From the Victorian Internet to Section 230:
Journalistic Discourse, Government Regulation, and New Communications Technology

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Kendal E. Aldridge

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To Mimi. From you I learned how to work hard and to never take life too seriously.

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Abstract

This study explores the role of mainstream media commentary in reflecting and shaping public opinion on the regulation of interactive communication online. It uses textual analysis to examine newspaper commentary on Section 230 leading up to the only two Supreme Court cases to challenge this controversial statute. The cases are *ACLU v. Reno,* argued in 1997, and *Gonzalez v. Google,* argued in 2023. This study analyzes six months of commentary, leading up to oral arguments in each case, from three major publications: *The Wall Street Journal, The New York Times,* and *The Washington Post.* Widely considered the first draft of history, journalistic discourse offers insight into how public perception of online communication has shifted over time. A qualitative textual analysis of newspaper commentary focused on the Section 230 statute of the reformed 1934 Communications Act found three dominant themes: a collective recognition of content harms, polarization on content moderation policy, and an overall politicization of First Amendment jurisprudence. Debate over the decision to keep or revoke Section 230 touches each of these three themes. This study also situates the current debate over online communication into the long history of government regulation of new media technologies. From its regulation of the telegraph to the internet, U.S. telecommunications law remains the pre-eminent legal framework governing each iteration of communications technology. Revisiting this history is important to understanding modern debates around the sufficiency of this old law to govern new technology.

Keywords: Section 230, content moderation, internet law, First Amendment, discourse

Contents

Introduction

Public discourse is often "incomplete, ambiguous, and contradictory," Phillips and Hardy argue, but it has the power "to produce a social reality that we experience as solid and real" (2002). This study explores the impact of discourse in two ways: It considers the role of mainstream journalistic discourse in shaping public perceptions of new communications technology, and it examines how those perceptions interact with politics to influence the legal regulation of these media innovations. It focuses on the rise of the internet; specifically, on the public debate and political and legal decision-making concerning the regulation of interactive, online communication – bulletin-board services and chat rooms in the 1990s, and social media in the past two decades. It places those debates in historical context by situating the rise of interactive communication online in the long history of electronic media, from the so-called "Victorian internet" of the nineteenth century – the telegraph – through the emergence of broadcasting across the twentieth.

Revisiting the cultural and legal discussions of the internet's origins is important to understanding current shortcomings in legal debates over how online communication should be governed. As Aufderheide argues, "communications policy has been marked by the recognition that communications and culture are intimately linked" (Aufderheide, 1999). Using history to inform how these issues are discussed today is imperative to the interplay between new technology, emerging law, and the shifting societal values shaping them.

In 1996, during Congressional debate over a sweeping telecommunications bill, U.S. representatives Chris Cox and Ron Wyden inserted language designed to facilitate the growth of

an “extraordinary” new form of public discourse – “interactive media” (47 U.S. Code S 230). The section’s key provision – the so-called “twenty-six words that created the internet” (Kosseff, 2022) – declared that an “interactive computer service” could not be held liable for content posted by a user.

Section 230 stirred little controversy in the “modem world” of the 1990s (Driscoll, 2022), when emerging online communities promised to increase public engagement and reinvigorate democratic deliberation. In the nearly three decades since, with the rise of broadband and social media, that promise has faded, and Section 230 has come under siege. This study pinpoints major moments in the development of telecommunications law to explore relevant cultural debates that shape the current digital communications environment. It analyzes Section 230 discourse from two time periods: its first survival of Supreme Court scrutiny in *ACLU v. Reno* in 1997, and its first Supreme Court review in *Gonzalez v. Google (2023)* – almost 25 years later.

Additionally, it places this debate over how to regulate interactive communication in a historical context by producing a cultural and legal history of electronic communication in the United States, from the rise of the mid-Nineteenth century “internet” of its day, the telegraph, in (Standage, 2010) through the Dot-Com Bust and the rise of social media in the first two decades of the twenty-first.

Literature Review

The Telegraph – The Victorian Internet

The Original Text Message: The telegraph's influence on networked communications

"Wire Service" is a term familiar to most journalists; it evokes a time when news was transmitted via telegraph. Journalists of this time used this cable wire to "scoop" revivals, creating competition among who could spread information first and fastest. Western Union emerged as the leading provider of this service due to the widespread demand of message delivery, which was reliant on this company's interconnected cables that spanned across the United States. Revisiting the history of the telegraph is an appropriate starting point for understanding the complicated nature of regulations that have come to govern online communications. Modern day reference to the telegraph as the "Victorian internet" (Standage, 1998) succinctly captures how the development of this network-based information sharing model eventually led to the creation of the world wide web.

Samuel F. Morse created the U.S. version of a working electric telegraph in 1844 (Standage, 1998). He encouraged the government to purchase the patent and build out a national system, but Congress balked. Instead, lawmakers appropriated $30,000 to construct a telegraph line to test Morse's creation (Czitrom, 1982). The first message – "What hath God wrought" – was transmitted on May 24, 1844, from the Supreme Court chamber in Washington to the Mount Clare depot in Baltimore (1982).

Newspapers duly reported the success of Morse's experiment, but initial public reaction was apathetic. Morse's experimental line between Washington and Baltimore was opened to the

public free of charge, yet it found few takers. Instead, curious onlookers watched telegraph operators use the dots and dashes of Morse code to chat and play long-distance chess on the line (Standage, 2008). These operators were the first to engage in interactive communication electronically; they were members of the first online community. But the public did not initially perceive these long-distance discussions as a major revolution in communications. As James Carey (1983) notes, the telegraph, much like the personal computer in the early 1980s, was initially considered to be a frivolous toy, not a transformational advance in communications.

The eventual success of the telegraph in the United States and western Europe generated a wave of contradictory discourse – much enthusiasm, but also concern, fear, and, most of all, confusion. In America, many public intellectuals lauded Morse and his invention. A respected painter who had tried to make his living as an artist, Morse was hailed as the "Leonardo Da Vinci" of America, a renaissance man who brought art and science into harmony (Fang, 2015). Princeton scientist Joseph Henry captured the utopian view of the new electronic age, declaring that Morse's creation represented "the application of abstract science to the useful arts, and the subjection of the innate powers of the material world to the control of the intellect as the obedient slave of civilized man" (Czitrom, 1982).

But in the years following Morse's first message, utopian and dystopian discourse competed for public attention. In Boston, the Reverend Ezra S. Gannett captured both sentiments in one famous sermon. Gannett described electricity – the driving force behind the telegraph – as both "the swift winged messenger of destruction" and the "vital energy of material creation" (1982). Ministers and some civic leaders denounced the telegraph as "black magic" and a

"product of the devil" (Standage, 2008). Many citizens were simply mystified by the new form of communication. Newspaper and magazine articles of the period captured this confusion. According to one report (2008), a resident "imagined the telegraph lines were hollow and that the papers on which the communications were written were blown through them, like peas through a pea shooter." Another one (2008) said he thought the telegraph lines were a tightrope and that he was eager to see "the man run along the wires with the letter bags." In Europe in 1870, the Prussian mother of a soldier fighting in France showed up at a telegraph officer with a plate of sauerkraut and asked it to be "telegraphed to her son" (2008).

The electronic telegraph existed for over a decade before it was an economic success. This was largely due to disagreement over how to turn this technology into a sustainable and profit-generating business. After funding Morse's experimental line, U.S. Congress declared that private industry was free to bring this new technology to market. New companies rushed to wire the nation and cash in on the telegraph boom. By 1850, twenty firms were sending messages across 12,000 miles of telegraph lines (2008). But many were under-capitalized; service was often chaotic and unreliable. Because prices were high, the telegraph was used almost exclusively by business; everyday citizens sent and received messages only in an emergency. Otherwise, they were better served by the government-run postal system, which delivered mail reliably at relatively low costs and enhanced by the Post Office Acts of 1845 and 1855 (Wolfe, 2013).

In 1861, the completion of a transcontinental telegraph line tied the nation together while civil war threatened to tear it apart. As the *Times of London* scoop showed, the telegraph

revolutionized journalism and dramatically increase demand for national and international news. To cover the war, five New York City newspapers created a consortium to share news coverage transmitted by telegraph from battlegrounds across the nation. The New York Associated Press (AP) made good use of the patchwork of rival telegraph networks operating during the war years, but it was clear that the system needed improvement.

In 1857, the six strongest regional telegraph companies had created what historian Joshua Wolff calls an "anti-competitive cartel" that tried to gain monopoly control of the national telegraph business (2013). The effort failed. But after the war, a larger and better capitalized firm succeeded – The Western Union Company.

Western Union claimed it was a "natural monopoly" – an industry in which costs decline as volume increases "so that a single firm serves the whole market more efficiently than competing firms" (2013). Critics disagreed vehemently. They claimed Western Union's investors had used their lobbying clout in Congress to allow the company to monopolize a critical communication infrastructure. They noted that the cost of sending telegraphs was higher in the United States than in western European countries, and they argued that Western Union catered to business customers at the expense of the public.

The public also complained when Western Union cut an exclusive deal with the growing Associated Press news consortium and refused to let competing wire services use Western Union facilities. Turning the AP into a "bilateral" monopoly, as Wolff calls it, was a "testy union of medium and message" (2013). This bottleneck in news dissemination contradicted the goals of the founders. In the early days of the republic, federal postal policies had allowed publishers to

share newspapers at next to nothing, promoting a robust and competitive press (2013). Despite the criticism, Congress refused to intervene. The public did not mind. By 1871, Western Union was operating 180,000 miles of telegraph lines and transmitting 90 percent all telegrams in the United States (2013).

Messages sent through the "wire system" impacted the development of news. Like today's social media landscape, the tool facilitated the spread of both private conversation and public debate. "Unlike previous technological advances applied to communications, the telegraph was not a vehicle but a channel," (Blondheim, 1994) – an entity of its own no longer requiring physical transportation, like the post offices, for message dissemination. Built alongside the railroad, the "the great highway of thought" (1994) was a fitting label for the telegraph. This metaphorical rhetoric foreshadows the influence of how society came to conceptualize information sharing technology.

The prominence of local businesses leading up to the Civil War meant many regulations occurred at a local level rather than the federal one. However, a post-war expansionary period saw the rise of corporate behemoths. Aspiring business tycoons took advantage of limited government intervention and expanded private sector power. Reliance on local regulation became a vulnerability of the Federal government especially due to its "presumption that the telegraph was something akin to an intrastate road or bridge" (Wolfe, 2013), and due to its inability to realize the scale in which corporations dominated industry. The unprecedented nature of new information systems exacerbated existing blind spots in policymakers' ability to understand, anticipate and mitigate these new harms.

The success of the trans-national railroad system provided an existing structure for the telegraph to emulate. Installing wires across this pre-existing railway network decreased cost and increased accessibility and efficiency (2013). Federal lawmakers subsumed regulation to the state giving them authority to “control and regulate” the telegraphs within its borders, and largely modeled its governance after that which was regulating the railroads (2013).

The success of innovation lies not just in an idea, but in the investments needed to make it a reality. The purchasing of patented technology, lobbying for government funds to implement ideas, and the debate between consolidation or competition are all important aspects to the history of the Western Union company. This company’s power came from its development of cohesive infrastructure that transmitted information domestically and abroad (through its underwater trans-Atlantic cable wire). This was only a glimpse into the technological innovations to come.

The Western Union story is one all too familiar to companies providing the resources to make technological innovation a reality. This company is a prime example of how to build a cooperative infrastructure that mobilizes existing technology into practical use - a central tenet of success for “information empires" (Wu, 2010). Western Union is the premier monopoly model. This company advocated for consolidation which helped unity and cooperation (2010), a necessity for this technology to succeed.

The trans-Atlantic cable wire showed potential for global communications. Monopoly power threatened local business as the laissez-faire approach of the pre-war federal government faded. Rising public reliance on the telegraph led to federal initiatives focused on fair access and

trade. States differed on how these services should be regulated. The public continued to debate the government's role in protecting individuals from access, privacy, and exploitative harms.

The telegraph caused disruption to traditional notions of space and time. Some feared that these "circulators of intelligence" drove newspapers to extinction (Blondheim, 1994). Others saw the telegraph as an opportunity. It leveraged the emotional gratification people experienced by "closing the time gap between the occurrence of exciting events and public knowledge of them" (1994). The telegraph eventually dissolved, yet its legacy as the first "monopoly of knowledge" (1994) pointed to a new type of power bestowed upon those who came to control these new communication channels.

Putting your Money where your Mouth is: Telegraph to Telephone & the Rise of AT&T

As the telegraph industry saw commercial success, competition heightened among inventors experimenting with transferring signals to sound. As the first to patent the telephone, Alexander Graham Bell received credit for its invention, but Theodore Vail is the man who turned telephones into a household name (Wu, 2010). Heavy investment into infrastructure (largely due to the backing of the famed J.P. Morgan) gave the newly minted American Telephone and Telegraph company (AT&T), a subsidiary of the Bell Company, a competitive advantage. Western Union's failure to see the telephone as a threat crippled this company's power. They naively "agreed to abandon telephony forever" (2010) in exchange for the promise that Vail's company would "never enter the telegraph market or offer competition to the Associated Press" (2010). This "left the telegraph market open to newcomers" (Paglin et. al.,

1999). As the first successful (and longest) government-controlled monopoly, Vail's AT&T recognized the value of consolidation to maintain a cohesive infrastructure needed for the telephone to succeed both in utility and profit.

During the early 20th century, many local communities managed independent telephone networks because they were easy to make and install. Vail desired to connect these networks and integrate AT&T services into these local networks. AT&T saw value in unifying networks through a process fittingly dubbed the "Interstate Enterprise" (Paglin et. al., 1999). Vail bartered with these independent providers giving them access to Bell services in exchange for control of their telephone network. This shrewd tactic ensured reliance on Bell systems across the country. AT&T remained the dominant telephone network in the U.S. until the end of its monopoly in 1984 (Coll, 1986).

Echoing rhetoric justifying the Western Union monopoly, Vail's AT&T promoted cohesion over competition. A self-described "natural monopoly" the company blended its private interests with public regulation (Paglin et. al., 1999). AT&T leveraged government regulation to maintain its private monopoly. The company propagated the necessities of both consolidation and government support to "maintain systemic integrity" and to benefit from "economies of scale" (1999). The "common carrier principle" emerged out of these debates espousing a public service ethos that made this monopoly palatable (1999).

The structural history of these early communications technology companies like Western Union, Marconi, and AT&T show that business models are just as important to the successful function of the technology itself. The ability to quickly distribute both written and spoken

communication across long distances was revolutionary. Information could be shared, but like a post courier is to letter, an intermediary was still needed for these systems to function. The growing reliance on these mediated communications raised new ethical concerns for individuals. Unprecedented regulatory challenges also occurred, especially due to conflicting interests of many government officials poised to benefit from the commercial success of this technology.

The Wireless Telegraph – Radio

From Railroad to Radio: How interstate commerce laws influenced the emergence of early communication regulation.

In April of 1912, the *New York Times* editorialized about the wonders of a new form of communication. "Few New Yorkers realize," the paper marveled, "that all through the roar of the big city there are constantly speeding messages between people separated by vast distances, and that over housetops and even through the walls of the buildings and in the very air one breathes are words written by electricity" (1912). The editorial appeared six days after the super-sized luxury liner Titanic crashed into an iceberg and sank in the frigid North Atlantic. More than 1500 the ship's passengers drowned in the icy waters. Only 615 survived the disaster. They were rescued by boats summoned to the scene by those "speeding messages … written by electricity (Woolley, 2016). It had taken more than a decade, but the "wireless telegraph" that Italian Guglielmo Marconi had created in 1895 was now being hailed as a revolutionary step forward – a key building block in the construction of what came to be known as the information superhighway.

That term – information superhighway, coined by U.S. Vice President Al Gore in 1994 – evokes the legislative legacy in which modern telecommunications is built: the 1887 Interstate Commerce Act (Paglin et. al., 1999). Transportation and communications are seemingly disparate industries but from a regulatory perspective they both embody similar concerns regarding market dominance, interconnectivity, and the recognition of public interest in new technology regulation (1999). In the early 1900s, lawmakers drew inspiration from existing federal legislation to curb discriminatory practices in the railroad industry. The "extortion of preferential rates" (1999) is one such overlapping example. Legislative acts that curbed monopoly power of railroads in the Gilded Age became natural models for regulating this new "interstate" technology at the turn of the 20th century.

In the months following the Titanic, U.S. congressional investigation into potential malfeasance resulted in the Radio Act of 1912 (Hoolihan, 2016). This public tragedy prompted the U.S. government to take regulatory action when they discovered that jammed radio wires prevented emergency signals from reaching shore (Driscoll, 2022). The Radio Act of 1912 was the first federal law to govern radio communications controlling signal access to prevent jams (Morrison, 2009). This law required a license to send messages via signals through this wireless technology. Under the auspices of Herbert Hoover (not yet President at the time), the 1912 Act conceptualized radio as "point-to-point system" (McChesney, 1993) where hobbyists were required to have a license and "were restricted to transmitting on wavelengths of 200 meters or less" (Driscoll, 2022).

Aspects of the act that proved challenging to lawmakers in 1912 are like modern difficulties surrounding internet regulation. Reliance on analogous phrasing like “wavelengths" and “channels” to understand the function of radio (N.C.B., 1930) showed their lack of technical expertise. Legal decisions were based on analogies not always exact in material points (1930). Efforts to combat this lack of technical expertise only expanded government power over the very thing they knew little about. A century later, Justices still wrestle with interpreting constitutional rights in relation to communications technology. Swapping “wavelengths” for “algorithms” and “channels” for “platforms,” the current Supreme Court even claimed they lacked the requisite technical expertise. U.S. Supreme Court Justice Elena Kagan’s declaration – “I mean we're a court. We really don't know about these things. You know, these are not like the nine greatest experts on the internet,”– captures the spirit of this issue (“*Gonzalez v. Google* oral argument,” 2023).

The 1912 Radio Act required radio users to register and receive licenses to operate “amateur” radio stations. The law did not account for the high volume of station registrations. Wave lengths became scarce resulting in a free-for-all to whatever licensee found accessible. Arbitrary prioritization decisions and discriminatory practices against licensee applications also occurred. In a challenge from Zenith Radio Corporation, the Supreme Court found this licensing process unconstitutional. “Hoover’s Powers over Radio Denied” (1926) headlined the *New York Times* shortly after the court’s 1926 decision. A period of “legal breakdown” (N.B.C., 1930) made radio reception a “national joke” (1930). This attitude came to an end with the rise of broadcast and the new regulatory changes from the 1927 Radio Act.

Congress intentionally updated this Act to account for the new telecommunications emerging around this time. Embedded in this law was the assumption that radio waves were scarce which justified government interference to ensure fair access. At this juncture, public interest became a widely accepted reason for government involvement. The term echoed similar rationales to interstate commerce law. With little precedence, early legal debates even wrestled with applying property rights to air-wave ownership (1930). Values such as "public interest, convenience, and necessity" guided federal transportation law in the 1880s (Aufderheide, 1999). Starting with the 1912 Act, these three values became the key tenets underlying modern U.S. telecommunications law. Lawmakers still struggle with distinguishing between public and the private spheres.

The concept of "broadcasting" had not yet reached mainstream popularity due to distance limits for radio signals. Radio at this time was primarily used by hobbyists as a tool for personal communication. These "amateurs" began to act against the restrictions imposed on them by this Act. In 1914, the Amateur Radio Relay League (ARRL) formed to gain political representation and to create a national network of cooperating radio stations. Innovation outpaced legislation, making policy vulnerable to unanticipated harms and increased backlash against ineffective rules.

The transformation of "amateur radio" run by hobbyists into a "legal" system is emblematic of what media law scholar Tim Wu calls "the Cycle," or the seemingly inevitable monopolization process that shaped the rise of communication and information industries. Telegraph, telephone, and broadcasting (radio and television) all originated out of ad hoc,

decentralized networks eventually absorbed into the belly of the capitalistic beast. They began as open systems that were easy to access, but often remained crude and unreliable. Eventually private investors stepped in with both public and government approval. This transformed communications technology into a popular, profitable, and tightly controlled industry. Information empires are often depicted as inevitable, like an act of nature rather than a process of political and economic decision-making. Their actual histories are more complicated. New ethical debates over profit models and public access emerged as these technologies embedded themselves into everyday life (McChesney, 1993).

Cutting the Cable: From wired to wireless

As is true of most innovations, early wireless communications are not attributed to one person but through the scientific advancements of many. The telegraph transitioned from wired to wireless, replacing copper cables with invisible satellite signals (Woolley, 2016). Scientist Heinrich Hertz proved that "intangible waves made from equal parts electricity and magnetism," and turned the theoretical predictions of his predecessors into reality in 1886 (2016). The wireless telegraph was the first to commercially succeed as scientists furthered innovations in the invisible world (2016).

The Marconi Company was the leading provider of this wireless telegraph service during the early 20th century. However, like many of the Silicon Valley startups today, the company grew too quickly, failed to implement a sustainable business model, and was continually cash strapped. Marconi's charismatic showmanship swayed investors to keep his business afloat

amidst mismanagement. This same narrative is not unfamiliar to today's startup culture that produces the products and services that define the modern Digital Age (Ester & Maas, 2016).

The telegraph was much more than its public perception of a diplomatic or military messaging tool (2016). This networked communication succeeded in the commercial market. The trans-Atlantic telegraph system also facilitated international arbitrage. Stock traders, learning of fluctuating currency exchanges, bought and sold stock to profit off the difference. One reporter noted how the "word wireless brings a smile to the lips of the Wall Street man" (2016).

Government began to see value in this new communications technology, especially regarding its military capabilities. Marconi's trans-Atlantic cable wire was soon proven to be unreliable until its work with the Navy, an FTC report during this time found (Woolley, 2016). The Navy's "patent bust" resulted in a successful collaboration and the development of high-powered stations. Patent disputes robbed innovators of their ability to create. Ironically, patent deregulation spurred technological advancements in industries where government sought regulatory control.

Military officials did not relinquish their power over the airwaves without a fight. A new war between government regulation and private sector self-governance continued legal battles well into the 21st century. The success of government intervention in WWI, foreshadows the public, private sector dynamics out of which the internet emerged. Alongside radio, computing technology also continued to develop due to a strong military interest in "code-reading machines" able to decipher foreign intelligence.

The Marconi company's story is a cautionary tale, showing how continuous innovation and cutthroat market competition can build or break a corporate empire. Its legacy remains a testament to global collaboration and its necessity for communications technology to reach its full potential. Despite this company's failure to seize opportunities to make it competitive with Vail's telephone, its legacy lies in that it "reminded the Marconi world, and all those yet to join it, to imagine the financial value of wireless" (Elmer, 2017). The fate of this company was sealed when its U.S.-based patents were sold from its British subsidiary to a U.S. company, called American Marconi, at the end of the first World War. The Marconi name was dropped and reintroduced as the Radio Corporation of America (RCA) in 1920 (2016). Under visionary leader David Sarnoff, RCA came to rival AT&T bringing a new industry into the fold - broadcasting.

From Radio Production to Rockefeller Plaza: The making of the broadcast industry.

As a former messenger boy for the Marconi company, Sarnoff learned early about the inner workings of the industry and noted the value of speed and reliability in message delivery (Woolley, 2016). Sarnoff always focused on the future. He saw that systems were good at delivering messages to individuals. However, "neither was any good at rapidly disseminating information to large groups of people" (2016). Sarnoff sought to rectify this problem with a "radio music box." Sarnoff spent years convincing executives the power of one-way message dissemination.

Turning to the marketing tactics of his corporate forefather, Marconi, Sarnoff harnessed the power of publicity to prove broadcast radio's potential. Broadcasting a popular boxing match, Sarnoff was able to bring the experience to individuals who didn't have a ticket. This

turned others' doubt into possibility and showed potential in disseminating a wide range of entertainment from music to public lectures. Despite RCA's inheritance of the Marconi-Navy patent of wireless radio, the company would not dominate the receiver market. However, it excelled due to its technical leadership. RCA became the largest radio equipment producer and leading set manufacturer during the 1920s (Scott & Walker, 2016).

Not only did RCA manufacture and sell radios, but the company also produced its first programming through the creation of the National Broadcasting Company (NBC) in 1926. NBC headquarters were established at 30 Rockefeller Plaza in New York City which still exists today. RCA controlled not just the communication "channel" but now the creation of content distributed through it. This raised some ethical concerns, which were just one aspect of this business that the 1927 Radio Act sought to address (McChesney, 1993).

Congress was persuaded to step in and exert "technical order" over the chaotic "amateur" use of the spectrum. Lawmakers passed the Radio Control Act of 1927, which created a five-person Radio Commission with the power to grant and deny licenses. It also assigned frequencies for each license. Under this law, radio was not classified as a "common carrier" like its technological predecessors (1993). The following year, the Radio Commission published General Order 40, declaring that broadcast radio could be developed by private business, not public money (1993). The public may own the electromagnetic spectrum, but – as with the telegraph and the telephone –private industry shaped radio's future. This time with only minimal oversight from lawmakers.

In 1934, the Roosevelt administration updated the 1927 Radio Act to prepare for the arrival of what appeared to be a fast-developing upgrade of radio – television. The Communications Act of 1934 brought radio, television, and telephone under one five-member commission – the Federal Communications Commission. Otherwise, the legislation mirrored much of the Radio Act of 1927. Taken together, the two regulatory acts created the media system that dominated broadcasting for the next six decades. Major networks based in New York provided the bulk of the programming for local stations. Those stations could be owned directly by the networks or by locally owned affiliates (1993). Present policy debates over net neutrality and antitrust are like the fair access and monopoly concerns that were challenging to early radio regulators.

At the peak of if its popularity and profitability in 1940, a "revolt against radio" emerged in public discourse (Pickard, 2015). By 1927, Congress had seen the need to step in and exert "technical order" over the chaotic "amateur" use of the spectrum. Earlier histories of broadcasting – many of them focusing on the national networks and the swashbuckling corporate titans who created them – suggested these regulatory decisions were taken without much debate. But since the 1990s, revisionist views have appeared, and their evidence is persuasive. McChesney (1992) claims a robust media reform movement composed of educators, labor and religious leaders, civil rights groups, public intellectuals, and the press emerged in 1927 and fought diligently through the mid-1930s. They criticized the network-dominated, advertiser-supported broadcasting system. But the rise of the Depression, and public satisfaction with the new entertainment medium of broadcast radio, blunted their opposition.

By the 1940s, public outrage over network programming revived criticism, and an actual "revolt against radio" emerged during and after World War II (Pickard, 2016). The diverse contingents of this media reform movement were not united, and they often pursued different complaints. But they tended to agree that the new prime-time programming on broadcast radio ran too many commercials, lacked public affairs programming, perpetuated dangerous stereotypes of Black Americans and other minorities – and was just plain dumb. Inventor Lee de Forest, whose audion tubes had helped bring sound to radio in the first decade of the century, and who liked to describe himself as the "father of radio." His criticism was summed up in a letter to network heads: "What have you gentlemen done with my child? This child of mine has been resolutely kept to the average intelligence of 13 years … as though you and your sponsors believe the majority of listeners have only moron minds" (Pickard, 2015).

De Forest wasn't alone. The *Saint Louis Post-Dispatch* launched a popular campaign against "plug-uglies" – offensive radio ads – that spread to other newspapers. In the *Atlantic*, respected cultural critic Gilbert Seldes (1948) claimed that network programmers "only want people to listen to the commercial." After the "entertainment has reduced the listener to a passive, noncritical state," Seldes wrote, "the announcer moves in … with his soothing syrup and finished the job" (1948). Black activist Canada Lee denounced the treatment – or lack of treatment – of Black Americans on network programs. For radio listeners, "we do not exist," Lee wrote. "Our problems need no solution … Our people need not be respected, need not be given equal rights … for on the radio we are not a people… Instead, radio is that of a white world" (2015).

Led by New Deal-era reformers James Fly and Clifford Durr, the FCC took limited action to address this problem. In 1946, the commission launched the so-called "blue book," a more stringent list of requirements that radio stations must meet to retain a license. These included a greater commitment to local programming in general and public affairs shows specifically, and the elimination of "excessive advertising." In 1949, the commission followed up with the "Fairness Doctrine," a rule encouraging stations to run programs about local issues of public concern, and to ensure that multiple points of view were included in those programs (2015). This reform had limited impact. The FCC did not say what constituted "excessive advertising" and, after the departure of Durr and Fly, the commission returned to its "light touch" approach to regulation of the medium (the Fairness Doctrine was repealed in 1987). Nonetheless, public discourse in the first decades of radio had pushed government regulators to take at least minimal steps to reign in industry control of a medium that reached into nearly every home in the nation.

Critics of the over-commercialization of radio noted that the U.S. government's hands-off approach to this powerful new form of information and entertainment was in stark contrast to the British Broadcasting Company (BBC) which relied on government subsidiaries to fund the creation of radio programming. These differing models are widely still debated not just for their use in radio, but other media institutions that have since emerged. This law was a precursor to a comprehensive communications law that, although amended, provides the foundational legal framework for modern telecommunications services.

Although this law would eventually govern internet communication, the computer was developing in a vastly different industry. The launch of the Punch Card machine from an emerging company called International Business Machine (IBM) in 1928, was not even on the radar of telecommunications lawmakers at this time. However, it was these new "calculation machines" pre-dated the rise of mainframe computers.

A New Commission in Town: The 1934 Communication Act and the early days of the FCC

To understand current communication regulations, one must go back almost 90 years to the Communications Act passed by Congress in the summer of 1934. Corporate governance, public interest, and monopoly power that underscored the rise of wireless radio and telephone were all addressed in the Act. Lawmakers were challenged with balancing public benefits with the broadcasters' constitutional rights (N.C.B., 1930).

Under the auspices of President Franklin Roosevelt, this Act passed in 1934 and established the Federal Communications Commission (FCC). It also implemented comprehensive federal provisions for telegraph, telephone, and radio service providers. The New Deal era policies emphasized public service and the benefits of a heavily regulated government economy. This Act was no exception and regulated the "airwaves" to public ownership. Preserving access was at the heart of this law (Aufderheide, 1999), which was modeled after both the Interstate Commerce Act of 1888 and the Radio Act of 1927 (Paglin et. al, 1999).

The Act gave the President power to appoint five individuals, with Congress's consent, to run the newly minted Commission (Communications Act, 1934). Despite strict regulations, the

Act entrusted the commercial sector to run these services (Aufderheide, 1999). The technical definitions this law included were also important. This inspired the definition of the internet. Components of this Act were debated approximately 60 years later when Congress introduced updates to the 1934 Act.

Licensing requirements for broadcast remained in this new legislation. Stricter requirements were added to make an efficient, effective enforcement process. Refined equal time provisions required broadcasters to provide political candidates of rival parties with the same on-air opportunities. This idea preceded the 1949 Fairness Doctrine which enforced similar standards for broadcast television.

The Act's required the FCC release an annual report to Congress, not just on spending but on recommendations for future policy. These reports became synonymous with the head commissioners that served on the FCC. One such early example came from FCC chairman, Clifford Durr (appointed in 1946). He launched the "Blue Book" program which was "one of the commission's most progressive initiatives ever attempted" (Pickard, 2016). Under his leadership, the commission developed requirements for licensing renewals which required proof or promise of public service content (2016).

Balancing government regulation, corporate governance, and Constitutional rights continues to be a challenge for the FCC. The aftermath of WWII led to much discussion about political propaganda and changed the public's attitude about government involvement in content requirements. This continued to exasperate partisan divisions between New Deal progressives and right-wing Libertarians (2016).

Factories transitioned from manufacturing ammunition to appliances, and U.S. consumers reveled in the spoils of a post-war economic boom. The end of the war however brought new geo-political conflicts in the 1950s. A power vacuum ended colonial dominance, and heightened competition between the United States and USSR.

Interactive Communication – The Internet

The New Frontier: The launch of a technology revolution

The spread of nuclear weapons and a national campaign to eradicate communism was the cultural environment out of which the internet was born. Mid-century politics saw a strong government interest in foreign operations and national security and heavily invested in military technology. Dubbed the "Cold War" by journalist Walter Lippmann, the U.S. effort to contain the Soviet Union increased intelligence gathering and tactical surveillance. This led to the formation of the Department of Defense (DOD) in 1947, the Central Intelligence Agency (CIA) in 1947, and the National Security Agency in 1952. These agencies developed initiatives and provided the financial investments that resulted in the invention of the internet (McCullough, 2018).

The Government wanted to create an intelligence tool capable of surviving a nuclear war. Telegraph, telephone, and radio were vulnerable to intercepts and breaches. This rendered them ineffective in a diplomatic war fought only through tactical secrecy and surveillance. A researcher on DOD-funded project at the RAND Corporation think tank proposed an alternative to the analog telecommunication system. This new system could withstand a Soviet nuclear attack (Abbate, 2017). This system transmitted digital bits of information across a distributed

network of computers through a process known as "packet switching." The concept is in the current legal definition of the internet which is a "network of both Federal and interoperable packet switched data networks" (Telecommunications Act of 1996).

The Soviet Union's successful launch of the Sputnik communications satellite in 1957 accelerated the "space race" between the two superpowers. Washington quickly formed the National Aeronautics and Space Administration (NASA) and invested heavily in the development of similar technology. Many existing telecommunications companies like RCA, saw this as an opportunity. The first weather satellite, sonar system, ballistic missile spotting satellites, were all inventions developed by RCA's Astro Electronics (Wooley, 2016). The Satellite Communication Act passed in 1962 mitigated issues regarding the commercialization of space. This Act gave similar licensing power to that which was already in place for radio, and restricted satellite ownership to one company owned by AT&T (2016). Satellite technology was not just to be used for space exploration but soon became essential to the 20th-century digital ecosystem.

The DOD eventually founded its own research division called the Advanced Research Project Association (ARPA) in 1961. They continued investing in research projects by contracting work out of public universities and private-sector labs. Named after its funding source, ARPANET resulted from one such university. It is widely considered to be the "grandfather" of the modern internet (McCullough, 2018). The decentralized digital network originally only linked computers at four different universities using AT&T's telephone wires (Levine, 2016). Yet this new network differed from its predecessors and could even re-route

signals through different networks should one be closed (2016). Interface message transmission, as this process was called, occurred across a distributed network when connected to these large machines housed in university research labs. Technology had finally transformed from transferring signals and sound to finally - information.

A 1964 *New York Times* headline, “Sarnoff Envisages Social ‘Explosion’ In Era of Computer," reflected the profound foresight of the very same broadcast visionary who started at RCA. “Computers would respond to handwriting, to images, and to spoken word commands" and one’s telephone number became “as important for him as his name” were two accurate predictions that Sarnoff witnessed in his lifetime (Benjamin, 1964). Society continued to support radical changes to the telecommunications landscape. As computer access increased, d many began to see their potential as a new social tool. Sarnoff’s vision of a “superhighway of communications" (Woolley, 2016) that could lead to a “new frontier, vaster beyond all imagination” (2016).

Old Hobbies Die Hard: How hobbyists shaped the internet

The development of the microchip transitioned computers from monolithic machines to portable devices. During the 1970s, RCA continued to stay competitive in the marketplace manufacturing personal computing kits. Mail-order catalogs and consumer electronic stores like RadioShack began selling equipment to technical hobbyists. These individuals enjoyed building and experimenting with computers during this time (Driscoll, 2022). The legacy of amateur radio greatly influenced early computing. Longstanding hobbyists saw “the microcomputer as a device for communication rather than information processing or automation” (2022). Like radio,

microcomputer hobbyists legitimized by forming groups like the Chicago Area Computer Hobbyists Exchange (CACHE) and the People's Computer Company Networking Committee (PCNET). The two founding members of CACHE created the first "Computerized Bulletin Board Service" (CBBS) in 1978 – also the impetus of the modem-world (2022).

Bulletin Board Systems (BBS) became the de facto use of personal computers during the 1980s, and individuals began to harness the power of information sharing. Early networks still used a point-to-point network structure and remained local due to pricey long-distance calls. Each network had one centralized point – a receiver. Each network had one centralized computer in which individuals' "dialed in." This network model meant that one individual, or a Sysop, was responsible for moderating access to the network. This network model curtailed expansion due to steep long-distance fees. As was true for its early telephonic predecessors, network decentralization made for efficient and effective information. It even allowed for long-distance fee circumvention. In the 1980s, CompuServe rose in popularity and partnered with the Associated Press to publish major newspapers on its network. It also provided email services to its users (Tweney, 2009). However, its live chat program was the company's most used product (2009).

Early personal computers were inextricably linked to the telephone. Computer networks were tied to the phone system in a household. One's 10-digital telephone number was capable of more than just calls. Computers were wired into this pre-existing network. Individuals connected to each other's computer by dialing the receiver's phone number - a process widely referred to as "dial-up" (2022). Referred to as "Ma Bell" during this time, AT&T monopolized the telephone

industry. Regulators slowly opened telephony to private competition through Ma Bell's break-up. The "formation of independent dial-up networks" (2022) where unlikely without this significant structural change.

Individuals slowly joined based on the type of content in which they wanted access rather than geographical proximity. One of the most popular networks, "FidoNet," was the first BBS to successfully expand. It increased its members by 24 percent at the end of 1984. The Orwellian overtures of this year did not go unnoticed by Apple, which launched its first Macintosh computer with a television ad that concluded: "you'll see why 1984 won't be '1984'" ("1984 Apple's Macintosh Commercial" 2012). Computer technology developed right alongside the networked services it facilitated and showed potential as a social organization rather than just a hobby (Driscoll, 2022). CompuServe's major competitor, Prodigy also launched in 1984., and became the first to implement graphical user interface.

The most mythologized BBS service was Stewart Brand's The Well. It launched in 1985 following the iconic Hacker's Conference. The Well wasn't the most widely used BBS but shaped the libertarian ethos commonly associated with Big Tech today (Driscoll, 2022). A San Francisco native, Brand originally wanted to facilitate idea exchanges for future conferences. The Well was local and facilitated "virtual communities" and user meetups (Hafner, 1997). Brand foresaw the dangers of anonymity. His credo "You own your words" meant Well users where required to use their real name to join (1997). His concern regarding third-party speech only scratched the surface of the issues to come. "To put the responsibility on the individual" (1997) was his solution.

A National Science Foundation (NSF) grant continued the development of NSFNET, a national network project tasked with bringing "ARPANET into the civilian world" (Levine, 2016). NSF contracted out this work, selecting the telecom companies IBM and MCI, to develop a nationwide network. Bulletin boards systems and public forums developed as the Government caved to public pressure and rolled back its acceptable use policy to commercialize this military tool (Mowery & Simcoe, 2002). Adoption of this continued the dismantlement of "Ma Bell" (2002). Regulatory agencies, like the FTC, supported initiatives that offset the telephone monopoly's power (2002). As the early 1990s began, the rise of the "Big Three" information service providers: AOL, CompuServe, and Prodigy, made the internet ripe and ready for the commercial world.

From Netscape to Napster: The commercialization of the internet

The onset of the "World Wide Web" ushered in a new chapter for the internet. It became accessible to populations outside of academics, government officials and devoted hobbyists for which it had long been primarily used (Naughton, 2016). Tim Berners-Lee creation of HTML, the computer language behind the world wide web (www), opened internet access to the masses (Isaacson, 2015). From its rapid and widespread public use, the internet fundamentally changed the way individuals around the world engage in civic life and private communication. During the mid-90s, the internet's rapid adoption only increased the public's reliance on it as a tool of communication with the popularity of chat, email, and publication services.

New telecommunications infrastructure supported the creation of networks capable of sustaining users across the nation. The broadband technology historically associated with

broadcast now supported wireless signal transfers. This allowed for internet access and connection to the world wide web. Netscape emerged as the most popular web browser. It allowed people to effectively navigate the internet. To evoke the transportation rhetoric long used to understand communications technology: the internet is the road, browsers the vehicle, search engines the map, and websites the stops along the way (*"*What is the Difference," 2021).

In the early 1990s, the rise of the world wide web and the spread of dial-up access accelerated the growth of digital communication. Online communities like The Well moved from the fringe to the mainstream – and created a host of new legal issues. *Cubby Inc. v. CompuServe Inc*. (1991), one of the first notable court cases concerning the regulation of online speech, asked whether defamation law applied to companies like CompuServe. It was one of three large, subscription-based platforms that distributed third-party content and allowed users to debate issues online (Twehey, 2009). A federal court in New York ruled that CompuServe was a distributor of information, not a publisher, and was not liable for defamatory speech on its site. This distinction between a neutral distributor of information and a third-party publisher shaped protections for digital platforms.

Four years later, the precedent set in the *Cubby* decision influenced a ruling in another liability case, this one involving the so-called "wolf of Wall Street." In *Stratton Oakmont, Inc. v. Prodigy (*1995*)* a co-founder of a Wall Street investment firm claimed he was libeled by content posted on the Prodigy online site. The post declared that Danny Poursh and his company were defrauding customers (later proven to be true). Stratton Oakmont's founders were convicted of fraud. Their story even became the focus of the Martin Scorsese movie, *The Wolf of Wall Street*,

starring Leonardo De Caprio. In 1995, when the case went to court, judges in New York state courts ruled in Stratton Oakmont's favor and held Prodigy libel.

Prodigy's unique selling proposition was its content moderation. Because the service claimed to edit posts when removing offensive and illegal content, the court held it liable for the defamatory content. The fact-pattern created in *Cubby* led the courts to treat online service providers as neutral distributors of content and shielded them from liability. Distributors became analogous to booksellers because they were not liable for the illegal contents of a book, unlike a book's publisher or author (Kosseff, 2019). In *Cubby*, CompuServe did not moderate its platform and it only distributed third-party content. The company was not found liable for the defamation claim. Prodigy claimed that it *did* edit content on the site; therefore, it took on the traditional role of a publisher and *was* liable for the content it published. That decision led to the inclusion of Section 230 into the Communications Decency Act (CDA) of 1996.

The court reasoned that because Prodigy moderated its platform, by removing content using certain keywords, the company was not a mere distributor but a publisher by legal standards. Internet service providers adapted a hands-off approach to content moderation. Poised to turn to this law due to the internet's devolution from traditional communication technology, Congress faced unprecedented challenges continued to prove challenging well into the 21st century.

Moral Panic and Pornography: The push for telecommunications reform

Congress passed the Communications Decency Act of 1996, amending the 1934 Act to address the proliferation of obscene content on the internet. But within a year, in a unanimous ruling, the Supreme Court struck down the CDA as a gross violation of First Amendment rights

(*Reno v. ACLU*, 1997). The landmark ruling was the first to address content on the internet. Yet only one part of the CDA –Section 230 –survived the strict scrutiny that overturned the rest of the proposed law. Section 230, a part of the Internet Freedom and Family Empowerment Act as the bill was titled in 1995, protected online service providers from liability for content posted by third parties. Section 230 provides an important framework for lawmakers navigating the different service touchpoints one must encounter to effectively engage with the internet.

Advocates for this measure wanted regulation to stay in the private sector - even when it came to enforcing parental controls (Internet Freedom and Family Empowerment Act, 1995). *Reno* favored limited government intervention and encouraged self-regulation of computer service providers which paved the way for Section 230. Revisiting the historic context out of which Section 230 is important to current discussion around platform regulation.

To engage with civic life, individuals rely on the internet. Despite all the different uses of the internet, its core function involves the distribution of information across networks. To apply the Section 230 definitions: interactive computer services facilitate connectivity; information content providers are responsible for creation or development of information provided on the internet; and information services offer the capability of "generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information" (1995). This led to widespread interpretation of the internet as an interactive computer service provider by courts.

Is the Medium also a Message? Current debates over Section 230

Congress could not have predicted how important the Section 230 amendment of the Communications Decency Act (CDA) became to legal debate when they passed this as federal

law in 1996. The CDA emerged in response to concerns about widespread use of the internet and the insufficiency of the 1934 Communications Act to regulate this new technology (Cannon, 1996). The internet's ubiquity as a platform for sharing large amounts of unregulated information created a moral panic about pornography. This led to legislative action that resulted in efforts like the CDA (1996). Obscene and indecent speech constitutionally challenged the CDA which influenced modern internet law and solidified its importance to First Amendment jurisprudence.

Many First Amendment scholars favor Section 230 for shaping the internet into a public sphere where discourse flourishes and government interventions are limited (Schroeder, 2018). However, since its inception in 1995, Section 230 has shielded platforms from liability for harmful speech, privacy violations, and even international terrorism. Growing public concern around this topic drove new legislative proposals and Courts' review of cases seeking remedy from Big Tech.

National security and safety concerns continue to challenge Section 230's third-party protections. In *Gonzalez*, Section 230 was Google's legal defense against allegations that its algorithm perpetuated information instrumental in coordinating a terrorist attack. The Anti-Terrorism Act (ATA) gave standing to family members of U.S. nationals slain in ISIS attacks to sue social media companies for "aiding and abetting" and "providing material support" to ISIS.

A similar case, *Taamneh v. Twitter,* involved plaintiffs bringing a civil suit under the ATA. Plaintiffs' failure to prove proximate cause resulted in a District Court ruling in favor of Twitter. Judicial review of Taamneh was contingent on the *Gonzalez* case.

These Supreme Court decisions affect how platforms like YouTube and Twitter operate. The Court could recognize the company's algorithms as purveyors of new content which resulted in a loss of protections from the liability shield, and could even affect how these platforms operate (O'Leary, 2022). As a result, *Gonzalez* is poised to establish powerful precedent regarding Section 230. Plaintiffs in both *Gonzalez* and *Taamneh* argued that these companies failed to make a "good faith effort" to regulate content on their platforms.

Security and safety concerns have always been a policy concern when it comes to regulating the internet, and its unique structure continues to puzzle lawmakers. The 1996 Telecommunications Act was the first legal reform to address online harms. Defining who is responsible for online harms is challenging for courts, especially with mounting public pressure for the government to address online harms related to terrorism, hate speech and revenge porn (Brown & Piper, 2022). Weighing the risks of new policy, especially if proposing tighter regulations on interactive computer service providers, is important. Critics of this believe that regulations put individuals at risk for government surveillance and limit their First Amendment freedoms. This consideration is important in shaping the direction of how law can/will treat the internet.

The Trump presidency catalyzed debate about Section 230 (Sinnreich et. al., 2023). Trump, eventually banned from Twitter. violated the company's community guidelines by publishing tweets that incited violence. The president retaliated by publicly condemning Section 230, which shielded Twitter from liability. Initially, Twitter would "mask" Trump's posts – labeling them as potentially harmful – before deciding to pursue an outright ban. "REVOKE

230!" was just one of several tweets Trump published in response to the company's actions. After determining that Trump's tweets incited the violence that resulted in the 2021 storming of the Capitol, Twitter banned Trump completely. Section 230 became a legislative target on Trump's conservative agenda and turned this once utilitarian policy debate into a partisan, performative one (2023).

How the court system and legislative process have handled this new cyberspace shows disparity in conceptualization of the internet created contentious legal debate. Politicization of internet regulation complicated a debate already couched in a cloak of corporate secrecy. Over time, society began to see the potentially harrowing effects of social media from election tampering to an increase in teen suicide. There is across-the-aisle consensus that these harms exist, yet minimal legislative interventions due to partisan disagreement. Competing constitutional concerns, consolidated corporate power, and a politically polarized public has only obfuscated these policy solution debates. The complexities of the internet's function are complicated for lawmakers. Law is constantly outpaced by the rapid ways in which technology changes.

Content Moderators, Censors, or Common Carriers? - Debating and defining the role of communications platforms

There is a need for a consensus among lawmakers on how the internet should be defined. First Amendment scholars contend the internet should allow as much speech as possible, placing a high bar on the criminalization of content. Law enforcement and some government officials advocate for content access rights to mitigate risks of societal harm. Private companies use the

lucrative model of mining individual data to sell to advertisers at the expense of an individual's privacy. These competing interests are difficult for lawmakers. Protections given to one typically come at the expense of the others.

User generated content is the catch-all term to describe the relationship between internet content providers and internet service providers. Some argue for social media companies to be seen as "digital curators" which challenges the current legal classification of content providers and weakens the liability protections afforded to these platforms. Digital civil rights supporters express concern over user privacy violations, minority disenfranchisement, and discrimination (Citron, 2022). Current U.S. law provides little recourse against the corporate behemoths in which most are beholden. Present scholarship proposes adoption of a new social contract between consumers, companies, and government that mitigates these widespread harms (Srinivasan & Ghosh, 2023).

Many legislative carve-outs to Section 230 address health misinformation, censorship, and criminal liability, and have been introduced in Congress. These legislative efforts are widely discussed in mainstream journalistic discourse. Public debate echoes past rhetorical fear. Without Section 230 protections, the internet could no longer be "mirror to society" (2019). Some legal scholars are concerned with the efficacy of these carve-outs and are unsure if modern internet law should apply judicial precedent (Matulat, 2019).

Gonzalez v. Google, which address Section 230, puts the discussion about online communication regulation at the top of the public agenda. This study examines elite news commentary to gain a better understanding of this debate. As courts and legislatures consider

bold new regulatory regimes for online communication, it is important to understand how these issues are being framed for public consumption. This study seeks to contextualize public debate about online communication regulation. By analyzing elite discourse from mainstream newspaper op-eds and editorials about Section 230, this study answers the following questions:

RQ1: How has mainstream press commentary constructed the meaning of the regulatory debate over interactive communication online?

RQ2: How has this discourse changed over time – from the late 1990s, when online communication was relatively new, to the present age of social media?

Methods

Overview

This study examines elite news media discourse about telecommunications law and policy during two critical moments in the evolution of interactive communications online. Studies have shown that news media coverage can influence Supreme Court decisions, at least at the margins (Badas & Justus, 2022). To explore this dynamic between mainstream media commentary and law, this study analyzes discourse leading up to two significant Supreme Court cases: *Reno v. ACLU* in 1997 and *Google v. Gonzalez* in 2023. The former case challenged the constitutionality of the Telecommunications Act of 1996 (which included Section 230) and the latter challenged the statute itself. These are the only two Supreme Court Cases to review and rule on Section 230. Both cases are influential in shaping how the internet functions especially as a tool of interactive communication.

Textual analysis was used in this study in an "effort to understand the relationship between media, culture, and society" (Brennan, 2017, p. 204), especially as it relates to policy debates, legal reform, and the construction of social meaning around the emergence of interactive communication online (2017). Scholars have used textual analysis to examine media coverage of journalistic values (McCaffrey, 2021), presidential initiatives (Lugo-Ocando, 2022), and free speech issues (McCallum, Waller, & Myers, 2023). As Phillips and Hardy note (2022, p. 210), textual analysis allows for the ability "to analyze a text in terms of the relationship it has with other texts."

To examine op-ed and editorial discourse surrounding Section 230, a newspaper database search in ProQuest identified all media coverage from both events in The *New York Times, The Wall Street Journal*, and *The Washington Post*. These three national papers were selected because of their status as outlets of elite opinion on Washington policy issues. (For example, President Biden published an op-ed in the *Wall Street Journal* laying out his administration's views on Section 230; other leading politicians published commentary in the *Times* and *Post* as well). Past studies even show a relationship between media discourse and public opinion (Gamson & Modigliani, 1989) and that "elite national news organizations are more likely to provide content about the outcomes of high-stakes Supreme Court case" (Vining & Marcin, 2014).

To capture the range of commentary on Section 230, only editorials and op-ed opinion articles were included. Previous studies showed how op-ed coverage of controversial political issues (Alieva, 2023) and societal issues (DeFoster, 2010) have changed over time. Each piece of commentary was examined to determine relevance to Section 230. A total of 50 articles were analyzed across the publications listed. Critically analyzing journalistic discourse, especially about coverage of controversial policy issues, is important. Especially due to journalism's susceptibility to influence by political actors (Bedingfield & Anshari, 2014). Scholars have used major newspapers as a proxy for elite discourse of political issues in studies about populist rhetoric in a presidential campaign (Kumar, 2005), and in comparing U.S. and Chinese reaction to street protests (Zhang, 2022).

Sample

To construct my sample for this textual analysis, I drafted search strings that described Section 230 as it was referred to in the two separate cases. The *Reno* argument occurred on March 19, 1997, and the *Gonzalez* one on February 21, 2023. This study looks at commentary, within a six-month span, leading up to each respective argument. (Since the *Gonzalez* decision will not be released before this research is completed, this study looks at media coverage leading up to the case.) News media coverage of the Supreme Court is important because it is the primary way individuals become aware of its actions (Badas & Justus, 2022).

The following search term was used to find articles from *Reno v. ACLU* oral argument on March 19, 1997, and six months prior: "decency act" or "communications act" or “interactive computer service” or “information content provider” or (“internet” and “First Amendment”) or (“content” and “internet”) or ("internet" and "censorship”) or ("free speech" and "internet").

The following search string was used to pull articles from a parallel time frame for the *Google v. Gonzalez* oral argument from February 21, 2023 and six months prior: "decency act" or "communications act" or “section 230” or “interactive computer service” or “information content provider” or (“content” and “regulation” and “social media”) or (“shield” and “third party” and “internet”) or (“internet” and “First Amendment”) or (“platforms” and “First Amendment”) or ("social media" and "harms" and “online”).

Analysis

To analyze the op-eds and editorials related to the evolution of Section 230, a qualitative textual analysis was conducted using Saldana’s (2013) qualitative coding methods. Textual

analysis was selected to “make meaning” (Brennen, 2017) of the media's role in the discussion of online interactive communication.

Textual analysis was used to compare op-eds and editorials occurring between the two SCOTUS cases. It shows the core shifts of this policy issue debate. Textual analysis’s ability to ground research in the historical process was significant; this study shows how history “delimits the possibilities for action” (Phillips & Hardy, 2002) through analysis of past and present time periods. A total of 50 articles where analyzed.

Saldaña’s first and second coding cycle method was used to analyze the data. For the purposes of this study, a code refers to a “short phrase that symbolically assigns a summative salient, essence-capturing, and/or evocative attribute for a portion of language-based or visual data” (Saldaña, 2013, p. 3). First cycle coding included descriptive, in-vivo, and versus coding. Descriptive coding summarizes in a word or short phrase the topic of the text (2013) whereas in-vivo coding uses explicit language from the text to describe the topic (2013) as discussed in everyday life. Newspaper discourse serves as a proxy for everyday discussion in this study. Lastly, versus coding was used for its appropriateness to policy discussion and evaluation. Versus coding also reveals “the inherent strong conflicts and competing goals” (2013, p. 115) embodied in a text.

Second-cycle coding “develop[ed] a sense of categorical, thematic, conceptual, and/or theoretical organization” from the first cycle codes (2013, p. 207). During this cycle, pattern coding “identified emerging themes” and “pull[ed] together a lot of material into a more meaningful and parsimonious unit of analysis” (Saldaña, 2013; Miles & Huberman, 1994).

Pattern codes for this study included themes like new technology harms, government regulatory efforts of Tech, public stances on Section 230, and attitudes towards free press and democracy in both time periods. The major themes uncovered through second-cycle coding comprise the section subtitles in the results section. For the 1990s, widespread criticism of the Communications Decency Act, the internet's commercialization, and partisanship concerns reoccurred in coverage. In the 2020s, social media's negative effects, the politicization of speech, and Section 230 critiques where the dominant themes.

Then, focused coding was used to analyze the discourse between each time-period. Focused coding relies on the "most frequent" or the "most salient categories" in the data (Saldaña, 2013). This coding helps "to assess comparability and transferability" across the dataset. Content moderation concerns, insufficiencies of both judicial precedence and policy , and continued political polarization are all major themes that emerged through the axial coding analysis of content across the 1990s and 2020s.

Qualitative research's ability to facilitate meaning making (Chesebro & Borisoff, 2007) is important to this study which provides a textual analysis of discourse from two periods of time, and the historical background to contextualize this discourse. The result is enriched analysis that explains Section 230's relevance to cultural and legal debates.

Results

Overview of Findings from the 1990s

Nineteen articles were analyzed leading up to the *ACLU v. Reno* hearing, including three from the *Wall Street Journal*, four from the *New York Times,* and twelve from the *Washington Post*. Most of the coverage included editorials (13) compared to op-eds (six). Coverage focused on internet harms and the sufficiency of past laws in regulating them. Criticism of the Communications Decency Act and early discussion of online advertising made for rich debate. Partisan politics also appeared in discourse likely due to the U.S. presidential election that occurred in November of 1996. For the first time, candidates campaigned online - just another way the internet was solidifying its presence in mainstream public life.

An Indecent Proposal: The rise and fall of the Communications Decency Act

The discourse leading up to *Reno* included ideas on how to mitigate children's exposure to harmful content online. Policy solutions such as filtering technology and nonpolicy solutions such as parental monitoring was mentioned. A *Washington Post* columnist effectively captured the core of this debate: "On one hand, you want your kids to be given every advantage of contemporary culture; on the other, you're concerned that they're vulnerable to in-your-face nastiness," (Leeks, 1997)

The Communications Decency Act (CDA), an addendum to the Telecommunications Act of 1934, was introduced by Republican Senator James Exxon. The bill sought to fine or imprison individuals who transmit "any comment, request, suggestion, proposal, image or other communication, which is obscene, lewd, lascivious, filthy, or indecent" (1996) knowingly or

unknowingly to a recipient under 18 years of age. This bill passed in the House after the inclusion of the Cox-Wyden agreement, named for the two respective representatives who introduced it. This addition was in "Section 230" of the CDA which were all part of the 1934 Communications Act. Editorials in both the *New York Times* and *Washington Post* opposed the bill. The *Wall Street Journal* only mentioned the CDA passively. References to Section 230, or any variation of the statute or its language, never explicitly appeared in coverage from this time.

The *Washington Post* quoted Wyden in an editorial published days before the *Reno* hearing: "If ever there was something that ought to be considered interstate commerce by definition, the Internet is it" ("Constructing the Cybermirror," 1997). The Cox-Wyden agreement served business interests. Referred to by big electronic and software coalitions as a "tax freedom" law, the provision helped the "Net to be unfettered from all such constraints in order to unleash its oft-promised, world-changing energies of creativity and global commerce" (1997). Framing Section 230 as a "tax moratorium" is vastly different from its current framing, which is widely focused on platform liability and speech – a debate more akin to that of the CDA from the 1990s which dealt strictly with content standards.

Editorial boards of these major newspapers opposed the CDA because they believed it violated the First Amendment. The *New York Times* editorial board addressed internet harms to children. It proposed an alternative to the CDA: a filtering software for parents which was a "far better solution, practically and constitutionally, than punishing those who transmit explicit material" ("Censorship in Cyberspace," 1996). This is like 2020s content moderation debate

about private-sector regulation or government-enforced content standard. Editorial boards stood behind the First Amendment advocating against government intervention in content regulation.

The *Washington Post* not only denounced the CDA, but like the *New York Times* emphasized filtering technology as an alternative. Yet unlike the *Times*, it did not mention harms to children, despite publishing several editorials on the topic. Software companies like CyberSitter, Net Nanny, and Surfwatch were all mentioned and described as "just the kind of product whose development is touted as desirable by those, ourselves, included, who oppose top-down government regulation" ("Babysitting the Internet," 1997).

Critics of these programs were concerned about the moral differences that appear when determining what content is objectionable (Weeks, 1997). These filtering companies were "weirdly unwilling to share their actual preferences with the customers" ("Babysitting the Internet," 1997) which only increased consumer demand to know how this technology worked and what content it was filtering out. Rhetoric today is critical of Big Tech's lack of transparency regarding its content moderation practices. As this skepticism increased so did corporate secrecy with pleas for "transparency" still happening in 2023 ("Mr. Biden is Daring Congress," 2023).

Broadcast regulation complicated discussion on how the internet should be regulated. The 1934 Communications Act distinguished regulation based on the principles of voluntary and involuntary exposure. Two-way communication tools like telephones were not subject to the same content standards as the one-way mediums like radio or television. In a *Washington Post* interview, MIT Professor Sherry Turkle argued for treating the computer "as a family appliance like a TV, not as a personal device like a Walkman" (Weeks, 1997; Turkle, 1997). The internet

blurred the historic distinction between one-way and two-way communication mediums. Internet access required reliance on a computer which was a much bulkier medium than the portable smartphones that debuted in the early 2000s.

Debates about broadcast rating systems naturally complemented discourse around the regulation of online speech. “If you tire of the debate over TV parental advisory labels, you can always turn to a parallel argument rollicking along in cyberspace” wrote the *Washington Post* editorial board (“Baby-Sitting the Internet,” 1997). This involuntary exposure, especially to children, justified policy interventions, like advisory labels, and renewed Comstock laws. Obscene speech was also framed as a potentially harmful to women. A *New York Times* article noted how, “the mistreatment of women is a serious concern. But trespassing on First Amendment protections is not the way to address it.” (“Sex, Speech, and the Military,” 1997).

Lawmakers' approval of the V-chip, a filtering technology required to be installed in television sets (Harwood, 1996), only made internet content regulation that much more urgent. Courts became tasked with interpreting how precedent applied. Legislatures struggled with policy solutions that could keep up with rapidly changing technology (“The Internet in Court,” 1996) – a problem still facing lawmakers 25 years later.

A New Golden Age of Advertising: The internet goes commercial.

Early discourse foreshadowed the advertising model of the Internet. Famed *Wall Street Journal* technology reporter Walter Mossberg noted the internet’s potential for personalized advertising and the “underlying technologies that will permit merchants to start offering you targeted goods and services based on detailed demographic profiles you submit” (Mossberg,

1996). This challenged existing business models and shaped the interactions between users, a computer, and the internet.

Discussion of the internet as an advertising tool further complicated this regulatory debate as speech concerns turned into commercial ones. *Washington Post* Columnist John Schwartz (1996) discussed how the "FDA's powers to regulate commercial speech, even in print, aren't universally supported," and advocated against the agency's regulation of online drug advertising. Two editorials in the *Washington Post* addressed the email spam debate – another integral part of the internet's emergence as an advertising medium. One described the debate as a battle between "cries for some kind of government regulation" and "cries that regulation will kill the Internet and destroy free speech" ("Canning Internet Spam," 1996).

First Amendment risks of legislating online "junk" mail also appeared in discourse echoing current debate between paid, promoted, and organic content. A *Washington Post* editorial even linked the regulation of spam email to that of the online obscenity debate. This further made it difficult to strike a balance between government authority and constitutional liberties. Analogous to "nanny" technologies, spam filters were positively positioned as a counter-solution to the "new laws against Net-borne harassment" ("Freedom from E-Junk," 1996) and were not as controversial due to the lower constitutional protections afforded to commercial speech. A federal judge determined free speech rights to be irrelevant to the issue of email spam (1996).

The Federal Trade Commission (FTC) is another federal agency that appeared. The FTC's role of consumer advocacy and advertising regulation made it relevant to online

advertising discourse. This added another layer of complications for lawmakers. The *Post* described the legalities of this as "fuzzy" and contingent on whether "cyberspace ends up as saturated with advertising as most commercial media" ("Canning Internet Spam," 1996). Today, the FTC is the most influential government agency in digital advertising because of its role in advertising regulation and consumers harm protection.

Use of graphic imagery in political ads also questioned the content regulation provisions in the 1934 Communications Act. Political speech is one of the most sacred forms of speech in the United States and is protected by the First Amendment. The adage "a picture speaks a thousand words" justified publication of images otherwise deemed obscene. The *Washington Post* editorial advocated for the inclusion of a graphic abortion picture in a television ad. "Pictures are a powerful part of his message" ("Disturbing Pictures," 1996), the *Post* wrote in reaction to a dispute over the Georgia Congressman's inclusion of the abortion image in his campaign ad. "The candidate should be allowed to make his best case" (1996) the editorial concluded. This affirmed the importance of imagery to free speech debate. Ten years later, similar discussions around political advertising, mediated platforms, and polarization became even more volatile during the 2016 Presidential election.

Discourse during the 90s foreshadowed targeted advertising and pay-per-click business models that are synonymous with internet platforms used today. Although commentary included some mentions of privacy concerns, most of the coverage was wildly optimistic. One *Wall Street Journal* columnist described customized web pages as a "great idea" (Mossberg, 1996). A *Washington Post* editorial noted how the internet "works all kinds of wonders" and is

distinguishable from a non-physical world "where conflict in cyberspace remains safer than the kind outside" ("Freedom from E-Junk," 1996). Cyberstalking, email spam, and copyright protections also complicated mainstream discourse. Like the CDA, many of the solutions were subjected to First Amendment scrutiny. A process further complicated when some courts delineated this speech as commercial.

Culture War and Partisan Peace: Pushing the traditional political boundaries.

The 1996 Presidential election between the Democratic incumbent Bill Clinton and Republican candidate Bob Dole created a backdrop of partisan politics. "The War in the Wings," the title of a *New York Times* op-ed, described a tense disconnect happening between the public and its potential political leaders (Rich, 1997). *New York Times* columnist Frank Rich critiqued a Dole-Clinton debate and described it as "The Debate that Changed Nothing" because of its "strange and total disappearance of the hot-button issues that collectively define this country's raging culture war" (1997). Rich also noted a rise in hyper-partisanship that continued to "boil over" even after the Nov. 5 election.

Debate coverage from a conservative Christian talk-show, *700 Club*, provided more insight into a partisan political landscape than the issues debated (1997). Dole was considered the debate's loser *even* by the 700 Club's Conservative Host Pat Robertson. On the heels of Dole's loss, Robertson interviewed Judge Robert Bork, a conservative federal judge that Rich and other left-leaning journalists considered to be extreme. "[Bork] calls for less separation of church and state, more government censorship (with the Internet as target No.1), and most

strenuously for an amendment allowing Congress to overrule Federal and state court decisions" Rich wrote in his column (1997).

A *Wall Street Journal* op-ed, noted a shift in political attitude alongside the internet's emergence, concluded with this analogy:

> "Whereas liberal say, 'Here's the tent; we have to get everybody inside,' and conservatives say, 'Here's the tent; we don't want anyone else inside,' the core Internet users say, 'here's the tent; everyone's welcome – but they have to get inside themselves" (Fry, 1996).

The last line illustrated a divergence from traditional partisan rhetoric to the radical individualism widely associated with Big Tech. A *Wall Street Journal* editorial also noted how industry "depends on and values individual liberties of the most basic sort" ("On Computers and Culture," 1997) – a core value of the Libertarian movement. Rhetoric described the internet as an "equalizer," and appeared in both time periods. As the internet became commercialized, a *Washington Post* editorial questioned if "the early ideas of the Net as a revolutionary medium that would change all rules, flatten hierarchies, abolish barriers" still applied ("Constructing the Cybermirror," 1997). A current *Times* op-ed described internet platforms as indeed having "flattened the frictions of place and time" (Klein, 2022) and showed how individuals' changed how they related to both the internet and each other.

A 1996 *Washington Post* editorial described a "fading era" of "campus speech codes and competing shouts of political correctness" ("Free Speech and Common Sense," 1996), and expressed optimism about the future of free speech. The editorial reacted to the decision of a

campus newspaper to run an op-ed with "obnoxiously racist statements" (1996). Mr. Haskins, the op-ed editor, and a Black man was lauded by the *Post* which asserted, "The way to defuse and, importantly, sometimes combat offensive expression is not necessarily to bottle it up" (1996). This piece, although not directly related to new technology, depicted a cultural backdrop filled relevant social issues. The heated debate over hate speech and censorship, exacerbated by online forums, contributed to the radical partisanship of today's political discourse.

Courts also bucked traditional notions of an apolitical judicial branch, according to a *New York Times* editorial. The *Times* described the 1996 Court as a "determined conservative majority suspicious of Federal authority" and expressed concern over controversial cases that "raise complex questions that defy easy answers along traditional ideological lines" ("The High Court Drama Begins," 1996). The *Times* criticized the CDA as a "wholly unneeded Congressional statute censoring the internet" (1996). In 2022, *New York Times* columnist Jamelle Bouie expressed similar concerns: "But the law and precedent and common sense do not seem to matter when the judge at issue is an ideologue in robes" (2022). The 1996 *Times* editorial and Bouie's op-ed both were critical of the "ideological rifts" ("The High Court Drama Begins," 1996) of the Supreme Court. Bouie's *Times* op-ed (2022) criticized President Trump's selection of "hyper partisan and ideological judges whose loyalty to Trump may outweigh their commitment to the law."

By 2023, The *Wall Street Journal* also criticized the Supreme Court's ideological polarization, but from a different perspective. The *Journal* attributed this division to increased federal regulation and administrative expansion which are "structurally ensuring that presidential

conflicts will tear the nation apart" (Hamburger, 2023). Legal scholar Susan Liebell (2023) espoused this division to the American public's belief that "the Supreme Court's originalist decisions are political." She also noted that "Capricious originalism may backfire if the public closes faith in the rule of law or the political branches begin to ignore the Court" as a result (2023).

Overview of Findings for the 2020s

Thirty-one articles were analyzed leading up to *Gonzalez v. Google* hearing, including five from the *New York Times*, seven from the *Washington Post* and 19 from the *Wall Street Journal*. Most of the coverage included op-eds (23 total) and the *Post* and *Journal* were the only ones to publish editorials (eight total). Leading up to *Gonzalez* there were notable shifts in the discussion about government censorship, the unchecked power of Big Tech, and continued concern about the harms of social media platforms.

The most prevalent companies mentioned were Facebook, Instagram, and Twitter – likely because of recent controversies such as whistleblower Frances Haugen's 2021 release of a trove of internal documents known as the Facebook Papers, and Elon Musk's purchase of Twitter at the end of 2022. Brought to the forefront of public debate in 2020 by criticism from Trump, Section 230 remained a hot topic with the statute's first Supreme Court challenge since *Reno*.

Fear Factors: The Harms that Haunt social media

The commentaries published leading up to the *Gonzalez* hearing were critical of social media and its negative impact. Issues ranging from child safety to national security were

included. In general, writers expressed an urgent need for legislation to address social media harms to children. U.S. Sen, Josh Hawley, a Republican from Missouri, captured this theme in five words: “While Congress talks. Children suffer” (Hawley, 2023).

In the debate over platform regulation, addressing harms to children is positioned as a bipartisan issue. Hawley was not a newcomer to this discussion; in 2021 he proposed a federal certification program for platforms to prove lack of bias. His previous proposal was referenced in a 2022 editorial by the *Wall Street Journal*, which described his 2021 bill as “a bad idea, but one that the continuing censorship push is doing its best to popularize” (“Climate Censor Campaign,” 2022). In contrast, Hawley’s *Journal* op-ed (2023) focused on content harms targeting children – a potentially strategic move to increase the likelihood of the bill passing. This is “one nonpartisan issue that deserves urgency he declared, echoing the rhetoric used in President Biden’s *Journal* op-ed published earlier the same year. Biden (2023) also encouraged “bipartisan proposals to protect our privacy and our children.”

Biden’s commentary claimed Big Tech puts “children at risk” and should be held accountable for “the experiment they are running on our children for profit” (2023). Biden revisited similar themes from his 2023 State of the Union about tech companies and the effects their products have on children. Two days later, the *Washington Post* editorial board responded favorably to Biden’s call for Congress to increase regulation around child data collection. The editorial not only highlighted Congress’s efforts to reform the 1998 Children's Online Privacy Protection Act, but also promoted policy that places limits on apps for young users (“Mr. Biden is Daring Congress,” 2023). At the same time, the newspaper declared that “legislatures

shouldn’t stop with children" (2023); the editorial also called for federal regulation that limited the collection of personal data by big companies.

Growing concerns around the misinformation proliferation and user safety also appeared in the discourse. Writers use disinformation and misinformation interchangeably in their commentary despite media scholarship that notes a difference between the two. Misinformation is considered the accidental or inadvertent spread of false or misleading content, while disinformation concerns purposeful deception (Benkler, Faris, & Roberts, 2018).

Discourse around misinformation and disinformation focused on COVID-19 vaccines. The conservative editorial page of the *Wall Street Journal* focused intently on federal government’s collaboration with social media platforms to remove vaccine misinformation. Twitter removed Alex Berenson, a vaccine skeptic, after he published a series of posts that questioned “government lockdowns, mask mandates and mRNA vaccines” (“Biden and Twitter Censorship,” 2022). Berenson's lawsuit against Twitter kept him in the public eye. Especially after he released documents from his legal discovery. Twitter eventually settled the case and reinstated Berenson on the site in August 2022. His removal had occurred shortly after a 2021 speech by President Biden who claimed social media companies were “killing people" by not moderating vaccine misinformation. The *Journal* criticized Biden’s comment in an editorial and praised Twitter’s response that “it erred in banning Mr. Berenson and agreed to restore his account” (2022). The editorial described Biden’s comment as “evidence of a direct connection between White House pressure and Twitter censorship.” The Berenson case “bolster[ed] the

argument that social-media platforms can be sued as ‘state actors’ for restricting speech in violation of the First Amendment” (2022).

“How to Take the Twitter Files to Court” (2023) was a title of the op-ed written by Jed Rubenfeld, a constitutional lawyer critical government censorship of social media content. Although Rubenfeld did not refer to this controversy as the “Twitter Files” until his 2023 op-ed, he previously co-authored a piece with Vivek Ramaswamy (who later announced his bid for the 2024 Presidential nomination). Their piece described Twitter as a tool of government censors (Rubenfeld & Ramaswamy, 2022). The authors claimed the Biden administration was “using Big Tech as its private censorship arm” (2022). As evidence, they pointed to White House Press Secretary Jen Psaki’s assertion that Biden’s administration was “flagging problematic posts for Facebook that spread disinformation” (2022).

“A reckoning for the government's unlawful, deceptive and dangerous conduct is under way in court,” concluded another *Journal* op-ed in reaction to a federal government which “unlawfully coerced the companies in an effort to ensure that Americans were exposed only to state-approved information about Covid-19” (Younes & Kheriaty, 2023). Another Journal op-ed referenced “coercion” regarding the federal government. “It can be difficult to identify when official encouragement crosses the line into coercion,” wrote Rivkin & Grossman Jr. (2022) in reaction to how the “Biden White House successfully pressed Twitter to shut down accounts.” *The Wall Street Journal* was the only publication to critique the constitutionality of the “gov-tech relationship” (Hamburger, 2022b) formed to moderate misinformation on social media. Another

Journal op-ed called for "tailored legislation" to "limit federal agency coordination with internet firms" and believed that without it the "web-censorship arms race" escalated (Willick, 2023).

Truth or Threat? Free speech in the age of Section 230

The law that protects social media sites from liability for their content – Section 230 of the Communications Decency Act – is of course at heart of the *Gonzalez* case. Yet surprisingly, the *New York Times* never referenced the statute in its commentary. Although the push to reform Section 230 received bi-partisan support on Capitol Hill, its absence from the historically liberal *Times* (Usher, 2021) and frequent presence in the conservative *Journal* suggests that it resonated more with those on the right than the left.

Both the *Journal* and *Washington Post* issued editorials calling for the Supreme Court to keep the liability shield in anticipation of the oral arguments for *Gonzalez v. Google*. But that did not mean that commentators supported Section 230 entirely. Section 230 reforms "are best answered by legislators, not the judiciary," the *Wall Street Journa*l editorial board wrote five days before the *Gonzalez* arguments. The *Washington Post* used similar rhetoric. It concluded its editorial this way: "Lawmakers wrote the 26 words that created the internet. It's their job to write the words that determine its future" ("How the Supreme Court Could," 2023). Commentators where in consensus that Section 230 should not be overturned in the court system. Most of the debate focused on how (or if) Congress should legislate this statute to address social media's ills.

Those who supported Section 230 provisions are not always favorable to the statute and fear its impact on the internet. Especially if the protections it affords platforms were removed. According to the *Wall Street Journal*, without Section 230, "it is hard to see how the internet as

we know it would function ("Isis, YouTube, and Section 230," 2023). Platforms will have to make changes "that would eliminate the immediacy and free-flowing nature of social media as we know it" (Nossel, 2023). Many fear that if social media companies are made legally liable for user posts, and platforms would be "forced to conduct legal review of posts before they go live" (2023). This could result in a chilling effect of a user's speech. A *Wall Street Journal* op-ed even complemented Twitter for its efforts in keeping terrorist groups off its platform. Despite this progress, Stalinksy (2023) noted that "jihadists still want to tweet and won't stop trying to sneak back onto Twitter" – the Sisyphean reality of public forums and freedom of speech.

Liability shield describes the legal immunity given to platforms for third party speech. It only is enforced if platforms make a good faith effort to remove illegal content. Another *Wall Street Journal* editorial encouraged "carefully considered reforms" to mitigate risk of "massive unintended consequences"' ("Mr. Musk Lurches," 2022). Modifying Section 230 could cause "litigation-wary sites to start moderating content even more aggressively than they already do" or cause "them to moderate not at all, because the act of moderation exposes them to liability" (2022). An *New York Times* op-ed even questioned if platforms should moderate content at all. "But why should we trust them to decide who should be banned?" *Times* contributor Zeynep Tufekci asked. "What if political winds shift?" (Tufekci, 2022).

There have been numerous policy debates about free speech and platforms. Public concerns about content moderation are also rising. Recurring references to Twitter as a "digital public square" (Willick, 2022) or "modern town square" ("Climate Censor Campaign," 2022) likened Twitter to the public-private distinction used by many lawmakers. The discussion about

speech and Section 230 is further complicated. The First Amendment only protects individuals from the State or from private entities acting with the authority of the government (State Action Doctrine, 2017). This leaves little room for legal recourse for the individuals' experiencing speech harms on private platforms.

The many interests impacted by Section 230 make for rich debate regarding user rights, government involvement, and corporate power. Content moderation was the most widely discussed reform, followed by possible structural changes to limit the economic power of Big Tech companies. Biden's discussion of "how Big Tech companies have elbowed mom-and-pop businesses out from their platforms, disadvantaged them, or charged them outlandish prices, making it harder for them to compete and grow, and thereby stifling innovation" is also notable (Biden, 2023). Biden called for antitrust solutions in his *Wall Street Journal* commentary. But former Trump administration Attorney General William Barr criticized this solution. He asserted that "case-by-case antitrust litigation alone won't rein in Big Tech" (Barr, 2023). He described this administrative legal solution as "slow" and instead advocated for a regulatory solution "which entails actively supervising an overall market and setting uniform rules for it" (2023).

Thinking outside the Black Box: Algorithm, AI & the future of content moderation

Gonzalez v. Google was the first Supreme Court case to address algorithmic editing - the technology that allowed communication platforms to operate at scale. This important nuance brought up in both op-eds and editorials about Gonzalez was mentioned only passively in previous Section 230 commentary. A *Washington Post* editorial argued that "algorithmic recommendation is what makes content moderation possible" ("How the Supreme Court Could,"

2023). This showed the weightiness of the Supreme Court's decision - especially if algorithmically governed social media is "out of bounds" (2023). Ruling in this way would get "the modern internet all wrong" and the "statute at hand wrong, too" (2023).

The Gonzalez family sued Google under the Anti-Terrorism Act after their daughter was killed in an attack by this terrorist group. Lower courts disagreed about whether YouTube, owned by Google, aided and abetted terrorism by recommending videos that helped radicalize ISIS members. A key aspect of this debate is whether Section 230 protects third-party content mediated by algorithms.

An inherent nod to national security comes with any case pertaining to terrorism. The *Wall Street Journa*l and the *Washington Post* differed in their description of the details in the *Gonzalez* case. The *Post* used terms like "Islamic State followers" and "murders in question" ("How the Supreme Court could," 2023) and included no mention of the word ISIS or any form of the word terrorism. But the *Journal* included descriptors like "ISIS attack" and "terrorist group" ("Isis, YouTube, and Section 230," 2023). The *Journal* also used the phrase "aided and abetted" which was strikingly absent from the *Washington Post* editorial. The *Times* ignored the discussion about platform liability and the Islamic state.

Transparency is a key tenant for both the *Journal* and the *Post* writers. One commentator asserted that "only by prying open the black box of how social media operates – the workings of the algorithms and the paths and pace by which problematic content travels – can regulators do their job" (Nossel, 2023). President Biden noted a "need for far more transparency about the algorithms Big Tech is using" and called for these companies to "take responsibility for the

content they spread and the algorithms they use" (Biden, 2023). The *Washington Post* editorial board responded to Biden's January *Journal* op-ed a month later. It concluded that "the most specific thing from Mr. Biden regarding 230 was the call for 'transparency," and interpreted this part of Biden's plan as "a morsel of encouragement" ("Mr. Biden is Daring Congress," 2023).

Content recommendation is another key social media affordance that is central to the *Gonzalez* debate. Recommendations are information in a form that a user sees, whereas algorithms, that generate the recommendation, operate in the background. To put it another way, if algorithms are the baking, then recommendations are the bread. This distinction is at the heart of the Section 230 debate within the *Gonzalez* case: "When platforms algorithmically promote those tweets, comments or, in this instance, videos, does their legal shield disappear?" ("How the Supreme Court Could," 2023). Recommended content is important to social media's business model, yet algorithms received only marginal attention in the Section 230 and in the Supreme Court cases that challenged it.

Content Still is King: A comparison of discourse then and now

Both time periods included discourse that challenged existing law. "What is legal in cyberspace is different from what is legal for its analogues in the world outside the computer," noted a *Washington Post* editorial ("Freedom from E-Junk," 1996). Recent discourse described internet law as "written for a different era" and unable to "resolve the problems of our current media ecology" (Tufekci, 2022). Social media complicated this debate – especially because of Section 230 "which passed in 1996, two years before Google was founded, three years before the

word ‘blog’ was invented, and when Mark Zuckerberg was 11 years old” (“Isis, YouTube and Section 230,” 2023).

In 1996, Microsoft founder Bill Gates proclaimed three simple, yet prophetic words: “Content is King” (Gates, 1996). Gates’s essay touched on advertising’s major role, the changes to traditional publishing, and a potential for global connectivity. Today, government, industry, and users are still fighting for the throne in which content sits. Content moderation always perplexed lawmakers, especially because this new medium defied traditional legal precedence. Internet users faced both voluntary and involuntary exposure to content traditionally regulated by the 1934 Act.

However, could the internet “liberate publishers” and be pushed “forward as a marketplace of ideas, experience and products – a marketplace of content” (1996) as Gates once foresaw? This debate perplexes both past and present lawmakers. Both time periods include publishing-related laws like copyright, libel, and defamation. A major part of the Section 230 debate is whether social media companies are classified as “interactive computer services.” If so, these companies “shall not be treated as publisher or speaker” of third-party speech. Commentary included critical examples publishing and harms it caused to victims. A *Wall Street Journal* editorial questioned: “If Congress hacks apart the Section 230 liability shield, won't platforms get even more cautious?” (“Alex Jones's Sandy Hook Reckoning,” 2022). The potential for “massive payouts” incentivized content providers “to turn the sensitivity dial up” argued the *Journal* (2022). Policy solutions are not easy. One *Times* op-ed even pointed out another concern – that of intermediary app stores. Roth (2022) criticized app store’s ability to

remove social media apps from download on user devices. He sarcastically noted how this is just "practical realities of life on Apple's and Google's internet." A recent Department of Justice report (2020) questioned the sufficiency of defamation law because the internet's accessibility has eased financial and editorial barriers. Any user could publish defamatory material and make it nearly impossible for those libeled to collect damages.

The 1996 *Washington Post* editorial titled "Disturbing Images" debated the permissibility of campaign ads on broadcast. "Those pictures are a powerful part of his message," the editorial noted. Now, AI generated images blur lines between a real images and fake ones. "While we may laugh right now at how the systems misinterpret language or mis-construct an animal or human face, this will all improve at a blinding speed," Joanna Stern (2022) noted in a *Journal* op-ed. AI's ability to parody photos of public figures who are subject to the "actual malice" standard in defamation and libel suits was also included in Stern's op-ed. Not only is AI outpacing law but it continues to exasperate misinformation by blurring the lines between truth and falsehoods. Early commentators who supported a right to publish now grapple with removal rights - putting First Amendment jurisprudence at odds with user rights.

Political polarization complicates free speech debate. A *Journa*l op-ed summarized how "Liberals now take a dimmer view of free speech than they did at the dawn of the tech era, while conservatives take a dimmer view of corporate power" (Willick, 2023). In an interview with the *Wall Street Journal,* former ACLU President Nadine Strossen said, "Conservatives denounce cancel culture without admitting that they too engage in it, whereas liberals deny that cancel culture exists without acknowledging that they too are victims of it" (Varadarajan, 2022;

Strossen, 2022). A “culture war” has divulged into a “cancel culture,” she said, arguing that “on campus, things are worse than they've been at least since the McCarthy era” (2022). This contrasts the 1996 *Washington Post* editorial that lauded a college newspaper for publishing controversial speech and declared the 1990s to be a “fading era” of campus speech codes (“Free Speech and Common Sense,” 1996). Furthermore, the *Wall Street Journal* also criticized the ACLU for its “upside-down argument.” “Siding with domineering corporations and against small-business owners” is a policy shift that “could be driven only by the ACLU's distaste” for free speech” (Mills, 2022).

Discussion

Criticism of Section 230 is ideologically divisive. The Trump presidency politicized libel by suing media companies for publishing “lies” about him. Trump’s outspoken condemnation of both libel and Section 230 became a keystone of the G.O.P agenda. Bills like the Texas and Florida censorship laws attack both legacy media and social media companies. These legislative efforts argue for government to prevent social media companies from enforcing their own content standards. Although this study does not focus specifically on these laws, they are relevant to the Section 230 debate. A *Washington Post* editorial even described these controversial bills as “poised” for a future high court review. The editorial cautioned that “justices should resist the temptation of seemingly easy answers that miss the digital age's most difficult realities” (“Tread Carefully on Digital Speech,” 2022). Legal vulnerabilities are a problem for every great technological advancement.

Section 230’s co-author, Ron Wyden is featured in a 1997 *Post* op-ed: "If ever there was something that ought to be considered interstate commerce by definition, the Internet is it” (“Constructing the Cybermirror,” 1997). A quarter of a century later, commerce law is still being disputed by courts. Textualist judges like Fifth Circuit Judge Andrew Oldham and Supreme Court Justice Clarence Thomas return to the 1887 Interstate Commerce Act for guidance on how to regulate “common carriers” of information. Legal scholars have even noted similarities between early broadcast regulation and current debate over “how privately operated forums of social media and the First Amendment should interact” (Terry, Schmitz, & Silberberg, 2022). First Amendment scholars fear the internet becoming “a heavily regulated medium where

content restrictions lacked the protections of strict scrutiny," (2022) if it loses Section 230 protections.

A *Journal* op-ed even mentioned the censorship bills and highlighted Judge Oldham's opinion on the Texas one. "Texas' law seeks to regulates business conduct –not speech – under the common carrier doctrine, which holds that government can impose nondiscrimination obligations on businesses 'affected with the public interest'" noted columnist Alyssa Finley in the *Journal* (Finley, 2022; Oldham, 2022). The author contextualized Judge Oldham's reference to the Western Union telegraph monopoly and its significance to the formation of common carrier law. "States, and later Congress, intervened to prohibit telegraph companies from discriminating against dispatches," Finley said. A provision that this current textualist-dominant Supreme Court could reject because it constitutionally challenges the original function of state common-carrier law from 1896 (Finley, 2022).

The outcome of the debate of whether the common carrier clause applies to social media companies will have a great impact on the future function of these platforms. The *Journal* Columnist Phillip Hamburger (2022a), also a Constitutional lawyer, proposed a new civil rights act that "would restrict private parties only if they exercise government power, if they cooperate with the government in enabling it to evade the First Amendment, or if they function as common carriers by holding their services open to the public." An earlier *Washington Post* contributor, Jason Willick believed that "forcing an entire industry into the common-carrier regime in one fell swoop would be a plunge into the economic and legal unknown" (2022).

As the naive optimism that once drove the adoption of Section 230 dwindles, outspoken critics oppose the "Good Samaritan" statute. Legal scholar Danielle Citron (2022) argues that users lack legal recourse against Big Tech companies that are complicit in content harms. The Fight Online Sex Trafficking Act (FOSTA), a Section 230 carve-out, made exceptions to the broad liability shield that protects interactive computer service providers. Platforms are criminally liable if they fail to remove third-party content that facilitates sex trafficking or prostitution (FOSTA, 2018). Critics argue this could be weaponized against researchers or journalists investigating related issues and violate their First Amendment rights (Goldman, 2018). An appeal in the second circuit, *Woodhull Freedom Foundation v. The United States* is challenging FOSTA on First Amendment grounds. Legislation addressing public safety and security concerns is important, but should it come at the risk of constitutional rights?

The Commerce Clause gives Congress authority to regulate anything that circulates across state lines. Scholars Schafer and Kosseff (2023) argue for this standard to apply to online statements. The authors call for Congressional intervention that pre-empted standardized enforcement modeled from Section 230. This mitigates risk of the Court overturning the actual malice standard, which could open the door to a slew of libel cases (2023). The actual malice standard created a high burden of proof for public officials and public figures. These individuals must prove that a publisher knew the defamatory information was false and could have easily discovered its falsity. Section 230 provides liability protections to platforms that help preserve an individual's First Amendment rights" (2023).

So, should strict application of the First Amendment grant social media companies the right to regulate content as they choose? Or has Section 230's liability shield, which was designed by lawmakers to facilitate the rise of "digital town square," placed too much power in the hands of Big Tech platforms? This is the debate underway and makes decisions between private sector regulation and public sector oversight more imminent. But as the findings in this study show, Section 230 received virtually no attention in elite discourse when it was passed a quarter century ago. Now, some of its fiercest critics seem to agree with Winston, George Orwell's main character in the dystopian novel *1984*, who lamented that: "technological progress only happens when its products can in some way be used for the diminution of human liberty."

Limitations

This study was designed to examine shifts in journalistic discourse about online communication technology regulation in both the mid-1990s and early 2020s. Supreme Court hearings from each time and addressed Section 230. The newspaper op-eds and editorials from three elite newspapers – the *New York Times*, the *Washington Post*, and the *Wall Street Journal* – provided substantive commentary about online communications regulation. Elite opinions on digital speech issues were examined with qualitative textual analysis. Limited to only three newspapers, this study is not representative of all opinion coverage related to Section 230.

Future research should examine the ideological backgrounds of editorial board members and op-ed contributors of major newspapers. This study aligns with the growing body of research which questions the notion of objectivity for both Supreme Court justices and journalists. In an

era, rife with political polarization and media distrust, researchers should explore a relationship between political ideology and online speech.

The global nature of interactive computer services is also an area for future researchers. The European Union's General Data Protection Regulation (GDPR) and its recent Digital Services Act both provide comprehensive compliance standards in which global social media companies must adhere. Current congressional proposals, like the Digital Services Oversight and Safety Act (DSOSA), inspired by European regulation, propose granting FTC authority to establish a commission able to regulate online service providers.

Conclusion

From the 1996 adoption of the Cox-Wyden agreement to its re-entry into public debate, Section 230 defines a quarter century of internet law. In 190s discourse Section 230 was overshadowed by greater debate over the CDA's constitutionality. Editorials from major newspapers denounced the CDA and described it as government censorship. This finding makes sense given how important First Amendment affordances are to the preservation of the news industry.

A divisive 1996 presidential election contributed to the rising partisanship of policy issues. The Communications Decency Act was one of several ideologically divisive issues to receive a Supreme Court ruling ("The High Court Drama Begins," 1996). Awestruck consumers and optimistic lawmakers are slowly becoming disillusioned with the promises the early internet. The 1990s discourse included concerns about anonymity and user authentication. Yet these were overshadowed by optimistic promises of online communication. Big data collection ushered in

an age of surveillance capitalism (Zuboff, 2019) where users choose between privacy and access to any online service. The 2020s commentators disagreed with overturning Section 230, yet still recognized a need for reform. The ad-revenue business model blurs speech and profit which raised the question: Is the role of platforms to be purveyors of public discourse or conduits of commercial speech?

The fear that drives mistrust in government has always existed. Those who think government "can't be trusted to control public debate through legal restraints" now believe that "the public interest and the interests of democracy…are best served by private enterprise and the free-market system of capitalism" (Harwood, 1997). The Reagan-era repeal of the Fairness Doctrine, which imposed content standards on broadcasters to ensure robust debates on public issues, deregulated broadcast and allowed the free market to reign.

Government content standard debates have many parallels to the debates that led to the Fairness Doctrine's repeal. A 21st Century version of the Fairness Doctrine "might involve a requirement that when blatant or harmful lies on issues of public importance are amplified, the people who are sent those lies are also sent corrections and further explanations," noted a recent *Times* op-ed (Tufekci, 2022). The uncertain future of Section 230 occurred alongside the re-application of past legal standards. Now lawmakers confront how to apply these standards to technological problems of modern day.

The *Gonzalez v. Google* decision was announced by the Supreme Court on May 18, 2023. The Court ruled 9-0 in favor of Google and did not include mention of Section 230 its opinion. The fate of Section 230 remains to be seen. Congress is now tasked with finding a

legislative balance between personal safety and online speech protections. Legal scholar Amy Gajda (2022) identifies this as a greater societal tension between dignity and liberty. Distinguishing between public space and private retreat will only become increasingly more complicated, especially for First Amendment jurisprudence, but “such is life on the double-edged Internet” (Weeks, 1997).

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