



Insight

The Precedents for Forcing Neutrality on Tech Platforms

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Last week, Republican Senator Josh Hawley proposed legislation that would fundamentally change a key law underpinning the tech economy, [Section 230 of the Communications Decency Act](#). Currently, Section 230 limits the liability of tech companies for the content that traverses across their Internet platforms. Hawley’s bill, titled “[Ending Support for Internet Censorship Act](#),” would only grant that kind of immunity to large tech platforms if the Federal Trade Commission (FTC) certifies them as nonpartisan.

This proposal arises from a longstanding concern about media companies and platforms: that they are biased. In fact, if enacted this proposal would not be the first law that attempts to force such neutrality. But such enforced neutrality has met opposition in the Supreme Court, and ironically it could stifle the free speech it seeks to support.

Section 230 and the Proposed Revision

Section 230 has been a valuable law for tech companies that operate platforms. The first part of the law establishes that “computer service” providers and their users aren’t to be “treated as the publisher or speaker of any information provided by another information content provider.” The second provision explains that,

No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.

In other words, the law allows companies to police their platforms for objectionable material, within reason, without having to worry too much about First Amendment protections. Such freedom has allowed companies to maintain higher standards for content on their platforms than otherwise might be possible.

[In practice](#), courts have granted users and network operators broad but not unlimited immunity from the content created by others. Section 230’s shield does not apply to federal criminal law, intellectual property law, the Electronic Communications Privacy Act of 1986, or state laws similar to the Electronic Communications Privacy Act of 1986.

Under Senator Hawley’s proposed revision of Section 230, to be granted immunity covered companies would have to be certified by the FTC that they were not “biased against a political party, political candidate, or political viewpoint” every two years. The FTC would also be required to set up a process to allow users to submit complaints or evidence they have been subject to politically biased content moderation. Covered companies would include any provider of “an interactive computer service” that in the previous 12 months, that

- had more than 30,000,000 active monthly users in the United States;

- had more than 300,000,000 active monthly users worldwide; or
- had more than \$500,000,000 in global annual revenue.

With that definition, a number of well-known networks would need to be certified, [including](#) Facebook, Instagram, Facebook Messenger, Twitter, Pinterest, Snapchat, Reddit, WhatsApp, LinkedIn, and Skype. Because it applies to an interactive computer service, Hawley’s bill would also cover the [major wireless companies](#) such as AT&T, Verizon, T-Mobile, and Sprint.

The History of Section 230’s Passage

So why did Section 230 get passed? [As Brent Skorup and Jennifer Huddleston of the Mercatus Center explain](#), the law came as a result of [1995 case](#) involving the [online service Prodigy](#). In the case, a securities brokerage firm claimed that Prodigy should be held liable for defamation because an anonymous user in an online forum suggested the firm had committed criminal and fraudulent acts in connection with the initial public offering of a company. As Skorup and Huddleston explain, platforms were stuck between two bad options:

First, intermediaries could heavily vet user content and take down close calls, but that risked stifling legitimate speech and was probably only practicable for large companies who could afford hiring moderators. Second, intermediaries could escape liability by, like phone operators, exercising no moderation at all. But that would mean leaving up the filth, racism, insults, and pornography that invariably accumulates when content is unpoliced.

The court agreed that the case had merit, and while it was eventually settled out of court, the case spurred Congress to react by writing Section 230. Combined with the [Clinton Administration’s hands-off approach to the Internet](#), Section 230 was a key to the blossoming of online networks. It allowed companies to run platforms and services that facilitated communication without becoming filled with junk. [As Adam Thierer noted](#) on the 15th anniversary of its passage, Section 230 “helped foster the abundance of informational riches that lies at our fingertips today” and has served as “the foundation of our Internet freedoms.”

One potential result of Section 230 was partisanship among platforms, but this effect was not necessarily bad, according to its boosters. Democratic Senator Ron Wyden, an author of the original bill, [recently touted it](#), saying, “You can have a liberal platform. You can have conservative platforms. And the way this is going to come about is not through government but through the marketplace, citizens making choices, people choosing to invest.”

Is This Proposal a New Fairness Doctrine?

This proposal would not be the first time that regulators or lawmakers have tried to require political neutrality in media channels. From 1949 to 1987, the Federal Communications Commission (FCC) enforced the Fairness Doctrine, which required broadcasters to present controversial issues in an honest, equitable, and balanced manner. When the issue made its way to the Supreme Court in [Red Lion Broadcasting Co. v. FCC](#), the doctrine was upheld, but in a very limited way: As the Court explained, broadcasting is unique because the radio spectrum can only support a limited number of broadcasters. Spectrum scarcity made it “idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.”

Even though the Supreme Court upheld the doctrine, regulators eventually eliminated it, on the grounds that it

curtailed the freedom of the press. It was the repeal of the Fairness Doctrine that [allowed for conservative talk radio to flourish](#), a fact which Rush Limbaugh has never [been shy about highlighting](#).

A couple years later, the Supreme Court revisited the issue when it reviewed a Florida law from 1913 that created a similar standard for newspapers. In *Miami Herald Publishing Co. v. Tornillo*, the Court noted characteristics of newspapers that are strikingly similar to tech companies today:

Access advocates submit that, although newspapers of the present are superficially similar to those of 1791, the press of today is in reality very different from that known in the early years of our national existence...

Newspapers have become big business, and there are far fewer of them to serve a larger literate population. Chains of newspapers, national newspapers, national wire and news services, and one-newspaper towns are the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events... Such national news organizations provide syndicated “interpretive reporting” as well as syndicated features and commentary, all of which can serve as part of the new school of “advocacy journalism.”

Nevertheless, the Court struck down the law, bluntly noting that “statute violates the First Amendment’s guarantee of a free press.” The Court [explained](#) that the First Amendment supersedes concerns that “monopoly of the means of communication allows for little or no critical analysis of the media except in professional journals of very limited readership.”

The [Ending Support for Internet Censorship Act](#) therefore faces a couple of challenges, one constitutional and one political. Even if it is enacted as law, the bill would have to contend with a Supreme Court precedent that already addresses this issue. Yet politically, if the bill is seeking to prevent left-leaning bias among the largest tech companies, it has to reckon with the fact that it was the repeal of similar restrictions in the past, not their enactment, that gave rise to powerful conservative voices in the media.