Section 230's Application to States' Regulation of Social Media

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[*Note*: this is my written testimony from the California Senate Judiciary Committee Informational Hearing entitled "State of Social Media Regulation: Misinformation, Exploitation, Harassment, and Radicalization"]

My name is Eric Goldman, and I am a professor of law and Associate Dean for Research at Santa Clara University School of Law in Santa Clara, California. I have been teaching and researching Internet Law, especially Section 230, for over 25 years, and I started advising Internet services how to build and operate their communities before Section 230 was enacted. Thank you for the opportunity to speak at this hearing.

Given that the California legislature's jurisdiction includes the Silicon Valley, it makes sense that if any state legislature would establish the rules for Internet services, it should be this legislature.

Unfortunately, state legislatures have limited or no role to play in telling Internet services how to manage their editorial operations. The First Amendment severely restricts any legislative mandates about Internet services' editorial decisions, and the Dormant Commerce Clause further restricts the California legislature's ability to regulate global media entities like Internet services.

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In my opening remarks, I've been asked to address why Section 230[1] also restricts the legislature's discretion. Any regulatory effort undertaken by this legislature must account for Section 230. However, navigating around Section 230 won't be enough to resolve all of the issues, because Constitutional considerations loom very large in any effort to regulate control social media.

Section 230 and State Regulation

I'll start by providing an overview of Section 230. Congress enacted the law in 1996 with the express intent of providing greater editorial discretion to Internet services. Congress accomplished this goal by reducing government regulation—including liability—for how Internet services manage third-party content. The statute expressly notes that Americans have benefited from "a minimum of government regulation" of the Internet,[2] and the statute articulates how Congress sought "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[3]

Section 230's main operative provision says that websites aren't liable for third-party content.[4] That basic legal principle has spurred a revolution in how members of our society communicate with each other; and we in California have benefited greatly from that revolution. Section 230 provides the legal infrastructure for an industry that powers the California economy and that helps Californians do their

[1] 47 U.S.C. § 230(c)(1).
[2] 47 U.S.C. § 230(a)(4).
[3] 47 U.S.C. § 230(b)(2).
[4] For a Section 230 explainer, see Eric Goldman, *An Overview of the United States' Section 230 Internet Immunity*, THE OXFORD HANDBOOK OF ONLINE INTERMEDIARY LIABILITY 155 (Giancarlo Frosio, ed. 2020), https://ssrn.com/abstract=3306737.

work, advance their education, perform essential services, and enjoy their leisure time.

Section 230 eliminates some types of liability based on third-party content, but it leaves other regulatory tools in place. For this reason, it's baffling to see Section 230 mischaracterized as creating a "lawless no-man's-land on the Internet"[5] or a "Wild West." Instead, I'll mention three ways that Section 230 preserves regulatory efforts.

First, Section 230's liability model encourages Internet services to undertake socially valuable editorial services that they would otherwise eschew if they faced liability for their editorial judgment calls or errors.[6] Without Section 230's protection, Internet services might turn into anything-goes free-for-all speech venues, an outcome no one would find valuable. More likely, without Section 230, Internet services would find user-generated content too risky and simply shut down our ability to talk with each other.

Second, the originator of illegal content never qualifies for Section 230 immunity. There's always at least one person legally responsible for every legal violation online.

Third, Congress preserved several categories where Internet services remain liable for third-party content. Section 230 has always excluded three types of claims:[7] the

[5] *See* Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1164 (9th Cir. 2008). Quoting *Roommates*, this phrase appears in over fifteen other court opinions.
[6] *See* Eric Goldman and Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH L. 191 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3911509.
[7] *See* 47 U.S.C. § 230(e).

Electronics Communications Privacy Act and similar state laws;[8] intellectual property claims;[9] and federal criminal prosecutions.[10] In 2018, Congress added a fourth exception as part of FOSTA.[11] Because Section 230 has never provided blanket immunity, Congress has always left some room for plaintiffs to seek legal redress for third-party content.

From the outset, Congress primarily reserved any regulation of liability for third-party content to itself, not the states. The drafters' goal was generally to ensure that Internet services only need to comply with a single national standard, not the cacophony of different regulatory approaches at the state level. To achieve this goal, Congress expressly says that Section 230 preempts "inconsistent" state laws.[12] Congress also highlighted the primacy of federal law over state law by excluding federal criminal prosecutions, but not state criminal prosecutions,[13] from Section 230 (but Congress slightly loosened this constraint in FOSTA).[14] Acknowledging the problems with heterogeneous state laws, the Ninth Circuit has also concluded that Section 230's intellectual property exception[15] only applies to federal IP claims.[16]

[8] 47 U.S.C. § 230(e)(4).
[9] 47 U.S.C. § 230(e)(2).
[10] 47 U.S.C. § 230(e)(1).
[11] 47 U.S.C. § 230(e)(5).
[12] 47 U.S.C. § 230(e)(3).
[13] For more details on why the federal/state crimes dichotomy makes sense, *see* Eric Goldman, *The Implications of Excluding State Crimes from 47 U.S.C. § 230's Immunity*, July 10, 2013, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2287622.
[14] For a FOSTA explainer, *see* Eric Goldman, *The Complicated Story of FOSTA and Section 230*, 17 FIRST AMENDMENT L. REV. 279 (2019), https://ssrn.com/abstract=3362975.
[15] 47 U.S.C. § 230(e)(2).
[16] Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102 (9th Cir. 2007).

Regulatory Options Available to California

Though it is surely frustrating for the California legislature that Congress has limited its authority, Congress has not completely eliminated states' regulatory authority over the publication of third-party content. California will not run afoul of Section 230 for laws that impose liability similar to the ECPA or that restrict commercial sex promotions.[17] However, I reiterate that any efforts to impose liability for third-party content in those areas likely raises Constitutional concerns.

California is also free to impose liability for topics unrelated to the publication of third-party content.[18] However, Section 230 does not permit the legislature to indirectly achieve what it can't do directly.

To illustrate this, before FOSTA was adopted, a few states tried to regulate the publication of ads for commercial sex.[19] Rather than ban their publication directly, the states required Internet services to verify that any depicted individuals were adults; and unless the Internet services retained documentary proof of each age verification, the laws said that the services had the requisite scienter for liability.

Three different courts struck down these laws due to Section 230.[20] As one court explained, the law "is inconsistent with Section 230 because it criminalizes the

[17] In re Facebook, Inc., 625 S.W.3d 80 (Tex. 2021) (Section 230 does not preempt Texas' state anti-sex trafficking law).
[18] *E.g.*, City of Chicago v. StubHub!, Inc., 624 F.3d 363 (7th Cir. 2010) (StubHub, acting as a "sales agent," was required to collect sales tax on user-to-user transactions despite Section 230); HomeAway.com, Inc. v. City of Santa Monica, 918 F.3d 676 (9th Cir. 2019) ("internet companies must also comply with any number of local regulations concerning, for example, employment, tax, or zoning").
[19] *E.g.*, Wash. Rev. Code § 9.68A.104 (repealed 2013); Tenn. Code Ann. § 39–13–315; N.J.S.A. § 2C:13–10.
[20] Backpage.com, LLC v. McKenna, 881 F. Supp. 2d 1262 (W.D. Wash 2012); Backpage.com, LLC v. Cooper, 939 F. Supp. 2d 805 (M.D. Tenn. 2013); Backpage.com, LLC v. Hoffman, No. 13–cv–03952 (DMC)(JAD), 2013 WL 4502097 (D.N.J. Aug. 20, 2013).

'knowing' publication, dissemination, or display of specified content. In doing so, it creates an incentive for online service providers not to monitor the content that passes through its channels. This was precisely the situation that [Section 230] was enacted to remedy."[21]

As a different way of trying to work around Section 230, some state legislatures have been exploring "transparency" obligations that require Internet services to publish information about their editorial operations, such as their editorial policies in their terms of service or statistics about their editorial decisions. To the extent these transparency obligations do not restrict the Internet services' decisions about publishing third-party content, then Section 230 may not address them. Nevertheless, I believe mandatory transparency requirements about editorial operations raise serious constitutional problems. I have a forthcoming paper laying out my concerns,[22] and I'm happy to discuss the issue in the Q&A.

Alternative Policy Options

Rather than attempt to control or supervise the editorial decisions of Internet services, the California legislature might consider how it can facilitate the kind of pro-social interactions it hopes to see. Three possibilities:

First, and most importantly, our education system needs to teach students how to be smart and caring digital citizens. No matter how much Internet services are

[21] Backpage.com, LLC v. McKenna, 881 F. Supp. 2d 1262 (W.D. Wash 2012).
[22] Currently with the title "The Constitutionality of Mandating Editorial Transparency," forthcoming 73 HASTINGS L.J. __ (2022).

regulated, we'll never achieve the kind of online world we want without educating people how to be good community members, both online and off.

Second, the legislature could fund research into the best practices for building pro-social online communities. The legislature could also help evangelize the findings to help uplift practices across-the-board, especially at smaller services that can't afford to do this kind of research themselves.

Third, if the California legislature believes that the market isn't providing its constituents with the right kind of Internet services, the legislature could consider building and operating its own services. As an analogy, governments provide physical-world parks to give citizens a place to play and socialize. The California legislature could create the equivalent of digital parks to play a similar pro-social role online.[23]

I'll close by noting the importance of the legislature paying close attention to the needs of the startup ecosystem to ensure that current and future entrepreneurs can launch services that out-innovate and out-compete the existing Internet incumbents.[24]

Thank you for the opportunity to share these remarks with you, and I look forward to the conversation.

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[23] *See* Eric Goldman and Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH L. 191 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3911509.

[24] *E.g.*, Eric Goldman, *Want to Kill Facebook and Google? Preserving Section 230 Is Your Best Hope*, Balkinization, June 3, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3398631.

Note that size-based distinctions do not clearly fix any competition problem. For thoughts on how to craft size-based distinctions for Internet services, *see* Eric Goldman & Jess Miers, *Regulating Internet Services by Size*, CPI ANTITRUST CHRON., May 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3863015.