

SECTION 230

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I. INTRODUCTION

Section 230 of the Communications Decency Act (CDA) has provided broad immunity to Internet service providers since 1996. Today, Section 230's protections are a ripe target for those concerned about the unanticipated power and reach of the small number of giants that have emerged to dominate the digital landscape.

But for those specifically concerned about the adverse effects that Internet companies are having on American democracy—as we are—Section 230 reform is no silver bullet. Recognizing—and monetizing—Internet users' property rights in their data may be a more productive approach.

II. THE TWENTY-SIX WORDS THAT CREATED THE INTERNET

A single sentence in the Communications Decency Act of 1996,¹ Section 230, has become known as “The Twenty-Six Words That Created the Internet”:²

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¹ 47 U.S.C. § 230 (2018).

² See, e.g., Jeff Kosseff, *The Twenty-Six Words That Created the Internet* (2019).

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.

The provision was designed to protect fledgling Internet companies from incurring liability when their millions of users posted content and when the companies made moves to police that content. Sen. Ron Wyden (D-Or.), who wrote Section 230 with then-Rep. Chris Cox (R-Cal.), says the concern was that such liability “will kill the little guy, the startup, the inventor, the person who is essential for a competitive marketplace. It will kill them in the crib.”³

Section 230 succeeded beyond all expectations. Amazon was just two years old⁴ and still a precocious toddler in 1996, with revenue just shy of \$16 million that year;⁵ it brought in twice as much as that *every hour* (for a total of \$70 billion) during the third quarter of 2019.⁶ Google, founded in 1998,⁷ two years after Section 230 became law, had third-quarter 2019 revenue of \$40.3 billion.⁸ Facebook, founded in 2004,⁹ had \$17.65 billion in third-quarter 2019 revenue.¹⁰

³ Emily Stewart, *Ron Wyden Wrote The Law That Built The Internet. He Still Stands By It - And Everything It's Brought With It.*, VOXMEDIA (May 16, 2019, 9:50 AM), <https://www.vox.com/recode/2019/5/16/18626779/ron-wyden-section-230-facebook-regulations-neutrality> [<https://perma.cc/Q7AQ-S8HM>].

⁴ Facebook, FORBES (last visited Apr. 23, 2020), <https://www.forbes.com/companies/facebook/#7bce1d154193> [<https://perma.cc/2WEL-XZV6>].

⁵ Alex Wilhelm, *A Look Back In IPO: Amazon's 1997 Move*, TECHCRUNCH (Jun. 28, 2017), <https://techcrunch.com/2017/06/28/a-look-back-at-amazons-1997-ipo/> [<https://perma.cc/8KVG-LD4N>].

⁶ J. Clement, *Amazon: Quarterly Net Revenue 2007-2019*, STATISTA (Jan. 31, 2020), <https://www.statista.com/statistics/273963/quarterly-revenue-of-amazoncom/> [<https://perma.cc/QR99-FE48>].

⁷ Google, FORBES (last visited Apr. 23, 2020), <https://www.forbes.com/companies/google/#3810b1fc5d28> [<https://perma.cc/3N2S-VWVF>].

⁸ J. Clement, *Google: Quarterly Revenue As 2008-2019*, STATISTA (Feb. 5, 2020), <https://www.statista.com/statistics/267606/quarterly-revenue-of-google/> [<https://perma.cc/9HGM-W5EE>].

⁹ Facebook, *supra* note 4.

¹⁰ J. Clement, *Facebook: Worldwide Quarterly Revenue 2011-2019*, STATISTA, <https://www.forbes.com/companies/facebook/#5811bd2c4193> [<https://perma.cc/JVT2-E56J>].

The distinction that Section 230 drew between the “interactive computer services”¹¹ it protects and the “information content providers”¹² who create the services’ content has consistently withstood legal assault.¹³

Section 230 is now under *political* assault from legislators critical of online services’ election policies.¹⁴ There is plenty to be critical of: Internet companies microtarget political advertising, creating filter bubbles and preventing the counterspeech that First Amendment jurisprudence celebrates.¹⁵ Internet companies amplify political misinformation and disinformation. They fail to adequately protect against foreign interference in our elections.¹⁶ Their algorithms exploit the basic human compulsion to react to material that outrages.¹⁷ They have a serious problem with inauthentic users and bots that their whack-a-mole approach is not solving.¹⁸

¹¹ 47 U.S.C. § 230(f)(2) (defining “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions”).

¹² 47 U.S.C. § 230(f)(3) (defining “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service”).

¹³ See, e.g., Chicago Lawyers’ Committee For Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008) (discriminatory housing ads); Zeran v. AOL, 129 F.3d 327 (4th Cir. 1997) (defamatory information); Delfino v. Agilent Technologies, 145 Cal.App.4th 790 (2006), cert. denied, 552 U.S. 817 (2007) (threats); Gentry v. eBay, Inc., 99 Cal. App. 4th 816, 830 (2002) (false information); Doe v. America Online, 783 So. 2d 1010, 1013–1017 (Fl. 2001), cert. denied, 534 U.S. 891 (2001) (sexually explicit content and minors).

¹⁴ Facebook is the most prominent target, partly because of its size and its aggressive stance on the use of personal data. It also has the easiest financials to analyze, because data-driven advertising is by far its largest line of business. The analysis in this paper applies across Internet companies, but Facebook will stand in as the most useful example throughout.

¹⁵ See, e.g., Ellen L. Weintraub, *Don’t Abolish Political Ads on Social Media. Stop Microtargeting*, WASH. POST (Nov. 1, 2019), <https://www.washingtonpost.com/opinions/2019/11/01/dont-abolish-political-ads-social-media-stop-microtargeting/> [<https://perma.cc/6RE8-RMNW>].

¹⁶ See, e.g., Ian Vandewalker & Lawrence Norden, *Getting Foreign Funds Out of America’s Elections*, BRENNAN CTR. JUST. (Apr. 9, 2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Foreign_Funds.pdf [<https://perma.cc/PLE8-RCGD>].

¹⁷ See, e.g., Jon Evans, “Facebook Isn’t Free Speech, It’s Algorithmic Amplification Optimized For Outrage,” TECHCRUNCH (Oct. 20, 2019), <https://techcrunch.com/2019/10/20/facebook-isnt-free-speech-its-algorithmic-amplification-optimized-for-outrage/> [<https://perma.cc/RQU3-6W7V>].

¹⁸ See, e.g., Nicholas Confessore et al., *The Follower Factory*, N.Y. TIMES (Jan. 27, 2018), <https://www.nytimes.com/interactive/2018/01/27/technology/social-media-bots.html> [<https://perma.cc/9QC6-YTQU>].

But the most prominent political attacks on Section 230 whistle past these democracy-endangering problems and instead take aim at a straw man: the claim that the way Internet companies (Facebook, especially) moderate their content cuts against Republicans.¹⁹ There is little evidence that such partisan bias exists.²⁰ But even if there were, there is no mandate within Section 230 for partisan neutrality,²¹ and any such government mandate would likely draw First Amendment-based objections.²²

Democrats have taken their swings at Facebook and Section 230 as well; Joe Biden told *The New York Times*, “Section 230 should be revoked . . . [f]or [Facebook] and other platforms,” because they are “propagating falsehoods they know to be false.”²³

¹⁹ See, e.g., Nash Jenkins, *The Mark Zuckerberg vs. Ted Cruz Showdown Was the Most Explosive Part of Today's Facebook Testimony*, TIME (Apr. 10, 2018) (quoting Senator Cruz: “There are a great many Americans who I would say are deeply concerned that Facebook and other tech companies are engaged in a pervasive pattern of bias and political censorship.”), <https://time.com/5235461/mark-zuckerberg-facebook-ted-cruz/> [https://perma.cc/63K3-DES3].

²⁰ The most serious attempt so far to investigate systemic partisan bias at Facebook, conducted by former GOP senator Jon Kyl and the law firm Covington & Burling LLP, found none. See Renée DiResta, *Facebook's Anti-Conservative Bias Audit Is Here*, SLATE (Aug. 21, 2019) (“Despite the time and energy invested, the conspicuous absence of evidence within the audit suggests what many media researchers already knew: Allegations of political bias are political theater.”), <https://slate.com/technology/2019/08/facebook-anti-conservative-bias-audit-results-kyl.html> [https://perma.cc/K4H2-RYE2]; See also Jon Kyl, COVINGTON INTERIM REPORT, (2019), https://fbnewsroomus.files.wordpress.com/2019/08/covington-interim-report-1.pdf?mod=article_inline [https://perma.cc/9LA6-ZSUR]; Marie C. Baca, *Facebook Makes Small Tweaks After Anti-Conservative-Bias Report. They're Unlikely To Make The Issue Go Away*, WASH. POST (Aug. 20, 2019), <https://www.washingtonpost.com/technology/2019/08/20/facebook-makes-small-tweaks-following-anti-conservative-bias-report-theyre-unlikely-make-issue-go-away/> [https://perma.cc/L9F2-BKM6].

²¹ See, e.g., Eliot Harmon, *No, Section 230 Does Not Require Platforms to Be “Neutral,”* ELECTRONIC FRONTIER FOUND. (Apr. 12, 2018), <https://www EFF.org/deeplinks/2018/04/no-section-230-does-not-require-platforms-be-neutral> [https://perma.cc/9XMT-4EYG].

²² This is illustrated well by the sharply limited ambit of the May 28, 2020, “Executive Order on Preventing Online Censorship,” Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (June 2, 2020). The E.O.’s most concrete legal step—by far—is its ordering of the Secretary of Commerce to file a rulemaking petition with the Federal Communications Commission to clarify aspects of Section 230. Filing an FCC petition is an action *any* person can undertake without any need for an executive order.

²³ Editorial Board, *Joe Biden*, N.Y. TIMES (Jan. 17, 2020), <https://www.nytimes.com/interactive/2020/01/17/opinion/joe-biden-nytimes-interview.html> [https://perma.cc/LPA4-F9WG].

III. THE DISTANCE THAT INTERNET COMPANIES HAVE TRAVELED SINCE 1996

When Section 230 was signed into law, online services were largely passive conduits for their users' communications, much like a telephone company. This made sense. It would be absurd to throw a racketeering charge at a phone company every time a Tony Soprano picked up a phone to commit a crime. But what if the phone company started to listen to the content of all its calls, and used that information to deliver selected phone calls to some users and not others? What if instead of ringing its customers as soon as someone called, the phone company decided to deliver calls in an order that it determined? What if the phone rang all the time, not with calls from people known to those who answered, but from people the phone company predicted those customers might like to hear from? And that the topics those people talked about were carefully chosen by the phone company as ones that would cause emotional reactions, to drive up telephone use?

That is the direction the major online companies have taken since 1996, and some that failed to do so nimbly enough have failed entirely. Every "like," every share, every click of every user is tracked and analyzed by online companies. Armed with this data, online companies deliver and present their information in an entirely different way. Fordham Law professor Olivier Sylvain writes:

Intermediaries today do much more than passively distribute user content or facilitate user interactions. Many of them elicit and then algorithmically sort and repurpose the user content and data they collect. The most powerful services also leverage their market position to trade this information in ancillary or secondary markets. Intermediaries, moreover, design their platforms in ways that shape the form and substance of their users' content.²⁴

What does this look like in practice? Facebook no longer distributes a user's every post to that user's every "friend," or to everyone who has "liked" a business, as it once did. Instead, after spending years encouraging businesses large and small to ask their customers to "like" them on Facebook, the company turned around in 2012 and started showing its users' posts only to a

²⁴ Olivier Sylvain, *Discriminatory Designs on User Data*, in EMERGING THREATS (David Pozen ed., Knight First Amendment Institute, 2018), <https://knightcolumbia.org/content/discriminatory-designs-user-data> [<https://perma.cc/AE7A-KH3M>].

subset of friends and likes.²⁵ “I felt slightly duped,” wrote Nick Bilton in a blog post for *The New York Times* in 2013:

I’ve stayed on Facebook after its repeated privacy violations partly because I foolishly believed there was some sort of democratic approach to sharing freely with others. The company persuaded us to share under that premise and is now turning it inside out by requiring us to pay for people to see what we post.

Facebook takes a different view, saying that it is still finding the right balance for the algorithm that decides what people see in their news feeds. “The two aren’t related; we don’t have an incentive to reduce the distribution that you send to your followers so that we can show you more ads,” said Will Cathcart, product manager for Facebook’s news feed.²⁶

It is worth noting that the method Facebook settled upon to allow its users to promote a post to more people was not by handwriting a polite note to its CEO, Mark Zuckerberg, but by paying cash money to Facebook.²⁷

Facebook²⁸ and Twitter²⁹ no longer default to a straight chronological timeline of the material they present their users; they instead select and shuffle postings in a manner that their algorithms believe will resonate best with their users. In fact, Facebook actually *bars* users from bypassing its algorithms permanently.³⁰ As Facebook executive Adam Mosseri told *Time* in 2015:

In general, chronological, I think, helps people who are worried about missing things or seeing more recent things, but if

²⁵ See, e.g., Adam Clark Estes, *Facebook Wants to Make Every User an Advertiser*, ATLANTIC, (Oct. 3, 2012), <https://www.theatlantic.com/technology/archive/2012/10/facebook-wants-make-every-user-advertiser/322933/> [<https://perma.cc/HK28-U6DJ>].

²⁶ Nick Bilton, *Disruptions: As User Interaction on Facebook Drops, Sharing Comes at a Cost*, N.Y. TIMES, (Mar. 3, 2013), <https://bits.blogs.nytimes.com/2013/03/03/disruptions-when-sharing-on-facebook-comes-at-a-cost/> [<https://perma.cc/6EYB-JA7F>].

²⁷ See *Facebook for Business*, <https://www.facebook.com/business/pages/boost-post> [<https://perma.cc/V7BQ-RETL>].

²⁸ See, e.g., Victor Luckerson, *Here’s Why Facebook Won’t Put Your News Feed in Chronological Order*, TIME (July 9, 2015), <https://time.com/3951337/facebook-chron/> [<https://perma.cc/YMK4-G3V6>].

²⁹ See, e.g., Joseph Volpe, *Don’t Like Twitter’s New Algorithmic Feed? Then Turn It Off*, ENGADGET, (Mar. 17, 2016), <https://www.engadget.com/2016/03/17/dont-like-twitters-new-algorithmic-feed-then-turn-it-off> [<https://perma.cc/6944-ML5H>] (“The new timeline feature is now enabled by default.”).

³⁰ See, e.g., Luckerson, *supra* note 27 (“Users can select a “Most Recent” tab to show posts as they appear, but the setting stubbornly switches back to Facebook’s algorithmically-driven feed after a certain amount of time.”).

everyone was on chronological all the time, people would miss a lot more important content. Our whole mission is to show people content that we think that they find meaningful. Recency is one important input into what people find meaningful, but we have found over and over again that it's not the only one.³¹

It is likely not a coincidence that the online services' fondness for their algorithms runs as deep as their ability to monetize these data-driven presentations. These algorithms have generated billions of dollars in advertising profits for Facebook and Google.³²

The move to algorithmically driven user experiences represents a profound change in these interactive computer services. Speaking before the American Bar Association last year, Federal Trade Commissioner Rohit Chopra said:

By converging with and into behavioral advertisers, tech companies transformed their platforms into pay-to-play enterprises. Far from being a neutral or passive conduit, these platforms are now actively shaping and profiting from user communications. Gone are the incentives to attract a community by offering privacy, control, and other user-centric benefits. In their place are incentives to not only track user activity, but also generate high user activity by promoting clickbait over content shared organically by other users.³³

³¹ Luckerson, *supra* note 27. Mosseri now serves as head of the Facebook subsidiary Instagram.

³² See *Facebook's Revenue and Net Income From 2007 to 2019*, STATISTA (Jan. 2020), <https://www.statista.com/statistics/277229/facebooks-annual-revenue-and-net-income/> [<https://perma.cc/N8BH-DFAT>]; see also *Operating Income of Google from 4th Quarter 2014 to 4th Quarter 2019*, STATISTA (Feb. 2020), <https://www.statista.com/statistics/584085/googles-quarterly-operating-income/> [<https://perma.cc/EQ2W-5S9Z>]; Twitter, which bears a structure not as naturally hospitable to advertising as Google and Facebook's, has had a longer, harder road to its present modest profitability. See Seth Fiegerman, *Twitter Records Its First Annual Profit, But It Is Losing Millions of Users*, CNN BUS. (Feb. 7, 2019), <https://www.cnn.com/2019/02/07/tech/twitter-earnings-q4/index.html> [<https://perma.cc/ZSK7-C7QD>].

³³ Rohit Chopra, Comm'r, U.S. Fed. Trade Comm'n, Prepared Remarks for the American Bar Association's Antitrust Section's Annual Spring Meeting: Tech Platforms, Content Creators, and Immunity (Mar. 28, 2019), https://www.ftc.gov/system/files/documents/public_statements/1510713/chopra_-_aba_spring_meeting_3-28-19_0.pdf [<https://perma.cc/JK7T-39S4>].

Section 230 aimed to protect the distribution of user-generated Internet content, but what should happen now that that content has taken a back seat to content calculated to generate outrage, stickiness to the platform, and profits?

Courts are beginning to take notice of the distance Internet companies have traveled since 1996 but have so far resisted redefining platforms as content developers to pierce Section 230's immunity protections. Last year, in *Force v. Facebook*, victims of a Hamas attack in Israel alleged that Hamas had posted content on Facebook that encouraged the attacks, suing Facebook on the grounds that its policies and algorithms "directed such content to the personalized newsfeeds of the individuals who harmed the plaintiffs."³⁴ In July 2019, the Second Circuit held that Facebook's direction of Hamas' content could not be considered to render Facebook the "creator" or "developer" of the content:

The term "development" in Section 230(f)(3) is undefined. However, consistent with broadly construing "publisher" under Section 230(c)(1), we have recognized that a defendant will not be considered to have developed third-party content unless the defendant directly and "materially" contributed to what made the content itself "unlawful." This "material contribution" test, as the Ninth Circuit has described it, "draw[s] the line at the 'crucial distinction between, on the one hand, taking actions... to ... display ... actionable content and, on the other hand, responsibility for what makes the displayed content [itself] illegal or actionable.'"³⁵

The panel split on this question; dissenting Judge Robert Katzmann wrote: "When a plaintiff brings a claim that is based not on the content of the information shown but rather on the connections Facebook's algorithms make between individuals, the CDA does not and should not bar relief."³⁶ Judge Katzmann's opinion recognizes that the platforms have come to occupy an ill-defined middle ground in terms of their responsibility for the parameters of online debate— more than passive conduits but less than content originators. As increasingly sophisticated AI comes to control more and more of the content users see, prioritizing content from sources the user never chose over known sources and amplifying speech for its provocative rather than edifying content, Judge Katzmann's cogent analysis may become more persuasive to other judges. For now, his dissenting opinion remains an outlier.

³⁴ *Force v. Facebook, Inc.*, 934 F. 3d 53, 59 (2d Cir. 2019).

³⁵ *Id.* at 68 (quoting *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1269 n.4 (9th Cir. 2016) and *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 413–14 (6th Cir. 2014)).

³⁶ *Id.* at 77.

IV. WHY FOCUSING ON SECTION 230 WILL NOT ADDRESS INTERNET COMPANIES' INJURIES TO DEMOCRACY

While we would welcome a broader adoption of Judge Katzmann's analysis, the nature of Internet companies' injuries to democracy makes it unlikely that they would bear litigation liability for them, regardless of who was considered the "creator" or "developer" of the content. Section 230 jurisprudence, standing doctrine, and First Amendment law all raise obstacles to litigation.

Courts, including the majority in *Force*, construe Section 230 to require that an Internet company must materially contribute to the unlawful nature of the content before they will be held liable as a developer of the information.³⁷ Note that the underlying requirement is that the content, not the company's practices, must be "unlawful."³⁸ Unlike defamation, invasions of privacy, child pornography, terrorism, or copyright violations, the democracy-damaging information ecospheres Internet companies have created are not in and of themselves illegal. Americans deserve fair elections undistorted by Internet companies, but Congress has provided no statutory guarantee of that.

Thus, Internet companies' democracy-damaging actions (exploiting humans' vulnerability to outraging material, creating filter bubbles that exacerbate polarization, programming for virality, and microtargeting), being not in and of themselves illegal, could not give rise to a legal cause of action based on current interpretations of Section 230 immunity.

Another hurdle is the difficulty a plaintiff would have in establishing standing to sue in federal court. However the Internet companies' injuries to democracy are defined, every U.S. citizen suffers that same injury. This would be the most generalized of generalized grievances.

Taxpayer standing doctrine bars a person from suing the federal government when an injury to her as a single U.S. taxpayer is identical to that suffered by her fellow 140.9 million U.S. taxpayers.³⁹ Likewise, any democracy-related injury suffered by a single U.S. citizen based on a platform's distribution of information is identical to that suffered by every

³⁷ *Id.* at 68–9.

³⁸ *Id.* at 69.

³⁹ *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553, 2559 (2007) (opining, "if every federal taxpayer could sue to challenge any Government expenditure, the federal courts would cease to function as courts of law and would be cast in the role of general complaint bureaus"); see also Robert Bellafiore, *Summary of the Latest Federal Income Tax Data, 2018 Update*, TAX FOUND. (Nov. 13, 2018), <https://taxfoundation.org/summary-latest-federal-income-tax-data-2018-update/> [<https://perma.cc/GT8W-V6ZF>].

other of the United States's 330 million citizens.⁴⁰ This standing hurdle would exist even if Section 230 were repealed outright.

Moreover, while Section 230 jurisprudence *requires* a focus on the content of particular communications and its legality, such content-based analysis implicates the First Amendment. Regulating the raw materials of the damage (political mis- and dis-information) is inherently fraught and would raise concerns about the government setting itself up as the arbiter of what is and is not truth.⁴¹

The First Amendment, as currently construed by the Supreme Court,⁴² also keeps federal campaign-finance law largely sidelined. Disclosure of the sources of political mis- and disinformation could and should be beefed up, as part of an enhanced disclosure regime for on-line political advertising.⁴³ Beyond transparency measures, however, little can be added to the Federal Election Campaign Act⁴⁴ by Congress, and little can be done by the Federal Election Commission that would have an appreciable effect while also passing muster with the Court.

But as campaign-finance lawyers, our instinct is to follow the money, and that instinct serves us well here. Let's take the example of Facebook. Facebook makes its money selling ads.⁴⁵ Facebook's impressive ability to sell so very many ads is fueled by the vast amount of user data it possesses. This data allows Facebook to target, and microtarget, and adjust timelines, and to shape every bit of every user's experience. But this data does not belong to

⁴⁰ See United States & World Population Clock, U.S. CENSUS BUREAU, <https://www.census.gov/popclock/> [<https://perma.cc/L65W-F596>] (last visited May 1, 2020).

⁴¹ See, e.g., *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014) (statute prohibiting false statements during a political campaign is an injury that creates Article III standing). The trial court, on remand, struck down the law: "We do not want the government (i.e., the Ohio Elections Commission) deciding what is political truth—for fear that the government might persecute those who criticize it. Instead, in a democracy, the voters should decide." *Susan B. Anthony List v. Ohio Elections Comm'n*, 45 F. Supp. 3d 765, 769 (S.D. Ohio 2014). If the First Amendment means anything, it means this: the Constitution prohibits the government from persecuting those who criticize it. This bedrock First Amendment principle again reveals the fallacy underlying the May 28, 2020 "Executive Order on Preventing Online Censorship," *supra* note 22.

⁴² Starting with *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court has relentlessly narrowed the reach of campaign-finance law.

⁴³ See, e.g., *Honest Ads Act*, S. 1989, 115th Cong. (2017).

⁴⁴ 52 U.S.C. § 30101 *et seq.*

⁴⁵ Sen. Orrin Hatch (R-Utah): "[H]ow do you sustain a business model in which users don't pay for your service?" Facebook CEO Mark Zuckerberg: "Senator, we run ads." *Facebook, Social Media Privacy, & the Use and Abuse of Data: Joint Hearing Before the S. Comm. on the Judiciary & the S. Comm. on Commerce, Science, & Transportation*, 116th Cong. 21 (2018).

Facebook. The thousands of data points that Facebook has on every Facebook user⁴⁶ belong to the users, not the company.

Facebook itself used to agree. But paralleling the company's increased monetization of its users' data are changes to Facebook's terms of service that show an increasing unwillingness to acknowledge its users' ownership of their personal data. What was users' "full ownership of all of your User Content and any intellectual property rights or other proprietary rights associated with your User Content" in 2007⁴⁷ has been reduced in 2020 to an acknowledgement only that users have ownership over the specific content they create and share on Facebook that enjoy copyright or trademark protection, like photos and videos.⁴⁸

Fortunately, Congress is not bound by Internet companies' estimation of who owns their users' personal data.

V. A PROPOSAL

One way to look at Internet companies' businesses, their products, and the harm they are doing to democracy is by viewing that harm as a negative externality, that is, a cost of production that is shifted away from a company and paid by society instead.

Governments can reduce negative externalities by taxing or regulating them. Pollution is the classic example: A product may be cheap because the factory producing it pours its waste into a river, creating a cost to society if it wants clean water to drink. The producer can be assessed a tax to cover the

⁴⁶ *Data Policy*, FACEBOOK, <https://www.facebook.com/about/privacy/> [<https://perma.cc/H4G6-ZVC9>].

⁴⁷ According to Facebook's 2007 Terms of Service: "[Y]ou retain full ownership of all of your User Content and any intellectual property rights or other proprietary rights associated with your User Content." See Facebook, *Terms of Use*, (last revised Nov. 15, 2007) <https://web.archive.org/web/20071219210353/https://www.facebook.com/terms.php> [<https://perma.cc/9TQK-MMFE>].

⁴⁸ By 2018, Facebook's Terms of Service read: "You own the content you create and share on Facebook," dropping the reference to "all" of a user's content and the associated "intellectual property rights or other proprietary rights," and narrowing coverage to things that a user might "create and share." See *Terms of Service*, FACEBOOK (last revised Apr. 19, 2018) <https://web.archive.org/web/20180701035918/https://www.facebook.com/terms.php> [<https://perma.cc/ZD5V-7FF3>]. The version current as of June 2020 defines user-owned content even more tightly. Gone is any affirmative statement that users own the content they create and share on Facebook, reading instead: "Some content that you share or upload, such as photos or videos, may be protected by intellectual property laws. You own the intellectual property rights (things like copyright or trademarks) in any such content that you create and share on Facebook and the other Facebook Company Products you use. Nothing in these Terms takes away the rights you have to your own content." *Terms of Service* FACEBOOK (last revised July 31, 2019), <https://www.facebook.com/legal/terms> [<https://perma.cc/4AHK-4XZ9>]. The terms are silent on what exactly Facebook considers to be "your own content."

cleanup cost, or it can be regulated to keep it from creating the external cost in the first place, or both. Either course increases the cost of production (ideally, to the true cost of production) without a corresponding increase in demand, which will decrease the amount of harm produced.

Taxing Internet companies for their democracy-harming negative externalities, or banning them by regulation, is tricky business because of the First Amendment issues involved.⁴⁹ But in this case, the negative externalities at play can also be addressed by raising the cost of inputs. If a paper mill were able to set disruptively low prices for its products because it was dumping waste into a river *and* it was stealing and pulping someone else's trees, one way to reduce the harm would be to require them to pay for the trees. Internet companies' cost of production, at the moment, includes the free use of their users' personal data. Making them pay a market price for that input is a content-neutral way of encouraging them to make different business decisions and do less harm to democracy.

With that in mind, here's a plan. Legislation could:

- Recognize the property rights that users of Internet services have in their personal data.⁵⁰
- Formally assign those rights to the users.
- Require Internet companies seeking to make use of their users' personal data to pay their users for the privilege.
- Forbid that payment from being waived.
- Set a fee, perhaps five percent of the payment to users—a “Democracy Dividend” of sorts—to establish a public fund aimed at enhancing democracy through such means as public campaign financing or public media.
- Require all unclaimed payments (including those not claimed by bots and other inauthentic users) to go to the public fund.

⁴⁹ See, e.g., *Speiser v. Randall*, 375 U.S. 513 (1958) (striking down law denying tax deductions to those advocating for the unlawful overthrow of the U.S. government).

⁵⁰ One possible definition for “personal data,” used by the European Union in its General Data Protection Regulation (GDPR), is “information relating to an identified or identifiable natural person.” Regulation (EU) 2016/679, art. 4, 2016 O.J. (L 119) 33; see also Information Commissioners Office, United Kingdom, *What is Personal Data?*, ICO.UK <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/key-definitions/what-is-personal-data/> [<https://perma.cc/CHY2-LLVD>].

This plan has the additional, perhaps even *more* significant, salutary effect of giving consumers control over the commercial use of their personal data.

Let's put some rough numbers to this.

What is the value of a single user's data? Let's use Facebook as the example again, as its financials are the most readily dissected. Loup Ventures crunched Facebook's 2017 numbers in 2018 and found that Facebook generated in the neighborhood of \$82.21 in ad revenue for every one of its active U.S. users. To get to the value of the data, Loup factored in half of Facebook's revenue going to other costs, and it is paying a 28 percent tax rate (though Facebook works hard to pay less),⁵¹ for a net profit of \$29.60 per active user. This is the value of a U.S. user's data to Facebook.

Loup assumed that Facebook would pay out 70 percent of that net profit to users for their data (an assumption we also adopt) for a total of \$20.72 per each active U.S. user per year.⁵²

We are not the first to propose allowing users to charge companies for their personal data.⁵³ The usual criticism of such proposals is that 20 bucks a year is not enough for anyone to care much about,⁵⁴ which may well be correct. But this plan's main point is not Facebook's \$20 payment to individual users; it is the behavior change that could come from requiring Facebook to pay a fair price for its data inputs. Given 221 million active U.S. Facebook users,⁵⁵ Facebook's payments would total \$4.6 billion a year for the privilege of monetizing the personal data belonging to its users. Google, Amazon, Adobe, and Verizon would likely also be among those paying their users for their personal data.

⁵¹ See, e.g., Renae Merle, "One of Facebook's Biggest Accomplishments: Paying Far Lower Taxes," L.A. TIMES (July 24, 2016), <https://www.latimes.com/business/la-fi-tn-facebook-taxes-20160714-snap-story.html> [<https://perma.cc/6MCT-DVA3>].

⁵² Doug Clinton, *Your Data Is Worth Less Than You Think*, LOUP VENTURES (Apr. 9, 2018), <https://loupventures.com/your-data-is-worth-less-than-you-think/> [<https://perma.cc/CL2H-2CBU>]. The \$29.60 valuation will come as a surprise to the forty-four percent of those surveyed, who estimated that their Facebook data was worth more than \$500 per year. *Id.*

⁵³ Such proposals even predate the Internet's emergence as a major influence. A widely cited 1996 article by N.Y.U. Prof. Kenneth C. Laudon, for example, proposed "National Information Markets (NIMs) in which information about individuals is bought and sold at a market clearing price" to address direct-mail marketers using personal data. Kenneth C. Laudon, *Markets and Privacy*, 39 COMM. ACM, 92, 99 (Sept. 1996), <https://dl.acm.org/citation.cfm?id=234476> [<https://perma.cc/95N9-8DZ7>].

⁵⁴ See, e.g., Lee Schafer, *How Much Are Your Online Data Really Worth?*, PHYS.ORG (Apr. 12, 2018) <https://phys.org/news/2018-04-online-worth.html> [<https://perma.cc/8NGB-5KMB>] (noting that a "\$20 bill likely won't be enough to get anyone excited about the prospect of trading away personal data to a company like Facebook.>").

⁵⁵ Facebook's Revenue and Net Income From 2007 to 2019, *supra* note 31.

The scope of the entities covered could be based on, for example, the California Consumer Privacy Act, which covers any business that does business in California and either has annual gross revenues over \$25 million; buys or sells the personal information of 50,000 or more consumers or households; or earns more than half its annual revenue from selling consumers' personal information.⁵⁶ By adopting a reasonable threshold, this kind of measure would have the additional benefit of encouraging competition in a digital world now dominated by a few giants. Only established entities would have to pay. Start-ups would be allowed some breathing room.

A public-fund fee set at five percent would generate an additional \$229 million per year from Facebook payments alone. This "Democracy Dividend" could be used to strengthen democracy through the funding of civic education and digital literacy training, non-partisan fact-checking entities, public media (much as Britain's TV licenses fund the BBC),⁵⁷ and/or public campaign financing. Payments unclaimed by fake and bot accounts would fall into this bucket as well, potentially substantially augmenting the fund and providing internet companies with a concrete incentive to reduce their ranks of inauthentic users.

Facebook's sticking to its current plan to aggressively micro-target its users, as it appears set on doing,⁵⁸ would cost it \$4.8 billion a year. Perhaps it stays the course and pays the price. Or perhaps it targets less advertising using personal data and can escape the charge for using that data.

VI. CONCLUSION

The role of Internet platforms has dramatically evolved from Section 230's original conception of platforms as largely passive pass-throughs on the information highway. Today, they play an active part in shaping the outrage-inducing, fact-optional narratives that exacerbate our differences and make consensus-driven democratic decision-making harder to achieve. The platforms reap vast profits from this intervention by appropriating the value of their users' personal data to drive the algorithms that manipulate their user experience. Restoring users' ownership of their own data and mandating

⁵⁶ Cal. Civ. Code § 1798.140.

⁵⁷ *Licence fee and funding*, BBC, <https://www.bbc.com/aboutthebbc/governance/licencefee>. [<https://perma.cc/Z9ZV-RVEH?>]

⁵⁸ See Rob Leathern, *Expanded Transparency and More Controls for Political Ads*, FACEBOOK (Jan. 9, 2020), <https://about.fb.com/news/2020/01/political-ads/> [<https://perma.cc/H8TR-EYCC>]; see also Ellen L. Weintraub (@EllenLWeintraub) TWITTER (Jan. 9, 2020, 9:20 AM) <https://twitter.com/EllenLWeintraub/status/1215277203249860608> [<https://perma.cc/Z28U-72EC>].

compensation for its use will help to re-balance incentives and impose costs appropriately.

Importantly, the platforms would be paying for their *conduct*, in extracting and manipulating users' personal data, not for their role in creating, disseminating, or amplifying any particular *content*, no matter how misleading or harmful. This content-neutral approach avoids constitutional difficulties, vindicates privacy rights, and does not require litigation to implement. It may not make the Internet a conflict-free zone, but could perhaps reduce the incentives that make it an incessant outrage machine.