

NetChoice Promoting Convenience, Choice, and Commerce on The Net

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July 15, 2019

Senator Ted Cruz
Chairman, Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Washington, DC

Re: *Hearing to examine Google and censorship through search engines, July 16, 2019*

Dear Chairman Cruz, ranking member Hirono, and members of the subcommittee:

I respectfully submit these comments for the record of your July 16, 2019 hearing to *examine Google and censorship through search engines*¹.

Given the importance of social media, we are troubled that today's hearing is driven by some members of congress seeking to regulate and/or break-up large platforms like Google, Twitter, and Facebook. Those demands are based on perceptions that these major social media platforms are biased against conservative user content that is uploaded to these platforms.

We realize that *perception is reality* for a user whose posts have been blocked or removed, so it is important that concerns held by conservatives are acknowledged and answered. But it is worth analyzing one of the most often cited examples of anti-conservative bias: PragerU.

Case study: YouTube moderation of PragerU videos

Many on the political right feel that their posts are moderated more strictly on social media than posts from the political left. Some conservatives provide anecdotes that they believe prove their accusation. But do these anecdotes stand up to analysis, and are they evidence of bias in content moderation?

One conservative content creator that is often cited as evidence of anti-conservative bias is PragerU, whose educational videos are immensely popular on YouTube. NetChoice analyzed YouTube's moderation of PragerU's videos and found no evidence that any PragerU videos were taken-down or blocked. What YouTube *has* done is to apply its content rating of *Teen* or *Mature* to about 12% of PragerU's videos, because of content regarding one or more of these subjects:

- | | |
|----------------------------------|-----------------------------|
| Mature Subjects | Drugs & Alcohol |
| Sexual Situations | Profane and Mature Language |
| Incendiary and Demeaning Content | Violence |

¹ NetChoice is a trade association of e-Commerce and online businesses, at www.netchoice.org. The views expressed here do not necessarily represent the views of every NetChoice member company.

Videos that YouTube rates as Teen or Mature are not removed from the platform. Instead, videos with those ratings are not shown in searches or video feeds to YouTube users who have opted-in to "Restricted Mode" in their YouTube account settings -- presumably because younger family members may be using that computer or shared YouTube account. Any YouTube user whose restricted mode is left in the default setting (Off), or who switches Off restricted mode, is able to see all PragerU videos.

To help understand PragerU's moderation on YouTube, we prepared the infographic below.



See the Facts: PragerU and YouTube

In 2017, Prager University sued YouTube for restricting the audience of some of their "PragerU" videos on the platform, alleging anti-conservative bias.

But how does this accusation stand up to the numbers?

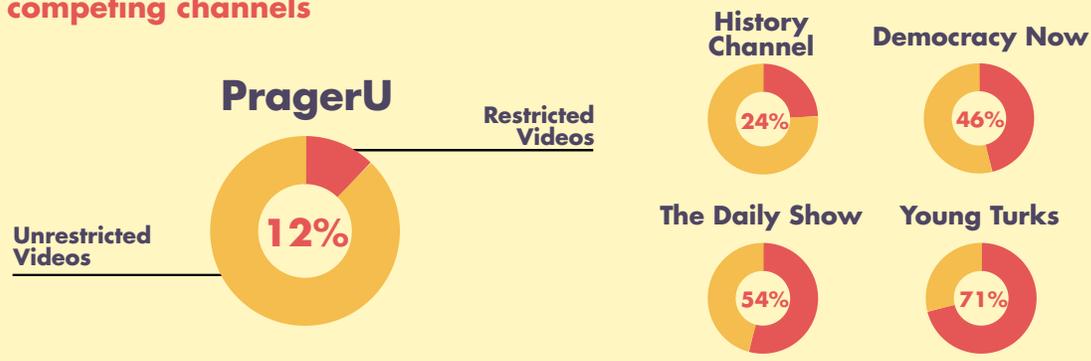
YouTube rates videos as Teen or Mature if the content includes:



YouTube users can opt-in to "restricted mode" so that videos rated as Teen or Mature do not show.

About 1.5% of YouTube users are opted-in to "restricted mode."

PragerU videos are more available on YouTube than videos made by competing channels



PragerU's Performance on YouTube

Total Subscribers (Thousands)



Total Views (Millions)



Note that only 12% of PragerU's videos earned a Teen or Mature rating, which is *half* the rate for videos uploaded by *The History Channel*. *The Daily Show* has its videos rated Teen or Mature at a rate *4 times higher* than PragerU. And the liberal video creator *Young Turks* earns that rating for over 70% of its videos. This should give some pause to those who claim YouTube moderates conservative videos more harshly than liberal videos.

And as seen in the two time-series charts at the bottom of the infographic above, PragerU is experiencing exponential growth for both its subscriber base and for views of its videos on YouTube – despite the Teen/Mature rating restriction on 12% of PragerU's videos.

The PragerU case is but one of many anecdotes cited by conservatives. The analysis for each anecdote is unique, depending upon the content uploaded and community standards as applied by the platforms. But the PragerU case is often mischaracterized, so it deserved further analysis which reveals this perception of bias is not fully backed by the facts.

However, *some* anecdotes of anti-conservative bias are provably true, and there may well be repeated instances where a social media platform interprets its community standards in ways that are demonstrably slanted against conservatives. The question is, what should Congress do to address this concern? Below we explore several approaches that have been suggested.

Government cannot impose speech regulation on private online platforms

As is well-known to all on this committee, our First Amendment prevents the government from directly regulating freedom of speech. To quote representatives from the Charles Koch Institute and TechFreedom²:

The First Amendment is to protect our speech and association *from* the government – not to empower the government to control our speech and association. If we support a bakery's decision about what to put on a wedding cake, we also support private platforms deciding what speech occurs on their platform.

And as NetChoice general counsel Carl Szabo wrote in *Daily Caller* last May³:

Fox News can be a conservative organization, while MSNBC can cover the other end of the political spectrum. Both rightly operate without the government dictating what political views they favor. Likewise, core conservative principles would oppose Congress holding hearings and passing laws to ensure that the Drudge Report doesn't favor conservative views over liberal ones.

There is neither a political consensus nor a constitutional pathway for Congress to impose speech codes on private social media platforms.

² May 13, 2019. Jesse Blumenthal and Ashken Kazaryan in TechFreedom Podcast #247: "Seeing the Silver Lining in the Current Techlash". Audio at <http://podcast.techfreedom.org/e/247-seeing-the-silver-lining-in-the-current-techlash/>

³ May 15, 2018. Carl Szabo in *The Daily Caller*, "SORRY CONSERVATIVES: You Don't Have Free Speech On Facebook Or Twitter", at <https://dailycaller.com/2018/05/15/sorry-conservatives-no-social-media-free-speech/>

Congress should not undermine Section 230, which enables user-created content online

Section 230 of the Communications Decency Act was enacted by Congress in 1996, to enable online platforms to host user content with certain limits on legal liability for content and conduct of the user.

As 16 conservative groups wrote to Congress last week⁴:

Truly diverse political speech has often been limited by traditional broadcast news or major newspapers. By contrast, social media has empowered an explosion of opinionated speech online, cutting out the filters and injecting users' ideas into mainstream media discussions.

These new venues for conservative speech are made possible by Section 230 of the Communications Decency Act. Section 230 has allowed anyone with Internet connectivity to have a voice that can be heard around the world.

Section 230 strikes a careful balance: the law holds individuals, not the tools they use, responsible for their actions online while demanding online intermediaries comply with all federal laws.

Senator Josh Hawley recently proposed legislation that undermines Section 230 by requiring large social media sites to satisfy the Federal Trade Commission with "clear and convincing evidence" that they are neutral when moderating user created content regarding political views. Former Congressman Chris Cox was co-author of Section 230, and observed in his *Wall Street Journal* op-ed last month⁵:

Will [the FTC] have some way to determine whether the website's "intent" in moderating was to exert political bias?

These questions would likely prove academic, as Sen. Hawley's bill provides a way of avoiding the unbounded legal liability that would come with being labeled politically biased. Any conceivably "political" content, no matter how hateful, dangerous or violent, will be left untouched—without concern for taste, public safety or the common decency one otherwise might expect in public discourse.

Ending content moderation on the largest, most popular social-media sites would be a game-changer. There would be nothing to prevent them from becoming extremist hubs like 8chan, a message board that has fostered a reputation as a lawless space for the most vitriolic content. Everything from jihadist screeds to supremacist hate speech is protected from government censorship by the First Amendment.

Without Section 230 liability limits, social media websites would bear little resemblance to the Facebook, Twitter, and YouTube we know today. These platforms would each have to hire tens of thousands of people to review uploaded videos, comments, and photos, not to mention the content of web pages linked to in search results. Consider that Google alone processes more than 800 million search results a day, all based on content created by others.

⁴ July 10, 2019, "16 Groups Write Letter to Congress Regarding Section 230", at <https://www.protectingtaxpayers.org/technology/16-groups-write-letter-to-congress-regarding-section-230/>

⁵ June 23, 2019, Christopher Cox, outside counsel for NetChoice, in the *Wall Street Journal*, "Hawley's Bad Idea to Protect Speech." At <https://www.wsj.com/articles/hawleys-bad-idea-to-protect-speech-11561317846>

This scale of content moderation would be unaffordable for any but the very largest platform companies, creating a new barrier to entry for new competitors. But even the largest platforms are likely to forego *any* content moderation, since the costs of libel lawsuits could still present unacceptable levels of risk. Amazon and Yelp, for example, would likely curtail user reviews of services and products, since these platforms could be sued for libelous comments by users.

The consequence of legislation that eviscerates lawsuit protection from Section 230 is predictable: we'll no longer have large platforms that let users post their own news and views. Author Jeff Kosseff was spot-on with the title of his new book on Section230: "[The 26 Words that Created the Internet.](#)"

Thank you for considering our views, and we are available to field your questions.

Sincerely,

A handwritten signature in black ink that reads "Steve DelBianco". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Steve DelBianco
President, NetChoice