supra* note 2.

11 *See* James Grimmelmann, *No ESC*, LAW.COM (Nov. 10, 2017), https://www.law.com/therecorder/sites/therecorder/2017/11/10/no-esc/ (calling Section 230 "the 21st-century First Amendment").

12 Modifications to Section 230 could themselves trigger First Amendment scrutiny, a topic beyond this Essay's scope.

The Essay proceeds in four parts. Part I discusses how legislatures sometimes statutorily supplement the First Amendment with laws like Section 230. Parts II and III identify Section 230's substantive and procedural benefits, respectively, compared to the First Amendment. Part IV discusses some policy implications.

## I. SPEECH-ENHANCING STATUTES

The First Amendment is a globally unique protection for free speech. It establishes an inviolable baseline of free speech in the United States. However, the First Amendment only sets a floor, not a ceiling, on free speech protections in the United States. Legislatures can enhance speech by extending the First Amendment with what I call "speech-enhancing statutes."[13] Four examples of such statutes include the following:

1. Reporter shield laws protect reporters from being obligated to disclose their confidential sources, which facilitates the gathering and publishing of sensitive or legally risky information.[14]
2. Anti-SLAPP laws procedurally expedite the dismissal of lawsuits targeting socially beneficial speech.[15]
3. Defamation retraction-demand statutes require plaintiffs to demand, and be denied, a retraction before bringing a defamation lawsuit.[16]
4. The Consumer Review Fairness Act (CRFA), and analogous state laws, prohibit businesses from banning consumer reviews.[17]

The justification for speech-enhancing statutes is clear when the laws extend the First Amendment. For example, anti-SLAPP laws and defamation retraction-demand statutes create procedural hurdles to speech-related lawsuits that the First Amendment does not require. The CRFA governs private vendor-customer contracts, which typically do not receive First Amendment scrutiny at all.

However, other speech-enhancing statutes, such as the reporter shield law, largely codify First Amendment jurisprudence. Why do legislatures enact these laws?[18]

Using Section 230 as a case study, this Essay partially answers that question. Irrespective of its substantive coverage, a speech-enhancing statute may offer

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13 Professor James Grimmelmann calls it "subconstitutional free speech law." *See* Grimmelmann, *supra* note 11.

14 *See, e.g.*, Romualdo P. Eclavea, *Annotation, Privilege of Newsgatherer Against Disclosure of Confidential Sources or Information*, 99 A.L.R.3d § 2[a] (1980).

15 *See, e.g.*, 2 RODNEY A. SMOLLA, LAW OF DEFAMATION § 9:107 (2d ed. 2007).

16 *See* John Francis Major, *Sufficiency of Retraction of Defamatory Statement*, 40 AM. JUR. 2D *Proof of Facts* § 3 (last updated Aug. 2019).

17 *See* Eric Goldman, *Understanding the Consumer Review Fairness Act*, 24 MICH. TELECOMM. & TECH. L. REV. 1, 4 (2017).

18 To be clear, legislatures provide statutory supplements to constitutional rights in other areas, such as how the Civil Rights and Voting Rights Acts extend the Fourteenth and Fifteenth Amendments.

valuable procedural benefits. The next two Parts show how Section 230 has both substantive and procedural benefits for free speech and how that advances user-generated content beyond what the First Amendment could achieve.

## II. SECTION 230'S SUBSTANTIVE BENEFITS

This Part describes how Section 230 provides more substantive protection for free speech than the First Amendment requires.

### *A. Section 230 Covers Defamation and Much More*

Defamation is Section 230's paradigmatic application. Section 230 directly responded to two early online defamation cases, *Cubby, Inc. v. CompuServe Inc.*[19] and *Stratton Oakmont, Inc. v. Prodigy Service Co*.[20] The Fourth Circuit's *Zeran v. AOL* ruling,[21] the seminal case that read Section 230 broadly,[22] was essentially a defamation case.

We can only speculate if the First Amendment and Section 230 produce the same substantive outcomes for online defamation law.[23] Section 230 overlaid UGC defamation cases from the Internet's earliest commercial days. This prevented the development of a jurisprudence applying the First Amendment defense to defamation claims for UGC. Thus, we never got enough data points to confidently predict if Section 230 and the First Amendment would treat UGC defamation cases the same.[24]

Despite defamation's centrality to Section 230's creation, defamation is only a small piece of Section 230's scope.[25] Section 230 covers many doctrines beyond defamation.

Indeed, courts routinely interpret Section 230 to immunize all claims based on third-party content (other than those referenced in Section 230's statutory

19 776 F. Supp. 135 (S.D.N.Y. 1991).

20 1995 WL 323710 (N.Y. Sup. Ct. 1995).

21 Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

22 Eric Goldman & Jeff Kosseff, *Commemorating the 20th Anniversary of Internet Law's Most Important Judicial Decision*, LAW.COM (Nov. 10, 2017), https://www.law.com/therecorder/sites/therecorder/2017/11/10/commemorating-the-20th-anniversary-of-internet-laws-most-important-judicial-decision/.

23 *Compare* Frye, *supra* note 7, *with* KOSSEFF, *supra* note 1, at 95 ("[*Zeran*'s] interpretation of Section 230 was so broad that it exceeded the standard First Amendment protections afforded to publishers. *Zeran* turned Section 230 into a nearly impenetrable super-First Amendment for online companies.").

24 For examples of cases that suggest how UGC jurisprudence might look without Section 230, see *Weigand v. NLRB*, 783 F.3d 889, 892 (D.C. Cir. 2015); *Vesely v. Armslist* LLC, 762 F.3d 661, 666 (7th Cir. 2014); *Roe v. Amazon.com*, 170 F. Supp. 3d 1028, 1040 (S.D. Ohio 2016); *Sandler v. Calcagni*, 565 F. Supp. 2d 184, 193 (D. Me. 2008); and *Lunney v. Prodigy Services Co.*, 94 N.Y.2d 242, 249 (N.Y. App. Div. 1999).

25 Section 230's broad cross-doctrinal application makes any assessment of the Section 230/defamation overlap unhelpfully incomplete. *See* Glynn, *supra* note 7, at 2048; Sharp-Wasserman, *supra* note 7, at 241.

exclusions), regardless of what causes of action the plaintiff actually alleges.[26] As a result, Section 230 has been invoked in cases involving negligence; deceptive trade practices, unfair competition, and false advertising; the common-law privacy torts; tortious interference with contract or business relations; intentional infliction of emotional distress; and dozens of other legal doctrines.[27]

Some of these claims have strong First Amendment defenses, analogous to the defamation jurisprudence.[28] However, for other claims, First Amendment defenses have little or no effect. Section 230 equally immunizes all of these claims, so it clearly provides more protection for those claims with limited or weak First Amendment defense.[29]

### *B. Section 230 Fully Protects Commercial Speech*

Section 230 and the First Amendment handle commercial speech differently. The First Amendment only requires a reduced level of scrutiny for commercial speech, usually intermediate scrutiny (instead of strict scrutiny) for truthful commercial speech[30] and minimal or no First Amendment protection for false commercial speech.[31]

In contrast, Section 230 does not distinguish between commercial speech and other types of speech, treating both types of speech equally.[32] For example, Section 230 has protected Internet services from liability for publishing third-party online advertisements,[33] and Section 230 has long protected online marketplace operators from liability for third-party listings of goods and services.[34]

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26 *See, e.g.*, Twitter, Inc. v. Super. Ct. for S.F., 2018 BL 516706, at *4 (Cal. Ct. App. Aug. 17, 2018).

27 4 IAN C. BALLON, E-COMMERCE AND INTERNET LAW 37.05[1][C] (2d ed.), Westlaw (database updated Jan. 2019); Ardia, *supra* note 7, at 427–28.

28 *See, e.g.*, Snyder v. Phelps, 562 U.S. 443 (2011) (intentional infliction of emotional distress); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) (intentional infliction of emotional distress); Time, Inc. v. Hill, 385 U.S. 374 (1967) (false light invasion of privacy).

29 *See* Jeff Kosseff, *First Amendment Protection for Online Platforms*, 35 COMPUTER L. & SECURITY REV. 199, 206–10 (2019).

30 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980); 2 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 20:10, Westlaw (database updated Apr. 2019).

31 *See* SMOLLA, *supra* note 30, § 20:15.

32 Though it may seem counterintuitive for Section 230 to protect commercial speech, this has spurred the development of online marketplaces that benefit society by improving market efficiency and reducing consumer costs.

33 *See, e.g.*, Goddard v. Google, Inc., 640 F. Supp. 2d 1193 (N.D. Cal. 2009); Ramey v. Darkside Prods., Inc., 2004 U.S. Dist. LEXIS 10107 (D.D.C. May 17, 2004); Cisneros v. Yahoo! Inc., CGC-04-433518 (Cal. Super. Ct. Nov. 6, 2008).

34 *See, e.g.*, Stoner v. eBay Inc., No. 305666, 2000 WL 1705637 (Cal. Super. Ct. Nov. 7, 2000); Gentry v. eBay, Inc., 121 Cal. Rptr. 2d 703 (Cal. Ct. App. 2002).

By treating commercial and noncommercial speech equally, Section 230 avoids the commercial speech doctrine's incoherency.[35] It also means that commercial speech gets more protection under Section 230 than it would under the First Amendment.

### *C. Scienter Is Irrelevant to Section 230*

Section 230(c)(1)'s immunity does not vary with the Internet service's scienter.[36] If a plaintiff alleges that the defendant "knew" about tortious or criminal content, the defendant can still qualify for Section 230's immunity.[37]

The First Amendment does not require this result.[38] For example, in *Smith v. California*,[39] the Supreme Court held that the First Amendment prohibited a retail bookseller from being strictly liable for criminal obscenity.[40] However, any scienter about obscenity could have exposed the bookseller to liability.

Similarly, the First Amendment sometimes prevents strict liability for defamation,[41] but sufficient scienter can override any First Amendment protection.[42] For example, a plaintiff can win a defamation case involving matters of public concern and public figures—the defamation claims most strongly protected by the First Amendment—if it proves the defendant's "actual malice."[43] In contrast, Section 230's immunity applies to actual malice allegations.[44]

The First Amendment also permits distributors of defamatory content to face liability when they have the requisite scienter—that is, they knew or should have known of the defamation.[45] Indeed, the two pre-Section 230 online distributor defamation cases (*Cubby* and *Stratton Oakmont*) applied that reasoning. In practice, this legal standard would turn defamation into a notice-and-takedown regime. In

35 *E.g.*, REBECCA TUSHNET & ERIC GOLDMAN, ADVERTISING & MARKETING LAW 45–46 (2018).

36 In contrast, Section 230(c)(2), a safe harbor from liability for content removals, requires the defendant's "good faith." *See* Eric Goldman, *Online User Account Termination and 47 U.S.C. §230(c)(2)*, 2 U.C. IRVINE L. REV. 659, 661 (2012).

37 *See, e.g.*, Daniel v. Armslist, LLC, 926 N.W.2d 710, 726 ("Because § 230(c)(1) contains no good faith requirement, courts do not allow allegations of intent or knowledge to defeat a motion to dismiss."); *see also* Goldman, *supra* note 2.

38 *See* Kosseff, *supra* note 29.

39 361 U.S. 147 (1959).

40 *Id.* at 152, 155.

41 *See* SMOLLA, *supra* note 30, § 23:1.

42 *See* KOSSEFF, *supra* note 1, at 27.

43 SMOLLA, *supra* note 30, § 23:3 & nn.14–15. *But see* McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in the denial of certiorari) ("If the Constitution does not require public figures to satisfy an actual-malice standard in state-law defamation suits, then neither should we.").

44 *See, e.g.*, Barrett v. Rosenthal, 146 P.3d 510, 513 (2006) (concluding that the defendant successfully defended on Section 230 grounds despite allegations that she acted maliciously).

45 SMOLLA, *supra* note 15, § 4:92.

contrast, Section 230 categorically rejects notice-and-takedown, as *Zeran* expressly indicated.[46]

By mooting inquiries into defendants' scienter, Section 230 provides greater substantive protection for defendants in both defamation and nondefamation cases.

## III. SECTION 230'S PROCEDURAL BENEFITS

The prior Part explained how Section 230 expands the First Amendment's substantive scope. This Part explores how Section 230 provides extra procedural benefits to defendants. While the First Amendment sometimes mandates procedural as well as substantive rules,[47] Section 230 offers more procedural protections, and greater legal certainty, for defendants. These procedural benefits help even in situations where the substantive scope of Section 230 and the First Amendment are identical.

### *A. Section 230 Enables Early Dismissals*

A prima facie Section 230(c)(1) defense typically has three elements: (1) the defendant is a provider or user of an interactive computer service, (2) the claim relates to information provided by another information content provider, and (3) the claim treats the defendant as the publisher or speaker of the information.[48]

Often, judges can resolve all three elements based solely on the allegations in the plaintiff's complaint. Thus, courts can, and frequently do, grant motions to dismiss based on a Section 230(c)(1) defense.[49] In jurisdictions with anti-SLAPP[50] laws, courts can grant anti-SLAPP motions to strike based on Section 230 without

46 *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997) *cert. denied*, 524 U.S. 937 (1998) ("Liability upon notice would defeat the dual purposes advanced by § 230 of the CDA.").

47 *See e.g.*, Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986) (stating the First Amendment requires that plaintiff bears the burden of showing falsity and fault in order to recover damages).

48 *See e.g.*, Bennett v. Google, LLC, 882 F.3d 1163 (D.C. Cir. 2018); BALLON, *supra* note 27, § 37.05[3][A].

49 *See* BALLON, *supra* note 27, § 37.05[7] ("Courts increasingly have been willing to address CDA immunity (at least under section 230(c)(1)) at the outset of a case.").

50 "SLAPP" is an acronym for "Strategic Lawsuits Against Public Participation." GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 2–3 (1996). Typically, SLAPPs inhibit the defendant's right to petition the government or otherwise express themselves in socially important ways. *See What is a SLAPP?*, PUB. PARTICIPATION PROJECT, https://anti-slapp.org/what-is-a-slapp (last visited Oct. 3, 2019). In response, anti-SLAPP laws typically provide procedural "fast lanes" for dismissing SLAPPs and include an attorneys' fee shift to a successful defendant. *See Anti-SLAPP Statutes and Commentary*, MEDIA L. RESOURCE CTR., https://www.medialaw.org/topics-page/anti-slapp?tmpl=component&print=1 (last visited Oct. 3, 2019).

allowing discovery in the case.[51] For cases that reach discovery, Section 230 may materially narrow the disputed facts and scope of discovery.

It matters a lot that Section 230(c)(1)'s prima facie elements do not reference defendant scienter. Otherwise, plaintiffs could allege that scienter—with minimal or no factual support—and often survive a motion to dismiss, get into discovery, and delay resolution of the case to summary judgment or later.

This dynamic occurs in Section 230(c)(1)'s sibling, Section 230(c)(2), which provides a safe harbor for a service's content-removal and content-filtering decisions. Unlike Section 230(c)(1), the Section 230(c)(2) safe harbor requires defendant good faith.[52] Plaintiffs can allege the defendant's bad faith in their complaints, which makes courts reluctant to grant Section 230(c)(2) motions to dismiss.[53] Not surprisingly, Section 230(c)(2)'s higher litigation burdens discourage defendants from relying upon it.

Section 230(c)(1)'s early dismissals are valuable to defendants.[54] They reduce the defendant's out-of-pocket costs to defeat an unmeritorious claim.[55] For smaller

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51 *See* BALLON, *supra* note 27, § 37.02[3].

52 The provision reads:

> 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 avail ability 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 . . . .

47 U.S.C. § 230(c)(2) (2012) (emphasis added).

53 *See* BALLON, *supra* note 27, § 37.05[4][B] (positing that defendants face "potential difficulty . . . obtaining dismissal of a claim pursuant to section 230(c)(2)(A), which requires a showing of good faith, voluntary action, which usually requires evidence from the defendant, either in support of a motion for summary judgment or, if controverted by evidence presented by the plaintiff, at trial"); *see also* Goldman, *supra* note 36, at 666 ("Deferential courts may refuse to grant § 230(c)(2) immunity on a motion to dismiss if the plaintiff alleges a lack of good faith, which gives plaintiffs the chance to hunt for evidence and imposes additional advocacy and discovery costs on the defendant.").

54 *See* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1174 (9th Cir. 2008) ("Websites are complicated enterprises, and there will always be close cases where a clever lawyer could argue that *something* the website operator did encouraged the illegality. Such close cases, we believe, must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged—or at least tacitly assented to—the illegality of third parties."); *accord* Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 255 (4th Cir. 2009) (quoting *Roommates.com*, 521 F.3d at 1175) ("We thus aim to resolve the question of § 230 immunity at the earliest possible stage of the case because that immunity protects websites not only from 'ultimate liability,' but also from 'having to fight costly and protracted legal battles.'").

55 *See* ENGINE, SECTION 230: COST REPORT, https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5c6c5649e2c483b67d518293/1550603849958/Section+230+cost+study.pdf (last visited Aug. 31, 2019) (getting into discovery raises Section 230 defense costs from a minimum of fifteen thousand dollars to a minimum of one hundred thousand dollars).

Internet services, defending a single protracted lawsuit may be financially ruinous.[56] Also, complex litigation can divert substantial managerial and organizational attention and mindshare from maintaining or enhancing the service. Thus, the ability of a defendant to resolve a case on a motion to dismiss (and avoiding expensive discovery) protects small and low-revenue Internet services, which in turn enhances the richness and diversity of the Internet ecosystem.[57]

Section 230(c)(1)'s early dismissals also benefit society in several ways. First, from a judicial economy standpoint, they save both parties from wasting valuable resources on doomed litigation. They also take meritless litigation off court dockets, freeing up the courts to handle other cases more carefully or quickly.

Second, Internet services rarely make a lot of money from any single item of third-party content, so they lack financial incentives to stand behind individual items. Also, the services often lack the contextual information necessary to properly defend third-party content in court.[58]

Accordingly, the most economically rational decision for most Internet services is to capitulate to any lawsuit over UGC—or avoid the lawsuit altogether by quickly removing third-party content in response to prelitigation demands, without any investigation or pushback. This causes "collateral censorship": the proactive removal of legitimate content as a prophylactic way of reducing potential legal risk and the associated potential defense costs.[59]

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56 *See, e.g.*, Eliot Van Buskirk, *Veoh Files for Bankruptcy After Fending Off Infringement Charges*, WIRED (Feb. 12, 2010), https://www.wired.com/2010/02/veoh-files-for-bankruptcy-after-fending-off-infringement-charges/ (noting that Veoh, a YouTube competitor, ran out of money while defending copyright claims before the courts confirmed it qualified for the online copyright safe harbor); *see also* UMG Recordings, Inc. v. Shelter Capital Partners LLC, 718 F.3d 1006, 1036 (9th Cir. 2013) (affirming that Veoh was not violating the law).

57 Admittedly, granting motions to dismiss increases the risk of erroneous plaintiff losses, especially where discovery would have produced inculpatory evidence. This highlights the cost-benefit tradeoffs of all substantive and procedural doctrines that encourage courts to resolve cases early.

58 *See* Venkat Balasubramani & Eric Goldman, *In Its "Innocence of Muslims" Ruling, the Ninth Circuit Is Guilty of Judicial Activism–Garcia v. Google*, TECH. & MKTG. L. BLOG (Feb. 27, 2014), https://blog.ericgoldman.org/archives/2014/02/in-its-innocence-of-muslims-ruling-the-ninth-circuit-is-guilty-of-judicial-activism-garcia-v-google.htm ("Google stood in the movie producer's shoes trying to defend his behavior. But Google wasn't a party to their conversations or their transactions, and Google's interest isn't in defending the movie but in avoiding liability for third party content."); *see also* Garcia v. Google, Inc., 786 F.3d 733 (9th Cir. 2015) (en banc).

59 *See, e.g.*, Jack M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2298 (1999); Glynn, *supra* note 7, at 2035–42; Kosseff, *supra* note 29, at 213; Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293, 295–96 (2013).

Unmeritorious quick removals are common in online copyright law,[60] because the UGC copyright safe harbor[61] is less favorable to defendants than Section 230 is.[62] In contrast, Internet services routinely stand up to noncopyright legal threats, legal demands, and cease-and-desist letters targeting UGC—because Section 230 provides them legal certainty at a relatively low cost.[63]

Unlike Section 230, constitutional litigation is rarely quick or cheap. In particular, courts are reluctant to resolve constitutional arguments on motions to dismiss. Further, constitutional doctrines often raise sufficient factual questions that courts wait until summary judgment (or later) before disposing of an unmeritorious case. Thus, Internet services will expect it to cost less to defend UGC via Section 230 than the First Amendment, which makes the services more willing to stand up for their users. And if Section 230 and the First Amendment both equally dictate the defense wins, society as a whole benefits from reaching that result as quickly and cheaply as possible.

The services' Section 230–aided commitment to their UGC especially benefits content from marginalized communities.[64] Not only are marginalized voices more likely to be targeted by people in positions of power, but Internet services are less likely to worry about marketplace or reputational consequences of removing content from marginalized communities. Compared to the First Amendment, Section 230 helps keep more "at risk" legitimate content online.

### *B. Section 230 Is More Predictable for Litigants than the First Amendment*

For defendants, there is a disproportionately large difference between one hundred percent confidence of victory and ninety-five percent confidence of victory. Ninety-five percent confidence means the defendant must calculate the potential economic risk (five percent chance of loss multiplied by a range of expected damages) and the expected defense costs through numerous litigation stages. If the five percent chance involves a potential total exposure of one hundred million dollars, the case has five-million-dollar expected value. When they face unlikely but massive financial exposure, many rational defendants will settle to ensure the business' survival, rather than "risk it all."

Meanwhile, it can be economically rational for plaintiffs' lawyers to bring cases with only a five percent chance of success. If the lawyer brings twenty of

60 *E.g.*, JENNIFER URBAN ET AL, NOTICE AND TAKEDOWN IN EVERYDAY PRACTICE 88, 116–17 (2017), https://illusionofmore.com/wp-content/uploads/2016/04/Berkeley_Columbia-on-512-takedown.pdf.

61 17 U.S.C. § 512(c) (2012).

62 *See generally* Eric Goldman, *How the DMCA's Online Copyright Safe Harbor Failed*, 18 KOR. U. L. REV. 103 (2015) (discussing some of the ways the DMCA safe harbor was undermined).

63 *See* Eric Goldman & Jessica M. Silbey, *Copyright's Memory Hole*, 2019 BYU L. Rev. (forthcoming) (manuscript at 12), https://ssrn.com/abstract=3351348. Where available, anti-SLAPP laws help by increasing the odds the Internet service will get its attorneys' fees paid. *See id.* at 11.

64 *See* Glynn, *supra* note 7, at 2041, 2047.

those cases, expecting to win one, the winnings from the single successful case could cover the costs of the nineteen failed cases. But plaintiffs' lawyers usually steer clear of a case that has a one hundred percent chance of failure.

First Amendment defenses may be ninety-five percent certain, but they are rarely one hundred percent certain. That minor difference will induce defendants to settle cases that are almost certainly unmeritorious. In contrast, a Section 230 defense sometimes is so obvious, backed by decades of precedential defense wins, that defendants will treat victory as one hundred percent assured. They are less likely to settle those cases, even for a fraction of defense costs.

### *C. Section 230 Inhibits Plaintiff Plead-Arounds*

Usually, Section 230 immunizes all claims applicable to a set of facts, irrespective of the precise claims asserted by plaintiffs. Whether the plaintiff pleads defamation, negligence, tortious interference, unfair competition, or infliction of emotional distress, the defendant wins if the lawsuit is based on third-party content and Section 230's statutory exceptions do not apply.[65] The few common-law claims that Section 230 does not cover, such as promissory estoppel[66] or failure to warn,[67] typically fail on their prima facie elements.[68]

In theory, the First Amendment works the same way. If a lawsuit targets the defendant's speech, the First Amendment should apply regardless of the plaintiff's claims. That's not what happens in practice. Each legal doctrine has its own First Amendment defense elements, and the defendant must navigate all of these requirements to successfully defeat the lawsuit.[69] This increases defense costs and reduces certainty of the outcome.

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65 Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1101–02 (9th Cir. 2009) ("[W]hat matters is not the name of the cause of action—defamation versus negligence versus intentional infliction of emotional distress—what matters is whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another. To put it another way, courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.' If it does, section 230(c)(1) precludes liability."); *accord* Taylor v. Twitter, Inc., CGC 18-564460, 2019 Cal. Super. LEXIS 92, at *18–19, *28–29 (Cal. Super. Ct. March 8, 2019) (saying that California courts look at the practical realities of plaintiffs' allegations, not the specific cause of actions they assert).

66 *Barnes*, 570 F.3d at 1109.

67 Doe 14 v. Internet Brands, Inc., 824 F.3d 846, 851 (9th Cir. 2016); Beckman v. Match.com, 668 Fed. App'x 759, 760 (9th Cir. 2016).

68 Both the *Doe 14* and *Beckman* cases ultimately failed on their elements. Beckman v. Match.com, LLC, 743 Fed. App'x 142 (9th Cir. 2018); Doe No. 14 v. Internet Brands, Inc., 2:12-cv-03626, 2016 BL 498065 (C.D. Cal. Nov. 14, 2016); *accord* Herrick v. Grindr LLC, 306 F. Supp. 3d 579, 588 (S.D.N.Y. 2018); Dyroff v. Ultimate Software Group, Inc., 2017 WL 5665670, at *11–15 (N.D. Cal. 2017).

69 *Cf.* William McGeveran, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49 (2008) (describing a similar problem with fair use defenses to trademark infringement).

### *D. Section 230 Moots State-Level Conflicts of Laws*

Many laws, such as defamation, privacy invasions, and unfair competition, have significant state-by-state differences. Ordinarily, Internet services would incur substantial costs to identify these variations and then deploy state-by-state versions of their services, so they may rationally choose to comply with the lowest common denominator. Section 230 preempts conflicting state law[70] and moots these differences.[71] Internet services can comply with a single national standard,[72] increasing their legal certainty and reducing their legal compliance costs.[73]

### *E. Section 230 Facilitates Constitutional Avoidance*

Courts try to avoid ruling on constitutional grounds and instead prefer to decide cases on any other ground if possible, a doctrine called "constitutional avoidance."[74] Among other reasons, constitutional interpretations can have unexpected consequences, and elected legislators are in a better position to anticipate and balance those considerations than unelected judges deciding a single case at bar. Furthermore, constitutional interpretations reduce legislators' future scope of actions, so constitutional avoidance preserves the legislature's power to superintend the law as society evolves.

This means that courts much prefer to rely on statutory grounds like Section 230 instead of interpreting the First Amendment, even if the substantive results would be the same. To the extent Section 230 statutorily "codifies" constitutional principles, it enables courts to advance constitutional free speech interests while respecting constitutional avoidance.

## IV. POLICY CONSIDERATIONS

Though Congress retains the power to superintend Section 230, it should wield that power infrequently and with precision. This Essay exposes numerous ways Congress could unintentionally undercut Section 230's benefits and hurt the Internet.

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70 47 U.S.C. § 230(e)(3) (2012).

71 *Cf.* Grimmelman, *supra* note 11 (discussing how Section 230 moots many of the doctrinal complexities in defamation law).

72 *But see* Sharp-Wasserman, *supra* note 7, at 233, 235–36 (arguing that circuit-by-circuit differences in Section 230 jurisprudence undermine its uniformity).

73 *See* Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1118 (9th Cir. 2007) ("While the scope of federal intellectual property law is relatively well-established, state laws protecting 'intellectual property,' however defined, are by no means uniform. Such laws may bear various names, provide for varying causes of action and remedies, and have varying purposes and policy goals. Because material on a website may be viewed across the Internet, and thus in more than one state at a time, permitting the reach of any particular state's definition of intellectual property to dictate the contours of this federal immunity would be contrary to Congress's expressed goal of insulating the development of the Internet from the various state-law regimes.").

74 *See, e.g.*, Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

First, Section 230 derives a lot of its strengths from its "horizontal" application to disparate causes of action. Defendants benefit from litigating only a single defense rather than navigating multiple prima facie elements and defenses. If Congress excludes more causes of action from Section 230's coverage, it increases defense costs, creates more constitutional litigation (as defendant now turn to the First Amendment as a backup defense), and encourages plaintiffs to shoehorn their claims into the new exclusion. Instead of adding new exceptions, Congress should enact other horizontal cross-doctrine speech-enhancing defenses, like a federal anti-SLAPP law.

Second, Section 230's agnosticism about defendant scienter is a key element of its success. Introducing scienter into Section 230, even just a little, erodes or wipes out most of Section 230's procedural benefits.

We saw this effect from Congress' most recent change to Section 230, the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 ("FOSTA").[75] FOSTA sought to protect victims of sex trafficking by adding new exceptions to Section 230, including several that depend on a defendant's scienter.[76] FOSTA almost certainly did not benefit sex trafficking victims; and the changes to Section 230 caused numerous Internet services to eliminate some offerings or exit the market entirely.[77] Literally, FOSTA shrunk the Internet.

FOSTA's failings also highlight the risks of incorporating complex fact-based inquiries into Section 230. Consider, for example, a recent proposal that Section 230 should apply only to defendants who act in good faith.[78] This idea might sound "reasonable" enough, but it's a radical change that would destroy Section 230. Putting aside how the change would reduce Section 230's substantive immunity, such amorphous eligibility standards would negate or completely eliminate Section 230's procedural benefits. It would make Section 230 litigation far less predictable, and it would require expensive and lengthy factual inquiries into all evidence probative of the reasonableness of defendant's behavior. Like FOSTA, these procedural losses will lead to the elimination or exit of Internet services—but on a much wider scale, because an across-the-board good-faith or reasonableness requirement would reach much further than FOSTA's specific exclusions. Such requirements would also cause more collateral censorship, as Internet services remove legitimate borderline content to safely ensure a future judge might consider their efforts "reasonable" or "in good faith."[79]

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75 Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. 115-164, 132 Stat. 1253 (2018).

76 Goldman, *supra* note 9, at 284.

77 *See, e.g.*, Eric Goldman, *Who Benefited from FOSTA? (Spoiler: Probably No One)*, TECH. & MKTG. L. BLOG (Jan. 29, 2019), https://blog. ericgoldman.org/archives/2019/01/who-benefited-from-fosta-spoiler-probably-no-one.htm.

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

79 James Grimmelmann, *To Err Is Platform*, KNIGHT FIRST AMEND. INST. COLUM. U. (Apr. 6, 2018), https://knightcolumbia.org/content/err-platform ("[F]or any exception to immunity, *the*

## CONCLUSION

This Essay mirrors the broader debate over rules versus standards.[80] Section 230 is like a rule; First Amendment defenses are like standards. If the First Amendment's standards would always reach the same substantive result as Section 230, we should prefer the rule to increase predictability and reduce adjudication costs. But Section 230 substantively protects more speech than the First Amendment, and the First Amendment will not adequately backfill any reductions in Section 230's protections.

Section 230's success as legislative policy is attributable to subtle and counterintuitive factors. Developments like FOSTA show that Congress does not fully grasp Section 230's doctrinal "hydraulics" or why Section 230 succeeds. By recognizing how Section 230 complements the First Amendment, Congress may be able to avoid ruining one of its legislative masterworks.

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*standard of liability must be clear* so platforms on the right side of the line can win their cases cheaply and reliably.").

80 *See, e.g.*, Sharp-Wasserman, *supra* note 7, at 237–40. *See generally, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).