Section 230, Social Media, and Status Quo: Considerations for Reform in the Digital Age

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I. INTRODUCTION

Section 230 of the Communications Decency Act, often credited with modernizing the Internet, is an instrumental piece of legislation shaping our twenty-first century information technologies. One of the critical consequences arising from Section 230 is the overwhelming prominence of social media platforms, made possible by provisions of the Section providing the platforms with immunity from liability for the actions of third-party users of their platforms. However, the expansive—and still growing—grasp of these platforms concerns many, producing a debate about what this dynamic and ever-changing technology means for the future of Section 230 and social media platforms. Today, society continues to grapple with urgent questions regarding whether social media platforms should possess the public authority to censor various forms of speech, and if not, what would be the most appropriate approach for reform.

This Article addresses these questions by examining Section 230, the current debate regarding its liability immunity, and various suggested modes of reform. More specifically, Part II of the Article provides a concise exploration of the historical context of free speech and its influence on the formation of Section 230. Part III covers the current state of the law by explaining Section 230's text and judicial interpretation. Part IV discusses the impact of Section 230, the current debate surrounding Section 230, and why the debate has such momentum at this particular time. Part V explores various proposed solutions to Section 230. Part VI analyzes these proposed solutions, the current state of the law, and what future reform should hold. Lastly, Part VII wraps up the arguments discussed about Section 230.

II. BACKGROUND OF SECTION 230

The First Amendment of the Constitution is one of the pillars of American life.[1] The First Amendment's Free Speech Clause is relatively straightforward, stating that "Congress shall make no law abridging the freedom of speech."[2] The Founding Fathers believed that "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; . . . that public discussion is a political duty; and that this should be a fundamental principle to the American government."[3] The "constitutional safeguard" of free speech "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people"[4] and is "a fundamental principle of our constitutional system."[5] While acknowledging the fundamental importance of freedom of speech and expression, it is crucial to note that the Clause's application is restricted solely to governmental actions and not to those of private entities.[6] Still, free speech is equally instrumental to American society today as it was at its founding. However, our landscape has distinctly changed, leaving many questions about the role of free speech in modern twenty-first century life.

Notably, the advent of the Internet and social media has created an environment and lifestyle unimaginable to our country's founders. Individuals all around the globe can share infor-

mation instantly, giving the impression of an increasingly boundaryless world. Smartphones, which became mainstream technology around the time of Section 230's drafting,[7] are now used by almost five billion people worldwide.[8] Additionally, today 93% of American adults use the Internet[9] and 72% use social media.[10] Social media giants like Facebook and Twitter have roughly 2.89 billion[11] and 330 million[12] global monthly active users respectively. More regionally, Facebook has approximately 261 million active monthly users in the United States and Canada combined,[13] and Twitter has roughly 68 million active monthly users in the United States.[14] Since the rise of modern technology and the consequential "information Big Bang,"[15] lawmakers and the courts have worked to apply free speech principles to this dynamic landscape.[16]

One of the most significant pieces of legislation is Section 230 of the Communications Decency Act of 1996, often referred to as "Section 230" or "230."[17] Congress enacted the Communications Decency Act (CDA) as part of the Telecommunications Act of 1996.[18] As a result of the rise of the Internet, Congress wanted to modernize the Telecommunications Act of 1996, which provided "protections against obscene, lewd, indecent, or harassing uses of a telephone."[19] While a few provisions of the CDA that "directly imposed liability for transmitting obscene or harassing material online" have been struck down by the U.S. Supreme Court as unconstitutional,[20] Section 230 remains standing and is extremely important to the development and use of the Internet as we know it.[21]

III. CURRENT STATE OF SECTION 230

A. Text of Section 230

The heart of Section 230 comes from two different protections in Section 230(c), which is captioned "Protection for 'Good Samaritan' blocking and screening of offensive material."[22] To understand Section 230 and its effect, one must take notice of the distinction between "interactive computer service" and "information content provider." Section 230(c)(1) states that "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."[23] "Interactive computer service" is defined in the statute as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet . . . ."[24] Courts consider social media platforms like Facebook and Twitter to be "interactive computer services,"[25] as well as other types of online platforms such as Yahoo! and Craigslist.[26] In contrast, an "information content provider" means "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."[27] Thus, Section 230 creates a distinction between "those who *create* content and those who *provide access* to that content[.]"[28] Ultimately, Section 230(c)(1) means that social media platforms and other online platforms—those who *provide access* to content—cannot be held liable as the *publishers* of the speech of their third-party users. In contrast, analog platforms (such as newspapers) can be held liable as publishers of a third party's speech.[29]

Section 230's second protection comes from Section 230(c)(2), which states:

> No provider or user of an interactive computer service shall be held [civilly] liable on account of—(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[30]

This provision "ensures that service providers may not be held liable for voluntarily acting to restrict access to objectionable material."[31] By protecting platforms from liability for "good faith" or "Good Samaritan" efforts to remove offensive material, Congress hoped to protect minors from obscene or indecent material on the Internet.[32]

While protecting minors from offensive material on the Internet was the primary purpose of Section 230, Congress also had many other objectives in mind when passing the legislation. Congress (albeit with a twentieth-century understanding of the Internet) *intentionally* created this broad immunity that is notably distinct from more traditional forms of media such as newspapers. Congress understood that "the rapidly developing array of Internet and other interactive computer services" represented an "extraordinary advance in the availability of educational and informational resources to [American] citizens," offered "a forum for true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity," and was relied on by Americans for "a variety of political, educational, cultural, and entertainment services."[33] Congress also noted that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, *with a minimum of government regulation*."[34] Thus, the broad immunity given to service providers was a purposeful effort to allow free speech and e-commerce on the internet to continue its growth.[35] Additionally, Congress also hoped that providing such immunity—and thus keeping platforms and other service providers from having to worry about liability constantly—would *incentivize* service providers to moderate their content.[36]

The statute also identifies five exceptions to the immunity it provides. Section 230 does not apply to (1) the enforcement of federal criminal law, (2) intellectual property law, (3) the enforcement of "any State law that is consistent with [Section 230]," (4) the Electronic Communications Privacy Act of 1986 and similar state law, and (5) various civil actions and state criminal prosecutions where the conduct underlying the charge violates sex trafficking law.[37] The fifth exception is the most recent amendment to Section 230; it was added by the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) in 2018.[38]

B. Judicial Interpretation of Section 230

Judicial interpretation of Section 230 has provided a broad scope of immunity to social media platforms and other service providers. This grant of immunity is vital because of

the considerable growth of the Internet since 1996. In *Zeran v. America Online, Inc.*, the seminal case covering the scope of Section 230, the Fourth Circuit rejected a claim that AOL was liable as a "notice-based" distributor for defamatory statements published on the online bulletin board.[39] The court held that Section 230's immunity for "publishers" included both original publishers and distributors because imposing "notice-based liability" against distributors would *deter* service providers from regulating and monitoring the content posted on its service, rather than incentivizing them to do so.[40] Moreover, the court emphasized that service providers' immunity from liability for the "exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content" is essential to maintaining freedom of speech "in the new and burgeoning Internet medium."[41] In sum, holding that service providers could be liable as "notice-based" distributors would effectively contradict Congress's goals of Section 230.

Section 230's most famous impact—and the focus of this article—is the role it plays in the context of social media platforms.

Zeran's interpretation of Section 230 is significant and many courts rely on it in Section 230 litigation. For example, in 2003, the Ninth Circuit ruled in *Batzel v. Smith* that Section 230's definition of "interactive computer services" included not only "services that provide access to the Internet as a whole" but also "'*any*' information services or systems" that "allow 'multiple users' to access 'a computer server.'"[42] *Batzel*'s rearticulated definition of "interactive computer services" and *Zeran*'s inclusion of distributors in Section 230's protection for publishers arguably paved the way for courts to hold that online platforms, including Twitter, Facebook, Yahoo, and Google are "internet service providers" and thus fall under the law's protections.[43]

IV. SECTION 230 LAW IN APPLICATION

A. Impact of Section 230

Section 230's most famous impact—and the focus of this article—is the role it plays in the context of social media platforms.[44] However, to understand the full significance of Section 230 and the gravity of its potential reform, it is crucial to realize the depth and breadth of its impact. When we say that Section 230 "created the Internet" as we know it today,[45] this goes beyond the existence of social media platforms. Section 230 and the Internet form an instrumental part of our economy. Section 230's liability protections "enable[] and protect[] a wide variety of businesses and business models."[46] Without Section 230's immunizations, the United States economy would lose roughly "$75 billion annually," employee earnings would lower "by some $23 billion annually," and "over 425,000 jobs" would be eliminated.[47] Moreover, Section 230 allows free discourse in discussion boards and product and business reviews, which is vital to industries such as ridesharing, vacation rental, and online shopping.[48] Thus, Section 230's impact extends beyond businesses and platforms, reaching ordinary individuals as users and consumers.[49]

Businesses affected by Section 230 include companies and platforms of all sizes, not just large and well-known names such as Google and Facebook. While large corporations—particularly social media platforms—are at the forefront of the discussion around Section 230,[50] small and mid-size companies should still be considered when examining the law's problems and potential solutions to those problems. Irrespective of their size, millions of "apps, websites, and platforms" reap Section 230's benefits.[51] Additionally, while Section 230 plays a significant role in the current free flow of discourse on social media giants,[52] such platforms would fair far better without Section 230's protections than small and mid-size platforms would.[53] Not only are Big Tech companies in a better place to afford the cost of wildly-increased litigation,[54] but developing such vast content moderation will be a more feasible task, both cost- and data-wise.[55] This inequity will severely harm existing non-Big Tech platforms and provide a significant barrier to entry for new companies, contributing to a Big Tech monopoly.[56]

B. Debate Surrounding Section 230 and Why It's an Issue Now

Section 230 is an extremely important piece of legislation with countless ripple effects. However, the resulting free reign of social media platforms to block or permit different kinds of speech is a topic of growing concern.[57] The debate surrounding Section 230 is simultaneously scattered and far-reaching, as complaints come from all angles. The problem with Section 230 appears to be two-fold: social media platforms are both regulating their content *too much*, resulting in biased and arbitrary censorship of social media users, and regulating their content *too little*, allowing hate speech and mis- and disinformation to permeate the platforms.[58] These concerns ultimately stem from the sheer amount of control platforms have, as Section 230 lets the platforms serve as the primary vehicle for creating, applying, and enforcing regulations. Thus, the platforms make the decisions and can do so without being transparent.[59] The lack of transparency among platforms' content moderation decisions (particularly among the Big Tech platforms) is one of the largest sources of frustration for Section 230 debaters.[60] Moreover, even if there is agreement that something in social media content moderation needs to change, there is further widespread debate about *what* this type of change should look like, *how* it should be enacted, and *who* is the best authority to enforce and implement it.[61]

It is also essential to understand the context of how and why Section 230 has become such a hot topic in the past several years. The time frame of Donald J. Trump's presidency plays a unique and significant role in Section 230's debate. Trump's unprecedented use of social media platforms throughout his campaigning and time in office—whether this be in response to growing social movements such as #MeToo[62] and #BlackLivesMatter,[63] to a global pandemic[64] or just everyday life[65]—represented a stark shift from how prior presidents have used social media.[66] The first noteworthy event especially relevant to the Section 230 discourse is the 2016 presidential election. Some have argued that the "primary trigger" for such reform-focused discussion is the Russian government's interference in the election.[67] The COVID-19 pandemic and the 2020 presidential election also pose essential contexts for the Section 230 debate, as social media giants such as Twitter and Facebook began labeling posts that potentially contained "fake news" or misinformation on these topics with warning messages.[68] In response, Trump took to Twitter and advocated for heightened regulation of social media platforms.[69] He further targeted Section 230 by issuing an "Executive Order on Preventing Online Censorship."[70] He later threatened to veto the National Defense Authorization Act (NDAA), an "annual defense funding bill," if Congress did not revoke Section 230.[71] These tensions reached their height in the January 6, 2021 insurrection, leading to several large platforms removing Trump's presidential and personal accounts.[72] This unexpected and unprecedented action left many questioning the scope of social media platforms' content moderation power.[73]

In the non-presidential context, it is also important to

recognize the general increase in trolling and disinformation in the past several years. Social media's ease of use—including anonymous usage—and vast quantities of use lends itself to an environment conducive to "trolling," hate speech, and mis- and disinformation.[74] Moreover, artificial intelligence is also capable of and does produce such content.[75] Concerns about this type of content have also contributed to the notion that social media platforms' content moderation needs to be more thoroughly regulated.[76]

V. PROPOSED SOLUTIONS

As a result of the discourse around Section 230, lawmakers and consumers have proposed various solutions to remedy the problems around social media content moderation. This Article discusses and provides commentary on four categories of these solutions: (1) revoking Section 230 in its entirety; (2) amending Section 230 by federal legislation; (3) intervention by individual state governments; and (4) avoiding government regulation entirely and instead relying on the platforms to self-regulate.

A. Revoking Section 230

President Biden and former President Trump have called to revoke Section 230.[77] Their advocation stems from different reasons, each representing one side of the two-fold problem[78] and reflecting the general dichotomy between the views of conservatives and liberals on Section 230.[79] Trump's basis for seeking revocation of Section 230 stems from platforms' supposed bias against conservative voices. In contrast, Biden's motive stems from the supposed problem of rampant misinformation on social media platforms, and he thus dislikes the law protecting social media platforms from liability for such misinformation.[80]

However, many argue that entirely revoking Section 230 would likely do more harm than good for the giants and smaller platforms.[81] Section 230's protections have contributed so widely to the existing Internet—and by extension, many facets of our economy[82]—that revoking the law would undoubtedly change our entire Internet and social media landscape.[83] Moreover, the consequences of repealing the law are unpredictable,[84] and it is unknown whether the lack of protection would cause social media platforms to regulate more or less.[85] And if platforms were required to regulate more, smaller platforms would be particularly disadvantaged, unable to compete with the resources of giant platforms.[86]

B. Amending Section 230

A much larger discussion revolves around *amending* Section 230 rather than repealing it entirely. Proposals to amend and reform Section 230 in various ways have been widespread and mainly gained steam after Congress enacted FOSTA in 2018.[87] Since then, at least twenty-six bills in Congress have spoken to Section 230, and the executive branch and outside commentators are also contributing to the dialogue.[88] Some of these proposals reflect the design of FOSTA, carving out certain kinds of claims as exceptions to Section 230's immunity.[89] Other recommendations inflict broader liability on service providers, requiring that offensive content be reported or removed within a specific time frame.[90] In particular, this article will examine two separate amendment proposals that primarily fall into the latter category: the Department of Justice's and Senator Josh Hawley's.

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The Department of Justice unveiled its proposal to reform Section 230 on September 23, 2020 on behalf of the Trump Administration.[91] The proposal predominantly inflicts broader liability but also includes some specific carve-outs. The DOJ argues that its reform is necessary because of the change from social media platforms "function[ing] as simple forums" to using "sophisticated algorithms to suggest and promote content and connect users."[92] This substantial increase in the power of platforms can be "abused" instead of used "for good."[93] The DOJ finds two main problems with the way Section 230 is functioning: (1) social media platforms are doing a poor job of "addressing criminal content on their services" and thus need more incentives, and (2) social media platforms are not sufficiently "transparent and accountable" in their current content moderation.[94]

Four categories of reform address these two problems.[95] First, the proposal "incentiviz[es] online platforms to address illicit content" by taking away Section 230's civil immunity from "Bad Samaritan" platforms—platforms that knowingly host illegal (by statutory or court-judgment means) content—and platforms that purposefully promote, facilitate, or solicit unlawful content.[96] The DOJ argues that the proposal's "heightened" mens rea requirement prevents the law from sweeping too broadly.[97] The proposal also includes two specific categories of claims that would be exempt from immunity: child sexual abuse, terrorism, and cyber-stalking; and actual knowledge or court judgments.[98]

Second, the proposal increases the federal government's role in content moderation by allowing the DOJ and other federal agencies to initiate *civil* enforcement actions rather than just criminal enforcement.[99] Third, the proposal "clarif[ies] that federal antitrust claims are not covered by Section 230 immunity."[100] The DOJ's articulated purpose for this revision includes promoting competition among Internet companies.[101]

Fourth, the proposal "promote[s] free and open discourse online and encourage[s] greater transparency between platforms and users" by taking away platforms' ability to use its discretion and remove content it deems objectionable and instead allowing platforms to remove only specific categories of content.[102] Additionally, the proposal inserts a definition of "good faith" that requires platforms to provide a "reasonable explanation" for content moderation actions.[103] The platform will receive Section 230 immunity only if the "reasonable explanation" is satisfactory.[104]

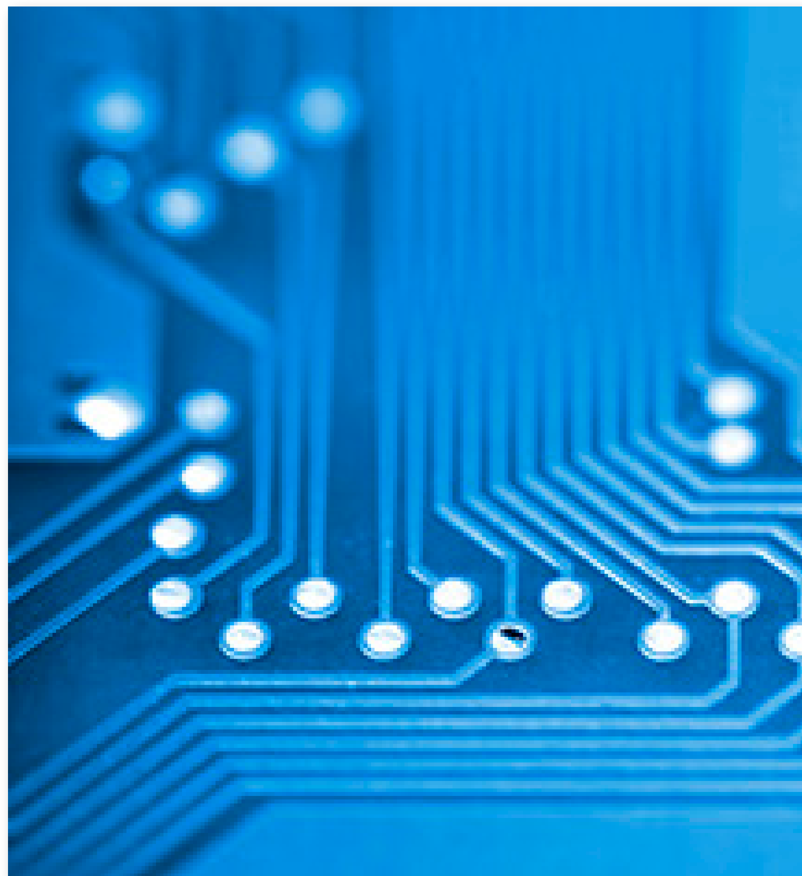
U.S. Senator Josh Hawley's Ending Support for Internet Censorship Act also proposes to amend Section 230.[105] Senator Hawley's proposal originates from the concern that platforms moderate their content with an anti-conservative bias.[106] The Act emphasizes that it only applies to "big tech companies," which it defines as those with more than: (A) thirty million active monthly users in the United States; (B) 300 million active monthly users globally, or (C) $500 million in global annual revenue.[107] The Act removes Section 230's automatic immunity for companies that fall under those parameters. It replaces it with the "ability to *earn* immunity through external audits" every two years that the companies themselves finance.[108] In these audits, companies must "prove to the FTC by clear and convincing evidence that their algorithms and content-removal practices are politically neutral."[109]

C. State Government Involvement

Another method of Section 230 re-

form involves regulation by state governments. Texas and Florida, attempting to reduce alleged censorship bias among social media platforms, passed laws regarding social media content moderation.[110] Both laws are currently the subject of litigation for their constitutionality.[111]

In September 2021, Texas enacted Texas House Bill 20 ("HB 20").[112] The bill makes it unlawful for social media platforms with more than fifty million active monthly users in the U.S. to "censor a user, a user's expression, or a user's ability to receive the expression of another person based on: (1) the viewpoint of the user or another person; (2) the viewpoint represented in the user's expression; or (3) a user's geographic location in this state or any part of this state."[113] The law provides two exceptions to this prohibition, allowing platforms to moderate expression that is (1) specifically requested by an organization aimed at preventing sexual abuse and sexual exploitation and (2) "directly incites criminal activity or consists of specific threats of violence targeted against a person or group" because of specific characteristics.[114] Thus, platforms would not be penalized for or prohibited from removing obscene or criminal content. HB 20 also requires these social media platforms to develop an "acceptable use policy."[115] The "acceptable use policy" requires that the platform develop an accessible complaint system, produce routine "transparency" reports of the removed content, and release its content regulation procedures.[116]



The law reflects conservatives' concern that social media companies possess an anti-conservative and anti-religious bias. In response to this concern, the regulation intends to "prohibit social media companies' ability to silence viewpoints on their platforms and allow users who were wrongly censored to seek recourse."[117] In December 2021, a federal district court blocked HB 20.[118] The court held that "social media platforms have a First Amendment right to moderate content disseminated on their platforms."[119]

Florida's law—Senate Bill 7072—goes even further than Texas's law. It prohibits social media platforms with more than 100 million active monthly users globally[120] from "barring from its site any candidate for office," "using an algorithm to put a candidate's post in the proper feeds—to put the post in the feed of a user who wishes to receive it or to exclude the candidate's post from the feed of a user who does not wish to receive it," and "taking action to 'censor, deplatform, or shadow ban' a 'journalistic enterprise'" based on its content.[121] The law also has various disclosure requirements.[122] These regulations are contrary to a private entity's typical free speech rights.[123] In June 2021, a federal district judge issued a preliminary injunction for the law, holding that the law violates the First Amendment.[124]

D. Avoiding Government Involvement and Relying on Self-Regulation

Another set of proposed solutions to social media content regulation advises steering clear of government regulation altogether and instead relying on the platforms themselves—individually or as an industry—to take further regulatory steps. First and foremost, because of the First Amendment, "American law and culture strongly circumscribe government power to regulate speech on the Internet and elsewhere."[125] There are few exceptions to free speech protection because "[t]he United States highly values individual speech in the public sphere."[126] Not only does the First Amendment's free speech protection allow users of platforms to post their viewpoints, but it—along with Section 230—allows social media platforms to decide what speech they want to have on their platforms.[127] Thus, many argue that government regulation of social media content poses too big a risk to this fundamental right; government officials are not the right players to deal with any content moderation problem, and any possible gains of government regulation are drastically outweighed by the dangers.[128] Instead, regulation is better left to the private sector.[129]

Self-regulation by social media platforms refers to "the steps companies or industry organizations take to preempt or supplement governmental rules and guidelines that govern their activities."[130] Self-regulation encompasses a variety of regulation forms at both the individual firm level and the industry level.[131] Proponents of self-regulation emphasize that such a solution is likely to be effective *now* because of the ongoing dialogue, as self-regulation works best when there are corresponding legitimate threats of government regulation[132] and when the long-term benefits outweigh the short-term costs.[133] Both of these factors are present for social media platforms: platforms are facing threats of government intervention at both the federal and state levels,[134] and prior instances of platforms engaging in self-regulation (specifically with terrorism and sexual exploitation) illustrate that they know content moderation actions can be ultimately worthwhile.[135] Moreover, given our current societal backdrop of a pandemic, and given areas such as "quality, health, [and] safety" are "likely to be better handled by self-regulation and platform governance rules . . . especially when the technology or platform operations are difficult for government regulators to understand and monitor,"[136] it is a possible time for self-regulation. While content moderation regarding hate speech and mis- and disinformation can be difficult because such topics involve more of a gray area than terrorism or sexual exploitation,[137] self-regulation is a possible alternative to government intervention.[138]

Another proposed avenue of self-regulation is *industry*

regulation among platforms rather than individual-platform regulation.[139] Self-regulation at the industry level often involves "forming collective institutions like industry associations"[140] or "self-regulatory councils ("SRC")"[141] that regulate with "common norms and standards."[142] These institutions often "develop standards and protocols that promote order and efficiency across the industry."[143] This type of industry regulation is particularly viable among the large social media platforms because they are in the same market, have "presumably similar business models and economic incentives,"[144] and are an industry where said regulation could enhance public trust.[145] The premise of industry-wide regulation may also reduce the deterrent effect of the cost of such rules because all platforms will endure the cost and thus be on equal footing.[146]

VI. ANALYSIS

To help ensure that reform will be realistic and successful, the discourse around Section 230 should take into consideration five points: (1) the Internet is exceptional and utterly unique; (2) the twenty-first-century backdrop of extreme political polarization and the rise of "cancel culture" is an unignorable component of the debate; (3) the vast impact of Section 230 and its proposed solutions on platforms of all sizes is a vital part of the law's influence; (4) the platforms, not government actors, are the experts on this topic, and accordingly they should be part of the conversation; and (5) if the government does take action, a standardized, federal approach seems the most reasonable.

A. The Internet's Exceptionalism

In some ways, Section 230's impact is almost an instance of a "happy accident"—its drafters, while understanding that the Internet would wield remarkable and unprecedented capabilities,[147] could not have imagined how far it would develop in less than thirty years. On the other hand, judicial interpretations indicate strong intentionality in the power Section 230 gives platforms. Furthermore, the notion of "internet exceptionalism" is a theme that the law's drafters recognized[148] and continues to be recognized by courts today.[149] Twenty-first-century information technologies—especially the Internet and accompanying social media platforms—play a key role in our society, largely due to Section 230.[150] Thus, in whatever form Section 230 reform takes place, legislators should ensure the notion of Internet exceptionalism is maintained. It would be a mistake to treat the Internet just like anything else—such as a newspaper or common carrier—because it is undeniable that the Internet is *not* like anything else. That does not mean platforms should receive a free pass from accountability but instead acknowledges the unique role that the Internet plays in our world. Keeping the exceptionalism of the Internet in mind not only keeps intact some of the drafters' goals for the legislation but also helps ensure that the ever-connected society that Section 230 helped create will get to continue.

B. Notable Twenty-First Century Backdrop of Political Polarization and Cancel Culture

Although Section 230 reform is necessary, legislators should take their time; Section 230 is too critical to the future of the Internet and social media platforms for legislators to fail to conduct reform deliberately and thoroughly. In the discourse around Section 230, especially with its problems being at least two-fold and divided by party lines,[151] it is vital to acknowledge the backdrop in which the Section 230 debate is occurring. Social and political polarization increasingly affects American society, with intense divisions *between* political parties and *within* political parties.[152] Such persistent and deep fractures hinder the chances of compromise or even authentic listening to the other side.[153]

While some contest the role of the Internet *in* such polarization,[154] the *existence* of this polarization is relevant to the Section 230 debate. Both political parties desire Section 230 reform but have differing views on what it should look like, who should undertake it, and what the problem is that requires reform.[155] These layers of disagreement can be attributed to our politically polarized state, as there is an increasing unwillingness to listen to the opposing side.[156] Therefore, without proper discussion and understanding between parties and all applicable players (including the platforms), Section 230 reform will mirror our polarized state and have unexpected consequences.

Additionally, "cancel culture" plays a unique role in the Section 230 debate. There has been much debate regarding the meaning of cancel culture.[157] One common understanding refers to it as "the practice or tendency of engaging in mass canceling as a way of expressing disapproval and exerting social pressure."[158] Cancel culture most commonly takes place over social media.[159] The primary conflict within the cancel culture phenomenon is whether it represents holding others accountable or a method for making snap judgments and doling out unnecessary punishment.[160] Viewpoints on this conflict also generally coincide with one's political party, with liberals often viewing it as a way to call attention to problematic behavior and conservatives often viewing it as a way to quickly judge and punish others without looking at the complete picture.[161]

Cancel culture is relevant to the Section 230 debate because many see it as contributing to an increasingly sensitive society that is intolerant of views in opposition to their own.[162] Many opposed to cancel culture understand it as a way to silence criticism rather than offensive material.[163] Moreover, it is significant that what is considered "offensive" can be subjective, which makes it difficult for platforms to respond to calls for content moderation when the topics are not necessarily black-and-white. Thus, cancel culture arguably creates an environment unconducive to open dialogue and discussion, fueling political polarization. Another platform obstacle is that the vast majority of speech is pro-

tected,[164] making the line "between free speech and feeling safe online" blurry.[165] Regardless of one's views towards cancel culture, its existence (especially on social media platforms) adds a noteworthy layer to the complaints about platforms over-or under-policing content. Thus it should be acknowledged as part of the Section 230 debate's backdrop.

C. Considering Section 230 and Proposed Solutions From the Perspective of Platforms of All Sizes

Section 230 reform would be incomplete without thoroughly considering how any proposed reform will impact platforms *of all sizes*. The problems with Section 230—namely that platforms simultaneously regulate their content too much and too little—primarily concern the social media giants, given the number of users on these platforms. However, reform proponents must remember that Section 230 impacts millions of smaller platforms. Lack of consideration will hurt these smaller platforms through a decreased chance of creation and survival, which will, in turn, damage the U.S. economy.

Small and mid-size platforms rely on Section 230's protections to develop and maintain their sites just as much or even more than the platform giants.[166] Thus, repeal of Section 230 would have disastrous consequences for these platforms. They would not have the financial means to handle an onslaught of litigation like larger platforms do. They would thus be incapable of maintaining their position in the marketplace.[167] Moreover, even if these platforms did have the resources to moderate content through artificial or human intelligence, such extreme content moderation is impractical—it would be nearly impossible to avoid overinclusiveness when using categories of speech as various proxies.[168] From this perspective, repeal of Section 230 is, therefore, the least favorable solution to platforms' content moderation problems.

Amending Section 230 through federal legislation has the potential to provide a more favorable outcome for small and mid-size platforms. Still, the standings between the platform giants and the rest indicate that a one-size-fits-all approach might be more harmful than helpful. This defect is seen in the DOJ's proposed amendment, as it applies to all platforms regardless of size.[169] The changes to Section 230 would also increase the amount of litigation platforms could face,[170] as the amendment would remove platforms' ability to remove content it deems objectionable, among other changes.[171] One of the proposal's goals is to promote competition among Internet companies,[172] but the disadvantage that increased litigation poses for smaller platforms contradicts this goal.

Additionally, the DOJ's proposal alters the law's "good faith" exception by including a definition of "good faith" that requires platforms to provide a "reasonable explanation" for their content moderation decisions.[173] This proposal is problematic for many reasons. Not only are smaller platforms less likely to have the resources to provide a "reasonable explanation" for every content moderation action, but the phrase "reasonable explanation" is also vague and subjective, leaving platforms without any actual guidelines. Moreover, platforms would have to expend time and money explaining content moderation choices that are typically uncontested.[174]

Current instances of state involvement in Section 230 regulations, although with its problems, reflect a more friendly strategy for small and mid-size platforms. The Texas and Florida legislation casts a narrower net, applying their restrictions only to platforms with more than 50 million active monthly users in the United States[175] and more than 100 million active monthly users globally.[176] Interestingly, Senator Hawley's proposal to amend Section 230 by federal legislation applies the smallest scope of these three, considering "Big Tech" to be companies that have more than 30 million active monthly users in the U.S. or more than 300 million active monthly users globally.[177] Although these numbers still cover a vast number of platforms—for context, traditional "Big Tech" platforms Facebook and Twitter respectively possess around 261 million and 68 million monthly active users in the United States[178] and 2.89 billion and 330 million active users globally[179]—the inclusion of specific benchmarks is more beneficial than an all-encompassing law. Thus, despite such legislation inevitably involving a line-drawing dilemma, platform giants' distinctiveness and incomparability suggest that perhaps Section 230 reform is most equitable *without* a one-size-fits-all approach.

Cancel culture is relevant to the Section 230 debate because many see it as contributing to an increasingly sensitive society that is intolerant of views in opposition to their own.

D. Conversations Regarding Reform Should Involve Input From Platforms of Varying Sizes

Implementation is a necessary step of the reform process, and the best chance for successful implementation requires communication with and input from platforms of varying sizes. Government actors—at federal and state levels—are not experts in the technology industry, the Internet, or social media platform content moderation.[180] To avoid legislation changes that would upend the use of the Internet (either advertently or inadvertently), legislators should converse with the platforms themselves to understand implementation challenges, feasibility, and overall impact. That does not mean that any legislation or regulation procedures should greatly favor platforms, but just that the dialogue is incomplete without participation from and consideration of those directly involved. Furthermore, such conversations must be with more than just the platform giants, especially if the legislative efforts apply to all platforms. Large, mid-size, and small platforms have varying resources and capabilities, and a greater understanding of these features will help ensure that Section 230 reform does not spell extinction for smaller platforms.

From this perspective, self-regulation is the most promising solution for the time being because it gives platforms a chance to determine the best and most feasible methods for content moderation. Section 230 is such a foundational piece of the Internet's infrastructure that it is safest to leave it alone and see if the platforms—particularly the giants, since they are the ones from which the problems are stemming —can find realistic, probable solutions without running the risk of irreparably changing the Internet. Furthermore, the timing is particularly apt for self-regulation efforts, as platforms increasingly face government intervention threats and realize that self-regulation can improve content moderation processes.

Indeed, platform giants such as Facebook, Twitter, and YouTube have undertaken efforts to reduce hate speech and mis- and disinformation on their platforms and to provide more comprehensive and accessible transparency policies in recent years. For example, Facebook and Twitter both utilized labels and warnings about "misleading" or "provably false" claims in users' posts in response to the COVID-19 pandemic and the 2020 U.S. Presidential Election,[181] and they are continuing to develop these fact-checking procedures.[182]

These platforms are also developing their transparency procedures. YouTube has begun to release a new "Violative View Rate (VVR)" statistic that discloses "what percentage of views on YouTube comes from content that violates [their] policies."[183] The release of its VVR statistic is an addition to the platform's disclosure of its "Community Guidelines Enforcement Report" starting in 2018, which gave users an insight into what type of content violated the guidelines and the reasons for removal.[184] Twitter has shifted from producing a transparency report to a "more comprehensive Twitter Transparency Center," which Twitter designed to "cover a broader array of [the platform's] transparency efforts" in a format that is "increasingly interactive and intuitive."[185] Facebook has undergone an independent audit of its Community Standards Enforcement Report metrics to ensure its transparency efforts accurately represent the platform's actions.[186] Most recently, Facebook created an "Oversight Board" to "ensur[e] respect for free expression" by "provid[ing] independent judgment" on the platform's content moderation decisions.[187] Inspired by the role of the U.S. Supreme Court,[188] the board is a "separate entity from the Facebook company." It comprises up to forty independent and diverse experts who will "uphold or reverse Facebook's content decisions" in a binding manner.[189] These efforts illustrate that platforms are attempting to self-regulate and are experimenting with various possible methods of problem resolution. Thus, time to determine the efficacy of these efforts should be allowed before legislators make drastic changes to Section 230.

Thus, given the situation's newness, smaller steps are likely to be a better bet than more expansive ones.

E. If Government Action is Taken, Federal Legislation Seems the Most Reasonable

However, suppose government involvement ends up being the selected path. In that case, some form of federal legislation seems preferable over state legislation because the uniformity of federal legislation will help ensure that platforms follow the provided guidelines. As illustrated by the differing applicability standards in Texas's HB 20, Florida's SB 7072, and Senator Hawley's proposal,[190] there are many possible interpretations of "big tech" platforms. There are also infinite possible variations of disclosure requirements. These inconsistencies can make it difficult for platforms to comply with the stated requirements. By contrast, uniform legislation provides clarity and consistency to the players tasked with following and implementing the new standards.

With this in mind, legislators should focus more on the type of Section 230 amendment proposals that carve out individual exceptions to the law's liability shield instead of the proposals that operate as more of an overhaul. The prevalence of social media platforms is still very new, with Myspace, Facebook, and Twitter launching in the early- and mid-2000s.[191] Additionally, the current push for Section 230 reform largely stems from events beginning in 2016.[192] Thus, given the situation's newness, smaller steps are likely to be a better bet than more expansive ones because of how important Section 230 is and how unpredictable the consequences of Section 230 reform will be. Moreover, carving out specific exceptions to Section 230's protections will still make some headway on the two main problems resulting from the law's liability shield: platforms will be unable to apply any supposed bias towards the topics of the exceptions, and they will have to engage in further content moderation.

VII. CONCLUSION

The role of Section 230 in today's society cannot be understated. Accordingly, any reform to the law should result from deliberate and thorough research. Well-rounded and complete Section 230 debate requires bearing in mind the exceptionality of the Internet, the unique background in which the debate is currently taking place, the law's impact on and importance for platforms of all sizes, and the comparative ease of uniform legislation when it comes to implementation. What the future holds for the Internet and social media platforms is unknown, and the possibilities for reform are endless. Still, the choices that are part of the law's development should reflect its value and gravity.

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1 *See* U.S. Const. amend. I.
2 *Id.*
3 Whitney v. California, 274 U.S. 357, 375 (Brandeis, J., concurring).
4 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (quoting Roth v. United States, 354 U.S. 476, 484 (1957).
5 *Id.* (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)).
6 *See* The Civil Rights Cases, 109 U.S. 3, 18–19 (1883) (establishing the state action doctrine); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991) ("Although the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints. This is the jurisprudence of state action[.]"
7 *See* Steven Tweedie, *The World's First Smartphone, Simon, Was Created 15 Years Before the iPhone*, Business Insider (June 14, 2015), https://www.businessinsider.com/worlds-first-smartphone-simon-launched-before-iphone-2015-6 (noting that the first smartphone debuted in 1992).
8 Cameron F. Kerry, *Section 230 Reform Deserves Careful and Focused Consideration*, Brookings (May 14, 2021), https://www.brookings.edu/blog/techtank/2021/05/14/section-230-reform-deserves-careful-and-focused-consideration/.
9 *Internet/Broadband Fact Sheet*, Pew Rsch. Ctr. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/internet-broadband/.
10 *Social Media Fact Sheet*, Pew Rsch. Ctr. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/social-media/.
11 *Number of Monthly Active Facebook Users Worldwide as of 2nd Quarter 2021*, Statistica https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/.
12 *Number of Monetizable Daily Active Twitter Users (mDAU) Worldwide From 1st Quarter 2017 to 3rd Quarter 2021*, Statistica, https://www.statista.com/statistics/970920/monetizable-daily-active-twitter-users-worldwide/ ("The last published figure regarding monthly active Twitter users amounted to 330 million before the company discontinued reporting on the metric").

13 *Number of Monthly Active Facebook Users in the United States and Canada as of 3rd Quarter 2021*, Statistica, https://www.statista.com/statistics/247614/number-of-monthly-active-facebook-users-worldwide/.
14 *Number of Monthly Active Twitter Users in the United States From 1st Quarter 2010 to 1st Quarter 2019*, Statistica, https://www.statista.com/statistics/274564/monthly-active-twitter-users-in-the-united-states/.
15 Kerry, *supra* note 8.
16 *See, e.g.*, 47 U.S.C. § 230.
17 47 U.S.C. § 230.
18 Valerie C. Brannon & Eric N. Holmes, Cong. Rsch. Serv., R46751, Section 230: An Overview 1 (2021), https://crsreports.congress.gov/product/pdf/R/R46751.
19 *Id.* at 1–2.
20 *Id.* at 1; Reno v. ACLU, 521 U.S. 844, 849, 885 (1997).
21 *See, e.g.*, Ashley Johnson & Daniel Castro, *Overview of Section 230: What It Is, Why It Was Created, and What It Has Achieved*, Info. Tech. & Innovation Foundation (Feb. 22, 2021), https://itif.org/publications/2021/02/22/overview-section-230-what-it-why-it-was-created-and-what-it-has-achieved; Jeff Kosseff, *Op-Ed: Section 230 Created the Internet As We Know It. Don't Mess With It*, L.A. Times (Mar. 29, 2019, 3:05 AM), https://www.latimes.com/opinion/op-ed/la-oe-kosseff-section-230-internet-20190329-story.html; *Communications Decency Act Section 230*, Am. Civ. Liberties Union, https://www.aclu.org/issues/free-speech/internet-speech/communications-decency-act-section-230 (last visited Dec. 25, 2021).
22 47 U.S.C. § 230(c).
23 *Id.* § 230(c)(1).
24 47 U.S.C. § 230(f)(2). // *Id.* § 230(f)(2).
25 Valerie C. Brannon, Cong. Rsch. Serv., R45650, Free Speech and the Regulation of Social Media Content 10 (2019), https://sgp.fas.org/crs/misc/R45650.pdf.
26 Brannon & Holmes, *supra* note 18, at 6.
27 47 U.S.C. § 230(f)(3).
28 Brannon & Holmes, *supra* note 18, at 3 (emphasis added).
29 *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283–86 (1964) (ruling that a public official must show "actual malice" to win a defamation suit).
30 47 U.S.C. § 230(c)(2)
31 Brannon & Holmes, *supra* note 18, at 3.
32 *See* Tim Hwang, *Dealing with Disinformation: Evaluating the Case for Amendment of Section 230 of the Communications Decency Act*, *in* Social Media and Democracy: The State of the Field and Prospects for Reform 260 (Nathaniel Persily & Joshua A. Tucker, eds., 2020), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/665B952A40A6A5F244E2141A84CA45D8/9781108835558c11_252-285.pdf/dealing_with_disinformation_evaluating_the_case_for_amendment_of_section_230_of_the_communications_decency_act.pdf.
33 47 U.S.C. § 230(a).
34 *Id.* § 230(a)(4) (emphasis added).
35 *See* John A. LoNigro, *Deplatformed: Social Network Censorship, the First Amendment, and the Argument to Amend Section 230 of the Communications Decency Act*, 37 Touro L. Rev. 427, 431–32 (2021).
36 *See* Brannon & Holmes, *supra* note 18, at 6 (noting that Section 230 was created with the partial motivation of overruling *Stratton Oakmont, Inc. v. Prodigy Services*, a New York state trial court decision that had held an internet service provider liable as a publisher for libelous content).
37 47 U.S.C. § 230(e).
38 *See* Valerie C. Brannon, Cong. Rsch. Serv. Legal Sidebar, LSB10306, Liability for Content Hosts: An Overview of the Communication Decency Act's Section 230 3 (2019), https://sgp.fas.org/crs/misc/LSB10306.pdf.
39 Zeran v. America Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997).
40 *Id.*
41 *Id.* at 330.
42 Batzel v. Smith, 333 F.3d 1018, 1030 (9th Cir. 2003).
43 *See* Jeff Kosseff, *The Lawsuit Against America Online That Set Up Today's Internet Battles*, Slate (July 14, 2020, 5:45 AM), https://slate.com/technology/2020/07/section-230-america-online-ken-zeran.html.
44 *See, e.g.*, Kerry, *supra* note 8.
45 *See, e.g.*, Stephen Engelberg, *Twenty-Six Words Created the Internet. What Will It Take to Save It?*, ProPublica (Feb. 9, 2021, 2:00 PM), https://www.propublica.org/article/nsu-section-230.
46 Johnson & Castro, *supra* note 21.
47 Christian M. Dippon, *Economic Value of Internet Intermediaries and the Role of Liability Protections*, NERA Economic Consulting 18 (June 5, 2017), https://internetassociation.org/wp-content/uploads/2017/06/Economic-Value-of-Internet-Intermediaries-the-Role-of-Liability-Protections.pdf.
48 Johnson & Castro, *supra* note 21; Kerry, *supra* note 8.
49 Laurent Crenshaw, *What Would the Internet Look Like Without Section 230?*, Inside Sources (Dec. 1, 2021), https://insidesources.com/what-would-the-internet-look-like-without-section-230/.
50 *See, e.g.*, Kerry, *supra* note 8.
51 Kerry, *supra* note 8.
52 *See* Engelberg, *supra* note 45 ("Freed from the threat of being sued for libel, Facebook, Twitter, Reddit and other corners of cyberspace became places where literally billions of people felt free to say whatever they wanted . . . .").
53 *See, e.g.*, Ryan Nabil, *Why Repealing Section 230 Will Hurt Startups and Medium-Sized Online Businesses*, Competitive Enter. Inst. (Feb. 1, 2021), https://cei.org/blog/why-repealing-section-230-will-hurt-startups-and-medium-sized-online-businesses/; LoNigro, *supra* note 34, at 478.
54 Nabil, *supra* note 52; Mark Weinstein, *Small Sites Need Section 230 To Compete*, Wall St. J. (Jan. 25, 2021, 2:16 PM), https://www.wsj.com/articles/small-sites-need-section-230-to-compete-11611602173;
55 Nabil, *supra* note 53; *see* LoNigro, *supra* note 35, at 478.
56 *See, e.g.*, Nabil, *supra* note 53 ("By deterring small and medium-sized companies from hosting third-party content, this repeal will further entrench Big Tech's market dominance and protect them from future competition.").
57 *See* Kerry, *supra* note 8.
58 *See, e.g.*, David Morar & Chris Riley, *A Guide For Conceptualizing the Debate Over Section 230*, Brookings (Apr. 9, 2021), https://www.brookings.edu/techstream/a-guide-for-conceptualizing-the-debate-over-section-230/; Clyde Wayne Crews Jr., *Regulating Social Media Content Moderation Will Backfire and Make Big Tech More Powerful*, Forbes (June 28, 2020, 7:52 PM), https://www.forbes.com/sites/waynecrews/2020/06/28/regulating-social-media-content-moderation-will-backfire-and-make-big-tech-more-powerful/?sh=943f9079ffee ("The current social media debate centers around competing interventionist agendas. Conservatives want social media titans regulated to remain "neutral," while liberals tend to want them to eradicate harmful content and address other alleged societal ills.").
59 *See* James Pethokoukis, *Jeff Kosseff on the Twenty-Six Words That Creatd the Internet: A Long-Read Q&A*, AEI (July 3, 2019), https://www.aei.org/economics/jeff-kosseff-on-the-twenty-six-words-that-created-the-internet-a-long-read-qa/.
60 *See, e.g.*, *id.*; Carly Miller, *Can Congress Mandate Meaningful Transparency for Tech Platforms?*, Brookings (June 1, 2021),

https://www.brookings.edu/techstream/can-congress-mandate-meaningful-transparency-for-tech-platforms/.
61 *See* discussion *infra* Section V.
62 *See* Jaime Ducharme, *Trump Just Went After the #MeToo Movement: 'Lives Are Being Shattered*,*'* TIME (Feb. 10, 2018 12:20PM), https://time.com/5143101/donald-trump-tweet-allegations/ (reporting on one of Trump's tweets relating to the #MeToo movement).
63 *See* Sim Khanuja & Caroline Steidley, *Political Issue: How Trump Handled BLM (A Thread of Tweets*), The Kirkwood Call (Oct. 21, 2020), https://www.thekirkwoodcall.com/opinion/2020/10/21/political-issue-how-trump-handled-blm-a-thread-of-tweets/ (posting pictures of Trump's now-unavailable tweets that were made in response to the Black Lives Matter movement).
64 *See* Rem Rieder, *Trump's Statements About the Coronavirus*, FactCheck.org (Mar. 19, 2020), https://www.factcheck.org/2020/03/trumps-statements-about-the-coronavirus/ (recapping Trump's oral and digital statements about the COVID-19 pandemic).
65 *See* Michael D. Shear et al., *How Trump Reshaped the Presidency in Over 11,000 Tweets*, N.Y. Times (Nov. 2, 2019), https://www.nytimes.com/interactive/2019/11/02/us/politics/trump-twitter-presidency.html (discussing the timeline and content of Trump's Twitter account).
66 *Id.* (describing the noteworthiness of Trump's use of social media during his presidential campaign and term).
67 *See* Hwang, *supra* note 32, at 254.
68 *See* Megan Graham & Salvador Rodriguez, *Twitter and Facebook Race to Label a Slew of Posts Making False Election Claims Before All Votes Counted*, CNBC (Nov. 6, 2020, 12:51 PM), https://www.cnbc.com/2020/11/04/twitter-and-facebook-label-trump-posts-claiming-election-stolen.html; *Facebook to Label Vaccine Posts to Combat COVID-19 Misinfo*, AP News (Mar. 15, 2021), https://apnews.com/article/business-misinformation-corona-virus-pandemic-mark-zuckerberg-55583cb7cee4e6966f49f-8604d76a081.
69 *See* Jack Brewster, *'Close Them Down': Trump Threatens To Shut Down Social Media Platforms*, Forbes (May 27, 2020, 8:48 AM), https://www.forbes.com/sites/jackbrewster/2020/05/27/close-them-down-trump-threatens-to-shut-down-social-media-platforms/?sh=7dc5c690445e.
70 *See* Valerie C. Brannon, Nina M. Hart, Eric N. Holmes & Chris D. Linebaugh, Cong. Rsch. Serv.: Legal Sidebar, UPDATE: Section 230 and the Executive Order on Preventing Online Censorship 1, 3 (2020).
71 Anshu Siripurapu, *Trump and Section 230: What to Know*, Council on Foreign Rels. (Dec. 2, 2020, 7:00 AM), https://www.cfr.org/in-brief/trump-and-section-230-what-know.
72 *See* Billy Perrigo, *Facebook and Twitter Finally Locked Donald Trump's Accounts. Will They Ban Him Permanently?*, TIME (Jan 7, 2021 11:19 AM), https://time.com/5927398/facebook-twitter-trump-suspension-capitol/.
73 *See* Sara Morrison, *How The Capitol Riot Revived Calls to Reform Section 230*, Vox: Recode (Jan. 11, 2021, 4:55 PM), https://www.vox.com/recode/22221135/capitol-riot-section-230-twitter-hawley-democrats.
74 *See* Hwang, *supra* note 31, at 253–56; Lee Rainie, Janna Anderson & Jonathan Albright, *The Future of Free Speech, Trolls, Anonymity and Fake News Online*, Pew Rsch. Ctr. (Mar. 29, 2017), https://www.pewresearch.org/internet/2017/03/29/the-future-of-free-speech-trolls-anonymity-and-fake-news-online/.
75 *How is Fake News Spread? Bots, People Like You, Trolls, and Microtargeting*, Ctr. for Info. Tech. and Soc'y at UC Santa Barbara, https://www.cits.ucsb.edu/fake-news/spread (last visited Dec. 31, 2021).
76 *See* Hwang, *supra* note 32, at 253–54.
77 Trump repeatedly called for repeal of Section 230 during his time in office. *See supra* discussion Section IV.B. Biden, during his 2020 campaign, stated that Section 230 should be "immediately" revoked for social media giants such as Facebook because they are "not merely an internet company" and are "propagating falsehoods they know to be false. *Joe Biden: Former Vice President of the United States*, The N.Y. Times: Opinion (Jan. 17, 2020), https://www.nytimes.com/interactive/2020/01/17/opinion/joe-biden-nytimes-interview.html?smid=nytcore-ios-share.
78 *See* discussion *supra* Section IV.2.
79 *See, e.g.*, Bobby Allyn, *As Trump Targets Twitter's Legal Shield, Experts Have A Warning*, NPR (May 30, 2020, 11:36 AM), https://www.npr.org/2020/05/30/865813960/as-trump-targets-twitters-legal-shield-experts-have-a-warning (noting that some conservatives "accuse social media sites of muzzling conservative voices" and that some liberals "say Section 230 has created a fertile environment for the rampant spread of online misinformation, harassment, and abuse.").
80 *See* Betsy Klein, *White House Reviewing Section 230 Amid Efforts to Push Social Media Giants to Crack Down on Misinformation*, CNN (July 20, 2021, 10:31 AM), https://www.cnn.com/2021/07/20/politics/white-house-section-230-facebook/index.html.
81 *See, e.g.*, Kerry, *supra* note 8.
82 *See supra* discussion Section IV.A.
83 *See, e.g.*, Kerry, *supra* note 8; Allyn, *supra* note 79.
84 *See* Kerry, *supra* note 8; Allyn, *supra* note 79.
85 *See, e.g.*, Amirta Khalid, *Why Startups Have So Much Riding on Section 230's Future*, Inc. (Jan. 15, 2021), https://www.inc.com/amrita-khalid/section-230-communications-decency-act-tech-startups-donald-trump.html ("If you repeal Section 230, one of two things will happen. Either platforms will decide they don't want to moderate anything, or platforms will moderate everything.").
86 *See, e.g.*, Nabil, *supra* note 53.
87 Valerie C. Brannon & Eric N. Holmes, Cong. Rsch. Serv., R46751, Section 230: An Overview 30 (2021), https://crsreports.congress.gov/product/pdf/R/R46751.
88 *Id.*
89 *Id.*
90 *See id.* at 31 & n.318.
91 *The Justice Department Unveils Proposed Section 230 Legislation*, U.S. Dep't Just.: Off. Pub. Affairs (Sept. 23, 2020), https://www.justice.gov/opa/pr/justice-department-unveils-proposed-section-230-legislation.
92 Department of Justice Cover Letter to Congress, U.S. Dep't Just. Archives 1 (Sept. 23, 2020), https://www.justice.gov/file/1319346/download [hereinafter DOJ Cover Letter].
93 *Id.*
94 *Id.*
95 *Department of Justice's Review of Section 230 of the Communications Decency Act of 1996*, U.S. Dep't Just. Archives, https://www.justice.gov/archives/ag/department-justice-s-review-section-230-communications-decency-act-1996 (last visited Feb. 19, 2022).
96 DOJ Cover Letter, *supra* note 92, at 3.
97 *See id.*
98 *See Department of Justice's Review of Section 230 of the Communications Decency Act of 1996*, *supra* note 95.
99 *See The Justice Department Unveils Proposed Section 230 Legislation*, *supra* note 91.
100 *Department of Justice's Review of Section 230 of the Communications Decency Act of 1996*, *supra* note 95.

101 *See id.*
102 *Id.*; *see also Ramseyer Draft Legislative Reforms to Section 230 of the Communications Decency Act*, U.S. Dep't Just. 1, https://www.justice.gov/file/1319331/download (last visited Feb. 19, 2022) [hereinafter DOJ Proposal Redline].
103 *See Department of Justice's Review of Section 230 of the Communications Decency Act of 1996*, *supra* note 95.
104 *See id*.
105 *See* Ending Support for Internet Censorship Act, S. 1914, 116th Cong. (2019), https://www.congress.gov/116/bills/s1914/BILLS-116s1914is.pdf.
106 *See Senator Hawley Introduces Legislation to Amend Section 230 Immunity for Big Tech Companies*, Josh Hawley: U.S. Sen. for Mo. (June 19, 2019), https://www.hawley.senate.gov/senator-hawley-introduces-legislation-amend-section-230-immunity-big-tech-companies; *see also* Ending Support for Internet Censorship Act § 2.
107 *See Senator Hawley Introduces Legislation to Amend Section 230 Immunity for Big Tech Companies*, supra note 106.
108 *Id.* (emphasis added).
109 *Id.*
110 *See* H.B. 20, 87th Leg., 2nd Spec. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/872/billtext/pdf/HB00020F.pdf#navpanes=0; S.B. 7072, 2021 Leg., Reg. Sess. (Fla. 2021).
111 *See, e.g.*, John Villasenor, *Texas' New Social Media Law Is Blocked For Now, But That's Not The End of the Story*, Brookings (Dec. 14, 2021), https://www.brookings.edu/blog/techtank/2021/12/14/texas-new-social-media-law-is-blocked-for-now-but-thats-not-the-end-of-the-story/; *Arguments Slated on Florida Social Media Law*, CBS Mia. (Jan. 14, 2022, 2:42 PM), https://miami.cbslocal.com/2022/01/14/arguments-florida-social-media-law/.
112 H.B. 20.
113 *Id.*
114 *Id.*
115 *Id.*
116 *Id.*; *see also* Kailyn Rhone, *Social Media Companies Can't Ban Texans Over Political Viewpoints Under New Law*, Tex. Trib. (Sept. 2, 2021, 4:00 PM), https://www.texastribune.org/2021/09/02/texas-social-media-censorship-legislature/.
117 Rhone, *supra* note 116.
118 NetChoice, LLC v. Paxton, No. 1:21-CV-840-RP, 2021 WL 5755120, at *1 (W.D. Tex. Dec. 1, 2021).
119 *Id.* at *6—7.
120 S.B. 7072, 2021 Leg., Reg. Sess. (Fla. 2021).
121 NetChoice, LLC v. Moody, No. 4:21cv220-RH-MAF, 2021 WL 2690876, at *3–4 (N.D. Fla. June 30, 2021).
122 *See id.* at *5.
123 *Id.* at *1 ("This legislation compels providers to host speech that violates their standards—speech they otherwise would not host—and forbids providers from speaking as they otherwise would.").
124 *See id.* at *1.
125 John Samples, *Why the Government Should Not Regulate Content Moderation of Social Media*, Cato Inst. Pol'y Analysis No. 865, Apr. 9, 2019, at 1, 1, https://www.cato.org/sites/cato.org/files/pubs/pdf/pa_865.pdf.
126 *Id.* at 3.
127 *See, e.g.*, Casey Newton, *Everything You Need to Know About Section 230*, The Verge (Dec. 29, 2020, 4:50 PM), https://www.theverge.com/21273768/section-230-explained-internet-speech-law-definition-guide-free-moderation.
128 *See, e.g.*, Samples, *supra* note 125, at 23 ("The arguments advanced for a greater scope of government power do not stand up. Granting such power would gravely threaten free speech and the independence of the private sector. We have seen that these tech companies are grappling with many of the problems cited by those calling for public action. The companies are thus far more capable of dealing with these issues."); Michael A. Cusumano, Annabelle Gawer & David B. Yoffie, *Can Self-Regulation Save Digital Platforms?*, 30 Indus. and Corp. Change 1259, 1261 (2021), https://academic.oup.com/icc/article/30/5/1259/6355574 ("Due to their complex technology and rapidly evolving features and services, it may be difficult for governments to intervene effectively in the operations of digital platforms. Poorly designed interventions also could generate harmful side effects for consumers, ecosystem participants, and the global digital economy."); Nina Brown, *Regulatory Goldilocks: Finding the Just and Right Fit for Content Moderation on Social Platforms*, 8 Tex. A&M L. Rev. 451, 486 (2021); Crews Jr., *supra* note 58.
129 *See* Samples, *supra* note 125, at 23; Cusumano, *supra* note 128, at 20–22.
130 Cusumano et al., *supra* note 128, at 1262.
131 *Id.*
132 *Id.* at 1278–79.
133 *See id.* at 1263, 1278–79; Brown, *supra* note 128, at 483.
134 *See supra* discussion Section V.
135 *See* Cusumano et al., *supra* note 128, at 1275–80; Brown, *supra* note 128, at 483.
136 Cusumano et al., *supra* note 128, at 1280.
137 *Id.* at 1277.
138 *See* Cusumano et al., *supra* note 128, at 1278–80.
139 *See* Cusumano et al., *supra* note 128, at 1262, 1278; Brown, *supra* note 128, at 488–90.
140 Cusumano et al., *supra* note 128, at 1262.
141 Brown, *supra* note 128, at 488.
142 Cusumano et al., *supra* note 128, at 1278.
143 Brown, *supra* note 128, at 489.
144 Cusumano et al., *supra* note 128, at 1278.
145 *See* Brown, *supra* note 128, at 489 ("SRCs . . . can be particularly useful in industries—like social media—where public trust is low."); Cusumano et al., *supra* note 128, at 1259–61.
146 Cusumano et al., *supra* note 128, at 1278.
147 *See* discussion *supra* Section III.A.
148 *See* discussion *supra* Section III.A.
149 Neil Fried, *The Myth of Internet Exceptionalism: Bringing Section 230 Into the Real World*, Am. Affs. J. (2021), https://americanaffairsjournal.org/2021/05/the-myth-of-internet-exceptionalism-bringing-section-230-into-the-real-world/.
150 *See* discussion *supra* Section II.
151 *See supra* discussion Section V.A.
152 *See, e.g.*, *Beyond Red vs. Blue: The Political Typology*, Pew Rsch. Ctr (Nov. 9, 2021) https://www.pewresearch.org/politics/2021/11/09/beyond-red-vs-blue-the-political-typology-2/; Shanto Iyengar, Yphtach Lelkes, Matthew Levendusky, Neil Malhotra & Sean J. Westwood, *The Origins and Consequences of Affective Polarization in the United States*, 22 Ann. Rev. Pol. Sci. 129, 130 (2019), https://www.annualreviews.org/doi/pdf/10.1146/annurev-polisci-051117-073034; *Partisan Antipathy: More Intense, More Personal*, Pew Rsch. Ctr. (Oct. 10, 2019), https://www.pewresearch.org/politics/2019/10/10/partisan-antipathy-more-intense-more-personal/ ("Today the level of division and animosity—including negative sentiments among partisans toward the members of the opposing party—has only deepened.").
153 *See* Frank Newport, *The Impact of Increased Political Polarization*, Gallup: News (Dec. 5, 2019), https://news.gallup.com/opinion/polling-matters/268982/impact-increased-political-polarization.aspx ("These skeptical views of institutions and social structures skew us toward distrust, anger, and internal fighting—not actionable efforts to fix problems and address threats.").

154 *See e.g.*, Iyengar et al., supra note 152, at 134–35.
155 *See* Allyn, *supra* note 79; Ashley Johnson & Daniel Castro, *Proposals to Reform Section 230*, Info. Tech. & Innovation Foundation (Feb. 22, 2021), https://itif.org/publications/2021/02/22/proposals-reform-section-230.
156 *See* discussion *supra* Section V.
157 *See, e.g.*, Emily A. Vogels et al., *Americans and 'Cancel Culture': Where Some See Calls for Accountability, Others See Censorship, Punishment*, Pew Rsch. Ctr. (May 19, 2021), https://www.pewresearch.org/internet/2021/05/19/americans-and-cancel-culture-where-some-see-calls-for-accountability-others-see-censorship-punishment/.
158 *Cancel culture*, *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/cancel%20culture (last visited Dec. 28, 2021).
159 *See* Vogels et al., *supra* note 157.
160 *See id.*
161 *See id.*
162 *See, e.g.*, Alec Greven, *Cancel Culture Is a Threat to Everyone*, Inst. for Free Speech (Sept. 22, 2021), https://www.ifs.org/blog/cancel-culture-threat-to-everyone/; Ramesh Ponnuru, *Here's What Neera Tanden's Defeat Says About 'Cancel Culture,'* Seattle Times (Mar. 4, 2021, 11:31 AM), https://www.seattletimes.com/opinion/heres-what-neera-tandens-defeat-says-about-cancel-culture/.
163 *See* Ponnuru, *supra* note 162.
164 *See* Victoria L. Killion, Cong. Rsch. Serv., IF11072, The First Amendment: Categories of Speech 1 (2019), https://sgp.fas.org/crs/misc/IF11072.pdf ("Accordingly, speech is generally protected under the First Amendment unless it falls within one of the narrow categories of unprotected speech[.]").
165 Vogels et al., *supra* note 157.
166 *See, e.g.*, *id.*
167 *See, e.g.*, Nabil, *supra* note 53.
168 *See, e.g.*, Kerry, *supra* note 8 ("…much of what is online that we consider offensive speech or misinformation, in one way or another, requires contextual judgments by humans to identify the problems and decide what's over the line.").
169 *See* DOJ Proposal Redline, *supra* note 102.
170 Aaron Mackey, *Two Different Proposals to Amend Section 230 Share A Similar Goal: Damage Online Users' Speech*, Elec. Frontier Found. (June 18, 2020), https://www.eff.org/deeplinks/2020/06/two-different-proposals-amend-section-230-share-similar-goal-damage-online-users.
171 *Id.*
172 *See Department of Justice's Review of Section 230 of the Communications Decency Act of 1996*, *supra* note 94.
173 *Id.*
174 Mackey, *supra* note 171.
175 *See* H.B. 20, 87th Leg., 2nd Spec. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/872/billtext/pdf/HB00020F.pdf#navpanes=0.
176 *See* S.B. 7072, 2021 Leg., Reg. Sess. (Fla. 2021).
177 *See Senator Hawley Introduces Legislation to Amend Section 230 Immunity for Big Tech Companies*, *supra* note 105.
178 *See* sources cited *supra* notes 13–14.
179 *See* sources cited *supra* notes 11–12.
180 *See, e.g.*, Cusumano et al., *supra* note 128, at 1261 ("Due to their complex technology and rapidly evolving features and services, it may be difficult for governments to intervene effectively in the operations of digital platforms. Poorly designed interventions also could generate harmful side effects for consumers, ecosystem participants, and the global digital economy.").
181 *See, e.g.*, Yael Roth & Nick Pickles, *Updating Our Approach to Misleading Information*, Twitter (May 11, 2020), https://blog.twitter.com/en_us/topics/product/2020/updating-our-approach-to-misleading-information; *How Facebook's Third-Party Fact-Checking Program Works*, Meta: Meta Journalism Project (June 1, 2021), https://www.facebook.com/journalismproject/programs/third-party-fact-checking/how-it-works; and Shannon Bond, *Twitter Expands Warning Labels To Slow Spread of Election Misinformation*, NPR (Oct. 9, 2020, 12:00 PM), https://www.npr.org/2020/10/09/922028482/twitter-expands-warning-labels-to-slow-spread-of-election-misinformation.
182 *See* Guy Rosen, *An Update on Our Work to Keep People Informed and Limit Misinformation About COVID-19*, Meta (last updated May. 26, 2021, 3:30 PM), https://about.fb.com/news/2020/04/covid-19-misinfo-update/.
183 Jennifer O'Connor, *Building Greater Transparency and Accountability with the Violative View Rate*, YouTube Official Blog: Inside YouTube (Apr. 6, 2021), https://blog.youtube/inside-youtube/building-greater-transparency-and-accountability/.
184 *Id.*
185 *A Brief History of Twitter Transparency*, Twitter Transparency, https://transparency.twitter.com/en/about.html (last visited Dec. 28, 2021).
186 Vishwanath Sarang, *Independent Audit of Community Standards Enforcement Report Metrics*, Meta (last updated Oct. 20, 2021, 11:00 AM), https://about.fb.com/news/2020/08/independent-audit-of-enforcement-report-metrics/.
187 Oversight Board, https://oversightboard.com (last visited Dec. 25, 2021).
188 *See* Kate Klonick, *Inside the Making of Facebook's Supreme Court*, The New Yorker: Annals of Technology (Feb. 12, 2021), https://www.newyorker.com/tech/annals-of-technology/inside-the-making-of-facebooks-supreme-court (stating that Noah Feldman, the initiator of The Oversight Board, came up with the concept after realizing that "Facebook needs a Supreme Court.").
189 Oversight Board, https://oversightboard.com (last visited Dec. 25, 2021).
190 *See* discussion *supra* Section VI.C.
191 *See History of Social Media (It's Younger Than You Think)*, Broadband Search, https://www.broadbandsearch.net/blog/complete-history-social-media (last visited Dec. 28, 2021).
192 *See* discussion *supra* Section IV.B.