I. INTRODUCTION

On January 8th, 2021, the inevitable happened. Twitter permanently banned then-President Donald Trump following a series of temporary bans and flagged tweets. This ban followed four tweets Trump posted on the night of January 6th, 2021, in the hours after the

Permanent Suspension of @realDonaldTrump, X: Blog (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension [hereinafter “Twitter”] [https://perma.cc/6KVL-NXMR]. While the company changed its tradename to “X” during the publication of this Comment, this Comment will refer to the company as “Twitter” as that name still appears in the URL used by the company and the company used that tradename during all the events discussed in this Comment.
insurrection at the United States Capitol building. Meta, the parent company of Facebook, indefinitely banned Trump from Facebook and Instagram the day before. Twitter, Meta, and Google banned plenty of users before Trump and plenty after him. But Trump’s deplatforming, along with the deplatforming, flagging, and suspensions of vaccine misinformation spreaders and those who spread misinformation about elections, prompted calls from all corners to rein in social media companies for purportedly censoring these users and abridging their free speech rights. Many commentators, however, knew that social media companies found protection behind an immunity shield from such claims. That shield, known as Section 230, remains one reason that banned users and those whose content gets flagged or removed by social media companies cannot sue the platforms.

Section 230 draws the ire of many across the political spectrum. During the COVID-19 pandemic and the 2020 election cycle, social media platforms began policing content more than ever before. They began removing content containing false information or labeling posts containing misinformation they did not want to remove. For example, on May 26th, 2020, Twitter flagged a Trump tweet regarding voting by

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4 “Deplatforming” as used in this Comment refers to the removal of a user from a social media website.


7 47 U.S.C. § 230. § 230(c) contains the liability shield provision.

8 The First Amendment would also prevent the same, as discussed infra Part 0.
Trump responded by calling for Section 230’s repeal and went so far as to threaten to veto the annual National Defense Authorization Act if Congress did not include a repeal of Section 230. Later, Trump issued an Executive Order seeking to “clarify” the scope of Section 230 immunities. He called on the Federal Trade Commission to investigate social media companies that employed “unfair or deceptive acts or practices,” including “practices by entities covered by section 230 that restrict speech in ways that do not align with those entities’ public representations about those practices.” Each of the largest platforms removed Trump’s accounts from their platforms following the January 6th, 2021, insurrection at the United States Capitol building.

This removal angered conservatives across Congress and the media, who claimed this amounted to “censorship” and a denial of Trump’s free speech rights. Following the deplatforming of Trump, others have found similar fates on social media platforms. President Joe Biden revoked Trump’s Executive order after taking office.

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9 See, e.g., Michael A. Cheah, Section 230 and the Twitter Presidency, 115 Nw. L. Rev. 192, 193 (2020).
12 Id. at 34,082.
14 See, e.g., Guynn, supra note 5; see also Oremus, supra note 5.
15 For a list of notable platform bans following the January 6, 2021, Capitol Riot, see Yelena Dzhanova, Here Are the Most Prominent People Who Got Banned from Social Media Platforms After the Capitol Riots, BUS. INSIDER (Jan. 10, 2021, 2:25 PM), https://www.businessinsider.com/people-banned-social-media-platforms-after-capitol-riots-2021-1. Platforms ban users for many reasons, including spreading vaccine misinformation, violating policies against nudity, and violating other terms of use. For a list of celebrity bans, see Dessi Gomez, Twenty-One Famous People Who Have Been Banned from Twitter, THE WRAP (Jan. 4, 2022, 7:43 AM), https://www.thewrap.com/people-who-have-been-banned-from-twitter/.
however, continued to call on Congress to reform Section 230, as he did while on the campaign trail.\textsuperscript{17}

Additionally, conservative-leaning states such as Florida and Texas have attempted to circumvent Section 230 by introducing “anti-censorship” legislation.\textsuperscript{18} These newly enacted laws remain paused from enforcement\textsuperscript{19} while a petition for certification sits before the United States Supreme Court.\textsuperscript{20} Meanwhile, the Court heard an unrelated challenge to Section 230 immunity in the Fall 2022 term.\textsuperscript{21} All this to say, Section 230 remains more contentious today than it was in 1996.

Congress passed Section 230\textsuperscript{22} in 1996 as part of the Communications Decency Act (CDA), itself a subsection of the Telecommunications Act of 1996.\textsuperscript{23} Events over the last few years have kept the immunity clause of Section 230 relevant.\textsuperscript{24} The law’s current form draws the ire of politicians and the media across the political spectrum.\textsuperscript{25}

\begin{footnotes}
\item[18] See infra Part 0.
\item[19] Netchoice, L.L.C. v. Att’y Gen., Fla., 34 F.4th 1196, 1203 (11th Cir. 2022) (preliminarily enjoining enforcement of portions of the Florida law concerning content moderation); see also Netchoice, L.L.C. v. Paxton, 142 S. Ct. 1715, 1715 (2022) (vacating the Fifth Circuit Court of Appeal’s stay of the district court’s preliminary injunction of portions of the Texas law concerning content moderation).
\item[22] 47 U.S.C § 230.
\item[24] 47 U.S.C. § 230(c); see, e.g., Danielle K. Citron, \textit{Fix Section 230 and Hold Tech Companies to Account}, \textsc{Wired} UK (June 5, 2021, 6:00 AM), https://www.wired.co.uk/article/section-230-social-media; TechDirt, \textit{Why is Wired So Focused on Misrepresenting Section 230?}, \textsc{Above the Law} (May 14, 2021, 4:03 PM), https://abovethelaw.com/2021/05/why-is-wired-so-focused-on-misrepresenting-section-230/.
\end{footnotes}
Here lies the conundrum: the drafters of Section 230 introduced the platform immunity section to help facilitate the growth of the internet. Their plan succeeded. The platform immunities conferred by Section 230, however, find separate roots in the First Amendment. So while some of the ideological handwringing about platforms’ lack of content moderation is well-placed and valid, the anti-censorship calls to remove Section 230 immunity for actions—such as deplatforming, so-called “shadow banning,” and flagging or removing content—misunderstand fundamental free speech doctrine. These actions taken by platforms constitute protected speech under the First Amendment. But just because social media platforms’ actions are protected by the First Amendment does not mean Congress should remove the immunities clause of Section 230. Congress had good reasons for enacting Section 230, which will be discussed in Part V. Furthermore, removing Section 230 protections only reverts platforms to regular protections under substantive bodies of law.

This Comment proceeds in four parts. Part II traces the background of Section 230, exploring the judicial backdrop in which Congress passed it. This Part will also explore the larger legislative push of the Communications Decency Act in which it was placed and subsequent cases changing the breadth of the Act. Part III will explore other proposed amendments to Section 230 and why such amendments do not achieve the correct aims of refining Section 230. Part IV will explore First Amendment jurisprudence underpinning the immunities offered within Section 230. Part V will propose a new framework for Section 230(c), codifying First Amendment compelled speech rights for platforms in Section 230’s text.

Section 230 would benefit from First Amendment-friendly reforms for two reasons. First, Section 230’s ambiguity on platforms’ specific rights and duties under the immunity clause continues to sow confusion and lead to inconsistent results. By reforming Section 230, the plain

27 See infra Part 0.
28 See infra Part 0.
29 See infra Part 0.
30 See infra Part 0.
31 Compare Maynard v. Snapchat, Inc., 816 S.E.2d 77, 81 (Ga. Ct. App. 2018) (holding Snapchat responsible for injuries in negligence because they provided the filter used by the user and third-party content was not uploaded at the time of the accident), with Lemmon v. Snap, Inc., 440 F. Supp. 3d 1103 (C.D. Cal 2020), rev’d and remanded, 995 F.3d 1085 (9th Cir. 2021) (holding Snap immune from liability on similar facts as Maynard). See also Andrew R. Klein, Balancing Interests Under Section 230(c) of the Communications Decency Act: Using the Sword As Well As The Shield, 55 Loy. L.A. L. Rev.
text of the statute will better comply with the First Amendment compelled speech doctrine while putting future actors on notice regarding its full scope. Second, Section 230, like other legislation meant to expand or codify First Amendment rights, provides immense procedural benefits to defendants that the First Amendment does not. These protections, however, only work for platforms when they may rely on Section 230 rather than a First Amendment claim of immunity.

II. THE HISTORY OF SECTION 230 AND HOW WE GOT HERE

The history of Section 230 illustrates the Act’s importance in supporting the internet, and social media platforms in particular, today. Section 230 began as part of the Communications Decency Act of 1996 (CDA). The dissonance between the Act’s name and the effect the immunity clause has on internet content stems from the Act’s history. The Act emerged from two pieces of legislation in a conference committee. The House version creating Section 230 sought to encourage the rapid expansion of the internet. The Senate version sought to clean up the burgeoning internet and protect children from what the sponsoring senator called “indecency.”

In drafting Section 230, the authors wanted to guard against internet service provider (ISP) liability for third-party content. Their concern stemmed from a New York trial court decision in Stratton Oakmont v. Prodigy Services. The court in Stratton Oakmont held Prodigy, an internet message board platform, liable for defamation for messages posted by a user. The drafters of Section 230, Representatives Chris Cox and Ron Wyden, heard of this result and decided it could not stand. They lobbied their colleagues to support the immunity created in Section 230, lest other ISPs abandon the market.

645, 663–73 (2022) (discussing the inconsistencies in these cases as well as other recent examples).

32 See Eric Goldman, Why Section 230 Is Better Than The First Amendment, 95 NOTRE DAME L. REV. ONLINE 33, 42 (2019) (noting that while Section 230(c)(1) defenses are routinely dismissed at the pleading stage, First Amendment claims almost never are) [https://doi.org/10.2139/ssrn.3351323].
33 See Goldman, supra note 32.
36 See Klein, supra note 31.
40 Koseff, supra note 37, at 59–60.
for fear of secondary liability should the *Stratton Oakmont* holding spread to other jurisdictions. They had good reason to worry. At the time, only one other court in the country had ruled on a similar case of ISP liability in *Cubby v. CompuServe*. Thus, with only two data points, courts were unpredictably free to adopt *Stratton Oakmont*'s holding.

Representatives Cox and Wyden also saw this as an opportunity to incentivize companies such as CompuServe and Prodigy—companies that did not merely post content but allowed other users to post, subject to rules—to moderate their content. Under the holdings of *CompuServe* and *Stratton Oakmont*, ISPs were incentivized to either post only their own content, decline to modify, or remove all third-party content to avoid liability. Through their drafting, Cox and Wyden created platform immunity to ensure platforms and providers were not punished for keeping things clean, even if they went overboard.

In the Senate, a very different bill made its way through the drafting process. Senator James Exon, appalled at the availability of pornography on the internet, used the occasion of a re-write of the Telecommunications Act to attempt to clean up the internet through punitive measures. In fact, by the time of the *Stratton Oakmont* ruling, Exon had already introduced the CDA. In a revised version following *Stratton Oakmont*, the Senate bill prohibited telecom companies from "making available 'indecent' material to minors under eighteen." Violations of this law would incur civil and criminal penalties. This version of the bill alarmed civil liberties groups. Rather than lobby against the bill in the Senate, those groups worked with Cox and Wyden on the House version.

And while Exon’s Senate Bill made a splash, Cox and Wyden quietly introduced H.R. 1978, which ultimately became

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41 Koseff, supra note 37, at 60; see also Klein, supra note 31, at 648; Danielle Keats Citron, *Hate Crimes in Cyberspace* 170-173 (2014).
43 Koseff, supra note 37, at 54.
44 See Koseff, supra note 37, at 55–56, 59.
45 Koseff, supra note 37, at 60.
46 Danielle Keats Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 UNIV. CHI. LEGAL F. 45, 49–50 (2020).
47 Koseff, supra note 37, at 62.
48 Koseff, supra note 37, at 61 (noting the 1995 draft of the bill had been introduced by Sen. Exon, creating a problem for Cox and Wyden).
49 Koseff, supra note 37, at 62.
50 Koseff, supra note 37, at 62 [https://doi.org/10.1038/038062b0].
52 Koseff, supra note 37, at 62–64.
Section 230. In the final bill, both Exon’s penalties for indecent content, codified in Sections 221 to 223, and Cox and Wyden’s incentives for good-faith removal of content, codified in Section 230, were included in the CDA of 1996, which President Bill Clinton signed into law.

The full CDA lasted just over a year before the United States Supreme Court invalidated Exon’s contributions to the Act. The day Clinton signed the CDA into law, the American Civil Liberties Union (ACLU) filed suit. In their suit, the ACLU contended the Exon portions of the CDA, Sections 223(d)(1) and 223(e)(5), amounted to unconstitutional censorship. The Court agreed, saying that the breadth of the Exon provisions “lack[ed] the precision that the First Amendment requires when a statute regulates the content of speech.”

The Court left in place Section 230 because the ACLU did not challenge its constitutionality and, in fact, supported the immunities offered to content providers under that section. When the Government suggested that the Court treat the internet like broadcast television, the court announced a consequential shift: instead, the Court placed internet speech into the same category as print publishing. As analogous to print, any government attempts to regulate internet content would fall under strict scrutiny.

Following Reno, courts have transformed the application of Section 230, broadening it from its “good Samaritan” origins to a broader shield of platform discretion. The current interpretation of Section 230 comes from Zeran v. America Online, a Fourth Circuit opinion on the heels of Reno. In Zeran, the plaintiff sued America Online (AOL) when they failed to remove a defamatory post. An anonymous user on AOL’s platform posted the plaintiff’s home telephone number in chat rooms on

53 Koeff, supra note 37, at 64.
54 Koeff, supra note 37, at 72–73.
56 Id. at 861.
57 See id. at 859 n.25.
58 Id. at 862.
59 Id. at 874.
60 Strossen, supra note 51, at 8.
62 Id. at 970 (“[U]nlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a ‘scarce’ expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds.”).
63 Id. at 870, 892; see also Strossen supra note 51, at 7.
64 See, e.g., Zango, Inc. v. Kaspersky Lab, Inc., 568 F.3d 1169, 1170 (9th Cir. 2009).
66 Id. at 328.
the platform in conjunction with fake advertisements for “naughty Oklahoma T-Shirts” and shirts mocking the Oklahoma City bombing, a terrorist attack occurring just days before.67 AOL asserted Section 230 immunity as an affirmative defense.68 The trial court accepted AOL’s use of Section 230 and dismissed the complaint on the pleadings.69 In denying the plaintiff relief on appeal, the Fourth Circuit acknowledged that AOL’s defamation defense fell squarely within the statute’s plain meaning, absolving AOL of any liability.70 In so holding, the court said, “[t]he imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech.”71

The court recognized AOL’s role as a publisher, separate from a speaker, and consistent with the First Amendment principles invoked in Reno.72 The court also noted the striking similarity between Zeran’s claim against AOL and Stratton Oakmont’s claims against Prodigy in the case that sparked Section 230.73 In Zeran, the plaintiff sued AOL for failing to immediately remove the content after removing posts elsewhere on the platform, rather than for posting information.74 Zeran became the standard for Platform immunity under Section 230.75

Since Zeran, courts have expanded the protections of Section 230, authorizing platforms to remove content they find objectionable without regard to any specific standard they may violate.76 In Zango v. Kaspersky Lab,77 for example, the Ninth Circuit upheld a district court’s grant of immunity to Kaspersky, a content filtering software, when Kaspersky blocked downloads and functionality of Zango, an arguable

67 Id. at 329.
68 Id.
69 Id. at 329–30.
70 Id. at 330.
72 Id. at 334.
73 Id.
74 Id. at 330.
75 See Mark D. Quist, Comment: “Plumbing the Depths” of the CDA: Weighing the Competing Fourth and Seventh Circuit Standards of ISP Immunity Under Section 230 of the Communications Decency Act, 20 Geo. Mason L. Rev. 275, 277 (2012) (“Zeran remains the national standard, and it is also the reading that best accords with the text of Section 230, with Congress’s intent in enacting the statute, as well as with the findings and policy aims announced in Sections 230(a) and (b)”). Cf. Chi. Lawyers’ Comm’n for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 670–71 (7th Cir. 2008) (finding Section 230 to grant a smaller umbrella of protection than the court in Zeran, but still finding immunity for the defendant against the Fair Housing Act claim asserted by plaintiffs).
76 See Citron & Franks, supra note 46, at 46.
77 Zango, Inc. v. Kaspersky Lab, Inc., 568 F.3d 1169, 1177–78 (9th Cir. 2009).
competitor.\textsuperscript{78} Zango raised tortious interference and other claims for Kaspersky's blocking.\textsuperscript{79} Kaspersky claimed immunity under Section 230 because it had labeled Zango's software as malicious.\textsuperscript{80} Zango argued that Section 230, as intended by Congress, did not apply to companies such as Kaspersky, who, rather than hosting content of others, filter materials that the user or Kaspersky finds objectionable.\textsuperscript{81} The Ninth Circuit, however, disagreed.\textsuperscript{82} The court expanded the working definition of provider to include platforms such as Kaspersky and granted Kaspersky immunity under Section 230.\textsuperscript{83}

On the other hand, courts have distinguished platforms that block, take down, or modify content from those that create content and seek immunity. For example, in another Ninth Circuit case, the court held that platforms that create content could not escape liability under Section 230 for violating the Fair Housing Act.\textsuperscript{84} The court in \textit{Fair Housing Council of San Fernando Valley v. Roommates.com} held the Section 230 immunity shield did not extend to the platform because the plaintiffs based their Fair Housing Act claim on content created or developed by Roommates.com, rather than by a disassociated third party.\textsuperscript{85} In interpreting the statute, the court added, "[t]he Communications Decency Act was not meant to create a lawless no man's-land on the Internet."\textsuperscript{86} This illustrates the outer bounds of Section 230 immunity as courts currently interpret it: while the limits of third-party content immunity seem endless, publishers remain liable for their own content within the usual bounds of other bodies of law.\textsuperscript{87}

Importantly, this distinction—between platforms that create content and platforms that host others' content—remains in flux. In the October 2022 Supreme Court term, the Court agreed to hear \textit{Gonzalez v. Google},\textsuperscript{88} a case about whether YouTube became a publisher of content when it created thumbnails of videos and suggested them via

\begin{itemize}
\item \textsuperscript{78} Id. at 1170.
\item \textsuperscript{80} Zango, 568 F.3d at 1172.
\item \textsuperscript{81} Id. at 1173.
\item \textsuperscript{82} Id.
\item \textsuperscript{83} Id. at 1177–78.
\item \textsuperscript{84} Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1165 (9th Cir. 2008).
\item \textsuperscript{85} Id. at 1166.
\item \textsuperscript{86} Id. at 1164.
\item \textsuperscript{87} See id. (remanding the case back to the district court to analyze whether Roommates.com should escape liability on other grounds, such as the Fair Housing Act or the First Amendment).
\item \textsuperscript{88} Gonzalez v. Google, LLC, 143 S. Ct. 80 (2022).
\end{itemize}
algorithm. The Court sidestepped the Section 230 question and remanded the case to the Ninth Circuit to re-evaluate whether the plaintiffs stated a claim under the Court’s companion decision in Twitter, Inc. v. Taamneh. Whether the Court changes the publisher standard under Section 230 via a future case remains to be seen.

The foregoing cases, from Zeran to Roommates, all dealt with content. Courts less frequently need to apply Section 230 to deplatforming or banning users. When courts do, Section 230 immunizes platforms just as it does in content-based cases. For example, when plaintiff Megan Murphy sued Twitter following her ban from their platform, Section 230 barred her breach of contract claim and required dismissal. When Trump sued Twitter following his ban, his First Amendment challenge to the ban and his First Amendment challenge to Section 230’s constitutionality failed. In Trump v. Twitter and other cases, such as Prager University v. Google, courts dismissed suits on First Amendment grounds. Courts have applied Section 230 immunity to a wide range of claims against platforms from Reno to the present. Courts hold platforms liable only in cases in which platforms had a direct role in creating the offending content. Further, in removing users from their platforms, Section 230 has second-chaired the First Amendment in

89 See Gonzalez v. Google, L.L.C., 2 F.4th 871, 894–95 (9th Cir. 2021).
90 Gonzalez, 143 S. Ct. at 1192; Twitter, Inc. v. Taamneh, 598 U.S. 471 (2023) (per curiam).
92 See discussion supra Part 0.
94 Id.
95 951 F. 3d 991 (9th Cir. 2020) (hereinafter “PragerU”).
96 Trump, 602 F. Supp. 3d at 1225 (“Overall, the amended complaint does not plausibly allege that Twitter acted as a government entity when it closed plaintiffs’ accounts. Consequently, the amended complaint does not plausibly allege a First Amendment claim against Twitter.”); see also PragerU, 951 F.3d at 995 (“Despite YouTube’s ubiquity and its role as a public-facing platform, it remains a private forum, not a public forum subject to judicial scrutiny under the First Amendment.”).
98 See Fair Hous. Council of San Fernando Valley v. Roommates.com, L.L.C., 521 F.3d 1157, 1165 (9th Cir. 2008) (“Roommates’s own acts—posing the questionnaire and requiring answers to it—are entirely its doing and this section 230 of the CDA does not apply to them.”).
shredding social media from liability. Because of Section 230’s breadth, many have sought to reform the statute, from Congress to the academy.

III. PROPOSED SOLUTIONS TO THE CURRENT SECTION 230

Legislators, academics, and commentators have proposed changing Section 230 in various ways. This Part will briefly examine two categories of Section 230 reforms: academic proposals and legislative actions. This Part will show that, while some of these measures take on other Section 230 issues that lie outside the scope of this Comment, many proposals from both legislators and academics ignore the First Amendment protections afforded to platforms.99 Many proposals may withstand constitutional scrutiny, so long as they only concern removing Section 230’s special protections and do not attempt to change protections afforded under the First Amendment.

Academics frequently propose many changes to Section 230. Some changes include new carve-outs, such as a public health disinformation exception.100 Others have proposed changing the classification of platforms. For example, one such proposal suggests creating a dichotomy between platforms that simply host content and those that encourage content leading to third-party torts.101 In the eyes of the proposal’s author, this would give courts more freedom to hold onto suits that plead facts of intermediary liability while still allowing blanket dismissals of non-actor claims.102 Another proposal would leave Section 230’s “over-filtering provision” (Section 230(c)(2)) intact,103 while modifying Section 230(c)(1).104 This modification would require that any platform seeking immunity for third-party content show that it did not encourage or fail to remove tortious materials before Section 230(c)(1) immunity would apply.105 Another proposal, seeking to remove all Section 230 protections, would re-classify some platforms, namely social media platforms, as common carriers, a designation

99 See infra Part 0.
100 See Michael L. Rustad & Thomas H. Koenig, Creating a Public Health Disinformation Exception to CDA Section 230, 71 Syracuse L. Rev. 1255, 1321 (2021). But see Citron & Franks, supra note 46, at 69 (warning against carve-outs for Section 230 because of problems with other carve-out schemes, including SESTA and FOSTA).
101 See Klein, supra note 31, at 675–80 (arguing for a defamation-like exception to Section 230).
102 See Klein, supra note 31, at 679.
104 Citron, supra note 103 (manuscript at 31, 35).
105 Citron, supra note 103 (manuscript at 35).
applied to utilities and the United States Postal Service.\textsuperscript{106} This proposal echoes many calls by conservative pundits and politicians that social media companies act, and should be treated, as common carriers. While the proposal claims that the classification of social media platforms as common carriers would probably stand up to a constitutional challenge, it would not solve many of the chief complaints of those who are removed from platforms and it would still allow for several editorial decisions protected by the First Amendment.\textsuperscript{107} This change to common carrier status would likely not control all social media platforms’ actions regarding its users.\textsuperscript{108} Some of these proposals, and myriad others like them, address specific Section 230-related problems, such as bad actors, while ignoring the constitutional issue of deplatforming.\textsuperscript{109} A complete fix to the ills of Section 230 would require creativity to incorporate some of these features as applied to intermediary liability while providing broad discretion—in keeping with Constitutional editorial discretion doctrine\textsuperscript{110}—to remove users and content as they see fit.\textsuperscript{111}

In addition to the proposals above, legislators continually propose changes to the protections of Section 230, attempting to solve a variety of perceived ills. In the 117th Congress alone, legislators in both chambers introduced multiple amendments to Section 230, from situation-specific changes to the full-scale repeal of the immunity clause.\textsuperscript{112} Some of the proposed legislation create more immunity carve-outs;\textsuperscript{113} Other proposals try to impose viewpoint-neutral

\begin{footnotesize}
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\item \textsuperscript{107} Volokh, supra note 106, at 407.
\item \textsuperscript{108} Volokh, supra note 106, at 412–14.
\item \textsuperscript{109} See Citron, supra note 103 (manuscript 103 at 33 n. 206).
\item \textsuperscript{110} See infra Part 0.
\item \textsuperscript{111} Incorporating fixes such as those of Professor Citron, supra note 103, while affirming platform editorial discretion rights clearly takes a balancing act. See infra Part 0.
\item \textsuperscript{112} See Meghan Anand et al., \textit{All the Ways Congress Wants to Change Section 230}, SLATE: Future Tense (March 23, 2021, 5:45 AM), https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html.
\item \textsuperscript{113} See, e.g., The Eliminating Abusive and Rampant Neglect of Interactive Technologies (EARN IT) Act of 2022, H.R.6544, 117 Cong. (Introduced Feb. 1, 2022); see also SAFE TECH Act, H.R. 3421, 117 Cong. (Introduced May 21, 2021) (removing liability protection for certain categories of information and for commercial speech on platforms). But see Citron & Franks, supra note 46, at 69 (cautioning against carve-outs such as these, based on the troubled application of other carve-outs, such as the Stop Enabling Sex Traffickers Act, which resulted in platforms filtering everything related to sex or nothing to maintain clean hands).
\end{itemize}
\end{footnotesize}
requirements,\textsuperscript{114} good-faith standards for content removal,\textsuperscript{115} or common carrier status\textsuperscript{116} in attempts to circumvent platform discretion. While some of these measures may incorporate the changes called for by academics above, others may run afoul of constitutional protections discussed in Part IV if they go beyond removing Section 230 immunity and impose penalties for constitutionally protected moderation.\textsuperscript{117}

Before turning to Part IV, it is worth noting at least two state-level attempts to circumvent Section 230. In the aftermath of Trump’s ban from many social media sites, some conservative state legislatures attempted to circumvent Section 230 immunity for platforms, particularly those that host what they describe as “political speech” or those that remove candidates for office.\textsuperscript{118} While these bills, as they relate to internet platforms, would be expressly preempted by Section 230,\textsuperscript{119} that has not stopped states from attempting to regulate and label the platforms as common carriers.\textsuperscript{120} In one instance, the Florida Legislature passed, and Governor Ron DeSantis signed, S.B. 7072, which banned platform “censorship” of political users.\textsuperscript{121} The law would, among other things, create a cause of action for any political candidate

\textsuperscript{114} See, e.g., The Preserving Political Speech Online Act, S. 2338, 117 Cong. (Introduced July 14, 2021) (requiring platforms to maintain records of all political ads on their sites, to afford equal advertising opportunities to each candidate, and removing immunity for screening or blocking content on the grounds of race, color, religion, sex, national origin, or political affiliation or speech, with an odd exception for services dedicated to “a specific set of issues, policies, beliefs, or viewpoints.”); see also the Disincentivizing Internet Service Censorship of Online Users and Restrictions on Speech and Expression Act, S.2228, 117 Cong. (Introduced June 24, 2021).

\textsuperscript{115} The Protect Speech Act, H.R.3827, 117 Cong. (Introduced June 14, 2021) (imposing an objective good-faith standard for specific content categories, or any other content that purportedly violates a platform’s terms of use).

\textsuperscript{116} 21\textsuperscript{st} Century FREE Speech Act, Twenty-First Century Foundation for the Right to Express and Engage in Speech Act, S.1384, 117 Cong. (Introduced Apr. 27, 2021). This bill would change the classification of some platforms to that of a common carrier and would further limit content moderation immunity to only certain kinds of content, removing the good-faith basis protection and the “otherwise objectionable” catchall language of Section 230(c)(2).

\textsuperscript{117} See infra Part 0.

\textsuperscript{118} See 2021 Fla. S.B. 7072; 2021 Tex. H.B. 20 [https://doi.org/10.4324/9781003236092-8].


“deplatformed” by "social media platforms." In addition, the law would require social media platforms to meet certain requirements when restricting speech by users. The bill additionally imposed stiff fines for deplatforming political candidates at $250,000 per day for candidates for state-wide office and twenty-five thousand dollars per day for all other candidates. A consortium group immediately challenged the law as unconstitutional and preempted by Section 230.

Similarly, Texas passed its own social media law prohibiting “censorship” based on viewpoint. Applying to platforms with at least fifty million monthly active users, the bill required platforms to disclose their content moderation policies, information on how they tailor content to users, how they moderate content, and requiring platforms to publish an acceptable use policy. The Texas bill, however, goes further. It prohibits “censorship” by social media platforms based on viewpoint, geography, or repeating another’s viewpoint. It also prohibits enforcement of choice-of-law clauses in platforms’ terms of use and imposes penalties to compel compliance. The same advocacy group that sued to block the Florida law also brought a similar action in Texas, receiving a preliminary injunction. The Fifth Circuit upheld the law’s constitutionality, setting up a circuit split between the Fifth and

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124 Id.
127 2021 Tex. H.B. 20, §§ 120.051–120.053.
128 2021 Tex. H.B. 20 § 143A.002(1)–(3).
129 2021 Tex. H.B. 20 § 143A.003. This clause is common across social media platforms’ terms of use and frequently comes up in litigation initiated in more conservative districts. See also Trump v. Twitter, Inc., 602 F. Supp. 1213, 1226 (N.D. Cal. May 6, 2022) (applying California’s choice-of-law doctrine over the request of the plaintiffs after the original case was filed in a Florida district court and transferred pursuant to the clause).
131 Netchoice, L.L.C. v. Paxton, 49 F.4th 439, 494 (5th Cir. 2022).
Eleventh Circuits. In each case, a petition for certiorari has been filed with the Supreme Court.

IV. THE FIRST AMENDMENT: A FRAMEWORK FOR UNDERSTANDING SECTION 230

Many criticisms of Section 230 complain that platforms censor users and violate their free speech rights. These claims, whether made in good faith or not, misstate or misunderstand the applicability of First Amendment doctrine to private companies, including all of today’s social media platforms. As many critics of Section 230 will point out, platforms do not censor users; only governments may censor. This reality flows from state action doctrine. Under state action doctrine, only actors representing the state may be held to the First Amendment’s standards. This does not apply to platforms moderating users or content, but it does apply to government interventions to tell them how to do so. As this Comment will further discuss, while social platforms cannot violate the First Amendment by moderating users and content, this does mean that attempts on behalf of the Government to regulate this action would violate the First Amendment under a separate First Amendment doctrine called compelled speech, which the Court sometimes refers to as editorial discretion. Thus, this Part will proceed by: (A) explaining state action doctrine and its exceptions; (B) reviewing compelled speech doctrine; and (C) addressing how the two doctrines interact to protect platforms’ speech rights to moderate content and users on their sites, in addition to the protection afforded by Section 230.

133 AG, Fla. v. Netchoice, L.L.C., No. 21-12355 (U.S. Sep. 21, 2022) (consolidating the Netchoice cases).
134 See, e.g., Strossen, supra note 51, at 3 (“On the other hand, unprecedented numbers of speakers are being silenced by non-governmental censorship of virtually any speech that anyone deems objectionable”) (citations omitted); see also Guynn, supra note 5.
136 See Strossen, supra note 51 at 4; Citron & Franks, supra note 46, at 62.
138 Id.
A. State Action Doctrine

Constitutional protections generally apply against government actors. This is the state action doctrine. Concerning First Amendment protections, this means that only government actors can censor or violate someone’s First Amendment rights. The Supreme Court has applied state action doctrine in a variety of free speech settings. For example, in New York Times v. Sullivan, a cornerstone First Amendment defamation case, the Court dispensed with a state action argument put forth by the plaintiffs in an attempt to block the Times’ First Amendment defense. This case involved a defamation claim against the New York Times over an advertisement displayed in a daily edition of the paper, setting the actual malice standard for defamation of a public figure. The Court allowed the New York Times’ First Amendment defense because, although the matter involved two private parties, the plaintiff (Sullivan) relied on Alabama state defamation law to assert a cause of action and that state law’s invocation amounted to a state action infringing the New York Times’ First Amendment rights.

A more recent Supreme Court case provides a helpful illustration. In Manhattan Community Access v. Halleck, the Court weighed whether a private operator of a public access station constituted a state actor for First Amendment purposes. To find a private entity, in this case, a local non-profit organization called Manhattan Neighborhood Network (MNN), subject to the state action doctrine, the Court asked whether the private company exercised a “function ‘traditionally exclusively reserved to the [s]tate’”—an exception to the state action doctrine sometimes called the public function exception. The Court held that MNN’s function, providing public access television, was not

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142 Chemerinsky, supra note 141, at 553–63.
143 See Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019); see also Netchoice, L.L.C. v. A.G. Fla., 34 F.4th 1196, 1203 (11th Cir. 2021) (“Put simply, with minor exceptions, the government can’t tell a private person or entity what to say or how to say it.”); Strossen, supra note 51, at 21.
145 Id. at 265.
146 Id. at 267.
147 Id. at 265.
148 Manhattan Cmty., 139 S. Ct. at 1926.
149 Id.
150 Id.
public, and reasoned that MNN did not transform into a state actor just because it “open[ed] its property for speech by others.”\textsuperscript{151}

\textit{Manhattan Community} bears a striking similarity to other claims made by plaintiffs complaining about deplatforming. The \textit{Manhattan Community} plaintiffs sued MNN when MNN cut off their access to on-air programming on MNN’s public access channels.\textsuperscript{152} The Court directly addressed the public function exception.\textsuperscript{153} First, the Court pointed out that the public function exception fits only a narrow array of functions—functions traditionally reserved for the state.\textsuperscript{154} According to the Court, “[i]t is not enough that the federal, state, or local government exercised the function in the past, or still does.”\textsuperscript{155} The Court continued, “it is not enough that the function serves the public good or the public interest in some way.”\textsuperscript{156} The proper criterion, the Court said, requires that the government “traditionally and exclusively performed the function.”\textsuperscript{157} The Court provided two examples of situations meeting this narrow exemption from its previous cases: running elections\textsuperscript{158} and operating a company town.\textsuperscript{159} The Court went on to cite a variety of examples that failed the public function exemption test, which included running sports associations,\textsuperscript{160} insurance payments,\textsuperscript{161} providing special education services,\textsuperscript{162} representing indigent criminal defendants,\textsuperscript{163} and providing electricity.\textsuperscript{164} After reviewing the function at issue, the Court concluded community access television did not constitute a public function, and thus MNN could assert its editorial discretion to exclude the plaintiffs and their programming.\textsuperscript{165}

\textsuperscript{151} Id.
\textsuperscript{152} Id. at 1927.
\textsuperscript{153} Id. at 1928.
\textsuperscript{155} Id.
\textsuperscript{156} Id. at 1928–29.
\textsuperscript{157} Id. at 1929.
\textsuperscript{158} Id. (citing Terry v. Adams, 345 U.S. 461, 468–70 (1953)).
\textsuperscript{159} Id. at 1929 (citing Marsh v. Alabama, 326 U.S. 501, 505–09 (1946)).
\textsuperscript{162} Id. (citing Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982)).
\textsuperscript{163} Id. (citing Polk Cnty. v. Dodson, 454 U. S. 312, 318–19 (1981)).
\textsuperscript{164} Id. (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 352–54 (1974)).
\textsuperscript{165} Id. at 1932–33.
Beyond public function, the Court traditionally recognizes another exception to the state action doctrine: the entanglement exception.\footnote{Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 68 (1963) ("The acts and practices of the members and Executive Secretary of the Commission disclosed on this record were performed under color of state law and so constituted acts of the State within the meaning of the Fourteenth Amendment.").} Under this exception, if a private entity acts because of the influence or coercive power of the state, the state has circumvented the state action doctrine and may not infringe others’ First Amendment rights.\footnote{See Chemerinsky, supra note 141, at 573.} The entanglement exception, often merged with the public function exception,\footnote{Eric Sirota, Can the First Amendment Save Net Neutrality?, 70 Baylor L. Rev. 781, 794–95 (2018) (discussing the factors constituting the public function exception).} might be stated as “a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.”\footnote{Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).} The Court’s treatment of this exception leaves many questions and few answers.\footnote{Chemerinsky, supra note 141, at 573 (“Unfortunately, the entanglement exception cases are even more inconsistent than those concerning the public function exception.”).}\footnote{Blum v. Yaretsky, 457 U.S. 991, 1004–05 (1982).} \footnote{See Strossen, supra note 51, at 21.} \footnote{Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n, 531 U.S. 288, 296–97 (2001). See also Sirota, supra note 168, at 798 (discussing the Court’s treatment of the same).} Blum v. Yaretsky,\footnote{Brentwood, 531 U.S. at 298.} which articulated the rule above, expressed that state influence is required, and “[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment.” A private company may be coerced into suppressing a person’s liberties or rights to a sufficient degree that it overrides the private nature of the company and becomes state action.\footnote{Id. at 296 (citing Lebron v. Nat’l R.R. Passenger Corp., 513 U.S. 374 (1995)).}

This line, however, remains difficult to determine. The Court uses past cases as data points to determine where to draw the line between private and state action and which standard might apply.\footnote{Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass’n, 531 U.S. 288, 296–97 (2001). See also Sirota, supra note 168, at 798 (discussing the Court’s treatment of the same).} For example, the Court in Brentwood Academy found state action in running a high school athletics association because the board members were predominantly public school and state officials.\footnote{Id. at 296 (citing Lebron v. Nat’l R.R. Passenger Corp., 513 U.S. 374 (1995)).} That case cited other data points to reach its conclusion, including Lebron v. National Railroad Passenger Corporation,\footnote{Id. at 296 (citing Lebron v. Nat’l R.R. Passenger Corp., 513 U.S. 374 (1995)).} which found that Amtrak was a state actor;
Pennsylvania v. Board of Directors of City Trusts of Philadelphia,\textsuperscript{176} which found a state-established board of directors turned the private college into a state actor; and Evans v. Newton,\textsuperscript{177} which held a private trustee group overseeing a park formerly in public hands acted on behalf of the state when it excluded people of color. The Court has increasingly resisted finding entanglements or public functions in private actors over the past several decades, as seen in Blum and others.\textsuperscript{178} Amongst such disparate data points, some filtering of the Court’s various rulings may help guide the way.

Because the Court has yet to entertain an entanglement case relating to social media platforms,\textsuperscript{179} examples from other telecommunications cases help, just as Manhattan Community serves as a data point for the public function exception.\textsuperscript{180} In Denver Telecomm, the Court weighed a constitutional challenge to a different Title Forty-Seven statute that regulated the broadcasting of “patently offensive” sexual content on cable channels.\textsuperscript{181} The Court held that the first provision of the law at issue, which allowed operators to moderate objectionable but otherwise legal content complied with the First Amendment.\textsuperscript{182} When asked to evaluate the regulatory scheme as coercive, the Court found that the regulatory scheme, a precursor to the Telecommunications Act of 1996, merely permitted cable operators to use their editorial discretion rather than rising to a level of coercion.\textsuperscript{183}

The parallels between Denver Telecomm and Section 230 loom over any analysis. In fact, the Denver Telecomm Court, after finding the first part of the statute at issue constitutional, found a second section, requiring cable channel providers to remove content harmful to children, unconstitutional.\textsuperscript{184} The Reno Court took the same approach with similar portions of the CDA.\textsuperscript{185} Given this congruence between both statutory schemes, it seems probable that Section 230 by itself does not create an entanglement for social media platforms.

\textsuperscript{176} Id. at 296–97 (citing Pa. v. Bd. of Dirs. of City Trs. of Phila., 353 U.S. 230, 231 (1957)).
\textsuperscript{177} Id. at 297 (citing Evans v. Newton, 382 U.S. 296, 299 (1966)).
\textsuperscript{178} Sirota, supra note 168, at 798.
\textsuperscript{179} See Strossen, supra note 51, at 22.
\textsuperscript{180} See Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1929 (2019).
\textsuperscript{182} Id. at 733.
\textsuperscript{183} Id. at 743.
\textsuperscript{184} Id. at 746.
B. Compelled Speech Doctrine

When evaluating the rights of platforms, a second strand of First Amendment doctrine comes into focus once we accept that platforms are not state actors. The analysis then shifts to compelled speech: whether the Government may tell private actors what to do, say, or display. This would implicate a private actor’s right to editorial discretion or compel them to speak or host speech. This doctrine, notably announced in *Miami Herald Publishing Co. v. Tornillo*, applies to platforms that publish speech, including the speech of others.

In *Miami Herald*, the Court invalidated a Florida right-of-reply law that required newspapers to give figures criticized in their pages the right to publicly reply in a subsequent issue. The Court based its holding on the intrusion of the state statute into the functions of the paper’s editors. At the respondent’s urging, the Court confronted a familiar sounding view: the consolidation of power in the hands of few news publishers meant a few entities held all the power to shape public opinion. Respondents argued that this shift in control from the founding days of the First Amendment necessitated government intervention. They claimed that the “government has an obligation to ensure that a wide variety of views reach the public.” The Court, however, pointed to a long history of cases counseling against “government-enforced access.” In upholding a right to editorial discretion, the Court noted that “[g]overnmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers.” In holding the Florida law unconstitutional, the Court based its reasoning on editorial discretion.

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186 *See supra* Part 0.
187 *See Miami Herald Publ’g Co. v. Tornillo, 418 U.S. 241, 258 (1974); see also CHEMERINSKY, supra note 141, at 1061–62 (“In some instances, the Court has held that the First Amendment is violated if the Government forces owners to make their property available for expressive purposes.”).
188 418 U.S. at 258.
189 *Id; see also* Mallyn Fidler, *The New Editors: Refining First Amendment Protection, 2 Notre Dame J. Emerging Tech. 241, 243, 251–54 (2021) (explaining the underdeveloped nature of First Amendment law to the Internet and its platforms because of Section 230’s sweeping immunity and that courts tend to decide such issues on statutory grounds rather than Constitutional ones).
190 *Miami Herald, 418 U.S. 241 at 258.*
191 *Id.*
192 *Id. at 249–50.*
193 *Id. at 248.*
194 *Id. at 254.*
195 *Id. at 256 (emphasis added) (citing Grosjean v. Am. Press Co., 297 U.S. 233, 244–45 (1936)).*
control, even when printing a third party’s reply would cost the paper nothing, and even when the newspaper would not be forced to forego any other content—either news or editorial.\footnote{Miami Herald Publ’g Co. v. Tornillo, 418 U.S. 241, 258 (1974).}

The right of editorial discretion began with news publishing, but it did not end there; editorial discretion comes in many forms.\footnote{See Fidler, \textit{supra} note 189, at 255 (“In the mid-1990s, the Supreme Court issued two decisions that made clear it was willing to construe editorial judgment broadly.”).} This discretion includes that of cable operators and their content, as discussed in \textit{Manhattan Community}\footnote{Manhattan Cnty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019).} and an earlier case, \textit{Turner Broadcasting System, Inc. v. FCC}.\footnote{Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 626–29 (1994).} It also extends to discretion over others’ speech by non-governmental actors, as the Court held in \textit{Hurley v. Irish-American Gay, Lesbian, and Bisexual Group}.\footnote{Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp., 515 U.S. 557, 573 (1995).} In \textit{Hurley}, the Court applied this doctrine to a private parade organizer’s discretion in deciding whether to include or exclude marchers with messages the organizers disagreed with.\footnote{Id. at 566.} The \textit{Hurley} Court said, “a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech. Nor, under our precedent does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication.”\footnote{Id. at 569; see also Fidler, \textit{supra} note 189, at 255 (quoting the same and adding “Selection over speech is enough: the coherency of that selection is not at issue.”).}

The Court similarly found compelled speech in cases previously discussed. Earlier, in \textit{Bantam Books}, the Court found compelled speech when the Government (through an entangled commission) influenced booksellers to refrain from stocking certain, presumably indecent materials (but which did not rise to the Court’s standards for obscenity)\footnote{Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 64 (1963).} and pressuring the booksellers to cease distribution of flagged books or face criminal referrals.\footnote{Id. at 68.} The same issue arose in \textit{Manhattan Community}, where the Court found a television station operator’s discretion paramount to a producer’s desire to publish on their channels.\footnote{Manhattan Cnty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019).}
In other situations, however, the Court has taken seemingly inconsistent positions.\textsuperscript{206} For example, in \textit{Pruneyard Shopping Center v. Robins},\textsuperscript{207} the Court held that a shopping center’s compelled speech rights were not implicated by a California Constitutional provision requiring them to host peaceful demonstrators and pamphleteers on mall property.\textsuperscript{208} The Court distinguished \textit{Pruneyard} from others in a few significant ways. First, it noted that the First Amendment did not bar California from imposing stronger protections for the speech of protestors.\textsuperscript{209} The shopping center’s prohibition in \textit{Pruneyard} applied to “any publicly expressive activity … that is not related to its commercial purposes.”\textsuperscript{210} The mall’s rules did not apply only to behavior the shopping center considered objectionable.\textsuperscript{211} Second, the Court distinguished the case with \textit{Miami Herald}, where the Court reasoned any intrusion into editorial discretion would “dampen the vigor and limit the variety of public debate,” conditions which the Court claimed were not present in \textit{Pruneyard}.\textsuperscript{212} Some scholars point out that \textit{Pruneyard} dealt with a state’s ability to legislate a requirement to host pamphleteers, not whether the exclusion of them violated the First Amendment.\textsuperscript{213} Aside from a recent dissenting opinion in the lifting of an injunction,\textsuperscript{214} the Court has not had an occasion to apply either \textit{Miami Herald} or \textit{Pruneyard} to the internet or social media platforms. The closest analog of recent times remains \textit{Manhattan Community}, in which the Court found private companies operating public access channels did not rise to the level of state actors.\textsuperscript{215}

\textsuperscript{206} Compare \textit{Pruneyard Shopping Ctr. v. Robins}, 447 U.S. 74, 88 (1980) (holding a law requiring a shopping center to host protesters handing out pamphlets did not violate shopping center’s First Amendment rights), \textit{with} \textit{Miami Herald Publ’g Co. v. Tornillo}, 418 U.S. 241, 258 (1974) (holding a state law compelling the newspaper to print a reply violated newspaper’s First Amendment right to editorial discretion).


\textsuperscript{208} \textit{But see} CHEMERINSKY, \textit{supra} note 141, at 1062 (arguing that the difference between holdings in \textit{Tornillo} and \textit{Pruneyard} lies in the freedom of the press to editorial discretion, which the shopping center in \textit{Pruneyard} lacked).


\textsuperscript{210} \textit{Id.} at 76.

\textsuperscript{211} \textit{But see} CHEMERINSKY, \textit{supra} note 141, at 1062 (questioning the tenuous relationship between the Courts claim that the shopping center owners did not specifically object to the viewpoint of the plaintiffs and the cases the Court attempts to reconcile, such as \textit{Miami Herald}).


\textsuperscript{213} \textit{Fidler, supra} note 189, at 256.


C. Applying the First Amendment to the Internet and Platforms

The previous Sections discussed two distinct strands of First Amendment doctrine, which work together to inform how Section 230 supplements First Amendment protections. Next, this Comment will apply these doctrines to platforms and the content and user moderation choices they make under the color of Section 230. First, it will discuss why state action doctrine poorly fits social media platforms and why neither the public function exception nor the entanglement exception likely would apply. Second, it will discuss how the compelled speech doctrine applies to content moderation efforts and largely protects platform choices to remove content, modify it, or exclude users for any reason.

1. State Action Doctrine and Internet Platforms

To begin, internet platforms, particularly social media platforms, resist the state actor label. This is because, aside from a few exceptions, private companies create, manage, and host the internet. Those few exceptions noted above do not change the private nature of internet platforms. Since the internet lies in the hands of private actors, an exception to state action must apply to draw social media platforms under the First Amendment’s free speech protections. Neither exception, however, fits well with social media platforms because they are not run by the government but by private companies. Additionally, social media platforms do not resemble—nor does the government’s influence over them—the sort of relationships covered by accepted applications of public function and entanglements exceptions.

First, it should be clear that the public function exception is a poor fit. As Justice Kavanaugh explained at length in Manhattan Community, for public function to take hold, the function must be “traditionally and exclusively” performed by the state. Our conception of today’s internet, developed in the

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216 See Citron & Richards, supra note 135, at 1361; see also Strossen, supra note 51, at 2. Citron and Richards note that the few exceptions exist in rule making for ICANN, the domain registration oversight body, as well as the government’s publishing content on .gov domains and serving as ISPs in some cases. None of these actions impact the private nature of other internet platforms’ operations. See, e.g., Timothy Zick, Clouds, Cameras, and Computers: The First Amendment and Networked Public Places, 59 Fla. L. Rev. 1, 23 (2007) (noting one such exception: government-provided Wi-Fi networks in public spaces, such as libraries and parks).

217 See supra Part 0.

218 Manhattan Cnty, 139 S. Ct. at 1929.

1990s, grew out of a host of actors private and public alike, who created individual pieces of the interconnected servers that make up the internet today.\textsuperscript{220} To further distance the internet from traditional public functions, consider that the internet as it exists today largely resulted from commercial competition: the browser wars of the early 2000s, smartphones and their ubiquity, and the rise of social media all pushed the internet from a loose network of connected computers to the behemoth hive of social activity we use daily.\textsuperscript{221} These developments of the internet point far away from the few public functions accepted by Court precedent.

An additional line of inquiry—whether the platforms under attack for content moderation represent the modern town square—runs into similar issues. To begin, the nature of social media platforms resists this label. Social media platforms, unlike physical town squares, all rely on complex algorithms to deliver a combination of advertisements (representing the platforms’ source of income) and to receive.\textsuperscript{222} Simply logging onto a platform and posting does not mean a person’s post will necessarily find an audience.\textsuperscript{223} This is because social media companies exert influence over what content each user sees.\textsuperscript{224} Additionally, the public function exception does not contemplate the public square as constituted in social media companies. Instead, the Court has limited the public function exception to just a few categories: company towns and the government in a domain “traditionally and exclusively performed by the state.”\textsuperscript{225}

A similar argument attacks social media platforms constituting “big tech” as holding a monopoly on this public square. Assuming for the moment that such a place exists, a monopoly of platforms does not dominate. For example, when platforms such as Facebook, Google (via YouTube), and Twitter banned Trump, their competition increased, first through platforms such as Parler and Gab. Later, new competition emerged through Truth Social, Trump’s own network.\textsuperscript{226} Now, the social

\textsuperscript{220} See Janet Abbate, Inventing the Internet 181–82 (1999) (discussing the decentralized authority, adaptable design, and open culture of collaboration between different server creators that led to the rapid growth of the internet in the 1980s and 90s).

\textsuperscript{221} See Thomas Haigh et al., Histories of the Internet: Introducing a Special Issue of Information \& Culture, 50 Info. \& Culture 143, 149 (2015) [https://doi.org/10.1353/lac.2015.0006].

\textsuperscript{222} See Sylvian, supra note 219, at 206.

\textsuperscript{223} Citron & Richards, supra note 135, at 1361–62.

\textsuperscript{224} Sylvian, supra note 219, at 207.

\textsuperscript{225} See Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921,1929 (2019).

\textsuperscript{226} For more on this line of interrogation, see Jane Bambauer et al., Platforms: The First Amendment Misfits, 97 Ind. L.J. 1047, 1057 (2022).
media landscape—particularly when it comes to news and information sources—has bifurcated into networks that provide like-minded information or a community of other users who share one’s views.\textsuperscript{227} This includes prominent accounts banned from other networks.\textsuperscript{228} On top of this ideological split, users also self-select social networks based on generational affiliation.\textsuperscript{229} What’s a monopolizing network to do about Gen Z, who prefers Snap, TikTok, and Instagram to Facebook and Twitter?\textsuperscript{230} Or consider that 67 percent of teens say they use TikTok, but only 23 percent say they use Twitter, even once per month.\textsuperscript{231} Consider also Millennials: they grew up with social networks such as Facebook, Myspace, Friendster, and Twitter, yet sometimes find themselves disgusted with social media and are actively reducing their exposure to platforms and their harms.\textsuperscript{232} Beyond this lack of monopoly, consider the Court’s treatment of other such monopolies. For example, in \textit{Jackson v. Metro Edison Co.},\textsuperscript{233} the Court took on another kind of monopoly with similar characteristics, public utilities. In \textit{Jackson}, the Court took on a similar claim of a private company’s monopoly of a public-facing service creating state action.\textsuperscript{234} The Court rejected such a connection.\textsuperscript{235} The Court laid out a familiar maxim:

\begin{quote}
It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be ‘state’ acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.\textsuperscript{236}
\end{quote}

\begin{footnotesize}


\textsuperscript{231} Id. at 347–48.

\textsuperscript{232} Id. at 350.


\textsuperscript{234} Id. at 347–48.

\textsuperscript{235} Id. at 350.

\textsuperscript{236} Id. at 350–51 (citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176 (1972)).
\end{footnotesize}
In so doing, the Court further distanced the work of public companies, similarly to social media companies, from traditional state actors.

Should this line of reasoning need further illustration, consider how fleeting social media platforms are in comparison to true public functions. As one commentator explains, “[w]hen comparing online platforms to historical information curators, it is misleading to treat online platforms as a static set of durable institutions that will dominate the market for generations.”

Platforms, even established ones such as Facebook, are young compared to traditional sources of information—even private ones not rising to the status of public functions such as the New York Times. Even those who have lasted the longest are far from stable. They face problems such as audiences shifting and increased competition like other businesses. The public function exception, which requires traditional vesting in the public does not fit.

Perhaps the better avenue for imbuing state action on social media platforms comes from the entanglement exception. This, too, remains a tough fit given the scant case law available. From the outset, cases such as Denver Area Educ. Telecomms. Consortium, Inc. v. FCC show that the permissive structure of Section 230 does not open a Pandora’s box of entanglement. Using the same Court’s reasoning, however,
raises concerns about any state-directed efforts to control platforms. In the analysis of whether sufficient entanglement exists, a court begins with the presumption that private entities “act as such.” Any entanglement claim would need to show such coercive influence as to become the decision of the state.

To illustrate the problems with an entanglement claim against social media platforms, consider again Trump v. Twitter, one of the few cases to be founded upon entanglement grounds against social media companies. In Trump, the district court looked for a colorable claim that Twitter acted pursuant to a government policy in closing accounts or banning users. The court found none. In drawing a distinction with Bantam Books, the court specifically noted the lack of coercion. The plaintiffs (who made up a putative class of banned Twitter users, not just Trump himself) asserted purported instances of coercion—from Congressional hearings on social media companies and misinformation to statements made by individual legislators in the media. The court, however, said these instances “fit[] within the normal boundaries of a congressional investigation, as opposed to threats of punitive state action.” Trump v. Twitter, though a district court case on a motion to dismiss, represents a valuable test balloon of the entanglement exception—and one of relatively few cases brought. It illustrates the difficulty any plaintiff will have given precedent, such as Manhattan Community, in rising above the state action doctrine. Similarly, compelled speech presents a much more formidable obstacle to overcoming the First Amendment.

249 Id.
250 Id. at 1220.
251 Id. at 1222.
252 Id. at 1220–21.
253 Id.
255 Id. at 1217 (granting the motion to dismiss the amended complaint).
This exception continues to evolve, however. Just in September of 2023, the Fifth Circuit upheld a preliminary injunction against the Biden Administration in a case brought by plaintiffs claiming censorship, including the states of Missouri and Louisiana.\textsuperscript{258} In \textit{Missouri v. Biden}, plaintiffs all were moderated by social media companies.\textsuperscript{259} They alleged that actions taken by two presidential administrations coerced the social media companies into such actions.\textsuperscript{260} The Western District of Louisiana judge and the Fifth Circuit agreed, at least to some of the government defendants.\textsuperscript{261} In affirming the preliminary injunction in part, the Fifth Circuit found that the actions by White House officials—specifically the public threats of increased regulation, antitrust investigation, and reforms to Section 230, combined with private unremitting pressure—moved the power of the state from influence to coercion.\textsuperscript{262} The court, on the other hand, held that the actions by some other state agencies likely did not rise to the level of a close nexus, therefore the District Court erred in enjoining them.\textsuperscript{263} Speaking about the State Department, for example, the Fifth Circuit pointed out that, although the Department reached out to social media companies, the plaintiffs presented no evidence that the Department’s actions went beyond educating platforms, in part, because they did not flag posts or ask for content to come down.\textsuperscript{264} Importantly, the plaintiffs in this case brought the action against the government, rather than any private companies, thus they did not implicate Section 230.\textsuperscript{265} This remains, however, far from the final word on the entanglements exception for social media companies.

2. Compelled Speech: Deciding When Internet Platforms Become Editors

The problems of overcoming state action aside, any attack on a platform’s choice of removing content will necessarily run into problems of editorial discretion. And given how content and user
moderation function, these decisions should fall under the reasoning in Miami Herald\textsuperscript{266} rather than PruneYard.\textsuperscript{267} The compelled speech analysis must begin with whether platforms perform editorial functions when they remove content or users.\textsuperscript{268} As discussed in Part II, Reno v. ACLU sets the standard by which we view online speech: it is analogous to print speech and subject to strict scrutiny in any attempt to regulate it.\textsuperscript{269} The Reno Court also characterized the internet as a place where “any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.”\textsuperscript{270}

Later, in Packingham v. North Carolina,\textsuperscript{271} the Court had an opportunity to evolve its thinking on how to view the internet but largely stayed the course. Justice Kennedy, writing for the Court regarded cyberspace, and specifically social media, as the modern public square—one of “the most important places . . . for the exchange of views.”\textsuperscript{272}

While the Reno and Packingham opinions establish how the Court views online activity, neither establishes how the Court would deal with this current content moderation debate. Instead, the Court wrote in both cases about the dangers of Government restricting speech, much like proposals to limit Section 230 would do.\textsuperscript{273}

To better understand a Court’s potential treatment of content and user moderation, parallels with other forms of speech provide helpful guideposts. For example, Miami Herald’s right of reply statute bears a striking similarity to a state’s requirement to leave up an objectionable post.\textsuperscript{274} Similarly, the decision to host others’ speech at all, in a place such as an online platform, resembles the discretion allowed in Hurley, in which a private parade organizer had discretion over participants in

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\item [\textsuperscript{266}] Miami Herald Publ’g Co. v. Tornillo, 418 U.S. 241, 258 (1974).
\item [\textsuperscript{267}] Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 388 (1980).
\item [\textsuperscript{268}] Fidler, supra note 189, at 247.
\item [\textsuperscript{269}] Reno v. Am. Civ. Liberties Union, 521 U.S. 844, 870 (1997); see Fidler, supra note 189, at 247.
\item [\textsuperscript{270}] Reno, 521 U.S. at 870; see also Strossen, supra note 51, at 9 (“Reno and Section 230 vested end users with the decentralized power to choose for themselves with whom and how they would engage online.”).
\item [\textsuperscript{271}] Packingham v. North Carolina, 582 U.S. 98, 104 (2017).
\item [\textsuperscript{272}] Id.
\item [\textsuperscript{273}] Speaking to the actions of the North Carolina Legislature in Packingham, Justice Kennedy said, “to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights.” Id. at 108.
\item [\textsuperscript{274}] Miami Herald Publ’g Co. v. Tornillo, 418 U.S. 241, 258 (1974); see Fidler, supra note 189, at 250. For a statute that would violate the First Amendment similarly, see 2021 Fla. S.B. 7072 (creating a cause of action for any user removed from a social media platform).
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their own parade.\textsuperscript{275} Both of these examples echo the Court’s most recent compelled speech case in \textit{Manhattan Community}, holding that a private entity that opens itself up to the speech of others retains their “exercising of editorial discretion over speech and speakers on their property.”\textsuperscript{276} In looking at social media platforms’ behavior, many actions the platforms take closely resemble the same that editors take. For instance, a platform’s choice to label a tweet with vaccine misinformation closely resembles an editor’s role in applying an in-line fact check to statements made in a news story. Likewise, removing a user resembles refusing to print someone’s letter to the editor. Compelled speech decisions serve as a powerful buttress to Section 230’s editorial protections. Any attempt to change the latter may invoke the former. Still, many proposed Section 230 reforms\textsuperscript{277} likely would steer clear of outright compelled speech.

Section 230 provides immunity from suits that otherwise would apply to internet platforms like they do to traditional publishers.\textsuperscript{278} The procedural benefits to invoking Section 230 contributed to the growth of the internet and continue to do so today.\textsuperscript{279} In fact, when Congress changed Section 230 protections previously, the changes resulted in internet providers eliminating services or pulling out of markets entirely, rather than police their content any differently.\textsuperscript{280} Further, changing or eliminating Section 230 protections, while having no effect on First Amendment protections, would complicate defenses leading to more constitutional cases and less judicial economy.\textsuperscript{281}

\textbf{V. Reforming Section 230 to Codify Platform Rights to Moderate Users}

Parts I through IV of this Comment have attempted to show that platforms have First Amendment rights to moderate content and remove users. This Part proposes how those editorial rights might be better incorporated in Section 230. Although it may seem duplicative to codify the First Amendment in a statute, at least three reasons counsel towards this change. This adjustment, largely to Section 230(c)(2),

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  \item \textsuperscript{276} \textit{Manhattan Cmty. Access Corp. v. Halleck}, 139 S. Ct. 1921, 1931 (2019).
  \item \textsuperscript{277} Reforms from the last Congressional session are explained in Part III.
  \item \textsuperscript{278} For example, if a newspaper prints a defamatory quote from someone, or a defamatory letter to the editor, they are liable in defamation from the subject of those comments. Not so for internet sites under Section 230.
  \item \textsuperscript{279} \textit{See infra} Part 0.
  \item \textsuperscript{280} \textit{See Goldman, supra} note 32, at 45.
  \item \textsuperscript{281} \textit{See Goldman, supra} note 32, at 45.
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would provide stability for platforms, create judicial economy, and guard against ill-informed rulings in the future.\textsuperscript{282}

The first step in this process requires removing the scienter requirement from Section 230(c)(2)(A).\textsuperscript{283} One benefit of Section 230 and the judicial economy that comes with it is the quick resolution of nuisance suits.\textsuperscript{284} The scienter requirement, as currently written, casts doubt on whether a platform at the pleading stage may be entitled to a quick motion to dismiss. Because of costs and the risks involved with litigation, this leads to settlement or de facto compelled speech.\textsuperscript{285}

Second, this Comment proposes the removal of the enumerated list of objectionable content for two reasons. First, an enumerated list traps platforms into explaining themselves when they often should not need to, much like the scienter requirement does. This reduces the likelihood of a quick resolution and instead, may lead to difficult pleading. Second, the enumerated list leads to problems of statutory interpretation. When interpreting any legal text, the presence of an enumerated list invokes the canon of \textit{ejusdem generis}.\textsuperscript{286} This canon says when language such as “otherwise objectionable” follows a list, its interpretation should align with the list that precedes it.\textsuperscript{287} In the case of Section 230, it would limit this “otherwise objectionable” content to content similar to “obscene, lewd, lascivious, filthy, excessively violent, [or] harassing” content.\textsuperscript{288} What then results if a platform takes down content it finds objectionable, such as vaccine misinformation or election falsehoods? Should a court hold a platform to such boundaries? Does the good Samaritan protection fall? Some commentators have gone so far as to argue this limited list itself violates the First Amendment and should invalidate Section 230 entirely.\textsuperscript{289} In that case, a second canon of

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\item 282 Goldman, \textit{supra} note 32, at 39–42 [https://doi.org/10.1016/S0029-7437(07)70615-8].
\item 283 Scienter requires knowledge or a specific mental state to achieve immunity. \textit{See} Goldman, \textit{supra} note 32, at 38.
\item 284 \textit{See} Goldman, \textit{supra} note 32, at 39–40 (noting in Section 230(c)(1), the procedural benefits afforded to Platform defendants allows for a speedier resolution of cases, even meritless cases, where 230(c)(2) creates higher litigation burdens which discourage defendants from relying upon them).
\item 285 \textit{See} Goldman, \textit{supra} note 32, at 40–41.
\item 286 \textsc{Antonin Scalia} \& \textsc{Bryan Garner}, \textsc{Reading Law: The Interpretation of Legal Texts} 199–213 (2012) ("Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned.").
\item 287 \textit{See} Scalia \& Garner, \textit{supra} note 286, at 199.
\item 289 \textit{See}, e.g., Alex Deise, \textit{Big Tech's First Amendment Argument Might Eviscerate Section 230}, \textsc{RealClearPolicy} (June 10, 2022),
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statutory interpretation comes into play: constitutional doubt.\textsuperscript{290} This canon requires that any statutory interpretation should avoid casting doubt on a statute’s constitutionality. As explained above, platforms should have virtually unfettered editorial discretion to remove content and speakers from their platforms. So, the interpretation of \textit{ejusdem generis} conflicts with an interpretation under constitutional doubt. A simple solution may be to remove the enumerated reasons and replace them with “for any reason” language. This would clear up any confusion for future courts and allow an easier and more efficient resolution to cases implicating Section 230(c)(2), like the efficiency of (c)(1).\textsuperscript{291}

V. CONCLUSION

This Comment reviewed the history of Section 230 and how the First Amendment, in part, supports Section 230 and, in other ways, plays second chair to Section 230. This Comment then reviewed proposals from a variety of sources to change Section 230 immunities. Next, this Comment looked at First Amendment doctrines implicated by Section 230 concluding that any attempt to impose penalties beyond revoking Section 230’s immunity shield—at least as far as content moderation is concerned—would likely fail because Section 230 merely enhances First Amendment protections for platforms including social media. Finally, this Comment proposed modest changes to Section 230 immunity to codify First Amendment protections. These would allow the law to better serve its policy aims.

This Comment leaves many related questions unanswered. It does not solve the problem of bad-faith websites and platforms that could use more scrutiny, either by creating a duty of care, as some suggest,\textsuperscript{292} or creating more carve-outs for specific social issues, such as the Accountability for Online Firearms Marketplaces Act.\textsuperscript{293} While the changes to Section 230 proposed here might seem small, they would promote the sort of good-faith content (and user) moderation the original drafters of Section 230 had in mind when they quietly dropped the Section into a larger Communications Decency Act.\textsuperscript{294}

\textsuperscript{290} Scalia & Garner, \textit{supra} note 286, at 247–51.

\textsuperscript{291} See Goldman, \textit{supra} note 32, at 39–40 [https://doi.org/10.1176/pn.39.1.0040].

\textsuperscript{292} See Klein, \textit{supra} note 31, at 675–79; Citron, \textit{supra} note 103.

\textsuperscript{293} Accountability for Online Firearms Marketplaces Act of 2021, S. 2725, 117 Cong. (Introduced Sep. 13, 2021).

\textsuperscript{294} See Kossef, \textit{supra} note 37, at 61.