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Jack Madeb
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The First Amendment of the United States Constitution states, "Congress shall make no law . . . abridging the freedom of speech."[1] The right to freedom of speech allows individuals to express themselves without government interference or regulation.[2] However, the level of protection speech receives depends on the forum in which that speech takes place.[3] Some public forums may discriminate against certain classes of speakers or types of speech from being presented within that forum.[4]

The public forum doctrine is believed to originate in 1939 by Justice Owen J. Roberts, and was later expanded upon in the 1980s, where Justice Byron R. White explained that there were three categories of government property for expressive activities.[5] The three categories are traditional, limited, and nonpublic forums.[6] In 2017, in the case of *Packingham v. North Carolina*, the Supreme Court determined the relationship between the First Amendment and the modern internet.[7] The decision struck down a North Carolina law which made it a felony for a registered sex offender to knowingly access a social networking website where the website permits minors.[8] The Court did this by describing Facebook and Twitter as a forum for users to "debate religion and politics with friends and neighbors,"[9] and thus declared that "the most important places (in a spatial sense) for the exchange of views . . . it is

cyberspace."[10] However, the court did not categorize the Internet as a specific type of forum, rather, it just analogized it to a traditional public forum, subjecting limits on online speech to strict scrutiny.[11]

In 2019, the 2nd and 4th Circuit Court of Appeals pinpointed the type of forum by government officials, ruling that government use of social media creates a limited public forum and thus, public officials are not legally permitted to block comments or individuals.[12] Limited public forums are organized when the government creates a "forum for expression dedicated to specific groups or discussion of specified topics."[13]

Back in May of 2018, the United States District Court for the Southern District of New York argued that President Trump's use of Twitter as a forum to take actions as the President made his Twitter account a designated public forum.[14] The court concluded that the President's blocking of specific users is unconstitutional.[15] This decision subjected the President to constitutional obligations, however, these obligations were not imposed on the average social media users since the court found that the President is a unique user who used Twitter as a public forum.[16] The same result occurred when former New York State Assemblyman Dov Hikind sued Representative Alexandria Ocasio-Cortez to have himself unblocked, however, that lawsuit ended in a settlement.[17] The results of these cases show that the First Amendment is applied to public officials when their social media accounts are used as a public political forum.

However, the case of silencing users by blocking them becomes much less straightforward when it is the social media platform doing the blocking. In the case of *Wilson v. Twitter*, Twitter suspended Wilson's account for hateful conduct.[18] Wilson sued Twitter as violating his First Amendment rights, however, the court ultimately dismissed the case, stating that the First Amendment's protection is only against government censorship, and just because Twitter is a publicly traded company, it does not make Twitter an extension of the government.[19] Thus, the court determined Twitter has a right to suspend Wilson's account indefinitely.[20] This appears to conflict with *Packingham*, since the court ruled it unlawful to disallow the plaintiff from joining social media websites because those websites were analogized to a public forum.[21] However, *Packingham* is only applied to the government itself banning individuals from joining a public forum, while *Wilson* exclusively deals with Twitter's banning of an individual.[22]

When it comes to online corporations who are banning users rather than government officials blocking users, Section 230 gives the corporations the protections needed. Section 230 states, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another in information content provider."[23] This means that the writer is responsible for what the writer says, and publishers, such as Twitter or Facebook, bear no responsibility.[24] It continues to state that these services will not be held liable for "any action voluntarily taken in good faith . . . to restrict access to or availability of

material . . . whether or not such material is constitutionally protected."[25] This gives social media websites permission to regulate content, however, the website's terms of use must be consistently applied or they may risk losing Section 230 protection.[26]

A California Superior Court's ruling in *Murphy v. Twitter* held that Section 230 shields corporations like Twitter from liability for suspending and banning a user for violating the platform's policies.[27] Murphy alleged that Twitter decision to suspend users due to Twitter's Hateful Conduct Policy constituted publishing activity, and thus Twitter violated their duties as a publisher.[28] However, the court points to *Zeran v. Am. Online, Inc.*, a Federal Court of Appeals case, which states, "§ 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publishers traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or later content—are barred."[29] The court in *Murphy* further discusses how "federal courts have specifically ruled that a service provider's decision to provide, deny, suspend, or delete user accounts are immunized by Section 230."[30] The *Murphy* court ultimately found that when Twitter acts as a publisher to suspend and ban accounts, it qualifies for Section 230 protection and thus the banning of accounts is not subject to legal repercussions in a similar fashion to public officials.[31]

On October 6th, President Donald Trump tweeted "REPEAL SECTION 230!!!" after Facebook and Twitter slowed the spread of a New York Post story.[32] Additionally, Former Vice President Joe Biden called for Section 230 to be "immediately" revoked, saying social media is "propagating falsehoods they know to be false."[33] Trump encouraged this action in May of 2020 as well, saying his reason to change Section 230 was to "defend free speech."[34] Although repealing Section 230 is controversial due to the protections it provides to online platforms, both Democrats and Republicans want to reform or even remove it, although for different reasons.[35] Republicans are concerned Section 230 gives social media immunity by silencing conservatives with no repercussions, while Democrats are more concerned about hate speech, harassment, disinformation, and terrorism-related content, which they believe should be removed.[36] The Justice Department proposed changes trying to fulfill both parties requests, however, they have yet to be adopted by Congress.[37]

Although criticism of Section 230 is seen on both sides, a general agreement can be made that repealing Section 230 will not work in the public's favor.[38] Legal experts say the outcome of repealing Section 230 would mean more censorship by major tech companies, not less.[39] Experts argue that websites would have less tolerance for people posting their opinions on almost all websites due to the legal implications that would come with certain comments.[40] Rather, experts believe Section 230 will be better off if additional protections for free speech and user liabilities were added to it.[41]

However, Section 230 is meant to give platforms the ability to moderate content in the way the platform decides to.[42] The problem is until recently, large tech companies have not been

terribly transparent about their content moderation policies and practices.[43] Because of this lack of transparency, the conversation of repealing Section 230 has become misguided.[44] The conversation should rather shift towards big tech transparency in order to allow legislators to gain a better understanding into effective Section 230 amendments, or even just leave Section 230 as it stands.[45]

Congress passed Section 230 so platforms could choose not to be neutral and moderate content based on user demands, thus empowering consumers rather than the government.[46] This effectually differentiates government officials from average users in that government officials using the platform are subject to the platform's moderation policies, but only government officials are subject to the First Amendment as well. Thus, Section 230 gives social media platforms the right to ban users in accordance to their policies, but states and government officials are restrained by the First Amendment and may not prevent users from viewing their social media accounts when their accounts are used as a public forum.

Jack Madeb is a Second Year Law Student at the Benjamin N. Cardozo School of Law and a Staff Editor at the Cardozo Arts & Entertainment Law Journal.

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