

# DAN O'HANLON ESSAY COMPETITION

- First Prize: \$1,000
- Second Prize: \$500

## The 2021 Essay Question

*Should Section 230 of the Communications Decency Act of 1996 be abolished or reformed, or Big Tech be regulated by the government in some other or additional way?*

*If so, why and what should the change or regulation be? If not, why not?*

This year's essay question asks the writer to consider how today's information environment – especially with respect to social media – impacts our democracy and whether government has some role to play in regulating that environment.

In considering the question, you should consider the role that truth might play in maintaining a democracy. One view of this question can be found in the essay, "Why Truth Matters in a Democracy," by Sophia Rosenfeld, the Walter J. Annenberg Professor of History at the University of Pennsylvania. <https://www.abc.net.au/religion/sophia-rosenfeld-why-truth-matters-for-democracy/11629714>.

Your essay should demonstrate an understanding of the First Amendment and how it applies to this question.

## Background

More than 100 years ago, in his powerful dissent in *Abrams v. United States* (1919), Justice Oliver Wendell Holmes invoked the "marketplace of ideas" theory to advocate broad protections for the free speech guaranteed by the First Amendment to the U.S. Constitution.

In *Abrams*, the majority affirmed the government's prosecution of an anti-war anarchist under the Espionage Act of 1917 for publishing antiwar and antigovernment leaflets. Holmes, however, dissented from the Court's decision, invoking the "marketplace" theory articulated by John Stuart Mill in *On Liberty* (1859), stating: "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market...." <https://www.oyez.org/cases/1900-1940/250us616>

Since then, the Supreme Court has invoked this theory to protect speech again and again. Indeed, First Amendment scholars rely upon the marketplace theory to argue against allowing private corporations, such as Facebook and Twitter, to decide what constitutes "hate speech" or otherwise unacceptable expression on their platforms. First Amendment scholar Nadine Strossen summarizes the argument here: <https://www.youtube.com/watch?v=bBDFowUx668>.

In 2021, the marketplace of ideas is predominantly online: in other words, it is in the hands of the private corporations that own the internet platforms. Various online platforms provide the vehicle of communication for edited and fact-checked content and also for content posted by third parties that is neither edited nor fact-checked. Moreover, there is an active, [profit-motivated trade in disinformation](#) and misinformation online, where players engage in the spreading of falsehoods and conspiracy theories, purposely seeking to disrupt and exacerbate societal and political tensions and controversies. One current example of this phenomenon is described here: <https://www.nytimes.com/2021/07/25/world/europe/disinformation-social-media.html?searchResultPosition=2>

Perhaps most significant, the online information marketplace is impacted by algorithms designed to prioritize how content is delivered to users, taking advantage of analytics based on the users' own engagement to maximize user attention, invoke outrage, and reinforce confirmation biases. The internet platforms, such as Facebook and Google, do this in order to maximize profits through the sale of advertising. The Netflix documentary "[The Social Dilemma](#)" provides a dramatized explanation of how algorithms work and their impact. <https://www.netflix.com/search?q=the%20social%20dilemma>

An overview of the legal challenges created by the online environment is provided by Dawn Carla Nunziato's law review article "[The Marketplace of Ideas Online,](#)" *94 Notre Dame L. Rev.* 1519-1584 (2019)

[https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2694&context=faculty\\_publications](https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2694&context=faculty_publications)

Other information platforms – such as newspaper and magazine publishers and radio and television broadcasting networks – can be sued if they publish or broadcast false or defamatory content that results in damage to someone. This provides an incentive for them to avoid publishing false or misleading information. Internet platforms, however, enjoy immunity from lawsuits for false information published on their platforms. This immunity is provided by Section 230 of the Communications Decency Act of 1996; when it was granted, 25 years ago, it was thought to be needed to allow the nascent internet to flourish. However, it has since been called into [question](#). See some discussion here

<http://library.cqpress.com/cqresearcher/document.php?id=cqresrr2020100200>

and here: <https://www.nytimes.com/2018/09/14/sunday-review/politics-disruption-media-technology.html>

Indeed, the U.S. Justice Department under multiple administrations has advocated that Section 230 be reformed and [many bills](#) have been introduced in Congress that seek to regulate the new “marketplace” created by the internet in various ways. <https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html>

Big Tech, however, in repeated Congressional hearings, through lobbying, and otherwise, insists that it can regulate itself, and [opposes Section 230 reform](#) or other regulation

<https://www.reuters.com/article/us-usa-tech-section-230-explainer/explainer-whats-in-the-u-s-law-protecting-internet-companies-and-can-it-be-changed-idUSKBN27D265>

while others argue that there are threats and [problems](#) with various proposed reforms. <https://slate.com/technology/2021/06/section-230-reform-antitrust-big-tech-consolidation.html>

What do you think about these issues? Should changes be made? Why or why not?  
And if so, what should these changes be?