Roger Williams University Law Review

Volume 26
Issue 1 *Winter 2021*

Article 7

Winter 2021

ESICA: Securing—Not Compelling—Speech on the "Vast Democratic Forums" of the Internet

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ESICA: Securing—Not Compelling—Speech on the "Vast Democratic Forums" of the Internet

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> *"While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be."*[1]
>
> *"REVOKE 230!"*[2]

INTRODUCTION

America's democratic political order requires "free trade in ideas."[3] Today, this vital exchange is increasingly conducted

* Candidate for Juris Doctor, Roger Williams University School of Law, 2021. I would like to thank Professor Andrew Spacone for his guidance and insight.

1. Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017).

2. Donald J. Trump (@realDonaldTrump), TWITTER (May 29, 2020, 11:15 AM), https://twitter.com/realDonaldTrump/status/1266387743996870656; *see* Bobby Allyn, *As Trump Targets Twitter's Legal Shield, Experts Have A Warning*, NPR (May 30, 2020 11:36 AM), https://www.npr.org/2020/05/30/865813960/as-trump-targets-twitters-legal-shield-experts-have-a-warning [https://perma.cc/QL6R-KCX4].

3. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also* Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 264 (1986) ("Freedom of speech plays a fundamental role in a democracy; as this Court has said, freedom of thought and speech 'is the matrix, the indispensable condition, of nearly every other form of freedom.'" (quoting Palko v. Connecticut, 302 U.S. 319, 327 (1937))); Cox v. Louisiana, 379

via online social media platforms.[4] However, some have alleged that these platforms moderate political content in a biased manner, jeopardizing the integrity of public discourse.[5] In June 2019, Senator Josh Hawley responded to such concerns by introducing the Ending Support for Internet Censorship Act (ESICA).[6] ESICA would require providers of interactive computer services of a certain size—including all major social media platforms (e.g., YouTube, Facebook, Twitter)—to demonstrate politically neutral content moderation policies in order to enjoy the legal immunity currently afforded

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U.S. 536, 552 (1965) ("[T]he opportunity for free political discussion is a basic tenet of our constitutional democracy.").

4. *See, e.g.*, Diana Owen, *The Past Decade and Future of Political Media: The Ascendance of Social Media*, BBVA, https://www.bbvaopenmind.com/en/articles/the-past-decade-and-future-of-political-media-the-ascendance-of-social-media/ [perma.cc/8XVS-X7DK] (last visited Jan 13, 2021). On the effect of social media on political discourse, one commentator observed:

> Digital media have vastly increased the potential for political information to reach even the most disinterested citizens. Attention to the 2018 midterm elections was inordinately high, and the ability for citizens to express themselves openly through social media has contributed to this engagement. Issues and events that might be outside the purview of mainstream journalists can be brought to prominence by ordinary citizens.

Id. One survey found that "[twenty percent] of social media users say they've modified their stance on a social or political issue because of material they saw on social media, and [seventeen percent] say social media has helped to change their views about a specific political candidate." Monica Anderson, *Social media causes some users to rethink their views on an issue*, PEW RESEARCH CTR. (Nov. 7, 2016), https://www.pewresearch.org/fact-tank/2016/11/07/social-media-causes-some-users-to-rethink-their-views-on-an-issue/ [perma.cc/K9EL-APPW].

5. *See, e.g.*, Queenie Wong, *Is Facebook censoring conservatives or is moderating just too hard?*, CNET (Oct. 29, 2019), https://www.cnet.com/features/is-facebook-censoring-conservatives-or-is-moderating-just-too-hard/ [perma.cc/GY3R-PRR6]; Sara Harrison, *No One's Happy With YouTube's Content Moderation Policies*, WIRED (Aug. 28, 2019, 07:00 AM), https://www.wired.com/story/no-ones-happy-youtubes-content-moderation/ [perma.cc/4MYD-M8G3]; Linda Givetash, *Laura Loomer banned from Twitter after criticizing Ilhan Omar*, NBC NEWS (Nov. 22, 2018, 8:01 AM), https://www.nbcnews.com/tech/security/laura-loomer-banned-twitter-after-criticizing-ilhan-omar-n939256 [perma.cc/8YCB-JEK5].

6. Ending Support for Internet Censorship Act, S. 1914, 116th Cong. (2019), https://www.congress.gov/116/bills/s1914/BILLS-116s1914is.pdf [perma.cc/JB3V-QMYZ]. All signs suggest that Hawley will resubmit the bill to the 117th Congress.

automatically by Section 230 of the Communications Decency Act (Section 230).[7] Since its proposal, critics have suggested that the bill is unconstitutional because, among other reasons, it compels speech in violation of the First Amendment.[8]

This Comment argues that ESICA is an important attempt to secure democratic free speech culture on the internet and that it would not unconstitutionally compel speech from the major social media platforms.[9] Part I will look at the relationship between democracy, free speech, and social media, as well as the promise of America's digital democracy and the threat posed thereto by politically biased content moderation on the major social media platforms. Part II will examine how ESICA would mitigate this threat by altering the immunity regime established by Section 230. Part III will contend that ESICA does not impermissibly compel the major social media platforms to speak in violation of the First Amendment.

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7. *Id.* § 2; *see* Communications Decency Act of 1996, 47 U.S.C. § 230.

8. *See, e.g.*, Clyde Wayne Crews, Jr., *How Conservatives' Campaign To Impose Political Neutrality Regulation On Big Tech Will Backfire*, FORBES (Dec. 23, 2019, 1:32 PM), https://www.forbes.com/sites/waynecrews/2019/12/23/how-conservatives-effort-to-impose-political-neutrality-regulation-on-big-tech-will-backfire/ [perma.cc/UUD5-KJLG]. Critics have attacked ESICA on other constitutional grounds (such as vagueness), but this Comment limits itself to considering the compelled speech critique. *See, e.g.*, Eric Goldman, *Comments on Sen. Hawley's "[Ending] Support for Internet Censorship Act*," TECH. & MARKETING L. BLOG (July 10, 2019), https://blog.ericgoldman.org/archives/2019/07/comments-on-sen-hawleys-ending-support-for-internet-censorship-act.htm [perma.cc/7UEN-MQP8] (putting forth a number of critiques of ESICA and collecting other sources).

9. This Comment focuses on what it calls "major social media platforms," particularly Facebook, Twitter, and YouTube, which have been at the forefront of the content moderation controversy. *See* sources cited *supra* note 5. Its constitutional analysis is tailored with an eye toward those platforms.

I. THE PROMISE OF THE "VAST DEMOCRATIC FORUMS" OF THE INTERNET

A. *Democracy and Free Speech*

Democracy is often envisioned as the semi-regular ritual of ballot-casting.[10] Certainly, the selection of officials to make, execute, and enforce laws on behalf of the people is a solemn privilege of democratic citizenship.[11] Yet, any account of democracy that limits itself to this electoral liturgy is woefully incomplete. Democracy is not an event or set of procedures, but an open-ended practice of reasoning together about social and political matters. It is a mode of common life characterized by an accessible, transparent, and broad-based participatory discourse.[12] American democracy involves a wide range of public actions—debates, parades, petitions, pickets, prayers, marches, incidents of civil disobedience, and conscientious objection—whereby citizens air their grievances, advance their interests, demand accountability, chasten government officials, resolve community tensions, engage in self-expression, and propose competing visions of the just society.

Democracy neither begins nor ends with the ballot box and it cannot be reduced to the periodic election of governments. The very "value and efficacy" of voting hinges on the "equal freedom . . . of examining and discussing [candidates'] merits and demerits."[13] In

10. *See, e.g.*, Ian Prasad Philbrick & David Leonhardt, *How to Participate in Politics*, N.Y. TIMES, https://www.nytimes.com/guides/year-of-living-better/how-to-participate-in-government [perma.cc/2RZA-EFE3] (last visited Jan. 13, 2021) ("Voting is the most fundamental form of civic engagement in a democracy."). This "proceduralist" view of democracy is quite common. *See* Siddhartha Baviskar & Mary Fran T. Malone, *What Democracy Means to Citizens—and Why It Matters*, 76 EUR. REV. OF LATIN AM. AND CARIBBEAN STUDIES 3, 4 (2004).

11. *See* Martin Luther King, Jr., "Give Us the Ballot," Address Delivered at the Prayer Pilgrimage for Freedom (May 17, 1957), *in* 4 THE PAPERS OF MARTIN LUTHER KING, JR., SYMBOL OF THE MOVEMENT, Jan. 1957–Dec. 1958, 208, 210 (Clayborne Carson et al., eds., 2000) (describing voting as a "sacred right," and its denial as a "betrayal of the highest mandates of our democratic tradition").

12. Raphael Cohen-Almagor, *Addressing Internet Dangerous Expressions: Deliberative Democracy and CleaNet©*, 21 J. INTERNET L. 3, 5 (2018).

13. *James Madison's Report to the Virginia House of Delegates, 1800*, FIRST AMENDMENT WATCH (Jan. 25, 2018), https://firstamendmentwatch.org/history-

other words, elections presuppose more primordial democratic goods, the first of which is free speech, "the matrix, the indispensable condition, of nearly every other form of freedom."[14]

As Benjamin Franklin said, "[f]reedom of speech is a *principal pillar* of a free government; when this support is taken away, the constitution of a free society is dissolved, and tyranny is erected on its ruins."[15] The ancient progenitors of western self-government in classical Athens saw free speech as "virtually equivalent to democracy itself,"[16] going so far as to say that democracy is "based on speech (*politeia en logois*)."[17] Our democracy likewise cherishes bold public speech so that, through the forceful expression of diverse viewpoints, foolish recommendations might be discredited by juxtaposition with sage counsel, ignorance and hostility might give way to understanding and sympathy, and common rule might bring about the common good.[18]

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speaks-james-madisons-report-virginia-house-delegates-1800/#selfgovernance [perma.cc/44RV-UG8Y].

14. Palko v. Connecticut, 302 U.S. 319, 327 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

15. Phelps-Roper v. Ricketts, 867 F.3d 883, 891 (8th Cir. 2017) (quoting Benjamin Franklin, *On Freedom of Speech and the Press*, PA. GAZETTE (Nov. 1737), *reprinted in* 2 THE WORKS OF BENJAMIN FRANKLIN 285 (emphasis added)).

16. Keith Werhan, *The Classical Athenian Ancestry of American Freedom of Speech,* 2008 SUP. CT. REV. 293, 298 (2008) (quoting Kurt A. Raaflaub, *Aristocracy and Freedom of Speech in the Greco-Roman World*, *in* FREE SPEECH IN CLASSICAL ANTIQUITY 41, 58 (Ineke Sluiter & Ralph M. Rosen eds., 2004)).

17. *Id.* (quoting Emily Greenwood, *Making Words Count: Freedom of Speech and Narrative in Thucydides*, *in* FREE SPEECH IN CLASSICAL ANTIQUITY, *supra* note 16, at 175–76).

18. *See* Cohen v. California, 403 U.S. 15, 24 (1971). In *Cohen*, the Court highlighted the importance of free expression:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Id. (citing Whitney v. California, 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring)).

Indeed, free speech animates the very enterprise of self-government, for it is "indispensable to the discovery and spread of political truth."[19] The relevant "truth" here is *political* truth, i.e., approximate conclusions concerning the advantageous arrangement of common life. Such conclusions are arrived at through debate, compromise, and experimentation, rather than necessary deduction from first principles, since political discourse deals with variable and contingent realities.[20] This process necessarily puts a premium on the widespread diffusion of information and opinion.[21] It also recommends an empirical and pragmatic mode of politics, which consists of testing ideas and leaders while assimilating data, in quasi-organic fashion, from the body politic's multitudinous appendages. "[R]ight conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."[22] The experimental dynamism that distinguishes democracy—especially America's pluralistic liberal democracy—requires a thriving free speech culture, or else its investigative and innovative inclinations will atrophy.

Moreover, free speech has a role in forming democratic citizens, who are not so much born as made—their political identities forged through participation in civic conversation. By speaking aloud in the public square, an individual performs, and thereby internalizes, his or her sovereign identity.[23] This internalization has profound

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19. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

20. *See* ARISTOTLE, NICOMACHEAN ETHICS (c. 340 B.C.E.), *reprinted in* THE BASIC WORKS OF ARISTOTLE 935, 1025–27 (Richard McKeon ed., 2001).

21. *See* Martin H. Redish, *Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678, 682 (1982).

22. United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945). *But see* JACQUES MARITAIN, THE RANGE OF REASON 166 (1953). Maritain critiqued the supposed truism of free speech arriving at truth:

> One of the errors of individualist optimism was to believe in a free society "truth," as to the foundations of civil life, as well as the decisions and modes of behavior befitting human dignity and freedom, would automatically emerge from the conflicts of individual forces and opinions supposedly immune from any irrational trends and disintegrating pressures.

Id.

23. *See id.* at 167–68.

social ramifications. The citizen's realization of his or her freedom and power tends to produce the sort of vibrant pluralism often associated with democracy.[24] Public speech must be unhindered in a democracy, lest the reality of self-rule, being not fully articulated, be not fully realized.[25] Where the exuberant practice of free speech is lacking, democratic self-identity inevitably withers away as citizens forget that they are active participants in a project of self-government, adopting instead the undemocratic roles of subject, consumer, and spectator.[26] At that point, the great dream of democratic life—the formation of a body politic endowed with the "collective capacity to effect change in the public realm . . . [and] reconstitute the public realm through action"[27]—evaporates. Additionally, insofar as the human being is a political creature who

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24. *See* PLATO, REPUBLIC 296 (Robin Waterfield trans., Oxford Univ. Press, 1994) (375 B.C.E.). In *Republic*, Socrates offers a compelling account of democracy's "beauty" that is rather alluring to the modern American pluralist:

> [I]n the first place, the members of the community are autonomous, aren't they? The community is informed by independence and freedom of speech, and everyone has the right to do as he chooses, doesn't he?
>
> . . . .
>
> And given this right, then clearly every individual can make for himself the kind of life which suits him.
>
> . . . .
>
> I should think, then, that there'd be a wider variety of types of people in this society than in any other.
>
> . . . .
>
> It's probably the most gorgeous political system there is . . . . Its beauty comes from the fact that it is adorned with every species of human trait, as a cloak might be adorned with every species of flower.

Id. Of course, Socrates' reflection on democracy is hardly characterized by unalloyed praise (quite the contrary), and even the above words contain more than a trace of irony. For a thoughtful study of Plato's complicated view of democracy, see generally Arlene W. Saxonhouse, *Democracy, Equality, and Eide: A Radical View from Book 8 of Plato's* Republic, 92 AM. POL. SCI. REV. 273 (1998).

25. *See* PLATO, *supra* note 24, at 299–300.

26. *See id.* at 300–02.

27. Josiah Ober, *The original meaning of "democracy": Capacity to do things, not majority rule* 5 (Princeton/Standford Working Papers in Classics, Paper No. 090704, 2007), https://www.princeton.edu/~pswpc/pdfs/ober/090704.pdf [perma.cc/Y6A5-2TLC].

finds dignity and meaning within political community,[28] the failure of democratic citizenship ultimately hinders the realization of the person's deepest aspirations.[29]

Thus, for members of a democratic regime, free speech is essential to self-rule and self-fulfillment.[30]

B. Isēgoria *and* Parrhēsia*: Illuminating Internet Free Speech*

The Greeks characterized free speech in terms of *isēgoria* and *parrhēsia*.[31] Despite their ancient vintage, these concepts have informed American speech-related jurisprudence and are helpful in comprehending our free speech tradition.[32] Significantly, *isēgoria* and *parrhēsia* illumine the significance of digital fora in the continuing maturation of American democracy.

For the purposes of this Comment, *isēgoria* indicates the democratic citizen's "equal opportunity" to address public matters

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28. ARISTOTLE, POLITICS, 1253a (Richard McKeon ed., 2011) (350 B.C.E.). Aristotle described the political nature of man:

> [I]t is evident that . . . man is by nature a political animal. . . .
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> . . . .
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> . . . [T]he individual, when isolated, is not self-sufficing; and therefore he is like a part in relation to the whole. . . . [And] man, when perfected, is the best of animals, but, when separated from law and justice, he is the worst of all . . . . But justice is the bond of men in states, and the administration of justice . . . is the principle of order in political society.

Id.

29. *See* THOMAS AQUINAS, COMMENTARY ON ARISTOTLE'S POLITICS 19 (Richard J. Regan, trans., Hackett Publ'g Co., Inc., 2007) (c. 1268–72).

> [P]olitical order brings human beings back to justice. And the fact that the Greeks call the order of the political community and the standard of justice by the same term, namely, right order, makes this clear. And so it is obvious that the one who established the political community kept human beings from being the worst and brought them to the condition of being the best in justice and virtues.

Id.

30. *See* Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 J.L. & POL. 451, 459 (1988). This article is highly recommended because it indicates that the "republican" case for free speech was known and utilized by Justice Brandeis. *See id*. at 460–61.

31. Werhan, *supra* note 16, at 300.

32. *See id*. at 307–10 (tracing the influence of classical Athenian political practice and theory on American free speech jurisprudence).

before his or her fellows, while *parrhēsia* indicates the democratic citizen's rhetorical preference for "open[ ] and frank[ ]" speech.[33] *Isēgoria* reveals the egalitarian presuppositions of democratic free speech culture: the integrity of a democracy depends on the ability of every citizen to access and enter into the civic discourse.[34] *Isēgoria* also suggests the relationship between popular sovereignty and free speech, for it is precisely free speech that enables the people to "chart their collective course as a community."[35] For its part, *parrhēsia* bespeaks the "confrontative, critical" quality of free speech, even its tendency to be "crude, profane, or offensive."[36] Americans value free speech precisely as a tool for challenging authority, disturbing convention, and expressing heterodox opinion.[37] *Parrhēsia* has been called the "sound of freedom."[38] This sound is not always pleasant; sometimes it is quite harsh.[39] But such is the "music of democracy"[40]: Forthright, fearless, disputatious, unsparing, unvarnished.[41] Indeed, "verbal

33. *Id.* at 300.

34. *See id*. at 301.

35. *Id*. at 309.

36. *Id.* at 316.

37. *See, e.g.*, Bridges v. California, 314 U.S. 252, 270 (1941) ("[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste.").

38. Werhan, *supra* note 16, at 318.

39. *See* Jonathan Simon, *Parrhēsiastic Accountability: Investigatory Commissions and Executive Power in an Age of Terror*, 114 YALE L.J. 1419, 1421–22 (2005). The confrontational nature of *parrhēsia* distinguishes it from gentler methods of persuasion. *See id*. *Parrhēsia* is akin to bitter medicine: it cures—but not without causing discomfort. *See id*. *Parrhēsia* typically involves courageous resistance to unjust authority. *See id*.

40. Judge Stephen H. Anderson, *Law Day Address,* 13 UTAH B.J. (2d ser.) 19, 20 (Sept. 2000) (speaking of "lawful protests, marches, meetings, speeches, demonstrations, and so on"); *see also* Cohen v. California, 403 U.S. 15, 24–25 ("To many, the immediate consequences of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve.").

41. *See* Mary Anne Franks, *Fearless Speech*, 17 FIRST AMEND. L. REV. 294, 320–23, 331 (2019); Werhan, *supra* note 16, at 323, 325–26, 328–29. Some distinguish "fearless speech" (i.e., *parrhēsia*) from "reckless speech" (speech that gratuitously offends, aggrieves, and incites). *See* Franks, *supra*, at 331. Those who make this distinction reckon the hallmarks of *parrhēsia* to be

cacophony" may be a fine measure of a democracy's health.[42]

In summary, *isēgoria* refers to the democratic citizen's right to access and shape civic discourse, while *parrhēsia* refers to the democratic citizen's candid and confrontational manner of speaking in public.

C. *Democracy, Free Speech, and the Internet*

The progress of democracy can often be measured by the expanding circle of those entitled to speak.[43] However, speaking serves no purpose—at least, no *democratic* purpose—if one's voice is too feeble to be heard by other citizens. In a small and egalitarian democracy, the right to speak is effectively the right to be heard.[44] But in a vast and unequal democracy, mere freedom of speech means little for purposes of self-government.[45] In such a regime, the power of speech turns on access to means of communication.[46] Therefore, an evaluation of democratic integrity always involves an analysis of the means of popular communication, with special

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sincerity, criticism of power, and moral courage. *See id*. at 320–23. It is not clear how helpful this distinction is in practice. First of all, irony (perhaps the opposite of sincerity) holds an important place in the free speech tradition (witness the figure of Socrates in much of the Platonic corpus). *See* Werhan, *supra* note 16, at 323, 325–26. Furthermore, the question of *who holds power in society* is often the *very topic* of *parrhēsiastic* discourse. *See id*. at 326. Third, the American free speech tradition ennobles "provocative speech." *See id*. at 328–29; *see also* Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.").

42. *Cohen*, 403 U.S. at 25.

43. *See* Alina Rocha Menocal, *What is a political voice, why does it matter, and how can it bring about change?*, ODI (May 2014), https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8950.pdf [https://perma.cc/3HG4-Z8KV].

44. *Cf.* Case Note, *Constitutional Law—Freedom of Speech as Including the Right to be Heard Through The Use of Amplifying Devices*, 3 U. MIAMI L.Q. 51, 51–52 (1948) (noting that courts have expanded the right of free speech explicitly to include the right to be heard).

45. *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

46. *See* Jennifer J. Lee, *The Internet and First Amendment Values:* Reno v. ACLU *and the Democratization of Speech in the Marketplace of Ideas*, 22 COLUM.-VLA J.L. & ARTS 61, 61–62, 82 (1997).

attention paid to the "conditions of communication . . . on the interplay of deliberative processes and informed public opinions."[47]

Today, the "conditions of communication" are defined by the digital revolution of the past few decades. It is undeniable that the internet is—and will be—critical to the maturation of America's democratic enterprise, for it magnifies the presence of the ordinary citizen in the political process by providing a cheap, convenient, and unintimidating platform for observing and participating in public discourse.[48] Democratic legitimacy is fundamentally about the "authorship" of our common life,[49] and the internet provides an unparalleled ability for citizens to contribute to the form, tone, and direction of that shared project. On the internet, "[t]hrough the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox."[50] Although this language reflects archaic technology, it captures the *isēgoriastic* promise of the "vast democratic forums of the Internet,"[51] where every American has the opportunity to relay his or her opinion to countless fellow citizens. Additionally, the real and metaphorical distance afforded by the internet encourages *parrhēsia*. Citizens will post comments to politicians' social media accounts that they would likely never utter aloud and in person. Intimidating power relations are arguably attenuated online, allowing people to confront political, social, and economic leaders in

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47. Cohen-Almagor, *supra* note 12, at 5 (citing JURGEN HABERMAS, BETWEEN FACTS AND NORMS 298 (1996)).

48. *See id.* Of course, a coin has two sides:

> As the Internet provides cheap, virtually untraceable, instantaneous, anonymous, uncensored distribution that can be easily downloaded and posted in multiple places, it became an asset for terrorist organizations, criminals, hate groups, and other antisocial individuals who abuse the Internet to transmit propaganda and provide information about their aims, to allow an exchange between like-minded individuals, to vindicate the use of violence, to delegitimize and to demoralize their enemies, to raise cash, to enlist public support and to promote violent conduct.

Id.

49. *See* Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011).

50. Reno v. ACLU, 521 U.S. 844, 870 (1997).

51. *Id.* at 868.

a manner that is critical and contemptuous.[52] Moreover, there are certain sincerely held beliefs that individuals feel comfortable publicizing only in the virtual realm. This digital fearlessness—albeit occasionally misguided and intemperate—is facilitated by the mask of anonymity, which is a venerable part of the American free speech tradition.[53] Finally, the ease of accessing online discourse mitigates structural obstacles inherent to traditional modes of discussion that have long disadvantaged minority communities (for instance, the physically disabled).[54]

Social media platforms are the frontier of democratic free speech culture: sprawling cyber-commons where millions of Americans argue, organize, and collaborate, while subjecting members of the social, political, and economic elite to scrutiny and censure. The process is not tidy. All the prejudices and passions of the "real world" exist online. Nevertheless, the major social media platforms—Twitter, YouTube, and Facebook—provide extraordinary opportunities for *isēgoriastic* and *parrhēsiastic* expression by providing every citizen a soapbox in an atmosphere that encourages bold, disruptive, and creative speech. One commentator noted: "[e]quipped with social media, the citizen no longer has to be a passive consumer of political party propaganda, government spin or mass media news, but is instead actually enabled to challenge discources [sic], share alternative perspectives

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52. *See* Angelo Antoci, Alexia Delfino, Fabio Paglieri, Fabrizio Panebianco & Fabio Sabatini, *Civility vs. Incivility in Online Social Interactions: An Evolutionary Approach*, PLOS ONE (Nov. 1, 2016), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0164286 [https://perma.cc/CP7N-ARR2].

53. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) (citation omitted):

> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.

Id.

54. *See* Jack M. Balkin, Commentary, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 9 (2004).

and publish their own opinions."[55]

In short, social media platforms, by their very structure, tend to foster the open-ended, confrontational, and improvisational conversations that animate authentic democracies. Despite the undeniable prevalence of hate speech, misinformation, and sheer nonsense, the proverbial uploading of public deliberation to social media has created a richer, more inclusive, and more egalitarian discourse.[56] Across the major social media platforms, Americans daily enact democracy by trading and testing ideas,[57] diffusing information,[58] provoking controversy,[59] critiquing power,[60] and expressing beliefs and preferences.[61]

D. *Social Media Speech Suppression: Lurking Peril to Democracy*

The Supreme Court has declared that a lively free speech culture requires "that all persons have access to places where they can speak and listen," and the Court has further identified social media as the "most important place[ ]" where this discursive exercise transpires.[62] Therefore, given the connection between free speech and democracy, suppression of political speech on the major social media platforms represents a threat to democracy itself. The threat to democracy will only grow more acute as human interaction is further digitized over the coming decades.

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55. Brian D. Loader & Dan Mercea, *Networking Democracy? Social media innovations in participatory politics*, 14 INFO., COMM. AND SOC'Y 757, 759 (2011).

56. *See* Ari Armstrong, *The Egalitarian Assault on Free Speech*, OBJECTIVE STANDARD (Oct. 18, 2012), https://theobjectivestandard.com/2012/10/the-egalitarian-assault-on-free-speech/ [perma.cc/FC4L-PN78].

57. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

58. *See* First Nat'l. Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978).

59. *See* Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).

60. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269–70 (1964).

61. *See* Winters v. New York, 333 U.S. 507, 510 (1948).

62. Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).

The existence of politically-biased content moderation remains hotly disputed.[63] This Comment does not attempt to definitively answer the question of whether the major social media platforms are intentionally engaged in campaigns of selective speech suppression. However, this Comment does maintain that, given the increasing transfer of civic life to online fora, our democratic society would be wise to proactively discourage censorship and encourage a culture of robust free speech.

One cannot deny that the major social media companies have the technological means to easily suppress speech with which they disagree. With the click of a button, YouTube can demonetize a channel, Facebook can suspend an account, and Twitter can limit the visibility of content to other users on the platform.[64] The recent presidential election featured at least one remarkable (and

63. *See, e.g.*, Mathew Ingram, *The Myth of Social Media Anti-Conservative Bias Refuses to Die*, COLUM. JOURNALISM REV. (Aug. 8, 2019), https://www.cjr.org/the_media_today/platform-bias.php [perma.cc/9EHZ-2NAE] (denying systematic anti-conservative bias). *But see, e.g.*, Kate Conger & Sheera Frenkel, *Dozens at Facebook Unite to Challenge Its 'Intolerant ' Liberal Culture*, N.Y. TIMES (Aug. 28, 2018), https://www.nytimes.com/2018/08/28/technology/inside-facebook-employees-political-bias.html [perma.cc/ENG6-W27E] (showing internal resistance to an alleged liberal "political monoculture" in Facebook, although not speaking directly to systematic bias by algorithm or human moderation); Kurt Wagner, *Twitter is So Liberal That Its Conservative Employees 'Don't Feel Safe to Express Their Opinions,' says CEO Jack Dorsey*, VOX (last updated Sept. 14, 2018), https://www.vox.com/2018/9/14/17857622/twitter-liberal-employees-conservative-trump-politics [https://perma.cc/9YJN-WRAC] (indicating alleged political bias at Twitter). For a more evenhanded analysis of variation within tech industry political cultures, *see* Sean Captain, *Politics Are Tearing Tech Companies Apart, Says New Study*, FAST COMPANY (Feb. 28, 2019), https://www.fastcompany.com/90313045/politics-are-tearing-tech-companies-apart-says-new-survey [perma.cc/BT74-SZSL].

64. *See, e.g.*, The YouTube Team, *Our Ongoing Work to Tackle Hate*, YOUTUBE OFFICIAL BLOG (June 5, 2019), https://blog.youtube/news-and-events/our-ongoing-work-to-tackle-hate [perma.cc/65CE-GU6B] (explaining demonetization as an enforcement mechanism for violations of YouTube's hate speech policies); *Disabled Accounts*, FACEBOOK HELP CENTER, https://www.facebook.com/help/185747581553788 [https://perma.cc/73CF-J29E] (last visited Jan. 13, 2021) (explaining disabling of an account, with possible reinstatement, for not following the Facebook Terms); *Our Range of Enforcement Options*, TWITTER HELP CENTER, https://help.twitter.com/en/rules-and-policies/enforcement-options [perma.cc/3234-MY7R] (last visited Jan. 13, 2021) (explaining that enforcement for violation of Twitter's rules and policies may include limiting tweet visibility and hiding a tweet while awaiting its removal).

controversial) exercise of this power.[65] It is worrying that the intellectual marketplace is increasingly consigned to the hidden hands of a few corporations, especially when their employees reportedly support causes and candidates of one political faction by a large margin.[66] Of course, nothing unseemly can necessarily be inferred from lopsided, but otherwise legitimate, participation in the political process. Still, it remains the case that these private actors are effectively entrusted with guardianship of the public discourse with minimal democratic oversight.[67] Right now, citizens can only depend on the platforms' good faith. Such reliance contradicts two principles of American political order: first, freedom is not secure if it rests on the mere benevolence of those in charge; second, unsupervised power inevitably runs amok.[68]

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65. *See* Shannon Bond, *Facebook and Twitter Limit Sharing 'New York Post' Story About Joe Biden*, NPR (Oct. 14, 2020), https://www.npr.org/2020/10/14/923766097/facebook-and-twitter-limit-sharing-new-york-post-story-about-joe-biden [perma.cc/YK65-9ZZK]. Twitter's ability to effortlessly color public discourse is also evident in the "warning labels" it has affixed to many of President Trump's Tweets, which allegedly contain disputed or misleading information. *See* Cat Zakrewski, *The Technology 202: Trump's Twitter feed is covered in warning labels*, WASH. POST (Nov. 5, 2020), https://www.washingtonpost.com/politics/2020/11/05/technology-202-trump-twitter-feed-is-covered-warning-labels/ [perma.cc/2RG9-NF5U].

66. *See* Robert Gearty, *Google, Facebook and Twitter Staffs Splurge on Democrats Ahead of Midterms*, FOX NEWS (Oct. 23, 2018), https://www.foxnews.com/tech/google-facebook-and-twitter-staffs-splurge-on-democrats-ahead-of-midterms [perma.cc/4PTP-MRCF]; Ari Levy, *A Shockingly Small Number of People Donated to Trump at Facebook and Twitter*, CNBC (Aug. 3, 2016), https://www.cnbc.com/2016/08/03/trump-love-twitter-and-facebook-goes-unrequited.html [https://perma.cc/KZC4-6BUC].

67. Helena Rosenblatt & Vasant Dhar, Opinion, *Social-media platforms are undermining our democracy. Lawmakers need to step up to protect it.,* BUS. INSIDER (Sep. 17, 2020, 8:43 AM), https://www.businessinsider.com/social-media-platforms-facebook-google-twitter-undermining-democracy-2020-9 [perma.cc/VCP4-XLUJ].

68. *See, e.g.*, THE FEDERALIST No. 51, at 264 (James Madison) (Ian Shapiro ed., Yale Univ. Press 2009). James Madison famously argued in support of the Constitution:

> It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you

Given the ever-growing importance of social media platforms to our democratic project, careful oversight and regulation of these entities is more than justified. ESICA offers a creative means of ensuring that the platforms remain open and available to all citizens.

II. ESICA: PROTECTING THE PROMISE OF THE INTERNET'S "VAST DEMOCRATIC FORUMS"

In Part I, this Comment assessed the relationships between free speech, democracy, and the internet. It also considered the threat to free speech—and consequently to democracy—posed by potentially politically-biased content moderation on the major social media platforms. It will now explore a possible solution to this threat: ESICA.[69] Simply put, ESICA would help secure a robust culture of democratic free speech on the internet by predicating Section 230 immunities on politically neutral content moderation policies. To appreciate what this solution means, it is necessary to review the history and substance of Section 230.[70]

A. *The Origins of Section 230*

One who publishes a false and injurious communication about another is liable for defamation.[71] Generally, one who repeats a defamation is as liable as the original publisher.[72] However, the law of torts generally exempts from liability one who acts as a "mere

> must first enable the government to control the governed; and in the next place oblige it to control itself.

Id.

69. *See* S. 1914, 116th Cong. (2019), https://www.congress.gov/116/bills/s1914/BILLS-116s1914is.pdf [https://perma.cc/FP38-4DU8] (last visited Jan. 13, 2021).

70. For useful background and perspective on Section 230, as well as an extended reflection on its relation to the First Amendment, see Note, *Section 230 As First Amendment Rule*, 131 HARV. L. REV. 2027 (2018).

71. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 519 (2d ed. 2011) (defining defamation at common law and describing its constitutional limitations). A publication is "any communication, by any method, to one or more persons who can understand the meaning," whether intentional or negligent, including a failure to remove or prevent such a publication. *Id.* at § 520.

72. *Id.* § 521.

conduit" in the circulation of defamation.[73] A conduit—also called a distributor—is characterized by its "attenuated or mechanical" transmission of offending material.[74] Traditionally, a distributor is subject to liability only if it knows, or should know, that it is reproducing defamation.[75] Bookstores are archetypal distributors[76] while newspapers are archetypal publishers,[77] even as to content prepared by third parties (e.g., advertisements).[78]

With the advent of the digital revolution, courts had to determine whether internet services should be considered publishers or distributors for the purpose of defamation liability.[79] Ultimately, a lot rested on this classification: not only black-and-white matters of legal exposure, but arguably the very character of cyberspace.[80]

In *Cubby, Inc. v. CompuServe, Inc.*, the Southern District of New York heard a case arising from the publication of defamatory material by a third party to an electronic forum maintained by defendant CompuServe.[81] CompuServe hosted more than one hundred and fifty similar forums.[82] Because CompuServe exerted minimal editorial control and processed a high volume of content,

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73. *Id.*

74. *Id.* § 522.

75. *Id.*

76. *See generally* Smith v. California, 361 U.S. 147 (1959). Other well-established distributors include "telegraph and telephone companies, libraries and news vendors." DOBBS ET AL., *supra* note 71, § 522.

77. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974) (treating appellant newspaper as a publisher in a First Amendment analysis).

78. DOBBS ET AL., *supra* note 71, § 522.

79. A brisk survey of this history is offered in Note, *supra* note 70, at 2028.

80. For Section 230's role in the development of vibrant internet culture, see *id.* at 2027, n.2. *See also* Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639, 653 (2014).

81. Cubby, Inc. v. CompuServe, Inc., 775 F. Supp. 135 (S.D.N.Y. 1991). At that time, CompuServe was a leading internet provider. Peter H. Lewis, *The Compuserve Edge: Delicate Data Balance*, N.Y. TIMES (November 29, 1994), https://www.nytimes.com/1994/11/29/science/personal-computers-the-compuserve-edge-delicate-data-balance.html [perma.cc/GS4F-B6GY]. Not long after *Cubby*, it was crowned one of the "Big Three information services," alongside Prodigy and America Online. *Id.* Prodigy takes center stage in the next case reviewed by this Comment.

82. *Cubby*, 776 F. Supp. at 137.

the court likened CompuServe to a library or news vendor[83] and, therefore, held that it was a distributor subject to liability only if it knew or should have known about the defamatory statements.[84]

Four years later, in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, the New York Superior Court examined a similar case but reached a different result.[85] *Stratton Oakmont* also sprang from defamatory third-party content posted to an online bulletin board.[86] However, while the *Cubby* court found CompuServe to be a distributor, the *Stratton Oakmont* court found Prodigy to be a publisher.[87] Unlike CompuServe, Prodigy explicitly embraced a policy of supervising and moderating content, going so far as to compare itself to a traditional newspaper.[88] The court reasoned that Prodigy's "conscious choice to gain the benefits of editorial control ha[d] opened it up to greater liability."[89]

Taken together, *Cubby* and *Stratton Oakmont* presented something of a paradox. If an internet service refrained from content moderation, it risked creating an environment conducive to vulgar, offensive, and malicious speech, yet it enjoyed significant immunity from liability; on the other hand, if an internet service engaged in content moderation, it could cultivate a hospitable and orderly environment, yet it exposed itself to considerable liability. This dilemma led to widespread consternation.[90] In the wake of these decisions, a prominent industry lawyer opined that the

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83. *Id.* at 140. As the *Cubby* court explained:

> A computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, book store, or newsstand would impose an undue burden on the free flow of information.

Id.

84. *Id.* at 140–41.

85. Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995).

86. *Id.*

87. *Id.* at *4.

88. *Id.* at *2.

89. *Id.* at *5.

90. *See* Jessica R. Friedman, *Defamation*, 64 FORDHAM L. REV. 794, 799 nn.580–82 (1995).

distinction was "[l]ikely to be short-lived."[91] The lawyer's prediction proved prescient.

Congressman Chris Cox learned about the *Stratton Oakmont* decision shortly after it was handed down.[92] It occurred to him that the ruling would disincentivize internet services from policing content, rendering cyberspace a "cesspool."[93] Cox immediately initiated a legislative effort to protect the well-being of the infant digital world, lest it be smothered in the cradle.[94] This effort, which was shepherded through the upper chamber by Senator Ron Wyden, culminated in 1996 with the bipartisan passage of Section 509 of the Communications Decency Act, codified at 47 U.S.C. § 230.[95] Wyden later explained that "the goal [of Section 230] was to protect the unique ability of the Internet to be the proverbial marketplace of ideas while ensuring that mainstream sites could reflect the ethics of society as a whole."[96] Simply put, Section 230 aimed to grant traditional distributor immunity to internet services without depriving them of the editorial oversight typically associated with publishers.[97]

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91. *Id.* at 799 n.580 (quoting Kent D. Stuckey, *Rights and Responsibilities of Information Service Providers*, *in* BUSINESS & LEGAL ASPECTS OF THE INTERNET & ONLINE SERVICES 203, 220 (Lance Rose & Shari Steele eds., 1995)).

92. Mark Sullivan, *The 1996 law that made the web is in the crosshairs*, FAST COMPANY (Nov. 29, 2018), https://www.fastcompany.com/90273352/maybe-its-time-to-take-away-the-outdated-loophole-that-big-tech-exploits [perma.cc/KLN9-426T].

93. Alina Selyukh, *Section 230: A Key Legal Shield for Facebook, Google, Is About to Change*, NPR (March 21, 2018), https://www.npr.org/sections/alltechconsidered/2018/03/21/591622450/section-230-a-key-legal-shield-for-facebook-google-is-about-to-change [perma.cc/BE9J-TQB2].

94. *Id.*

95. The Supreme Court struck down portions of the Communications Decency Act in *Reno v. ACLU*, 521 U.S. 844, 878–79 (1997). Additionally, Congress recently amended Section 230 to remove potential safe harbors for internet services that facilitate sex trafficking. *See* 47 U.S.C. § 230(e)(5).

96. Ron Wyden, *The Consequences of Indecency*, TECHCRUNCH (Aug. 23, 2018), https://techcrunch.com/2018/08/23/the-consequences-of-indecency/ [perma.cc/6E5M-2TLS].

97. 47 U.S.C. § 230(c)(1).

B. *The Scope and Substance of Section 230*

Section 230 establishes that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information by another information content provider."[98] Furthermore, the statute removes liability from any "provider or user of an interactive computer service" who "in good faith . . . restrict[s] access to or availability of material" deemed "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[99]

In the years since Congress passed Section 230, state and federal courts have dramatically enlarged the scope of the immunity it provides. For instance, in *Zeran v. America Online, Inc.*, the Fourth Circuit precluded even the application of traditional notice-based distributor liability, reasoning that Congress intended to encourage "unfettered speech on the Internet."[100] Subsequent holdings extended Section 230 bit by bit, so that today it is thought to overcome almost any claim relating to third-party content, defeating causes of action ranging from interference with contract to computer fraud.[101]

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98. *Id.* An "interactive computer service" means "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." *Id.* § 230(f)(2).

99. *Id.* § 230(c)(2).

100. Zeran v. Am. Online, Inc., 129 F.3d 327, 334 (4th Cir. 1997). *See also id.* at 330 ("By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.").

101. *See* Chander, *supra* note 80, at 653 n.58 (cataloguing cases); *see also* Michal Lavi, *Content Providers' Secondary Liability: A Social Network Perspective*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 855, 869 (2016) ("After *Zeran*, [Section] 230 repeatedly shielded web enterprises from lawsuits in a plethora of cases. Courts have found that content providers that host harmful content are immune to liability, even if they failed to screen harmful content, and even after being notified of the harmful content." (footnotes omitted)). The Supreme Court has yet to determine the contours of Section 230, although Justice Thomas recently critiqued lower courts for interpreting the statute overbroadly. *See* Malwarebytes, Inc. v. Enigma Software Grp. USA, L.L.C., No. 19–1284, slip op. at 6–7 (U.S. Oct. 13, 2020) (Thomas, J., concurring in denial of certiorari).

In short, providers now enjoy extraordinary risk-free discretion. Whether they fastidiously moderate content or let anarchy reign, they are shielded from potentially fatal lawsuits by the sturdy bulwark of Section 230.

C. *Section 230 Under Fire*

Despite widespread praise from tech advocates and repeated success in the courts, Section 230 has lately come under fire from liberals and conservatives alike.[102] Liberal criticism generally assumes two forms. First, there are those who argue that the free speech culture enabled by Section 230 allows hateful ideas to thrive in cyberspace, fortifying inequitable power dynamics and motivating violence against peripheral communities.[103] In this view, online speech, far from being "free," comes at the expense of marginalized peoples: "First Amendment advocates will often just assume that it's okay for black and brown people to bear the brunt

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102. This is not to say that Section 230 is without supporters on both wings of the political spectrum, as evidenced by the negative response of some liberals and conservatives to President Trump's May 2020 Executive Order on Preventing Online Censorship. *See* Peter Baker & Daisuke Wakabayashi, *Trump's Order on Social Media Could Harm One Person in Particular: Donald Trump*, N.Y. TIMES (May 28, 2020), https://www.nytimes.com/2020/05/28/us/politics/trump-jack-dorsey.html [perma.cc/V9Z4-GPAD] (note particularly the comments of Kate Ruane of the American Civil Liberties Union and Patrick Hedger of the Competitive Enterprise Institute); *see also infra* note 207. Indeed, some of the most spirited defenses of Section 230 have come from the right. *See, e.g.*, David French, *Section 230: Donald Trump v. Twitter*, THE DISPATCH (May 29, 2020), https://thedispatch.com/p/section-230-donald-trump-vs-twitter [perma.cc/F95E-PM75] (writing in the context of President Trump's executive order).

103. *See* Andrew Marantz, *Free Speech Is Killing Us,* N.Y. TIMES (Oct. 4, 2019), https://www.nytimes.com/2019/10/04/opinion/sunday/free-speech-social-media-violence.html [perma.cc/CJD5-BEHW] (advocating a reassessment of online free speech culture, including a "rethinking" of Section 230, in light of purported real world consequences). *But see* Elizabeth Nolan Brown, *Section 230 Is the Internet's First Amendment. Now Both Republicans and Democrats Want To Take It Away*, REASON (Aug. 29, 2018), https://reason.com/2019/07/29/section-230-is-the-internets-first-amendment-now-both-republicans-and-democrats-want-to-take-it-away/ [https://perma.cc/SX5G-9T46] ("Ending or amending Section 230 wouldn't make life difficult just for Google, Facebook, Twitter, and the rest of today's biggest online platforms. Eroding the law would seriously jeopardize free speech for everyone, particularly marginalized groups whose ideas don't sit easily with the mainstream.").

of white free speech."[104] Second, there are those who believe that the social media giants have failed to adequately guard the gates of American democracy, using Section 230 as an excuse to act negligently in the face of foreign election meddling and domestic misinformation campaigns. For instance, then Senator, and now Vice President, Kamala Harris promised to hold "accountable" those platforms "act[ing] as a megaphone for misinformation or cyberwarfare."[105] And Speaker Nancy Pelosi warned that Section 230 is a "privilege" that "could be removed."[106] Perhaps most importantly, President Joe Biden has straightforwardly stated that Section 230 "should be revoked, immediately," framing his opposition in terms of fairness and responsibility.[107]

Conservative criticism of Section 230 is rooted in the widespread conviction that the major social media platforms are biased against right-wing users.[108] Conservatives are especially suspicious of Twitter, which some charge with undertaking covert

104. Elie Mystal, *Alex Jones Has Been Banned…Let's See If Free Speech Still Exists*, ABOVE THE LAW (Aug. 7, 2018), https://abovethelaw.com/2018/08/alex-jones-has-been-banned-lets-check-if-free-speech-still-exists/ [https://perma.cc/F2RL-WX6W].

105. *See* Ryan Brooks, *Democrats Running For President Say Social Media Companies Have A White Nationalist Problem. Some Think Regulation Should Be The Answer*, BUZZFEED NEWS (May 21, 2019), https://www.buzzfeednews.com/article/ryancbrooks/2020-regulate-social-media-white-nationalism-facebook [perma.cc/S9G2-QRAT].

106. Transcript of Nancy Pelosi's interview with Kara Swisher, Decode/Recode, VOX (Apr. 12, 2019), https://www.vox.com/2019/4/12/18307957/nancy-pelosi-donald-trump-twitter-tweet-cheap-freak-presidency-kara-swisher-decode-podcast-interview [https://perma.cc/9N72-44KC].

107. The New York Times Editorial Board, *Interview with Joe Biden*, N.Y. TIMES (Jan. 17, 2020), https://www.nytimes.com/interactive/2020/01/17/opinion/joe-biden-nytimes-interview.html [perma.cc/GAF6-HNBU].

108. *See* Jessica Guynn, *Ted Cruz threatens to regulate Facebook, Google, and Twitter over charges of anti-conservative bias*, USA TODAY (Apr. 10, 2019), https://www.usatoday.com/story/news/2019/04/10/ted-cruz-threatens-regulate-facebook-twitter-over-alleged-bias/3423095002/ [perma.cc/4HTK-WEYS]; *see also* Matt Clinch, *Trump claims social media firms are discriminating against conservative voices*, CNBC (Aug. 18, 2018), https://www.cnbc.com/2018/08/18/trump-claims-social-media-firms-are-discriminating-against-conservative-voices.html [perma.cc/P699-MALT].

"shadow banning" campaigns.[109] Undoubtedly, the conservative critique stems partly from a generalized mistrust of the corporate goliaths of digital communication, which are viewed as elite institutions captive to the liberal agenda: "Big Tech undoubtedly is . . . run by left-wing political activists who, similar to deep state operatives within the U.S. government, want to stop President Trump from getting reelected."[110] President Trump has channeled the collective frustration of conservatives by publicly calling for the revocation of Section 230.[111]

Hawley introduced ESICA within this context of bipartisan concern about the power and influence of major social media platforms. The bill aims to ensure that online political discourse is fair, transparent, and characterized by accountability.[112] It would obtain this result by predicating Section 230 immunity on politically unbiased content moderation.

D. *The Proposal: Predicated Immunity Under ESICA*

Under ESICA, interactive computer services of a certain size or profitability—"covered companies"[113]—would no longer enjoy

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109. *See* Liam Stack, *What Is a 'Shadow Ban,' and Is Twitter Doing It to Republican Accounts?*, N.Y. TIMES (July 26, 2018), https://www.nytimes.com/2018/07/26/us/politics/twitter-shadowbanning.html [perma.cc/LEE2-CBK3].

110. Adriana Cohen, *Big Tech Cuts Out Conservatives*, REALCLEAR POLITICS (May 10, 2019), https://www.realclearpolitics.com/articles/2019/05/10/big_tech_cuts_out_conservatives_140296.html [perma.cc/V9YV-ZCHK].

111. *See* sources cited *supra* note 2. Conservative suspicion of Big Tech and hostility toward Section 230 has only increased in the aftermath of the 2020 general elections. *See, e.g.*, Jaclyn Diaz, *Trump Vows To Veto Defense Bill Unless Shield For Big Tech Is Scrapped*, NPR (Dec. 2, 2020), https://www.npr.org/2020/12/02/941019533/trump-vows-to-veto-defense-bill-unless-shield-for-big-tech-is-scrapped [perma.cc/2WRZ-J9XQ]; Francesca Tripodi, *Conservatives Are Gearing Up to Falsely Blame Big Tech Censorship for Trump's Loss*, SLATE (Nov. 9, 2020), https://slate.com/technology/2020/11/big-tech-conservative-bias-trump-election-voter-suppression.html [perma.cc/HEH6-6FUP].

112. Press Release, *Senator Hawley Introduces Legislation to Amend Section 230 Immunity for Big Tech Companies*, U.S. SENATE (June 19, 2019), https://www.hawley.senate.gov/senator-hawley-introduces-legislation-amend-section-230-immunity-big-tech-companies [perma.cc/RQD4-WT2F].

113. *See generally* S. 1914, 116th Cong. sec. 2(a)(2) (2019), https://www.congress.gov/116/bills/s1914/BILLS-116s1914is.pdf [https://perma.cc/J49Y-TF9E] (last visited Jan. 14, 2021).

Section 230 immunity by default.[114] Instead, such entities would enjoy Section 230 immunity by acquiring an "immunity certification" from the Federal Trade Commission (FTC).[115] The FTC would give immunity certifications upon a showing of politically unbiased content moderation.[116] Moderation would be deemed biased if:

> [It] is designed to negatively affect a political party, political candidate, or political viewpoint; or disproportionately restricts or promotes access to, or the availability of, information from a political party, political candidate, or political viewpoint; or [if] an officer or employee of the provider makes a decision about moderating information provided by other information content providers that is motivated by an intent to negatively affect a political party, political candidate, or political viewpoint.[117]

Moderation that might otherwise be biased within the meaning of the statute would be permitted if "necessary for business," or if the target content is not "protected under the First Amendment . . . [and] there is no available alternative that has a less disproportionate effect, and the provider does not act with the intent to discriminate based on political [affiliation, party, or viewpoint]."[118]

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114. *See id.* sec. 2(a)(1). All of the major social media platforms would qualify as covered companies. *See* Dustin W. Stout, *Social Media Statistics 2020: Top Networks By the Numbers*, DUSTIN STOUT BLOG https://dustinstout.com/social-media-statistics/#twitter-stats [perma.cc/SGQ6-SGE4] (last visited Jan. 14, 2021).

115. S. 1914, 116th Cong. sec. 2(a)(1), § (c)(3)(A), (B) (2019), https://www.congress.gov/116/bills/s1914/BILLS-116s1914is.pdf [perma.cc/N7K8-ZQMB] (last visited Jan. 14, 2021).

116. *Id.* sec. 2(a)(1), § (c)(3)(A). For a definition of "moderate," *see id.* sec. 2(a)(2), § (f)(6) (note that it includes both human and algorithmic moderation).

117. *Id.* sec. 2(a)(1), § (c)(3)(B)(ii).

118. *Id.* sec. 2(a)(1), § (c)(3)(B)(iii)(I). Business necessity is defined as a "lawful act that advances the growth, development, or profitability of a company but does not include any action designed to appeal to, or gain favor from, persons or groups because of their political beliefs, political party membership, or support for political candidates." *Id.* sec. 2(a)(2), §(f)(7). Presumably, this exception would permit the moderation of content that runs

Covered companies would be required to go before the FTC every two years[119] and demonstrate by clear and convincing evidence that, during the preceding period, they had engaged in politically neutral content moderation.[120] The certification process would invite public input.[121] Dissenting opinions with respect to certification would be published.[122] Costs of certification would be borne by the applicant.[123]

E. *Criticism of ESICA*

Since its release, ESICA has received significant criticism. Some of this criticism is misguided, insofar as it focuses on Hawley's purported belief that Section 230 immunity was motivated primarily by a commitment to "true diversity of political [opinion]" online.[124] If this is indeed Hawley's opinion—and it *is* the opinion of some conservatives[125]—it seems not to be *wholly* accurate. Although Congress wished to protect the open exchange of ideas,[126] a goal recognized by the courts,[127] Section 230 was not fundamentally concerned with viewpoint diversity online.[128] Whatever Hawley's personal perspective, ESICA is mute as to the original meaning of Section 230.[129]

Other criticism focuses on the practical effects of ESICA. Some critics fear that the removal of Section 230 immunity would: (1) create a cataclysmic deluge of moderation requests, (2) lead to over-

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afoul of typical terms of service agreements, such as harassing behavior, abusive language, or criminality.

119. *Id.* sec. 2(a)(1), § (c)(3)(C)(i).

120. *Id.* sec. 2(a)(1), § (c)(3)(B)(i)(III).

121. *Id.* sec. 2(a)(1), § (c)(3)(B)(iv)(IV).

122. *Id.* sec. 2(a)(1), § (c)(3)(B)(iv)(III).

123. *Id.* sec. 2(a)(1), § (c)(3)(D)(i).

124. *See* Brown, *supra* note 103.

125. *See generally* Elliott Harmon, *No, Section 230 Does Not Require Platforms to Be "Neutral,"* ELECTRONIC FRONTIER FOUND. (Apr. 12, 2018), https://www.eff.org/deeplinks/2018/04/no-section-230-does-not-require-platforms-be-neutral [perma.cc/TC4Q-B9NK].

126. *See* 47 U.S.C. § 230(a)(3).

127. *See, e.g.*, Zeran v. Am. Online Inc., 129 F.3d 327, 334 (4th Cir. 1997).

128. *See supra* Section II.B.

129. S. 1914, 116th Cong. (2019), https://www.congress.gov/116/bills/s1914/BILLS-116s1914is.pdf.

policing of content, and/or (3) enable bad actors to suppress the speech of opponents through cynical manipulation.[130] Of course, such nightmare scenarios presume that the major social media platforms would fail to render their content moderation policies ESICA compliant—a dubious conjecture. Still other critics have reacted negatively to ESICA due to anxiety about overweening federal regulators who would, far from eliminating bias, simply entrench their own biases.[131] Finally, some critics have noted that ESICA sweeps in many platforms that have no relation to the purported problem of politically biased content moderation, unnecessarily burdening important players in online recreation (Twitch) and commerce (eBay).[132]

Such objections are worthy of serious reflection. However, this Comment will restrict itself to tackling a constitutional objection: specifically, that ESICA compels speech in violation of the First Amendment.[133]

III. ESICA—SECURING, NOT COMPELLING, FREE SPEECH ONLINE

The compelled speech case against ESICA runs as follows. The bill predicates a critical government benefit on adherence to a government-mandated moderation policy, forcing covered companies to adopt a potentially disagreeable content curation policy or face ruinous legal and financial consequences. While not an unreasonable argument, this Comment contends that ESICA is

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130. *See* Brown*, supra* note 103. One commentator argued:

> Without Section 230, companies would thus be more likely to simply delete all user-flagged content, whether the report has merit or not, or at least immediately hide reported content as a review proceeds. It's easy to imagine massive backlogs of challenged content, much of it flagged strategically by bad actors for reasons having nothing to do with either safety or veracity. Silencing one's opponents would be easy.

Id.

131. *Hawley Proposes a Fairness Doctrine for the Internet*, TECH FREEDOM (June 19, 2019), https://techfreedom.org/hawley-proposes-a-fairness-doctrine-for-the-internet/ [https://perma.cc/6C9S-8MCC].

132. *See* Goldman, *supra* note 8.

133. *See, e.g.*, Clyde Wayne Crews, Jr., *How Conservatives' Campaign to Impose Political Neutrality Regulation on Big Tech Will Backfire*, FORBES (Dec. 23, 2019, 1:32 PM), https://www.forbes.com/sites/waynecrews/2019/12/23/how-conservatives-effort-to-impose-political-neutrality-regulation-on-big-tech-will-backfire/ [perma.cc/C9WN-NCEY].

fundamentally dissimilar to laws that have been struck down for impermissibly compelling speech and that it therefore has a decent chance of escaping a constitutional challenge from the major social media platforms on this basis.

A. *An Overview of Compelled Speech Doctrine*

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[134] This constitutional guarantee not only protects the right to speak, but also the right not to speak: "[S]peech compulsions . . . are as constitutionally suspect as . . . speech restrictions."[135] Indeed, perhaps the "cardinal constitutional command"[136] is that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[137]

Although the Free Speech Clause is simple on its face, it has produced a doctrinal "labyrinth."[138] In traditional speech restraint analysis (i.e., analysis concerning direct curtailment of speech), the chief concern is preventing "purposeful government censorship"[139] and the primary inquiry is whether a government regulation is content-based or content-neutral.[140] A regulation is content-based if it explicitly identifies speech based on the "ideas or messages it express[es]."[141] Such regulations are subject to strict scrutiny and only pass constitutional muster if the government can demonstrate

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134. U.S. CONST. amend. I.

135. Eugene Volokh, *The Law of Compelled Speech*, 97 TX. L. REV. 355, 355 (2018). This Comment makes appreciative use of Professor Volokh's compelled speech framework.

136. Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31, 138 S. Ct. 2448, 2463 (2018).

137. W. Va. State Bd. of Ed. v. Barnette, 319 U.S. 624, 642 (1943).

138. Kevin Francis O'Neill, *A First Amendment Compass: Navigating the Speech Clause with A Five-Step Analytical Framework*, 29 SW. U. L. REV. 223, 225 (2000).

139. *See* Leslie Gielow Jacobs, *Pledges, Parades, and Mandatory Payments*, 52 RUTGERS L. REV. 123, 127 (1999).

140. *See id.* at 126–29.

141. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015). A regulation is also content-based if, while facially neutral, it can only be explained by "reference to the regulated speech," or if it was implemented based on government disapproval of its content. *Id.*

that they are "narrowly tailored to serve compelling state interests."[142] On the other hand, a regulation of speech is content-neutral if it "confer[s] benefits or imposes burdens on speech without reference to the ideas or views expressed."[143] Such regulations are subject to intermediate scrutiny, which means that they will be upheld if the government can show that they further an "important or substantial governmental interest . . . unrelated to the suppression of free expression[,] and if the incidental restriction of alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[144]

Speech restraint doctrine is complicated but (relatively) coherent. Contrarily, compelled speech doctrine is "a patchwork of cases with no clear thread that ties them together."[145] Although the Court has applied some of the concepts and terminology of the former to the latter, the transposition has been inconsistent at best,[146] with the Court often justifying its decisions with "seemingly case-specific distinctions and analogies" and "highly debatable

142. *Id.* at 2226.

143. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994). "The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation . . . because of disagreement with [its] message." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). Content neutral laws are typified by regulation of the "time, place, and manner" of speech, regardless of its content. *Id.*

144. *Turner*, 512 U.S. at 662. Other routine inquiries examine where the relevant speech occurs, whether the speech falls into an unprotected category, whether the speech involves a commercial transaction, and the whether the state is speaking or subsidizing speech. *See* Charles W. "Rocky" Rhodes, *The First Amendment Structure for Speakers and Speech*, 44 SETON HALL L. REV. 395, 403–04 (2014); *see also* Jacobs, *supra* note 139, at 129.

145. Jacobs, *supra* note 139, at 125.

146. For instance, the Court has identified certain compelled speech laws as content-based and applied strict scrutiny thereto. *See* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2374–78 (2018) (striking down a regulation requiring pro-life crisis pregnancy centers to post state-drafted notifications about publicly-funded abortions). Yet, it has dealt with seemingly similar laws without describing them as content-based or expressly applying strict scrutiny. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 714–17 (1977) (striking down laws requiring vehicles to display license plate with philosophically-charged state motto—"Live Free or Die"—and penalizing any defacement of words on said plates). Indeed, *Wooley* leaned on two cases employing intermediate scrutiny. *See* Jacobs, *supra* note 139, at 140.

factual judgments."[147] Even where the Court has applied the language of speech restraint jurisprudence, it has often imbued that language with different meaning.[148] Thus, while the general outline of compelled speech jurisprudence may be settled, "its details are often hard to pin down" and "major uncertainties" and "internal tensions" abound.[149]

Ultimately, compelled speech analysis is a fact-intensive process that involves not the application of a single test, but multiple distinct yet interrelated inquiries[150] informed by broad principles derived from "clusters of holdings."[151] These principles are in turn derived from a hodgepodge of landmark cases, some with idiosyncratic fact patterns, which this Comment will now consider.

B. *Compelled Speech: Landmarks and Principles*

Compelled speech laws can be divided into two categories: speech compulsions as speech restrictions and pure speech compulsions.[152]

Speech compulsions are speech restrictions when government laws have the effect of curbing, limiting, or otherwise preventing a person from speaking as he or she would have spoken *but for* the compelled speech regulation.[153]

A law requiring newspapers to print replies from individuals criticized in its pages falls into this bucket. In *Miami Herald Publishing Co. v. Tornillo*, the Court knocked down such a "right-of-access" statute, reasoning that it ran roughshod over editorial discretion and imposed economic penalties for publishing content

147. *Id.* at 138.

148. *Id.* at 125 ("[W]hile the labels are the same, their meanings and apparent significance in constitutional analysis are not. For example, although the Court purports to evaluate whether compelled expression requirements are 'content-based,' it has attached at least four different meanings to the label.").

149. Volokh, *supra* note 135, at 356–57.

150. Jacobs, *supra* note 139, at 162–63.

151. Nat Stern, *The Subordinate Status of Negative Speech Rights*, 59 BUFF. L. REV. 847, 850 (2011) (describing compelled speech doctrine as "sprawling and ungainly").

152. *See* Volokh, *supra* note 135, at 358.

153. *See generally id.* at 359–366.

critical of public figures, thus chilling civic discourse.[154] Similarly, the Court held unconstitutional a state regulator's order requiring a utility to occasionally include in its mass mailings a newsletter prepared by an adversarial interest group.[155] The Court reasoned that, as in *Tornillo*, the order forced the utility to "associate" with disagreeable opinions and bear the costs of distributing the same, thereby presenting the risk that it might simply "avoid controversy" rather than "disseminate hostile views."[156]

A government speech compulsion also serves to impermissibly restrict speech where it forces a speaker to incorporate some undesirable element into a "coherent speech product."[157] In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, the Court observed that a parade is an expressive act comprised of multiple meaningful units (floats, banners, uniformed contingents, etc.), each with its own meaning, and the Court therefore held that the forced inclusion of a unit communicating beliefs repugnant to the parade's organizers unacceptably infringed on their "autonomy to choose the content of their own message."[158] Likewise, in *National Institute of Family and Life Advocates v. Becerra* (*NIFLA*), the Court found that a law requiring pro-life crisis pregnancy centers to post or distribute a state-drafted information sheet concerning government-funded abortion opportunities ran afoul of First Amendment guarantees because it "alter[ed] the content" of the centers' speech.[159] *Hurley* and *NIFLA* stand for the proposition that speech is sometimes an aggregative phenomenon consisting of many discrete communicative units.[160] Where speech is aggregative, the compelled inclusion of a disagreeable communicative unit has the potential to change the whole gist of

154. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257–58 (1974).

155. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 20 (1986).

156. *Id.* at 13–15.

157. Volokh, *supra* note 135, at 361.

158. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 572–73 (1995).

159. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018).

160. *See* Volokh, *supra* note 135, at 363.

the message and is therefore suspect on First Amendment grounds.[161]

However, in *Rumsfeld v. Forum for Academic and Institutional Rights* (*FAIR*), the Court considered a law that required schools to afford equal access to military recruiters on campus or risk losing federal funds.[162] Some schools protested that facilitating recruitment entailed speech acts, such as posting signs and sending e-mails.[163] The Court reasoned that the accommodation of military recruiters was not "inherently expressive," and that any incidental communication did not appreciably "interfere with any message from the school[s]" as to their approval or disapproval of military policy.[164] Furthermore, the Court identified no danger that the recruiters' views would be attributed to the schools.[165] Similarly, in *PruneYard Shopping Center v. Robins*, the Court ruled that a state law requiring the accommodation of guest speakers in private shopping centers did not transgress the First Amendment.[166] The shopping centers' owners argued that the requirement that they host speakers amounted to compelled speech.[167] The Court disagreed, finding that the owners were not being made to "affirm . . . any governmentally prescribed position or view," that they could easily "dissociate" themselves from the speakers, and that there was no danger of dampening public debate by penalizing editorial discretion.[168]

Pure speech compulsions are especially offensive because they make a person "speak things they do not want to speak."[169] A law requiring students to pledge allegiance to the American flag is an archetypal instance of a pure speech compulsion.[170] However, the principle has a broader reach. For instance, in *Wooley v. Maynard*, the Court found unconstitutional a law forcing drivers to display

161. *See id*.
162. Rumsfeld v. Forum For Acad. & Inst. Rights, 547 U.S. 47, 47 (2006).
163. *Id.* at 61–62.
164. *See id.* at 64–65.
165. *Id.* at 66.
166. PruneYard Shopping Ctr. v. Robins, 447 U.S. 75, 76, 88 (1980).
167. *Id.* at 87–88.
168. *Id.* at 88.
169. Volokh, *supra* note 135, at 368.
170. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1942).

the New Hampshire state motto—"Live Free or Die"—on their license plates, reasoning that it effectively drafted drivers to serve as "couriers" of an ideological message crafted by the state.[171]

Based on the cases discussed above, a court might find that a law impermissibly compels speech if it:

(1) imposes a prohibitive financial cost for accommodating speech, thereby dissuading speakers from addressing controversial matters;[172]

(2) unduly interferes with editorial discretion;[173]

(3) exclusively advantages the speech of an adversarial party;[174]

(4) drafts a person into the role of "courier" for state ideology,[175] or otherwise make them "affirm [a] governmentally prescribed position or view[;]"[176]

(5) forces the inclusion of an expressive unit into an intelligible aggregative speech act, thus changing its meaning;[177] and/or

(6) involves the accommodation[178] of another's speech in a manner or context that: (a) does not allow the host to plainly "disavow any identity of viewpoint" with the accommodated speaker, or (b) suggests that the host approves of the accommodated speech.[179]

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171. Wooley v. Maynard, 430 U.S. 705, 717 (1977). Interestingly, Justice Rehnquist dissented, arguing that the state motto would not be reasonably imputed to the driver, thus emphasizing the attenuation theme that arguably proved decisive in *Rumsfeld* and *PruneYard*. *See id.* at 721–22 (Rehnquist, J., dissenting).

172. *See, e.g.*, Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257 (1974).

173. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 10–11 (1986); *Tornillo*, 418 U.S. at 258.

174. *See Pac. Gas & Elect. Co.*, 475 U.S. at 12–13.

175. *Wooley*, 430 U.S. at 715–17.

176. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980).

177. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 568–69, 578 (1995).

178. Many of the accommodation cases involve requirements to *host* speakers on one's premises (*FAIR*, *PruneYard*), but "accommodation" ultimately has a broader definition, as the Court placed the right-to-access laws of *Pacific Gas* and *Tornillo* in this category. *See* Rumsfeld v. Forum for Acad. & Inst. Rights, Inc., 547 U.S. 47, 63 (2006).

179. *Hurley*, 515 U.S. at 576; *PruneYard*, 447 U.S. at 87; *Wooley*, 430 U.S. at 721–22 (Rehnquist, J., dissenting).

C. *ESICA and Compelled Speech*

Based on the foregoing principles, and for the following reasons, ESICA arguably would not impermissibly compel speech from major social media platforms like Facebook, YouTube, and Twitter.

1. The nature of digital media substantially diminishes traditional concerns about the prohibitive costs of accommodating speech

In *Tornillo*, where a right-to-access law required newspapers to give column space to public figures criticized in their pages, the Court highlighted the prohibitive costs of accommodating speech in the context of print media.[180] The Court worried that newspapers, faced with finite space and averse to additional editing and printing expenses, would opt to remain silent about controversial topics rather than bear the costs of accommodating speech.[181] This rationale is closely tied to the nature of print media; therefore, it is largely inapplicable to digital media, which lacks the inherent limitations of the former mode of communication. True, ESICA might require social media platforms to host accounts and content that would otherwise be suspended or removed. However, the vast scale at which the platforms operate would likely render the burden of accommodation *de minimis*. Indeed, ESICA could conceivably reduce costs by narrowing the scope of content susceptible to moderation.

2. ESICA would not interfere with editorial discretion because the major social media platforms do not exercise conventional editorial discretion

Editorial discretion is the deliberate selection of material for publication according to the publisher's tastes and aims.[182] Editorial discretion is fundamentally communicative. It announces a considered value judgment: *X* is beautiful, *Y* is true, *Z* is

180. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257 (1974); *see also* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 29–30 (1986) (Rehnquist, J., dissenting).

181. *Tornillo*, 418 U.S. at 256–57.

182. Here, the term "publisher" should be understood broadly enough to embrace a newspaper and a cable news operator.

newsworthy.[183] From this perspective, the major social media platforms exercise negligible editorial discretion. Rather, they are best described as "passive receptacle[s] or conduit[s]"[184] for torrents of variegated content published by independent users.[185] The millions of content units that pour through Twitter, Facebook, and YouTube daily are inexpressibly diverse. Moreover, users generate content proactively, normally posting without review or permission.[186] Therefore, it is absurd to suggest that the major social media platforms exercise meaningful editorial discretion in the conventional meaning of that term.

True, the social media platforms are not entirely *laissez-faire* in their approach to content. They sometimes remove posts that are abusive, obscene, illegal, or otherwise contrary to broadly-framed terms of service.[187] Similarly, at least one major social media platform labels posts that contain misleading information and disputed or unverified claims.[188] Finally, every platform

183. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 636–37 (1994) ("Through 'original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,' cable programmers and operators '*see[k] to communicate messages on a wide variety of topics* and in a wide variety of formats.'" (quoting Los Angeles v. Preferred Commc'n, Inc., 476 U.S. 488, 494 (1986) (emphasis added))).

184. *Tornillo*, 418 U.S. at 258.

185. For instance, in May 2020, Twitter users generated an average of 500 million tweets per day. David Sayce, *The Number of Tweets per day in 2020*, https://www.dsayce.com/social-media/tweets-day/#more-313 [perma.cc/7CJ3-XZCA] (last visited Jan. 14, 2021). Almost none of these tweets were commissioned or screened by Twitter before their publication. Nunes v. Twitter, Inc., 194 F. Supp. 3d 959, 967 (N.D. Cal. 2016) ("Twitter does not 'review' the content of tweets. It does not 'edit' the content of tweets. It does not make decisions about whether to send out a tweet."). The other major social media platforms have comparably enormous figures. *See, e.g.*, Mansoor Iqbal, *YouTube Revenue and Usage Statistics (2020)*, BUS. OF APPS (Oct. 15, 2020), https://www.businessofapps.com/data/youtube-statistics/ [https://perma.cc/LQZ6-M8TV] (500 hours of video uploaded on YouTube *every minute*).

186. *See, e.g.*, *Nunes*, 194 F. Supp. 3d at 967.

187. *See, e.g.*, *The Twitter Rules*, TWITTER, https://help.twitter.com/en/rules-and-policies/twitter-rules [https://perma.cc/X8YZ-P8ZK] (last visited Jan. 14, 2021).

188. *Updating our approach to misleading information*, TWITTER, https://blog.twitter.com/en_us/topics/product/2020/updating-our-approach-to-misleading-information.html [perma.cc/2PZT-47L6] (last visited Jan. 14,

employs sophisticated and rather mysterious algorithms to prioritize content per user preferences.[189]

Yet these interventions, such as they are, do not amount to editorial discretion in the traditional sense. Imagine a newspaper that published millions of reader letters on a daily basis. Now imagine that these minimally reviewed, independently generated letters comprised almost the entirety of the newspaper's content. Would a reasonable person hold that this newspaper exercised editorial discretion—even if it occasionally retracted a letter for containing abusive language or advancing a flagrantly untrue claim?

The major social media platforms' business model may be characterized as "come one, come all." ESICA would simply incentivize the platforms to observe this relatively hands-off approach with respect to political content.

3. ESICA would not exclusively advantage the speech of adversarial parties

In *Tornillo* and *Pacific Gas*, the Court signaled its suspicion of laws that force speakers to solely foreground antagonistic opinions.[190] However, ESICA would not require the major social media platforms to extend special solicitude to the speech of adversarial parties.[191] The platforms would not have to give voices with which they disagree a privileged position from which to speak, nor would they have to prominently and exclusively display contrary opinions.

2021). Exactly how Twitter applies these labels is unclear. *See id.* (referencing "internal systems" and reliance on "trusted partners").

189. *See, e.g.*, Joshua Boyd, *The Facebook Algorithm Explained*, BRANDWATCH (Jan. 2, 2019), https://www.brandwatch.com/blog/the-facebook-algorithm-explained/; *What are Promoted Tweets?*, TWITTER, https://business.twitter.com/en/help/overview/what-are-promoted-trends.html [https://perma.cc/CE7N-NNB3] (last visited Jan. 14, 2021).

190. *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 14 (1986); *see also* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974).

191. *See Pac. Gas & Elec. Co.*, 475 U.S. at 5–7, 13 ("Access is limited to persons or groups . . . who disagree with appellant's views . . . and who oppose appellant in Commission proceedings. Such one-sidedness impermissibly burdens appellant's own expression."); *see also Tornillo*, 418 U.S. at 243–44.

4. ESICA would not make the major social media platforms "couriers" of state ideology

The Court has evinced hostility toward laws that make individuals "couriers" of state ideology.[192] Such laws are unconstitutional because they force speakers to "foster" state-sanctioned messages, forging an undesired "associat[ion]" between the state's ideology and its unwilling messengers.[193] Thus, the Court in *Barnette* struck down a law requiring school children to recite the national pledge of allegiance[194] and in *Wooley* struck down a law requiring drivers to display a philosophically-charged motto on their license plates.[195] However, these cases are inapposite. While ESICA might require platforms to maintain political content produced by state actors—content the platforms would otherwise remove for one reason or another—it would simultaneously protect, and thus indirectly foster, content *critical* of state propaganda. Additionally, there is little danger that reasonable observers would impute the opinions of these actors to the platforms themselves.[196] Finally, ESICA would help platforms resist state pressure to suppress adversarial content—pressure to which platforms have bowed in the past[197]—by providing a readymade legal justification for hewing to politically neutral content moderation. Far from drafting the major social media platforms into the service of the state, or some party that

192. *See* Wooley v. Maynard, 430 U.S. 705, 715–17 (1977); *see also* W. Va. State Bd. of Ed. v. Barnette, 319 U.S. 624, 625–26, 628–29 (1943).

193. *See Wooley*, 430 U.S. at 715, 717 n.15.

194. *Barnette*, 319 U.S. at 642.

195. *Wooley*, 430 U.S. at 707.

196. *See id.* at 720–22 (Rehnquist, J., dissenting) ("For First Amendment principles to be implicated, the State must place the citizen in the position of either apparently or actually 'asserting as true' the message."). Although Justice Rehnquist found himself in the *Wooley* minority, his reasoning proved important in later cases, including *PruneYard* and *FAIR*, discussed *infra* Section III.C.6. Moreover, as already noted, the *Wooley* majority concedes, albeit implicitly, the analytical significance of the imputation of the state's message to the messenger. *See id.*, 430 U.S. at 715, 717 n.15 (majority opinion).

197. *See*, *e.g.*, Erik Wemple, *Facebook admits error in censoring anti-Obama message*, WASH. POST (Oct. 31, 2012), https://www.washingtonpost.com/blogs/erik-wemple/post/facebook-admits-error-in-censoring-anti-obama-message/2012/10/31/d6063c22-235e-11e2-ac85-e669876c6a24_blog.html [perma.cc/B9XL-D3EZ].

participates in the governance thereof, ESICA would ensure that the platforms mature into neutral fora for lively democratic discourse.

5. ESICA would not alter the content of the major social media platforms' speech because there is no coherent speech product to alter

The content that populates the major social media platforms is not integrated or arranged so as to sound an intelligible "common theme"[198] that might be changed by the inclusion of discordant material. The major social media platforms are therefore dissimilar to the parade in *Hurley*, which the Court viewed as a discrete and orderly event with a relatively discernible cultural message.[199] Nor are the platforms comparable to the crisis pregnancy centers in *NIFLA*, whose medical advice was governed by an ideological opposition to abortion.[200] Rather, the platforms act as "passive receptacles" for spontaneous and ever-mutating user-generated content.[201]

Some may respond that the Court already views the major social media platforms as coherent speech products.[202] However, the Court has acknowledged the fluidity of internet free speech law, which is tied to the technology's "protean" quality.[203] There is no reasonable basis for regarding these platforms as "coherent speech products" worthy of heightened First Amendment protection, given the nature of the medium.

198. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 576 (1995).

199. *Id.* at 569–70.

200. *See* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2368 (2018).

201. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974).

202. Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017) ("[T]he Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.").

203. *Id.* at 1732.

6. Under ESICA, the major social media platforms would be able to easily and plainly disassociate from users' disagreeable speech

In *PruneYard* and *FAIR*, the Court identified a host's capacity to publicly disavow an accommodated speaker's opinion as a crucial factor in compelled speech analysis.[204] Under ESICA, the major social media platforms would remain free to publish disclaimers distinguishing their stances from those of users with whom they disagree. Seemingly, the bill would even allow platforms to engage with posts (e.g., by labelling them misleading, untruthful, or otherwise problematic)—so long as such engagement is neutrally applied to content across the political spectrum and not designed to negatively impact a particular party, candidate, or viewpoint. Simply put, ESICA would not force the major social media platforms to adopt content moderation policies giving rise to an impermissible "implication" of endorsement.[205] Absent an "intimat[e] connect[ion]" between the platforms and the speech of any given user, there is no appreciable infringement on autonomy of expression, a fundamental interest guarded in the compelled speech context.[206]

CONCLUSION

Free speech—understood as *isēgoria* and *parrhēsia*—is the lifeblood of democracy. This blood now flows through the veins of social media, which provides every citizen an equal opportunity for candid, confrontational speech.[207] Therefore, the major social

204. Rumsfeld v. Forum for Acad. & Instit. Rights, 547 U.S. 47, 65 (2006); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980).

205. *See* Wooley v. Maynard, 430 U.S. 705, 722 (1977).

206. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 576 (1995).

207. The debate over Section 230 continues to evolve at a rapid clip. Several developments, while outside the scope of this Comment, merit brief mention. In May 2020, the Trump administration acknowledged the danger of politically-biased censorship on social media and recommended that Section 230 immunity extend only to those who moderate content in good faith. *See* Exec. Order No. 13925, 85 Fed. Reg. 34079 (May 28, 2020). In June 2020, Senators Hawley and Rubio introduced a bill that would "prohibit Big Tech companies from receiving Section 230 immunity unless they update their terms of service to operate under a clear good faith standard and pay a $5,000 fine if they violate those terms." Press Release, Senator Marco Rubio, Rubio, Hawley Announce Bill Empowering Americans to Hold Big Tech Companies

media platforms must be dissuaded from engaging in politically biased content moderation. ESICA offers a creative and arguably constitutional means of protecting and nourishing America's robust free speech tradition on the "vast democratic forums" of the internet. Ultimately, ESICA should be seen not as *compelling speech*, but as *securing speech*, ensuring the advance of America's noisy, noble democratic experiment into cyberspace.

Accountable for Acting in Bad Faith (June 17, 2020), https://www.rubio.senate.gov/public/index.cfm/2020/6/rubio-hawley-announce-bill-empowering-americans-to-hold-big-tech-companies-accountable-for-acting-in-bad-faith [perma.cc/D42E-AALA]. In August 2020, the Department of Justice recommended "reform[ing]" and "realign[ing]" Section 230 so as to safeguard free speech on the major social media platforms. *See* Department of Justice's Review of Section 230 of the Communications Decency Act, U.S. DEP'T OF JUSTICE, https://www.justice.gov/ag/department-justice-s-review-section-230-communications-decency-act-1996?utm_medium=email&utm_source=govdelivery [https://perma.cc/AX8P-UE38] (last visited Jan. 14, 2021). In December 2020, President Trump vetoed the National Defense Authorization Act because, among other things, it failed to eliminate Section 230 liability for social media companies. *See* Sahil Kapur and Dareh Gregorian, *Congress overrides Trump's veto for the first time on major military bill*, NBC NEWS (Jan. 1, 2021), https://www.nbcnews.com/politics/congress/congress-overrides-trump-s-veto-first-time-major-military-bill-n1252652 [https://perma.cc/N82K-DAQX]. On January 8, 2021, Twitter "permanently suspended" President Trump in the wake of the Capitol Riot. Brian Fung, *Twitter bans President Trump permanently*, CNN BUSINESS (Jan. 9, 2021), https://www.cnn.com/2021/01/08/tech/trump-twitter-ban/index.html [perma.cc/5ZKZ-KDND]. Such a suspension effectively eliminates all of his tweets from public viewing. Twitter also seems to have undertaken a widespread purge of conservative accounts. *See, e.g.*, James Woods (@RealJamesWoods), TWITTER (Jan. 8, 2021, 10:57 PM), https://twitter.com/RealJamesWoods/status/1347754402581340163 [https://perma.cc/S9FR-8NZY] (a far-right celebrity claiming to have lost 85,000 followers within roughly 36 hours). Such actions bespeak the timeliness of this Comment and the salience of ESICA and similar legislation. Yet they simultaneously call into question this Comment's contention that the platforms do not exercise editorial discretion or produce coherent speech products. The question is whether censoring criminal (or borderline criminal) content—or the users who produce such content—really amounts to editorial discretion as traditionally understood, and whether such actions render the platforms coherent speech products. Events will likely continue to outpace this Comment, but hopefully its core arguments and principles will remain valuable in judging the wisdom and lawfulness of regulating the major social media platforms to ensure robust free speech online.