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26 Words: The Transformation of Section 230 Immunity for Technology Companies in U.S. Court

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Abstract

Section 230 is a foundational internet law from the 1996 Communications Decency Act that provides technology companies with the ability to moderate content on their platforms. Policymakers from both sides of the aisle have fallen out of love with Section 230 today, and as a result, there is an ongoing policy debate in Congress on how to proceed with regulating speech online. Applying social science methods to legal research, this paper explores a simple random sample of 181 federal Section 230 case decisions in the U.S. between 2010 and 2020 to determine how these case decisions have changed over time and provide policymakers with quantitative data to reference as they proceed with plans for reform. Focusing my study on Section 230 case decisions during an expansive time period for technological innovation, I provide the only empirical study of Section 230 case decisions between 2010 and 2020 in the existing scholarship today. I discuss how recent policy proposals can be categorized into three broader themes for reform: regulating accountability and transparency, targeting the section of the statute that gives technology companies their ability to moderate content, and incentivizing technology companies to moderate more aggressively. However, these proposal themes do not properly target the ways in which Section 230 operates in court; therefore, I conclude that there is a dissonance between the Section 230 legislative history over the past ten years and the most recent policy proposals for reforming the statute. My main findings show that there has been a drastic shift in the types of defendants in these cases since 2010, the majority of these case decisions revolve around a section of the statute that does not receive much attention in Congress, and narrowing existing immunity through carveout approaches is not the most effective solution for reform.

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Introduction

The months leading up to the U.S. 2020 Presidential Election placed a spotlight on social media companies from a variety of stakeholders to perform better than they had in 2016. By performance, I am referring to election integrity efforts from foreign interference and a commitment to content moderation enforcement that would create a more constructive political dialogue on their platforms. Although by many stakeholders' standards, social media companies exceeded expectations by escaping the narrative of foreign interference in the U.S. 2020 Presidential Election, a different narrative began to take place. The topic that dominated the 2020 election cycle in the internet policy space was Section 230 of the Communications Decency Act of 1996. Put simply, the conversation surrounded how social media companies are regulating speech and content online, problems with these content moderation processes, and most importantly, Section 230, which is a statute from 1996 that gives tech companies the ability to moderate content on their platforms.[1] Furthermore, this statute made its way into the public spotlight this election cycle after Twitter placed a content warning label on one of President Donald Trump's tweets about mail-in-voting as "misleading".[2] Twitter's content moderation action over President Trump's speech, and not the label itself, falls under Section 230's legal protections for technology companies.[3] Shortly after Twitter moderated this content, the President and Republican Congressional leaders began a campaign against Section 230 on Twitter and scheduled a senate hearing about the statute 6 days before the general election. These actions, although part of a larger political strategy, have potentially dire consequences for how

[1] 47 U.S.C. § 230
[2] Conger, Kate, and Davey Alba. "Twitter Refutes Inaccuracies in Trump's Tweets About Mail-In Voting." The New York Times. The New York Times, May 26, 2020.
[3] The label that Twitter placed onto the tweet is considered Twitter's speech, which is protected under the First Amendment, while the action of moderating third-party speech is protected under Section 230.

people experience the internet every day, and lend themselves to the questions: why Section 230, and why now?

Section 230 of the Communications Decency Act of 1996 (CDA) is known by scholars as "the 26 words that created the internet we know today", although not many people are aware of what it is and how it affects their daily experience of the internet.[4] The statute was written by House Representatives Ron Wyden (D-OR) and Chris Cox (R-CA) into the CDA, or the first notable attempt by Congress to regulate pornographic, and more broadly, shield "indecent" content online from children.[5] Central to the history leading up to Section 230's addition into the CDA is the landmark court case, *Stratton Oakmont, Inc. v. Prodigy Services Co*.[6] In this case, the president of Stratton Oakmont, which is a securities investment banking firm, sued Prodigy, an online service provider, for failing to remove defamatory content from a third-party about the company's president from their platform. The plaintiff argued that Prodigy should be treated as the publisher of the defamatory content that a user had posted on the site because Prodigy had used editorial control to moderate content on its platform more broadly to make it a family friendly space online. The House of Representatives that authored Section 230 did not think it was fair that Prodigy was held liable in this case for trying to make the internet a safer place for users, and as a result, Section 230 was written into law as a bi-partisan Congressional effort. Although the CDA was ruled unconstitutional by the Supreme Court a year after its institution, due to the fact that its regulation on what adults could view on the internet was an encroachment of the government's power over individual rights, Section 230 survived. [7]

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[4] Jeff Kosseff. 2019. The Twenty-Six Words That Created the Internet (1st. ed.). Cornell University, USA.
[5] Communications Decency Act of 1995, H.R. 104
[6] *Stratton Oakmont v. Prodigy Servs. Co.,* 1995 N.Y. Misc. LEXIS 229, 23 Media L. Rep. 1794 (Supreme Court of New York, Nassau County, May 26, 1995, ENTERED).
[7] *Reno v. Aclu,* 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874, 1997 U.S. LEXIS 4037, 65 U.S.L.W. 4715, 97 Cal. Daily Op. Service 4998, 97 Daily Journal DAR 8133, 25 Media L. Rep. 1833, 11 Fla. L. Weekly Fed. S 211 (Supreme Court of the United States June 26, 1997, Decided).

In order to fully capture the influence of Section 230 legal immunity on how people experience the internet every day, especially on social media platforms, it is important to describe who this statute protects and how. Officially titled, the "Protection for 'Good Samaritan' blocking and screening of offensive material", Section 230 provides technology companies with legal protection in two key ways: protection from liability for what their users post and protection from being treated as a publisher of the content at issue.[8] First, the statute states under (c)(1) 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".[9] Essentially, providers of online platforms or services, such as Facebook, YouTube, and Twitter, cannot be held liable for any content that is posted by their users. This includes, but is certainly not limited to, content related to sex trafficking, hate speech, terrorism, child exploitation, nudity, graphic content, and incitements of violence. Second, the statute states under (c)(2) that it protects technology companies from being treated as the publisher of said content. This means that tech companies can edit and remove content, as a publisher would, without being treated as a publisher under a publishing liability framework (*see Background*). Additionally, under clauses (f)(2) and (f)(3), the statute defines who constitutes an "interactive computer service provider" and an "information content provider". It is also important to note that although Section 230 provides technology companies with broad immunity in court, the statute has no effect on federal criminal, intellectual property law, state law, communications privacy law, and sex trafficking law. This means that under clauses (e)(1-5) of the statute, which are also known as carveouts, a

[8] 47 U.S.C. § 230
[9] 47 U.S.C. § 230 (c)(1)

Section 230 defense cannot be used to dismiss these types of claims if a plaintiff uses them against the defendant in a case.[10]

Ultimately, Section 230 can be described as a procedural fast lane in court, which simply means that if it did not exist, courts would most likely end up with the same result under First Amendment protections in a similar case at a much slower pace.[11] However, it is important to note that this may not always be true, depending on the claims brought in the case. Rather than have to spend years in court litigating, Section 230 speeds up the process for both the plaintiffs and the defendants, reducing expensive litigation costs that could ruin technology companies financially in the long run. The faster pace of Section 230 cases in court, in comparison to First Amendment cases, can be understood through a three-pronged requirement that was established by the U.S. Court of Appeals for the Ninth Circuit under a case called *Barnes v. Yahoo!, Inc*.[12] Essentially, tech companies have to meet all three criteria of the test in order to be granted Section 230 immunity. First, the court asks whether the defendant is a "user or provider of an interactive computer service". Second, the court asks whether the defendant is being "treated as the publisher or speaker" of the content at issue. And third, the court asks whether the information that has been brought to the court's attention was provided by "another content information provider". If the answer is yes to all three conditions, then the tech company can dismiss the plaintiff's complaint. If the answer is no to one of the conditions, the result could

[10] A carveout in the Section 230 context is when lawmakers make exceptions to the statute such that a section 230 defense will have no effect on specific claims brought by plaintiffs that fall under that carveout category. Ultimately, it is a way that lawmakers can narrow Section 230 legal protections for technology companies under the law.
[11] Goldman, Eric, Why Section 230 Is Better Than the First Amendment (November 1, 2019). Notre Dame Law Review, Vol. 95, No. 33, 2019.
[12] *Barnes v. Yahoo!, Inc.,* 570 F.3d 1096, 2009 U.S. App. LEXIS 20053, 37 Media L. Rep. 1705, 47 Comm. Reg. (P & F) 1028 (United States Court of Appeals for the Ninth Circuit June 22, 2009, Amended).

potentially have a large effect on precedent, or how future cases with similar circumstances are decided by the courts.

Although Section 230 has provided technology companies and other providers of interactive computer services with a broad immunity from liability related to third-party generated content, platform users and defendants continue to sue. Between 1996 and 2009, there have been approximately 184 state and federal U.S. court cases related to Section 230 included in legal research databases; however, this number pales in comparison to the 340 strictly federal cases that have been brought to court over the past 10 years (meaning that the inclusion of state cases would put this total at a much higher number).[13] These numbers include both appellate and district court cases. If the overwhelming majority of plaintiffs' claims against technology companies are dismissed in the courts under Section 230's blanket immunity, then why do people continue to sue?

In tandem with this drastic increase in lawsuits brought against technology companies, it is evident that social media companies have grown exponentially over the past ten years.[14] Social media and technology are an integral, sometimes even pervasive, part of many people's daily lives, and yet, there is very little time and attention that has been given to thinking about the relationship between policy and technological innovation in the United States. Specifically looking at this issue in regard to content moderation and regulating speech online, Congressional leaders have fallen out of love with Section 230. Republicans think that Section 230 allows for "anti-conservative bias", which means they believe technology companies like Facebook and

[13] These numbers were pulled from a key word search of "Section 230" on the legal research service, NexisUni.
[14] "Demographics of Social Media Users and Adoption in the United States," April 14, 2021. https://www.pewresearch.org/internet/fact-sheet/social-media/.

Twitter are censoring conservative speech on their platforms.[15] Alternatively, Democrats believe technology companies are not doing enough to protect people online, allowing hate speech, bullying, and harassment to flourish unnoticed by platforms' moderation systems.[16] This disdain for the once cherished bi-partisan effort to "clean up the internet" has now resulted in over twenty-six attempts to modify, repeal, and/or replace Section 230 within the 116th Congress alone.[17] However, only one of these attempts was successfully passed into law under the Trump Administration, and many scholars have criticized it for not properly balancing "anti-sex trafficking initiatives with Section 230's benefits", essentially chipping away at protections for technology companies without truly solving the problems it initially set out to eliminate in the first place.[18]

Furthermore, no quantitative data exists on how Section 230 has worked in court over the past 10 years, arguably the most important time period of the statute's existence. As the Biden Administration has made it clear its intentions to take action on Section 230 in the near future, it is imperative that policymakers can look to the nature of case decisions over time and apply numerical data to back up proposals for reform. My paper will examine how Section 230 immunity case decisions between 2010 and 2020 have changed over time and how these changes can inform upcoming reform efforts. Using a simple random sample of 181 federal appellate and district court case decisions from a population size of 340, I will produce an original dataset of Section 230 case decisions between 2010 and 2020 to observe any changes in the outcomes of

[15] Katie Mellinger, "The Section 230 Standoff: Safe Harbor Rollbacks Would Not Solve Alleged 'Anti-Conservative Bias' in Social Media Content Moderation," Wake Forest
[16] Mellinger, *Ibid.*
[17] I pulled this number of policy proposal attempts from a Section 230 Bill Tracker created by Section 230 expert Jessica Meirs, a 3L at Santa Clara University Law School and Policy Specialist at Google.
[18] Goldman, Eric. "Balancing Section 230 and Anti-Sex Trafficking Initiatives." *SSRN Electronic Journal*, 2017, doi:10.2139/ssrn.3079193.

these case decisions over time and compare my findings to themes observed in the most recent policy proposals for reform. Understanding if and how these Section 230 case decisions have changed over time, while providing quantitative data on the subject, will provide crucial context to how policymakers should proceed with proposals to reform Section 230 or maintain the status quo. My findings on key aspects of the Section 230 case decisions during the expansion of the digital era will show that there is a concerning dissonance between the most recent policy proposals to reform Section 230 and my quantitative evidence.

Important Legal Definitions

Due to this paper's heavy emphasis on legal cases and trends, it is important to define a few legal concepts that are used throughout this paper and the existing literature:

1. ***Case Decision***: One case can have multiple case decisions over the course of the case's progression. I looked at case decisions for the purposes of my study; therefore, there will be more case decisions than cases in my methodology section. These decisions can be categorized by a number of case postures such as a Motion to Dismiss, the plaintiff's claims being "Affirmed", "Denied", etc.

2. ***Interactive Computer Service (ICS):*** "…any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server[.]"[19] This is usually the intermediary type, or defendant in a case. Facebook, Google, and Twitter, for example, all fit under this definition; however, this definition also encompasses darker parts of the internet, such as websites or forums dedicated to hate speech.

3. ***Information Content Provider (ICP):*** An entity or individual that creates the content at issue in the case. ICPs are not eligible for Section 230 immunity. An ICS can be an ICP at the same time, depending on the circumstances of the case, which would mean they are not eligible for Section 230 immunity.

4. ***Legal Precedent:*** A legal decision made in a previous case that either persuades or binds a future court to follow the same ruling, given a case with a similar set of circumstances.

5. ***Claims:*** These are brought by plaintiffs against a defendant, or intermediary for my purposes, requesting that a court enforces a legal right to something that one party owes

[19] 47 U.S.C. § 230

the other. For example, defamation, negligence, deceptive trade, and tortious interference with contract or business relations are all examples of claims that can be brought in court during a 230 case.

6. ***Motion to Dismiss:*** this occurs when the defendant, primarily the technology companies, move to dismiss the claim(s) that has been brought against them in court by the plaintiff.

7. ***Affirmative Defense:*** Section 230 is an affirmative defense, because it gives the judge reasons why the defense should win, regardless of if the plaintiff's claims are true.

Background

Although Section 230 has been in the news consistently over the past few years, the history of the statute and its development in case law since 1996 are vital context needed for the rest of this study's discussion. To fully grasp the weight of this statute on tech legal protections and the nature of the case law before 2010, it is necessary to provide the following: reasons why freedom of speech online is not the same as the First Amendment; the difference between publisher and distributor liability; three important legal cases determining precedent of decisions; and the most recent Congressional policy proposals for reforming Section 230. Below is a table that lists the clauses of Section 230 that will be referred to most frequently in this paper for reference:

Section 230 Clause	**Purpose**
(c)(1)	Interactive computer service providers cannot be held liable for third-party user-generated content (e.g., big tech companies cannot be held liable for the content that their users post on their platforms).
(c)(2)	This clause gives interactive computer service providers their ability to moderate content that is "consider[ed] to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable", regardless of whether that content is protected by the Constitution.[20]
(f)(2)	This clause defines who falls under the definition of an "interactive computer service". See the statute's definition of an ICS in the *Important Legal Definitions* section above.

[20] 47 U.S.C. § 230

(f)(3)	This clause defines who is creating the content at issue in the case, or who is the "information content provider". A defendant can be both an ICS and an ICP at the same time, which would not give them Section 230 immunity.
(e)(1-5)	These claims narrow Section 230 protections, which means that a Section 230 defense cannot be used to dismiss these types of claims if a plaintiff uses them against the defendant in a case. Claims that fall under (e)(1-5) include federal criminal laws, intellectual property laws, state laws, communications privacy laws, and sex trafficking laws.

Section 230 v. The First Amendment

Simply stated by Eric Goldman, a legal expert on Section 230, "The First Amendment and Section 230 are not substitutes for each other."[21] Instead, Section 230 provides a variety of extensions of the First Amendment's protections for free speech in court, in addition to some key procedural benefits.[22] This means that the more that Congress or the courts narrow Section 230's free speech protections online, the less likely it is that the First Amendment would be able to fill in the gaps: resulting in less free speech online. Additionally, the "largest public space in human history", also known as the internet, is not really a true "public forum" at all, rendering the internet and internet service providers free of most of the First Amendment limitations.[23] The disconnect that exists between Section 230's online speech protections and the First Amendment's speech protections can also be observed through the role of private companies in moderating online speech.[24] Under Section 230, these private intermediaries can exercise control over harmful content which would be "otherwise unreachable" in a public forum or First

[21] Eric Goldman, "The Ten Most Important Section 230 Rulings," 2017.
[22] Goldman, *Ibid.*
[23] David S. Ardia, Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity under Section 230 of the Communications Decency Act, 43 LOY. L. A. L. REV. 373 (2010).
[24] Ardia, *Free Speech Savior or Shield for Scoundrels*, 378.

Amendment speech context.[25] Lastly, the First Amendment and Section 230 differ on the basis of who they protect. For example, under the First Amendment, "Congress shall make no law ... abridging the freedom of speech, or of the press."[26] This protection allows any speech against the government and most hate speech against individuals to be considered legal, with the exception of certain types of both direct and symbolic speech, such as inciting action to harm others or child pornography.[27] In contrast, Section 230 gives technology companies the "right, but not the responsibility" to moderate content on their platforms.[28] This means that technology companies are able to create their own rules for what kind of speech is allowed on their platforms through their Community Standards and Terms of Service, two governing documents that users agree to when they sign on to use social media platforms. These standards were actually based off of free speech principles in the early days of social media company policymaking; however, due to the amplification of messages through social media, much less is allowed to be said on platforms now than would be allowed under the First Amendment in a public forum.[29]

Publisher v. Distributor Liability

A crucial distinction that comes up in the cases over time that is widely disputed is whether defendants, usually the technology companies, should be treated as a publisher or a distributor of third-party content. The difference, in this context, is the difference between the defendant winning or losing the case. This debate goes back to two liability frameworks that existed before Section 230 was even passed and are now incorporated into discussions of where tech

[25] Ardia, *Ibid.*
[26] "The Constitution of the United States," Amendment 1.
[27] Kathleen Ann Ruane, Freedom of Speech and Press Exceptions to the First Amendment, Congressional Research Service, (2014).
[28] Gillespie, Tarleton. Custodians of the Internet: Platforms, Content Moderation, and The Hidden Decisions that Shape Social Media. Yale University Press, 2018. Page 31.
[29] Gillespie, *Ibid.*

companies, also known as internet-service providers, fit into these liability frameworks. First, "publisher liability" is when a "person who publishes a statement by another bears the same liability for the statement as if he or she had initially created it."[30] In the context of tech legal protections, Section 230 makes sure that tech companies are not viewed as a publisher of third-party user content posted on their platforms, simply for exercising "editorial control over the content" through content moderation processes.[31] The second relevant liability framework in the common law is "distributor liability", which is usually what is given to bookstores, libraries, and newsstands for distributing content to others (although they have no duty to "examine" these items for illegal content before distribution).[32] Internet service providers such as Facebook, Twitter, and Google, are all given distributor liability under Section 230, and any claims against them that seeks to hold them as the publisher of third-party content is dismissed in court immediately.

Legal Precedent

Although some Circuit courts have overruled precedent in different cases, a few key landmark rulings remain relevant to today's discussion of Section 230 and judicial opinions for ongoing cases. Understanding where the Section 230 case law has been will help to contextualize where it is going and uncover the trends that this paper seeks to reveal for policymakers. *Zeran v. AOL*, decided the year after Section 230 was enacted in 1997, was one of the first cases to rule on the statute.[33] It involved the plaintiff, Ken Zeran, being the victim of a trolling scheme on the

[30] Ardia, *Free Speech Savior or Shield for Scoundrels*, 397.
[31] Ardia, *Ibid*.
[32] Ardia, *Free Speech Savior or Shield for Scoundrels*, 398.
[33] *Zeran v. Am. Online, Inc.,* 129 F.3d 327, 1997 U.S. App. LEXIS 31791, 25 Media L. Rep. 2526, 10 Comm. Reg. (P & F) 456 (United States Court of Appeals for the Fourth Circuit November 12, 1997, Decided).

defendant's, AOL's, message boards. This is often deemed the most important Section 230 ruling in the statute's history because the Fourth Circuit decided to read the scope of the law broadly, setting the tone for cases to follow; the ruling also decided that "Section 230's protection for third-party content could not be eliminated via demand letters or takedown notices."[34] This decision also determined that Section 230 allows internet service providers editorial control for online content that would otherwise activate publisher liability in the offline context.

The second important case in the Section 230 jurisprudence *is Fair Housing Council of San Fernando Valley v. Roommates.com*.[35] This decision is commonly used by internet service providers as an exception to the *Zeran* case, and states, "If you don't encourage illegal content, or design your website to require users to input illegal content, you will be immune."[36] However, the case has a "checkered legacy", which means that a subsequent ruling of the case concluded that Roommates.com "never had any illegal content at all", making the original ruling "pointless".[37] Although there are a multitude of other landmark cases, the third case of importance for the purposes of this paper is *Jane Doe v. Backpage.com*, which is often used as a "retort" to plaintiffs that cite the *Roommates.com* decision. [38] This case involved a website that published "online classified ads", including those for prostitution.[39] The victims in the case claimed that the way that Backpage.com was set up facilitated sex trafficking and violated

[34] *Zeran v. Am. Online, Inc.,* 129 F.3d 327, 1997 U.S. App. LEXIS 31791, 25 Media L. Rep. 2526, 10 Comm. Reg. (P & F) 456 (United States Court of Appeals for the Fourth Circuit November 12, 1997, Decided).
[35] *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC,* 2004 U.S. Dist. LEXIS 28965 (United States District Court for the Central District of California, November 22, 2004, Filed).
[36] *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC,* 2008 U.S. Dist. LEXIS 130811 (United States District Court for the Central District of California, November 7, 2008, Filed).
[37] Goldman, *The Ten Most Important Section 230 Rulings*, 3.
[38] *Doe v. Backpage.com, LLC,* 817 F.3d 12, 2016 U.S. App. LEXIS 4671, 44 Media L. Rep. 1549, 118 U.S.P.Q.2D (BNA) 1672, 64 Comm. Reg. (P & F) 483, 2016 WL 963848 (United States Court of Appeals for the First Circuit March 14, 2016, Decided).
[39] Goldman, *The Ten Most Important Section 230 Rulings*, 4.

federal law; however the First Circuit Court of Appeals decided that Backpage.com was immune under Section 230 legal protection because a "website operator's decisions in structuring its website and posting requirements are publisher functions entitled to section 230 (c)(1) protection."[40] Eventually, the Backpage.com site was seized by the federal government as more evidence came to light that the company was knowingly enabling prostitution and the trafficking of children on its platform.[41] In this case, Backpage.com was only held liable because rather than being held liable for the actions of their users, the court held them liable for their own federal crimes. However, it is important to note that in cases where, for example, false and disparaging comments are made about someone with the potential to ruin their livelihood, platforms are not responsible for taking this content down, considering they are not held liable for the content of their users through 230 and are not required to take such content down through court-ordered "demand letters or takedown notices".[42] This distinction will become important later on in my paper as I discuss my policy recommendations. Ultimately, these three landmark Section 230 cases provide a helpful understanding of the following: how courts are instructed to rule broadly on 230, how companies that are involved in the creation of illegal content or activity on their platforms are not eligible for immunity, and how these cases can often deal with the really dark and saddening parts of the internet that have created real-world harm and suffering.

Recent Policy Proposal Trends

[40] Eric Goldman, "The Complicated Story of Fosta and Section 230," First Amendment Law Review 17, no. Symposium (2018): 279-293.
[41] Goldman, *Fosta and Section 230,* 285.
[42] *Zeran v. Am. Online, Inc.,* 129 F.3d 327, 1997 U.S. App. LEXIS 31791, 25 Media L. Rep. 2526, 10 Comm. Reg. (P & F) 456 (United States Court of Appeals for the Fourth Circuit November 12, 1997, Decided).

Zooming out to observe the broader Section 230 policy proposal landscape, starting with the 116th Congress, I will discuss select recent policy proposals to determine whether they align with the data that my paper will produce on Section 230 case decisions over the past 10 years. Namely, I will highlight three recent policy proposals that have not passed as law to highlight broader themes among all proposals or suggested reform solutions. These themes can be categorized as:

(1) Regulating transparency and accountability

(2) Altering (c)(2) to comply with the First Amendment

(3) Requiring that technology companies "earn" their right to moderate. [43]

Additionally, I will elaborate on the one reform policy that was actually passed and codified into law in 2018 and why scholars and critics have largely determined that it fell short as a proper mechanism for solving the issues that Congressional leaders have with Section 230.

In June of 2020, U.S. Senators Brian Schatz (D-HI) and John Thune (R-SD) introduced the Platform Accountability and Consumer Transparency (PACT) Act with the hopes of "strengthening transparency in the process online platforms use to moderate content and hold those companies accountable for content that violates their own policies or is illegal".[44] This proposal demands an increase in transparency reporting requirements for technology companies, faster turnaround times to remove violating content (24 hours), and introducing general disclosures of content moderation practices that is easy for users to understand.[45] A revised

[43] These themes are from a presentation that was created and presented by Jess Miers and Professor Eric Goldman from the Santa Clara University of Law. The presentation is titled, *Section 230 Key Developments (2020).*
[44] Platform Accountability and Consumer Transparency (PACT) Act of 2020, H.R., 116th Cong, S.4066 (2020).
[45] Platform Accountability and Consumer Transparency (PACT) Act of 2020, H.R., 116th Cong, S.4066 (2020).

version of the PACT Act was released in early March of 2021 that mainly changed the amount of time companies would have to remove content based on a court-order (from 24 hours to 4 days).[46] This proposal has been praised for providing victims of violating content with a greater path for recourse in court than the status quo; however, critics of the proposal state that it places too much emphasis on the creation of a "notice and takedown regime", in which service providers are required to remove content after given notice by a judicial order.[47] This type of liability framework, critics describe, results in more incentives for technology companies to remove speech from platforms, regardless of whether these notices are actually legitimate or the plaintiff simply does not like the defendant's speech.[48] Similarly, the requirement that tech companies review violating content within 4 days of a takedown notice at scale would be fairly difficult for larger companies to do successfully in such a short timeframe.[49]

Examining the second common theme amongst policy proposals is modifying (c)(2) to be more compliant with First Amendment speech principles, essentially eliminating the "otherwise objectionable" definition to be more specific with what content is and is not allowed to be moderated online.[50] Policy proposals like the Stop the Censorship Act, which was introduced in July of 2020 by Representative Paul Gosar (R-AZ,04) and other co-sponsors, aims to revoke Section 230 immunity for what the proposers call the removal of "lawful speech", or speech otherwise protected under the First Amendment.[51] Essentially, these proposals remove tech companies' ability to moderate content they determine is "otherwise objectionable" and replace

[46] Platform Accountability and Consumer Transparency (PACT) Act of 2020, H.R., 116th Cong, S.4066 (2020).
[47] Mackey, Aaron. "Even with Changes, the Revised PACT Act Will Lead to More Online Censorship," March 26, 2021. https://www.eff.org/deeplinks/2021/03/even-changes-revised-pact-act-will-lead-more-online-censorship.
[48] Mackey, *Ibid.*
[49] Mackey, *Ibid.*
[50] 47 U.S.C. § 230
[51] Stop the Censorship Act of 2020, H.R.4027, 116th Cong, (2020).

it with "unlawful, or that promotes violence or terrorism".[52] These types of proposals significantly reduce companies' ability to moderate content that is protected under the First Amendment, such as hate speech, that can create a toxic online environment as social media amplifies the extent to which these messages can spread and foster real world harm.

Next, policies like the Eliminating Abusive and Rampant Neglect of Interactive Technologies (EARN IT) Act of 2020, which was co-sponsored by Senator Lindsey Graham (R-SC), Senator Richard Blumenthal (D-CT), and Senator Dianne Feinstein (D-CA) among others, require that technology companies "earn" their right to moderate through a variety of enforcement requirements.[53] Essentially, this proposal targets tech companies' Section 230 protection by incentivizing companies to comply with a set of "best practices" for fighting child sexual exploitation online, which would be developed by a 19-member panel of unelected government leaders.[54] Additionally, this proposal actually amends (c)(2) of 230, such that it eliminates end-to-end encryption of private conversations on platforms in order for law enforcement to find child sexual predators, among other uses.

Lastly, the dual Fight Online Sex Trafficking Act and the Stop Enabling Sex Traffickers Act (FOSTA-SESTA) was a law that was passed in 2018 under the Trump Administration to mainly target Backpage.com, the site mentioned previously who was originally not held liable in court for its facilitation of the sex trafficking of minors.[55] Although the site was taken down before this bill was signed into law by President Trump, FOSTA-SESTA holds service providers liable for "knowingly assisting, supporting, or facilitating" prostitution or sex trafficking on their

[52] Stop the Censorship Act of 2020, H.R.4027, 116th Cong, (2020).
[53] Eliminating Abusive and Rampant Neglect of Interactive Technologies (EARN IT) Act of 2020, H.R., 116th Cong, S. 3398, (2020).
[54] Eliminating Abusive and Rampant Neglect of Interactive Technologies (EARN IT) Act of 2020, H.R., 116th Cong, S. 3398, (2020).
[55] Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R.1865, 115th Cong, Public Law 164, (2017).

platforms through the addition of the (e)(5) clause in the statute.[56] This clause essentially states that a Section 230 defense has "no effect on sex trafficking law".[57] However, similar to the EARN IT Act, this bi-partisan effort intended to curb sex trafficking of minors online has largely been criticized for its inefficacy.[58] Critics argue that FOSTA-SESTA has not provided much of a shift from Section 230's existing exceptions for federal crimes, while reducing free speech online and the scope of tech companies' protection under the law.[59] These criticisms stem from the fact that the bill ultimately resulted in platforms removing and censoring parts of their platforms that were not actually solely used for promoting prostitution or sex trafficking.[60] These online spaces were just removed anyway because moderating them for the potential that they might host illegal content would be too difficult.[61] Additionally, the Act makes no distinction between legal and illegal online sex work, essentially just making legal sex work more difficult and unsafe for sex workers as their business cannot be vetted online anymore.[62] More work needs to be done to ensure child safety online through legislation; however, FOSTA-SESTA, as critics argue, "appears to have hurt many communities without countervailing benefits".[63]

Literature Review

In order to fully understand policymakers' most recent pushes for reforming or repealing Section 230 of the 1996 Communications Decency Act, it is crucial to understand the existing scholarship surrounding Section 230 and its implications for the regulation of speech online. One

[56] Goldman, *Fosta and Section 230,* 284.
[57] 47 U.S.C. § 230
[58] Goldman, *Fosta and Section 230,* 288.
[59] Goldman, *Fosta and Section 230,* 289.
[60] Goldman, *Fosta and Section 230,* Ibid.
[61] Goldman, *Fosta and Section 230,* Ibid.
[62] Goldman, *Fosta and Section 230,* 291.
[63] Goldman, Eric, Dear President Biden: You Should Save, Not Revoke, Section 230 (January 12, 2021). Bulletin of the Atomic Scientists, Santa Clara Univ. Legal Studies Research Paper.

theme that can be found across the existing 230 literature is that there is a fundamental lack of comprehensive quantitative evidence after 2010 on the outcomes of these case decisions in court. Instead, many scholars have focused on the implications of a few cases on Section 230 precedent with standard legal research, or alternatively, have focused on how and why technology companies moderate content on their platforms and various internet services. The legal conventional wisdom on how to proceed with Section 230 varies across a spectrum of repealing, reforming, or maintaining the status quo; however, the variety in viewpoints on the subject strengthens the necessity for my study's quantitative findings. First, I will review the conventional wisdom on why technology companies moderate content on their platforms. Then, I will focus on how scholars situate the Section 230 policy debate within its relationship to the courts' broad interpretation of the statute; and finally, I will show how some scholars believe the correct path for reform is through legislation or changes to the statute, while others think that the responsibility should fall on technology companies themselves for solutions.

Section 230 Literature

A common question that appears within the existing literature is: if technology companies have Section 230 immunity from third-party content, then why do they bother to moderate? Some scholars argue that moderation is an inherent part of what constitutes a platform.[64] In essence, it is the "commodity" that they provide to users and what distinguishes them from the "open web".[65] Other scholars claim that tech platforms moderate because they have created a "voluntary system of self-regulation", since they are "economically motivated" to create a safe

[64] Gillespie, *Custodians of the Internet*, 21.
[65] Kate Klonick, "The New Governors: The People, Rules, and Processes Governing Online Speech," Harvard Law Review 131, no. 6 (April 2018): 1598-1670.

and "hospitable" online environment for their users.[66] Both of these perspectives maintain that Section 230 is not the problem, but rather, it is the framework that technology companies provide for their own content moderation systems that often runs them into legal battles. These companies have the "right, but not the responsibility" to remove user content, which creates confusion surrounding why policymakers have a large issue with technology company's moderation of online speech.[67]

Many of the policy discussions around alternatives to Section 230 and the statute's downfalls begin with looking at what Congress intended Section 230 to accomplish at the time of its enactment. The common consensus is that it was created to "protect providers seeking to clean up the internet", and then, the argument that usually follows is that Congressional lawmakers could never have imagined how large social media companies would have become and the broad over-reaching immunity that this act would provide them.[68] Although this argument for reforming 230 based on the current technology landscape is compelling, it does not actually address the core purpose of the statute: giving companies the ability to control obscene content on their platforms to make the internet a more family-friendly space. Congress gave tech companies this sweeping immunity in favor of moderation because without content moderation, it is argued that free speech would actually be inhibited online.[69] The darkest corners of the internet would be able to run unchecked, most likely making the internet a very scary place for users.

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[66] Kate Klonick, *The New* Governors, 31.
[67] Gillespie, *Custodians of the Internet*, 31.
[68] Danielle Keats Citron; Benjamin Wittes, "The Internet Will Not Break: Denying Bad Samaritans Sec. 230 Immunity," Fordham Law Review 86, no. 2 (November 2017): 401-424 McGill Guide.
[69] Citron and Wittes, *Ibid*.

Since Congress left Section 230 purposefully vague, giving courts the authority to decide whether to interpret the statute broadly or narrowly on a case-by-case basis, scholars disagree on ways to reform the statute. On one hand, ruling "broadly" on a legal issue means that judges choose to "develop broad rules that enhance predictability in the law", providing "guidance to policymakers, lower courts, and individuals".[70] On the other hand, judges that prefer a narrow view of the law prefer to "stick to the case at hand" and avoid "rules that wander beyond the specific issues presented".[71] In the case of Section 230, the U.S. Circuits are "in general agreement" that "Section 230 (c)(1) should be construed broadly in favor of immunity."[72] This view was solidified in the landmark case, *Zeran v. America Online, Inc.*, which ruled on the statute the year after it was enacted in 1997. Essentially, the Fourth Circuit illustrated Congress's concerns with speech online when they created the statute by stating in their decision:

> "The amount of information communicated via interactive computer services is . . . staggering. The specter of . . . liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress . . . chose to immunize service providers to avoid any such restrictive effect."[73]

Here, the Fourth Circuit set a precedent in 1997 that courts should choose to "immunize service providers" to avoid the "obvious chilling effect" on speech that narrow interpretations would

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[70] Fox, Justin, and Georg Vanberg. "Narrow versus Broad Judicial Decisions." *Journal of Theoretical Politics*, vol. 26, no. 3, 2013, pp. 355–383., doi:10.1177/0951629813502709.
[71] Fox and Vanberg, *Ibid*.
[72] *Force v. Facebook, Inc.,* 934 F.3d 53, 2019 U.S. App. LEXIS 22698, 2019 WL 3432818 (United States Court of Appeals for the Second Circuit July 31, 2019, Decided).
[73] *Zeran v. Am. Online, Inc.,* 129 F.3d 327, 1997 U.S. App. LEXIS 31791, 25 Media L. Rep. 2526, 10 Comm. Reg. (P & F) 456 (United States Court of Appeals for the Fourth Circuit November 12, 1997, Decided).

elicit.[74] As the proliferation of content across all digital mediums continues to grow, understanding why the legal system prioritizes broad immunity in Section 230 cases, and how this interpretation of the statute compares to alternative solutions for reform today, will add important context for my findings later on. It is important to note, however, that Republican and Democratic leaders in Congress have different views on how the statute's blanket immunity for service providers should be narrowed.

Some scholars believe that Section 230 should remain untouched, supporting a broader interpretation and application of the statute in court. Eric Goldman, a leading expert on Section 230, believes that people's problems with Section 230 is actually them having a problem with the First Amendment.[75] He argues that "Section 230 substantively protects more speech than the First Amendment" and that the First Amendment will not be able to fill in the gaps of any "reductions in Section 230's protections" by members of Congress; therefore, if people have seemingly fallen out of love with the internet and Section 230, it is because they have in turn, fallen out of love with the First Amendment.[76] Similarly, Katie Mellinger, a communications and technology law expert, agrees that reducing Section 230's protections to address conservatives claim of "anti-conservative bias" against social media platforms' content moderation practices would "degrade online communities" and increase the occurrence of unnecessary litigation.[77] In contrast, scholars such as Danielle K. Citron and Benjamin Wittes believe that Section 230 immunity is too broad.[78] They claim that courts have created a "mighty fortress" that protects

[74] *Zeran v. Am. Online, Inc.,* 129 F.3d 327, 1997 U.S. App. LEXIS 31791, 25 Media L. Rep. 2526, 10 Comm. Reg. (P & F) 456 (United States Court of Appeals for the Fourth Circuit November 12, 1997, Decided).
[75] Goldman, Eric, Why Section 230 Is Better Than the First Amendment (November 1, 2019). Notre Dame Law Review, Vol. 95, No. 33, 2019.
[76] Goldman, *Why Section 230 Is Better Than the First Amendment,* 38.
[77] Mellinger, *The Section 230 Standoff*, 403.
[78] Citron and Wittes, *The Internet Will Not Break,* 406.

platforms "from accountability for unlawful activity on their systems" and use the broad sweeping approach to Section 230 because it was based on First Amendment values.[79] They suggest that Section 230's scope be narrowed to eliminate immunity for the "worst actors", or sites that "encourage destructive online abuse or know they are principally used for that purpose."[80]

Alternatively, some scholars look to the reform of the content moderation practices of companies themselves, rather than solely Section 230 for answers. The majority of pushes for this type of reform, which in turn support maintaining the Section 230 status quo, suggest changes such as greater transparency into content moderation practices, greater opportunities for users to appeal decisions, and mandatory disclosures of removals and takedowns on the responsibility of the platform.[81] Although scholars such as Kyle Langavardt, a Professor at the Nebraska College of Law, believe that it is time to "consider legislation that would guarantee meaningful speech rights in online spaces," he argues that the likelihood of this coming to fruition through legislation is low, due to the tension that this concept runs into with the tradition of free speech in America.[82] This content "moderator's dilemma", in which moderation to create safe spaces online is at odds with the free speech tradition in America, is a problem that has been "permanently sewn into the logic of the internet", essentially leaving the burden on technology companies to step in.[83] Ways to address this paradox through greater transparency in decision-making for content removals and adjusting the process of moderation itself is very present

[79] Citron and Wittes, *Ibid*.
[80] Citron and Wittes, *The Internet Will Not Break*, 419.
[81] Kyle Langvardt, "Regulating Online Content Moderation," Georgetown Law Journal 106, no. 5 (June 2018): 1353-1388
[82] Langvardt, *Ibid*.
[83] Langvardt, *Regulating Online Content Moderation*, 1362.

throughout the existing literature, but whether social media platforms will fully take on this "social responsibility" remains unclear.[84]

The existing Section 230 literature, as seen above, largely revolves around examining Section 230 in the context of a standard legal research framework. Although this perspective is valuable for determining the applications of this statute in a few landmark cases, there is a fundamental lack of systematic, empirical research on Section 230 after 2010. My study will provide imperative quantitative evidence as to how this statute has been working in court over the past 10 years, any important changes from the only other previous empirical study conducted on the statute in 2010, and why these changes matter in a policymaking context. Furthermore, as recently as October 13th of 2020, Supreme Court Justice Clarence Thomas released a statement indicating his interest in the Supreme Court of the United States reviewing a future Section 230 case to evaluate "whether the text of this increasingly important statute aligns with the current state of immunity enjoyed by Internet platforms."[85] The Supreme Court's acknowledgement of the importance of this topic, when it never has before, in addition to the recent calls for reform from the Biden Administration and Congress, demonstrate the need to make informed policy decisions using quantitative evidence.

Methodology

Case Decisions

To examine the trajectory of changes in the Section 230 case law over time, I conducted a quantitative study using an original dataset of legal district and appellate court case decisions

[84] Gillespie, *Ibid*.
[85] Statement of Justice Clarence Thomas, Malwarebytes, Inc. v. Enigma Software Group USA, LLC. SCOTUS, October 13, 2020.

between 2010 and 2020.[86] First, I created a dataset of 181 federal case decisions (119 cases) in the U.S from 2010 to 2020 that cite Section 230 in their decisions. I will observe certain trends in the case law separately for district and appellate court case decisions to reflect the hierarchy of case decisions in the U.S. federal court system.[87] I have chosen this time period, 2010 to 2020, because the only alternative study to empirically examine Section 230 was conducted by David Ardia in 2010, where he looked at the 230 case decisions between 1996 and 2009.[88] My study is inspired by David Ardia's; however, my study is more limited in the depth of analysis I conducted due to the limited time in which I had to learn how the legal system works and how to conduct legal research. My study looks more at the general relationships between different case factors and the outcomes of the case decisions over time, rather than observing correlative relationships of each factor through linear regressions.

Since I am only capturing cases that contribute to common law, this study did not include Section 230 cases that settled outside of court. Through a legal research service called NexisUni, I pulled cases using the search term, "Section 230", and put the following information into a data set: general information about the case, the posture of the decision, the type of plaintiff and defendant (intermediary type), the claims and defenses used, details about the outcome, and other miscellaneous details. Using a 95% confidence interval, I pulled a simple random sample of 181 federal case decisions, including both appellate and district courts, from a population size of 340 case decisions on NexisUni's legal research services. Then, I removed 41 decisions for a total of 140 because of decisions being either tangential, meaning 230 was not the main focus of the case

[86] It is important to note that one case can have multiple case decisions; therefore, I created my data set on the decisions, rather than the cases themselves (see *Important Legal Definitions* section for more information).
[87] In the U.S. federal court system, appellate courts have the authority to affirm or overturn certain district court decisions; therefore, appellate courts sit higher up in the hierarchy of case decisions, making them more final than a district court decision.
[88] Ardia, *Ibid*.

or was not addressed at that stage of the case, or the case intermediary type fell outside of the scope of my study, meaning someone was suing a municipal government or government official (rather than a technology company or interactive computer service provider).

Using a "content analysis methodology", I discerned varying trends in the case law over time, such as who was being sued in the cases (intermediary type), the claims plaintiffs brought against them, the different defenses used, etc., to determine if and how Section 230 case law has changed over time at the district and appellate levels.[89] Conducting a "content analysis methodology" simply means applying social science research methods to legal studies to provide conclusions on the connections between "judicial opinions and other parts of the social, political, or economic landscape". [90]

Additionally, it is important to note that this study is taking particular interest in the connection between lawsuits in which social media companies such as Facebook, Twitter, Snapchat, TikTok and YouTube are the defendants and changes in the Section 230 case law. In 2010, David Ardia's study found that only 7% of cases involved social media networks as the defendants using the Section 230 defense for legal immunity.[91] I hypothesize that this percentage will be much more significant over time, given the expansion of social media usage and the growth of these platforms' daily users since 2010.[92]

[89] Mark A. Hall & Ronald F. Wright, Systematic Content Analysis of Judicial Opinions, CAL. L. REV. 63, 64 (2008); see also Beebe, supra note 16, at 554 n.13; Reed C. Lawlor, Fact
Content Analysis of Judicial Opinions, 8 JURIMETRICS J. 107, 110 (1968).
[90] Hall and Wright, *Systematic Content Analysis of Judicial Opinions*, 100.
[91] Ardia, *Free Speech Savior or Shield for Scoundrels*, 431.
[92] Mackey, *Ibid*.

Limitations

A key limitation to my study is that due to the time constraint, I am reducing the scope of my project to only focus on federal court cases, rather than state and federal. I do not think that reducing the scope of my legal research will negatively affect the accuracy of the data, considering that there are significantly more federal cases, compared to state cases on NexisUni. Additionally, the majority of cases that make law are cases appealed to federal court, and since my paper is trying to focus on trends in the case law over time, focusing on federal court cases is an advantage, rather than a disadvantage. Lastly, a limitation exists with my knowledge of legal jargon and the U.S. court system. Although I may not be a student in law school, I have been able to gain a thorough understanding of legal trends by reading hundreds of cases for my research thus far.

It is also important that I acknowledge my bias as a researcher. Previously, I worked at a major technology company for nine months where I saw firsthand the importance of Section 230 and how it helps technology companies conduct the moderation work that keeps people online safe. However, my bias as a researcher will not have a significant effect on my quantitative findings because I simply created a dataset in which case decisions were tagged on an objective set of case categories and general information. I believe my bias as a research will emerge more so in my discussion on recent policy proposals; however, I attempt to show that both sides of the aisle's policy proposals have their flaws, and in this vein, I will aim to stay as objective as possible using my quantitative evidence to support my claims.

Data and Findings

Distribution by Year

Before discussing how my findings can inform upcoming policy proposals for reform, I will provide some summary statistics that show how 230 case decisions have changed or remained the same over the past 10 years. Between 2010 and 2020, my data showed that approximately 79.3% (111) of defendants were granted 230 immunity, while 20.7% (29) were not. Separating these case decisions by appellate and district courts to show whether this finding holds true across the hierarchy of court decisions, I found that 16 out of 20 (80%) of appellate court case decisions and 95 out of 120 (79.17%) district court case decisions were granted 230 immunity between 2010 and 2020. These numbers align with the overall total percentage of case decisions granted immunity, and I did not find this finding striking considering that courts have been instructed by precedent to provide interactive computer service providers with "broad immunity" in 230 cases to preserve freedom of speech online.[93] However, my findings show a large increase in case decisions granted immunity over time in comparison to David Ardia's in 2010, which found that between 1996 and 2009, only 59.8% of 184 case decisions were granted immunity under Section 230.[94] Additionally, the trendlines in *Figure 1* below show that although the percentage of intermediaries that have been granted immunity between 2010 and 2020 is larger than the percentage between 1996 and 2010, this does not necessarily mean that this trend will continue. 2019 and 2020 have already begun to show slight decreases in the percentage of immunity granted to intermediaries overall (*Figure 1*).

[93] *Baldino's Lock & Key Serv. v. Google LLC,* 285 F. Supp. 3d 276, 2018 U.S. Dist. LEXIS 5617, 2018-1 Trade Cas. (CCH) P80,256, 2018 WL 400755 (United States District Court for the District of Columbia, January 12, 2018, Filed).
[94] Ardia, *Free Speech Savior or Shield for Scoundrels,* 434.

Observing how many Section 230 case decisions have been brought to court generally per year, there has been a steady progression in the total number of case decisions (appellate and district combined) brought against intermediaries, with the exception of 2015 and 2017 (*Figure 1)*. Overall, 2019 and 2020 had the highest number of case decisions brought in court total, and the average percentage of intermediaries granted immunity per year between 2010 and 2020 is pretty high at 87.22%, which is demonstrated by *Figure 1* below. In addition to *Figure 1*, I have included *Figures 2-3* to show the total versus granted decisions at the district court and appellate court levels. I found that at the district court level, there has been a steady progression in the number of case decisions brought against intermediaries per year, with the exception of 2015 and 2016 (*Figure 2*). Appellate courts did not have a similar progression in case decisions per year, with the most decisions being brought in 2016, 2019, and 2020 respectively. The fact that there are more decisions being brought at the district court level per year makes sense, considering that there are far less appellate court decisions than district court decisions in my sample of the population. Additionally, the appeals process can be expensive and arduous, so parties are less likely to try to appeal the decisions of a lower court, resulting in less appellate court case decisions in comparison to district court decisions generally in the population.[95] Overall, these findings align with my original expectations for there to be a disproportionate share of case decisions granted immunity than not, considering there has been no change in legal precedent to prioritize evaluating 230 cases with a narrower view. However, the relative increase in case decisions granted immunity over the past ten years, in comparison to Ardia's findings in 2010, slightly deviated from my expectation that case decisions would be granted immunity at a comparably high rate between 1996 to 2009. This discrepancy may be a result of courts trying to

[95] "Federal Court Management Statistics ." Accessed April 14, 2021. https://www.uscourts.gov/statistics-reports/analysis-reports/federal-court-management-statistics.

understand how to apply the statute to cases and conceptualize its effects on online spaces right after the statute's enactment in 1996. For example, I would imagine that courts gained a better understanding of applying Section 230 in favor of broad immunity as they began to see a variety of different case circumstances over time.

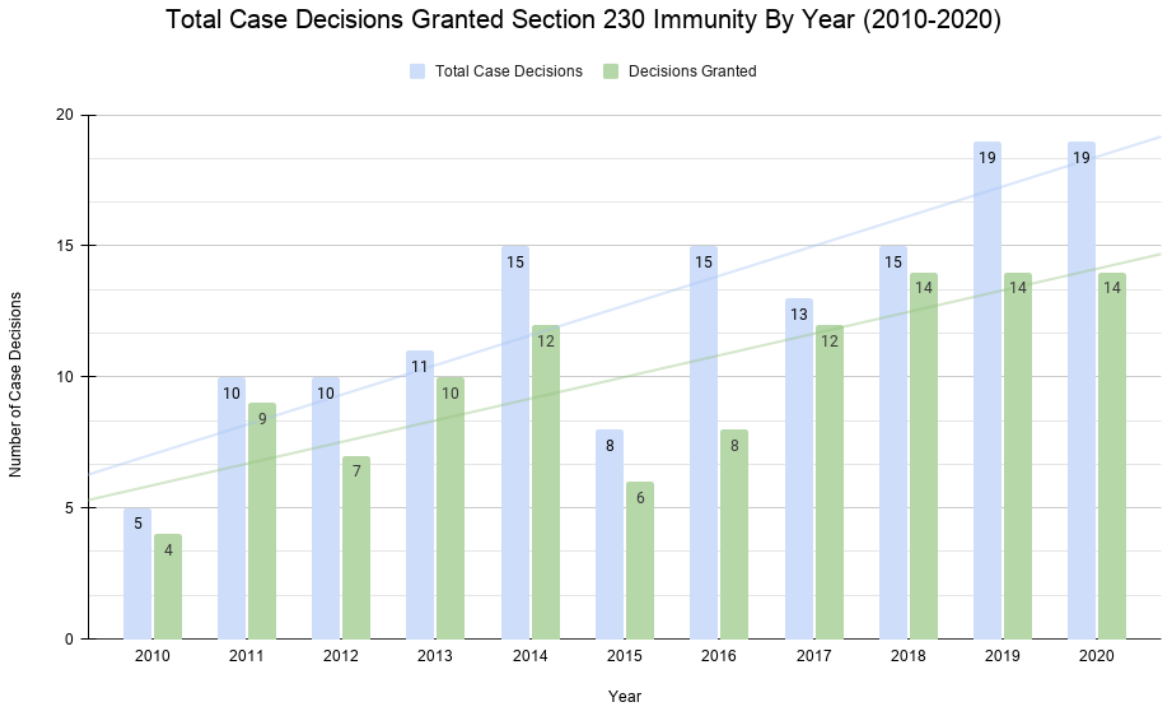


Figure 1: Total case decisions that were granted Section 230 immunity in court from 2010-2020 (appellate & district court cases combined to show the general trajectory of case decisions)

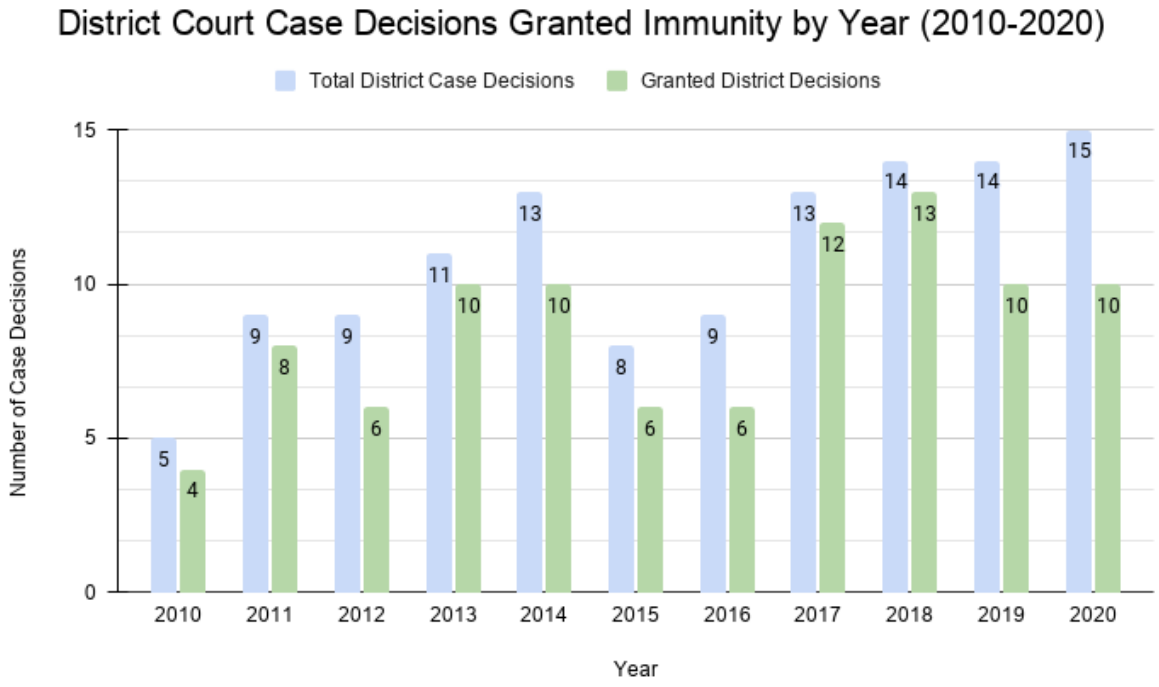


Figure 2: Total district court case decisions that were granted Section 230 immunity in court from 2010-2020

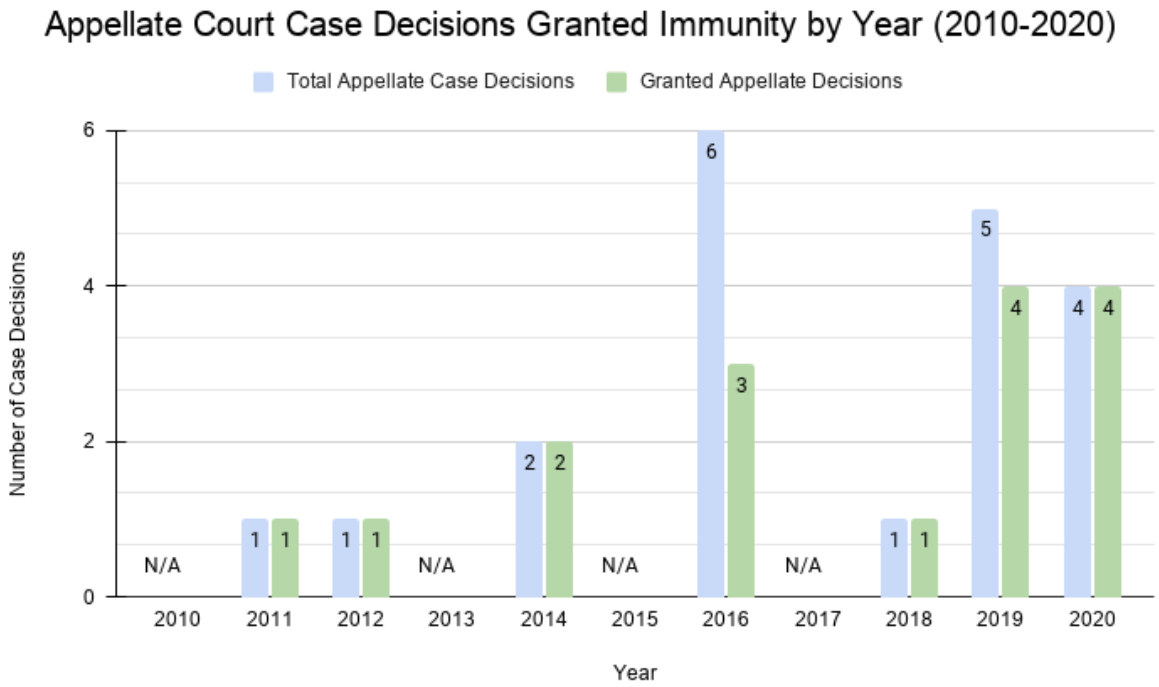


Figure 3: Total appellate court case decisions that were granted Section 230 immunity in court from 2010-2020. N/A represents years where there were no appellate court case decisions brought.

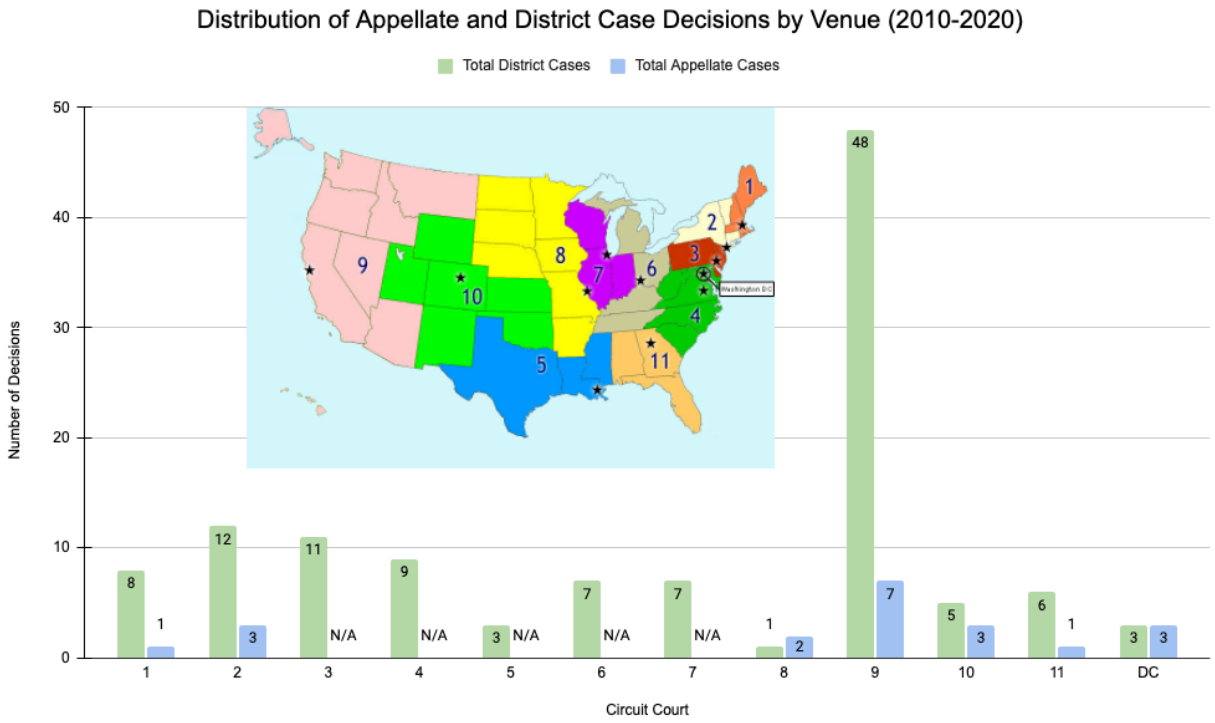
Distribution by Circuit Court

Next, it is important to illustrate where these cases are being brought in court geographically across the United States. My data showed that the highest concentration of 140 case decisions were brought in the 9th circuit at 39.29% of total case decisions, with the 2nd circuit following at 11.43%. These concentrations in the 9th and the 2nd circuit were also represented when separating the case decisions at the district and appellate levels (*Figure 4)*. At the district level, 40% of cases were brought at the 9th circuit, with the next highest percentage following at 10% in the 2nd circuit. Similarly, the highest percentage of appellate cases (35%) was brought in the 9th circuit, while the next highest percentage was 15% at the 2nd, 10th, and DC circuits. The 9th circuit contains California, so the disproportionate number of cases in this area is congruent with the locations of major tech hubs such as Silicon Valley, which can be viewed in *Figure 4* below. Additionally, based on data I pulled from the Administrative Office of U.S. Courts, this finding for appellate case decisions related to Section 230 in the 9th aligns with the higher baseline total of all appellate court cases that this circuit sees on average per year. According to this data, between 2010 and 2020, the 9th circuit held the most appellate court cases on average per year at 12,677 cases.[96] However, the 2nd, 10th, and DC circuits, which all held the second highest number of Section 230 cases in my data, were not congruent by rank based on their average number of appellate cases per year. Rather, the 2nd circuit ranked 5th, the 10th circuit ranked 10th, and the DC circuit ranked 12th in overall averages of appellate cases per year between 2010 and 2020.[97] These findings could be due to a variety of factors, such as how many technology companies or interactive computer service providers are in the circuit region or whether the circuit is

[96] "Federal Court Management Statistics ." Accessed April 14, 2021. https://www.uscourts.gov/statistics-reports/analysis-reports/federal-court-management-statistics.
[97] "Federal Court Management Statistics ." Accessed April 14, 2021. https://www.uscourts.gov/statistics-reports/analysis-reports/federal-court-management-statistics.

"considered to be a favorable or unfavorable jurisdiction for plaintiffs".[98] The baseline averages for district court cases between 2010 and 2020 were much more difficult to calculate based on the presentation of the data from the Administrative Office of U.S. Courts; therefore, I did not pull this information for my study.

Overall, 34 states total were represented in this study, so there was still a much larger geographic variety than I originally expected. The 2nd Circuit, which is comprised of New York, Connecticut, and Vermont, was the second highest geographical concentration of total case decisions at 11.43%, with all other circuit courts remaining fairly low in their total share of case decisions. This finding is slightly different from Ardia's, in which federal case decisions in the 2nd Circuit remained fairly high around 10%, but were not the second highest category of case decisions by case venue between 1996 and 2009. [99]



[98] Ardia, *Free Speech Savior or Shield for Scoundrels,* 419.
[99] Ardia, *Free Speech Savior or Shield for Scoundrels,* 422.

Figure 4: This chart illustrates which regions of the United States appellate & district court case decisions between 2010 and 2020 were being issued. A visual representation of the corresponding Circuit Courts to their region in the U.S. is included in the chart for reference.[100]

Distribution by Intermediary Type

Now that I have established when and where these cases have been brought in the US during my allotted time frame, I will discuss my findings on key changes in the intermediary type, claims brought, and the sections of the statute at issue. The intermediary type, or defendant being sued in the case, is an important factor in the 230 case decisions because it provides insight into how broad 230 immunity reaches across a variety of intermediaries. For example, the 230 definition of an "interactive computer service provider" applies not only to large technology companies like Facebook or Google, but also to small businesses with websites or an amateur online blog. Figuring out exactly who these cases have been focused on recently, in comparison to the beginning of the statute's introduction into law, will provide a better understanding of how our interactions online have changed over time and what this change means for Section 230's future.

My findings show that social media platforms such as Facebook, Twitter, and Snapchat, made up the highest category of intermediaries between 2010 and 2020 at 17.86%, which is significantly higher than the 7% they made up between 1996 and 2009 (*Figure 5*).[101] Next, I found that forums, such as Reddit, Quora, and other types of message board-like platforms, made up only 3.57% of the case defendants between 2010 and 2020. This is significantly lower than when they made up 21.3% of intermediaries in Ardia's findings. [102] Here, my definition of a "social media platform" differs from my definition of a "forum" by the main way that

[100] Image pulled from: *Circuit Court*. *Liberal Dictionary*. Accessed April 14, 2021. https://www.tekportal.net/circuit-court/.
[101] Ardia, *Free Speech Savior or Shield for Scoundrels,* 431.
[102] Ardia*, Ibid.*

conversation is structured on each. On a social media platform, conversations are structured around an individual's followers and who they are following. In contrast, individuals using forums engage in conversation by following certain subjects or topics of discussion, rather than following individual people to engage with that individual's content. I think that this shift away from forums to social media platforms could be attributed to the general shift in the nature of how we interact online today. For example, many people would perhaps prefer the connection to friends and family that platforms such as Facebook and Twitter provide to the anonymity of a message board service like Reddit or Quora.[103] Additionally, search engines like Google were the second highest category of intermediary types in Section 230 cases, making up 14.29% of total case decisions. Surprisingly, I also viewed a shift towards more individual CEOs of technology companies/interactive computer service providers being sued in these cases, making up the third highest category of intermediary types at 11.43% of case decisions. I will elaborate more on the potential meaning behind these findings in my *Discussion* section below.

[103] In the figure below, some intermediary types are combined to reflect cases in which more than one defendant are involved. I decided to view this category by total case decisions, rather than separate it out at the appellate and district level, to get a sense of the overall trend in intermediaries between 2010 and 2020 for Section 230 cases.

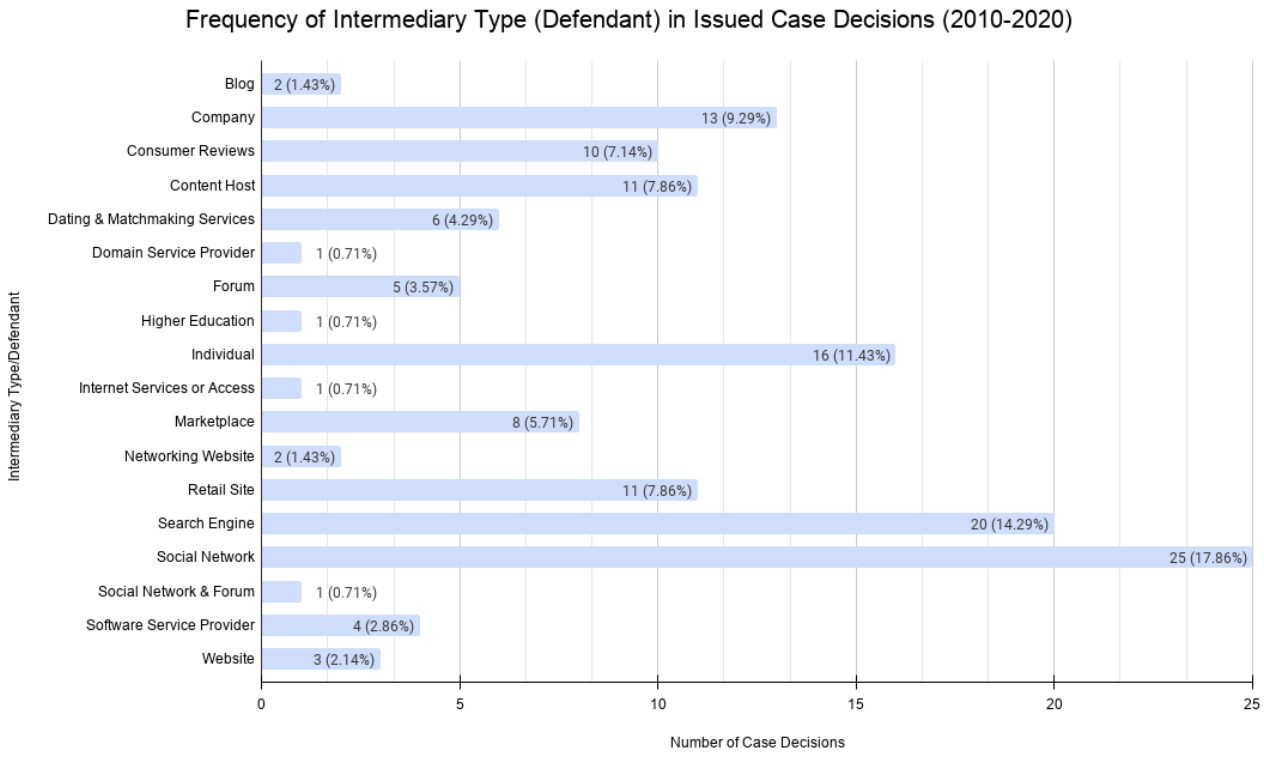


Figure 5: This chart highlights the distribution of the intermediary type, or the defendant in the case, for all case decisions between 2010 and 2020. The percentages represent the percentage of the total case decisions that these intermediary types made up in this time period.

Distribution by Claim Type

Next, it is important to observe changes in the claims being brought in these cases.[104] The four largest buckets of claims (since one type of claim may have different names in different states, although they mean the same thing legally), remained largely the same to Ardia's study's findings. Deceptive trade (plus unfair competition and false advertising) and defamation (plus libel, slander, and disparagement) were the two highest categories of claims at 43 and 42 mentions in case decisions respectively (*Figure 6)*. Tortious interference with business relations,

[104] I decided to view this category by total case decisions, rather than separate it out at the appellate and district level, to get a sense of the overall trend in claims brought by plaintiffs in court between 2010 and 2020 for Section 230 cases.

contracts, and economic advantage followed at 35 case decisions, while the fourth bucket of claims, negligence (failure to warn), came in at 30 mentions. Although these categories have not changed significantly since 2010, which is consistent with the ways in which most content moderation-related cases go in court, two other claim categories had striking implications. The first, claims to violations of plaintiffs' First Amendment right to the freedom of speech, remained roughly similar to 2009.[105] Only 8 case decisions, or around 5.71% of the total case decisions in my dataset, involved the plaintiff(s) saying that the defendants' actions violated their right to free speech between 2010 and 2020.

Although the argument could be made that the low number of free speech claims in the case decisions is because these cases related to 230 typically lose in court, (since except in extreme situations, private parties do not have freedom of speech rights against one another), most claims overall have not been strong enough to beat a Section 230 defense in court.[106] As I noted earlier, only 29 case decisions (25 district and 4 appellate) over the course of the past 10 years have been able to overcome a Section 230 defense; therefore, bringing a claim that would typically lose in this context is more of a statement than an expectation to win. Considering that these claims were often, but not always, brought alongside other types of claims to increase the chances of the plaintiff winning a case through another argument, it is surprising that not more statement free speech claims were brought when viewed in tandem with some of the dominant criticisms about Section 230 in the policymaking sphere. Republicans in Congress' largest concern with Section 230 immunity is that it allows social media platforms to censor them, and more broadly, conservative viewpoints, but only a small fraction of total case decisions mention

[105] Ardia, *Free Speech Savior or Shield for Scoundrels,* 428.
[106] Essentially, the First Amendment of the U.S. Constitution protects individuals from infringements of their right to free speech from the government.

a claim of this nature. This discrepancy signals that rather than relying on quantitative data, policies are being proposed to radically change how the internet functions today to potentially serve political interests.

The second striking trend was the addition of a new claim type that was not mentioned in the case decisions between 1996 and 2009, violations of the Anti-Terrorism Act. 5 cases brought against defendants claimed that interactive computer service providers were tied to real-world acts of terrorism and should be held liable for their role in facilitating harm in these events. For example, three court cases within the past 4 years have been brought against technology companies for "materially supporting" terrorists by allowing them to create accounts and post on their platforms.[107] All three cases were brought following a real-world terrorist attack, and each defendant, usually a family member of a victim, claimed that the tech company's inability to remove terrorist propaganda on their platforms directly resulted in the victims' real-world harm. Although there have been other types of cases, such as *Doe v. Backpage.com*, in which plaintiffs experienced real-world harm as a result of the defendant's negligence in moderating content, not many other types of cases have been brought at such a large scale.[108] These cases are expanding the nature of what kinds of claims and harms that have manifested from online content can be brought against tech companies in court, regardless of whether the defendant's motion to dismiss is granted. This expansion could result in large and potentially devastating consequences for tech

[107] *Fields v. Twitter, Inc.,* 217 F. Supp. 3d 1116, 2016 U.S. Dist. LEXIS 161233, 2016 WL 6822065 (United States District Court for the Northern District of California, November 18, 2016, Filed).
[108] *Doe v. Backpage.com, LLC,* 817 F.3d 12, 2016 U.S. App. LEXIS 4671, 44 Media L. Rep. 1549, 118 U.S.P.Q.2D (BNA) 1672, 64 Comm. Reg. (P & F) 483, 2016 WL 963848 (United States Court of Appeals for the First Circuit March 14, 2016, Decided).

companies if basic Section 230 protections continue to be narrowed down through legislation.

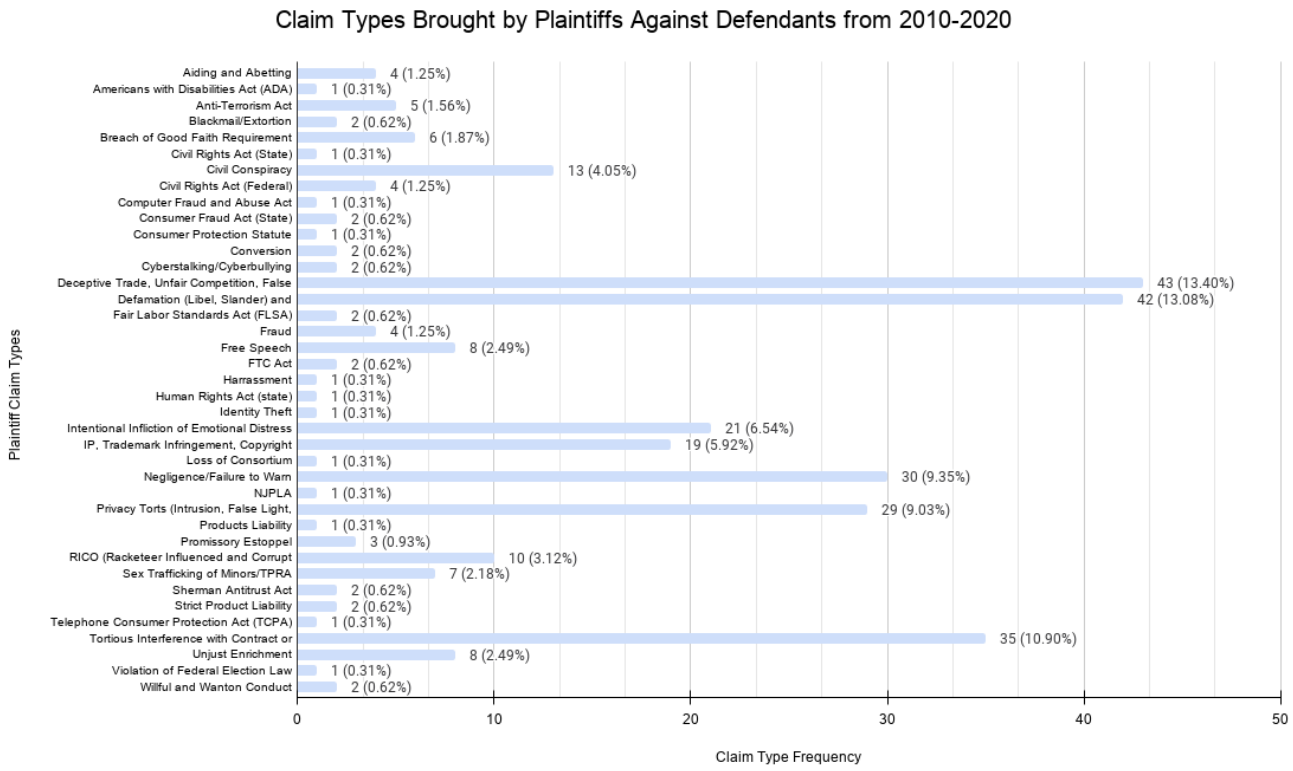


Figure 6: This chart shows the number of times a claim was brought by a plaintiff against a defendant in court and the percent of the total claims (321) brought that a specific claim made up between 2010 and 2020.

Distribution by Section at Issue, (C)(1) v. (C)(2)

Now, I will examine the specific clauses of 230 that had the largest effects on whether intermediaries were granted or denied immunity under the statute. As a reminder, (c)(1) states that interactive computer service providers cannot be held liable as the speaker or publisher of third-party content, and (c)(2) gives technology companies their ability to moderate in "good faith".[109] For this section, I decided to look at the district and appellate court case decisions combined to get a sense of the overall discrepancy between the clauses in the case law between

[109] 47 U.S.C. § 230

2010 and 2020. However, I will look at case decisions at these levels again separately when evaluating which clause of the statute the decisions turned on in the 29 denied decisions. 130 (92.86%) of the total case decisions turned on (c)(1), while only 5 (3.57%) case decisions out of 140 turned on (c)(2) on its own (one of those being denied) (*Figure 5)*. By "turn", I mean that these case decisions were focused on specific parts of Section 230, which resulted in their ultimate outcomes. Generally, this discrepancy makes sense from a legal perspective on the side of both parties, considering that determining whether an ICS moderated content in "good faith" under (c)(2)(a) requires a higher standard of knowledge than (c)(1). This means that in order for the plaintiffs to prove that defendants were not acting in "good faith", both parties would have to enter into discovery, which is an expensive and time-consuming evidence gathering process. However, a large narrative around Section 230 reform on the Republican side is centered around (c)(2), not (c)(1). This is a perfect representation of the imbalance between (c)(1) and (c)(2)'s treatment in the case law, which draws out serious policy implications when compared to how majority of recent policy proposals focus on altering (c)(2). As Figure 5 demonstrates below, around 13.57% of case decisions involved looking at both clauses, (c), but ultimately, this is still a significantly lower share of the total case decisions than those that targeted (c)(1) specifically. Similarly, out of 140 case decisions, only 10 (7.14%) did not look at (c)(1) at all.

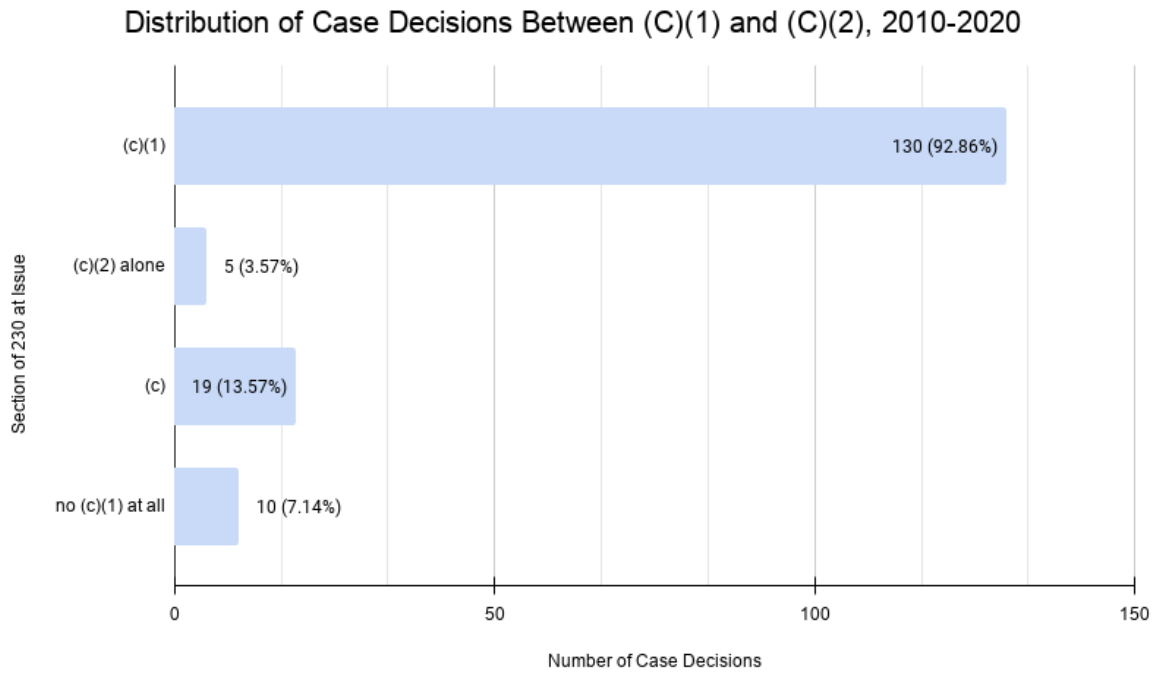


Figure 7: This graph highlights the distribution of case decisions between 2010 and 2020 that turned on (c)(1) v. (c)(2 and their respective percentages of the total number of case decisions.

Distribution by Section at Issue, (E)(1-5)

Similarly, my paper looked at distinctions between clauses (e)(1-5) to determine which other state and federal law claims were being brought in these case decisions for plaintiffs to argue that intermediaries should not be granted 230 immunity. My main purpose for pulling this finding was to observe how different carveout approaches to Section 230 have worked over the past 10 years to better evaluate the third policy proposal trend for reform which prioritizes narrowing the statute's protection through additional carveouts.[110] As a reminder, (e)(1-5) state that Section 230 has no effect on specific state and federal laws. Ultimately, these carveouts ensure that

[110] A carveout approach in the Section 230 context is when lawmakers make exceptions to the statute such that a section 230 defense will have no effect on specific claims brought by plaintiffs that fall under that carveout category. Ultimately, it is a way that lawmakers can narrow Section 230 legal protections for technology companies under the law.

technology companies are given just enough immunity to moderate without liability, while maintaining that they do not have free reign to do anything they want under the statute's protection.

Clauses (e)(1-5) can be viewed in the table below for reference:

Clause	Section 230 Has No Effect on the Following Other Laws:
(e)(1)	**Criminal law:** Section 230 cannot "impair the enforcement" of laws related to obscenity, sexual exploitation of children, or any other Federal criminal statute.[111]
(e)(2)	**Intellectual Property Law**
(e)(3)	**State Law**
(e)(4)	**Communications Privacy Law:** Section 230 cannot impair the enforcement of the Electronic Communications Privacy Act of 1986 or any other similar State law
(e)(5)	**Sex Trafficking Law:** Section 1595 of title 18, Section 1591 of title 18, section 2421A of title 18, or promotion/facilitation of prostitution

In *Figure 8* below, clause (e)(3), which states that Section 230 cannot prevent any State from enforcing State law, is the carveout that was used most frequently against defendants between 2010 and 2020 at 21.43% of total case decisions. It is important to note that these statistics are looking at both instances in which an (e) clause was used either alone or in tandem with another part of the statute, such as (c), in a case decision. This finding makes sense, considering many federal Section 230 cases were removed from state court originally; therefore, they are likely to involve state claims. Other claims under (e), such as criminal law, intellectual property, and sex trafficking law remained fairly low at around 2.14%, 5.00%, and 2.14% of the total case

[111] 47 U.S.C. § 230

decisions respectively. Clause (e)(4), which says that Section 230 has no effect on Communications Privacy Law, had 0 case decisions around it in my population sample. Although these findings could just be showing how much activity that falls under these legal categories is happening generally in the United States, it is still important to understand how successful these carveouts have been in defeating Section 230 defenses because that will help inform whether or not they are effective at providing plaintiffs with paths for redress in the legal system. Understanding this relationship will help policymakers determine whether carveout approaches should be incorporated into future reform proposals or not.

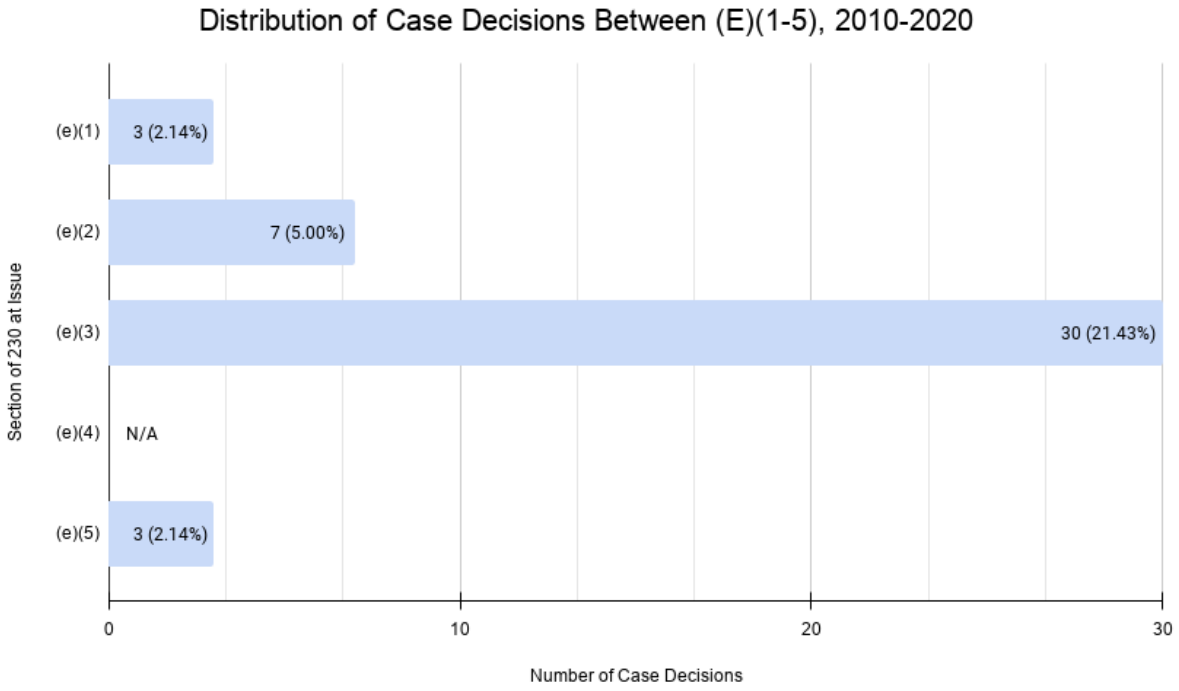


Figure 8: This chart shows which state and federal law claims were used most frequently against defendants in Section 230 case decisions between 2010 and 2020. The percentages represent the percent of the total number of case decisions in which these (e) clauses were used. These percentages include both instances when an (e) clause was used alone and in combination with other parts of the statute.

29 Denied Decisions

Now that I have established a deeper understanding of the different intermediaries, claims brought, and sections at issue in the Section 230 case decisions over the past 10 years, I would like to zoom in on my findings on the 29 decisions that were denied Section 230's blanket immunity in court. In *Figure 9* and *Figure 10* below, I have shown the percentage of the total district and appellate court case decisions by year that were denied immunity. Overall, there were 25 denied district court case decisions between 2010 and 2020, so 20.83% of the total 120 district court case decisions in my data set were denied immunity. In *Figure 9*, which focuses on these district court case decisions, there does not seem to be a huge trend in the amount of 230 case decisions denied per year; however, 2020 had the highest number of denied district court case decisions at 33.33% of the total cases brought in 2020, and there has been a slight increase in denied decisions over the past two years.

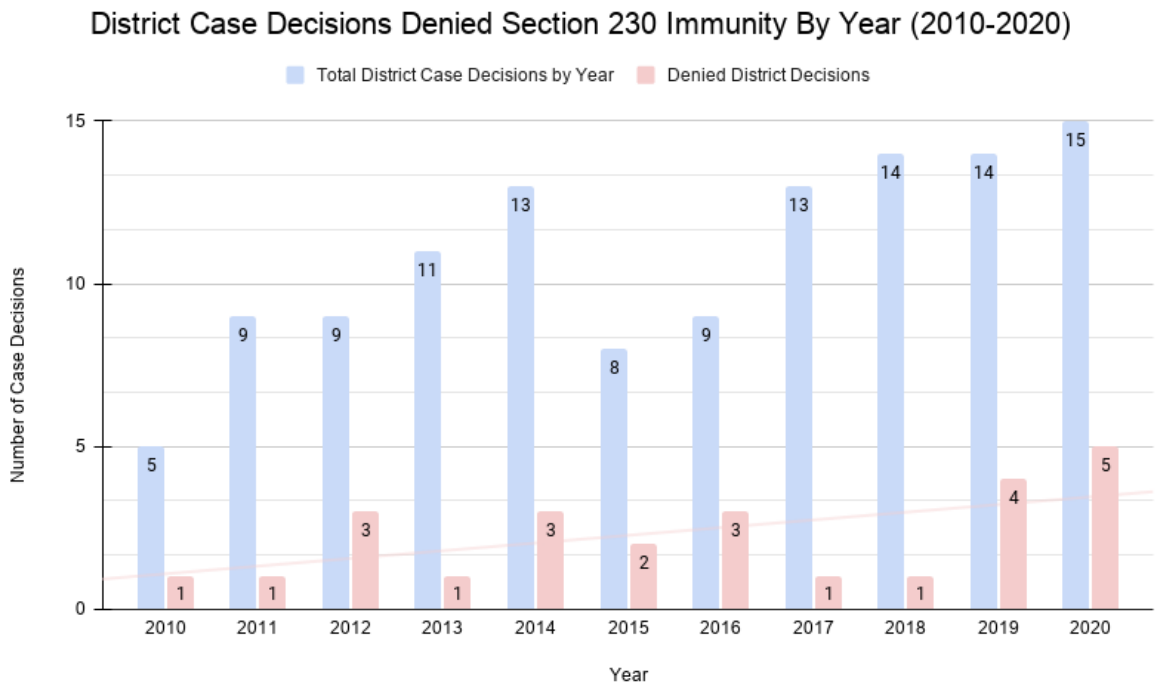


Figure 9: This figure demonstrates how many district court case decisions were denied immunity per year out of the total 120 district court case decisions in my dataset.

In contrast, there were only 4 appellate case decisions out of 20 total that were denied immunity, which means that 20% of appellate court case decisions were denied immunity. In *Figure 10* below, which looks at the number of the total appellate court case decisions by year that were denied immunity in comparison to the overall number of appellate court case decisions brought that same year, 2016 and 2019 are the only two years which had denied decisions. In 2016, 50% of the total appellate court case decisions were denied immunity, while 20% of the total case decisions in 2019 were denied immunity.

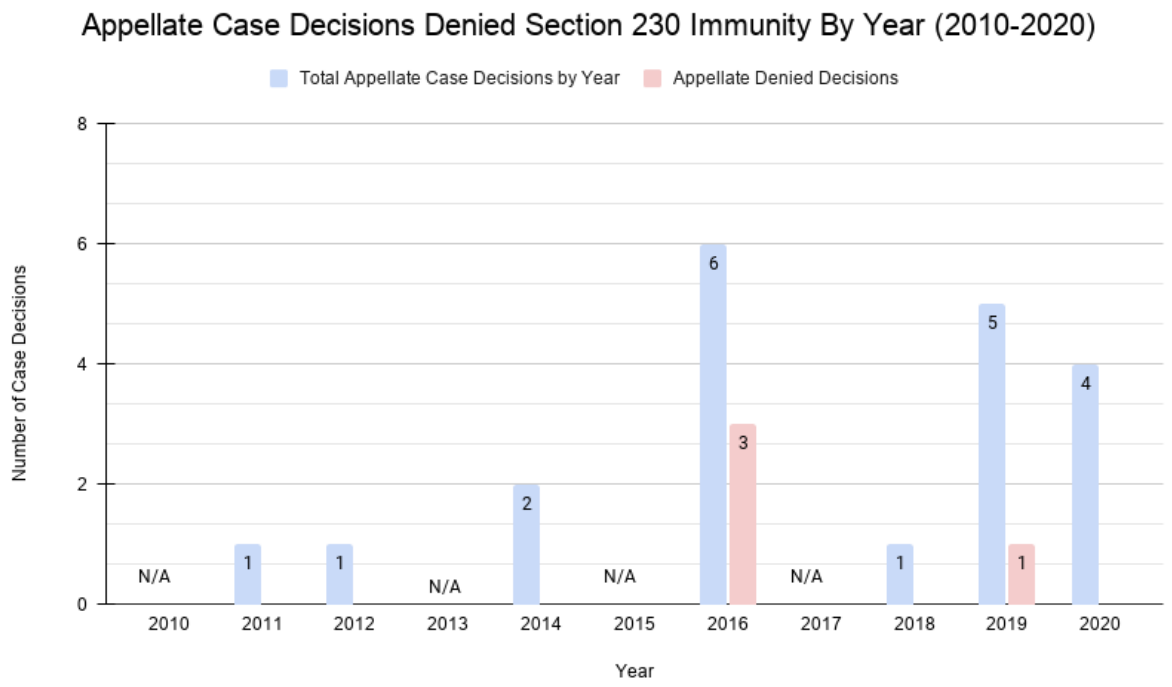


Figure 10: This figure demonstrates how many appellate court case decisions were denied immunity per year out of the total 20 appellate court case decisions in my dataset. N/A is used to represent years with no appellate case decisions brought in court.

29 Denied Decisions: Distribution by Section at Issue

Now, I want to focus on the parts of Section 230 that were at issue in these case decisions in which immunity was denied because they can provide key insight into what is happening in these court cases today. It is important to note that plaintiffs will often use a combination of multiple parts of Section 230 to argue against defendant's receiving immunity. For example, a plaintiff may state that a defendant should not be entitled to Section 230 immunity because they are not an interactive service provider, which would limit them from immunity under (c)(1), and that, instead, the defendant is an information content provider under (f)(3), essentially removing them from qualifying for immunity altogether. For reference, I have created a table below that defines what each part of Section 230 I will be discussing qualifies:

Clause of Section 230	General Definition
(b)	General policy motivations for the statute such as "promot[ing] the continued development of the internet" and preserving "the vibrant and competitive free market" of the Internet, for example.
(c)(1)	ICS cannot be held liable as the speaker or publisher of third-party content
(c)(2)	Gives technology companies their ability to moderate content in "good faith"
(f)(2)	Definition for who is an ICS (the defendant/intermediary type for the scope of my study)
(f)(3)	Definition for who is an ICP or the entity/individual creating the content at issue

As we saw earlier, the majority of all decisions (both granted and denied immunity) involved (c)(1) in some form or fashion, which means that the defendant meeting the criteria for an interactive computer service provider was questioned, or they were being treated as the publisher or speaker of the illegal content (i.e., an information content provider). As a result, (c)(1) was also the clause with the highest number of denied cases turning on it at 27.59% of total denied case decisions (*Figure 11*). When only looking at the 4 denied appellate court case decisions, they are each evenly dispersed at 3.45% of the total case decisions across (c)(1), (c)(1)/(f)(2)/(f)(3), (e)(3), and (c)(2)/(e)(2). Two denied appellate decisions relied on (c)(1), while only one relied on (c)(2). At the district court level, the denied decisions turned mainly on (c)(1) at 7 case decisions, or 24.14% of the total denied decisions. Additionally, the combination of (c)(1)/(f)(3), or an instance where the court deemed the defendant responsible for creating or facilitating the creation of the content at issue as an information content provider, was the second highest reason for district court case decisions being denied in 6 decisions, or 20.69% of the 29

denied decisions. It is difficult to tell whether or not these higher percentages of (c)(1) and (c)(1)/(f)(3) for decisions that were denied immunity are a departure from Ardia's findings in 2010, considering he did not look at each section of the statute's frequency in the case law. However, this movement towards more defendants being denied immunity due to their involvement in the creation of content, and not merely their ability to provide an interactive computer service, may signal a shift in the ways in which plaintiffs can receive recourse in the legal system; or alternatively, it may signal that new developments in technology are clashing with outdated regulations as technology is becoming more integrated with the ways in which people communicate online every day.

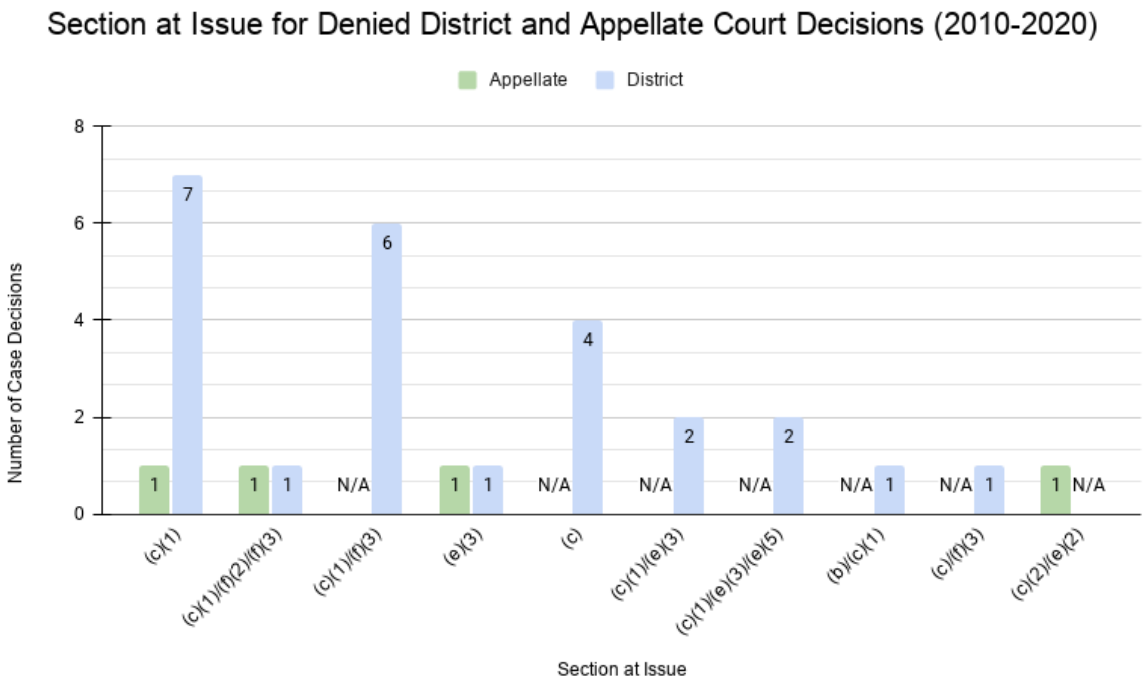


Figure 11: This figure shows the distribution of denied district and appellate court case decisions out of the total 29 denied decisions between 2010 and 2020 by the clause of Section 230 that was the main issue of the case (what the judges focused on in their judicial opinions). N/A is used to represent clauses that did not have any case decisions that turned on them.

Ultimately, my overall findings show that although some characteristics of the Section 230 case law remain similar to Ardia's findings between 1996-2009, the smaller transformations between 2010 and 2020 can have serious implications for what happens to the internet we know today if Section 230 is repealed or drastically altered. These implications will become clearer when viewed in tandem with the common themes amongst recent policy proposals for reform.

Discussion

Now that I have provided quantitative evidence to support how Section 230 cases have changed over the past 10 years, drawing my findings back to the most recent policy proposals for reform will elucidate my paper's key takeways. The most recent policy proposals for reform from Congress have revolved around three main themes: regulating accountability and transparency; asking for changes to (c)(2); and creating legal protection incentives for tech companies to moderate more aggressively.[112] My findings show that these themes do not fully target the changes in Section 230 case decisions over time to provide more efficient policy proposals that balance freedom of speech online while maintaining user safety on platforms. I will show that my findings related to intermediary types, claims, and sections at issue uncover a major dissonance between policy proposals for reform between the 116th and 117th Congress and what has actually occurred in the Section 230 case decisions over the past 10 years. Policy reform should take the Section 230 legislative history into account in order to understand how this statute has actually been working in practice and create targeted solutions that work to solve problems afflicting people's experiences online today.

[112] These themes are from a presentation that was created and presented by Jess Miers and Professor Eric Goldman from the Santa Clara University of Law. The presentation is titled, *Section 230 Key Developments (2020).*

Theme 1: Regulating Accountability and Transparency

Through policy proposals such as the Platform Accountability and Consumer Transparency (PACT) Act and the Limiting Section 230 Immunity to Good Samaritans Act, Congressional leaders are calling for greater accountability and transparency regarding big tech companies' content moderation policies through changes to Section 230. Section 230 gives technology companies their moderation ability, and alongside more aggressive pushes against hate speech from the European Commission (which has more established regulatory bodies for technology), transparency has followed. For example, Facebook has started releasing quarterly transparency reports to give their larger community of users "visibility into how [they] enforce policies" and even separating these statistics by verticals such as hate speech, suicide and self-injury, bullying and harassment, terrorism, and more.[113] Similarly, Twitter has developed its own transparency report, providing references for information such as how many removal requests, platform manipulations, and rule enforcements there have been in the past year.[114]

Although the specifics of both Facebook and Twitter's content moderation policies are not public knowledge, their ambiguity should not necessitate complete transparency for an important reason: the adaptation of bad actors creating illegal content. Internet trolls, networks of inauthentic accounts, and mass influence operations seek to abuse platforms. If companies make their content moderation practices entirely open to the public, not only will these platforms be extremely vulnerable to bad actors that adapt and innovate their methods of intrusion to fit publicized policy changes, but there will also be repercussions that will extend into real world experiences. As social media and technology continue to intertwine with every aspect of our

[113] "Facebook Transparency Report: Community Standards." *Facebook Transparency Report | Community Standards*, transparency.facebook.com/community-standards-enforcement.
[114] "Twitter Transparency Center." *Twitter*, Twitter, transparency.twitter.com/.

daily lives, both in negative and positive ways, bad actors will be able to use the complete transparency of policies and best practices to their advantage.

Similarly, steps are being taken by technology companies to create accountability measures independent of these companies. For example, Facebook has recently instituted the Oversight Board, which consists of 40 members from diverse backgrounds and perspectives from around the world to take content cases for their review and "uphold or reverse Facebook's content decisions".[115] Although the Oversight Board is an experiment in independent judgement for content moderation appeals and opinions in the social media space, a rapid trend is developing in which companies are beginning to model their moderation processes on existing governmental institutions, such as the Supreme Court of the United State in this case. It is not a secret that government institutions have similar issues with transparency and accountability in a variety of sectors. Therefore, I argue that Congress should move away from forcing technology companies into complete content policy transparency and impossible content removal times because these companies are continuing to improve, invest, and take more accountability for their content moderation practices every day.

Rather, I argue that current Congressional leaders' push to hold big tech accountable through heightened transparency measures and unrealistic time frames for removing content are a sign of growing pains. Major social media and technology companies such as Facebook, Twitter, Google, and YouTube are not your "traditional intermediaries" from 1996, as Tarleton Gillespie argues in his book, *Custodians of the Internet*.[116] In this sense, a "traditional intermediary" is a service provider that is entrusted with protecting and acting as the conduit of

[115] Independent Judgment. Transparency. Legitimacy." *Oversight Board*, oversightboard.com/.
[116] Gillespie, *Custodians of the Internet*, 41.

information between users. In contrast, social media platforms are a "hybrid" of two different types of intermediaries, "conduits of information" and "producers of entertainment".[117]

As major technology companies continue to create new features and products, user contributions and discussions online will continue to be influenced, to some extent, by the modes in which these new features facilitate and encourage conversation. Drawing on my findings to support how this change relates to regulating transparency and accountability, a shift in the distribution of intermediary types in case decisions between 2010 and 2020 is evident. Between 1996 and 2009, forum-like platforms made up 21.3% of intermediaries in Section 230 cases, while social media companies made up a mere 7% of intermediaries.[118] These statistics are the complete reverse today, and they may go hand in hand with why many Congressional leaders today strongly dislike Section 230. In 1996, Congressional leaders were excited to combat the unchartered territory of the internet when the internet was a more directly unsafe place - due to the anonymity and ease at which internet trolls could use forums such as 4chan and 8chan to disseminate hate speech, among other forms of obscene content. Now that users prefer the connection and community that go a long with social media platforms and individual user profiles, community standards violators can be more easily traced and associated to individual people, strengthening the sentiment that moderation violates an individual's right to speak freely.

Although some critics would question why this shift in intermediary type even matters, considering content has always been at the heart of the issues surrounding Section 230, I argue that the type of content (i.e. how we communicate) can be influenced by the intermediary type to some extent. Essentially, the ways in which people communicate and interact online are often shaped and influenced by the tools and features that facilitate that communication. As the

[117] Gillespie, *Ibid.*
[118] Ardia, *Free Speech Savior or Shield for Scoundrels,* 431.

environment and space to communicate online changes, our behaviors and social norms online also change ever so slightly. For example, Twitter provides a character limit of 280 words (formerly 140) to promote short-form communication. Instagram focuses on more visual and personalized forms of connection such as photos, stories, IGTV, and reels, while TikTok was created for short video content. React buttons such as the like, heart, or sadness reacts for content across these platforms encourage interaction with someone else's content. Each of these platforms facilitate different ways of communication that is important for a debate surrounding how to regulate speech online. In contrast, a website provides information from one party to be consumed by another, with little direct interaction or communication between the site creator and the site visitor. The list of examples could go on; however, it shows that the ways in which we communicate online and the content we produce is largely facilitated by the structures and foundation that a platform provides, which means that the type of intermediary in these Section 230 cases will also continue to matter, as long as these structures continue to differ and influence types of content creation.

Similarly, different intermediary types may require different standards for moderation, transparency, and accountability. (C)(1) states that interactive computer service providers should not be held liable for third-party speech or be treated as the publisher or speaker of said content. This protection from liability hinges entirely on who constitutes an interactive computer service provider and how. If major social media companies are not intermediaries in the "traditional" sense, as Gillespie argues, then regulating them the exact same way as more traditional or less complex intermediaries could be a factor in the tension that Congressional leaders are running into as they attempt to reform the statute. Additionally, the key distinction between regulating

Section 230 around (c)(1) or (c)(2), which I will discuss in the section below, will provide larger implications for how Section 230 reform should proceed.

Theme 2: Targeting (C)(2) Alone

The next prevalent policy proposal theme that is worth evaluating in light of my findings is the targeted focus on altering (c)(2) of Section 230. Namely, (c)(2)(a) states:

> "No provider or user of an interactive computer service shall be held 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…".[119]

Recent policy proposals, such as the Stopping the Censorship Act 2020 and Ending Support for Internet Censorship Act of 2019, called for drastic alterations to (c)(2). These calls for change aim to make Section 230 follow First Amendment speech principles in order to stop the alleged censorship of conservative speech online. The former proposal called for removing the "otherwise objectionable" definition bolded above and replacing it with "unlawful" and the "promotion of terrorism".[120] Essentially, this change would allow for hate speech on platforms, reducing free speech online as the darkest parts of the internet creep back into normative online spaces. CEO of Twitter, Jack Dorsey, confirmed the consequence of such a critical change to the "otherwise objectionable" definition in a Senate Hearing regarding Section 230 before the 2020 Presidential Election. He stated,

[119] 47 U.S.C. § 230 (c)(2)(a)
[120] Ending Support for Internet Censorship Act of 2019, S.B., 116th Cong, S. 1914, (2019).

> "Well, [Twitter's] interpretation of objectionable is anything that is limiting potentially the speech of others. All of our policies are focused on making sure that people feel safe to express themselves. And when we see abuse, harassment, misleading information, these are all threats against that. And it makes people want to leave the internet, makes people want to leave these conversations online. So that is what we're trying to protect, is making sure that people feel safe enough and free enough to express themselves in whatever way they wish."[121]

Thinking about this tech perspective on how slight changes to Section 230's language could potentially limit "the speech of others" on platforms, which is counter to Republican's intentions with changes to (c)(2), the need to follow the legislative history before proposing ideas for reform without context is greater than ever. The latter legislative proposal, titled The Ending Support for Internet Censorship Act, called for Section 230 requirements under (c)(2) to hinge on the fact that interactive computer service providers engage in "politically unbiased content moderation", which already sounds difficult to discern in practice.[122] However, these are not the only policy proposals that suggest such drastic changes to the statute's broad moderation immunity. Out of the 116th Congress's twenty-six proposals for reforming Section 230, (c)(2) was the only (c) clause that had proposals specifically and solely targeting changes to its language, while (c)(1) was never targeted alone in a proposal. I found this fixation on (c)(2) in the policy proposals to be counter to my findings, considering that only 3.57% of 140 case decisions turned on (c)(2). Alternatively, (c)(1) – which was involved in 92.86% of case

[121] U.S. Senate. Committee on Commerce, Science, and Transportation. *Does Section 230's Sweeping Immunity Enable Big Tech Bad Behavior?* (Oct. 28, 2020) at 2:40:06.
[122] Stopping Big Tech's Censorship Act of 2020, S.B., 116th Cong, S. 4062, (2020).

decisions as the section at issue in my findings – is largely only proposed in reform beside changes to (c)(2) or when combined with changes to (e) or (f).[123]

This dissonance between policy proposals and the Section 230 case decisions over the past ten years suggests that Section 230 reform was and is being used as a political tool to push technology companies into softening their Community Standards. This fear is supported by testimony from the Senate Hearing that was held 6 days before the U.S. 2020 Presidential Election, titled "Does Section 230's Sweeping Immunity Enable Big Tech Bad Behavior?".[124] During the hearing, Senator Brian Schatz discussed how "six Republican-only bills" that were recently introduced have "threatened platform's ability to moderate content on their sites".[125] Furthermore, Senator Schatz claimed that these actions were conducted to "[bully]" platforms for "electoral purposes" to "advance misinformation" ahead of the 2020 Presidential Election.[126] It is important to note that prior to the hearing, there were calls from both Democratic and Republican Congress members to reform the statute; however, the motives behind the timing of the hearing right before the contentious election day were called into question.

These suggestions that Senate and House Republicans are applying pressure to technology platforms through legislation centered on changes to (c)(2), even though the cases between 2010 and 2020 rarely turned on this clause alone, is further supported by the issuing of President Trump's Executive Order from May of 2020. Following Twitter's labeling of one of President Trump's tweets about mail-in-voting as misinformation, President Trump issued an

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[123] I gathered my information on recent policy proposals in Congress from a Section 230 Bill Tracker created by Section 230 expert Jessica Meirs, a 3L at Santa Clara University Law School and Policy Specialist at Google.
[124] U.S. Senate. Committee on Commerce, Science, and Transportation. *Does Section 230's Sweeping Immunity Enable Big Tech Bad Behavior?* (Oct. 28, 2020).
[125] U.S. Senate. Committee on Commerce, Science, and Transportation. *Does Section 230's Sweeping Immunity Enable Big Tech Bad Behavior?* (Oct. 28, 2020) at 01:35:09.
[126] U.S. Senate. Committee on Commerce, Science, and Transportation. *Does Section 230's Sweeping Immunity Enable Big Tech Bad Behavior?* (Oct. 28, 2020) at 01:37:51.

executive order stating that "online platforms are engaging in selective censorship" and that these companies "ought to be viewed as content creators".[127] These statements were coupled with a petition to allow the Federal Communications Commission the power to clarify the language around Section 230, essentially narrowing the scope of immunity for technology companies. Although the executive order briefly mentions that these companies should be viewed as information content providers (which would fall under (c)(1)), the purpose of the order was to center the narrative of Section 230 around (c)(2) and "tech censorship".[128]

Some would argue that this dissonance between the policy proposals and the legislative history is because Congressional Republicans are simply suggesting changes to (c)(2) while knowingly ignoring the legal prevalence of (c)(1) in the vast majority of case decisions. However, this argument strengthens the necessity of my study's findings and the importance of including Section 230's legislative history in reform discussions. I have provided quantitative evidence to demonstrate that policy changes to (c)(2) are not in line with constituent's requests for recourse in the legal system. This idea can be seen in my findings based on the surprisingly low number of claims to violations of free speech that plaintiffs brought against intermediaries in court. Similar to the number of free speech violation claims brought between 1996 and 2009, only 2.49% of the total case decisions consisted of a free speech claim under the First Amendment. Although these claims are not considered "winners" in this legal context, plaintiffs still brought them anyway to make a statement that they felt like their right to free speech had been violated. If social media companies were censoring speech on a broad scale, I would expect the percentage of free speech claims brought by plaintiffs between 2010 and 2020 to be

[127] Executive Order on Preventing Online Censorship, 3 C.F.R., 2020.
[128] Executive Order on Preventing Online Censorship, 3 C.F.R., 2020.

significantly higher to mirror the focus that Congressional Republicans have placed on the anti-conservative bias narrative in this reform debate.

Theme 3: Incentivizing Tech Companies to Moderate

The final major policy proposal theme that I will examine alongside my study's findings is attempting to forcefully incentivize companies to take more aggressive stances on moderating content. These proposals, which Democrats tend to favor, usually center on incorporating carveouts, which are already present under Section 230 (e)(1-5), or as I examined with the EARN IT Act, they attempt to sneak in other changes unrelated to Section 230, like eliminating end-to-end encryption of private messages, for example. Similarly, the Department of Justice (DOJ) under former Attorney General William Barr issued a proposal to Congress for reforming Section 230 in June of 2020. The report states:

> "At the same time, courts have interpreted the scope of Section 230 immunity very broadly, diverging from its original purpose. This expansive statutory interpretation, combined with technological developments, has reduced the incentives of online platforms to address illicit activity on their services and, and the same time, left them free to moderate lawful content without transparency or accountability"[129]

First, it is important to note that if Section 230 was not viewed broadly in the court, technology companies would not be able to remove much of the "illicit activity" on their platforms in the first place. Even more "lawful content", or content allowed under the First Amendment, would be taken down to avoid any semblance of legal liability in a more narrowly interpreted statute. For example, the report's reference to how "incentives" for technology companies to reduce

[129] *Section 230 Nurturing Innovation or Fostering Unaccountability?* U.S. Department of Justice, (2020).

illicit activity and content on their services has declined due to Section 230 is inconsistent with the approach that the DOJ suggests policymakers to take in the report. The DOJ suggests that there should be carveouts for "child abuse, terrorism, and cyber-stalking" codified into the statute, in order to increase the paths for recourse that victims of harmful content can use in the legal system against interactive computer service providers. Although I completely agree with the sentiment that service providers and platforms must do more to continue improving their content moderation practices and making the internet a safer space for individuals and children, the DOJ's suggestion for reform does not align with their intended result. Here, I mean that what some Congressional leaders and, in this case, the DOJ, define as "incentivizing" technology companies to moderate more aggressively, actually results in less moderation, and in turn, simply results in the removal of online spaces altogether to avoid liability. This was largely part of the outcome in the 2018 FOSTA-SESTA Bill, which was meant to combat sex trafficking online; however, it resulted in the entire deletion of online spaces and reduction of free speech, because even if there was no illegal content in those spaces, the potential that there might be some that went unnoticed was too much of a legal liability for companies.[130]

Bringing this discussion back to my findings, the sections of 230 at issue in the case decisions, specifically for clauses (e)(1-5), can provide some clarity as to why extra carveout approaches for specific legal rights categories are an ineffective motivator for interactive computer service providers to moderate more aggressively. Plaintiffs frequently brought other legal claims against intermediaries that Section 230 has no effect on in 43, or 30.71%, of case decisions. In the 29 case decisions that were denied immunity between 2010 and 2020, 24.14% of those involved an (e) clause. This means that only 6.57% of case decisions involving legal

[130] Goldman, *Fosta and Section 230*, 289.

claims that the plaintiff thought a Section 230 defense would have no effect on were still granted immunity for other claims. Although not as significant of a percentage of the sections at issue in the case decisions denied Section 230 immunity, these findings still represent how the carveouts that already exist within Section 230 for other State and Federal laws are largely successful in their aim. However, adding more specific carveouts to the existing categories of exception would result in the opposite outcome of the intended effect. This is largely because most of the carveouts that exist today are fairly broad in scope, and specificity has led to the shutdown of online spaces altogether and the overall reduction of free speech.

Ultimately, "platforms are not platforms without moderation", and these carveout approaches meant to incentivize companies into unrealistic standards for content removal, as content moderation exists today, has had quite the opposite effect than intended.[131] Understanding the dissonance between these recent reform trends and the data between 2010 and 2020 will help policymakers make more targeted and efficient proposals that actually motivate, rather than disincentivize interactive computer service providers to do the moderation work that keeps online communities safe.

Policy Recommendations

Section 230 reform will be difficult and complex; however, my quantitative findings provide a starting point that Congressional leaders can reference for guidance. Outside of the three main policy proposal themes that dominate the reform landscape, there remains another that is important to note: a general antagonization of major technology companies' content moderation practices. Rather than working with these technology companies, Congressional

[131] Gillespie, *Custodians of the Internet*, 21.

leaders are conducting policymaking without them. In order to create more comprehensive internet policy reform related to Section 230, we need government leaders to thoroughly understand how the statute works in practice and have a general willingness to work collaboratively with technology companies on solutions. Looking toward the near future, as the Biden Administration has signaled explicit interest in reform efforts for Section 230, my policy recommendations based on my findings are the following:

Recommendation #1	Differentiation in Section 230 based on intermediary type, which would move regulation toward (c)(1) and away from (c)(2)
Recommendation #2	Leave Section 230 alone + Institutionalize technological innovation into legislation through a new regulatory agency that works directly with experts from technology companies and digital rights activist groups to thoroughly understand Section 230 and content moderation

Turn Reform Efforts Towards (C)(1)

First, I propose that if changes be made to Section 230, policymakers should focus their attention to changing (c)(1), rather than (c)(2). Section 230 largely works how it was intended to in court as a broad immunity for technology companies, considering approximately 80% of intermediaries in my findings were granted immunity between 2010 and 2020. This means that as a procedural fast lane in court, it has largely been successful in giving tech companies the ability to moderate obscene content and keep online spaces safe. However, as the ways in which people communicate and interact on the internet has changed, so too should the ways in which we oversee online activity. This transition is supported by the drastic shift in defendants with the

most claims brought against them in court over the past 10 years; therefore, I recommend that Section 230 immunity require different standards of moderation for different intermediary types. This idea, which turns the focus of regulation back to (c)(1) and is aligned with my findings, is actually supported by the European Commission's most recent series of proposed technology regulation called the Digital Services Act package. Most important for this context is the Digital Services Act (DSA), which was proposed by the European Commission in December 2020 and is primarily focused on regulating content moderation and online advertising. Similar to my recommendation, the DSA makes a distinction between "very large platforms", defined as "platforms reaching more than 10% of 450 million consumers in Europe" that "pose particular risks in the dissemination of illegal content and societal harms", and medium-to-smaller sized internet service providers.[132] The DSA requires that these "very large platforms", such as Facebook, Twitter, Google, TikTok, and Snapchat, be subject to more stringent legislative requirements such as external audits at their own expense, stricter content moderation monitoring by the EC, and higher transparency reporting standards.[133] Although I think the DSA goes too far in certain regulatory aspects, such as algorithm disclosures to the public, it is pioneering legislation in the digital economy age in many other ways. Furthermore, Facebook agreed with this approach of focusing on distinctions between interactive computer service providers in regulation in its latest "Response to EC Public Consultation on the Digital Services Act" on September 8, 2020. Facebook stated,

[132] Directorate-General for Communications Networks, Content and Technology, European Commission (2020). *Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act*. Brussels.
[133] Directorate-General for Communications Networks, Content and Technology, European Commission (2020). *Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act*. Brussels.

> "While Facebook supports regulation requiring digital platforms to have systems in place to address content that is unlawful, a homogenous one-size-fits-all approach is not a viable solution. Obligations should be proportionate in relation to the nature and characteristics of the service, and include appropriate safeguards to protect the privacy of users in the course of legitimate and lawful activities, and any requirements should be tailored to the variety of business models involved and developed in collaboration with stakeholders. Any regulation must take this into account. For example, small and medium-sized online platforms and services may have less capability and resources, and less advanced processes than larger companies."[134]

As innovation continues to create new ways of facilitating online communication, our expectations for regulation and monitoring should as the report says, not follow a "one-size-fits all approach". Although the general principles of ensuring safe online spaces should remain integral to changes in regulation, social media platforms and search engines should be held to higher content moderation standards than a small business' website or a small online forum. Creating verticals that define which intermediary type is subject to which standards of moderation will reduce the validity of the argument that Section 230 provides sweeping immunity to all interactive computer service providers.

More specifically, this change to Section 230 would require a change to (c)(1), rather than (c)(2) – which is consistent with my findings that show that the majority of the case decisions relied on (c)(1) for their outcomes. As a reminder, (c)(1) determines if an intermediary is an interactive computer service provider, whether they are being treated as the speaker or publisher of the content at issue, and whether they created the content at issue (information

[134] Facebook (Sep. 8, 2020), *Facebook Response to EC Public Consultation on the Digital Services Act (DSA)*. Page 42.

content provider). Ultimately, my proposal to change Section 230 would focus on the criteria for (c)(1) that determines which intermediaries meet the definition of an "interactive computer service provider" and potentially creating new tiered definitions based on entity scale and moderation capability.

Institutionalizing and Normalizing Internet Law in the U.S.

Second, if not reforming 230 directly, I propose moving the policy debate towards introducing a new technology regulator or governing body in the U.S. that is specifically designed to work on internet policy issues such as freedom of speech online, data privacy, and other technology verticals. Due to Congressional leaders' stark differences in opinion on how to proceed with Section 230 reform, creating a new regulatory agency that is created specifically to address these issues and bridge the ideological divide across the aisle could potentially produce more creative and appropriate legislative solutions. Regulatory changes through an agency are required to be open to public comment, which provides individuals and interest groups with greater say in how changes to Section 230 will alter their experiences of the internet every day. Currently, issues related to social media and big tech often fall under the Federal Communications Commission (FCC) at the federal agency level; however, the FCC deals predominantly with traditional forms of commercial mass media. A new agency with experts focused solely on social media and technology is necessary to provide its full attention to these increasingly pressing issues related to free speech, democracy, and content moderation. Additionally, this agency should prioritize the civil liberties of individual users, acknowledge the global legal frameworks of expression these technology companies are balancing in their moderation policies, and take into account the severity and prevalence of harmful content on the

internet today that is removed thanks to existing content moderation practices.[135] Although some would push back on the notion that technology companies are open to more regulation from government leaders, especially in the form of an institutionalized body, they are already working with them frequently in the European Union.

In fact, many changes to current content moderation practices and policies are coming directly from the European Commission. As recent as 2016, the European Commission launched "The Code" in collaboration with Facebook, Microsoft, Twitter, and YouTube. This code of conduct was created as a response to the "proliferation of racist and xenophobic hate speech online", and it ensures that requests to remove harmful content are dealt with quickly.[136] Adherence to this code is then swiftly monitored by civil society organizations located in different countries within the EU based on a standardized methodology.[137] Additionally, the European Commission has launched a "Digital Strategy" to shape Europe's "digital future" through a variety of proposed regulatory frameworks aimed to position the EU as a global thought leader in the technology space. By taking a more hardline approach to regulation of the industry, in comparison to the United States' lighter approach, the EU's proposals may have a lasting effect on user experiences of social media and internet services across the globe. These are some of the many regulations that the European Commission has worked with the largest technology platforms on to introduce and implement within and potentially outside of the EU. As internet policy issues become more mainstream, it will become increasingly important that the United States government becomes a thought leader in this space; however, the current lack of bipartisan consensus on reform questions for Section 230 on the Senate and House floor is due to

[135] Bikert, Monika. Facebook. "Charting A Way Forward: Online Content Regualtion". February 2020.
[136] European Commission (2016). *The Code of Conduct on Countering Illegal Hate Speech Online*. Brussels.
[137] European Commission (2016). *The Code of Conduct on Countering Illegal Hate Speech Online*. Brussels.

a lack of thorough understanding of the statute and the technology itself. Institutionalizing a group of regulators committed to working with existing technology leaders to understand their platform's moderation practices and innovations through a new government agency, will ensure that thoughtful change to Section 230 is implemented and demonstrate that the United States is dedicated to comprehensive and thoughtful internet policy regulation.

Overall, the combination of more specified verticals for which intermediary types constitute a provider of an "interactive computer service" to enhance moderation standards based on need and/or the normalization of internet policy issues through the creation of a regulatory body will provide more comprehensive ideas for Section 230's future. The vague language of the statute, as it relates to (c)(1) specifically, was valuable in 1996 when the internet was in its early stages of development; however, specificity in language is crucial now in clarifying some of the more ambiguous legal questions regarding the balance of freedom of speech online and safety of individual users now that there is a more established landscape of intermediaries to observe.

Redress for Victims

One important issue that my research did not focus on, but I think is extremely important to acknowledge is how Section 230 can also cause real world harm on an individual level. Victims of online harassment, defamation, or nonconsensual pornography ("revenge porn") often have very little to no recourse through the legal system in getting this content about them removed from platforms.[138] As I mentioned earlier, Section 230 gives interactive computer service providers the "right, but not the responsibility" to remove content on their platforms; therefore,

[138] Citron, Danielle Keats and Wittes, Benjamin, The Problem Isn't Just Backpage: Revising Section 230 Immunity (July 23, 2018). 2 Georgetown Law Technology Review 453 (2018), U of Maryland Legal Studies Research Paper No. 2018-22.

some of this content remains up depending on the context.[139] Section 230 legal scholars Danielle K. Citron and Mary Ann Franks describe the effects of this gap in content removal:

> "Victims of online abuse do not feel safe on or offline. They experience anxiety and severe emotional distress. They suffer damage to their reputations and intimate relationships as well as their employment and educational opportunities. Some victims are forced to relocate, change jobs, or even change names. Because the abuse so often appears in internet searches of their names, victims have difficulty finding employment or keeping their jobs."[140]

One policy recommendation that these scholars propose to rectify this pressing issue, which I support as an additional policy recommendation to the ones I produced above, is to "[amend] Section 230 to exclude bad actors from its legal shield". This solution would involve either "[denying] the immunity to online service providers" that purposefully leave up "unambiguously unlawful content that clearly creates a serious harm to others" or alternatively, "[excluding] intermediaries who exhibit deliberate indifference to unlawful content or conduct". [141] Essentially, if this concept was instituted through a federal criminal bill, such as the SHIELD Act of 2019 that proposed such a revision, a Section 230 defense would not be strong enough to win the case in favor of defendants, considering Section 230 has no effect on federal criminal laws (clause (e)(1)).[142] This change would not narrow Section 230 protections for providers that are actively protecting individual users from abuse on platforms, while incentivizing companies to

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[139] Gillespie, *Custodians of the Internet*, 31.
[140] Citron, Danielle Keats, and Mary Anne Franks. "The Internet as a Speech Machine and Other Myths Confounding Section 230 Speech Reform." *SSRN Electronic Journal*, December 1, 2020. https://doi.org/10.2139/ssrn.3532691.
[141] Citron and Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Speech Reform*, 70.
[142] Citron and Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Speech Reform*, 71.

remove content that could cause irreparable damage to individual users' lives and livelihoods. This solution, combined with my earlier policy recommendations, will pave the way for thoughtful Section 230 regulation that is based on quantitative evidence from the legislative history between 2010 and 2020.

Conclusion

Despite the ongoing politicization of the content moderation policy debate in Congress, Section 230 has allowed for the development of the internet that we know today. Overall, my paper has shown that Section 230 strengthens, rather than diminishes, freedom of speech online – while allowing service providers to moderate and remove the darkest parts of the internet from public view. However, a strong push from government leaders in the 116th and 117th Congress suggests that reform is on the horizon, and if Congressional leaders are going to drastically alter how individuals experience the internet in their daily lives through reform, they need quantitative evidence that will demonstrate where their policy proposals are going wrong or how they are headed in the right direction.

My study is the first to systematically and empirically examine Section 230 federal district and appellate court case decisions between 2010 and 2020 in order to determine how changes over time in the case law can inform upcoming policy proposals for reform. Applying social science methodology to legal studies, I discovered that there is a clear dissonance between how these case decisions have developed over time and the main themes across policy proposals to reform the statute in Congress today. Mainly, pushes to regulate accountability and transparency, target changes to (c)(2), and incentivize technology companies to moderate content more aggressively have dominated policy proposals in the 116th and 117th Congress. My findings

showed that these themes do not align with the data, which saw a drastic shift in intermediary types being brought in these cases, the disproportionate share of cases turning on (c)(1) instead of (c)(2), and the success rates of (e)(1-5) clauses in holding interactive computer service providers accountable despite Section 230's broad protection.

My paper urges policymakers to examine this study's data in order to elicit more efficiently targeted policy proposals that critically examine a path forward for the regulation of speech online. I recommend that policymakers either alter Section 230 regulation to focus on different standards and expectations for moderation by intermediary types; or, alternatively, policymakers can leave Section 230 alone and combine its immunity with a broader prioritization of bringing technology law and policy issues into the mainstream through a new regulatory agency in the United States that prioritizes individual digital rights and user safety online. As technology companies continue to grow and new forms of digital communication and innovation emerge, the need for a larger understanding for how to approach complex, and often ambiguous, technology policy issues in the digital age like Section 230 will become increasingly pressing.

Bibliography

§ 230. Protection for private blocking and screening of offensive material, 47 USCS § 230 (Current through Public Law 116-193, approved October 30, 2020.).

Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R.1865, 115th Cong, Public Law 164, (2017).

Baldino's Lock & Key Serv. v. Google LLC, 285 F. Supp. 3d 276, 2018 U.S. Dist. LEXIS 5617, 2018-1 Trade Cas. (CCH) P80,256, 2018 WL 400755 (United States District Court for the District of Columbia, January 12, 2018, Filed), *available at* https://advance-lexis-com.proxy.uchicago.edu/api/document?collection=cases&id=urn:contentItem:5RD1-0JD1-F04C-Y46R-00000-00&context=1516831.

Barnes v. Yahoo!, Inc., 570 F.3d 1096, 2009 U.S. App. LEXIS 20053, 37 Media L. Rep. 1705, 47 Comm. Reg. (P & F) 1028 (United States Court of Appeals for the Ninth Circuit June 22, 2009, Amended), *available at* https://advance-lexis-com.proxy.uchicago.edu/api/document?collection=cases&id=urn:contentItem:7WK7-MS61-2R6J-208X-00000-00&context=1516831

Citron, Danielle Keats, and Mary Anne Franks. "The Internet as a Speech Machine and Other Myths Confounding Section 230 Speech Reform." *SSRN Electronic Journal*, December 1, 2020. https://doi.org/10.2139/ssrn.3532691.

Citron, Danielle Keats and Wittes, Benjamin, The Problem Isn't Just Backpage: Revising Section 230 Immunity (July 23, 2018). 2 Georgetown Law Technology Review 453 (2018), U of Maryland Legal Studies Research Paper No. 2018-22, Available at SSRN: https://ssrn.com/abstract=3218521

Conger, Kate, and Davey Alba. "Twitter Refutes Inaccuracies in Trump's Tweets About Mail-In Voting." The New York Times. The New York Times, May 26, 2020.

Danielle Keats Citron; Benjamin Wittes, "The Internet Will Not Break: Denying Bad Samaritans Sec. 230 Immunity," Fordham Law Review 86, no. 2 (November 2017): 401-424

David S. Ardia, "Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity under Section 230 of the Communications Decency Act," Loyola of Los Angeles Law Review 43, no. 2 (Winter 2010): 373-506

"Demographics of Social Media Users and Adoption in the United States," April 14, 2021. https://www.pewresearch.org/internet/fact-sheet/social-media/.

Directorate-General for Communications Networks, Content and Technology, European Commission (2020). *Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act*. Brussels.

Doe v. Backpage.com, LLC, 817 F.3d 12, 2016 U.S. App. LEXIS 4671, 44 Media L. Rep. 1549, 118 U.S.P.Q.2D (BNA) 1672, 64 Comm. Reg. (P & F) 483, 2016 WL 963848 (United States Court of Appeals for the First Circuit March 14, 2016, Decided), *available at* https://advance-lexis-com.proxy.uchicago.edu/api/document?collection=cases&id=urn:contentItem:5J9B-YP91-F04K-H09N-00000-00&context=1516831.

Does Section 230's Sweeping Immunity Enable Big Tech Bad Behavior, 116th Cong. (2020) (Senator Brian Schatz).

Eliminating Abusive and Rampant Neglect of Interactive Technologies (EARN IT) Act of 2020, H.R., 116th Cong, S. 3398, (2020).

Ending Support for Internet Censorship Act of 2019, S.B., 116th Cong, S. 1914, (2019).

Eric Goldman. "Balancing Section 230 and Anti-Sex Trafficking Initiatives." *SSRN Electronic Journal*, 2017, doi:10.2139/ssrn.3079193.

Eric Goldman. "Dear President Biden: You Should Save, Not Revoke, Section 230" (January 12, 2021). Bulletin of the Atomic Scientists, Santa Clara Univ. Legal Studies Research Paper, Available at SSRN: https://ssrn.com/abstract=3765247

Eric Goldman, "The Complicated Story of Fosta and Section 230," First Amendment Law Review 17, no. Symposium (2018): 279-293

Eric Goldman, "The Ten Most Important Section 230 Rulings," Tulane Journal of Technology and Intellectual Property 20 (2017): 1-10

European Commission (2016). *The Code of Conduct on Countering Illegal Hate Speech Online*. Brussels.

Executive Order on Preventing Online Censorship, 3 C.F.R., 2020.

Facebook (Sep. 8, 2020), *Facebook Response to EC Public Consultation on the Digital Services Act*. 1-134.

"Facebook Transparency Report: Community Standards." *Facebook Transparency Report | Community Standards*, transparency.facebook.com/community-standards-enforcement.

Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC, 2004 U.S. Dist. LEXIS 28965 (United States District Court for the Central District of California, November 22, 2004, Filed), *available at* https://advance-lexis-com.proxy.uchicago.edu/api/document?collection=cases&id=urn:contentItem:4HX5-SCJ0-TVSH-32DX-00000-00&context=1516831.

Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC, 2008 U.S. Dist. LEXIS 130811 (United States District Court for the Central District of California, November 7, 2008,

Filed), *available at* https://advance-lexis-com.proxy.uchicago.edu/api/document?collection=cases&id=urn:contentItem:5TKB-5071-F06F-227F-00000-00&context=1516831.

"Federal Court Management Statistics ." Accessed April 14, 2021. https://www.uscourts.gov/statistics-reports/analysis-reports/federal-court-management-statistics.

Fields v. Twitter, Inc., 217 F. Supp. 3d 1116, 2016 U.S. Dist. LEXIS 161233, 2016 WL 6822065 (United States District Court for the Northern District of California, November 18, 2016, Filed), *available at* https://advance-lexis-com.proxy.uchicago.edu/api/document?collection=cases&id=urn:contentItem:5M76-C6S1-F04C-T01J-00000-00&context=1516831.

Force v. Facebook, Inc., 934 F.3d 53, 2019 U.S. App. LEXIS 22698, 2019 WL 3432818 (United States Court of Appeals for the Second Circuit July 31, 2019, Decided), *available at* https://advance-lexis-com.proxy.uchicago.edu/api/document?collection=cases&id=urn:contentItem:5WPG-4871-JBT7-X008-00000-00&context=1516831.

Fox, Justin, and Georg Vanberg. "Narrow versus Broad Judicial Decisions." *Journal of Theoretical Politics*, vol. 26, no. 3, 2013, pp. 355–383., doi:10.1177/0951629813502709.

Goldman, Eric, Why Section 230 Is Better Than the First Amendment (November 1, 2019). Notre Dame Law Review, Vol. 95, No. 33, 2019.

Image pulled from: *Circuit Court*. *Liberal Dictionary*. Accessed April 14, 2021. https://www.tekportal.net/circuit-court/.

"Independent Judgment. Transparency. Legitimacy." *Oversight Board*, oversightboard.com/.
Katie Mellinger, "The Section 230 Standoff: Safe Harbor Rollbacks Would Not Solve Alleged 'Anti-Conservative Bias' in Social Media Content Moderation," Wake Forest Journal of Law & Policy 10, no. 3 (2020): 389-408

Kate Klonick, "The New Governors: The People, Rules, and Processes Governing Online Speech," Harvard Law Review 131, no. 6 (April 2018): 1598-1670

Kathleen Ann Ruane, Freedom of Speech and Press Exceptions to the First Amendment, Congressional Research Service, (2014).

James Everett Jatz, The Social Media President. Barack Obama and The Politics of Digital Engagement. Palgrave Macmillan, 2013.

Kyle Langvardt, "Regulating Online Content Moderation," Georgetown Law Journal 106, no. 5 (June 2018): 1353-1388

Mackey, Aaron. “Even with Changes, the Revised PACT Act Will Lead to More Online Censorship,” March 26, 2021. https://www.eff.org/deeplinks/2021/03/even-changes-revised-pact-act-will-lead-more-online-censorship.

Mark A. Hall & Ronald F. Wright, Systematic Content Analysis of Judicial Opinions, 96 CAL. L. REV. 63, 64 (2008); see also Beebe, supra note 16, at 554 n.13; Reed C. Lawlor, Fact Content Analysis of Judicial Opinions, 8 JURIMETRICS J. 107, 110 (1968).

Maynard v. Snapchat, Inc., 346 Ga. App. 131, 816 S.E.2d 77, 2018 Ga. App. LEXIS 336, 2018 WL 2676081 (Court of Appeals of Georgia June 5, 2018, Decided).

Monika Bikert. Facebook. “Charting A Way Forward: Online Content Regualtion”. February 2020.

Platform Accountability and Consumer Transparency (PACT) Act of 2020, H.R., 116th Cong, S.4066 (2020).

Reno v. Aclu, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874, 1997 U.S. LEXIS 4037, 65 U.S.L.W. 4715, 97 Cal. Daily Op. Service 4998, 97 Daily Journal DAR 8133, 25 Media L. Rep. 1833, 11 Fla. L. Weekly Fed. S 211 (Supreme Court of the United States June 26, 1997, Decided), *available at* https://advance-lexis-com.proxy.uchicago.edu/api/document?collection=cases&id=urn:contentItem:3RV9-X130-003B-R17P-00000-00&context=1516831.

Section 230 Bill Tracker Created by Section 230 Expert Jessica Meirs, 3L at Santa Clara University Law School and Policy Specialist at Google.

Section 230 Key Developments (2020). Presentation created and presented by Jess Miers and Professor Eric Goldman from the Santa Clara University of Law.

Section 230 Nurturing Innovation or Fostering Unaccountability? U.S. Department of Justice, (2020).

Statement of Justice Clarence Thomas, Malwarebytes, Inc. v. Enigma Software Group USA, LLC. SCOTUS, October 13,2020.

Stopping Big Tech’s Censorship Act of 2020, S.B., 116th Cong, S. 4062, (2020).

Stop the Censorship Act of 2020, H.R.4027, 116th Cong, (2020).

Stratton Oakmont v. Prodigy Servs. Co., 1995 N.Y. Misc. LEXIS 229, 23 Media L. Rep. 1794 (Supreme Court of New York, Nassau County, May 26, 1995, ENTERED), *available at* https://advance-lexis-com.proxy.uchicago.edu/api/document?collection=cases&id=urn:contentItem:3RVM-6600-003V-B4FS-00000-00&context=1516831.

Tarleton Gillespie, Custodians of the Internet: Platforms, Content Moderation, and The Hidden Decisions That Shape Social Media.Yale University Press, 2018.

"The Constitution of the United States," Amendment 1.

“Twitter Transparency Center.” *Twitter*, Twitter, transparency.twitter.com/.

Zeran v. Am. Online, Inc., 129 F.3d 327, 1997 U.S. App. LEXIS 31791, 25 Media L. Rep. 2526, 10 Comm. Reg. (P & F) 456 (United States Court of Appeals for the Fourth Circuit November 12, 1997, Decided), *available at* https://advance-lexis-com.proxy.uchicago.edu/api/document?collection=cases&id=urn:contentItem:3RJX-J910-0038-X09F-00000-00&context=1516831.