"PLUMBING THE DEPTHS" OF THE CDA: WEIGHING THE COMPETING FOURTH AND SEVENTH CIRCUIT STANDARDS OF ISP IMMUNITY UNDER SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

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INTRODUCTION

A serial rapist is brought to justice after using Craigslist to arrange dates with his unsuspecting victims. May those victims seek compensation from Craigslist because the site broadcast their attacker's message? College students disseminate hurtful rumors on Facebook about their former boyfriends and girlfriends. Is Facebook liable for such defamatory communications regardless of whether they employ screening measures that target such content? Roommate-matching websites invite users to indicate their race and sexual preference when creating site-specific profiles. Have these sites taken partial or even total responsibility for the generation of these profiles' contents?

The answers to these questions depend on the extent to which publishers of Internet content may be held to the same liability standards as traditional publishers.[1] Since the mid-1990s, the scheme of liability for Internet content has diverged dramatically from the standards that have existed for traditional public media.[2] After a series of early-decade court cases holding Internet service providers ("ISP" or "ISPs") to traditional standards of media-publisher liability,[3] Congress recognized a need to shelter providers of

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[1] *See* RESTATEMENT (SECOND) OF TORTS § 577 (1977) (defining the traditional scope of publisher liability for publication of defamatory matter).

[2] Brian J. McBrearty, Comment, *Who's Responsible? Website Immunity Under the Communications Decency Act and the Partial Creation or Development of Online Content*, 82 TEMP. L. REV. 827, 830 (2009). Traditional public media in this context refers to radio, television, and print news, while traditional publishers generally include radio stations, and television networks, and newspapers.

[3] *See generally* Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y. 1991); Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), *superseded by*

"interactive computer service" from liability for third-party content to an extent not previously enjoyed by traditional publishers.[4] Since then, ISPs and providers of interactive Internet services like Facebook and Craigslist have flourished, providing new interactive tools to a wider audience in part thanks to the comparatively unregulated framework of liability that has existed since the enactment of the Communications Decency Act of 1996 ("CDA").[5]

In Section 230 of the CDA ("Section 230"), Congress granted statutory protection to providers of interactive computer services, stating that they shall not be treated as publishers of "any information provided by another information content provider."[6] Despite the brevity of Section 230(c)(1), which contains that crucial language, and the straightforward definitions enumerated in Section 230(f),[7] the scope of the immunity granted by the statute is the subject of considerable dispute at the circuit level.[8]

The dispute hinges, in part, on which of the statute's policy goals the courts view as preeminent. The resolution of the dispute is muddled by the varied policy aims enumerated in the statute, the broader aims of the CDA as separate from Section 230, and the history of Section 230's inclusion in the CDA. The most prevalent reading of Section 230(c)(1) broadly immunizes service providers from any liability for content originating with third parties.[9] The Fourth Circuit introduced this interpretation in its 1997 deci-

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statute, Communications Decency Act of 1996, 47 U.S.C. § 230 (2006), *as recognized in* Shiamili v. Real Estate Grp. of N.Y., Inc., 952 N.E.2d 1011, 1016 (N.Y. 2011).

4 *See* 47 U.S.C. § 230 (2006); Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1163 (9th Cir. 2008) (en banc) ("Section 230 was prompted by a state court case holding Prodigy responsible for a libelous message posted on one of its financial message boards." (footnote omitted)); Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997) ("Congress' purpose in providing the § 230 immunity was thus evident. Interactive computer services have millions of users. . . . The specter of tort liability in an area of such prolific speech would have an obvious chilling effect.").

5 *See generally* Cecilia Ziniti, Note, *The Optimal Liability System For Online Service Providers: How* Zeran v. America Online *Got It Right and Web 2.0 Proves It*, 23 BERKELEY TECH. L.J. 583 (2008).

6 47 U.S.C. § 230(c)(1). The statute later defines an "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* § 230(f)(3).

7 *Id.* § 230(c)(1) (stating 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"); *id.* § 230(f) (defining "interactive computer service," "information content provider," and other terms found in the preceding subsections of § 230).

8 *Compare* Doe v. GTE Corp., 347 F.3d 655, 660 (7th Cir. 2003) (arguing for a possible interpretation of 47 U.S.C. § 230(c)(1) as a limited definitional clause that contains no immunity provision and suggesting that § 230(c)(2) provides only a limited grant of immunity), *and* Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 669 (7th Cir. 2008) (invoking and adopting as the standard of the Court, in an opinion by Chief Judge Easterbrook, the earlier *Doe v. GTE Corp.* decision), *with Zeran*, 129 F.3d at 328, *and* Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 254 & n.4 (4th Cir. 2009) (rejecting the Seventh Circuit's interpretation).

9 *Zeran*, 129 F.3d at 330.

sion, *Zeran v. America Online, Inc.*,[10] and it remains current in at least the First, Third, Fourth, and Tenth Circuits.[11] The Ninth Circuit adhered to the *Zeran* standard before apparently following the lead of the Seventh Circuit in changing course on its approach to Section 230.[12] Though it has never issued a holding inconsistent with *Zeran*, the Seventh Circuit has twice indicated a willingness to do so based on Chief Judge Frank Easterbrook's competing interpretation of Section 230, which he introduced as dicta in 2003 and which the Seventh Circuit formally adopted in 2008.[13]

Zeran remains the national standard, and it is also the reading that best accords with the text of Section 230, with Congress's intent in enacting the statute,[14] as well as with the findings and policy aims announced in Sections 230(a) and (b). However, with no Supreme Court guidance on the interpretation of Section 230, the potential for disparate treatment among the circuits will create an atmosphere of uneven administration of the law, forum shopping, deep uncertainty among industry leaders,[15] and, perhaps, the precise chilling effect that Congress sought to preempt with Section 230.[16] The longer it takes to achieve a national consensus, the greater the prospects of detrimental consequences on a national scale.

This Comment proceeds in four parts. Part I covers the genesis of Section 230, its various impetuses, and the policy aims that inform its interpretation. Part II reviews the original, broad interpretation of statutory immunity derived from the *Zeran* ruling and briefly addresses the critical response to that decision. Part III examines the Seventh Circuit's 2003 *Doe v. GTE Corp.*[17] decision and 2008 *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*[18] decision as well as the Ninth Circuit's 2008 *Fair Housing Council v. Roommates.com, LLC*[19] decision to understand the challenges to the traditional interpretation of Section 230 and the reasons for cutting against the *Zeran* standard.[20] Part IV explains how the Seventh Circuit did not fully explore the economic incentives inherent in a

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10 129 F.3d 327 (4th Cir. 1997).

11 *Id.* at 330; Universal Commc'n. Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 419 (1st Cir. 2007); Green v. Am. Online (AOL), 318 F.3d 465, 470-71 (3d Cir. 2003); Ben Ezra, Weinstein, & Co. v. Am. Online Inc., 206 F.3d 980, 986 (10th Cir. 2000); *Zeran*, 129 F.3d at 330.

12 *Compare* Batzel v. Smith, 333 F.3d 1018, 1026-30 (9th Cir. 2003), *with* Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1170-72 (9th Cir. 2008) (en banc).

13 *See Craigslist*, 519 F.3d at 669-72; *GTE Corp.*, 347 F.3d at 660.

14 *Roommates.com*, 521 F.3d at 1187-88 (McKeown, J., dissenting) (citing H.R. REP. No. 107-449, at 13 (2002), which states that "[t]he courts have correctly interpreted section 230(c), which was aimed at protecting against liability for such claims as negligence . . . and defamation" and cites *Zeran* as an example of a correct ruling).

15 *Id.* at 1187.

16 *Id.* at 1188.

17 347 F.3d 655 (7th Cir. 2003).

18 519 F.3d 666 (7th Cir. 2008).

19 521 F.3d 1157 (9th Cir. 2008) (en banc).

20 *See id.* at 1162; *GTE Corp.*, 347 F.3d at 660.

broad reading of Section 230, instead insisting on an overly narrow reading of the statute. The Part then concludes by showing that the *Zeran* decision not only best addresses the findings and the policy aims enumerated in subsections (a) and (b) of Section 230, but that its findings are better in keeping with the plain language of the statute.

I. THE CDA AND THE IMMUNITY PROVISION OF SECTION 230

In the mid-1990s, Congress took an interest in promoting the technological development and ubiquity of the Internet, recognizing in cyberspace a useful means of popular access to a vast array of educational, cultural, and political information.[21] Therefore, when state and federal courts began to interpret common law standards of publisher liability in a manner Congress feared would have a chilling effect on ISPs, the national legislature reacted rapidly.[22] In order to enable the steady development of this burgeoning technology, and in response to an increased concern that state courts would continue to impose a "strict liability" standard of publisher liability, Congress employed its legislative authority to provide ISPs and interactive content providers with broad immunity for user-generated content.[23]

In addition to providing immunity against liability for third-party content, Section 230 was included in the CDA, broadly speaking, as a response to concerns about children's access to pornography.[24] Section 230(c) is itself subtitled: "Protection for 'Good Samaritan' blocking and screening of offensive material."[25] At the same time, it is generally accepted that the inclusion of Section 230 in the CDA was primarily a reaction to the *Strat-*

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21 47 U.S.C. § 230(a) (2006) (praising the Internet as a "forum" for mass communication and media access at a time when Americans increasingly rely "on interactive media for a variety of political, educational, cultural, and entertainment services").

22 Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997) ("Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect."); Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *3 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, Communications Decency Act of 1996, 47 U.S.C. § 230 (2006), *as recognized in* Shiamili v. Real Estate Grp. of N.Y., Inc., 952 N.E.2d 1011, 1016 (N.Y. 2011).

23 Batzel v. Smith, 333 F.3d 1018, 1026 (9th Cir. 2003) ("As a matter of policy, 'Congress decided not to treat providers of interactive computer services like other information providers such as newspapers, magazines or television and radio stations . . . .'") (quoting Blumenthal v. Drudge, 992 F. Supp. 44, 49 (D.D.C. 1998)); *Zeran*, 129 F.3d at 331 ("The court [in *Stratton Oakmont*] held Prodigy to the strict liability standard normally applied to original publishers of defamatory statements . . . .").

24 Eric Weslander, Comment, *Murky "Development": How the Ninth Circuit Exposed Ambiguity Within the Communications Decency Act, and Why Internet Publishers Should Worry*, 48 WASHBURN L.J. 267, 274 (2008).

25 47 U.S.C. § 230(c).

ton Oakmont, Inc. v. Prodigy Services Co.[26] decision, which held an ISP liable as a publisher because it voluntarily took steps to attempt to delete offensive content.[27] Even courts that have limited the scope of Section 230 immunity in recent years have acknowledged as much.[28] Nonetheless, the same courts continue to cite the broader context of the CDA—as part of an effort to encourage ISPs to screen and censor content potentially harmful to children[29]—in scaling back the immunity provisions contained in Section 230.[30]

The final text of Section 230 addressed both of these concerns, creating immunity from third-party liability that sheltered ISPs from lawsuits in order to meet the twin aims of (1) promoting the unfettered growth of the Internet and (2) encouraging good faith efforts by ISPs to screen offensive Internet content without fear of liability.[31] To understand why the *Zeran* precedent correctly interprets the scope and impact of the immunity provision, one must examine the text of Section 230 and the case that contributed to its inclusion in the CDA.

A. Stratton Oakmont *and Congress's Reaction*

In May 1995, in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, the New York Superior Court addressed a defamation claim against Prodigy, an ISP, stemming from the publication of statements about an investment bank and its president on Prodigy's "Money Talk" message board.[32] Though the statements themselves were almost certainly defamatory,[33] the state court

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26 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, Communications Decency Act of 1996, 47 U.S.C. § 230 (2006), *as recognized in* Shiamili v. Real Estate Grp. of N.Y., Inc., 952 N.E.2d 1011, 1016 (N.Y. 2011).

27 S. REP. No. 104-230 (1996) (memorializing for the record that "[o]ne of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions . . . ."); *see* Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1163 (9th Cir. 2008) (en banc) (explaining that after the *Stratton Oakmont* decision Congress sought to preempt any further imposition of strict liability on ISPs for third-party content).

28 *Zeran*, 129 F.3d at 331 ("Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.").

29 47 U.S.C. § 230(d).

30 *Roommates.com*, 521 F.3d at 1164.

31 47 U.S.C. § 230(b)(1)-(4), (c)(2)(A), (d).

32 Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, Communications Decency Act of 1996, 47 U.S.C. § 230 (2006), *as recognized in* Shiamili v. Real Estate Grp. of N.Y., Inc., 952 N.E.2d 1011, 1016 (N.Y. 2011).

33 The statements alleged, among other things, that the investment bank, Stratton Oakmont, Inc., was a "cult of brokers who either lie for a living or get fired" and that the actions of the president of the investment bank, Daniel Porush, were "soon to be proven criminal." *Id.* at *1.

had to decide whether Prodigy had made itself liable as a publisher of those statements by holding itself out as a "family oriented computer network" that "exercised editorial control over the content of messages posted on its computer bulletin boards[.]"[34]

The New York Superior Court found that Prodigy acted as a liable publisher of defamatory material by admitting to voluntarily deleting *only some* objectionable content from its website.[35] Though Prodigy did not generate the original content on which the charges of defamation were based, the *Stratton Oakmont* court felt that Prodigy had made a conscious choice to cultivate a reputation as a "family-oriented" company.[36] This opened Prodigy up to liability for failing to protect against the dissemination of unwholesome content.[37] By advertising its ability to control content, edit messages, and generally protect users from objectionable material, Prodigy made itself a *publisher* of that material, even despite its apparent inability to screen all content before publication.[38] When Prodigy, perhaps inevitably, failed to catch and delete objectionable content, it became responsible for the impact of that content.[39]

The reaction to *Stratton Oakmont* was overwhelmingly negative, and major ISPs joined forces to oppose the ruling.[40] Though not widely binding, *Stratton Oakmont* set a presumptively hostile standard of treatment for ISPs at a time when the Internet was beginning to emerge as a potent communications medium. Furthermore, the New York court created a perverse incentive for the ISPs of the day, such as Prodigy, AOL, and CompuServe. Only by attempting to regulate the content that passed over its servers had Prodigy become liable.[41] Had it made no effort to screen offensive material, it would have escaped liability.[42]

The New York court sought to impose a custodial duty on Prodigy, but it left the ISP in a difficult situation. Any good faith effort to protect users against offensive content incurred publisher liability, thereby disincentivizing responsible content censorship.[43] Though perhaps more importantly for its subsequent impact on ISP liability in defamation suits, the *Stratton*

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34 *Id.* at *1-2.

35 *Roommates.com*, 521 F.3d at 1163; *Stratton Oakmont*, 1995 WL 323710, at *4.

36 *Stratton Oakmont*, 1995 WL 323710, at *5.

37 *Id.*

38 *Id.*

39 *Roommates.com*, 521 F.3d at 1163.

40 *See, e.g.*, Peter H. Lewis, *Prodigy Seeks to Reargue Its Defense in Libel Lawsuit*, N.Y. TIMES, Jul. 25, 1995, *available at* 1995 WLNR 3838292; *Leaky Logic*, INTERNET WORLD, Feb. 1, 1996, *available at* 1996 WLNR 6147727 (arguing that "[t]he judges' reasoning in the Stratton Oakmont v. Prodigy case is faulty"); *On-Line Service Can Be Sued for Libel*, CINCINNATI POST, May 26, 1995, *available at* 1995 WLNR 846288.

41 *Stratton Oakmont*, 1995 WL 323710, at *5.

42 *See Roommates.com*, 521 F.3d at 1163.

43 *See id.*

Oakmont decision threatened to generally chill ISPs from providing Internet services to the public, either as publishers or as distributors of content.[44]

By including Section 230 in the CDA, Congress sought to address the chilling effect the *Stratton Oakmont* ruling would have on ISPs:[45]

> The conference agreement adopts the House provision with minor modifications as a new section 230 of the Communications Act. This section provides "Good Samaritan" protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material. One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own . . . .[46]

Generally, the CDA was enacted in order to encourage ISPs to protect children from pornography and other obscene materials online,[47] and Section 230 must be considered in light of this broader regulatory aim. At the same time, Section 230 was amended to the CDA two and a half months after *Stratton Oakmont* and passed along with the rest of the final bill in 1996.[48]

When reading the final text of Section 230, it is important to keep in mind the timing of its inclusion and the way in which the statute's policies reflect the lessons learned from *Stratton Oakmont*. The policies and purposes of Section 230(b) reflect the various lessons of *Stratton Oakmont* and not just the narrow aim of incentivizing content screening and blocking measures in line with the overall aims of the CDA.

B. *The Text of Section 230 of the CDA*

The CDA was included in the omnibus Telecommunications Act of 1996 in order to address issues of obscenity and violence in the media and over the Internet.[49] Large portions of the CDA were ruled unconstitutional

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44 *Id.* at 1176 (McKeown, J., dissenting); *see* 47 U.S.C. § 230(a)-(b) (2006).

45 Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997) ("The amount of information communicated via interactive services is . . . staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect."); *see* Peter Adamo, Comment, *Craigslist, the CDA, and Inconsistent International Standards Regarding Liability for Third-Party Postings on the Internet*, 2 No. 7 PACE INT'L L. REV. ONLINE COMPANION 1, 4 n.20 (2011) ("In the Conference Report [to create the CDA], the conferees specifically stated that they were overturning *Stratton*." (quoting Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681, 697 (N.D. Ill. 2006))).

46 S. REP. No. 104-230, at 194 (1996) (quoting the final Senate committee report prior to the bill's passage later that year).

47 Adamo, *supra* note 45, at 5.

48 Batzel v. Smith, 333 F.3d 1018, 1026 (9th Cir. 2003).

49 Timothy E. Nichols, The Communications Decency Act: A Legislative History 1 (manuscript), *available at* http://pdfcast.org/download/the-communications-decency-act-a-legislative-history.pdf (last visited Sept. 24, 2012).

in 1997, in *Reno v. ACLU*,[50] because prohibiting the transmission of obscene and indecent material imposed "a content-based blanket restriction on speech" in violation of the First Amendment.[51] However, Section 230, along with other portions of the Act, was not deemed unconstitutional and remains in effect today.[52]

Section 230 of the CDA is brief. In line with the broader aims of the CDA, it bears the heading: "Protection for private blocking and screening of offensive material."[53] Sections 230(a) and (b) set forth Congress's preliminary findings and policy aims, respectively.[54]

The findings in subsection (a) describe the benefits of the Internet, its rapid development free of significant government regulation, and its increasing cultural significance:

> (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represents an extraordinary advance in the availability of educational and informational resources to our citizens.
>
> (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
>
> (3) 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.
>
> (4) The Internet and other interactive computer services have flourished to the benefit of all Americans with a minimum of government regulation.
>
> (5) Increasingly, Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.[55]

Subsection (b) then outlines five policy aims, three of which explicitly address removing disincentives to screening and monitoring offensive online content, and two of which relate to encouraging technological advancement:

> It is the policy of the United States—
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> (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
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> (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

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50 521 U.S. 844 (1997).
51 *Id.* at 845.
52 47 U.S.C. § 230 (2006).
53 *Id.*
54 *Id.* § 230(a)-(b).
55 *Id.* § 230(a).

> (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
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> (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
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> (5) to ensure vigorous enforcement of Federal criminal laws to deter and publish trafficking in obscenity, stalking, and harassment by means of computer.[56]

These policies, which seem to touch on two discrete sets of issues, inform the remaining four subsections of the statute.

Section 230(c) contains the most important text in any discussion of the scope of Section 230 immunity.[57] It is divided into two parts. Section 230(c)(1), "Treatment of publisher or speaker," 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."[58] This is the language relied on by the Fourth Circuit in *Zeran* in deriving its broad theory of immunity from liability for third-party content.[59] The Seventh Circuit, however, reads 230(c)(1) as only a "definitional" clause preliminary to a more limited grant of immunity to follow.[60]

Section 230(c)(2), subtitled "Civil liability," then explains that "[n]o provider or user of an interactive computer service shall be held liable on account of" their attempts to restrict or censor obscene content and to enable users to do the same.[61] This section, according to Chief Judge Easterbrook, contains the only actual grant of immunity to be found in the text of Section 230.[62]

Subsection (d) sets forth the obligations of "[i]nteractive computer service" providers to notify users of the availability of parental control software; subsection (e), importantly, explains that Section 230 preempts contradictory state and federal laws with a limited set of specifically enumerated exceptions; and subsection (f) defines many of the terms employed in Section 230.[63] Significantly, Sections 230(f)(2) and (3) define the terms

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56 *Id.* § 230(b).

57 *Id.* § 230(c).

58 47 U.S.C. § 230(c)(1).

59 Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

60 Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 669-70 (7th Cir. 2008) (citing Doe v. GTE Corp., 347 F.3d 655 (7th Cir. 2008)); *see GTE Corp.* 347 F.3d at 660 (explaining that "[o]n this reading, an entity would remain a 'provider or user'—and thus be eligible for the immunity under § 230(c)(2)—as long as the information came from someone else; but it would become a 'publisher or speaker' and lose the benefit of § 230(c)(2) if it created the objectionable information").

61 47 U.S.C. § 230(c)(2).

62 *Craigslist*, 519 F.3d at 669.

63 47 U.S.C. § 230(d)-(f).

"[i]nteractive computer service" and "[i]nformation content provider" as used in the preceding sections.[64]

In considering the competing interpretations that follow, it is important to remember not only the plain language of Section 230(c), but the extent to which, in interpreting the aims of 230(c), the courts seek to harmonize the various policy aims set forth in subsection (b). The prevailing standard, still embodied by the Fourth Circuit's *Zeran* case, suggests a complementary reading.

C. *A Brief Personal Note on Statutory Interpretation*

Chief Judge Easterbrook's scholarship on statutory construction, in particular his essay, *Text, History, and Structure in Statutory Interpretation*, and his article, *Statutes' Domains*, have informed much of my own perspective on the meaning of statutory text in our constitutional system, the correct method of statutory interpretation, and the properly limited role of legislative history.[65] This may come as a surprise given my critical reaction to Easterbrook's interpretation of Section 230 and my occasional references to the congressional record in this Comment. While I respectfully disagree with Chief Judge Easterbrook's interpretation of the statute on what I believe are squarely textual grounds, I find his writings both philosophically satisfying and theoretically persuasive.

There is no single accepted doctrine of statutory interpretation, and varying interpretations of a single text always—on some level—reflect the linguistic assumptions and the theoretical or political preconceptions of the interpreter.[66] Nonetheless, certain basic principles underlie most theories and methods of construction and inform many of the canonical presumptions often employed to enable uniform statutory interpretations.[67]

A "cardinal rule" of statutory construction, the "whole act rule," holds that all the parts of a statute must be interpreted as a "harmonious whole"

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64 *Id.* § 230(f)(2)-(3).

65 *See generally* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994) [hereinafter Easterbrook, *Statutory Interpretation*]; Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983).

66 *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 264-65 (1993); Easterbrook, *Statutory Interpretation*, *supra* note 65, at 62-64.

67 *See* YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 2-3 (2008). This Comment tries to adhere to what is universal among the multitude of possible methodologies—hopefully, even to those methodologies which reject formal methodology itself. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION, ch. 4 (1994) (rejecting formalist methodology and the notion of fixed textual meaning in favor of a dialectic search for common understanding of the statute). This may have been a vain effort, or it may simply have been impossible. At any rate, hopefully this digression provides some explanation of this Comment's method and reasons for employing certain interpretive aids.

consonant with the principles and aims of the statute.[68] Always to be considered are the definitions, statements of findings, and purposes announced within the statute, the structure of the statute itself, its relations to other specific pieces of legislation, and "the broader context of the body of law into which the enactment fits."[69]

Whether legislative history may be employed as an interpretive tool, and if so, to what extent, remains a controversial question. The "strict" textualist approach championed by Justice Antonin Scalia rejects—on pragmatic and constitutional grounds—the use of preenactment history in favor of a "holistic" approach to statutory interpretation.[70] On the other hand, reference to legislative history remains a commonplace and widely accepted (if perhaps practically and theoretically unreliable) tool of many contemporary theories of interpretation.[71]

My objection to the use of legislative history stems more from formal, constitutional considerations than from practical concerns for judicial interpreters' ability to sort the preenactment wheat and chaff. In this Comment, however, I am simultaneously attempting to support the broad *Zeran* reading of the text of Section 230 and to tell the story behind the statute's enactment in a way that will illuminate the issues at the heart of the interpretive controversy. Accordingly, I feel that a discussion of cases like *Stratton Oakmont*, of the mid-1990s Internet business climate, and of the legislative history of the statute are crucial and entertaining story-telling aids. Analytically, I rely on such considerations sparingly, if at all. The plain meaning and wording of Section 230 itself, the principles and definitions expounded within its text, and its place within the broader context of the CDA are far and away the most authoritative interpretive reference points. Text is prime; text is law. At the end of the day, and as this Comment will show, I am satisfied that my interpretation stands firmly on the text of Section 230(c) without recourse to extratextual, contextual clues.

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68 KIM *supra* note 67, at 2-3.

69 *Id.* at 3.

70 *See* United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." (citation omitted)).

71 *See, e.g.*, Wirtz v. Bottle Blowers Ass'n, 389 U.S. 463, 468 (1968) (arguing that a "proper construction frequently requires consideration of [a statute's] wording against the background of its legislative history and in the light of the general objectives Congress sought to achieve"); *see also* POSNER, *supra* note 66, at 290.

II. *ZERAN* AND THE TRADITIONAL ARGUMENT FOR BROAD IMMUNITY

Within a year of the passage of the Act, the Fourth Circuit examined the extent of the statutory immunity the CDA provided in *Zeran v. America Online, Inc.*, which remains the most commonly cited case in statutory analyses of Section 230.[72] In *Zeran*, the court found AOL to be a publisher in the context of traditional defamation liability, but held that the text of Section 230 protects all publishers of Internet content from liability for material originating with others.[73] The Fourth Circuit read Section 230(c) as a clear expression of Congress's intent to liberate the Internet from traditional tort liability in line with findings and aims expressed in the first two parts of the statute:

> [That section] was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. . . . The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. . . . Faced with potential liability . . . interactive computer service providers might choose to severely restrict the number and type of messages posted.[74]

This section elucidates the extent of the immunity the *Zeran* ruling derives from subsection Section 230(c)(1). It then briefly addresses some of the policy critiques that commentators have leveled at the decision and its progeny in the years since *Zeran*.

A. Zeran *and the Fourth Circuit's Account of the Plain Language of Section 230*

In *Zeran*, an unidentified individual perpetrated a vicious Internet hoax against a Seattle man named Kenneth Zeran.[75] The perpetrator posted a series of messages in AOL chat pages under pseudonymous screen names, claiming to be Zeran.[76] In fact, Zeran himself had never subscribed to the

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72 *See, e.g.*, Batzel v. Smith, 333 F.3d 1018, 1026-27 (9th Cir. 2003) (citing Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997)); Doe v. MySpace, Inc., 474 F. Supp. 2d 843, 847 (W.D. Tex. 2007) (same); Doe v. Bates, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758, at *3 (E.D. Tex. Dec. 27, 2006) (same).

73 *Zeran*, 129 F.3d at 330 ("[Section] 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role.").

74 *Id.* at 330-31; *see also* S. REP. No. 104-230, at 86 (1996) (listing the findings of Congress for enacting Section 230, including "to promote the continued development of the Internet" and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services").

75 *Zeran*, 129 F.3d at 329.

76 *Id.*

Internet.[77] The posts provided Zeran's home telephone number, which he also used for business purposes, and advertised the sale of "Naughty Oklahoma T-Shirts" and other merchandise glorifying or making light of the April 1995 Oklahoma City Bombing, which had occurred less than a week before the posts first appeared.[78] Within hours, Zeran was inundated with angry calls and death threats, as many as two per minute for a period of weeks.[79] When he informed AOL of his predicament, AOL agreed to take down the offending messages, but refused to print a retraction as a matter of policy.[80]

Each time AOL took down the messages, a new screen name began to post the same or similar advertisements, again including Zeran's contact information.[81] This continued for over a week until the story was picked up by an Oklahoma City radio station, which provided Zeran's phone number on the air and encouraged listeners to call him.[82] The results were understandably devastating for Zeran's home business and his peace of mind. Though the radio station offered an on-air retraction weeks later, by mid-May, Zeran still received 15 calls per day.[83]

Zeran sued AOL for defamation on the theory that AOL had a distributor's duty to remove the defamatory posts, notify subscribers of the messages' falsity, and screen for similar defamatory material after the first posting.[84] The Eastern District of Virginia and subsequently the Fourth Circuit were tasked with deciding whether Section 230 of the CDA immunized AOL from all publisher liability, or whether distributor liability was indeed a separate matter, as the *Stratton Oakmont* court had found in 1995.[85]

The Fourth Circuit rejected Zeran's argument that Congress intended Section 230 to leave distributor liability intact as separate from publisher liability.[86] According to traditional tort principles, distributors—unlike most publishers—can only be held liable for defamatory messages they "distribute" if they have actual knowledge of the defamatory content.[87] However, the text of the statute refers to "publishers" as a general category, making

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77 David R. Sheridan, Zeran v. AOL *and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147, 172 (1997).

78 *Zeran*, 129 F.3d at 329; Carl S. Kaplan, *Another Legal Defeat for Victim of Online Hoax*, THE SKEPTIC TANK (Feb. 17, 2000), http://www.skeptictank.org/gen2/gen00105.htm (explaining that one T-shirt allegedly bore the message "Rack'em, Stack'em and Pack'em—Oklahoma 1995").

79 *Zeran*, 129 F.3d at 329.

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.* at 330.

85 *Zeran*, 129 F.3d at 331.

86 *Id.* at 332.

87 *Id.* at 331.

no separate reference to distributors.[88] Zeran argued that this was a deliberate omission and that the authors of the statute intended to leave some form of third-party liability intact.[89] The *Zeran* court disagreed, reasoning that publisher liability and distributor liability are not discrete forms of liability, rather, that distributor liability is simply a subcategory of publisher liability that the CDA did not intend to treat as separate or distinct.[90] According to the Fourth Circuit, the distinction between publisher and distributor liability merely signifies that distributor liability belongs *within the larger category of publisher liability*.[91] Citing the language of Section 230, as well as *Prosser and Keeton on Torts*, the court held that distribution is merely a form of publication, and therefore Section 230 of the CDA immunized ISPs against both publisher and distributor liability.[92]

Even if Zeran could have proven that AOL acted as a distributor under traditional tort standards, Section 230 would have barred his suit according to the Fourth Circuit, since distributor liability exists merely as a subset of publisher liability, which Section 230(c)(1) explicitly addressed.[93]

B. *The Fourth Circuit's Broad Theory of Immunity Under Section 230(c)(1)*

More significant to the development of Internet law than Mr. Zeran's inability to obtain compensation, however, is the Fourth Circuit's reading of Section 230(c)(1), which found a "broad" statutory immunity against ISP liability and set the tone for future interpretations of Section 230.[94] Generally speaking, the *Zeran* decision broadly immunizes "service providers" from liability for content originating with third parties.

Chief Judge J. Harvie Wilkinson's opinion cut straight to the text of Section 230(c)(1) to argue that it creates a "federal immunity to any cause of action that would make service providers liable for information originat-

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88 *See* 47 U.S.C. § 230 (2006).

89 *Zeran*, 129 F.3d at 332.

90 *Id.* at 332-33; *see* Cubby, Inc. v. Compuserve Inc., 776 F. Supp. 135, 140-41 (S.D.N.Y. 1991); Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, Communications Decency Act of 1996, 47 U.S.C. § 230 (2006), *as recognized in* Shiamili v. Real Estate Grp. of N.Y., Inc., 952 N.E.2d 1011, 1016 (N.Y. 2011).

91 *Zeran*, 129 F.3d at 332-33 (explaining that different standards of publisher liability may be applied depending on the type of publisher concerned, but that "distributors" remain publishers and are consequently entitled to protection under 47 U.S.C. § 230).

92 *Id.* at 331-32 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 810 (5th ed. 1984)).

93 *Id.* at 332.

94 *Id.* at 330; *see* Universal Commc'n Sys. v. Lycos, Inc., 478 F.3d 413, 419 (1st Cir. 2007); Green v. Am. Online (AOL), 318 F.3d 465, 471 (3d Cir. 2003); Ben Ezra, Weinstein & Co. v. Am. Online Inc., 206 F.3d 980, 986 (10th Cir. 2000).

ing with a third-party user of the service."[95] Although the text of Section 230 does not mention "immunity" in any of its six subsections, Chief Judge Wilkinson's opinion suggests that the grant of immunity is not only implied, but explicitly envisioned by the plain meaning of the language of Section 230(c)(1).[96] Even without considering the principles outlined in the previous subsection, the commanding language of Section 230(c)(1) ("No provider . . . shall be treated")[97] contains the force of a directive. Broadly speaking, since publisher liability is the primary—if not exclusive—basis for third-party ISP liability, to thus preclude publisher liability is to provide general immunity against liability for third-party content. The Fourth Circuit promotes this reading.[98]

Significantly, *Zeran* places heavy emphasis on the free market-related policy aims listed in Section 230(b) and the preemption language of Section 230(d)(3) when explaining the necessity of broad immunity against liability for third-party content.[99] The Fourth Circuit points to the principles set forth in the first two sections of the statute in arguing that Congress's statutory purpose was to create broad, general immunity from liability because anything less would not adequately protect "interactive computer services" from the dilemma of suppressing speech or subjecting themselves to liability on an unsustainable scale[100]:

> The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. . . . In specific statutory findings, Congress recognized the Internet and interactive computer services as offering "a forum for a true diversity of political discourse" . . . Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.[101]

The Fourth Circuit argued that Section 230(d)(3) further supports this reading by preempting potentially conflicting state-law claims that conflict with the broad grant of immunity.[102] The combined effect of this presumption and the policy goals enumerated in Section 230(b) provide the background that informed the Fourth Circuit's interpretation of Section 230(c)(1) as a broad immunity provision.

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95 *Zeran*, 129 F.3d at 330.

96 *Id.* (deriving a grant of broad immunity from the text: "'No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.'" (quoting 47 U.S.C. § 230(c)(1))).

97 47 U.S.C. § 230(c)(1).

98 *See Zeran*, 129 F.3d at 331-32 (explaining that Congress's policy choice in enacting Section 230 was a necessary remedy to the "impossible" task of expecting ISPs to constantly monitor the "millions of postings" on their pages).

99 *Id.* at 330-34.

100 *Id.* at 330-33.

101 *Id.* at 330-31 (quoting 47 U.S.C. § 230).

102 *Id.* at 334.

Broad statutory immunity from liability is a good in itself, according to the *Zeran* reading of Section 230, because such immunity is supposedly crucial to the technological development of the Internet and the facilitation of the free flow of information in the Internet age. This, according to the Fourth Circuit, was the mandate provided by Congress in Section 230(c)(1).[103]

C. *What Recourse for Defamation Plaintiffs Post-*Zeran*?*

Before considering the alternative reading of Section 230, it will be useful to understand the dominant critiques of broad immunity that arose in the wake of *Zeran*'s robust grant of statutory immunity. At the time the case was decided, many scholars and critics found fault with the ruling, or with Section 230, on which the Fourth Circuit based its decision.[104] The primary flaw decried by such critics remains the lack of recourse *Zeran* leaves to the victims of online defamation and its supposed failure to encourage service providers to prevent similar offenses in the future.[105] Because *Zeran* essentially provided broad immunity to ISPs for the content provided by third-party users, it has been argued that, absent a major corporate defendant with "deep pockets," such a sweeping decision leaves little incentive for plaintiffs to continue such suits and for ISPs to take efforts to prevent them.[106]

The First Amendment right to anonymity makes it difficult to unmask authors of cyberspace defamation.[107] The Supreme Court has recognized a right to speak anonymously,[108] and it is difficult to compel ISPs to identify the IP addresses of users who post defamatory material.[109] By immunizing ISPs against third-party liability, many feel that Congress created a loophole whereby normally impermissible defamatory speech can be published with impunity on the Internet.[110] Critics claim that ISPs benefit from a double standard under *Zeran*, because the distinction between the role of the

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103 *Id.* at 330 ("[B]y its plain language, §230 creates . . . .").

104 *See* Sheridan, *supra* note 77, at 169; Skyler McDonald, Note, *Defamation in the Internet Age: Why* Roommates.com *Isn't Enough to Change the Rules for Anonymous Gossip Websites*, 62 FLA. L. REV. 259, 278 (2010); Brian C. McManus, Note, *Rethinking Defamation Liability for Internet Service Providers*, 35 SUFFOLK U. L. REV. 647, 649-50 (2001). *But see* Ziniti, *supra* note 5, at 588-89.

105 McManus, *supra* note 104, at 649-50.

106 *Cf.* Doe v. GTE Corp., 347 F.3d 655, 657 (7th Cir. 2003) (implying that, absent the strong financial incentive, the case might not have been appealed).

107 Doe v. Cahill, 884 A.2d 451, 457 (Del. 2005).

108 *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) (holding that statutory prohibition of anonymous distribution of campaign literature violated the freedom of speech guaranteed under the First Amendment).

109 *See* McManus, *supra* note 104, at 655.

110 Andrew J. Slitt, Note, *The Anonymous Publisher: Defamation on the Internet After* Reno v. American Civil Liberties Union *and* Zeran v. America Online, 31 CONN. L. REV. 389, 418-19 (1998).

newspaper and the role of the ISP in propagating defamation is baseless.[111] Some fear the emergence of an online "Wild West" where the tort of defamation has become largely an anachronism.[112]

It is important to consider the basic interplay of these policy concerns—both that defamation plaintiffs would be insufficiently protected and that ISPs and providers of interactive online content would be insufficiently motivated to protect users—when examining subsequent efforts to question the authority of the *Zeran* reading. The most serious judicial critiques of *Zeran* focus less on its reading of the text of Section 230 than on its interpretation of and assumptions about the statute's broader aims.

III. CHIEF JUDGES EASTERBROOK AND KOZINSKI AND THE ARGUMENT FOR LIMITED IMMUNITY

Though the Supreme Court has addressed the difference between the Internet and traditional means of publication in the past,[113] the nation's highest court has never settled the extent to which the standard of publisher liability for ISPs differs from traditional publisher and distributor liability. Consequently, under the existing legislative regime instituted by Congress,[114] the answers to these questions largely depend on which federal circuit (or state court) hears the case.

In 2008, writing for a divided but en banc panel of the Ninth Circuit, Chief Judge Alex Kozinski added a wrinkle to the interpretive landscape of Section 230, holding that when ISPs expressly solicit or compel specific user content, they become responsible in whole or in part for the creation of that information.[115] The *Fair Housing Council v. Roommates.com, LLC* majority, over the strenuous objections of three judges,[116] expressly advocated the limited view of Section 230 immunity expounded by Chief Judge Easterbrook and the Seventh Circuit.[117]

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111 Sheridan, *supra* note 77, at 149 (arguing that the "differences in legal treatment [between ISPs and newspapers] are difficult to justify by any differences in the technology involved").

112 Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 863, 885 (2000).

113 Reno v. ACLU, 521 U.S. 844, 854-55 (1997) (differentiating between the "the receipt of information on the Internet" and "communications received by radio or television" (internal quotation marks omitted)).

114 Communications Decency Act of 1996, 47 U.S.C. § 230 (2006).

115 Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1164-66 (9th Cir. 2008) (en banc).

116 *Id.* at 1176-78 (McKeown, J., dissenting).

117 *Id.* at 1172 n.33 (majority opinion) ("Consistent with our opinion, the Seventh Circuit explained the limited scope of section 230(c) immunity."); *see* Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008); Doe v. GTE Corp., 347 F.3d 655 (7th Cir. 2003).

Emphasizing the broader goals of the CDA over the specific aim of Section 230, then Judge Easterbrook proposed an alternative reading of Section 230 in the dicta of a 2003 decision that the Seventh Circuit would adopt as its standard only five years later.[118] Noting that Section 230(c)(1) does not expressly use the term "immunity," the Seventh Circuit suggested that Section 230(c)(1) should be read merely as a definitional clause, and that only limited immunity should be granted under Section 230(c)(2) in line with the subsection's "Good Samaritan" heading.[119] This interpretation was later considered and rejected by the Fourth Circuit in 2009.[120]

The *Zeran* standard is the one most commonly upheld nationwide, with other circuits—notably, the First,[121] Third,[122] and Tenth[123]—widely embracing the Fourth Circuit's reading of Section 230(c)(1). The Seventh Circuit, after its opinion in *Craigslist*, has departed definitively from the broad reading of Section 230(c)(1), even if its decisions to date have remained consistent with *Zeran* in their basic holdings.[124] Before its 2008 decision in *Roommates.com*, it would have been fair to include the Ninth Circuit among the list of *Zeran* adherents. Indeed, the court insisted in *Roommates.com* that its opinion was consistent with *Zeran*, but that no other circuit court had previously addressed a similar case.[125] However, *Roommates.com* not only took a step back from *Zeran*'s robust presumption in favor of immunity, it also embraced the Seventh Circuit's contrary analysis.

This section examines the precise reasoning of the Seventh and Ninth Circuits' Section 230 immunity standards in order to assess their merits in contrast to the *Zeran* standard.

A. Doe v. GTE Corp. *and the Origin of the Limited Reading of Section 230 Immunity*

In *Doe v. GTE Corp*., the plaintiffs-appellants were victims of a voyeur hidden camera scam that videotaped the locker rooms and bathrooms of several college sports teams and sold videos of naked athletes online under a series of phony business names.[126] The victims, mainly varsity athletes from various Illinois universities, sued the unidentified scam operator,

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118 *See Craigslist*, 519 F.3d at 669-70; *GTE Corp.*, 347 F.3d at 659-60.

119 *Craigslist*, 519 F.3d at 669-70; *GTE Corp*., 347 F.3d at 659-60.

120 *See infra* note 192 and accompanying text.

121 Univ. Commc'n. Sys. v. Lycos, Inc., 478 F.3d 413, 419 (1st Cir. 2007).

122 Green v. Am. Online (AOL), 318 F.3d 465, 471 (3d Cir. 2003).

123 Ben Ezra, Weinstein & Co. v. Am. Online Inc., 206 F.3d 980, 984-85 (10th Cir. 2000).

124 *See* Dart v. Craiglist, Inc., 665 F. Supp. 2d 961, 965-66 (N.D. Ill. 2009).

125 Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1172 n.33 (9th Cir. 2008) (en banc) ("No other circuit has considered a case like ours and none has a case that even arguably conflicts with our holding today.").

126 Doe v. GTE Corp., 347 F.3d 655, 656 (7th Cir. 2003).

the universities, and GTE, an ISP and subsidiary of Verizon that provided the Internet access to enable the scam.[127] The victims alleged state law negligence claims that were preempted by Section 230(e) and dismissed before trial.[128] They also pressed a claim under the Electronic Communications Privacy Act, a narrow exception to Section 230 listed in Section 230(e)(4), which the court also dismissed out of hand.[129]

Though the court threw out the state law claims against GTE as necessarily inconsistent with the purpose of Section 230,[130] the opinion questioned the standard reading of Section 230(c)(1) as a broad grant of immunity and suggested an alternative interpretation of the statute.[131] The court questioned, "[w]hy not read Section 230(c)(1) as a definitional clause rather than as an immunity from liability, and thus harmonize the text with the caption?"[132] According to the Seventh Circuit, instead of an imperative, Section 230(c)(1) merely *defines* the term "provider or user" as one who is eligible for limited immunity outlined under Section 230(c)(2).[133] Section 230(c)(2), as Easterbrook argues, provides the real grant of immunity, exempting from liability those ISPs that engage in good faith efforts to exercise their editorial and screening responsibilities[134]—a conscious reference to the perverse incentive created by the *Stratton Oakmont* decision.[135]

In this view, immunity under Section 230 must reflect the broad aim of the CDA to encourage screening and monitoring of offensive and defamatory content.[136] The caption of Section 230(c): "Protection for 'Good Samaritan' blocking and screening of offensive material," invokes this goal.[137] Section 230 itself bears the title: "Protection for private blocking and

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127 *Id.*

128 *Id.* at 657-661.

129 *Id.*

130 *Id.* at 662.

131 *Id.* 659-60.

132 *GTE Corp.*, 347 F.3d at 659-60.

133 *Id.* at 660.

134 *Id.* (arguing that "an entity would remain a 'provider or user'—and thus be eligible for the immunity under § 230(c)(2)—as long as the information came from someone else; but it would become a 'publisher or speaker' and lose the benefit of § 230(c)(2) if it created the objectionable information"). Presumably, this is according to the definition of an "information content provider" provided in § 230(f)(3).

135 *Id.*; *see* H.R. REP. No. 104-458, at 194 (1996) (Conf. Rep.) (noting the purpose of the section was "to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because . . . such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services").

136 *GTE Corp.*, 347 F.3d at 659-60 ("[Section] 230(c)—which is, recall, part of the 'Communications Decency Act'—bears the title 'Protection for 'Good Samaritan' blocking and screening of offensive material', hardly an apt description if its principal effect is to induce ISPs to do nothing about the distribution of indecent and offensive materials via their services.").

137 *Id.* at 660.

screening of offensive material."[138] These facts inform Easterbrook's interpretation of Section 230, and he argues that the common interpretation, applied at the district court level in *GTE Corp.*,[139] would actually cut against the aims of the CDA, thus making ISPs "indifferent to the content of information they host or transmit."[140]

At the time, these musings were simply dicta in a relatively straightforward case.[141] However, Easterbrook revisited his *GTE Corp.* discussion several years later, quoting it at length while fashioning an alternative reading of Section 230.[142]

B. *The Application of Limited Immunity in Craigslist*

In *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, the Seventh Circuit once again addressed Section 230 immunity, this time in the context of a public interest suit alleging that Craigslist facilitated the posting of discriminatory housing advertisements on its classified pages in violation of the federal Fair Housing Act ("FHA").[143] The FHA prohibits discriminatory housing advertisements based on "race, color, religion, sex, familial status, or national origin."[144] Additionally, the Act holds publishers of such advertisements liable for the harm resulting from the advertisements' publication.[145] The lower court's grant of summary judgment to Craigslist was affirmed based on the combined reading of Section 230(c)(1) and the ban on discriminatory publication contained in the FHA.[146] The theory of Craigslist's liability under the FHA hinged on its qualifying as a publisher,[147] and Section 230 explained that an "online information system" like Craigslist could not be held liable as the publisher of someone else's original content.[148]

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138 47 U.S.C. § 230 (2006).

139 *GTE Corp.*, 347 F.3d at 659.

140 *Id.* at 660.

141 *Id.* ("We need not decide which understanding of § 230(c) is superior . . . .").

142 Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 669-70 (7th Cir. 2008).

143 *Id.* at 668.

144 42 U.S.C. § 3604(c) (2006); Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1162 n.4 (9th Cir. 2008) (en banc).

145 42 U.S.C. § 3604(c); *Roommates.com*, 521 F.3d at 1164 n.13 (citing 42 U.S.C. § 3604(c)).

146 *Craigslist*, 519 F.3d at 671 ("We read each to do exactly what it says. So did the district court. A natural reading of § 230(c)(1) in conjunction with § 3604(c) led that court to grant summary judgment for [C]raigslist.") (citing Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681 (N.D. Ill 2006)).

147 *Id.* at 668-71 (stating that "only in a capacity as publisher could [C]raigslist be liable"); *see* 42 U.S.C. § 3604(c).

148 *Craigslist*, 519 F.3d at 671.

In *Craigslist*, though he once again ruled in favor of the ISP, Easterbrook, now chief judge of the Seventh Circuit, referenced his *GTE Corp.* decision and explicitly challenged the *Zeran*-derived interpretation of Section 230 advocated by Craigslist.[149] According to the Seventh Circuit, the application of the *Zeran* standard was precluded in *Craigslist* by the Supreme Court's decision in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*[150] In *Grokster*, a copyright case, the Court found that a content producer had established a prima facie infringement case against a file-sharing software company on a secondary liability theory of "contributory infringement."[151]

While *Craigslist* affirms the lower court's ultimate holding based on the incompatibility of the FHA and Section 230(c)(1),[152] the opinion discusses at length the reasons why Craigslist does not qualify as a publisher.[153] It then concludes that it would be impractical to hold Craigslist, a company of roughly 30 people whose site sees roughly 30 million postings a month, responsible for reviewing all user content for objectionable material.[154] Given the citation to Section 230(c)(1), this is a curious inclusion. Under the standard reading of Section 230(c)(1), it would not actually matter whether a company like Craigslist qualified as a "publisher," because even if it did reasonably fit under such a description, the subsection would immunize that company from liability. In *Zeran*, for instance, the Fourth Circuit stated just that, positing that even if AOL qualified as a distributor, Section 230 "foreclosed" such a theory of liability.[155] This formulation is rather simple: if individuals or corporate defendants qualify as providers of interactive computer service, they are exempt from any theory of liability that attempts to hold them responsible for third-party content. In *Craigslist*, the Seventh Circuit never makes this point.[156] In fact, when Craigslist made this argument in its defense,[157] Chief Judge Easterbrook used it as the jumping-off point to launch into a critique of *Zeran*.[158]

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149 *See id.* at 669 ("As [C]raigslist understands this statute, § 230(c)(1) provides 'broad immunity from liability for unlawful third-party content.' That view has support in other circuits. We have questioned whether § 230(c)(1) creates any form of 'immunity' . . . ." (citations omitted)); *see also id.* at 670 ("[The Supreme Court's opinion in] *Grokster* is incompatible with treating § 230(c)(1) as a grant of comprehensive immunity from civil liability for content provided by a third party.").

150 545 U.S. 913 (2005).

151 *Id.* at 930-34, 940-41 (vacating a summary judgment in favor of the file-sharing company and remanding the case to the Ninth Circuit); *Craigslist*, 519 F.3d at 670.

152 *Craigslist*, 519 F.3d at 671.

153 *Id.* at 668-69.

154 *Id.* at 669.

155 Zeran v. Am. Online, Inc., 129 F.3d 327, 332 (4th Cir. 1997) (discussing 47 U.S.C. § 230).

156 *See generally Craigslist*, 519 F.3d 666.

157 *Id.* at 669.

158 *Id.* at 669-70.

Latent in the *Craigslist* opinion is Easterbrook's eschewal of the *Zeran* standard in favor of the limited standard of immunity proposed in *GTE Corp.* As he saw it, broad immunity would have a disincentive effect on precisely the measures that he believed the statute was enacted to promote.[159] Therefore, to rule that Section 230(c)(1) barred the suit outright would flout the aims of the CDA under the limited immunity reading of the statute. This reading may ignore many of the policy statements enumerated at the beginning of the statute, as well as some of the lessons of *Stratton Oakmont*, but insomuch as it embraces the limited goal of incentivizing content monitoring under the CDA, it remains logically consistent.

C. *Roommates.com and the Ninth Circuit's Tacit Embrace of Limited Immunity*

In *Fair Housing Council v. Roommates.com, LLC*, Chief Judge Kozinski addressed what the Ninth Circuit considered a novel challenge to Section 230 immunity,[160] though the dissent considered the case substantively identical to their recent cases decided in-line with *Zeran*.[161] In *Roommates.com*, as in the Seventh Circuit's *Craigslist* case, the extent of the immunity provided by Section 230 had to be tempered by civil rights considerations laid out in the FHA.[162]

According to the facts of the case, Roommates.com invited users to fill out profiles that included potentially discriminatory information as a condition of enrolling in the site.[163] The majority argued that in doing so, Roommates.com essentially compelled this information from users as a condition of service, thereby becoming responsible, at least in part, for the creation or "development" of that information.[164] Thus, the Ninth Circuit held that by soliciting—and arguably compelling—self-descriptive information that included race and number of children, Roommates.com became wholly or partially responsible for the creation of content and could not claim immunity under the CDA.[165] The three dissenting judges questioned whether such a solicitation actually constituted creative or editorial control and further

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159 *See* Doe v. GTE Corp., 347 F.3d 655, 659-60 (7th Cir. 2003) (discussing the supposed disincentive effect of reading § 230(c)(1) to grant broad immunity from publisher liability).

160 Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1172 n.33 (9th Cir. 2008) (en banc) ("No other circuit has considered a case like ours and none has a case that even arguably conflicts with our holding today.").

161 *Id.* at 1176, 1186 (McKeown, J., dissenting) (discussing the comparable circumstances of Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003), and the "virtually indistinguishable" circumstances of Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003)).

162 *Id.* at 1164-65 (majority opinion).

163 *Id.* at 1161-62.

164 *Id.* at 1166-67.

165 *Id.* at 1165 (citing 47 U.S.C. § 230).

argued that such a reading was plainly inconsistent with the generally accepted reading of Section 230(c)(1).[166]

Though it claimed to be in accord with *Zeran* and other circuit-level decisions endorsing the broad view of immunity,[167] the *Roommates.com* decision not only cut into the *Zeran* standard,[168] but also tacitly endorsed the Seventh Circuit's limited reading of Section 230(c)(1). The *Roommates.com* majority does not undertake as close an examination of the text of Section 230 as the Seventh Circuit does in *GTE Corp.* and *Craigslist*.[169] In fact, Chief Judge Kozinski does not make a single reference to Sections 230(c)(1) or (2)—a distinction crucial to the Seventh Circuit's interpretation of the statute—instead referring only to Section 230(c) or even just "section 230" generally.[170] Yet the key policy assumption that informs the Seventh Circuit's departure from the *Zeran* standard is endorsed in *Roommates.com*.[171] Explicitly referencing the *Craigslist* opinion, Chief Judge Kozinski echoes the claim that Section 230(c) is best understood with reference to its caption[172]—that is, as an incentive measure designed to promote responsible screening and monitoring of offensive content (and presumably not as an abstract grant of statutory immunity for its own sake).[173] This more limited view of the scope of Section 230(c)(1) informs much of Kozinski's analysis,[174] and it suggests a determination to reframe the scope of Section 230 immunity as necessarily dependent on the broader goals of the CDA. The assumption that Section 230 must be interpreted primarily through the lens of its caption is questionable. A closer examination of the text of Section 230 and the congressional record compel the contrary conclusion that Section 230 should be interpreted in line with the broad grant of immunity found in *Zeran*.

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166 *Roommates.com*, 521 F.3d at 1182 (McKeown, J., dissenting).

167 *Id.* at 1172 n.33 (majority opinion).

168 *Id.* at 1189 (McKeown, J., dissenting) (warning that the majority opinion cuts a "broad swath" out of the immunity provided by § 230(c)(1)); Weslander, *supra* note 24, at 289.

169 *See Roommates.com*, 521 F.3d at 1162-76.

170 *See* id.

171 *Id.* at 1164.

172 *Id.*

173 *Id.* at 1163-64.

174 *Id.* at 1163-65 ("The Communications Decency Act was not meant to create a lawless no-man's-land on the Internet."); *id.* at 1175 ("When Congress passed section 230 . . . it sought to encourage interactive computer services that provide users *neutral* tools to post content online to police that content without fear that through their 'good samaritan . . . screening of offensive material' they would become liable for every single message posted by third parties on their website." (citation omitted)).

IV. RESOLVING THE SPLIT AND RECONCILING THE POLICY AIMS OF SECTION 230

The Fourth Circuit flatly rejected the Seventh Circuit's analysis in 2009 in *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*[175] At the same time, it took pains to distinguish itself from the complementary Ninth Circuit reading of Section 230.[176] As explained above and stressed by the *Zeran*-friendly dissent in *Roommates.com*,[177] the resolution of this circuit conflict may prove crucial to the current health and future development of the Internet as a socially useful means of mass communication.[178]

This Part demonstrates that the Seventh Circuit's rejection of *Zeran* stems from two flawed premises: (1) the unsupported supposition that *Zeran* fails to provide adequate incentives to ISPs to self-regulate, and (2) an overly narrow construction of the policy aims of Section 230.[179] Not only is its criticism of the *Zeran* standard misplaced, but the Seventh Circuit's alternative reading of the statute appears to conflict with the plain meaning of Section 230(c) and the full host of policy aims enumerated at the beginning of the statute. Accordingly, it should be rejected in favor of national recognition of the *Zeran* standard.

A. Zeran, *Easterbrook, and the Plain Meaning of Section 230(c)(1)*

The Fourth Circuit's *Zeran* decision better embodies the plain meaning of Section 230 than the alternative reading offered by the Seventh Circuit. Irrespective of competing policy interests, *Zeran*'s broad immunity reading coincides with the plain meaning of the text of Section 230(c)(1) as reaffirmed by multiple circuits,[180] and as confirmed on the floor of the U.S. House of Representatives.[181] Furthermore, it coincides with the policy aims set forth at the beginning of the statute, making it not only a valid reading, but also, presumptively, *the* authoritative reading. Though the Seventh Circuit, in departing from the *Zeran* standard, suggests that the broad immuni-

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175 591 F.3d 250 (4th Cir. 2009).

176 *Id.* at 257.

177 *See supra* Introduction.

178 *Roommates.com*, 521 F.3d at 1189 (McKeown, J., dissenting) (stating that "the decision today will ripple through the billions of web pages already online, and the countless pages to come in the future").

179 Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 669-70 (7th Cir. 2008) (discussing Doe v. GTE Corp., 347 F.3d 655, 659-60 (7th Cir. 2003)).

180 Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997); Universal Commc'n Sys. v. Lycos, Inc., 478 F.3d 413, 418-19 (1st Cir. 2007); Green v. Am. Online (AOL), 318 F.3d 465, 471 (3d Cir. 2003); Ben Ezra, Weinstein & Co. v. Am. Online Inc., 206 F.3d 980, 986 (10th Cir. 2000).

181 H.R. REP. No. 107-449, at 13 (2002); *see also Roommates.com*, 521 F.3d at 1187-88 (McKeown, J., dissenting).

ty reading of Section 230(c)(1) cannot be squared with the statute's plain meaning, the weight of the analysis appears to stem from a policy critique rather than a substantial textual dispute.

There is always room for interpretive disagreement when discussing the "plain meaning" of even the most simple statutory text,[182] but the absence of the specific term "immunity" from the text of 230(c)(1) by no means forestalls the *Zeran* construction on its own. Chief Judge Easterbrook points out in *Craigslist* that Section 230(c)(1) does not contain the word "immunity" or any near synonym.[183] Absent such language, he suggests, the *Zeran* reading of Section 230(c)(1) finds poor support in the statutory text and "cannot be understood as a general prohibition of civil liability."[184] Yet the absence of a specific term of art does not make the statute's plain meaning any less clear; meaning must be imputed, according to Easterbrook, in light of the "right interpretive community."[185] According to *Black's Law Dictionary*, "immunity" is defined as "[a]ny exemption from a duty, liability, or service of process[.]"[186] The language "*[n]o provider or user* of an interactive computer service *shall be treated as* the publisher or speaker" plainly exempts qualifying service providers and users from publisher treatment for content they have not created.[187] Absent language to the contrary elsewhere in the statute, there are no grounds for dismissing the *Zeran* reading out of hand, as *Craigslist* does.

Indeed, the same logic, if valid, would doom Easterbrook's alternative reading of the statute. Easterbrook explicitly credits Section 230 with granting a limited form of "immunity," except he believes the immunity derives from Section 230(c)(2), rather than 230(c)(1):

> On this reading, an entity would remain a "provider or user"—and thus be eligible for the immunity under § 230(c)(2)—as long as the information came from someone else; but it would become a "publisher or speaker" and lose the benefit of § 230(c)(2) if it created the objectionable information. The difference between this reading and the district court's is that

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182 *See* Easterbrook, *Statutory Interpretation*, *supra* note 65, at 67 ("'Plain meaning' as a way to understand language is silly. In interesting cases, meaning is not 'plain'; it must be imputed; and the choice among meanings must have a footing more solid than a dictionary—which is a museum of words, an historical catalog rather than a means to decode the work of legislatures."); *see also* KIM, *supra* note 67, at 40-41 (citing Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985), in which the Supreme Court Justices agreed that the statute in question had a plain meaning, but disagreed about what that meaning was).

183 *Craigslist*, 519 F.3d at 669.

184 *Id.*

185 *See* Easterbrook, *Statutory Interpretation*, *supra* note 65, at 69 (discussing imputed meaning, jurisprudential theories of statutory meaning, and rejecting as simplistic the common resort to the "plain meaning").

186 BLACK'S LAW DICTIONARY 817-818 (9th ed. 2009).

187 47 U.S.C. § 230(c)(1) (2006) (emphasis added).

> . . . [it] would not preempt state laws or common-law doctrines[,] . . . for such laws would not be "inconsistent with" this understanding of § 230(c)(1).[188]

Yet Section 230(c)(2), like 230(c)(1), does not contain the word "immunity" or any synonym of it within its text.[189] Easterbrook relies on 230(c)(2) to derive his limited grant of statutory immunity, but the absence of a crucial term from one part of the statute can no more condemn the *Zeran* reading than its absence from the other part of the statute condemns the *GTE Corp.* and *Craigslist* readings.

Aside from this logical inconsistency, the "definitional" reading of Section 230(c)(1) offered in *GTE Corp.* and formally adopted by the Seventh Circuit in *Craigslist* is problematic in its own right. Structurally, one problem with reading Section 230(c)(1) as a "definitional" clause is that Section 230 already contains a subsection devoted to definitions of statute-specific terms—if "providers" or "users" need to be separately defined, it stands to reason that such definitions belong in subsection 230(f), which is already subtitled "[d]efinitions."[190]

Easterbrook's interpretation can be questioned on semantic grounds, as well. *If* Section 230(c)(1) is "definitional," then grammatically, one would expect it to be phrased differently. To say that no provider of interactive computer service "*shall be treated as*" a publisher is an active construction that does not suggest a simple definition.[191] Were Section 230(c)(1) merely a definition, one would expect a passive construction more along the lines of: *No provider or user of an interactive computer service is . . . ,* or *A provider or user of an interactive computer service is not . . . .* The language of Section 230(c)(1), as actually phrased and as interpreted by the Fourth Circuit, carries more weight in its active verbiage than a simple preliminary definition. Rather than setting the interpretive parameters for the following clause of the statute, Section 230(c)(1) is the dominant, operative, active clause of the statute.

In responding to *Craigslist* in 2009, the Fourth Circuit acknowledged the circuit split and drily played down the significance of the Seventh Circuit's contradictory analysis:

> There is some disagreement as to whether the statutory bar under § 230 is an immunity or some less particular form of defense for an interactive computer service provider. The Seventh Circuit, for example, prefers to read "§ 230(c)(1) as a definitional clause rather than as

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188 *Craigslist*, 519 F.3d at 670 (quoting Doe v. GTE Corp., 347 F.3d 655, 659-60 (7th Cir. 2003)).

189 47 U.S.C. § 230(c)(2).

190 *See id.* § 230(f).

191 *See id.* § 230(c)(1) (emphasis added).

> an immunity from liability." . . . Of whatever academic interest that distinction may be, our Circuit clearly views the § 230 provision as an immunity.[192]

On the one hand, this shows that the Fourth Circuit believes the distinction drawn in *Craigslist* and *GTE Corp.* to be practically meaningless. In another equally important sense, however, this footnoted rebuttal illustrates a major problem with the Seventh Circuit's interpretation of Section 230. The "definitional" interpretation of the single-sentence Section 230(c)(1) does not follow obviously from its twenty-six words. It required extensive explanation even when first presented,[193] and it necessitates further detailed explication when practically applied.[194] The same choice of wording that constitutes the Seventh Circuit's *sole* textual objection to the *Zeran* standard would, if reasonable, apply equally damningly to the Seventh Circuit's own reading.[195] In short, the Seventh Circuit's real objection to the *Zeran* standard does not appear to derive from any convincing textual argument, nor from any inherent problem with viewing Section 230 as a broad grant of immunity. As this section will explain, the Seventh Circuit interpretation seems to derive from a contrary policy analysis.

B. *The 'Good Samaritan' Heading and the Policy Thrust of Section 230*

The more forceful objection to the *Zeran* standard posed by the Seventh Circuit in *GTE Corp.* and *Craigslist* is that, as a policy matter, Congress cannot possibly have intended Section 230(c)(1) as an immunity provision because of the supposedly absurd result it would produce. As Easterbrook points out, Section 230(c) is subtitled, "Protection for 'Good Samaritan' blocking and screening of offensive material":[196]

> If [the *Zeran*] reading is sound, then § 230(c) as a whole makes ISPs indifferent to the content of information they host or transmit: whether they do . . . or do not . . . take precautions, there is no liability under either state or federal law. As precautions are costly, not only in direct outlay but also in lost revenue from the filtered customers, *ISPs may be expected to take the do-nothing option and enjoy immunity under § 230(c)(1).* Yet § 230(c)—which is, recall, part of the "Communications Decency Act"—bears the title "Protection for 'Good Samaritan' blocking and screening of offensive material", hardly an apt description if its principal

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192 Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 254 n.4 (4th Cir. 2009) (citation omitted) (quoting Doe v. GTE Corp., 347 F.3d 655, 660 (7th Cir. 2003)).

193 *GTE Corp.*, 347 F.3d at 659-60.

194 *See, e.g.*, Dart v. Craigslist, Inc., 665 F. Supp. 2d 961, 965-67 (N.D. Ill. 2009).

195 Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 669-70 (7th Cir. 2008).

196 *See id.* at 670 (quoting *GTE Corp.*, 347 F.3d at 660).

> effect is to induce ISPs to do nothing about the distribution of indecent and offensive materials via their services.[197]

Essentially, Easterbrook suggests that the *Zeran* reading would create a perverse incentive, encouraging ISPs not to implement any screening measures whatsoever. This would of course run contrary to the statutory aim of encouraging service providers to screen offensive material. Immunity, according to this reading, should only apply to those service providers who undertake the expense and effort of protecting "the privacy and sensibilities of third parties."[198]

Ignoring for the moment the fact that Section 230 enumerates a broader set of policy aims that cannot be so narrowly construed,[199] Easterbrook's policy concerns can be allayed through anecdotal evidence.

As the following examples make clear, Section 230 need not directly incentivize compliance in order for ISPs to enact the screening and monitoring provisions envisioned by the CDA. Over a decade passed between the enactment of Section 230 and the Seventh Circuit's *Craigslist* opinion, yet Chief Judge Easterbrook provides no evidence from the intervening years to substantiate the claim that "ISPs *may be expected* to take the do-nothing option and enjoy immunity."[200] This conclusion assumes a narrow set of actuarial incentives, while ignoring the extralegal motives that have indeed induced ISPs to voluntarily employ better and better screening measures and flourish as a result.[201] As demonstrated, in spite of their broad Section 230 immunity and regardless of the supposed cost of providing screening and monitoring tools to parents,[202] there is ample evidence that ISPs and providers of interactive services have continued to respond to public safety concerns, either voluntarily or by accession to public pressure.[203]

ISPs and interactive service providers have a considerable reputational interest in allaying parents' safety concerns: children constitute a considerable market force in today's Internet, and as such, companies care about the concerns of parents who control their children's Internet access.[204] It bears recalling that CompuServe originally opened itself up to liability in the

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197 *Id.* (emphasis added) (quoting *GTE Corp.*, 347 F.3d at 660).

198 *Id.*

199 *See* 47 U.S.C. § 230(a)-(b) (2006); *infra* Part IV.D.

200 *Craigslist*, 519 F.3d at 670 (emphasis added) (quoting *GTE Corp.*, 347 F.3d at 660).

201 *See infra* note 204 and accompanying text.

202 *See infra* note 208 and accompanying text.

203 *See infra* notes 205-211 and accompanying text.

204 Joshua Warmund, Note, *Can COPPA Work? An Analysis of the Parental Consent Measures in the Children's Online Privacy Protection Act*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 189, 190 n.3 (2000) (noting that, in 1997, children ages two to fourteen "directly influenced spending by their parents in an amount as much as . . . $188 billion"). For a discussion of the role of reputational considerations in market decisions and litigation, see Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981).

view of the *Stratton Oakmont* court through its *voluntary* efforts to cultivate a family-friendly image.[205] However, CompuServe did so without being strong-armed into compliance by state or federal authorities.[206] Americans put considerable stock in the right and duty of parents to monitor and control their children's access to objectionable media content.[207] Therefore, the public image-driven incentive to provide child-friendly access to the Internet remains as strong in 2012 as it was in 1995, even under the new liability regime. Indeed, despite the supposed cost of enforcement, websites pride themselves on aggressively protecting children and "scalping" offenders.[208]

Interactive service providers often respond voluntarily to public and governmental pressure over safety concerns. In 2008, for instance, Facebook negotiated with the attorneys general of forty-nine states and the District of Columbia to implement a series of recommended safety precautions ranging from age and identity verification software to "age locking" and image-screening measures.[209] Once again in 2010, Facebook came under pressure from child-safety groups in Britain to introduce a "panic button" deterrent against child predators.[210] After weathering a several-month campaign of public criticism, Facebook finally agreed to implement the measure voluntarily.[211]

In 2009, Craigslist faced considerable public pressure from Internet watchdog groups and public officials who alleged that it willingly provided a platform for pimping, child prostitution, and other illegal ventures.[212] In

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205 Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *4 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, Communications Decency Act of 1996, 47 U.S.C. § 230 (2006), *as recognized in* Shiamili v. Real Estate Grp. of N.Y., Inc., 952 N.E.2d 1011, 1016 (N.Y. 2011).

206 *See id.*

207 Larry Magid, *Digital Citizenship Includes Rights as Well as Responsibilities*, HUFFINGTON POST (Nov. 7, 2010, 7:42 PM), http://www.huffingtonpost.com/larry-magid/digital-citizenship-inclu_b_780127.html.

208 *See, e.g.*, Elinor Mills, *At Facebook, Defense Is Offense*, CNET (Jan. 31, 2011, 4:00 AM), http://news.cnet.com/8301-27080_3-20029954-245.html (describing the efforts of Facebook's Internet security team to bring child predators to justice and deter online fraud).

209 *Facebook Reaches Nationwide Agreement with Attorney General Nixon, 49 Other Attorneys General to Help Protect Children from Online Predators*, US STATE NEWS, May 8, 2008, *available at* 2008 WLNR 8823124.

210 Richard Edwards, *Facebook Ignores Safety, Say Police*, DAILY TELEGRAPH (London), Apr. 9, 2010, *available at* 2010 WLNR 7355174; *Hotline, But Facebook Refuses to Panic*, BRISBANE NEWS (Austl.), Apr. 14, 2010, *available at* 2010 WLNR 7654541.

211 Mark Sweney, *Facebook ClickCeop App to Offer Optional 'Panic Button'*, GUARDIAN (Jul. 11, 2010), http://www.guardian.co.uk/technology/2010/jul/12/facebook-clickceop-app-optional-panic-button.

212 *See* Dart v. Craigslist, Inc., 665 F. Supp. 2d 961, 962-63 (N.D. Ill. 2009) (alleging in plaintiff sheriff's complaint that "Craigslist is now the single largest source for prostitution, including child exploitation, in the country"); *Mistress Jailed for Net Hitman Advert*, EVENING STANDARD (London), Feb. 5, 2009, *available at* 2009 WLNR 2308529 (detailing an attempted murder for hire venture pursued on Craigslist); Eric Tucker, *Another Case Similar to Craigslist Slaying*, PRESS-REGISTER (Mobile, Ala.),

Dart v. Craigslist, Inc.,[213] the Sheriff's Department of Cook County, Illinois, attempted to hold the website liable for the cost of policing the prostitution that arose out of Craigslist solicitations.[214] Though the case was eventually dismissed on the pleadings, Craigslist nonetheless voluntarily redesigned many of its services, including changing its "erotic" category to an "adult" category subject to review by site administrators.[215]

As sites like Craigslist and Facebook have demonstrated, even in a liability-free regime, service and content providers retain considerable incentives to screen offensive material, provide parental monitoring tools, and remain responsive to the safety concerns of users and public officials. The Seventh Circuit's conclusion that a broad immunity regime would kill off self-regulatory efforts appears misinformed.

C. *Section 230(c)(1): Balancing the Twin Policy Aims of Section 230*

As the preceding Part demonstrates, the broad immunity reading of Section 230(c)(1) promoted by the Fourth Circuit is not inherently antithetical to the broader content-policing and child-protective aims of the CDA.[216] Indeed, free of liability, ISPs and providers of interactive services have continued to undertake voluntary efforts to screen and monitor offensive communications. Yet children's safety and privacy controls are not the only goals of the statute. Section 230 enumerates additional policy aims that give credence to the view that Congress saw broad immunity for service providers as a desirable end in its own right and not just a means of enabling or encouraging compliance.

It is not uncommon for a statute to attempt to tackle disparate policy aims; the *Craigslist* opinion itself makes the point that "a law's scope often differs from its genesis[,] [o]nce the legislative process gets rolling."[217] While enacted as part of a broader regulatory regime designed to encourage the implementation of content-monitoring and parental control technology, the findings and policy aims contained in Sections 230(a) and (b) show that Section 230 addresses goals beyond simply the "blocking and screening of offensive material."[218] Section 230 enumerates five separate policy aims premised on five separate preliminary "findings," not all of which can be reconciled with the limited goal of incentivizing censorship measures in

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Apr. 28, 2009, *available at* 2009 WLNR 9525042 (describing multiple violent incidents resulting from sexual solicitations made over Craigslist).

213 665 F. Supp. 2d 961 (N.D. Ill. 2009).

214 *Id.* at 963.

215 *Id.*

216 *See supra* Part IV.B.

217 Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 671 (7th Cir. 2008).

218 47 U.S.C. § 230(a)-(c) (2006).

line with "Good Samaritan" principles.[219] Even Chief Judge Easterbrook concedes the generality of Section 230, admitting that—whatever else may be true about the statute's provisions—Congress's primary purpose in enacting Section 230 was to prevent the recurrence of outcomes like that in *Stratton Oakmont*.[220] As has already been acknowledged, that case contains broader implications for Internet law than simply incentivizing content monitoring.[221]

In Sections 230(a) and (b), the majority of the findings and policies appear to have little to do directly with the blocking and screening of offensive web content. As detailed in Part I of this Comment, four of the five preliminary findings extol the Internet as an extraordinary technological leap, an unprecedented forum for political, entertainment, and cultural activities, and as an environment free of excessive government regulation.[222] Only the second finding makes any mention of "control over the information that [users] receive."[223] Likewise, two of the five policy aims deal exclusively with promoting "the continued development of the Internet" and preserving free market principles in a system "unfettered by Federal or State regulation."[224]

Encouraging greater freedom of access and minimal government regulation might initially seem antithetical to the goals of "blocking" and "screening," as leading First Amendment advocates argued when the Supreme Court struck down portions of the CDA in *Reno v. ACLU*.[225] Though the Seventh Circuit's limited immunity reading makes no attempt to reconcile these goals with its narrow understanding of Section 230(c)(1), the Fourth Circuit embraces them as integral to its statutory analysis in *Zeran*:

> The purpose of this statutory immunity is not difficult to discern. . . . Congress made a policy choice . . . not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages.[226]

This reading appears consistent with the free-market incentives and regulatory restraint emphasized by six of the ten congressional findings and principles.[227] As it has already been shown that broad immunity is consistent with encouraging the responsible monitoring and privacy controls for which

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219 *Id.* § 230(a)-(b).

220 *See Craigslist*, 519 F.3d at 671.

221 *See supra* Part I.A.

222 47 U.S.C. § 230(a).

223 *Id.* § 230(a)(2) ("These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.").

224 *Id.* § 230(b)(1)-(2).

225 *See generally* Reno v. ACLU, 521 U.S. 844, 871-74 (1997).

226 Zeran v. Am. Online, Inc., 129 F.3d 327, 330-31 (4th Cir. 1997).

227 *See* 47 U.S.C. § 230(a)-(b).

the statute calls,[228] it seems that both sets of policy aims, while not reconciled by the Seventh Circuit's limited immunity reading, are perfectly compatible under *Zeran*.

When read together, the twin policy aims of Section 230 indicate that Congress viewed broad immunity from liability for third-party content as a socially desirable end in itself. The *Zeran* decision alludes to this point,[229] but Judge M. Margaret McKeown's dissent in *Roommates.com* gives it full voice:

> With more than 1.3 billion Internet users and over 158 million websites in existence, a vast number of them interactive like Google, Yahoo!, Craigslist, MySpace, YouTube, and Facebook, the question of webhost liability is a significant one. On a daily basis, we rely on the tools of cyberspace to help us make, maintain, and rekindle friendships; find places to live, work, eat, and travel; exchange views on topics ranging from terrorism to patriotism; and enlighten ourselves on subjects from "aardvarks to Zoroastrianism." . . . *The bipartisan view in Congress was that the Internet, as a new form of communication, should not be impeded by the transference of regulations and principles developed from the traditional modes of communication.*[230]

The Seventh Circuit's analysis misses this point entirely. The limited immunity view does not see immunity as serving any purpose beyond that of incentivizing compliance with the CDA's regulatory aims. This view relegates immunity to the status of a regulatory tool, while in the process failing to fully incorporate Congress's aims in enacting Section 230. Yet Section 230, as approved by overwhelming margins of 414-16 in the House and 91-5 in the Senate,[231] not only sought to enable responsible behavior, but to promote freedom from liability for the businesses that drive Internet innovation *precisely because* that freedom constitutes a social boon.[232]

D. *Subsequent Legislative Support for* Zeran

Admittedly, the Congressional Record—especially the post-enactment discussions of a law—provides poor support for an interpretation of a statute.[233] Congress has expressed support for the broad immunity standard in the years since *Zeran*, stating that *Zeran* provides the proper reading of

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228 *See supra* Part IV.C.

229 *Zeran*, 129 F.3d at 330.

230 Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1176-77 (9th Cir. 2008) (en banc) (McKeown, J., dissenting) (emphasis added) (quoting Ashcroft v. ACLU, 535 U.S. 564, 566 (2002)).

231 Nichols, *supra* note 49, at 7.

232 *See* 47 U.S.C. § 230(a)-(b); H.R. REP. No. 107-449, at 13 (2002).

233 WILLIAM N. ESKRIDGE ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 1035-43 (4th ed. 2007). *But see* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (relying on subsequent legislative history as evidence of congressional acquiescence).

Section 230 in a committee report that preceded the passage of the Dot Kids Implementation and Efficiency Act of 2002 ("Dot Kids Act").[234] Toward the end of Judge McKeown's lengthy dissent in *Roommates.com*, she refers to this May 2002 House Report in defending the *Zeran* standard against encroachment by the Ninth Circuit majority.[235] The report explicitly endorsed the *Zeran* reading of Section 230, which at that time provided the only widely referenced standard of Section 230 interpretation:[236]

> ISPs have successfully defended many lawsuits using section 230(c). *The courts have correctly interpreted section 230(c),* which was aimed at protecting against liability for such claims as negligence (See, e.g., *Doe v. America Online*, 783 So.2d 1010 (Fla. 2001)) and defamation (*Ben Ezra, Weinstein, and Co. v. America Online*, 206 F.3d 980 (2000); *Zeran v. America Online*, 129 F.3d 327 (1997)).[237]

Of course, in 2002, neither *GTE Corp.* nor *Craigslist* had yet been decided, so it is not entirely clear what the authors of the Dot Kids Act would have thought of Chief Judge Easterbrook's alternative reading of Section 230.[238] Nonetheless, the citation to *Zeran* and other cases reaffirming the Fourth Circuit's reading,[239] as well as the explicit statement that Section 230 has been correctly interpreted by these courts, bear mentioning.

GTE Corp. and *Craigslist* do not address this expression of congressional approval. A circuit court cannot reasonably be expected to review the full record of congressional deliberations and reports relating to every piece of legislation. Furthermore, Chief Judge Easterbrook is practically and constitutionally opposed to reliance on post-enactment legislative history.[240] However, where he has already discussed the historical background of a piece of legislation, such a pertinent, on-point reference to Congress's intent in including Section 230 in the CDA seems relevant to any thorough attempt at reviewing the impact of the statute.[241] Though the Supreme Court

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234 H.R. REP. No. 107-449, at 13.

235 *Roommates.com*, 521 F.3d at 1187-88 (McKeown, J., dissenting) (quoting H.R. REP. No. 107-449, at 13).

236 H.R. REP. No. 107-449, at 13.

237 *Id.*

238 The Seventh Circuit decided *GTE Corp.* in 2003 and *Craigslist* in 2008. Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008); Doe v. GTE Corp., 347 F.3d 655 (7th Cir. 2003).

239 Ben Ezra, Weinstein & Co. v. Am. Online Inc., 206 F.3d 980, 986 (10th Cir. 2000) (stating that "we agree with the Fourth Circuit's decision in *Zeran*, 129 F.3d at 327"); Doe v. Am. Online, Inc., 783 So.2d 1010, 1013 (Fla. 2001) (confirming that "[w]e find persuasive the reasoning of the United States District Court in *Zeran v. America Online, Inc.*, 958 F. Supp. 1124, 1131-37 (E.D. Va. 1997), and the Fourth Circuit in *Zeran*, 129 F.3d at 331-32").

240 *See* Easterbrook, *Statutory Interpretation*, *supra* note 65, at 67 ("[T]ext and structure, as opposed to legislative history and intent (actual or imputed), supply the proper foundation for [a statute's] meaning."); *see also Craigslist*, 519 F.3d at 669-70.

241 KIM, *supra* note 67, at 41.

has held that "post-enactment history" carries little interpretive weight[242]—at least when compared to expressions of congressional intent at the time of enactment of the bill itself[243]—such a reference in the congressional report attached to a related law suggests not only widespread awareness of the *Zeran* decision, but also conscious acquiescence to the Fourth Circuit's interpretation.[244]

In every respect, the *Zeran* standard constitutes the best guide to interpreting Congress's intent in enacting Section 230. It represents the most internally consistent and widely supported interpretation of immunity. It accords with the full array of policy aims presented at the beginning of the statute. Furthermore, it has earned at least a limited degree of congressional approval in the years since it was decided. Conversely, the Seventh Circuit standard appears inconsistent with both the text and the full list of policy aims set forth in Section 230. Despite the policy concerns that motivate *Zeran*'s Seventh and Ninth Circuit detractors, the more prevalent Fourth Circuit reading of Section 230 should prevail.

CONCLUSION

The resolution of the circuit split regarding the scope of the immunity provided by Section 230(c)(1) of the CDA will be crucial to the future development of the Internet. The very chilling effect warned of by the *Zeran* court may reasonably be expected to result if the Seventh Circuit's limited immunity reading gains traction nationally and if more cases are decided along the lines of *Roommates.com*, *GTE Corp.*, or *Craigslist* within the next few years.[245] While the *Zeran* decision still provides the most commonly upheld standard for interpreting the scope of Section 230 immunity, the Seventh Circuit's alternative interpretation must be definitively rejected as inconsistent with the language of Section 230 and Congress's intent in enacting the CDA. Furthermore, in recognition of the freedom of technologi-

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242 Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 840 (1988) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." (quoting United States v. Price, 361 U.S. 304, 313 (1960))).

243 Se. Cmty. Coll. v. Davis, 442 U.S. 397, 411 n.11 (1979) ("[I]solated statements by individual Members of Congress or its committees, all made after enactment of the statute under consideration, cannot substitute for a clear expression of legislative intent at the time of enactment.").

244 KIM, *supra* note 67, at 46 (stating that congressional inaction may sometimes be construed as approval of an administrative or judicial interpretation of a statute). Congressional acquiescence is, of course, itself a questionable means of interpretative support. *See* Robert J. Gregory, *The Clearly Expressed Intent and the Doctrine of Congressional Acquiescence*, 60 UMKC L. Rev. 27, 45-52 (1991).

245 Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1185-86 (9th Cir. 2008) (en banc) (McKeown, J., dissenting) (arguing that the implications of holding Roommates.com liable set a "dangerous precedent" for "future internet cases," especially those that address providers of "interactive" web-based services).

cal growth encouraged by the statute and reflected by the *Zeran* standard, Congress should be loath to alter the scope of immunity currently provided by the CDA. If Congress wishes to address the difficulties that victims of online defamation experience, it must find a way to do so without undermining the free development of the Internet—a development which, to no small degree, has resulted from the broad immunity provided by Section 230.