Section 230 and the Anti-Social Contract

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Courts' sweeping interpretation of Section 230 assures powerful private actors that the government will not interfere when they disregard the exploitation and abuse of vulnerable communities. The power that tech platforms have over individuals can be legitimized only by rejecting the fraudulent contract of Section 230 and instituting principles of consent, reciprocity, and collective responsibility.

What makes power legitimate? In essence, that is the question that centuries of philosophical and political theorizing about the social contract tries to answer. For much of its history, social contract theory has focused on how to justify the power that governments wield over their citizens—the right of the state to restrain liberty, to use violence, to delegate resources—and what citizens are entitled to in exchange for it. But more recently, the concept of the social contract has also become a common theme in internet law and policy, where it is paradoxically invoked to reject the legitimacy of government power in favor of self-governance. But while the techno-libertarian view of the social contract is on the surface at odds with the traditional view of the social contract, in practice they produce the same result: the advancement of wealthy, white, and male interests disguised in terms of consent and reciprocity. Today, the courts' sweeping interpretation of Section 230 of the Communications Decency Act[1] assures powerful private actors that the government will not interfere when they disregard, encourage, or profit from the exploitation and abuse of vulnerable communities. In doing so, Section 230 serves as an anti-social contract, replicating and perpetuating

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[1] 47 U.S.C. § 230 (2018). According to Blake Reid, the most accurate citation for the law is "Section 230 of the Communications Act of 1934." I have retained "Section 230 of the Communications Decency Act" because of its common usage. Blake Reid, "Section 230 of… What?," Sept. 4, 2020, https://blakereid.org/section-230-of-what/ [https://perma.cc/DUL6-DKK2].

long-standing inequalities of gender, race, and class. The power that tech platforms have over individuals can be legitimized only by rejecting the fraudulent contract of Section 230 and instituting principles of consent, reciprocity, and collective responsibility.

SOCIAL CONTRACTS AND PSEUDO-REVOLUTIONS

The social contract is a concept foundational to American political theory. Thomas Jefferson referred to it in the 1776 Declaration of Independence, writing that "Governments are instituted among Men, deriving their just powers from the consent of the governed" and charged with securing the unalienable rights of life, liberty, and the pursuit of happiness. The Declaration ends with a commitment to reciprocal obligations: "And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor."

More than 200 years later, in his 1996 "Declaration of the Independence of Cyberspace," John Perry Barlow denounced the efforts of the "Governments of the Industrial World" to regulate the internet.[2] Barlow decried the "increasingly hostile and colonial measures" of internet regulation, which "place us in the same position as those previous lovers of freedom and self-determination who had to reject the authorities of distant, uninformed powers." Government has no role to play in cyberspace, Barlow argued, because cyberspace would regulate itself. "Where there are real conflicts, where there are wrongs, we will identify them and address them by our means. We are forming our own Social Contract. This governance will arise according to the conditions of our world, not yours. Our world is different." The social contract of cyberspace, Barlow maintained, would produce "a world that all may enter without privilege or prejudice accorded by race, economic power, military force, or station of birth. … [A] world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity."

It is tempting to dismiss Barlow's grandiose manifesto, with its earnest emulation of revolutionary rhetoric, as merely the overheated sentiments of an early tech evangelist (indeed, Barlow himself later expressed some regret over "imitating the grandiloquent style of a notorious former slaveholder"[3]). But Barlow's utopian, anti-regulatory vision of cyberspace has proved tremendously

[2] John Perry Barlow, "A Declaration of the Independence of Cyberspace," Electronic Frontier Foundation, Feb. 8, 1996, https://www.eff.org/cyberspace-independence.
[3] *The Economist*, "How John Perry Barlow Views His Internet Manifesto on Its 20th Anniversary, Feb. 8, 2016, https://www.economist.com/international/2016/02/08/how-john-perry-barlow-views-his-internet-manifesto-on-its-20th-anniversary.

influential in both the law and the public understanding of the internet. Barlow co-founded the Electronic Frontier Foundation (EFF) in 1990, an organization that continues to play an outsized role in the perception and policies of the tech industry today, perhaps most visibly in its championing of Section 230 of the Communications Decency Act, the 1996 federal law that governs much internet activity. Barlow's manifesto, especially its conception of a cyberspace social contract, provides a valuable source of insight into the relationship among tech companies, the people dependent on their services, and the government.

Barlow's social contract would seem on its face to conflict with Jefferson's—after all, Jefferson's Declaration was intended to celebrate the advent of a new government, whereas Barlow's claimed to throw off the shackles of government altogether. But in reality, both Declarations are pseudo-revolutionary documents that use the social contract to disguise the advancement of white patriarchy. Jefferson's ringing claim that "all men are created equal" was both a cruel falsehood about racial and economic equality and a stark assertion of gender inequality; Barlow's breezy repudiation of the "privileges and prejudices accorded by race, economic power, military force, or station of birth" similarly ignores the entrenched reality of racism and classism and pointedly omits even a nominal acknowledgment of sexism. Like the American Revolution, the true story of the Internet Revolution is not the liberation of the oppressed, but the liberation of slightly less privileged white, wealthy men from the rule of more privileged white, wealthy men.[4]

This description is not, as some observers might claim, historical revisionism: It was offered by several perceptive contemporaries of the "Founding Fathers," including Abigail Adams, who repeatedly pointed out the inherent contradictions in the revolutionary rhetoric of her husband, John, and his peers. Writing about slavery in 1774, she observed, "It allways appeard a most iniquitious Scheme to me, fight ourselves for what we are daily robbing and plundering from those who have as good a right to freedom as we have."[5] Addressing women's status in 1776, Adams complained, "[W]hilst you are proclaiming peace and good will to Men, Emancipating all Nations, you insist in retaining an absolute power over Wives."[6] Not only did slaves of both sexes and women of all races continue to be exploited long after the Declaration of Independence was signed and the Constitution was ratified, but the legacy of that subordination persisted long after formal barriers to equality had finally been eradicated. Today, political, economic, and social power remains

[4] See Mary Anne Franks, *The Cult of the Constitution* (Redwood City, CA: Stanford University Press, 2019), 160–64.
[5] Margaret A. Hogan & C. James Taylor (eds.), *My Dearest Friend: Letters of Abigail and John Adams* (Cambridge, MA: Harvard University Press, 2007), 110.
[6] Hogan & Taylor, 116.

concentrated largely in the hands of white, wealthy men, the result of centuries-long practices of racial and gender exclusion.

When Jefferson invoked the social contract in 1776, he was fully aware that the new government had not obtained "the consent of the governed" and had no interest in vindicating the rights of women or nonwhite men. When Barlow similarly invoked the social contract in 1996, he was aware that "the unwritten codes" that structured the virtual world were written by and for elites. In both cases, the "social contract" meant no more than the assurance that government would act in whatever way would best serve the interests of the powerful—intervening when they are under attack, withdrawing when they are assured.

This, as many critics of the concept have noted, is the truth of the social contract: Its celebrated elements of consent and mutual obligations have never existed in practice. As Charles W. Mills writes, "[I]t is obviously false, as mainstream contract theory classically implies, that all (adult) humans are equal contractors, have equal causal input into this process of creation, and freely give informed consent to the structures and institutions thereby established."[7] Carol Pateman has observed that the social contract hides a "sexual contract" that subordinates women to men[8]; Mills has described the "racial contract" as operating similarly to subordinate nonwhites to whites.[9] The state does not exert its protections equally; historically, it has been most concerned with guaranteeing the welfare of white, wealthy men. This inequity is illustrated by the systematic overprotection of their rights—to self-defense, property, privacy, free speech, and many other civil rights and liberties—and the systematic underprotection of the same rights of women, nonwhite men, and the poor.

Drawing on Rousseau's *Discourse on the Origin of Inequality*, Mills argues that "[t]he contract is really a stratagem by the rich to entrench their power and privilege behind a façade of consent and democracy. Hence, it could be regarded as a class contract among the wealthy to disenfranchise the rest of the population, who give a 'consent' that is actually uninformed and manipulated."[10] Accordingly, Mills suggests that the organizing principle of Western society is more accurately described as a "domination contract" than a "social contract": "Society is 'created' (in an ongoing

[7] Charles W. Mills, "The Domination Contract," in Carol Pateman & Charles W. Mills, *Contract and Domination* (New York: Wiley, 2007), 82.
[8] Carol Pateman, *The Sexual Contract* (Cambridge, UK: Polity Press, 1988).
[9] Charles W. Mills, *The Racial Contract* (Ithaca, NY: Cornell University Press, 1997).
[10] Mills, *The Domination Contract*, 74–75.

sense) by groups (men, the privileged classes, whites) acting in coordination to secure unfair group advantage for themselves, and not by all individuals acting on their own."[11]

As Mills highlights, the guiding principle of the domination contract is neither the celebration nor condemnation of governmental power, but the protection of elite interests. That protection sometimes requires government interference; at other times, it requires government forbearance. The anti-regulatory, elitist libertarianism of the digital revolution is an extension of the domination contract. The extreme interpretation of Section 230 that has taken firm hold in U.S. law allows powerful, multibillion-dollar tech corporations to profit from reckless conduct that disproportionately harms women, minorities, and other vulnerable groups—a relationship that cannot be described as consensual, reciprocal, or just.

SECTION 230 AND THE SOCIAL MEDIA CONTRACT

In 1996, the year that Barlow wrote his Declaration, the internet was not the dominating, inescapable force it is today. Only 20 million American adults had internet access, and these users spent less than half an hour a month online. But even in these early days, disparities in user experiences along gender and racial lines were evident. In 1994, about four times as many men as women were online; in 1996, there were still more than twice as many men.[12] One reason for the gap may have been the kinds of content women were likely to encounter online. As journalist Julian Dibbell recounted in his 1993 article, "A Rape in Cyberspace," virtual "rapes" of female-identified avatars in early online communities were common.[13] In 1995, University of Michigan student Jake Baker made headlines when he was arrested by the FBI after he posted to an online discussion board a story in which he described fantasies of raping, torturing, and murdering one of his female classmates.[14] That same year, a message composed by four male Cornell students with the subject line "75 Reasons Why Women (Bitches) Should Not Have Freedom of Speech" became one of the earliest "viral" emails.[15] Among the reasons were "The 2nd and 19th amendments"; "God forbid, a woman president"; and "Of course, if she can't speak, she can't say no."[16]

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[11] Charles W. Mills, "Philosophy and the Racial Contract," in *The Oxford Handbook of Philosophy and Race* (New York: Oxford University Press, 2017).
[12] Robert J. Klotz, *The Politics of Internet Communication* (Lanham, MD: Rowman & Littlefield, 2004), 24.
[13] Julian Dibbell, "A Rape in Cyberspace," *Village Voice,* Dec. 23, 1993.
[14] *United States v. Alkhabaz*, 104 F.3d. 1492,1496 (6th Cir. 1997).
[15] Ethan Katsh & Orna Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes* (New York: Oxford University Press, 2017), 30.
[16] http://www.angelfire.com/hi2/jimb/womenshouldnothavefreedomofspeech.html.

In 1985, the *New York Times* reported that a neo-Nazi organization called the Aryan Liberty Net had "established a computer-based network to link rightist groups and to disseminate a list of those who it says 'have betrayed their race.'" A list titled "Know Your Enemy" included names and addresses of individuals the group referred to as "race traitors" and "informers," along with location information for Anti-Defamation League and Communist Party U.S.A. offices. The group was restricted to "Aryan patriots only" and described itself as "a pro-American, pro-White, anti-Communist network of true believers who serve the one and only God—Jesus, the Christ." Members celebrated the murder of an FBI informer providing information against the Ku Klux Klan and praised the new "young lions" of the movement, "the armed party which is being born out of the inability of white male youths to be heard." One message on the network, titled "At Last, Unity," announced: "Finally, we are all going to be linked together at one point in time. Imagine, if you will, all the great minds of the patriotic Christian movement linked together and joined into one computer."[17]

But none of this was apparently interesting to John Perry Barlow, who seemed to view governmental regulation as the only real threat relating to cyberspace in 1996. Barlow took particular issue with the 1996 U.S. Telecommunications Reform Act, aimed at prohibiting obscenity and indecency on the Internet. While most of the act was eventually struck down on constitutional grounds, one provision survived: Section 230 of the Communications Decency Act.

Section 230 was, like the rest of the original law, concerned ostensibly with access to online indecency and other offensive material, but the provision rejected government regulation as an answer to the problem in favor of regulation by the tech industry itself. Section 230 has three main provisions:

- 230(c)(1), which states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."
- 230(c)(2), which shields providers and users of an interactive computer service from civil liability with regard to any action that is "voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" or "taken to enable or make available to information content providers or others the technical means to restrict access" to such material.

[17] Wayne King, "Computer Network Links Rightist Groups and Offers 'Enemy' List," *New York Times*, Feb. 15, 1985.

- 230(e)(3), which states, inter alia, that "no cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."

Section (e)(3) sets out the principle of broad immunity for tech companies, and the other two sections detail the two situations in which this principle is applied: when a company leaves harmful content up—(c)(1)—and when it takes it down or restricts it—(c)(2).

Despite its recently controversial status on the right,[18] Section (c)(2) is an innocuous provision, as it is essentially a restatement of rights that interactive computer service providers, as private actors, already have under the First Amendment (contrary to the claims that this provision is responsible for the novel and essential goal of encouraging the tech industry to engage in responsible content moderation).

Section (c)(1) is the law's most troubling provision, as courts have interpreted it broadly to provide online intermediaries immunity from liability for their choices about what content they choose to leave up, even if they know of its unlawful nature and take no reasonable steps to address it. This is not necessarily what Congress intended, as the statute bars treating providers only as "publishers," not as distributors. Distributor liability, unlike publisher liability, is contingent on a defendant's awareness of unlawful content. But in the 1997 case *Zeran v. AOL*, the U.S. Court of Appeals for the Fourth Circuit held that distributor liability was merely a subset of publisher liability, and that Section 230 accordingly prohibited imposing distributor liability as well as publisher liability on online intermediaries. The *Zeran* view of Section 230 has since become the dominant one.

The law has been read to express a principle of governmental nonintervention regarding the internet—an agreement to allow, as Barlow demanded, the inhabitants of cyberspace to address conflicts according to their own means. The justification for this principle of government nonintervention is spelled out in the prefatory text of Section 230, which reflects the rosy view of the internet offered in Barlow's Declaration: "The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." Asserting that the internet has "flourished, to the benefit of all Americans, with a minimum of government regulation," the statute states that one goal of Section 230 is to ensure that the internet remains a "vibrant and competitive free market … unfettered by Federal or State regulation."

[18] See, for example, Maggie Haberman & Kate Conger, "Trump Signs Executive Order on Social Media, Claiming to Protect 'Free Speech,'" *New York Times,* May 28, 2020, https://www.nytimes.com/2020/05/28/us/politics/trump-order-social-media.html.

The basic idea expressed in Section 230 is the same basic idea expressed in Barlow's Declaration, which in turn is the basic idea expressed by both economic and civil libertarianism: Freedom means the absence of government regulation. Wherever conflicts or wrongs may arise, they are best solved by private actors, not state power. With regard to the internet, those private actors are providers of interactive computer services, also known as online intermediaries, purportedly empowered by Section 230 to address unlawful or objectionable content in any good-faith way they wish.

As noted earlier, Section 230's advocacy of government restraint appears to be at odds with the principles of the traditional social contract, principles that are commonly invoked to justify government intervention on behalf of the common good. In its overt commitment to government inaction, Section 230 effectively repudiates even the pretense of the social contract between the government and an individual who is subject to online harm. In its place, Section 230 offers a new social contract between the government and private third parties, namely, tech companies. In this contract, the government promises, in effect, to refrain from using its power to address wrongs in exchange for a weak plea for private third parties to exercise theirs.

Given the historically illusory and problematic nature of the social contract—or, as Mills calls it, the domination contract—one might wonder if this social contract between the government and the tech industry is an improvement over the status quo: Given how the government is so consistently delinquent in its duties to women and nonwhite men, and so unjustifiably solicitous toward the interests of wealthy white men, it is possible that the express delegation of power to private third parties with regard to online harms could be a welcome change.

But, in fact, the social media contract reinforces and worsens the inequities of the traditional social contract. First, it signifies an explicit abdication of the state's responsibility to protect the most vulnerable; second, it is even more asymmetrical and unenforceable than the social contract between individuals and the government; and third, its protections are entirely subject to the whims of multibillion-dollar for-profit companies. In short, it is a fully illusory, unenforceable contract that further entrenches gender, racial, and class inequality.

First, the government's responsibilities to its citizens are unique and nontransferable. Under the social contract, people who consent to curtail their individual rights are entitled to a particular good in exchange: the vindication of collective rights and protection by the state. Private entities simply cannot fill this role; there is no good that a private entity can deliver that would be commensurate with the renunciation of individual rights.

Second, while transparency and accountability are challenging enough under the social contract between the individual and the government due to power disparities, the situation is even worse in the relationship between the individual and tech companies. In the contract between the individual

and the government, both have some power, at least in theory, to hold the other accountable for breaches, though the individual's power is considerably weaker than the government's. The government can use its police power to punish individuals who do not hold up their end of the bargain; the people can use the power of their votes to remove government officials who fail to protect them. But tech companies can't be removed from office, and it is increasingly difficult for individuals to escape from the monopolistic domination of multibillion-dollar tech companies over a vast array of vital human activities.

Finally, the social contract between individuals and tech companies is completely subject to the whims of private entities that have no inherent incentives or obligations to hold up their end of the bargain. The mandate of the state—however imperfectly realized—is to do what is best for its citizens; the mandate of a private company is to do what is best for the company. Tech companies, especially those that provide "free" services, are not beholden in any way to individual welfare or to the public interest. It is a fundamental principle of contract law that a contract in which one party gives nothing in exchange is illusory and unenforceable. A party that can choose to honor its obligations only if it wants to offers nothing more than a gratuitous promise—absolute sovereignty disguised as benevolence.

In short, the current social contract between individuals and tech companies cemented by Section 230 is pure illusion, a continuation and amplification of the domination contract that structures the relationship between individuals and the government rather than a repudiation of it. Champions of Section 230 claim that the law promotes free speech, stimulates commerce, and allows unprecedented access to information, and there is some truth to this: Section 230 has, without a doubt, produced a wealth of expressive, economic, and informational benefits. Often missing from this account, however, is acknowledgment of the unequal distribution of both the benefits and the harms flowing from the exceptional immunity granted to the tech industry. For while the ruthlessly anti-regulatory, pro-corporation, techno-utopian system made possible by courts' expansive interpretation of Section 230 immunity certainly does generate enormous capital, both literal and symbolic, the vast majority of that capital stays firmly in the hands of those who have always had more of it than everyone else: the wealthy, the white, the male. While Section 230 does indeed amplify free speech, increase profits, and enable informational dominance for the powerful and the privileged, it also enables the silencing, bankrupting, and subordination of the vulnerable.

Far from "a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity," the world Section 230 built is steeped in inequality: speech inequality, financial inequality, informational inequality. The concept of "cyber

civil rights" (a phrase coined by Danielle Keats Citron in 2009)[19] speaks to the need to safeguard recent and fragile progress in racial and gender equality from attacks in the digital age. Internet anonymity, amplification, and aggregation make it possible for private actors to discriminate against, harass, and silence vulnerable groups on a massive and unprecedented scale, further chilling the intimate, artistic, and professional expression of individuals whose rights were already under assault offline.[20]

In particular, the online abuse of women amplifies sexist stereotyping and discrimination, with devastating effects on women's speech, privacy, and civic participation.[21] From nonconsensual pornography to sextortion to deepfakes, women are targeted with vicious abuse for being professionally successful, for exiting abusive relationships, or for being elected to political office.[22] Sexual harassment of women in schools and workplaces has migrated from in-person communication to social media, where it can be both more pernicious and harder to regulate.[23] Victims of stalking and domestic violence face a new array of sophisticated and invasive surveillance technologies that place them and their loved ones in increased danger.[24] The ubiquitous presence of undetectable recording devices (and the ability to transmit footage to the world at large within seconds) has produced a cottage industry of sexual humiliation, from "upskirt" photos to video footage of sexual assaults. The cumulative effect of this abuse is to discipline and silence women: pushing them to be docile, submissive, sexless, conventional, and devoid of opinions, or else face devastating injury to their privacy, their careers, their safety, their families. Both state and private entities have failed to intervene against these assaults on women's rights, whether online or off.

The Section 230 social contract has been devastating not just for women and minorities but also for society as a whole. It has fueled our current dystopian reality by fundamentally undermining the legal principle of collective responsibility, obliterating the distinction between speech and conduct,

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[19] Danielle Keats Citron, "Cyber Civil Rights," *Boston University Law Review* 89 (2009): 61.
[20] See Mary Anne Franks, "The Free Speech Black Hole: Can the Internet Escape the Gravitational Pull of the First Amendment?" Knight First Amendment Institute, August 2019, https://knightcolumbia.org/content/the-free-speech-black-hole-can-the-internet-escape-the-gravitational-pull-of-the-first-amendment.
[21] Mary Anne Franks, "Unwilling Avatars: Idealism and Discrimination in Cyberspace," *Columbia Journal of Gender Law* 20 (2011): 224.
[22] See Danielle Keats Citron & Mary Anne Franks, "Criminalizing Revenge Porn," *Wake Forest Law Review* 345 (2014): 49.
[23] See Mary Anne Franks, "Sexual Harassment 2.0," *Maryland Law Review* 655 (2012): 71.
[24] See Cindy Southworth & Sarah Tucker, "Technology, Stalking, and Domestic Violence Victims," *Mississippi Law Journal* 667 (2007): 76.

and granting special privileges to online entities unavailable to their offline counterparts.[25] Courts have interpreted Section 230 to protect online classifieds sites from responsibility for advertising sex trafficking,[26] online firearms sellers from responsibility for facilitating unlawful gun sales,[27] and online marketplaces from responsibility for putting defective products into the stream of commerce.[28] As Charlie Warzel wrote in the *New York Times* about Facebook, social media, "when it's working as designed, is a natural accelerating force in the erosion of our shared reality and, with it, our democratic norms."[29]

After years of pressure by harassment experts and advocacy groups, social media platforms have recently begun making some modest attempts to enact and enforce policies aimed at combating disinformation and misinformation. These attempts have been met with swift backlash, often by government officials. For example, mere days after Twitter for the first time added a fact-check label to Donald Trump's tweets containing false information, Trump signed an executive order threatening to put an end to social media "censorship." When Twitter announced that it was turning off some of the application's features to fight election misinformation, the Trump campaign attacked the move as "extremely dangerous for our democracy" and complained that "the unelected liberal coastal elites of Silicon Valley are once again attempting to influence this election in favor of their preferred ticket by silencing the President and his supporters."[30]

But these attacks on Section 230 are as spurious as they are telling. It is the First Amendment, not Section 230, that gives private entities the right to engage in counterspeech and reject compelled speech. As Trump's own Supreme Court appointee Brett Kavanaugh wrote in a 2019 case, "[M]erely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints."[31] Indeed, as Kavanaugh emphasized, to treat private actors as state actors simply because they make their forums available to

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[25] See Mary Anne Franks, "How the Internet Unmakes the Law," *Ohio State Technology Law Journal* 10 (2020): 16.
[26] For example, Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12 (1st Cir. 2016).
[27] For example, *Daniel v. Armslist, LLC*, 2019 WI 47, 386 Wis. 2d 449 N.W.2d 710, *cert. denied,* No. 19-153, 2019 WL 6257416 (U.S. Nov. 25, 2019).
[28] For example, Oberdorf v. Amazon.com, Inc., 295 F. Supp. 3d 496 (M.D. Pa. 2017), affirmed in part, vacated in part, 930 F.3d 136 (3d Cir. 2019), vacated en banc, 936 F.3d 182 (3d Cir. 2019).
[29] Charlie Warzel, "Facebook and the Group That Planned to Kidnap Gretchen Whitmer," *New York Times*, Oct. 8, 2020, https://www.nytimes.com/2020/10/08/opinion/facebook-gretchen-whitmer.html.
[30] Kate Conger, "Twitter Will Turn Off Some Features to Fight Election Misinformation," *New York Times,* Oct. 9, 2020, https://www.nytimes.com/2020/10/09/technology/twitter-election-ban-features.html.
[31] *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019).

the public would be to intrude upon a "robust sphere of individual liberty."[32] This would be "especially problematic in the speech context," he continued, "because it could eviscerate certain private entities' rights to exercise editorial control over speech and speakers on their properties or platforms."[33] As a private entity, Twitter can use its fact-check labels to exercise its own free speech rights, and it is under no First Amendment obligation to allow any president to use its platform as a propaganda channel.

The conservative attacks on Section 230 are a stark demonstration of the selectiveness of the domination contract: Conservatives want the government to stay out the marketplace as long as the interests of the white, wealthy, and male are assured, but the moment those interests are in doubt, conservatives are the first ones clamoring for government intervention.[34] Since 1997, white men as a group have been largely free to reap the tremendous benefits of the internet while being shielded from its harms. This is, as the saying goes, not a bug but a feature, an intentional product of legislative and policy design. But even with the deck so resolutely stacked in their favor, conservative, white, male elites cannot completely ensure that the vast powers of social media will always be harnessed for their benefit. After building, promoting, and benefiting from the system of social contractarianism and free-market libertarianism that allowed tech companies to become multibillion-dollar monopolies with influence that rivals, if not outstrips, that of government, conservative elites are now aghast at the realization that they cannot entirely control it.

FRAMING THE NEW SOCIAL CONTRACT

Recent conservative attacks on Section 230 have made it easy for the law's defenders to characterize all calls for reform as reactionary censorship. But bad-faith conservative critiques of Section 230 contractarianism should not obscure the reality that the current social media contract is illegitimate. We should be willing to say, along with Abigail Adams, that no one is "bound by any Laws in which we have no voice, or Representation."[35] Women and nonwhite men must be subjects of, not merely subjected to, any social contract worth the name, both online and off.

What that entails, first, is open acknowledgment of those groups that have historically been excluded from the social contract and what the consequences of that exclusion have been. It also requires an explicit commitment to correcting those consequences through law and policy. Consent

[32] *Manhattan Community Access Corp.,* 1934.
[33] *Manhattan Community Access Corp.,* 1932.
[34] See, for example, Charlie Kirk, "It's Time to Treat Tech Platforms Like Publishers," *Washington Post*, July 19, 2019, https://www.washingtonpost.com/opinions/2019/07/11/its-time-treat-tech-platforms-like-publishers/.
[35] Hogan & Taylor, 110.

and reciprocity are necessary elements of any true social contract. As Rousseau wrote, it is through our obligation to respect and defend the rights of others that we obtain the respect and defense of our own rights. The most powerful function of the social contract is to restrain power, including our own. The social contract must serve as a check against the drive to exploit others for personal gain, according to rules informed by those with the greatest knowledge of the burdens of subordination.

The early suffragettes provided a model for the new social contract in the 1848 Seneca Falls Declaration of Sentiments, which carefully rewrote the Declaration of Independence to reflect the women who had been excluded, to record the litany of abuses women had suffered under the tyranny of the patriarchy, and to demand the rights they had so long been denied:

> We hold these truths to be self-evident: that all men *and women* are created equal …. The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her. … Now, in view of this entire disfranchisement of one-half the people of this country, their social and religious degradation--in view of the unjust laws above mentioned, and because women do feel themselves aggrieved, oppressed, and fraudulently deprived of their most sacred rights, we insist that they have immediate admission to all the rights and privileges which belong to them as citizens of the United States. (emphasis added)[36]

Necessary, too, is the acknowledgment that inequality is perpetuated as much through the social order as by direct state action. As Catharine MacKinnon and Kimberlé Crenshaw wrote in a recent article advocating for an Equality Amendment to the Constitution, "women are not exclusively, or even principally, made or kept unequal to men by the actions of states, but rather by the social order—its structures, forces, institutions, and individuals acting in concert."[37] That being the case, any true social contract must demand more than a "negative state"—the state must have affirmative duties to ensure equality.

> The state does not so much act to deny equality of rights through law as it fails to guarantee freedom from these violations, and fails to provide legal claims against them or precludes those claims altogether. Equality is powerfully denied to women through law abdicating an equality role, for example, in domestic violence, sexual abuse and exploitation, and unequal pay for work of comparable worth. Law allows these violations to happen, and to continue to happen, until they form the substrate

[36] The Declaration of Sentiments, Seneca Falls Conference, 1848.
[37] Catharine A. MacKinnon & Kimberlé W. Crenshaw, "Reconstituting the Future: An Equality Amendment," *Yale Law Journal* 129 (2019): 358.

> of the normal. The negative state—the state as embodied in a constitution that supposedly guarantees rights best by intervening in society least—has largely abandoned women to social inequality imposed on them by men.[38]

MacKinnon and Crenshaw's Equality Amendment begins in the acknowledgment that "all women, and men of color, were historically excluded as equals, intentionally and functionally, from the Constitution of the United States, subordinating these groups structurally and systemically."[39] In addition to prohibiting the denial or abridgment of equality of rights "based on account of sex … and/or race … and/or like grounds of subordination," Section 3 of the amendment requires that

> Congress and the several States shall take legislative and other measures to prevent or redress any disadvantage suffered by individuals or groups because of past and/or present inequality as prohibited by this Amendment, and shall take all steps requisite and effective to abolish prior laws, policies, or constitutional provisions that impede equal political representation.[40]

The revolutionary vision of MacKinnon and Crenshaw's Equality Amendment is the kind of robust reimagining that should be applied to laws, such as Section 230, that are based on a fraudulent social contract. In the current historical moment, tech companies continue to insist that they are neutral entities that can best serve the values of democracy and freedom when left to their own devices, free of any government oversight or interference. But this social experiment has gone on for more than two decades, and the result is clear: a society drowning in falsehood, propaganda, cruelty, and cowardice. It is long past time to end the tech industry's privilege of self-regulation, in accordance with a basic principle of legality, as expressed in the Latin maxim *Nemo judex in causa sua*: "no man is to be judge in his own case." To be a true party to a social contract, platforms must bear at least the same responsibilities as other private entities, including the obligation to restrict their self-interest on behalf of the collective welfare.

Specifically, a true social contract would require tech platforms to offer transparent and comprehensive information about their products so that individuals can make informed choices about whether to use them. It would also require tech companies to be held accountable for foreseeable harms arising from the use of their platforms and services, instead of being granted preemptive immunity for ignoring or profiting from those harms. Online intermediaries must be

[38] MacKinnon & Crenshaw, 358.
[39] MacKinnon & Crenshaw, 358.
[40] MacKinnon & Crenshaw, 361.

held to similar standards as other private businesses, including duty of care and other collective responsibility principles.[41]

This will require, among other things, amending Section 230(c)(1) to deny immunity to any online intermediary that exhibits deliberate indifference to harmful conduct.[42] For nearly 20 years, Section 230 defenders have claimed that the status quo serves the interests of marginalized populations, too, and that any limitation of platform immunity will inevitably result in disproportionate silencing of women and minorities. While speculation about how a multibillion-dollar industry will manage increased exposure to liability has its place, it should not be allowed to drown out the present, documented effects of unchecked abuse and harassment on vulnerable individuals.

A revolutionary social contract would acknowledge the role that the tech industry has played in sustaining hierarchies of race, class, and gender and in eroding democracy. It would involve tech companies committing to concrete steps to making amends for these harms, including dedicating significant resources to develop innovative practices and policies to combat racism, misogyny, and extremism; increasing accessibility to underserved communities; and funding nonprofit and advocacy efforts to protect the rights and liberties of all people. The tech industry is now more powerful than any individual, organization, or government—powerful enough to reject, finally, the agenda of domination.

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[41] See Mary Anne Franks, *Reforming Section 230 and Platform Liability*, Stanford Cyber Policy Series (2021), https://fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/cpc-reforming_230_mf_v2.pdf.
[42] Danielle Keats Citron & Mary Anne Franks, "The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform," *University of Chicago Legal Forum* 3 (2020): 70.