Forbes

To protect free speech, reform section 230; don't put it into the USMCA

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June 12, 2019

Congressmen Paul Gosar and Matt Gaetz have called for removing Article 19.17 from the US-Mexico Canada Agreement (USMCA). They correctly understand that this provision, patterned on section 230 of the Communications Decency Act, constitutes a gift of legal immunity to the Big Tech internet firms, such as Google and Facebook—for which the public receives nothing in return.

In an effort to justify this giveaway, Big Tech's defenders claim that Article 19.17, and section 230, itself, protect free speech. This claim could not be further from the truth. In reality, Section 230, protects Big Tech censorship in the U.S. Reforming the law is the first step to restoring the free flow of ideas online—and expanding the reach of its principles through the USCMA is but pure folly.

Congress passed section 230 with two main provisions, each with a different purpose. First online platforms cannot "be treated as the publisher or speaker of any information provided by another." In other words, Facebook cannot be held liable for defamatory, tortious, or otherwise illegal content which its users post. Here, Congress wanted to protect upstart internet companies by limiting their potential huge liability for every statement posted on their platforms. By relieving them of liability resulting from user generated content, Congress gave the early internet firms the same protections as a newsstand, library and other "distributors" received under common law for the content they distributed via print.

Second, a "Good Samaritan" provision immunizes platforms for restricting content that they believe in good faith "to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." This provision aims to remove disincentives from filtering out obscene and violent content. Congress passed this provision in reaction to previous judicial rulings. Some courts had ruled that efforts by internet platforms to censor and remove obscene content rendered them liable for all user generated content. Thus, the Good Samaritan exception allows such limited censorship while still giving the platforms immunity for all other types of user generated content.

Over the last two decades, some courts have broadly interpreted Section 230 to give platforms total immunity for any tortious or illegal content, and even allow them to disobey takedown orders issued by courts after formal legal judgments. Silicon Valley has had less luck in using the "Good Samaritan" provision to grant themselves an unrestricted right to censor. Courts have generally held that it only grants immunity for removals made in good faith and have declined to "to broadly interpret `otherwise objectionable' material to include any or all information or content," as the Southern District of California held in *Sherman v. Yahoo* (2014).

As Google and Facebook have become indispensable intermediaries for online speech, they have also increasingly used their power to censor views they disagree with. While they started off with obnoxious trolls and neo-Nazis, they have gradually gone after more and more mainstream conservative voices, and even some liberals and moderates who offend their sensibilities. In this, they eviscerate their public promises to be free platforms open to all ideas. And, they often use section 230 to defend themselves against suits challenging their failure to live up to their promises.

Big Tech's reliance on section 230 to defend their own censorship is ironic. Congress passed section 230 with the express purpose of encouraging online platforms to offer a "forum for a true diversity of political discourse." Because section 230 is used to achieve the opposite of this goal, Senators Josh Hawley and Ted Cruz have floated the idea of conditioning section 230 immunity on free speech. As Sen. Cruz wrote last year, "In order to be protected by Section 230, companies like Facebook should be 'neutral public forums.' On the flip side, they should be considered to be a 'publisher or speaker' of user content if they pick and choose what gets published or spoken." Similarly, Democratic FTC Commissioner Rohit Chopra said in April, "For companies that have converged away from neutrality, we need to consider whether they have lost Section 230 immunity unless or until their business is structured to simply serve content rather than select it."

Responding to bipartisan calls for reforming section 230, Silicon Valley lobbyists and their libertarian allies support exporting Section 230 into the USCMA, claiming it will protect free speech in the U.S. Reason Magazine's Robby Soave argued Sen. Hawley's reforms would lead to more censorship, because "if content providers were to lose this protection, they would invariably default toward censoring all kinds of speech."

But, under Section 230, Big Tech platforms have almost no responsibility in the U.S. for any user generated content with the exclusion of intellectual property violations and, since last year, sex trafficking. Nonetheless, this has not kept them from censoring content— which they appear to do regularly. And, they routinely use Section 230 as a defense against lawsuits which seek to hold them accountable for falsely claiming to be politically neutral platforms. Indeed, Michael Beckerman of the Internet Association—which lobbies for Google, Amazon, Facebook, and other tech giants—recently opined that "repealing 230 would make it harder – not easier – for online platforms to moderate both illegal *and legal* content that no reasonable person wants online – like threats, harassment, or hate speech."

Putting aside the biased and pretextual enforcement of their rules, plenty of reasonable people don't think that "misgendering" or calling illegal immigrants "criminals" is hate speech,

as Twitter and Facebook's respective policies proscribe. (In full disclosure, I am currently representing Canadian Feminist Meghan Murphy, who was kicked off of Twitter for "deadnaming" and "misgendering.")

Moreover, as I wrote in RealClearPolitics last year, USMCA 19.17 immunity for removing content is broader than the Good Samaritan provision in Section 230, giving the Big Tech platforms an even stronger legal immunity to censor content.

Trying a different tack, the Cato Institute's John Samples argues that reforming Section 230 will result in European-style censorship where "[c]ompanies must suppress [hate] speech within 24 hours or face fines up to 50 million euros." Samples' argument about Europe conflates criminalizing political speech (e.g. hate speech rules) with holding platforms responsible for distributing and profiting from illegal content. But, regardless, the tech platforms already conform their platforms to hate speech laws. Mark Zuckerberg has emphasized that Facebook seeks to adopt to the fact that free speech "norms are different in each region" of his "global community."

Samples worries that without Section 230, a "company might be tempted to follow the German example" and censor even more. However, these companies already take their lead from Europe. A leaked internal Google report with Orwellian name, "The Good Censor," admitted that Twitter, and Facebook have abandoned the "American model" of being a neutral platform, that "prioritizes free speech" to the "European tradition" which wants "spaces for safety" like an editor or publisher.

Most important, most critics of Section 230 do not advocate total elimination of the law. Rather they simply want the platforms to treat their users neutrally if they want protections designed for a "forum for a true diversity of political discourse." If "Section 230 is what allows the internet to exist" as Soave argues, then the threat of losing their special privileges would disincentivize arbitrary censorship. That is really all that the section 230 critics, such as Senators Cruz and Hawley, seek.

As I note in a forthcoming law review article, this is the balance struck by both the common law and federal regulation for other types of mass distribution technologies, including telegraph operators, cable distributors, and broadcasters for over a century. For example, the Supreme Court noted in *Farmers Union v. WDAY* (1959), when the "power of censorship. . . is prohibited it must follow as a corollary that the mandate prohibiting censorship includes the privilege of immunity from liability for defamatory statements made by the speakers."

Simply asking the wealthiest and most powerful companies in the world to abide by the same rules that everyone else does will not break the internet. However, granting them unrestricted immunity to both host illegal content and censor whomever they want is big step towards abolishing the marketplace of ideas.