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I. INTRODUCTION

As society evolves and technology develops, the law must develop and evolve as well. This evolution is necessary to meet the needs of both society and the technology industry alike. One such development has been the tremendous growth in accessibility of the internet.[1] As will be shown, a majority of Americans rely on the internet and social media for their information.[2] Having access to unlimited information is surely a good thing and a positive aspect of a learned society, but what if the information is withheld or the information is untrustworthy? What if the very people who are in control of the industry, guided by personal ideologies and profits, fail to provide access to both sides of the discussion? As will be argued, the information superhighway, like any road in need of repair, requires regulatory revision or judicial intervention.[3]

Such issues will be discussed throughout because the largest Congressional regulation on the internet was in 1996.[4] Section 230 was meant to address free and open access to the marketplace of free ideas, but a lot has changed since 1996 when dial up was king.[5] One can easily recall downloading a video or a song taking hours when those same files now stream instantly. Given this change, what will be discussed further is the need for evolution and development—it is time for Congress to amend and update section 230 or for the Court to consider the internet as a public forum—because left unfettered, the internet and social media platforms will threaten free speech and democracy.[6]

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1. *See infra* Part II.A.
2. *See id*.
3. *See infra* Part II.B.
4. *See id*.
5. *See id*.
6. *See infra* Parts II-IV.

II. HISTORY: THE HIGH-SPEED ROAD THUS FAR

A. Hazard Ahead: Current Crisis

While Congress shall not abridge First Amendment rights, the Court has limited these rights: for example, in *Brandenburg v. Ohio*,[7] the leader of the Ku Klux Klan made a speech promoting vengeance against the government.[8] The Court held that this speech was unlikely to incite immediate illegal activity.[9] This holding created a bright-line test for future courts to limit speech in such instances.[10] Social media platforms have become online worlds and stages where similar speeches and activities are possible but lack regulation. Similar direct harm will result if social media remains completely unfettered.

A recent study illuminated the divisive and problematic issue social media presents to a thoughtful, open, and free exchange of ideas.[11] For this study, a researcher created two fake Facebook profiles: both women of similar age, with similar interests, who differed only in political ideology.[12] The potential danger of this issue was illuminated because the somewhat conservative profile was directed to a "wide-ranging extremist ideology that allege[d] celebrities and top Democrats [were] engaged in a pedophile ring."[13] Directing users to misinformation intentionally amplifies the political divide through the same misinformation that has furthered political polarization.[14] Because there are over 2.9 billion active users,[15] any continuation of the intentional harm to the free exchange of ideas should prompt Congressional or judicial action.

Congressional or judicial action is further warranted because a recent whistleblower revealed the company does this intentionally: she revealed the

> algorithms select videos and posts that it deems a user is most likely to engage with . . . [t]he danger with this system . . . is that the posts people are most likely to engage with are ones that elicit an 'extreme

7. Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding that a state may only regulate speech that advocates violence if the speech is intended and likely to incite imminent illegal activity).
8. *Id.* at 444-45.
9. *Id.*
10. *Id.* at 447.
11. Jessica Guynn & Kevin McCoy, *The Story of Carol and Karen: Two Experimental Facebook Accounts Show How the Company Helped Divide America*, USA TODAY, (Oct. 25, 2021), https://www.yahoo.com/news/story-carol-karen-two-experimental-080010755.html.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*

> reaction' such as conspiracies and hate speech, leading algorithms to show people increasingly dangerous content.[16]

Because the algorithm exposes users to unsolicited content, the algorithm exemplifies the influence of dangerous content.[17] Such an instance occurred when "[a] military veteran who grew up in a Democratic, pro-union family . . . said Facebook normalized racist views and led him down a rabbit hole to far-right ideologies . . . he became a Nazi sympathizer and a backer of other extremist views", which he blamed on the algorithm's "recommendations system" because he would not have searched for or would not have known of their existence otherwise.[18] The Government should consider taking steps to redress these harms because after the whistleblower revealed this "bombshell" information "the UK Government [began] drawing up legislation to impose a statutory Duty of Care on tech companies to prevent their algorithms [from] harming people."[19]

Evidence that social media inflicts imminent harm was further shown when a teenage girl committed suicide after "viewing self-harm and suicide material" that prompted an "inquest . . . to establish if social media algorithms 'overwhelmed' [her] with the content . . . algorithms may have started showing her self-harm material even without the teenager directly searching for it."[20] Further, Facebook will shift focus to users in this younger age group,[21] who are likely more susceptible to misinformation and social pressures, may not be able to discern fact from fiction, and may not be able to deal as readily with the potential dangers.[22]

Social media's potential danger was apparent in a recent case: a fifteen-year-old and two fourteen-year-old girls were, after an online meeting via social media, tricked into either modeling or forming a relationship.[23] These online interactions resulted in an in-person meeting, where the girls were photographed and the images uploaded online.[24] They were then trafficked and repeatedly raped, causing them to bring suit.[25] "[P]laintiffs in all three [consolidated] cases allege[d] they were victims of sex trafficking who

16. Mike Wright, *Exclusive: Facebook Whistleblower Frances Haugen Warns Company's Encryption Will Aid Espionage by Hostile Nations*, TELEGRAPH, (Oct. 24, 2021), https://www.yahoo.com/news/facebook-whistleblower-warns-dangerous-encryption-145115043.html.

17. Wright, *supra* note 16; Guynn & McCoy, *supra* note 11.

18. Guynn & McCoy, *supra* note 11.

19. Wright, *supra* note 16.

20. *Id.*

21. Katie Canales, *Mark Zuckerberg Said He's 'Retooling' Facebook Toward Young Adults and Away from Older Users*, BUS. INSIDER (Oct. 25, 2021), https://www.yahoo.com/news/mark-zuckerberg-said-hes-retooling-215733217.html.

22. Wright, *supra* note 16.

23. In re Facebook, Inc., 625 S.W.3d 80, 83-85, 64 (Tex. 2021).

24. *Id.* at 84-85.

25. *Id.*

became entangled with their abusers through Facebook[]" and the company was, thus, liable for negligence due to its "alleged failure to warn of, or take adequate measures to prevent, sex trafficking on its internet platforms."[26] The Texas Supreme Court found only the trafficking claim could move forward and held that section 230 would not allow "[h]olding internet platforms accountable for the words or actions of their users."[27] However, finding the platforms liable was different because section 230 had been amended "to indicate that civil liability may be imposed on websites that violate state and federal human-trafficking laws."[28]

This shows that companies are typically legislatively protected, and courts are unlikely to prevent such harm by imposing liability.[29] The court made an exception for the trafficking claim because of the section 230 amendment, and the claim was an "affirmative act[] in violation of section 98.002."[30] The court held that "[p]laintiffs' claims for negligence . . . all premised on Facebook's alleged failures to warn or to *adequately protect Plaintiffs from harm caused by other users*—are barred by section 230 and must be dismissed."[31] The court understood that while their hands were tied to impose liability and imposing liability may be necessary as technology advances, it was ultimately for Congress to decide.[32] The court made an important clarification about potentially regulating platforms because today's internet is different than the internet at its advent:

> [t]he internet today looks nothing like it did in 1996, when Congress enacted section 230. The Constitution, however, entrusts to Congress, not the courts, the responsibility to decide whether and how to modernize outdated statutes. Perhaps advances in technology now allow online platforms to more easily police their users' posts, such that the costs of subjecting platforms like Facebook to heightened liability for failing to protect users from each other would be outweighed by the benefits of such a reform. On the other hand, perhaps subjecting online platforms to greater liability for their users'

26. *Id.* at 83-84.
27. *Id.* at 83.
28. *In re Facebook, Inc*., 625 S.W.3d at 83.
29. *Id.* at 84.
30. *Id.* at 101; *see also* TEX. CIV. PRAC. & REM. § 98.002 ("(a) A defendant who engages in the trafficking of persons or who intentionally or knowingly benefits from participating in a venture that traffics another person is liable to the person trafficked, as provided by this chapter, for damages arising from the trafficking of that person by the defendant or venture. (b) It is not a defense to liability under this chapter that a defendant has been acquitted or has not been prosecuted or convicted under Chapter 20A, Penal Code, or has been convicted of a different offense or of a different type or class of offense, for the conduct that is alleged to give rise to liability under this chapter.").
31. *In re Facebook, Inc*., 625 S.W.3d at 96 (emphasis added).
32. *Id.* at 101.

> injurious activity would reduce freedom of speech on the internet by encouraging platforms to censor "dangerous" content to avoid lawsuits.[33]

In doing so, this court recognized the need for development and evolution to protect society's interest.[34] When the Texas Supreme Court referred to a largely different internet, it is easy to see why: a growing percentage of Americans prefer getting their news online through social media, namely Facebook, but this does not mean that users are fooled by content, because

> Americans are skeptical of the information . . . on social media . . . a majority of those who often get news on social media (57%) say they expect the news they see on these platforms to be largely inaccurate. Concerns about . . . inaccuracies . . . are prevalent even among those who say they *prefer* to get their news there.[35]

A problematic feature of using these sites for "news" is that not all of what one reads is true. Despite this knowledge, only some users have changed their online behaviors and know, or at least can tell, an apocryphal article from actual events; yet these users still engage with misinformation.[36] How are the thoughts of those who cannot tell the difference shaped and guided by misinformation? How are they to intelligently navigate the road to a final destination: truth? While the currently poled population may know the difference, what happens if future users totally fail to discern fact from fiction?

B. Section 230 Roadmap: The Information Superhighway Needs Construction

Social media companies are protected from the above-mentioned harms to users, intentionally spreading misinformation that furthers the political divide, and inflicting harm on the free exchange of ideas under 47 U.S.C. § 230: "Protection for private blocking and screening of offensive material."[37] Apparent from the statutory language, this Congressional act did not account for the potential abuse of the protected resources; spreading misinformation; and curtailing educational benefits, political discourse, and cultural

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33. *Id.*
34. *Id.*
35. A.W. Geiger, *Key Findings About the Online News Landscape in America*, PEW RES. CENTER (Sept. 11, 2019), https://www.pewresearch.org/fact-tank/2019/09/11/key-findings-about-the-online-news-landscape-in-america/ (emphasis in original).
36. *Id.*
37. 47 U.S.C. § 230 (2018).

development.[38] Congress originally recognized that online services "represent an extraordinary advance in the availability of educational and informational resources[,]" and "offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops."[39] Congress decided that these "services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity[,]" which "have flourished, to the benefit of all Americans, with a minimum of government regulation. . . . Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services."[40]

As a result of these findings, Congress enacted policy "to promote the continued development of" said services and "to preserve the vibrant and *competitive free market* . . . unfettered by Federal or State regulation[.]"[41] Congress provided protection to the servicing companies: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[42] Congress provided further protection to both users and the services, and neither "shall be held liable" for

> any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or . . . any action taken to enable or make available to information content providers or others the technical means to restrict access to material[.][43]

Thus, Congress, in promoting the notion of a *marketplace of ideas*, understood that these services would further citizens' ability to grow politically, culturally, and intellectually, such that the providers of services would not be liable for the users' behavior.[44] On its face, the statute's goal was to preserve the competitive free market, and Congress viewed imposing liability as disrupting that market.[45] As noted above, while the First

38. *Id.*
39. 47 U.S.C. § 230 (a)(1)-(2) (2018).
40. 47 U.S.C. § 230 (a)(3)-(5) (2018).
41. 47 U.S.C. § 230 (b)(1)-(2) (2018) (emphasis added).
42. 47 U.S.C. § 230 (c)(1) (2018).
43. 47 U.S.C. § 230 (c)(2)(A)-(B) (2018).
44. 47 U.S.C. § 230(b)-(c) (2018).
45. 47 U.S.C. § 230(b)(2), (c) (2018).

Amendment is not without limitations, section 230 provides a liability shield to companies that even the government does not have.[46]

People can be held accountable for in-person speech and must adhere to other First Amendment limitations.[47] The Court has given corporations "person" status in free exercise cases.[48] The Government would violate the Constitution and the First Amendment by strictly enforcing regulations on the internet.[49] Americans would likely consider this censorship and a threat to freedom of speech. Consequently, it has been argued that "non-government entities that are granted the ability and power to spread speech must not be immune to the repercussions of their actions. The most powerful market actors should not be allowed to censor or silence free speech, or promote false, potentially harmful information with no accountability."[50] As it stands, these private companies are afforded unparalleled protection from liability that any other actor would be liable for had harm resulted.[51] Section 230 was adopted in 1996, and while the online world has faced "radical digital advancement, there has not been any change to regulation of big tech, to the detriment of consumers, free markets and the marketplace of ideas."[52]

C. How Did We Get Here: Why Should We Care About Roads Less Traveled?

This begs two questions: where did the marketplace of ideas originate, and what is the purpose of it? Justice Holmes's dissent in *Abrams v. United States*, a case concerning a violation of the Espionage Act for distributing leaflets against World War I, discussed this marketplace of ideas and how discussing opposing opinions achieves *truth* when a different set of facts disrupted what was a *settled* limitation on free speech:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the *ultimate good desired is better reached by free trade in ideas*—that the best test of truth is the power of the thought to get itself accepted in the *competition of the*

46. 47 U.S.C. § 230(c) (2018).

47. Brandenburg v. Ohio, 395 U.S. 444, 448 (1969) (holding that a state may only regulate speech that advocates violence if the speech is intended and likely to incite imminent illegal activity).

48. *See generally* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

49. *Brandenburg*, 395 U.S. at 448.

50. Natalie Seales, *Congress Can Protect the First Amendment by Holding Big Tech Accountable*, NEWS MEDIA ALLIANCE (June 29, 2020), https://www.newsmediaalliance.org/congress-protect-1a-section-230/.

51. *Id.*

52. *Id.*

> *market*, and that truth is the only ground upon which their wishes safely can be carried out.[53]

Justice Holmes penned the unanimous decision for the Court in *Schenck v. United States*, a case that also concerned a violation of the Espionage Act for distributing flyers that urged resistance to the draft, when the *settled* limitation on freedom of speech was "whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the *substantive evils that Congress has a right* to prevent."[54] The change, in Justice Holmes's opinion, was the context of the speech: "the character of every act depends upon the circumstances in which it is done[,]"[55] and "[i]t is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country."[56] Thus, though both cases concerned violations of the Espionage Act and opposition to the war, for Justice Holmes, it was the likelihood that the spread of that opinion was likely to bring about imminent harm that took the message outside of the marketplace of free ideas and into an actual harm against society.[57]

Countless cases have referenced the marketplace of ideas, which, though made judicial precedent by Justice Holmes, stemmed from ideas discussed by John Stuart Mill in *On Liberty*.[58] The Court has cited Mill several times as an authority on a variety of issues[59] because Mill was renowned as a philosopher, political economist, and member of parliament.[60] Mill understood the vital need for adverse opinions and stated, "If all mankind minus one, were of one opinion, and only one person were of the contrary

53. Abrams v. United States, 250 U.S. 616, 618, 630 (1919) (Holmes, J. dissenting) (emphasis added).

54. Schenck v. United States, 249 U.S. 47, 48, 52 (1919) (emphasis added).

55. *Id.* at 52.

56. *Abrams*, 250 U.S. at 628 (Holmes, J. dissenting).

57. *See generally Schenck,* 249 U.S. 47; *see also Abrams*, 250 U.S. 616.

58. *See, e.g.,* McCreary County v. Am. C.L. Union, 545 U.S. 844, 883 (2005) ("In the marketplace of ideas, the government has vast resources and special status. Government religious expression therefore risks crowding out private observance and distorting the natural interplay between competing beliefs."); Randall v. Sorrell, 548 U.S. 230, 279-80 (2006) ("a legislative judgment that 'enough is enough' should command the greatest possible deference from judges interpreting a constitutional provision that, at best, has an indirect relationship to activity that affects the quantity—rather than the quality or the content—of repetitive speech in the marketplace of ideas"); Reno v. Am. C.L. Union , 521 U.S. 844, 885 (1997) ("The dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention.").

59. *See, e.g.,* Obergefell v. Hodges*,* 576 U.S. 644, 706 (2015) (on social thought); Michigan v. Bryant, 562 U.S. 344, 388 n. 4 (2011) (dystopia and the Confrontation Clause); Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 612-13 (2007) (taxpayer standing).

60. Richard Anschutz, *John Stuart Mill*, BRITANNICA, https://www.britannica.com/biography/John-Stuart-Mill (last updated Mar. 14, 2023).

opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."[61] This means that for Mill, no one opinion was any greater, nor deserved to be heard any more than any other opinion.[62]

He believed there was a necessity to the freedom of opinion, even when wrong or incorrect, and a necessity to express that opinion, "on four distinct grounds[.]"[63] The four grounds, as summarized, offer instruction: silencing ideas assumes the ideas are wrong or false when the ideas could turn out to be right or true; discussing ideas brings us closer to truth, and adverse opinions are valuable because false opinions can hold new knowledge; discussion is necessary to truly understand the grounds for one's thinking and to prevent prejudice; and open discussion prevents the meaning of truth from being lost – prevents growth in thought, and this is harmful to human development.[64] Thus, the essence of Mill's *free market of ideas* is that no opinion should be silenced; even if it does not prove to be true, it can and should be contested to promote the growth of thought by those with opposing opinions.[65]

Thomas Emerson, professor of law at Yale University, author of several books and articles,[66] and prolific, "arguably the foremost", First Amendment scholar,[67] promoted a theory similar to Mill, by stating, "the right to control individual expression, on the ground that it is judged to promote good or evil, justice or injustice, equality or inequality, is not, speaking generally, within

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61. JOHN STUART MILL, ON LIBERTY 87 (David Bromwich & George Kateb eds., 2003).
62. *Id.* at 87.
63. *Id.* at 118.
64. *Id.*

> First, if *any opinion* is *compelled to silence*, that opinion *may*, for aught we can certainly know, *be true*. To deny this is to assume our own infallibility. Second, though the *silenced opinion be an error*, it may, and very commonly does, *contain a portion of truth*; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by *the collision of adverse opinions that the remainder of the truth has any chance of being supplied*. Thirdly, even *if the received opinion be not only true*, but the whole truth; *unless* it is suffered to be, and actually is, vigorously and earnestly *contested*, it will, by most of those who receive it, be *held* in the manner of a *prejudice*, with *little comprehension* or feeling of its rational grounds. And not only this, but, fourthly, the *meaning* of the doctrine itself will be in *danger of being lost*, or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground, and *preventing the growth of any real and heartfelt conviction*, from reason or personal experience.

Id. (emphasis added).

65. *Id.*
66. Tribute, *Writings of Thomas Irwin Emerson*, 101 YALE L.J. 327-28 (1991).
67. David Hudson Jr, *Thomas Emerson*, FIRST AMEND. ENCYC. (2009), https://mtsu.edu/first-amendment/article/1295/thomas-emerson.

the competence of the good society."[68] Thus, a good society requires a diversity of ideas and thoughts.[69] He went further and said this freedom must be preserved:

> thought and communication are the fountainhead of all expression of the individual personality. To cut off the flow at the source is to dry up the whole stream. Freedom at this point is essential to all other freedoms. Hence society must withhold its right of suppression until the stage of action is reached.[70]

Essentially, this demonstrates that the *marketplace of free ideas* must be preserved, assuming the speech in that marketplace adheres to the limitation set in *Brandenburg*,[71] because "expression is normally conceived as doing less injury to other social goals than action. It generally has less immediate consequences, is less irremediable in its impact."[72] Emerson recognized that authority and freedom need to be balanced: "the power of society and the state over the individual is so pervasive, and . . . to limit this power so difficult, that only by drawing such a protective line between expression and action is it possible to strike a *safe* balance between authority and freedom."[73]

Thus, the balance between the ability to express speech and the ability for societal structures to censor speech must be to ensure safety. Emerson asserts this stems from frailty in judgment.[74] Because judgment is frail and predicated by emotion, people need access to all opinions and knowledge in their search for *truth* to test what they believe; thus, suppressing ideas denies that possibility.[75] Emerson and Mill would agree that challenging thought is

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68. Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 880 (1963).

69. *Id.*

70. *Id*. at 881.

71. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that a state may only regulate speech that advocates violence if the speech is intended and likely to incite imminent illegal activity).

72. Emerson, *supra* note 68, at 881.

73. *Id.* (emphasis added).

74. *Id.*

75. *Id.*

> *Human judgment is a frail thing*. It may err in being subject to emotion, prejudice or personal interest. It *suffers from* lack *of information*, insight, or inadequate thinking. It can seldom rest at the point any single person carries it, but must always remain incomplete and *subject to further extension, refinement, rejection or modification*. Hence an *individual who seeks knowledge and truth must hear all sides of the question, especially as presented by those who feel strongly and argue militantly for a different view*. He must consider all alternatives, test his judgment by exposing it to opposition, make full use of different minds to sift the true from the false. Conversely, *suppression of information, discussion, or the clash of opinion prevents one from reaching the most rational judgment*, blocks the generation of new ideas, and tends to perpetuate error.

critical because the human mind suffers from frailty; thus, suppression of ideas or opinions, no matter their falsity, is likely dangerous because it would prevent the growth of knowledge and perpetuate ignorance.[76]

As history and Emerson show, "most widely acknowledged truths have turned out to be erroneous. Many of the most significant advances in human knowledge—from Copernicus to Einstein— have resulted from challenging hitherto unquestioned assumptions. No opinion can be immune from challenge."[77] It is not difficult to imagine a modern-day Copernicus being shut down as a sun-circler akin to modern-day flat-Earthers. What is potentially more difficult to imagine is the world of science if this happened. Emerson recognized this possibility and argued:

> coercion of expression is likely to be ineffective. While it may prevent social change, at least for a time, it cannot eradicate thought or belief; nor can it promote loyalty or unity. As Bagehot observed, "Persecution in intellectual countries produces a superficial conformity, but also underneath an intense, incessant, implacable doubt."[78]

Thus, not only is the freedom to express opinions vital to society but also, the danger of suppressing ideas because:

> suppression drives opposition underground, leaving those suppressed either apathetic or desperate. It thus saps the vitality of the society or *makes resort to force more likely* . . . as Mill observed, "beliefs not grounded on conviction are likely to give way before the slightest semblance of an argument." In short, *suppression of opposition may well mean that when change is finally forced on the community it will come in more violent and radical form*.[79]

Emerson and Mill are in concert about the need for freedom to express an opinion and the repercussions to suppressing opinions. Emerson takes a step further about where suppression of ideas may lead: "[o]nly a government which consistently fails to relieve valid grievances need fear the outbreak of violent opposition."[80] This appears to present an impasse: preventing the spread of misinformation and the necessity to access contrary opinions.

Id. (emphasis added).

76. *Id.*; STUART MILL, *supra* note 61, at 118.

77. Emerson, *supra* note 68, at 881-82.

78. *Id.* at 884 (quoting Bagehot, The Metaphysical Basis of Toleration, in 2 WORKS OF WALTER BAGEHOT 339, 357 (Hutton ed. 1889)).

79. *Id.* at 884-85 (quoting STUART MILL, *supra* note 61, at 42) (emphasis added).

80. *Id.* at 885.

The advent of social media has led to an immense opportunity in the freedom to express and share an opinion, regardless of how controversial, adversarial, or fallacious that opinion may be. Social media also allows one to find like-minded individuals, which presents the ability to incite immediate imminent harm given the recent surge in the outbreak of violence and use of platforms to organize violence.[81] These concerns are critical because the recent whistleblower revealed that these companies have constructive knowledge of the repercussions and profit from them.[82] Profit dictates their behavior instead of societal good:

> social network's algorithm amplified misinformation and was exploited by foreign adversaries. . . . Facebook consistently chose to maximize its growth rather than implement safeguards on its platforms[.] . . . Facebook knew about how organizers of the Jan. 6 Capitol siege used its platform; how effective it is as removing hate speech; and how Instagram makes body image issues worse.[83]

First Amendment concerns involve not only content but the fact that social media sites

> frequently share[,] . . . vet news content, [and] publish content of their own, making them moderators of public forums . . . platforms have

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81. Craig Timberg & Isaac Stanley-Becker, *Violent Memes and Messages Surging on Far-Left Social Media, A New Report Finds*, WASH. POST (Sept. 17, 2020), https://www.washingtonpost.com/technology/2020/09/14/violent-antipolice-memes-surge/.

> Months of civil unrest have coincided with a significant rise in social media posts critical of police that sometimes are laced with violent themes, including calls to destroy property and attack officers, according to research released Monday morning . . . report, by the Network Contagion Research Institute (NCRI), which previously has studied right-wing violence . . . warns that some left-wing groups have embraced similar social media tactics, including memes and humorous catchphrases, to spread their messages and possibly help coordinate offline activity. . . . Some memes that spread on social media depict police officers being shot or their vehicles burned. One post from a left-wing group cited by the report called for the use of laser pointers to obstruct surveillance and the lighting of fires at police barricades. Another post urged people to use 3-D printers to make guns that can't be traced by authorities. Comments using anti-police slogans surged nearly 300 percent on Reddit and more than 1,000 percent on Twitter during the unrest triggered by the killing of George Floyd in May, according to the report. It also described the growth of left-wing networks on Facebook, with such groups as Redneck Revolt and the Socialist Rifle Association boasting about 50,000 and 40,000 members, respectively — numbers that still pale in comparison to right-wing communities online.

Id.

82. Bobby Allyn, *Here Are 4 Key Points from the Facebook Whistleblower's Testimony on Capitol Hill*, NAT'L PUB. RADIO (Oct. 5, 2021), https://www.npr.org/2021/10/05/1043377310/facebook-whistleblower-frances-haugen-congress.

83. *Id.*

> essentially been granted the protections of a private residence, while having the reach and substantive effect of a public forum, with nearly 70 percent of adults in the United States using Facebook.[84]

One recommended solution was that

> [t]he best application of the Constitution . . . would be to impart . . . the liability that accompanies the First Amendment protections they already enjoy. If digital platforms truly champion the principles of Free Speech and Free Press . . . they will accept the accountability that comes with their role as publishers and arbiters of content.[85]

This would solve the apparent impasse because it would impose liability without limiting the spread of opinions.

III. ANALYSIS: RULES OF THE ROAD

A. Staying in the Right Lane: Treat Platforms as Publishers

The call for these platforms to be treated as publishers would allow a legal remedy to redress such issues, and "[i]t isn't just outside observers who have noted that the tech platforms resemble traditional publishers – the tech companies themselves have admitted as much in court proceedings."[86] The author cited to "the case [of] *Six4Three v. Facebook*, where an app developer sued Facebook for its refusal to grant access to user data, Facebook referred to its decision to limit data access as a 'quintessential publishing function.'"[87]

> The company doubled down on this argument, saying "that this publishing function includes deciding what to publish and what not to publish. Yet, Facebook has consistently refused to describe itself as a publisher in public statements. This exhibits the unashamed tendency of the big tech companies to claim the benefits that come with being a publisher when it suits them, while refusing to accept any of the societal responsibility that comes with it.[88] While these companies are trying to have their proverbial cake and eat it too, they should face accountability when misinformation goes against the

84. Seales, *supra* note 50.
85. *Id.*
86. Johannes Munter, *Online Platforms Challenge Free Speech Through Editorial Decisions*, NEWS MEDIA ALL. (Oct. 23, 2018), https://www.newsmediaalliance.org/platforms-free-speech-online/.
87. *Id.*
88. *Id.*

> initial purpose of section 230 because these companies put profit above users' safety.

The recent above-mentioned whistleblower shows the companies' actions do not align with their legal defenses and should disrupt the typical duplicitous response by the company, which would allow courts to impose liability if Congress does not act: "Facebook has long had the same public response when questioned about its disruption of the news industry: it is a tech platform, not a publisher or a media company."[89] Facebook's legal team "presented a different message from the one executives have made to Congress, in interviews and in speeches: Facebook, they repeatedly argued, is a publisher, and a company that makes editorial decisions, which are protected by the [F]irst [A]mendment."[90]

The company cannot claim the First Amendment shield and avoid the sword despite its "contradictory claim" and "latest tactic against a high-profile lawsuit," either Congress or the Court should deny their sought protection in hiding behind the argument that they are a "neutral platform that does not have traditional journalistic responsibilities."[91]

> This is especially true when "[i]n court . . . a lawyer for Facebook, even drew comparison with traditional media: 'The publisher discretion is a free speech right irrespective of what technological means is used. A newspaper has a publisher function whether they are doing it on their website, in a printed copy or through the news alerts."[92]

The whistleblower and this article bolster the claim that "Zuckerberg developed a 'malicious and fraudulent scheme' to exploit users' personal data and force[d] rival companies out of business."[93] What is worse, as the above cases have shown, national courts seem unwittingly complicit by deciding in these companies' favor.[94]

The Ninth Circuit denied any role these platforms play as publishers in *Prager Univ. v. Google LLC*, where PragerU, a media and educational nonprofit that creates videos on socio-political issues for the internet with a goal of "provid[ing] conservative viewpoints and perspective on public issues

89. Sam Levin, *Is Facebook a Publisher? In Public it Says No, But in Court it Says Yes*, GUARDIAN (July 3, 2018), https://www.theguardian.com/technology/2018/jul/02/facebook-mark-zuckerberg-platform-publisher-lawsuit.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. Levin, *supra* note 89; Munter, *supra* note 86.

that it believes are often overlooked[]", was tagged by Youtube for posting videos they deemed "as appropriate for the Restricted Mode. YouTube also 'demonetized' some of PragerU's videos, which means third parties cannot advertise on those videos."[95] The nonprofit sought to fight this decision through the "internal process, but at least some of the videos remain restricted or demonetized."[96]

The court held that the "claim that YouTube censored PragerU's speech faces a formidable threshold hurdle: YouTube is a private entity."[97] The court clarified that only the government was prohibited from abridging speech and not private parties.[98] The court saw this as a "straightforward application of the First Amendment. Because the state action doctrine precludes constitutional scrutiny of YouTube's content moderation" and dismissed the claim, which ignored the nonprofit's "prophe[cy of] living under the tyranny of big-tech, possessing the power to censor any speech it does not like."[99] It would be problematic to allow the government to control the conversation as this would result in censorship, but private corporations are currently allowed to do the exact same thing and harm the marketplace of ideas in the process.[100]

These companies intentionally misinform the public, allow for the organization of violence,[101] and have unfettered control of the conversation, which if done by the government would be censorship. If not addressed, these issues will have potential consequences to the democratic process as well because "Facebook and Twitter took steps . . . to limit the spread of a controversial New York Post article critical of Joe Biden, sparking outrage among conservatives and stoking debate over how social media platforms should tackle misinformation ahead of the US election."[102] It is unlikely that one piece of a puzzle could have utterly changed the face of the last election, but there should not be a question when this prevention was "an unprecedented step against a major news publication[.] Twitter blocked users from posting links to the Post story or photos from the unconfirmed report."[103]

This was not preventing the spread of misinformation; it was controlling the conversation. As Emerson and Mill discussed, freedom of opinion is vital to shaping the growth of knowledge.[104] Denying voters information by

95. Prager Univ. v. Google LLC, 951 F.3d 991, 995-96 (9th Cir. 2020).
96. *Id.* at 996.
97. *Id.*
98. *Id*.
99. *Id.* at 999.
100. *Prager Univ*., 951 F.3d at 996.
101. Timberg & Stanley-Becker, *supra* note 81.
102. Kari Paul, *Facebook and Twitter Restrict Controversial New York Post Story on Joe Biden,* GUARDIAN (Oct. 14, 2020), https://www.theguardian.com/technology/2020/oct/14/facebook-twitter-new-york-post-hunter-biden.
103. *Id.*
104. *See supra* Part II.C.

"plac[ing] restrictions on linking to the article, [and] saying there were questions about its validity"[105] should not be left to private companies with a potentially vested interest. It is the job of the voter to seek out more information on a questionable issue, policy, or candidate background, if and when they choose it is important enough to find such information. This is especially troublesome because

> [t]he move mark[ed] the first time Twitter has directly limited the spread of information from a news website, as it continues to implement stricter rules around misinformation ahead of the 2020 elections. . . . Twitter also reportedly locked the personal account of the White House press secretary Kayleigh McEnany for sharing the article.[106]

Former President Trump was equally as guilty, likely more so, of spreading misinformation,[107] but when he tried to shut down the opposition, it was unconstitutional.[108]

B. The Road Should be Accessible to All: Treat Platforms as Public Forums

Former President Trump brought suit against Twitter, and the case was heard and affirmed by the Second Circuit who held "that he engaged in unconstitutional viewpoint discrimination by utilizing Twitter's 'blocking' function to limit certain users' access to his social media account, which is otherwise open to the public at large, because he disagrees with their speech."[109] The former President argued against his account being labeled as a public forum, and argued blocking someone "did not prevent them from accessing the forum[,]" even if it were a public forum, but the court held that "the evidence of the official nature of the Account is overwhelming. We also conclude that once the President has chosen a platform and opened up its interactive space to millions of users and participants, he may not selectively exclude those whose views he disagrees with."[110] This is exactly what private companies are allowed to do, and when they do it, users are denied access to

105. Paul, *supra* note 102.

106. *Id.*

107. Nate Rattner, *Trump's Election Lies Were Among His Most Popular Tweets*, CONSUMER NEWS BUS. CHANNEL POLITICS (Jan. 13, 2021), https://www.cnbc.com/2021/01/13/trump-tweets-legacy-of-lies-misinformation-distrust.html ("analysis of Trump's tweets during his presidency found that his most popular and frequent posts largely spread disinformation and distrust").

108. Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 234 (2d Cir. 2019) [hereinafter *Knight I*].

109. *Id.* at 230.

110. *Id.* at 234.

information. The former President was denied a rehearing,[111] and the Court dismissed the case as moot.[112]

Thus, when former President Trump, as argued by the court in the case above, created a public forum, and a public forum may be created "only by intentionally opening a nontraditional forum for public discourse[,]"[113] the argument that social media platforms are generally public forums gains credibility. Online platforms are currently not traditional forums for public discourse,[114] but the argument and possibility for such a decision should be advanced because the former President and other elected officials continually engage constituents and the public online. These platforms are surely used for such public discourse and interaction with elected officials and have become a source for information and misinformation on news and in politics.[115]

Despite the Court's mootness holding in former President Trump's suit, Justice Thomas wrote a separate concurring opinion and noted how problematic this issue has become, which further demonstrates the importance of addressing it:

> applying old doctrines to new digital platforms is rarely straightforward . . . rather odd to say that something is a government forum when a private company has unrestricted authority to do away with it . . . no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms.[116]

Justice Thomas acknowledged the public forum designation may be appropriate because Congress has "giv[en] these companies special privileges, governments place them into a category distinct from other companies and closer to some functions, like the postal service, that the State has traditionally undertaken."[117]

The former President of the United States and the last election were not without severe controversy and were utterly polarizing. The former President's suit was against these platforms for "suspensions of his accounts

111. Knight First Amend. Inst. at Columbia Univ. v. Trump, 953 F.3d 216, 217 (2020) [hereinafter *Knight II*].

112. Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1221 (2021).

113. Cornelius v. Nat'l Assoc. Advancement Colored People Legal Def. & Edu. Fund, Inc., 473 U.S. 788, 802 (1985).

114. *Id.*

115. Geiger, *supra* note 35.

116. *Biden,* 141 S. Ct. at 1221 (Thomas, J., concurring).

117. *Id.* at 1223.

after a mob of his supporters attacked the U.S. Capitol in January."[118] The reason for his suspension, according to the companies, was "the risk of further violence[,]" and his sentence was harsh: "Twitter banned Trump permanently, Facebook has suspended him for two years and YouTube has said it will let him return only 'when we determine that the risk of violence has decreased.'"[119] His punishment would seem in line with the limitation in *Brandenburg* because of the possible threat of imminent violence.

These companies, however, hold the key and can lock the door at their discretion even when their conclusion may not be true: "The president didn't commit incitement or any other crime . . . didn't mention violence on Wednesday, much less provoke or incite it."[120] The article's author, a former Washington prosecutor known for protest prosecution, examined former President Trump's words, and found "there was no 'public disturbance,' only a rally. The 'disturbance' . . . by a small minority who entered the perimeter and broke the law. They should be prosecuted."[121]

Ironically, the former President Trump who arguably was not liable for any violence was blocked as a user when the Court found a North Carolina statute to be unconstitutional for denying a former sex offender access to such platforms[122] just because such users have used the platforms to commit acts of violence on unassuming children. Like the language of section 230 , the Court acknowledged that these platforms are for accessing information, news, employment possibilities, and communication, but "with one broad stroke" the state barred such access and prohibited sex offenders from "the modern public square", and "*foreclose[d] access to social media altogether . . . to prevent the user from engaging in the legitimate exercise of First Amendment rights*."[123]

While admittedly the latter case was a state statute barring access to users and the former was a private entity, the Court acknowledged that these platforms are the "modern [day] public square."[124] This means that a convicted criminal and child sex offender who may have used the platform in the past to cause actual harm deserves access, but the former President who

118. Shannon Bond, *Donald Trump Sues Facebook, YouTube And Twitter For Alleged Censorship*, NAT'L PUB. RADIO (July 7, 2021), https://www.npr.org/2021/07/07/1013760153/donald-trump-says-he-is-suing-facebook-google-and-twitter-for-alleged-censorship.

119. *Id.*

120. Jeffrey Scott Shapiro, *No, Trump Isn't Guilty of Incitement*, WALL STREET J. (Jan. 10, 2021), https://www.wsj.com/articles/no-trump-isnt-guilty-of-incitement-11610303966.

121. *Id.*

122. *See generally* Packingham v. North Carolina, 137 S. Ct. 1730 (2017).

123. *Id.* at 1737 (emphasis added).

124. *Id.*; Bond, *supra* note 118.

arguably did not incite imminent harm was not afforded the same right.[125] These are fundamental rights, and standards for access must be the same.

Prior to the Supreme Court's ruling in *Knight*, the Second Circuit offered insight on the public forum issue by reifying a former holding and clarifying that former President Trump

> uses this account to make official statements on a wide variety of subjects, many of great national importance. The public, in turn, is able to respond to and engage with the President and other users on Twitter. . . . [T]his dialogue creates a public forum . . . [and] violates the First Amendment when he excludes persons from the dialogue because they express views with which he disagrees.[126]

The court also referenced the *Packingham* decision and the above asserted contention because in that case

> Justice Kennedy discussed the relationship between Twitter and the First Amendment. He said that "[w]hile in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the vast democratic forums of the Internet in general, and social media in particular. . . . [O]n Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. . . . In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics as diverse as human thought."[127]

Further, the Second Circuit clarified "that public fora are 'used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' As the Court noted in *Packingham v. North Carolina*, that is precisely what social media platforms do. Twitter is no exception."[128] These decisions bolster the movement for such platforms to be considered public forums.

Justice Thomas, typically antiquated and notoriously conservative in his views, seemed rather forward looking as the sole concurrence for the vacated judgment in *Knight*, which furthered a public forum consideration for online platforms when he noted that

125. *Packingham*, 137 S. Ct. at 1737; Bond *supra* note 118; *Knight I*, 928 F.3d 226, 234.
126. *Knight II*, 953 F.3d 216, 217 (2020) (Barrington, J., concurring).
127. *Id.* at 220 (quoting *Packingham*, 137 S. Ct. at 1735-36).
128. *Id.* at 223 (quoting Hague v. Comm. Indus. Org., 307 U.S. 496, 515 (1939)).

> Though digital instead of physical, they are at bottom communications networks, and they "carry" information from one user to another. A traditional telephone company laid physical wires to create a network connecting people. Digital platforms lay information infrastructure that can be controlled in much the same way. And unlike newspapers, digital platforms hold themselves out as organizations that focus on distributing the speech of the broader public. . . . The analogy to common carriers is even clearer for digital platforms that have dominant market share. Similar to utilities, today's dominant digital platforms derive much of their value from network size. The Internet, of course, is a network. But these digital platforms are networks within that network. The Facebook suite of apps is valuable largely because 3 billion people use it. Google search—at 90% of the market share[.] . . . Although both companies are public, one person controls Facebook (Mark Zuckerberg), and just two control Google (Larry Page and Sergey Brin). No small group of people controls e-mail. Much like with a communications utility, this concentration gives some digital platforms enormous control over speech. When a user does not already know exactly where to find something on the Internet—and users rarely do—Google is the gatekeeper between that user and the speech of others 90% of the time.[129]

Justice Thomas's gatekeeper label would be particularly problematic if the gatekeeping door was open to perspectives that matched that of a Zuckerberg, Page, or Brin, but closed when the perspective was an opposing one. Justice Thomas continued this analysis:

> It changes nothing that these platforms are not the sole means for distributing speech or information. A person always could choose to avoid the toll bridge or train and instead swim the Charles River or hike the Oregon Trail. But in assessing whether a company exercises substantial market power, what matters is whether the alternatives are comparable. For many of today's digital platforms, nothing is. . . . Even if digital platforms are not close enough to common carriers, legislatures might still be able to treat digital platforms like places of public accommodation. Although definitions between jurisdictions vary, a company ordinarily is a place of public accommodation if it

129. Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1224 (2021). (Thomas, J., concurring).

> provides "lodging, food, entertainment, or other services to the public . . . in general."[130]

If the gatekeepers close the door and deny access because of such a disagreement in perspective, they are denying access and in essence denying free speech online with an unregulated power to do so. This is content-based and/or viewpoint-based discrimination. As mentioned previously, section 230 has yet to be amended to modern-day standards, and "Congress does not appear to have passed these kinds of regulations. To the contrary, it has given digital platforms 'immunity from certain types of suits,' with respect to content they distribute, 47 U.S. C. § 230, but it has not imposed corresponding responsibilities, like nondiscrimination, that would matter here."[131]

Thus far, it would seem to be only a political discrimination that *closes the gate*, but should it need to go further to make Congress act when

> if the aim is to ensure that speech is not smothered, then the more glaring concern must perforce be the dominant digital platforms themselves. As Twitter made clear, the right to cut off speech lies most powerfully in the hands of private digital platforms. The extent to which that power matters for purposes of the First Amendment and the extent to which that power could lawfully be modified raise interesting and important questions.[132]

Even questioning whether online speech is free speech, when the online world is as ubiquitous as any other utility or public forum, shows the need for change. Justice Thomas's concurring opinion could open the door to labeling the online world as a public forum, which ensures protections and disallows content-based or viewpoint-based discrimination.

C. How to Access the Road: Public Forums Precedent

In the early 1980s, members of the union brought action concerning several collective bargaining rights provisions in an agreement between the bargaining representative and the school district, which challenged who could access the interschool mail system and teacher mailboxes to the exclusion of a rival union.[133] The Supreme Court framed the issue as "whether the First Amendment . . . is violated when a union that has been elected by public school teachers as their exclusive bargaining representative is granted access

130. *Id.* at 1225 (quoting Black's Law Dictionary (11th ed. 2019)).

131. *Id.* at 1226 (quoting Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J. L. & TECH. 391, 403 (2020)).

132. *Biden*, 141 S. Ct. at 1227 (Thomas, J., concurring).

133. *See generally* Perry Educ. Ass'n v. Perry Loc. Educators Ass'n, 460 U.S. 37 (1983).

to certain means of communication, while such access is denied to a rival union[,]" which the Court concluded was without question a constitutional interest and such "interests are implicated by denying PLEA use of the interschool mail system. . . . The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue."[134]

The Court went on to define that character and held that

> [i]n places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." In these quintessential public forums, the government may not prohibit all communicative activity.[135]

In the modern age, whether one shares the perspective of the gatekeeper, they may be "granted access to certain means of communication, while such access is denied to" someone of a rival or opposing perspective.[136] The internet has become a place devoted to assembly and debate, which the state may not be directly regulating but is allowing a private company to regulate in such a discriminatory manner with government fiat: a section 230 stamp of approval.[137] Communication between citizens is critical, even, and when they are wrong or blindly ignorant as Emerson and Mill professed. If Congress will not amend section 230, the courts should find that the online world and social media platforms have become the modern-day public forum through which such discussion takes place.

This is especially true when the Court defined a public forum as a place where "all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject."[138] Disagreeing is not a compelling reason, as noted, it was unlikely the former President's statements would be likely to incite, and Emerson and Mill's ideas would further show that such speech cannot be barred from the public forum as it would go underground and become more violent and more radical.[139]

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134. *Id.* at 44.
135. *Id.* at 45 (quoting Hague v. Comm. Indus. Org., 307 U.S. 496, 515 (1939)).
136. *Id.* at 44.
137. *Biden,* 141 S. Ct. at 1226 (quoting Candeub, *supra* note 131).
138. *Perry Educ. Ass'n*, 460 U.S. at 55.
139. Emerson, *supra* note 68, at 885; STUART MILL, *supra* note 61, at 118.

Social media companies denying access is not a state action, but in *Manhattan Community Access Corporation v. Halleck*, the Court reasoned that the "question here is whether MNN—even though it is a private entity—nonetheless is a state actor when it operates the public access channels."[140] While the majority held that "a private entity who provides a forum for speech is not transformed by that fact alone into a state actor[,]"[141] the four dissenting judges concluded that

> [t]he channels are clearly a public forum: The City has a property interest in them, and New York regulations require that access to those channels be kept open to all. And because the City (1) had a duty to provide that public forum once it granted a cable franchise and (2) had a duty to abide by the First Amendment once it provided that forum, those obligations did not evaporate when the City delegated the administration of that forum to a private entity. Just as the City would have been subject to the First Amendment had it chosen to run the forum itself, MNN assumed the same responsibility when it accepted the delegation.[142]

The analogy to the internet is similar: section 230 shows Congress's interest in them and puts in place a regulation that requires access to the internet to be open for all. Congress has a duty now that it has granted social media franchises and a duty to abide by the First Amendment once it provided the forum. This obligation does not evaporate because private entities run the platforms after a Congressional christening. Congress would have been subject to the First Amendment had they run the platforms, so social media platforms should assume that responsibility. Since Congress has yet to amend section 230, the Court's holding in *Manhattan Community Access Corporation* was a missed opportunity to further social media as a public forum consideration as four justices would have been likely to support the position given their dissenting opinion.[143]

This is especially true considering that the Court held that one town, private and company-owned, was a state actor as their operation was "essentially a public function."[144] The Court concluded "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[145] Such precedent allowed a park,

140. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019).
141. *Id.* at 1930.
142. *Id.* at 1936 (Sotomayor, J., dissenting).
143. *Id.* at 1945.
144. Marsh v. Alabama, 326 U.S. 501, 505–06 (1946).
145. *Id.* at 506.

though privately owned, because of "public character" to be considered a state actor,[146] as was a shopping center.[147]

One writer's contention points out "that utilities — things like gas, electricity, and water — are almost always distributed with a governmental intermediary who can make sure that rates are even, safety measures are being enforced, and access is as equitable as possible."[148] In seeing this, he asserts that "[r]ight up there with water and electricity, internet access has become an essential component of our lives, and in recent years, it's been increasingly regulated as a public utility."[149]

As most people would likely agree based on the staggering figures previously mentioned for the numbers of users, "there's no denying that the prevalence and importance of social media have grown in the last 15 years, and it's now vital for business owners who hope to stay competitive, friends who hope to stay connected, and political figures who hope to get elected."[150] He postulates and asks readers to imagine a life without access, and to "[i]magine you were a campaign manager but you were forbidden from using any social media: it would be a massive handicap[,]" because so "many of us probably check Twitter more often than we turn on a faucet in our homes. Yet for something so commonplace in our lives, it is completely devoid of regulatory oversight approaching anywhere near the other utilities we take for granted."[151] Many may think that social media is not a necessity, with which the author agrees, but contends that "neither was electricity 100 years ago, and that became a public utility. I don't think it's too much of an imaginative stretch to envision a world where social media become even more essential to daily life[.]"[152] His answer, however, is "to bust up Zuckerberg's monopoly and treat social media as the services they were meant to be: platforms where all are treated equally and fairly, and communities can grow organically[,]"[153] where this writer would be more comfortable with amending section 230, finding it liable as a publisher, or judicial precedent in labeling social media as a public forum, but would not disagree with the de-monopolization of such companies.

Whether any of these remedies or all should apply in the future, something must change in the law because Emerson and Mill's prophetic

146. Evans v. Newton, 382 U.S. 296, 301-02 (1966).

147. Amalgamated Food Emp. Union Loc. 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 316–20 (1968).

148. Aaron Mayer, *Is Social Media a Public Utility?*, MEDIUM (May 28, 2020), https://medium.com/impact-labs/is-social-media-a-public-utility-d9f88570b339.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. Mayer, *supra* note 148.

wisdom that speech cannot be barred from the public forum as it would go underground and become more violent and more radical[154] has shown to be true:

> Months of civil unrest have coincided with a significant rise in social media posts critical of police that sometimes are laced with violent themes, including calls to destroy property and attack officers[] . . . report, by the Network Contagion Research Institute (NCRI), which previously has studied right-wing violence from groups such as the "boogaloo boys," warns that some left-wing groups have embraced similar social media tactics, including memes and humorous catchphrases, to spread their messages and possibly help coordinate offline activity. . . . Comments using anti-police slogans surged nearly 300 percent on Reddit and more than 1,000 percent on Twitter during the unrest triggered by the killing of George Floyd in May, according to the report. It also described the growth of left-wing networks on Facebook, with such groups as Redneck Revolt and the Socialist Rifle Association boasting about 50,000 and 40,000 members, respectively — numbers that still pale in comparison to right-wing communities online. . . . [R]esearchers examined unrest that unfolded in a handful of cities on July 25 to assess how social media might have helped fuel the simultaneous conflict. They found that avowedly anarchist groups posted about the planned protests, organized in solidarity with ongoing demonstrations in Portland, Ore., using such hashtags as #J25, short for July 25. A frequency analysis performed by the researchers found the hashtag in only a small number of tweets, but several of the posts proved influential and had hundreds or thousands of likes, retweets and comments. Some of the left-wing youth collectives that sought to build support for the actions enlisted some of the profane slogans, such as "ACAB," in their posts on social media. The same groups also helped map out routes and provided real-time alerts about police activity. [155]

What is worse, is that the companies know about this trend: "Twitter spokesman Trenton Kennedy said, 'We welcome the chance to collaborate with external stakeholders on identifying and taking action on attempts to manipulate the conversation on Twitter.'"[156]. However, Twitter is not alone as

154. Emerson, *supra* note 68; STUART MILL, *supra* note 61, at 118.
155. Timberg & Stanley-Becker, *supra* note 81.
156. *Id.*

> Facebook spokeswoman Sarah Pollack said, "We've taken action against a number of the entities identified in this report through updated policies we announced this summer. We continuously study new trends in terminology, symbols, and memes for connections to offline violence and review organizations to determine whether they should be banned from our platform."[157]

IV. REMEDY: HOW TO REPAIR THE ROAD

This author is not alone in seeing the hailstorm of articles as necessitating change "with lawmakers on both sides of the aisle saying its liability protections should be pared back. However, they are divided on what reform would look like, with Republicans focusing their criticisms on alleged censorship and Democrats seeking to hold the companies more responsible for misinformation and other harmful content."[158] Both sides of the aisle would seem to understand that this is an issue and worry about online content in the context of free speech,[159] which suggests one way to remedy this issue would be to amend section 230. Congress could do something similar to what the UK government has done and write legislation that imposes "a statutory Duty of Care on tech companies to prevent their algorithms [from] harming people."[160] This would allow negligence suits against the companies, which, as noted above, section 230 currently disallows.[161]

This amendment would allay both fears: protection from censorship and protection from misinformation by allowing the public to bring suit against these private companies for negligence. Such suits would likely satisfy both contentions because, should the public fear information being withheld by private companies, they could bring suit and hold these private companies liable as publishers holding them accountable for any misinformation. One drawback to such an amendment would be what would no doubt result: an onslaught of litigation from those wishing to profit from the deep-pocketed companies.

As a result, another remedy would be much simpler: concede that online platforms have become the modern-day public square and shall be treated as a public forum, affording such rights and remedies. Any of these remedies—amending section 230 and creating a duty for these companies, treating them as publishers, or finding the online world to be a public forum—would ensure equal treatment under the law, regardless of one's perspective—be it wrong, ill-conceived, uninformed, stemming from willful blindness, ignorance,

157. *Id.*
158. Bond, *supra* note 118.
159. *Id.*
160. Wright, *supra* note 16.
161. *See supra* Part II.A.

hatred, or the like—because anything else denies the freedom to be wrong—a freedom inherent in the freedom of speech—and, more importantly, the ability to learn from those wrongs as a society. Imagine how different the world would be if people were not allowed to be wrong and to learn and grow: would we have seen the evolution of *Dred Scott* to *Brown v. Board*?

V. CONCLUSION

The First Amendment has limitations. The recent whistleblower, the election controversy, the former President's lawsuit, the use of platforms to abduct and violate children, and the use to organize city-wide violence, all show that these platforms need reform because they are used as a conduit for the type of violence that would otherwise be limited under *Brandenburg*,[162] which limits the freedom of speech to the likelihood of inciting imminent illegal activity. The listed examples have such a likelihood. The solution could be to view these platforms as public forums, Congress amending section 230, or holding platforms liable as publishers, but interference must happen before the ideological divide erupts into something catastrophic and irreparable. This need has been realized but not actualized.[163] Social media companies cannot escape liability and pervasively control the conversation. Suppression denies growth of thought, allows violence, and disrupts the marketplace of ideas.[164]

As has been shown throughout, the internet and social media are wildly available and widely relied on. Given the ubiquitous presence of social media, all voices and perspectives should be a part of the conversation, if only to learn from ignorance and to help to erase hate. Controlling information is a dangerous breeding ground for extremist beliefs, which can lead to extremist behavior. If we are truly the land of the free, our policies and conversations must diligently reflect such notions.

162. *See generally* Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding that a state may only regulate speech that advocates violence if the speech is intended and likely to incite imminent illegal activity).

163. *See supra* Part IV.

164. *See supra* Part II.A-C.