CHARACTERIZATIONS AND MISREPRESENTATIONS OF SECTION 230 IN NEWS COVERAGE — *A CONTENT ANALYSIS*

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ABSTRACT

Kathryn Alexandria Johnson: Characterizations and Misrepresentations of Section 230—A Content Analysis
(Under the direction of Dr. Victoria Ekstrand)

This thesis is designed to analyze contemporary news coverage of Section 230 of the Communications Decency Act by *The New York Times* and *The Wall Street Journal*. Relying on self-governance theory as well as agenda-setting and framing theory, the author examines reporting in 222 news articles from January 2020 through December 2021 to evaluate how journalists are presently covering Section 230 and how news coverage can be improved to further self-governance principles.

This thesis concludes with the author offering a set of "Best Practices" recommendations for journalists to consider implementing to improve future news coverage of Section 230 and a proposed description of the law. The Best Practices recommendations include: considering ways to increase thematic coverage; including clear definitions of Section 230; discussing Section 230's impacts; prioritizing balanced reporting; and reporting accurately and avoiding common legal missteps.

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CHAPTER 1: BACKGROUND AND PROJECT SCOPE

I. Introduction

> *Section 230 of the C.D.A. is neither long nor particularly inscrutable. It clocks in at under 1,000 words, and it makes clear that the law does not premise protection on political neutrality. Neither does it force tech companies to assume either the role of "publisher" or "platform." And it states that C.D.A. 230 has no bearing on federal criminal law — or on intellectual property law, for that matter.*[1]

Section 230 of the Communications Decency Act ("CDA") was enacted in 1996,[2] for the purpose of limiting speech—specifically to encourage "internet service providers," or platforms,[3] to take down obscene and indecent content from their sites—and to clean up the internet.[4] Since its enactment, the law has been interpreted to protect platforms from claims that arise from content posted by third-parties on their sites and simultaneously protect and encourage freedom of speech online.[5] In short and simply put, Section 230 protects intermediaries from being held

[1] Sarah Jeong, *Politicians Want To Change the Internet's Most Important Law. They Should Read it First.*, N.Y. TIMES (July 26, 2019), https://www.nytimes.com/2019/07/26/opinion/section-230-political-neutrality.html#click=https://t.co/tLqhw3KfNm.

[2] 47 U.S.C. § 230.

[3] Note that throughout this study, internet service providers, as defined in 47 U.S.C. § 230(f)(2), may also be referred to as "platforms."

[4] *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) ("Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.); *CDA 230: Legislative History*, EFF, https://www.eff.org/issues/cda230/legislative-history [hereinafter *CDA 230: Legislative History*].

[5] *See Zeran*, 129 F.3d at 330 ("Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred."); *Section 230 of the Communications Decency Act*, EFF, https://www.eff.org/issues/cda230 [hereinafter, *Section 230 of the Communications Decency Act*].

liable for third-party content they publish on their sites but does not protect intermediaries from liability arising from their own content.[6]

Section 230 has two main provisions, subsections 230(c)(1) and (c)(2).[7] Subsection 230(c)(1) provides that "[n]o 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."[8] Therefore, under subsection 230(c)(1), interactive computer services are generally not liable for the content that third-party users post on their sites. Subsection 230(c)(2) provides protection from civil liability for interactive computer services to engage in content moderation practices and create their own standards for what type of content they want to allow on their sites, so long as the restriction is "taken in good faith."[9] However, Section 230's "immunity generally will not apply to suits brought under federal criminal law, intellectual property law, any state law 'consistent' with Section 230, certain privacy laws applicable to electronic communications, or certain federal and state laws relating to sex trafficking."[10]

Since Section 230's enactment in 1996, the internet has grown and evolved. The internet we use today, and the role it plays in our lives, far eclipses what could have been anticipated at its inception thirty years ago. In 1991, the World Wide Web Project began with a single

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[6] *Id.* However, Section 230 "immunity generally will not apply to suits brought under federal criminal law, intellectual property law, any state law 'consistent' with Section 230, certain privacy laws applicable to electronic communications, or certain federal and state laws relating to sex trafficking." *See* SECTION 230: AN OVERVIEW, CONGRESSIONAL RESEARCH SERVICE i (Apr. 7, 2021), https://crsreports.congress.gov/product/pdf/R/R46751 [hereinafter *CRS Section 230 Overview*]; § 230(e).

[7] 47 U.S.C. § 230(c)(1)–(2).

[8] § 230(c)(1).

[9] § 230(c)(2).

[10] *CRS Section 230 Overview*, *supra* note 6 at i.

website.[11] By 1996, there were 257,601 websites on the Internet. In 1998, Google was created; in 2004, Facebook launched, and in 2005, YouTube was born.[12] As of January 2021, there were 1,197,982,359 websites online.[13] Some of the most common platforms used today, namely Google, Meta, and YouTube, did not even exist when the Section 230 was written, but these platforms now benefit from the law's protections. In 2021, Google's annual revenue amounted to $256.7 billion, with $209.49 billion of that revenue from advertising.[14] Meta exerts a similar dominance, boasting 3.5 billion monthly users across all of the company's platforms, and raking in $39.37 billion in revenue in 2021.[15] Considering the growth of the internet and the power that online companies hold, lawmakers have been contemplating the possibility of reforming Section 230.[16]

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[11] *Total Number of Websites*, INTERNET LIVE STATS, https://www.internetlivestats.com/total-number-of-websites/.

[12] *Id.*

[13] Nick Huss, *How Many Websites Are There in the World? [2021]*, SITEEFY (last updated Nov. 18, 2021), https://siteefy.com/how-many-websites-are-there/#The-Reasons-for-the-Growth. However, of the billion websites in the world, only about 17% of these websites are active. *Id.*

[14] *Annual Revenue of Google from 2002 to 2021*, https://www.statista.com/statistics/266206/googles-annual-global-revenue/.

[15] *Leading Countries Based in Facebook Audience Size as of January 2022*, https://www.statista.com/statistics/268136/top-15-countries-based-on-number-of-facebook-users/#:~:text=With%20around%202.9%20billion%20monthly,most%20popular%20social%20media%20worldwide; *Annual Meta (Formerly Facebook Inc.) Net Income from 2008 to 2021*, https://www.statista.com/statistics/1289490/annual-facebook-net-income/#:~:text=In%202021%2C%20Meta's%20(formerly%20Facebook,dollars%20on%20the%20previous%20year.

[16] *See infra* notes 17–20 and accompanying text. *See READ: Trump's Executive Order Targeting Social Media Companies*, CNN (May 28, 2020, 6:00 PM), https://www.cnn.com/2020/05/28/politics/read-social-media-executive-order/index.html ("It is the policy of the United States that the scope of that immunity should be clarified: the immunity should not extend beyond its text and purpose to provide protection for those who purport to provide users a forum for free and open speech, but in reality use their power over a vital means of communication to engage in deceptive or pretextual actions stifling free and open debate by censoring certain viewpoints."); Josh Gerstein, *Justice Department To Defend Tech Protections Biden Denounced*, POLITICO (Nov. 18, 2021), https://www.politico.com/news/2021/11/18/justice-department-tech-protections-biden-522990 ("Section 230 should be revoked, immediately should be revoked, number one. For Zuckerberg and other platforms.").

Since March 2020, thirty-eight bills have been introduced in Congress, with twenty still pending before the 177th Congress.[17] While many legislators have either formal legal training,[18] or experience interpreting laws with complex implications, reforming Section 230 is a particularly high-stake endeavor. Not only are the entities governed by the law—internet platforms—complex, evolving systems, but they are also deeply embedded in our society. The internet has been regarded as a "vast democratic forum[ ],"[19] and in many ways, the internet has democratized speech by reducing barriers so that all individuals can be publishers, speakers, and creators.[20] Accordingly, each individual has some stake in how speech online is regulated. While not bound by the First Amendment, internet platforms reflect the American ideal of freedom of speech by providing a space for individuals to speak and be heard online.

While the public might not know Section 230 by name, fifty-six percent of United States adults believe that people should not be able to sue social media companies for third-party content posted on their sites.[21] Interestingly, it seems that Americans are tuned into the debate about what role government should play in regulating the major technology companies—with

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[17] *See* Meghan Anand, Kiran Jeevanjee, Daniel Johnson, Brian Lim, Irene Ly, Matt Perault, Jenna Ruddock, Tim Schmeling, Niharika Vattikonda, Noelle Wilson & Joyce Zhou, *All the Ways Congress Wants to Change Section 230*, SLATE (March 23, 2021, 5:45 AM), https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html (last updated Feb. 11, 2022) [hereinafter *All the Ways Congress Wants to Change Section 230*]

[18] *See* MEMBERS OF THE 117TH CONGRESS WITH LAW DEGREES, ABA (Jan. 21, 2021); https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/117-congress-jds.pdf (providing background information for the 175 members of the 117th Congress with a law degree).

[19] Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017); *see also* Am. Civil Liberties Union v. Reno, 929 F. Supp. 824, 883 (E.D.Pa. 1996) ("As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion.").

[20] *See* Zaryn Dentzel, *How the Internet Has Changed Everyday Life*, OPENMIND BBVA, https://www.bbvaopenmind.com/en/articles/internet-changed-everyday-life/.

[21] Emily A. Vogels, *56% of Americans Oppose the Right to Sue Social Media Companies for What Users Post*, PEW RSCH. CTR. (July 21, 2021), https://www.pewresearch.org/fact-tank/2021/07/01/56-of-americans-oppose-the-right-to-sue-social-media-companies-for-what-users-post/.

fifty-one percent indicating they have heard at least a fair amount about this issue.[22] A recent study indicates that on this issue, "many Americans' views are shaped not only by party but by their attitudes about free speech and the state of U.S. democracy, their level of civic engagement, and their general use of and opinions about the internet."[23] This finding suggests that the public's opinion on issues related to Section 230 are impacted by a variety of factors. However, while these studies show that the public has opinions about issues related to Section 230, the studies do not show how the public is being informed with respect to the applicable law.[24] The purpose of this study was to identify themes in contemporary news coverage of Section 230 and to provide recommendations as to how journalists can better convey the legal realities of the law in a way that the public can understand.

The public's engagement with issues surrounding Section 230 is important to the concept of self-governance—the ability of citizens to have a say in the laws that govern them. Freedom of speech has long been regarded as a critical precondition for effective self-governance—the idea that citizens should "make and obey their own laws."[25] To self-govern effectively, "[t]he voters . . . must be made as wise as possible," because "[t]he welfare of the community requires

[22] *Id.* This public concern over Section 230 occurs in the context of a growing lack of trust in technology companies like Facebook and Twitter, with forty-seven percent of Americans believing these companies should be more heavily regulated by the government. Brooker Auxier, *How Americans See U.S. Tech Companies as Government Scrutiny Increases*, PEW RSCH. CTR. (Oct. 27, 2020), https://www.pewresearch.org/fact-tank/2020/10/27/how-americans-see-u-s-tech-companies-as-government-scrutiny-increases/. Meanwhile, seventy-three percent of Americans believe platforms intentionally censor politically objectionable content and sixty-six percent say they have very little confidence in platforms to correctly label content as inaccurate or misleading. *Id.*

[23] Knight Foundation, *Americans' Attitudes on Internet Regulations Go Beyond Party Lines*, KNIGHT FOUND. (Mar. 9, 2022), https://knightfoundation.org/press/releases/americans-attitudes-on-internet-regulations-go-beyond-party-lines/.

[24] 47 U.S.C. § 230(c)(1)–(2).

[25] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT, 15 (1948) [hereinafter *Free Speech and Its Relation to Self-Government*].

that those who decide issues shall understand them."[26] "Democracy requires that policymakers respond to the public," and public responsiveness to policy outputs can incentivize policymakers to provide the public with its preferred policies.[27] "[W]ithout the presence of widespread media coverage of a policy, democratic representation and responsiveness may be much less likely to occur."[28] Therefore, if citizens are to self-govern with respect to potential reform efforts surrounding Section 230, media coverage of the law should play an important part in the democratic process. This thesis proposal is based on the belief that journalists can and should play an important role in informing citizens about Section 230.

Now that Section 230 is a frequent topic of public and legislative debate, citizens should be properly informed regarding how the law is written, how it has been applied, and the law's associated impacts. Common misconceptions regarding Section 230 cloud the discussion regarding if, and how the law should be changed. These misconceptions range from improperly categorizing Section 230 as a "safe harbor,"[29] confusing the Communications Decency Act and

[26] *Id.* at 25.

[27] *See* Christopher J. Williams & Martijn Schoonvelde, *It Takes Three: How Mass Media Coverage Conditions Public Responsiveness to Policy Outputs in the United States*, 99 SOCIAL SCIENCE QUARTERLY, 1627, 1635 (2018).

[28] *Id.* ("The evidence we have presented in this study suggests that without media coverage of policies, we will see little responsiveness in public preferences to policy outputs.").

[29] Jonathan Taplin, *How To Force 8Chan, Reddit and Others to Clean Up*, N.Y. TIMES (Aug. 7, 2019), https://www.nytimes.com/2019/08/07/opinion/8chan-reddit-youtube-el-paso.html#click=https://t.co/pUG8F02xnj ("Though it may seem that there is little that platforms and politicians can do to stop the spread of online hatred, a great deal could be accomplished with one simple tweak to the existing Communications Decency Act: revise the safe harbor provisions of the law.").

the Digital Millennium Copyright Act,[30] suggesting Section 230 requires neutrality,[31] and imprecisely discussing the interplay between Section 230 and the First Amendment. [32]

"When a question of policy is 'before the house,' free men choose to meet it not with their eyes shut, but with their eyes open."[33] Effective self-governance requires that citizens "gain wisdom," regarding issues of public debate.[34] The media plays an important role in the chain linking the policy desires of citizens and public policy outputs that reflect those desires.[35]

[30] *Id.* ("An earlier version of this article misstated the law containing a provision providing safe haven to social media platforms. It is the Communications Decency Act, not the Digital Millennium Copyright Act.").

[31] *See* Catherine Padhi, *Ted Cruz v. Section 230: Misrepresenting the Communications Decency Act*, LAWFARE (April 20, 2018, 10:00 AM), https://www.lawfareblog.com/ted-cruz-vs-section-230-misrepresenting-communications-decency-act ("Sen. Ted Cruz, the Republican from Texas, suggested [neutrality is required] while questioning Facebook CEO Mark Zuckerberg during last week's congressional hearings."); *see also* Ending Support for Internet Censorship Act, S.B. 1914, 116th Cong. (2019) (introduced by Senator Josh Hawley (R-MO), prohibiting platforms from "moderating information on its platform from a politically biased standpoint"); https://www.congress.gov/bill/116th-congress/senate-bill/1914?q=%7B%22search%22%3A%5B%22ending+support+for+internet+censorship%22%5D%7D&s=1&r=1.

[32] *See* Berin Szóka & Ari Cohn, *The Wall Street Journal Misreads Section 230 and the First Amendment*, LAWFARE (Feb. 3, 2021, 3:43 PM), https://www.lawfareblog.com/wall-street-journal-misreads-section-230-and-first-amendment. These errors arise particularly in the context of the Free Speech Clause of the First Amendment, with Section 230's role of protecting platforms from liability being conflated with the more general role of the First Amendment in protecting speech online. *See* Danielle Keats Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Speech Reform* 10–20 (Boston Univ. Sch. L. Pub. L. & Legal Theory Paper No. 20-8, 2020), https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1833&context=faculty_scholarship (Danielle Keats Citron and Mary Anne Franks explain the common conflations of Section 230 and the First Amendment: believing all internet activity is protected speech, attempting to treat private actors as government actors, and assuming regulation of speech results in less speech.). There is persisting public confusion regarding the state action doctrine, with many citizens unaware that the First Amendment "constrains only governmental actors and protects private actors." Manhattan Cmmt'y Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019); Eric Goldman, *Your Periodic Reminder That Facebook Isn't a State Actor*–Williby v. Zuckerberg, TECH. & MKTG. L. BLOG (June 23, 2019), https://blog.ericgoldman.org/archives/2019/06/your-periodic-reminder-that-facebook-isnt-a-state-actor-williby-v-zuckerberg.htm ("This is a pro se case from an apparently repeat plaintiff, which is typically a breeding ground for legal arguments that lawyers wouldn't normally try. The plaintiff claimed Facebook violated his First Amendment rights by blocking his posts per its hate speech policy.").

[33] *Free Speech and Its Relation to Self-Government*, *supra* note 25, at 27.

[34] *Id.* at 25.

[35] *See* Williams & Schoonvelde, *supra* note 27, at 1627.

II. Literature Review

This literature review starts by examining recent legal scholarship regarding Section 230, focusing on commentary regarding proposed Section 230 reform efforts and the potential benefits and consequences of reforming Section 230. The literature review will then discuss communications scholarship that focuses on how and why the media covers issues of public concern, before concluding that although there is an abundance of legal scholarship regarding how Section 230 operates or could be reformed, there is no communications scholarship regarding how the media presents Section 230 to the public.

A. Section 230 Reform and Recent Legal Scholarship

The cases decided after Section 230's enactment demonstrate the difficulty courts have had in interpreting the statute, despite Congress's attempt to explain the relevant policy considerations and its intent for the law's enactment. Subsequent judicial interpretation of Section 230 will be discussed later in Chapter 2.[36] In a content analysis conducted by David Ardia, an empirical study of Section 230 case law demonstrated that over one-third of the claims survived Section 230's protection from liability, suggesting Section 230 is not a complete bar to relief for plaintiffs.[37] While Ardia's study does not consider normative arguments as to how or if Section 230 should be changed, it illustrates yet another misconception—that Section 230 completely bars liability. Courts' difficulty in interpreting the law, and the fear that Section 230 gives platforms a free pass,[38] have driven the discussion that Section 230 should be reformed in

[36] *See infra* Chapter 2, Part III.

[37] 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 LOYOLA L.A. L. REV. 373, 493 (2010).

[38] Cameron F. Kerry, *Section 230 Reform Deserve Careful and Focused Consideration*, BROOKINGS (May 14, 2021), https://www.brookings.edu/blog/techtank/2021/05/14/section-230-reform-deserves-careful-and-focused-consideration/ ("The original statute creates a distinction between internet platforms and content producers—resulting in what some consider to be a free pass for social media companies from legal responsibility over user-

some way—however, there is little consensus on *how* the law should be changed.[39] It seems that reforming Section 230 has bipartisan support; however, both parties are motivated by different interests.[40] Generally speaking, many conservatives believe that platforms do too much to censor content online and believe platforms exercise too much editorial discretion, which they argue, leads to de-platforming conservative voices.[41] At the same time, conservatives still want to exempt harmful activity such as sex-trafficking and harms to children from Section 230's protection.[42] On the other hand, progressives seem to take the position that platforms are not doing enough to create an inclusive speech environment, frequently identifying hate speech as one thing standing in the way of marginalized groups using platforms to promote justice.[43]

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generated content."); Marguerite Reardon, *Section 230: How It Shields Facebook and Why Congress Wants Changes*, CNET (Oct. 6, 2021, 5:00 AM), https://www.cnet.com/news/section-230-how-it-shields-facebook-and-why-congress-wants-changes/ ("Facebook should not get a free pass on choices it makes to prioritize growth, virality and reactiveness, over public safety.").

[39] Mary Anne Franks, Mike Godwin, Jeff Kosseff & Andrés Martinez, *Where Do We Go from Here with Section 230?*, SLATE (Dec. 15, 2020, 11:22 AM), https://slate.com/technology/2020/12/legal-scholars-mary-anne-franks-mike-godwin-and-jeff-kosseff-on-section-230-of-the-cda.html (Franks stating: "For a long time, my view was that the problem wasn't the text of 230 itself, but how courts were applying it. But courts have gone down so many bad roads now (or so far down the same bad road) that I think reform is necessary.") [hereinafter *Where Do We Go from Here with Section 230?*]

[40] *See* Mark MacCarthy, *Back to the Future for Section 230 Reform*, BROOKINGS (Mar. 17, 2021), https://www.brookings.edu/blog/techtank/2021/03/17/back-to-the-future-for-section-230-reform/; Jessica Guynn, *Hate Speech, Censorship, Capitol Riot, Section 230: Lawmakers Slam Facebook, Google, and Twitter, Warn of Regulation*, USA TODAY, https://www.usatoday.com/story/tech/2021/03/25/facebook-google-youtube-twitter-dorsey-zuckerberg-pichai-section-230-hearing/6990173002/ ("Republicans repeatedly accused social media companies of liberal bias and censoring conservatives including Second Amendment supporters, Christians, pro-life activists and a sitting president of the United States.") (updated Mar. 26, 2021, 9:13 AM) [hereinafter *Back to the Future for Section 230 Reform*].

[41] *See* MacCarthy, *supra* note 40.

[42] *Id.*

[43] *Id.*

Numerous legislative proposals have been put forward describing how Section 230 should be changed.[44] These proposals range from a focus on consumer-protection,[45] requiring platforms act with responsibility and diligence in preventing harm online,[46] creating a neutrality requirement,[47] restricting internet service providers ability to engage in protected content

[44] *See* Chris Riley & David Morar, *Legislative Efforts and Policy Frameworks Within the Section 230 Debate*, BROOKINGS (Sept. 21, 2021), https://www.brookings.edu/techstream/legislative-efforts-and-policy-frameworks-within-the-section-230-debate/ (providing an overview of several Section 230 reform policies); Ashley Johnson & Daniel Castro, *Proposals to Reform Section 230*, ITIF (Feb. 22, 2021), https://itif.org/publications/2021/02/22/proposals-reform-section-230; *The Justice Department Unveils Proposed Section 230 Legislation*, U.S. DEPT. JUST. (Sept. 23, 2020), https://www.justice.gov/opa/pr/justice-department-unveils-proposed-section-230-legislation; U.S. DEPT. JUST., SECTION 230 SUMMARY OF PUBLIC WORKSHOP (June 2020), https://www.justice.gov/file/1286201/download; Klon Kitchen, *Section 230—Mend It, Don't End It*, HERITAGE FOUND. (Oct. 27, 2020), https://www.heritage.org/technology/report/section-230-mend-it-dont-end-it; MacCarthy, *supra* note 40.

[45] *See* Platform Accountability and Consumer Transparency Act, S.B. 979, 117th Cong. (2021) (introduced by Senator Brian Schatz (D-HI), requiring platforms to publish an "acceptable use policy" with specific rules regarding content and to furnish a biannual transparency report); Online Consumer Protection Act, H.R. 3067, 117th Cong. (2021) (introduced by Representative Janice Schakowsky (D-IL), requiring platforms make their terms of service public and include a "consumer protection policy," as well as establish a "consumer protection program").

[46] *See* Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 423 (2017) ("Instead, our proposal seeks to establish a reasonable standard of care that will reduce opportunities for abuses without interfering with the further development of a vibrant internet or unintentionally turning innocent platforms into involuntary insurers for those injured through their sites."); Online Freedom and Viewpoint Diversity Act, S.B. 4534, 116th Cong. (2020) (introduced by Senator Roger Wicker (R-MS), requiring "that the actor must have an *objectively reasonable belief* that the material [in question] is obscene, lewd, lascivious, filthy, excessively violent, harassing, promoting self-harm, promoting terrorism, or unlawful. Currently, a good faith actor must only *consider* such material to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" and redefining the term "information content provider" more broadly as "any person who editorializes or affirmatively and substantively modifies the content of another person or entity."); EARN IT Act of 2020, S.B. 3398, 116th Cong. (2020) (introduced by Senator Lindsey Graham (R-SC), establishing the National Commission on Online Child Sexual Exploitation Prevention commission and directs the commission to "develop best practices for interactive online services providers (e.g., Facebook and Twitter) to prevent the online sexual exploitation of children").

[47] Stopping Big Tech's Censorship Act, S.B. 4062, 116th Cong. (2020) (introduced by Senator Kelly Loeffler (R-GA), conditioning protection from liability on interactive computer services acting in a "viewpoint-neutral manner).

moderation,[48] and combating health misinformation online.[49] Due to the breadth of the concerns targeted by each proposal, there is a growing concern in the legal community that the nuance of the application of Section 230 creates misconceptions about how the law operates, which makes it difficult to build a consensus around a particular reform route.[50] These misunderstandings make it difficult not only for policymakers, but also for the public, to engage in a meaningful discourse about the trajectory of Section 230.

While there are numerous media and legal scholars discussing Section 230, discourse surrounding how Section 230 operates and how the online speech landscape would operate without it, is critical to any reform discussion. While many individuals are contributing important work with respect to Section 230, discussion about reforming Section 230 can be roughly divided into three camps. The first group (*pro-Section 230*) is made up of those individuals who believe Section 230 should remain as is, at least for now. The second camp (*reform Section 230*) is made up of those who believe the law should remain intact but suggest specific amendments or changes. Finally, the third camp, (*anti-Section 230*) would support a total repeal of Section 230.

Eric Goldman, a law professor focused predominately on internet law,[51] is at the forefront of the debate emphasizing the importance of Section 230, and generally expresses *pro-Section*

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[48] Stop the Censorship Act of 2020, H.R. 7808, 116th Cong. (2020) (introduced by Representative Paul Gosar (R-AZ), modifying interactive computer services' immunity for content moderation, specifically eliminating immunity for restricting content that is "otherwise objectionable").

[49] *See* Health Misinformation Act of 2021, S.B. 2448, 117th Cong. (2021) (introduced by Senator Amy Klobuchar (D-MN), treating interactive computer services as publishers and speakers of health misinformation distributed through their services).

[50] *See supra Where Do We Go from Here with Section 230?*, note 39 (Godwin stating: "I agree with Jeff's caution that changing 230 won't necessarily fix issues people think it might . . . .").

[51] "Eric Goldman is a Professor of Law at Santa Clara University School of Law in the Silicon Valley. He also co-directs the High Tech Law Institute and supervises the Privacy Law Certificate. . . . His research and teaching focuses on Internet, IP and advertising law topics, and he blogs on these topics at the Technology & Marketing Law

230 viewpoints. Goldman emphasizes the critical role Section 230 plays in our society and remains wary of the high stakes associated with reforming the law, frequently analyzing the pitfalls and short-sightedness of proposed reform efforts.[52] Goldman argues that Section 230 should remain as is, at least for now, illustrated most recently by our extreme reliance on the law during COVID-19 to provide critical services[53] and because of Congress' historied inability to construct well-thought out technology policies.[54] In his piece *Why Section 230 Is Better than the First Amendment*, Goldman argues primarily that "reductions to Section 230's scope pose serious risks to Internet speech."[55] Goldman pushes back on recent legal scholarship that has implied that if Section 230 protections were reduced, "the First Amendment would backfill gaps in Section 230's immunity."[56] Throughout his piece, Goldman explains how Section 230 is more speech protective than the First Amendment—especially with respect to defamation and commercial speech.[57] Goldman argues that Section 230 operates like a "rule" and the First

Blog [http://blog.ericgoldman.org]." *See* SANTA CLARA UNIVERSITY SCHOOL OF LAW, https://law.scu.edu/faculty/profile/goldman-eric/.

[52] Eric Goldman, *New Op-Ed: People Who Understand Section 230 Actually Love It*, TECH. & MKTG. L. BLOG (Jan. 10, 2021), https://blog.ericgoldman.org/archives/2021/01/new-op-ed-people-who-understand-section-230-actually-love-it.htm [hereinafter *People Who Understand Section 230 Actually Love It*]; Eric Goldman, *While Our Country Is Engulfed By Urgent Must-Solve Problems, Congress Is Working Hard To Burn Down Section 230*, TECH. & MKTG. L. BLOG (Aug. 4, 2020), https://blog.ericgoldman.org/archives/2020/08/while-our-country-is-engulfed-by-urgent-must-solve-problems-congress-is-working-hard-to-burn-down-section-230.htm [hereinafter *Congress Is Working Hard To Burn Down Section 230*].

[53] Goldman argues that during COVID-19, while individuals were separated physically, Section 230 permitted the creation and dissemination of user-generated content. *See supra Congress Is Working Hard To Burn Down Section 230*, note 52. While Goldman does not further elaborate on this statement, such user-generated content might include anything from posts containing information about COVID-19 testing, vaccination, and other health precautions, or simply providing a means of communication and connection between isolated individuals.

[54] *See id.* ("It's tragic that Congress has stopped trying to build such policies; at this point, all it can do is tear down one of its most successful tech policy achievements of the past 25 years.").

[55] Eric Goldman, *Why Section 230 Is Better than the First Amendment*, 95 NOTRE DAME L. REV. 33, 33 (2019).

[56] *Id.* at 34.

[57] *Id.* at 36–38. While the First Amendment provide defenses for some claims, such as defamation or intentional infliction of emotional distress, two commonly alleged First Amendment offenses, Section 230 "immunizes"

Amendment operates like a "standard," and suggests that Section 230 is valuable because it is more predictable.[58]

Of the legal scholars who support reforming Section 230, legal scholars Mary Anne Franks,[59] Danielle Keats Citron,[60] and Jeff Kosseff[61] have suggested concrete changes that would leave the law functionally intact. For example, Franks has advised against carve-outs and against a "piecemeal approach," because this strategy is "inevitably underinclusive."[62] Instead, Franks has suggested that Section 230's protection should be explicitly limited to speech only and that Section 230 "should not apply to [interactive computer services] who exhibit deliberate indifference to unlawful conduct."[63] Franks has also offered support for Citron and Wittes' proposal to condition immunity on reasonable content moderation practices.[64] Citron and Wittes

platforms against those claims. *Id.* at 36–37. Similarly, while the First Amendment distinguishes between political speech and commercial speech, providing a reduced level of scrutiny for the latter, Section 230 does not distinguish between the two. *Id.* at 37. This is especially important today, when platforms rely so heavily on advertising for revenue because Section 230 protects platforms if they are to publish third-party advertisements that would otherwise not be constitutionally protected. *Id.*

[58] *Id.* at 45–46.

[59] "Mary Anne Franks, Professor of Law and Michael R. Klein Distinguished Scholar Chair, is a nationally and internationally recognized expert on the intersection of civil rights and technology." *See* UNIVERSITY OF MIAMI SCHOOL OF LAW: FACULTY DIRECTORY, https://www.law.miami.edu/faculty/mary-anne-franks.

[60] "Danielle Citron is the Jefferson Scholars Foundation Schenck Distinguished Professor in Law and Caddell and Chapman Professor of Law at UVA, where she writes and teaches about privacy, free expression and civil rights." *See* UNIVERSITY OF VIRGINIA SCHOOL OF LAW: FACULTY, https://www.law.virginia.edu/faculty/profile/uqg7tt/2964150.

[61] "Jeff Kosseff is an associate professor of cybersecurity law in the United States Naval Academy's Cyber Science Department. . . . His latest book, The Twenty-Six Words That Created the Internet, a history of Section 230 of the Communications Decency Act, was published in 2019 by Cornell University Press." *See* UNITED STATES NAVAL ACADEMY: PEOPLE, https://www.usna.edu/CyberCenter/People/Biographies/Kosseffbio.php.

[62] Citron & Franks, *supra* note 32, at 20–21.

[63] *See Where Do We Go from Here with Section 230?*, *supra* note 39.

[64] Citron & Franks, *supra* note 32, at 22–24; *see* Citron & Wittes, *supra* note 46, at 423 ("Instead, our proposal seeks to establish a reasonable standard of care that will reduce opportunities for abuses without interfering with the

favor an approach that would require platforms to show "their response to unlawful uses of their services was reasonable" in order to benefit from Section 230 immunity.[65] Kosseff has been one of the most prominent voices pushing for greater transparency regarding Section 230 before reform is considered, calling for the creation of a new commission to study how platforms create their content moderation policies and how these policies are implemented.[66] Kosseff should also be commended for his personal dedication to creating a more informed public with respect to Section 230. In addition to numerous online articles written, his piece *A User's Guide to Section 230*, emphasizes two important concepts that Section 230 reformers get wrong: (1) that if Section

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further development of a vibrant internet or unintentionally turning innocent platforms into involuntary insurers for those injured through their sites.").

[65] *See* Citron & Wittes, *supra* note 46, at 419. Citron and Wittes suggest rewriting Section 230(c)(1) to state:

> No provider or user of an interactive computer service that takes reasonable steps to prevent or address unlawful uses of its services shall be treated as the publisher or speaker of any information provided by another information content provider in any action arising out of the publication of content provided by that information content provider. *Id.*

[66] Jeff Kosseff, *A User's Guide to Section 230, and a Legislator's Guide to Amending it (or Not)*, 37 BERKLEY TECH. L.J. 1, 40 (2021) ("I suggest that Congress consider forming a nonpartisan commission of experts to gather facts about how content moderation currently works, what is possible, and how changes in the law might positively or negatively affect the field."); Jeff Kosseff, *Understanding the Internet's Most Important Law Before Changing It*, REGUL. REV. (Oct. 10, 2010), https://www.theregreview.org/2019/10/10/kosseff-understand-internets-most-important-law-before-changing-it/ ("A new commission should attempt to answer many important questions, including: How do platforms develop their moderation policies? Who reviews decisions to block particular users? How effective is artificial intelligence-based moderation? What could platforms do to improve their moderation? How does moderation differ across companies?").

230 was repealed, the First Amendment would protect the type of speech that many find objectionable,[67] and (2) Section 230 does not only apply to "neutral platforms."[68]

There does not seem to be any significant support for completely repealing Section 230 within the legal community, with legal scholars recognizing that while the law is far from perfect, it plays a crucial role in how we interact with one another.[69] However, some legislators, as well as our former and current Presidents have indicated they would support repealing the law entirely.[70] Legal scholars like Goldman have done important work in predicting and cautioning

[67] Kosseff, *supra* note 66, at 30–32. First, Kosseff explains that "[i]f Congress were to repeal Section 230 tomorrow, it still could not constitutionally pass a law that holds platforms liable for online hate speech." *Id.* at 30. Kosseff elaborates that "while the First Amendment prohibits the government from directly banning particular types of speech, it also prohibits the government from requiring platforms to ban that speech." *Id.* However, because Facebook is a private entity, "the First Amendment does not prohibit platforms from independently deciding to block that same speech." *Id.* This is an important distinction because it illustrates that Facebook has First Amendment rights itself, but is not bound by the First Amendment because it is not a state actor. *See* Manhattan Cmmt'y Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019) (""The Free Speech Clause of the First Amendment constrains governmental actors and protects private actors. To draw the line between governmental and private, this Court applies what is known as the state-action doctrine."). Even without Section 230 in place, the First Amendment would still protect hate speech and other constitutionally protected, although maybe objectionable, speech, and Facebook would still have the *ability* to regulate speech on its own platform. Whether or not Facebook decided to exercise that ability would be a question similar to the ones contemplated by platforms in *Cubby* and *Stratton*. *See supra* notes 151–86 and accompanying text.

[68] *Id.* at 36–38. The idea that political bias or unequal censorship removes Section 230 protection is not rooted in the text of the statute. *See* 47 U.S.C. § 230(c). Kosseff points out that "Section 230 is very much a free-market-based law and assumes that by providing platforms with the breathing room to set their own policies, they will best meet the demands of many of their users." Kosseff, *supra* note 66, at 38. Kosseff explains that those in favor of reforming Section 230 to include a "neutrality" requirement want platforms to moderate in a "viewpoint neutral" manner or to allow all constitutionally protected speech. *Id.* at 37. Nevertheless, as it stands, Section 230 does not require that platforms like Facebook be equal in their enforcement of their terms of service, and as Kosseff explains, is written to provide wide latitude to platforms to engage in content moderation practices. *See id.* at 38.

[69] *See People Who Understand Section 230 Actually Love It*, *supra* note 52 ("Section 230 is the heart of the modern Internet. Virtually every Internet service you love depends on Section 230—including both critical services (such as Wikipedia's online encyclopedia and consumer review services) and sources of daily joy (such as viral TikTok videos). Whether we realize it or not, we benefit from Section 230-protected services dozens of time each day.").

[70] *See* A Bill To Repeal Rection 230 of the Communications Act of 1934, S.B. 2972, 117th Cong. (2021) (introduced by Senator Lindsey Graham (R-SC)); New York Times Editorial Board, *Joe Biden*, N.Y. TIMES, https://www.nytimes.com/interactive/2020/01/17/opinion/joe-biden-nytimes-interview.html ("The idea that it's a tech company is that Section 230 should be revoked, immediately should be revoked, number one. For Zuckerberg and other platforms."); Bobby Allyn, *As Trump Targets Twitter's Legal Shield, Experts Have A Warning*, NPR (May 30, 2020, 11:36 AM), https://www.npr.org/2020/05/30/865813960/as-trump-targets-twitters-legal-shield-experts-have-a-warning ("President Trump has a new rallying cry in his escalating crusade against Twitter. As he put it in a tweet Friday: 'REVOKE 230!'").

what would happen if Section 230 was repealed—foreshadowing more censorship from "Big Tech"[71] as well as more difficulty for smaller websites to function in the marketplace.[72] Ardia echoes this concern:

> If Congress considers modifying section 230, it should keep in mind that the rich informational ecosystem we know today is not simply a product of the decentralized, open architecture of the [i]nternet. It is a function of the "breathing space" [i]nternet intermediaries currently have under the law to facilitate speech that may be injurious or illegal.[73]

Understanding the current legal scholarship surrounding Section 230, and which scholars are at the forefront of this issue is important to evaluate because these scholars are sources of information and expertise that journalists should rely on when reporting. However, while numerous legal scholars have written on Section 230 and its implications, and some have studied how courts have interpreted Section 230 since its enactment,[74] there has been no comprehensive study focused on understanding how the media represents Section 230 to the public. Although it is well-known within the media law community that Section 230 is often misinterpreted and misapplied, there is no tangible or objective knowledge about how or how often this occurs. This study seeks to fill this gap in the literature, by observing the nature of current coverage of Section 230 with an eye towards understanding how journalists can most accurately, and most helpfully discuss the law moving forward.

[71] When referenced in this thesis, "Big Tech" is meant to refer to the leading technology companies such as Meta (Facebook), Alphabet (Google), Amazon, etc. *See* Alison Beard, *Can Big Tech Be Disrupted?*, HARVARD BUS. R. (Jan. 2022), https://hbr.org/2022/01/can-big-tech-be-disrupted.

[72] *See* Allyn, *supra* note 70.

[73] Ardia, supra note 37, at 493–94.

[74] *See generally id.* at 446–94 (conducting a content analysis of Section 230 case law spanning from 1996 to 2009).

B. Media Coverage of Complex Issues

Section 230 is simply written, but complex in its application and its effects. The discussion regarding if and how Section 230 should be changed requires informed discussion. The media, journalists in particular, play an important role in educating the public so that citizens can form knowledgeable opinions about what they want speech online to look like. Journalists have a responsibility to contribute to the free exchange of information in a way that is accurate, fair, and thorough. The media's coverage of Section 230 is a significant factor in whether democratic representation and responsiveness occurs with respect to Section 230 reform.[75] Accuracy in reporting is especially important with respect to Section 230 in light of its common misinterpretation. In order to provide helpful guidelines for journalists to use in reporting on Section 230 moving forward, it is important to understand how journalists are currently discussing Section 230. An analysis of the media's coverage of Section 230 will help to determine how the law is currently being framed, characterized and explained, and to identify any misrepresentations regarding the law that are perpetuated through imprecise reporting.

Numerous communications scholars have conducted analyses of the media's coverage of different laws and other public issues. These studies are disparate but provide context for this study because they demonstrate the ability of researchers to evaluate the media's coverage of complex issues and to identify themes and trends in how issues are covered using qualitative methods. For example, Gollust et al., conducted a qualitative content analysis of 1,569 television stories covering the Affordable Care Act ("ACA") to examine the public health and policy

[75] *See* Williams & Schoonvelde, *supra* note 26, at 1635 (The evidence we have presented in this study suggests that without media coverage of policies, we will see little responsiveness in public preferences to policy outputs.").

discussion surrounding the law when it was first implemented.[76] The study found there was an "emphasis on strategic over substantive reporting," highlighted by the reliance on political and partisan sources, while researchers and academics were cited in only 3.9% of news coverage.[77] The study's coding instrument included variables such as tone of coverage, messages about the law and its effects, framing of the name of the law, and sources cited in the coverage of the story.[78]

Another qualitative content analysis considered local media coverage in Mississippi of the 2016 Comprehensive Addiction and Recovery Act, an effort to expand the use of Naloxone, a drug used to reverse opioid overdoses.[79] Relying on agenda-setting and framing theory, Bagely et al. sought to understand how the media was "framing the conversation about Naloxone products."[80] Foster et al., conducted a similar study on the media's coverage of United States government regulation of tobacco.[81] The study involved a content analysis of 570 news articles from *The New York Times* and *Washington Post* and revealed an imbalance in reporting on the topic when comparing coverage during the Clinton and Bush eras.[82] The analysis considered the

[76] Sarah E. Gollust, Laura M. Baum, Jeff Niederdeppe, Colleen L. Barry & Erika Franklin Fowler, *Local Television News Coverage of the Affordable Care Act: Emphasizing Politics Over Consumer Information*, 107 PUB. HEALTH POL'Y 687, 687 (2017).

[77] *Id.* at 691–92.

[78] *Id.* at 688.

[79] Braden Bagley & Candace Forbes Bright, *"Those People Count": Naloxone Media Coverage in Mississippi*, 30 QUAL. HEALTH RSCH. 1237, 1237 (2020).

[80] *Id.* at 1238.

[81] Carolina Foster, Jim Thrasher, Sei-Hill Kim, India Rose, John Besley & Ashley Navarro, *Agency-Building Influences on the New Media's Coverage of the U.S. Food and Drug Administration's Push to Regulate Tobacco, 1993–2009*, J. HEATH HUM. SERVS. ADMIN. 303, 303 (2012).

[82] *Id.*

volume and content of coverage in order to determine what affected the media agenda, namely how influential sources, real events, and journalistic norms shaped the media coverage of the tobacco issue.[83] In a study considering print media coverage preceding the Voluntary Assisted Dying legislation in Australia, a summative content analysis was used to code for the type of story, the sources or origins of statements, the inclusion of narratives, and key aspects and terms related to the law.[84] The study specifically considered how palliative care was characterized by the media and what sources the media relied on.[85]

In a more longitudinal study of *The New York Times*' coverage of the birth control pill, spanning from 1960 to 2010, researchers primarily focused on what sources had been used over time, how certain values were presented over the course of the study, and how the framing of the stories evolved.[86] Considering these questions helped Kruvand understand "how changes in coverage have reflected and influenced changes in American journalism and society."[87]

[83] *Id.* at 305.

[84] Andrew Kis-Rigo, Anna Collins, Stacey Panozzo & Jennifer Philip, *Negative Media Portrayal of Pallative Care: A Content Analysis of Print Media Prior to the Passage of Voluntary Assisted Dying Legislation in Victoria*, 51 INT'L MED. J. 1336, 1336–37 (2021).

[85] *Id.* at 1338.

[86] Marjorie Kruvand, *The Pill at Fifty: How the* New York Times *Covered the Birth Control Pill, 1960–2010*, 29 AM. JOURNALISM 34, 43 (2012).

[87] *Id.* at 43.

Qualitative content analyses have also be conducted to understand media coverage of medicinal cannabis,[88] crowdfunding campaigns,[89] police body-cameras,[90] and e-cigarette regulation.[91]

One particular study that investigated media coverage of the Allow States and Victims to Fight Online Sex Trafficking Act and the Stop Enabling Sex Traffickers Act ("FOSTA-SESTA") is particularly applicable to the conversation surrounding Section 230. In April 2018, FOSTA-SESTA was passed by the House and the Senate with bipartisan support.[92] The enactment of FOSTA-SESTA created an exception to Section 230 of the Communications Decency Act, and for the first time, internet service providers could be held legally responsible for third-party content or activity that occurred on their websites—namely, platforms such as Craigslist could be held legally responsible for online sex trafficking.[93] As a result of FOSTA-SESTA, websites such as Craigslist.org and Backpage.com are now required to remove sexual personal advertisements from their classified advertising services. This eliminated digital gathering spaces for sex workers.[94]

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[88] Mark Monaghan, Emma Wincup & Ian Hamilton, *Scandalous Decisions: Explaining Shifts in UK Medicinal Cannabis Policy*, 116 ADDICTION 1925 (2020).

[89] Black Murdoch, Alessandro R. Marcon, Daniel Downie & Timothy Caulfield, *Media Portrayal of Illness-Related Medical Crowdfunding: A Content Analysis of Newspaper Articles in the United States and Canada*, PLOS ONE 1 (2019).

[90] Carolyn Naoroz & Hayley D. Cleary, *News Media Framing of Police Body-Word Cameras: A Content Analysis*, 15 POLICING 540 (2019).

[91] Chris Patterson, Shona Hilton & Heide Weishaar, *Who Thinks What About E-cigarette Regulation? A Content Analysis of UK Newspapers*, 111 ADDICTION 1267 (2016).

[92] *See* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) (as amended in scattered sections of ch. 18 and 47 of the United States Code).

[93] *Id.*

[94] Chelsea Reynolds, *"Craigslist is Nothing More than an Internet Brothel": Sex Work and Sex Trafficking in U.S. Newspaper Coverage of Craigslist Sex Forums*, 58 J. SEX RSCH. 681, 681 (2020).

The enactment of FOSTA-SESTA has been both lauded and criticized since its enactment. Although FOSTA-SESTA has cleaned up the internet, creating a safer place for children and exploited adults, some claim that the new law negatively impacts consensual sex workers.[95] Research has indicated that national United States newspapers have reported on sex trafficking and related policy issues in such a way to dehumanize sex workers.[96] To fully understand the impact of FOSTA-SESTA on the sex industry and sex workers, it is important to understand "the social and political contexts in which support for [the law] developed."[97] Reynold's research aimed to fill this gap by offering the history of how the news had discussed digital sex work and sex crimes before FOSTA-SESTA was enacted.

Reynolds utilized a critical discourse analysis to consider how national United States newspapers had reported on sex trafficking and related policy issues on Craigslist sex forums during the thirteen years before FOSTA-SESTA's enactment.[98] Reynolds relied on the theory of news framing—"the process of message construction by journalists, in which emphasis on certain elements and under-emphasis of other elements of the story gives meaning to an event."[99] Reynolds acknowledged a recent analysis that found that "[i]ncreased media coverage of a policy issue can serve as a 'policy signal' that increases public responsiveness" and "without the presence of widespread media coverage of a policy, democratic representation and

[95] Chapman-Schmidt, *"Sex Trafficking" As Epistemic Violence*, 12 ANTI-TRAFFICKING R. 172 (2019).

[96] *See* Reynolds, *supra* note 94, at 681.

[97] *Id.*

[98] *Id.*

[99] *Id.* at 682.

responsiveness may be much less likely to occur."[100] Reynold's study sought to consider how "journalistic framing of online sex forums as trafficking hubs may increase the salience of sex trafficking legislation among news audiences."[101]

Reynolds utilized qualitative coding to detect patterns and longitudinal themes in Craigslist sex forum coverage in the newspaper stories from the seven highest-circulation United States newspapers archived by ProQuest—the *Chicago Tribune*, *The Denver Post*, the *Los Angeles Times*, *The New York Times*, *USA Today*, *The Wall Street Journal*, and *The Washington Post*.[102] Reynolds began by sampling 624 newspaper stories published between 2003 and 2016 that matches keyword searches for "Craigslist and sex" and "Craigslist and Casual Encounters," and refined the sample to 280 salient articles during the pre-coding process.[103] Articles' relevance was based on two factors: (1) the primacy of Craigslist sex forums to the story, and (2) the primacy of sex, sexuality, or gender identity to the story. Articles were limited to full-length reported articles, including editorials.

With respect to Reynold's first research question: "How did framing of Craigslist's reputation evolve in historical coverage of the website?," the study identified that the way journalists framed coverage of Craigslist changed over time—from sex-positive, to an emphasis on police operations such as a sex stings, to highlighting Craigslist's economic morality and its implications for the First Amendment, Internet anonymity, and impact on black markets, public

[100] *See* Williams & Schoonvelde. *supra* note 26, at, 1635.

[101] Reynolds, *supra* note 94, at 683.

[102] *Id.*

[103] *Id.*

health, and a defense of sex worker's rights.[104] The frames journalists used in Craigslist reporting shifting in response to salient events over the thirteen year period such as Craigslist removing its Erotic Services and Adult Services forums in response to pressure from lawmakers and various crimes that took place using Craigslist platform.[105] In terms of the second research question: "How have high-circulation U.S. newspapers represented sex work, and sex crimes in stories published about Craigslist sex forums," Reynolds discovered that newspapers used two main frames in covering Craigslist-based sex workers: sex work primarily as a criminal activity or as the exploitation and victimization of young women."[106]

Notably, Reynolds deduced that journalists "inconsistently used legal definitions when reporting on sex trafficking victims," using "trafficking interchangeable with online prostitution."[107] Sex trafficking is defined differently than prostitution under a manager, as sex trafficking requires coercion or force. FOSTA-SESTA criminalized online prostitution, but the inconsistent conflation of consensual sex work with sex trafficking in the coverage of Craigslist stories was notable.

Reynold's study of media coverage of sex trafficking and Craigslist leading up to the enactment of FOSTA-SESTA provides some guidance for a similar qualitative content analysis of the media's coverage of Section 230. General media coverage of Section 230 has not been explored. As highlighted by Kruvand, changes in media coverage can both reflect and influence

[104] *Id.* at 684–86.

[105] *Id.* at 685–86.

[106] *Id.* at 686.

[107] *Id.* at 689.

changes in journalism and society with respect to issues of public debate.[108] Given the apparent desire to reform Section 230 in some way, it is important to understand how the media is characterizing the law, and consequently, what the public has been told to believe about Section 230.

C. Purpose of the Study

The purpose of this thesis is multifaceted. First, this thesis will identify the nature of contemporary news coverage of Section 230, considering specifically the news frames the media uses to report on the law. Second, this thesis will identify the dominant legal frames and associated impacts of Section 230 in coverage of the law. Third, this thesis will consider if, and which misconceptions regarding Section 230 are present in coverage. Finally, this thesis will identify the sources of the legal misrepresentations. These four considerations will coalesce in a recommendation for the news media suggesting how coverage of Section 230 can be improved to best further responsible self-governance with respect to Section 230 reform.

III. Research Questions

RQ 1: What is the nature of contemporary news coverage of Section 230 in *The New York Times* and *The Wall Street Journal*?

RQ 2: What are the legal and impact frames of Section 230 present in characterizations of the law?

RQ 3: How and to what extent are Section 230's legal components misrepresented in coverage?

RQ 4: What are the sources of the legal misrepresentations?

[108] *See* Kruvand, *supra* note 86, at 43.

Using a qualitative content analysis, this study identifies themes in contemporary media coverage of Section 230 and ultimately offers "Best Practices" to guide journalists when reporting on Section 230—emphasizing how to convey the legal realities of the law in a way that the public can understand.

This study considers how two high-circulation U.S. newspapers—*The New York Times* and *The Wall Street Journal*—have covered Section 230 over the past two years. In an attempt to answer this overarching question, a qualitative content analysis will be used to analyze how journalists frame Section 230 and how the law is contextualized for readers. Three theories—self-governance theory, agenda-setting theory, and framing theory—are examined to explain and illustrate why the media plays an important role in informing the public about what Section 230 is and what it does. These theories will be discussed in more detail in Chapter 3.

This thesis will proceed as follows. Chapter 2 provides the background of publisher and distributor liability before Section 230 was enacted. Then Chapter 2 discusses Section 230's enactment and subsequent judicial interpretations of the law. Chapter 3 provides an overview of the theoretical basis for this study and describes the study's methodology. Chapter 4 provides the results, qualitative analysis, and discussion with respect to Research Question 1. Chapter 5 provides the results, qualitative analysis, and discussion with respect to Research Question 2. Chapter 6 provides the results, qualitative analysis, and discussion with respect to Research Questions 3 and 4. Finally, this thesis concludes with Chapter 7 which discusses the study's limitations, conclusions, and recommendation.

CHAPTER 2: SECTION 230 LEGAL BACKGROUND

The purpose of Chapter 2 is to describe the publisher liability and distributor liability dichotomy as it exists under the First Amendment and to explain how this distinction changed for platforms after Section 230 was enacted. This Chapter also explains how Section 230 has been interpreted by courts since its enactment. This legal background will be applied when analyzing Research Questions 1 and 3, namely evaluating journalists' definitions and descriptions of Section 230, as well as identifying any misrepresentations with respect to Section 230 that are present in news coverage of the law.

I. Jurisprudential Background of Distributor and Publisher Liability

While Section 230 was not enacted until 1996, the foundation upon which its necessity arose, began in 1959 in *Smith v. California*.[109] Since its enactment, Section 230 has been interpreted to collapse distributor liability into a broader category of publisher liability.[110] However, before Section 230, distributor liability and publisher liability were interpreted under the First Amendment to be distinct. Distributor liability required the distributor of the content to have knowledge of its illegality in order to be held liable for its distribution.[111] On the other hand, those who published illegal content were held to a strict liability standard.[112]

[109] 361 U.S. 147 (1959).

[110] *Zeran*, 129 F.3d at 332.

[111] *Smith*, 361 U.S. at 153.

[112] *Zeran*, 129 F.3d at 331.

A. Distributor and Publisher Liability

In *Smith v. California*, *Ginsburg v. New York*,[113] and *Dworkin v. Hustler*,[114] the United States Supreme Court established the boundaries of distributor liability and recognized that a strict liability standard for distributors was untenable.[115] The Court determined that because distributors could not screen all of the content they would potentially disseminate, distributors would significantly limit the content they distributed if they could be held liable for any content in their possession.[116] The Court concluded that such result would "deprive the public of reading educational and entertainment materials," violating the First Amendment.[117] After this line of cases, it was well established that in order to avoid private censorship of content out of fear of liability, courts would require a showing of scienter, or knowledge of the unlawful content, before a distributor could be held liable.[118]

In *Smith v. California*,[119] the United States Supreme Court began to develop the common law distributor liability regime.[120] *Smith* involved a California ordinance that imposed strict liability for the possession of obscene material, such as writings, pictures, and films.[121] Eleazar Smith was the owner of a bookstore, convicted of possessing within his store, a book that was

[113] 390 U.S. 629 (1968).

[114] 611 F. Supp. 781 (D. Wyo. 1985).

[115] *Smith*, 361 U.S. at 155.

[116] Dworkin, 611 F. Supp. at 787.

[117] *Id.* at 787.

[118] *Id.* at 786–87.

[119] 361 U.S. 147 (1959).

[120] *Id.* at 152–54.

[121] *Id.* at 148 n.1.

determined to be obscene.[122] Smith challenged the ordinance's lack of a scienter requirement, arguing that in this instance, strict liability would "work a substantial restriction on the freedom of speech and the press."[123] Justice Brennan, writing for the majority, acknowledged that while strict liability statutes have been constitutional in other contexts, "the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller."[124] Specifically, "[b]y dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tend[ed] to impose a severe limitation on the public's access to constitutionally protected matter."[125]

In reaching its decision, the majority expressed the concern that if Smith could be held criminally liable without knowledge of the contents of the books in his store, Smith would limit the books he sold to those he had inspected personally.[126] Not only would this be unreasonable,[127] the ordinance "would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly."[128] The ordinance would cause self-censorship on behalf of the bookseller, which would affect the whole public's access to not just obscene material, but constitutionally protected literature as well.[129]

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[122] *Id.* at 148.

[123] *Id.* at 150.

[124] *Id.* at 152–53.

[125] *Id.* at 153.

[126] *Id.* at 153.

[127] *Id.*

[128] *Id.* at 154.

[129] *Id.* 154.

The Court explicitly declined to address what level of scienter would be required for a similar law to be constitutional.[130] However, regardless of what mental state might be permissible under the First Amendment, the ordinance in question went too far by imposing strict liability.[131] Therefore, *Smith* stands for the proposition that while the State has power to regulate the distribution of unprotected speech, such as obscene material, there still must exist a "constitutional barrier" to the exercise of that power.[132]

Nine years later in *Ginsburg v. New York*,[133] the Supreme Court refined its holding in *Smith* when it considered the constitutionality of a New York criminal obscenity statute which prohibited the distribution of pornographic material to minors but not to adults.[134] Returning to the issue presented in *Smith*, the Court distinguished the unconstitutional California ordinance from the New York law, noting that the law under consideration only prohibited sales made "knowingly."[135] The New York statute defined "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both . . . the character and content of any material described herein which is reasonably susceptible of examination by the defendant and the age of the minor."[136] The Court relied on the New York Court of Appeal's interpretation of the State's general obscenity statute to mean "that

[130] *Id.* at 154–55 (mentioning "honest mistake" as to the contents of the book, or requiring the bookseller to "investigate further," or placing the burden on the seller to explain why he did not investigate).

[131] *Id.* at 155.

[132] *Id.*

[133] 390 U.S. 629 (1968).

[134] *Id.* at 631, 634.

[135] *Id.* at 643.

[136] *Id.* at 646 (the definition of "knowingly" excluding "an honest mistake" from liability "if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor").

only those who are in some manner aware of the character of the material they attempt to distribute should be punished."[137] The majority determined that the "knowingly" definition satisfied the scienter requirement first established in *Smith*, and upheld the statute as constitutional.[138]

Through *Smith* and *Ginsburg*, the United States Supreme Court established the knowledge requirement for distributor liability. In *Dworkin v. Hustler*, a federal district court applied the distributor liability standard from *Smith* and *Ginsburg*, to a defamation claim.[139] In *Dworkin*, plaintiff Andrea Dworkin sued Larry Flynt and *Hustler* magazine for libel and defamation.[140] Two other plaintiffs associated with the National Organization of Women sued two other corporations who had distributed the *Hustler* magazine in question based on the same allegedly defamatory material.[141]

Plaintiffs' counsel relied on the traditional theory of distributor liability and comments in the Section 581 of the Second Restatement of Torts and claimed distributors assumed the risk for "disseminating notoriously sensational or scandalous publications."[142] Plaintiffs argued that since *Hustler* had been involved in prior defamation litigation, the distributing companies "should have been on notice to check every issue of Hustler for possible libelous content."[143] The trial court determined that the plaintiffs did not provide sufficient evidence to suggest the distributing

[137] *Id.* at 644 (quoting People v. Finkelstein, 9 N.Y.2d 342, 344 (1961)).

[138] *Id.* at 644–45.

[139] Dworkin v. Hustler, 611 F. Supp. 781, 783 (D. Wyo. 1985).

[140] *Id.*

[141] *Id.*

[142] *Id.* at 786.

[143] *Id.*

company, or its president, knew of the allegedly defamatory material or that *Hustler* ever printed something untrue or defamatory.[144]

Applying the same concept from *Smith*, the trial court acknowledged that "if a distributor were to be held accountable for reading all possible scandalous material that he sells to check it for libelous statements, much written material otherwise protected by the First Amendment would simply not be offered for sale to the public."[145] The court then reiterated the requirement that a plaintiff be able to show knowledge of the defamatory content before "*mere* distributors" can be held liable.[146] Neither prior allegations against *Hustler*, nor the ill reputation, nor the magazine owner's personal reputation was enough to put the distributing company on notice to check the magazine for defamatory content.[147] Thus, when the principles from *Smith* were applied in the defamation context, the court determined that distributors would have had to have knowledge, or be put on notice of the defamatory content before they could be held liable for distributing the content—to determine otherwise would "foster excessive censorship . . . in direct contradiction of the right of freedom of the press guaranteed by the First Amendment."[148]

Through *Smith*, *Ginsburg*, and *Dworkin*, the Supreme Court establish the boundaries of distributor liability and recognized the First Amendment interest implicated. Since distributors would be unable to screen all of the content they would potentially distribute, the Court was

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[144] *Id.*

[145] *Id.*

[146] *Id.* (emphasis added).

[147] *Id.* at 787.

[148] *Id.* 786–87 ("[U]nless there is something unusual which should put him on notice, a distributor is also 'under no duty to examine the various publications that he offers for sale to ascertain whether they contain any defamatory items.' " (citing § Section 581 of the Second Restatement of Tort, cmt. (d))).

concerned that distributors would significantly limit the content they distributed and "deprive the public of reading educational and entertainment materials."[149] After this line of cases, it was well established that in order to avoid private censorship of content out of fear of liability, courts require a showing of scienter, or knowledge of the defamatory content, before a distributor could be held liable.[150]

B. Adapting Distributor and Publisher Liability to the Digital Sphere

While the courts began to develop a system for evaluating distributor liability, prioritizing First Amendment values with respect to published writing in the traditional sense, the dawning of the internet age would pose new challenges. In the 1990s, the first iteration of the World Wide Web was created.[151] The new speech environments made possible by the internet created a new frontier for distributor liability. Online forums and message boards served as a centralized location for users to communicate with one another, connecting millions of people instantly and enabling voluminous amounts of speech.[152] Many new questions arose: How should these online services be treated? Are they distributing the content of their users? How should distributor liability apply?

[149] *Id.* at 787.

[150] *Id.* at 786–87.

[151] *From Arpanet to World Wide Web: An Internet History Timeline*, JEFFERSON ONLINE (Nov. 22, 2016), https://online.jefferson.edu/business/internet-history-timeline/.

[152] Joel Lee, *How We Talk Online: A History of Online Forums, From Caveman Days to the Present*, MUO (Oct. 23, 2012), https://www.makeuseof.com/tag/how-we-talk-online-a-history-of-online-forums-from-cavemen-days-to-the-present/.

Cubby, Inc. v. CompuServe, Inc.,[153] was the first instance in which a court applied the traditional distributor liability principles from *Smith* to the digital sphere.[154] The matter involved CompuServe Information Service ("CIS") an online "electronic library" that could be accessed by subscribers from their computers.[155] Subscribers to CIS had access to "forums," or electronic and interactive bulletin boards. The forum at issue in this case was the "Journalism Forum," which focused on the journalism industry. CompuServe contracted Cameron Communications Inc. ("CCI") to " 'manage, review, create, delete, edit and otherwise control the contents' of the Journalism Forum 'in accordance with editorial and technical standards and conventions of style as established by CompuServe.' "[156] The Journalism Forum included a publication called Rumorville USA ("Rumorville"), a daily newsletter covering reports about journalism, published by Don Fitzpatrick Associates of San Francisco ("DFA").[157] Each day, Rumorville was uploaded into CompuServe by DFA and then immediately available to CIS subscribers. CompuServe had no opportunity to review Rumorville's content before it was uploaded.[158]

Plaintiffs Cubby, Inc. ("Cubby") and Robert Blanchard ("Blanchard") developed Skuttlebut, a computer database that electronically published news and gossip about the television and radio industries. Plaintiffs planned to compete with Rumorville. Plaintiffs filed a complaint, claiming that Rumorville published false and defamatory statements relating to

[153] 776 F. Supp. 135 (S.D.N.Y. 1991).

[154] *Id.* at 139–41.

[155] *Id.* at 137.

[156] *Id.*

[157] *Id.*

[158] *Id.*

Skuttlebut and Blanchard and that CompuServe was a publisher of this content because it carried the statements on its Journalism Forum.[159] CompuServe argued that it acted as a distributor under *Smith* and therefore could not be liable for the statements made in Rumorville because it had no editorial oversite or opportunity to review content before it was published.[160]

In granting CompuServe's motion for summary judgment against plaintiffs, the court acknowledged that:

> A computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, book store, or newsstand would impose an undue burden on the free flow of information.[161]

The court determined that CompuServe should be treated as a distributor because "CompuServe ha[d] no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so."[162] The court articulated that the proper standard for CompuServe was "whether it knew or had reason to know of the allegedly defamatory Rumorville statements."[163] Evaluating CompuServe under this distributor liability standard, the court concluded that plaintiffs' allegations were conclusory as to whether CompuServe "knew or had reason to know of the

[159] *Id.* at 138.

[160] *Id.*

[161] *Id.* at 140.

[162] *Id.* at 140–41

[163] *Id.* at 141.

Rumorville statements," and therefore, there was no genuine issue of material fact and granted summary judgment for CompuServe.[164]

In 1995, the New York State Supreme Court[165] considered another case involving a computer network's online bulletin board.[166] In *Stratton Oakmont, Inc. v. Prodigy Services Co.*,[167] the trial court considered whether PRODIGY ("Prodigy"), the owner and operator of an online bulletin board, "Money Talk," should be treated as a publisher of the content hosted on its site.[168] In 1990, Prodigy held itself out as a "family oriented computer network," that "exercised editorial control over the content of messages posted on its computer bulletin boards, thereby expressly differentiating itself from its competition and expressly likening itself to a newspaper."[169] In addition to their 1990 policy, Prodigy had promulgated "content guidelines," a screening program that prescreened posts for offensive content, and a Board of Leaders to enforce the content guidelines and remove posts from the bulletin boards.[170] Prodigy claimed to be "committed to open debate and discussion on the bulletin boards" but acknowledged that "this

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[164] *Id.*

[165] The New York State Supreme Court is the highest trial-level court for civil cases in the state of New York. *See 1st JD – Supreme Court, Civil Branch, NY County*, NYCOURTS.GOV, http://ww2.nycourts.gov/courts/1jd/supctmanh/index.shtml.

[166] Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *1–2 (S.D.N.Y. May 24, 1995).

[167] 1995 WL 323710 (S.D.N.Y. May 24, 1995).

[168] *Id.* at *1.

[169] *Id.* at *2.

> "We make no apology for pursuing a value system that reflects the culture of the millions of American families we aspire to serve. Certainly, no responsible newspaper does less when it chooses the type of advertising it publishes, the letters it prints, the degree of nudity and unsupported gossip its editors tolerate."

Id.

[170] *Id.* at *2–3.

doesn't mean that 'anything goes.' "[171] Prodigy asked their users to "refrain from posting notes that are "insulting" and warned that posts "deemed to be in bad taste or grossly repugnant to community standards, or are deemed harmful to maintaining a harmonious online community" would be removed.[172]

The threshold question in *Stratton* was whether Prodigy "exercised sufficient editorial control over its computer bulletin boards to render it a publisher with the same responsibilities as a newspaper."[173] The plaintiffs' claims for defamation against Prodigy could not proceed unless Prodigy was considered a publisher of the allegedly defamatory content on its site.[174]

The court repeated the then, well-established, principles of distributor liability:[175] "A distributor, or deliverer of defamatory material is considered a passive conduit and will not be found liable in the absence of fault."[176] The trial court then described how other courts have understood liability in the context of newspapers: "However, a newspaper, for example, is more than a passive receptacle or conduit for news, comment and advertising."[177] The court emphasized that because newspapers choose the material and the content to go into their publications, "the decisions made as to the content of the paper constitute the exercise of editorial control and judgment, and with this editorial control comes increased liability."[178]

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[171] *Id.* at *2.

[172] *Id.*

[173] *Id.* at *3.

[174] *Id.*

[175] *See id.*

[176] *Id.* (citing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974)).

[177] *Id.*

[178] *Id.*

Prodigy contended that that the 1990 policy had been changed before the allegedly defamatory comments were made and that in reality, the volume of the posts on the site would make manual review by the "Board" impossible.[179] Prodigy also relied on *Cubby*, arguing *Cubby* should apply and that it should be treated as a distributor.[180] The court distinguished the present case from *Cubby* in two important respects. First, Prodigy held itself out to the public and its subscribers as a site that controlled the content posted by its users.[181] Second, through its screening program and guidelines enforced by the Board of Leaders, Prodigy implemented the control it claimed to have.[182] The court determined that Prodigy exercised "editorial control" by "actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and 'bad taste,' " and therefore should be treated as a "publisher instead of a distributor."[183]

The court stated that despite the holding in the present case, "[c]omputer bulletin boards should generally be regarded in the same context as bookstores, libraries and network affiliates."[184] However, it was Prodigy's "own policies, technology and staffing decisions which [ ] altered the scenario and mandated the finding that it [was] a publisher."[185] Thus, *Stratton* and *Cubby* stand for the proposition that when computer networks, such as Prodigy and

[179] *Id.*

[180] *See id.* at *4.

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *Id.* at *5.

[185] *Id.*

CompuServe, make a "conscious choice, to gain the benefits of editorial control," the networks open themselves up to greater liability.[186]

The decisions in *Cubby* and *Stratton* illustrate the line-drawing practices courts engaged in to consider when "editorial control" triggered publisher liability. While *Cubby* and *Stratton* did not have a binding effect outside the Southern District of New York and the New York Supreme Court, *Cubby* and *Stratton* provided helpful guideposts for judges adjudicating similar claims. However, in *Stratton*, Justice Stuart foreshadowed that the Communications Decency Act, which was pending in Congress at the time, would have a profound effect on distributor and publisher liability.[187]

II. What Is Section 230?

A. Legislative History

In 1995 when Congress was drafting the first major renovation to the Telecommunications Act, which at the time was over sixty years old, multiple members of Congress were considering how to address issues presented by the burgeoning internet sphere.[188] Senator James Exon from Nebraska introduced the Communications Decency Act to regulate obscenity and indecency online, by prohibiting the making, creation or solicitation, and transmission of "communication which is obscene or child pornography" when the creator knew the recipient was a minor.[189] Research conducted on the legislative intent of Exon's

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[186] *Id.*

[187] *See id.* ("[T]he Court also notes that the issues addressed herein may ultimately be preempted by federal law if the Communications Decency Act of 1995, several versions of which are pending in Congress, is enacted.").

[188] *See CDA 230: Legislative History*, *supra* note 4.

[189] Telecommunication Act of 1996, Pub. L. No. 104-105, 110 Stat. 133 (codified as amended at 47 U.S.C. § 223(a), https://www.congress.gov/104/plaws/publ104/PLAW-104publ104.pdf.

Communications Decency Act indicates that Congress intended that the law target only content providers, those who post the content, and not the access providers or users that might view the content.[190] While the language of Exon's bill seemed vague to some, concerns regarding the threat of pornography to children's' safety were compelling enough for the bill to pass.[191]

Representatives Chris Cox of California and Ron Wyden of Oregon introduced their own amendment to Exon's Communications Decency Act for other reasons—mostly in response to the decisions in *Cubby* and *Stratton*, and their concern about government regulation of the internet, but also to incentivize internet service providers to police the type of content contemplated in Exon's proposal.[192] Representative Cox and Wyden's amendment, the Internet Freedom and Family Empowerment Act,[193] would become what we know today as Section 230. In a piece written by former Senator Cox on the origins of Section 230, he explained that if left in place, the jurisprudence established by *Cubby* and *Stratton* "would have created a powerful and perverse incentive for platforms to abandon any attempt to maintain civility on their sites," and he and Wyden were determined that "good faith content moderation should not be punished."[194] The amendment relieved interactive service providers from liability as publishers of third-party content, unlike publications such as newspapers, which are liable for the content

[190] *See* Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMMS. L.J. 51, 58 fn.1 (1996) (citing the remarks of Sen. Exon: "In general, the legislation is directed at the creators and senders of obscene and indecent information").

[191] *See CDA 230: Legislative History*, *supra* note 4.

[192] *See id.*; Chris Cox, *Policing the Internet: A Bad Idea in 1996 – and Today*, REALCLEAR POLITICS (June 25, 2020), https://www.realclearpolitics.com/articles/2020/06/25/policing_the_internet_a_bad_idea_in_1996_--_and_today.html (explaining that the two main components of the bill were "protecting speech and privacy on the Internet from government regulation, and incentivizing blocking and filtering technologies that individuals could use to become their own censors in their own households").

[193] Internet Freedom and Family Empowerment Act, H.B. 1978, 104th Cong. (1995).

[194] Cox, *supra* note 192.

they print. The amendment passed the House of Representatives 420-4, and the new Telecommunications Act, including Section 230, was signed into law on February 8, 1996.[195]

The same day the law passed, the American Civil Liberties Union filed a legal challenge for a temporary restraining order for the provisions put forward by Senator Exon, specifically, the portion of the Communications Decency Act that prohibited the transmission of obscene or indecent communications by means of telecommunications device to minors.[196] The United States Supreme Court struck down the challenged provisions as facially broad content-based restrictions on speech that violated the First Amendment.[197] Concluding its opinion, the Court highlighted one of the guiding principles that spurred Representative Cox and Wyden to draft the amendment to the Communications Decency Act—concern over government regulation of the internet—"The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship."[198] While the anti-indecency sections of the Communications Decency Act proposed by Senator Exon were found to be unconstitutional, "Section 230, the amendment that promoted free speech, survived."[199]

B. Text of the Statute

The text of Section 230 is broken up into five sections—Congress' findings, Congress' policy considerations, the "Good Samaritan" provision, the obligations of interactive computer

[195] *CDA 230: Legislative History*, *supra* note 4.

[196] *See id.*; Reno v. Am. Civ. Liberties Union, 521 U.S. 844 (1997).

[197] *Reno*, 521 U.S. at 872–79.

[198] *Id.* at 885.

[199] *CDA 230: Legislative History*, *supra* note 4.

services, the effect on other laws, and a definitional section.[200] The first section reprises the findings of Congress that drove the law's enactment.[201] First, written into the text of the statute, Congress acknowledged that at the time the law was passed, the internet and interactive computer services[202] were developing quickly, making more information available to more people than ever before contemplated.[203] The internet was evolving rapidly, and Congress predicted that internet computer services would continue to offer more user control as technology developed.[204] Next, Congress lauded that this new internet space "offer[ed] a forum of true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[205] Due to the services the internet provided, Congress acknowledged that Americans had come to rely on the internet "for a variety of political, educational, cultural, and entertainment services." [206] Further, Congress attributed the early success of the internet to an overall lack of government regulation in this sphere.[207]

With the understanding of the importance of the internet, interactive computer services, and the role they had begun to play in American life, Congress made it the United States' policy

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[200] *See* 47 U.S.C. § 230.

[201] § 230(a).

[202] "[A]ny information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." § 230(f)(2).

[203] § 230(a)(1).

[204] § 230(a)(2).

[205] § 230(a)(3).

[206] § 230(a)(5).

[207] § 230(a)(4).

to promote the continued development of these services[208] and to "preserve the vibrant and competitive free market" the services had created.[209] The policy considerations outlined in the statute illustrate that Section 230 was also intended to "encourage the development of technologies that maximize user control" of information.[210] This policy consideration demonstrated Congress's intention to remove the disincentives created by *Cubby* and *Stratton* that discouraged interactive computer services from using "blocking and filtering technologies" that restrict minors' access to objectional online content.[211] Finally, the text of the statute shows that some of the policy behind Section 230 still captures the spirit of Senator Exon's Communications Decency Act, namely the proposal to enforce criminal laws to "deter and punish trafficking in obscenity, stalking, and harassment" online.[212]

While the text of Section 230 clearly delineates Congress's findings and policy considerations leading to the enactment of the law,[213] the operative text of the statute is more opaque. Known as the "Good Samaritan" protection, Section 230(c) is the statutory provision that does much of the heavy lifting. Subsection 230(c)(1) describes when an interactive computer service will be treated as a publisher or speaker and states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information

[208] § 230(b)(1)

[209] § 230(b)(2).

[210] § 230(b)(3).

[211] § 230(b)(4).

[212] § 230(b)(5).

[213] For further discussion of the intentions behind the enactment of Section 230, see Kosseff, *supra* note 66, at 13–16.

provided by another information content provider."[214] Internet content providers are understood to be people or entities that play a role in the "creation or development of information" that is provided through the internet or other interactive computer service.[215] Therefore, under subsection 230(c)(1), no interactive computer service is subject to publisher liability for the content that individual users post on their sites.[216]

Next, Subsection 230(c)(2) clears up confusion left after *Cubby* and *Stratton*—courts no longer must consider what constitutes enough "editorial control" to trigger publisher liability. Subsection 230(c)(2) states that:

> No provider or user of an interactive computer service shall be held liable on account of . . . 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 . . . .

Subsection 230(c)(2) incentivizes interactive computer services to engage in content moderation practices and create their own standards for what type of content they want to allow on their sites,[217] so long as the restriction is "taken in good faith." In *Stratton*, the threshold question was whether the interact computer service "exercised sufficient editorial control . . . to render it a publisher with the same responsibilities as a newspaper."[218] After Section 230, this question is

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[214] § 230(c)(1).

[215] § 230(f)(3).

[216] With the exception that Section 230 does not apply to suits "brought under federal criminal law, intellectual property law, any state law 'consistent' with Section 230, certain privacy laws applicable to electronic communications, or certain federal and state laws relating to sex trafficking." *CRS Section 230 Overview*, *supra* note 6, at i; § 230(e).

[217] *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997) ("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 considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.").

[218] Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *3 (S.D.N.Y. May 24, 1995).

much less relevant. In most instances, an interactive computer service's exercise of editorial control will not subject an interactive computer service to publisher liability for third-party content.[219]

Here, Congress also explicitly gives interactive computer services the ability to restrict speech that would otherwise be protected under the First Amendment. This language of the statute contemplates that third-party online speech, made possible through these non-governmental interactive computer services, is not subject to the same constraints or protections as speech in our traditional public square. While Section 230 has exceptions for federal criminal law,[220] intellectual property law,[221] state laws consistent with Section 230,[222] communications privacy law,[223] and sex-trafficking law,[224] Section 230(c) covers, and provides immunity from liability for interactive computer services for the bulk of the communication that occurs online today.

[219] Courts have struggled to define the contours of this part of the statutory provision. *See infra* Section III.C.

[220] § 230(e)(1).

[221] § 230(e)(2). This provision is especially relevant, as one of the common misconceptions of Section 230 is that it protects platforms from copyright infringement claims. *See* Mike Masnick, *NY Times Publishes a Second, Blatantly Incorrect, Trashing of Section 230, a Day After Its First Incorrect Article*, TECHDIRT (Aug. 13, 2019, 9:37 AM), https://www.techdirt.com/articles/20190812/11120142756/ny-times-publishes-second-blatantly-incorrect-trashing-section-230-day-after-first-incorrect-article.shtml (discussing how New York Times writer Jonathan Taplin confused Section 230's protections with the Digital Millennium Copyright Act's safe harbors).

[222] § 230(e)(3).

[223] § 230(e)(4).

[224] § 230(e)(5). It is important to note that in 2018, Congress amended Section 230 to create a carve-out to allow for liability for interactive computer services that promote or facilitate prostitution and sex-trafficking. *See* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) (as amended in scattered sections of ch. 18 and 47 of the United States Code), https://www.congress.gov/115/plaws/publ164/PLAW-115publ164.pdf. The media coverage surrounding the enactment of this specific law will be analyzed later in Part V.

III. Judicial Interpretation of Section 230

A. Basics of Interpretation

1. Three Relevant Inquiries

Derived from the text of Section 230 itself, there is a three-part inquiry to determine if the statute provides immunity to an interactive computer service for online content posted on their website.[225] First, in order for Section 230 to provide immunity, the defendant must be a provider or user of an interactive computer service.[226] Interactive computer services, while commonly understood to be platforms such as Facebook or Twitter, include information services, systems, and access software providers that "provide[ ] or enable[ ] computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet . . . ."[227] While "the precise contours of this definition remain unclear," courts have interpreted internet service providers to include broadband internet access providers such as Verizon, internet hosting companies such as GoDaddy, search engines such as Google, as well as other varieties of online platforms and message boards such as Facebook, Instagram, and Twitter.[228]

Next in the Section 230 inquiry, a court must determine if the defendant is an "information content provider."[229] Interactive computer services are shielded from liability from

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[225] *See* KATHLEEN ANN RUANE, CONG. RSCH. SERV., HOW BROAD A SHIELD? A BRIEF OVERVIEW OF SECTION 230 OF THE COMMUNICATIONS DECENCY ACT 1, 2 (Feb. 21, 2018), https://sgp.fas.org/crs/misc/LSB10082.pdf; Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100–01 (9th Cir. 2009).

[226] § 230(c)(1).

[227] § 230(f)(2).

[228] *See* RUANE, *supra* note 225, at 231.

[229] *Id.*

unlawful content only when they disseminate the content, not when they are involved in the creation of such content.[230] Internet content providers include "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the [i]nternet or any other interactive computer service."[231] How courts consider what constitutes "creation or development" will be discussed in Part III.C.1 below.

Finally, a court will consider if the claim treats the internet service provider as a publisher or speaker.[232] Section 230 will only apply and shield a defendant from liability if a claim is based on the internet service provider's editorial decisions.[233] If the claim does not allege liability based on a defendant's exercise of its editorial discretion, Section 230 will not apply, and the claim will likely proceed. Since Section 230's enactment, much of the litigation associated with the law has involved evaluating the final two considerations—(1) what does content creation and development look like, and (2) when does a claim involve a publisher's editorial decisions? These two questions help to establish the boundaries for when Section 230 does and does not apply.

2. Narrow Versus Broad Interpretation

Generally speaking, subsection (c)(1) of the CDA could be interpreted in two different ways—a limited reading, or a more expansive reading.[234] One scholar explains the narrow reading: that Section 230(c) codified a version of the standard from *Cubby*, whether the internet

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[230] *See* § 230(c)(1).

[231] § 230(f)(3).

[232] RUANE, *supra* note 225, at 2.

[233] *Id.*

[234] Zeran v. AOL*: Why the Fourth Circuit Is Wrong*, FindLaw, https://corporate.findlaw.com/law-library/zeran-v-aol-why-the-fourth-circuit-is-wrong.html (last updated March 26, 2018); Kosseff, *supra* note 66, at 16.

computer service "knew or had reason to know of the allegedly defamatory . . . statements."[235] This reading of the statute seems to be inconsistent with the policy goals of Congress when it enacted Section 230, namely that it sought to "preserve the vibrant and competitive free market . . . unfettered by Federal or State regulation."[236] It is not only unclear how the "reason to know" standard would be evaluated by courts, but the "codification" of *Cubby* would severely hamstring internet computer services by requiring them to investigate and take down allegedly unlawful user content, or defend against lawsuits.[237]

The more expansive reading of subsection 230(c)(1) would contemplate that most claims[238] against providers or users of interactive computer services arising from content posted by a third-party would be barred.[239] This interpretation would not consider the "reason to know" requirement from *Cubby*—there would be no liability for interactive computer services, regardless of knowledge. The broader reading would also require courts to square the "sufficient editorial control"[240] question from *Stratton* and determine that an interactive computer service acting as a distributor of content, should be treated as a "publisher" under subsection 230(c)(1). In 1997, the Fourth Circuit would have the opportunity to weigh in on how the statute should be

[235] Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 141 (S.D.N.Y. 1991).

[236] *See* § 230(b)(2).

[237] For a more detailed discussion of how a "reason to know" or a notice and takedown regime would affect platforms, see Chapter 6, Part II.A.2.

[238] Section 230 "immunity generally will not apply to suits brought under federal criminal law, intellectual property law, any state law "consistent" with Section 230, certain privacy laws applicable to electronic communications, or certain federal and state laws relating to sex trafficking." *See CRS Section 230 Overview*, *supra* note 6, at i; § 230(e).

[239] Kosseff, *supra* note 66, at 16.

[240] Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *3 (S.D.N.Y. May 24, 1995).

interpreted, narrowly, or more broadly—opting for a reading that would allow expansive protection from liability for interactive computer services.[241]

B. How Section 230 Alters Distributor and Publisher Liability

In *Zeran v. American Online, Inc.*,[242] the U.S. Court of Appeals for the Fourth Circuit issued the first federal circuit court opinion on the interpretation of Section 230.[243] Plaintiff Kenneth Zeran sued interactive computer service provider, American Online ("AOL"), for negligence for unreasonable delay in removing defamatory postings made by an unidentified third party.[244] Zeran also alleged that AOL was negligent for not posting retractions of the defamatory content and not preventing similar postings.[245] The district court found for AOL on the grounds that Section 230 barred the Zeran's claims.[246] On appeal, Zeran argued that Section 230 did not abrogate the former principle from *Cubby* and that interactive computer service providers who possessed notice of defamatory material posted through their services could still be held liable.[247] Zeran also argued that the CDA did not apply to alleged negligence that occurred prior to the law's enactment.[248] The Fourth Circuit determined that the CDA barred

[241] *See* Zeran v. American Online, Inc., 129 F.3d 327 (4th Cir. 1997).

[242] 129 F.3d 327 (4th Cir. 1997).

[243] *Id.* at 338.

[244] *Id.* at 337.

[245] *Id.*

[246] *Id.* at 338.

[247] *Id.*

[248] *Id.*

Zeran's claims and that the CDA applied to any complaint filed after the law's effective date, irrespective of when the relevant conduct occurred.[249]

In interpreting Section 230 for the first time, the Fourth Circuit adopted the more expansive interpretation of the law and explained that the law "precludes courts from entertaining claims that would place a computer service provider in a publisher's role," and therefore, "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred."[250] In discussing the legislative intent behind the enactment of Section 230 outlined in the law itself, the court explained that "Congress enacted [Section] 230 to remove the disincentives of self-regulation created by the *Stratton Oakmont* decision."[251] The court indicated that consistent with Congress's purpose outlined in subsection 230(b)(4)—"to remove disincentives for the development and utilization of blocking and filtering technologies"[252]—Section 230 "forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.[253]

While Zeran contended that Section 230 "immunity eliminates only publisher liability, leaving distributor liability intact," the Fourth Circuit expressly rejected plaintiff's theory and held that distributor liability is "a subset, or a species, of publisher liability, and is therefore also

[249] *Id.* at 337.

[250] *Id.* at 330.

[251] *Id.* at 332.

[252] 47 U.S.C. § 230(b)(4).

[253] Zeran v. American Online, Inc., 129 F.3d 327, 332 (4th Cir. 1997).

foreclosed by [Section] 230."[254] The court further clarified that "[t]o the extent that decisions like *Stratton* and *Cubby* utilize the terms 'publisher' and 'distributor' separately, the decisions correctly describe two different standards of liability. *Stratton* and *Cubby* do not, however, suggest that distributors are not also a type of publisher for purposes of defamation law."[255] The court reasoned that distributor liability for interactive computer services would be untenable because while it might be possible for traditional print publishers to investigate each claim for defamatory statements, "the sheer number of postings on interactive computer services would create an impossible burden in the [i]nternet context."[256]

Further, if interactive computer services were subject to liability for publication only, they would have "a natural incentive to remove messages upon notification, whether the contents were defamatory or not."[257] In the same vein, the court reasoned that notice-based liability "has a chilling effect on the freedom of Internet speech" because it would "deter service providers from regulating the dissemination of offensive material over their own services" because investigation would likely put them on notice of even more potentially defamatory content.[258] Therefore, the Fourth Circuit concluded that "[b]ecause the probable effects of distributor liability on the vigor of [i]nternet speech and on service provider self-regulation are directly contrary to [Section] 230's statutory purposes, [the court] [would] not assume that Congress intended to leave liability

[254] *Id.*

[255] *Id.*

[256] *Id.* at 333.

[257] *Id.*

[258] *Id.*

upon notice intact."[259] To do otherwise would defeat the purposes for enacting the law in the first place.[260]

C. When Section 230 Applies and When It Does Not

As a threshold matter, *Zeran* established that Section 230 should be read broadly to bar claims that place interactive computer services in the role of a publisher. Therefore generally speaking, claims that are based on an interactive computer service's decisions to publish, or not to publish, are precluded.[261] Plaintiffs commonly rely on two primary lines of argumentation to contend Section 230 does not apply and therefore the interactive computer service can be held liable: "(1) the platform at least partly developed or created the content; or (2) the claim did not treat the platform as the publisher or speaker of third-party content."[262] Both arguments will be discussed in turn.

1. Development or Creation of Content—230(c)(1) and 230(f)(3)

Subsection 230(c)(1) provides that an interactive service provider will be shielded from liability when providers are hosting the content "provided by another information content provider."[263] However, when an interactive service provider "is responsible, in whole or in part, for the creation or development" of the content in question, Section 230 does not apply, and the interactive service provider can be held liable.[264] Therefore, one way plaintiffs attempt to

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[259] *Id*.

[260] *See id.* at 334.

[261] *Id.*

[262] Kosseff, *supra* note 66, at 21.

[263] 47 U.S.C. § 230(c)(1).

[264] § 230(f)(3).

circumvent Section 230 is by arguing that the interactive service provider created or developed the content that is the subject of the litigation. In these cases, courts will consider subsections 230(c)(1) and 230(f)(3) to determine if Section 230 applies and bars the plaintiff's claim.

In *Fair Housing Council v. Roommates.com*,[265] ("*Roommates*") the U.S. Court of Appeals for the Ninth Circuit provided helpful guideposts for what does and does not constitute "development" in the definition of an "information content provider" under Section 230.[266] The Ninth Circuit also clarified two of its previous decisions, *Batzel v. Smith*[267] and *Caravano v. Metrosplash.com, Inc.*,[268] which both turn on the same concept of "development."[269]

In *Roommates*, the defendant, Roommates.com ("the Website") operated an online service designed to match individuals looking for places to live, with others who were looking to rent out spare rooms.[270] The process to create a profile to use the Website's services involved a three-step application: (1) the user was required to answer questions about their name, location, and email address; (2) the user was required to disclose his or her sex, sexual orientation, and preferences concerning living with children; and (3) the user was encouraged to describe themselves and their preferred roommate in an open-ended essay in the "Additional Comments" section.[271] After the application was completed, the Website would then assemble a profile for

[265] 521 F.3d 1157 (9th Cir. 2008).

[266] *Id.* at 1169.

[267] 333 F.3d 1018 (9th Cir. 2003).

[268] 339 F.3d 1119 (9th Cir. 2003).

[269] *Roommates*.com, 521 F.3d at 1170–72.

[270] *Id.* at 1161.

[271] *Id.*

the user using their inputted data.[272] The Fair Housing Councils of the San Fernando Valley and San Diego ("Councils") challenged the Website's online practices, alleging that various portions of the user application process violated the federal Fair Housing Act ("FHA") and California housing discrimination laws.[273] The district court dismissed the Councils' claims after determining that Section 230 barred their claim against the Website.[274] On appeal, a panel of the Ninth Circuit determined that some of the Website's practices were shielded by Section 230, while others were not.[275]

In its decision, the Ninth Circuit explained that immunity under Section 230 can turn on whether the internet service provider is also an "information content provider," defined as someone who is "responsible, in whole or in part, for the creation or development of"[276] the content in question.[277] The content in question in *Roommates* implicated the Website as both a service provider, when it "passively display[ed] content that [was] created entirely by third parties," as well as a content provider, when it created content itself, or when it was "responsible, in whole or in part" for developing or creating content.[278] With this in mind, the court analyzed the Website's features to determine when the Website was acting as a service provider and a content provider.

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[272] *Id.* at 1161–62.

[273] *Id.* at 1162.

[274] *Id.*

[275] *Id.*

[276] 47 U.S.C. § 230(f)(3).

[277] *Roommates*.com, 521 F.3d at 1162.

[278] *Id.*

First, with respect to the questions the Website asked prospective users, the Fourth Circuit determined the Website was an "information content provider" because the Website "created the questions and choice of answers, and designed its website registration process around them."[279] The court determined that the Website could not claim immunity for posting the questions or forcing users to answer them as a condition for using its service.[280] The court reasoned that the questions posed could violate the FHA and "[t]he CDA does not grant immunity for inducing third parties to express illegal preferences."[281] Since the Website's own acts of "posting the questionnaire and requiring answers to it" were "entirely its doing," Section 230 did not apply to the questions.[282]

Next, the Councils challenged the profile pages that the Website developed to display users' information and preferences disclosed from the registration process.[283] Since the unlawful questions "solicit (a.k.a. 'develop') unlawful answers," the court determined that the Website was at least partially responsible for the users' profiles "because every such page is a collaborative effort between [the Website] and the subscriber."[284] With respect to the search engine feature of the Website, the Ninth Circuit determined that Section 230 did not apply because the search system filtered listings and directed emails to users based on discriminatory criteria.[285]

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[279] *Id.* at 1163.

[280] *Id.* at 1164.

[281] *Id.* at 1165.

[282] *Id.*

[283] *Id.*

[284] *Id.* at 1166.

[285] *Id.* at 1167.

Finally, the court considered the "Additional Comments" section that provided the option for users to free-write their preferences in an open-ended comment box. Since the Website published the content of the Additional Comments as written, did not provide guidelines as to what users should write, and did not urge users to be discriminatory, the court determined the Website was "not responsible, in whole or in part, for the development of this content, which comes entirely from subscribers and is passively displayed by [the Website]."[286]

In *Roommates*, a helpful standard for "development" emerges: "[A] website helps to develop unlawful content, and thus falls within the exception to [S]ection 230, if it contributes materially to the alleged illegality of the conduct."[287] The Ninth Circuit illustrated this standard further with several examples. A website that provides "neutral tools" that *could* be used to carry out unlawful conduct does not amount to "development."[288] Similarly, websites that allow users to specify their preferences by means of "user-defined criteria" for the purpose of excluding emails from other users of a particular race or sex would still enjoy immunity, as long as the website does not *require* the use of discriminatory criteria.[289] Finally, "[a] website operator who edits user-created content—such as by correcting spelling, removing obscenity or trimming for length—retains his immunity for any illegality in the user-created content, provided that the edits are unrelated to the illegality."[290] However, if the operator edits content in a way that contributes

[286] *Id.* at 1173–74.

[287] *Id.* at 1168.

[288] *Id.* at 1169.

[289] *Id.*

[290] *Id.*

or creates the alleged illegality, such as "transform[ing] an innocent message into a libelous one," the operator is a developer and is not immune.[291]

In addition to providing direction as to what is considered "development," the Ninth Circuit clarified *Batzel* and *Caravano* and situated them within the *Roommates* opinion. In *Batzel*, an editor of an email newsletter incorporated a tip about artwork that the tipster falsely alleged to be stolen. In incorporating the tip into the newsletter, the editor included a headnote before sending the newsletter to the subscribers.[292] The Ninth Circuit found, which is consistent with its later opinion in *Roommates*, that "an editor's minor changes to the spelling, grammar and length of third-party content do[es] not strip him of section 230 immunity" if the changes do not contribute to the illegality of the message.[293] Since the added headnote did not make the tip libelous and the editor was exercising his discretion in deciding to publish the tip, the editor was not involved in the "development" of the libelous content and was immune under Section 230.[294] In *Caravano*, the Ninth Circuit determined that because the website provided neutral tools and did not force or encourage the libelous statement, the illegal content was developed "entirely by the malevolent user, without prompting or help from the website operator."[295]

After *Roommates*, it is well-established that when a website "directly participates in developing the alleged illegality," such as the Website's creation of the discriminatory questions and corresponding profiles, the interactive computer service is not protected under Section

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[291] *Id.*

[292] *Id.* at 1170.

[293] *Id.*

[294] *Id.* at 1170–71.

[295] *Id.* at 1171.

230.[296] However, "in cases of enhancement by implication or development by inference," such as the Website's "Additional Comments" feature, Section 230 does provide protection from liability.[297] The Ninth Circuit concluded that close cases should be resolved in the favor of immunity "to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles."[298] For example, the Sixth Circuit's decision in *Jones v. Dirty World Entertainment Recordings LLC*,[299] is consistent with the Ninth Circuit's reasoning in *Roommates*. The Sixth Circuit determined that the defendants were not information content providers and therefore not subject to liability because the defendants "did not develop the statements forming the basis of [plaintiff's] tort claims" and "did not materially contribute to the tortious content."[300]

2. Treatment as a Publisher or Speaker—230(c)(1)

The second way plaintiffs attempt to circumvent Section 230 is by arguing that the interactive service provider was not acting as a publisher or engaging in traditional publisher activities. A plaintiff might argue, with varying degrees of success, that the interactive service provider breached a contract, negligently provided a service, or provided a defective product. In these cases, courts will consider the text of subsection 230(c)(1) to determine if Section 230 applies and bars the plaintiff's claim.

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[296] *Id.* at 1174.

[297] *Id.* at 1174–75.

[298] *Id.* at 1174.

[299] 755 F.3d 398 (6th Cir. 2014).

[300] *Id.* at 417

For example, while in *Roommates* the Ninth Circuit determined that Section 230 did not protect the interactive computer service because the service was responsible for the "creation or development" of the content, in *Barnes v. Yahoo!, Inc.*,[301] the Ninth Circuit instead focused on the meaning of the terms "publisher" and "speaker" in subsection 230(c)(1).[302] In *Barnes*, plaintiff's ex-boyfriend created fake profiles for her on a website ran by the defendant.[303] These profiles contained nude photographs of Barnes, taken without her permission, a solicitation for sexual intercourse, and included her email addresses, and phone number and address of her employer.[304] After receiving emails, phone calls, and in-person visits at her place of employment, Barnes followed the defendant's policy to have the profiles removed, and for over a month, the defendant failed to remove the profiles.[305] Despite the defendant promising Barnes the profiles would be removed, another two months passed with no resolution and Barnes filed this lawsuit.[306]

Barnes' theory of recovery was based on two Oregon laws, the first based on "the negligent provision or non-provision of services" defendant provided through its services.[307] The second was a promissory estoppel claim based on defendant's "promise" to remove the profiles

[301] 570 F.3d 1096 (9th Cir. 2009).

[302] *Id.* at 1101.

[303] *Id.* at 1098.

[304] *Id.*

[305] *Id.*

[306] *Id.* at 1098–99

[307] *Id.* at 1099.

and Barnes' reliance on that promise.[308] The district court dismissed Barnes' claim, finding that Section 230 protected the defendant from liability, and Barnes timely appealed.[309]

In its analysis, the Ninth Circuit acknowledged that while Section 230 is commonly applied in defamation cases because of the decisions in *Cubby* and *Stratton*, "what matters is whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another."[310] If so, then Section 230 protects the defendant from liability.[311] Barnes' first claim sought to treat defendant as a 'publisher or speaker' of the profiles in order to hold the defendant liable for its "failure to exercise reasonable care to perform [its] undertaking" because the defendant's failure to remove the profiles increased the risk of harm and the harm resulted from Barnes' reliance on defendant to remove them.[312] While Barnes attempted to couch her claim as holding the defendant liable for negligently providing a service, the Ninth Circuit understood her theory of relief as merely renaming "defamation" as "negligence."[313] Since Barnes claimed that the defendant's negligent activity was not removing the profiles, and "removing content is something publishers do," the duty Barnes claimed the defendant breached was that of a publisher. Thus, consistent with the Ninth Circuit's decision in *Roommates*, "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online," is publishing activity protected by Section 230.[314]

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[308] *Id.*

[309] *Id.*

[310] *Id.* at 1101–02.

[311] *Id.* at 1102.

[312] *See id.*

[313] *Id.*

[314] *Id.* at 1103 (quoting *Fair Housing Council v. Roommates.com*, 521 F.3d 1157, 1170–71 (9th Cir. 2008)).

With respect to Barnes' promissory estoppel claim, the court acknowledged that Barnes did "not seek to hold Yahoo liable as a publisher or speaker of third-party content, but rather as the counter-party to a contract, as a promisor who has breached."[315] The court determined this theory of recovery was different because promising is "not synonymous with the performance of the action promised" and "[c]ontract liability here would come not from Yahoo's publishing conduct, but from Yahoo's manifest intention to be legally obligated to do something."[316] Therefore, Section 230 did not preclude the plaintiff's claim.[317] However, the court notes that a promise cannot be inferred, and that "a general monitoring policy, or even an attempt to help a particular person" by the interactive computer service is not enough to establish contract liability.[318] In so holding, the court reversed the trial court's dismissal of Barnes' promissory estoppel claim and remanded for further proceedings.[319] Thus, the Ninth Circuit maintained its consistency that Section 230 applies to claims that *require* the defendant to be treated as a publisher or speaker—usually based on what content the plaintiff claims the defendant did or did not publish or remove.

The Ninth Circuit continued to refine the meaning of the terms "publisher" and "speaker" in subsection 230(c)(1) in *Doe v. Internet Brands, Inc.*,[320] and *Lemmon v. Snap, Inc*.[321] In *Doe*,

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[315] *Id.* at 1107.

[316] *Id.* at 1108.

[317] *Id.* at 1109. However, the court did highlight that courts cannot "infer a promise from an attempt to de-publish," but that there must be an actual "contract" or "meeting of the minds" under contract law for the claim to succeed. *Id.* at 1108.

[318] *Id.* at 1108.

[319] *Id.* at 1109.

[320] 824 F.3d 846 (9th Cir. 2016).

[321] 995 F.3d 1085 (9th Cir. 2021).

plaintiff Jane Doe brought a claim against website defendant Internet Brands alleging liability for negligence for failure to warn under California law.[322] Jane Doe was an aspiring model who had posted personal information on the defendant's website for networking purposes.[323] Two men created fake identities disguised as talent scouts and lured Jane Doe with a fake modeling opportunity to Florida where they drugged her and sexually assaulted her.[324] Jane Doe pled that the defendant knew about the illegal activity but did not warn the website users and alleged this amounted to negligence under California law.[325] The district court dismissed the action after determining Section 230 barred Jane Doe's claim.[326] Jane Doe appealed.[327]

The question before the Ninth Circuit was whether Section 230 barred Jane Doe's negligent failure to warn claim.[328] Under California law, a duty to warn a potential victim of harm exists when there is a "special relationship" either between the controlling entity and the potential victim or the entity who needs to be controlled.[329] Jane Doe "allege[d] that Internet Brands had a cognizable 'special relationship' with her and that its failure to warn her of [the] rape scheme caused her to fall victim to it."[330] The "essential question" the Ninth Circuit had to answer was whether Jane Doe's claim required the court to treat the defendant as a "publisher or

[322] *Doe*, 824 F.3d at 848.

[323] *Id.* at 848–49.

[324] *Id.*

[325] *Id.* at 848.

[326] *Id.*

[327] *Id.*

[328] *Id.* at 850.

[329] *Id.*

[330] *Id.*

speaker of information provided by another information content provider."[331] The court determined that defendant was not acting as a publisher or speaker because the duty to warn would not "require [defendant] to remove any user content or otherwise affect how it publishes or monitors such content," and if defendant provided a warning, it would only involve content the defendant created, not third-party content.[332] Therefore, Section 230 did not bar Jane Doe's claim.[333]

In *Lemmon*, the surviving parents of two boys sued Snap, Inc. after their children died in a high-speed car accident.[334] The parents alleged that the defendant, a social media provider, encouraged their sons to drive at high speeds through the negligent design of their "Speed Filter" which displayed how fast the boys were traveling in the car.[335] The district court dismissed plaintiffs' claims after determining Section 230 applied because the claims sought to treat the defendant as the "publisher or speaker" of the boys' photos using the Speed Filter.[336]

The Ninth Circuit reversed, determining that plaintiffs' claims turned on the defendant's design of their app.[337] The plaintiffs alleged that the defendant created: "(1) Snapchat; (2) Snapchat's Speed Filter; and (3) an incentive system within Snapchat that encouraged its users to pursue certain unknown achievements and rewards."[338] The court interpreted these claims as

[331] *Id.* (quoting 47 U.S.C. § 230(c)(1)).

[332] *Id.* at 851.

[333] *Id.* at 854.

[334] *See* Lemmon v. Snap, Inc., 995 F.3d 1085, 1087 (9th Cir. 2021).

[335] *See id.* at 1087–88.

[336] *Id.* at 1087.

[337] *Id.* at 1087, 1091.

[338] *Id.* at 1091.

alleging "a cause of action for negligent design—a common products liability tort."[339] Plaintiffs' claims did not treat defendant as a publisher or a speaker, but rather as a product manufacturer.[340] Since the duty to design a safe product is independent of defendant's role in publishing third-party content,[341] the Ninth Circuit determined this was not the type of claim Congress sought to bar when Section 230 was enacted.[342]

However, in *Herrick v. Grindr, LLC*,[343] a plaintiff was unsuccessful in arguing that the platform, a web-based dating site, was not a "publisher" for purposes of Section 230.[344] Plaintiff's claim arose from unwanted solicitations from users of Grindr, a dating site, after plaintiff's ex-boyfriend used the site to impersonate the plaintiff.[345] The plaintiff alleged fourteen causes of action, including a failure-to-warn claim, all related to (1) the defendant's defective design and lack of built-in safety features; (2) the defendant misleading the plaintiff that defendant could prohibit the impersonating profiles; and (3) the defendant's refusal to identify and remove the impersonating profiles.[346] The district court granted the defendant's motion to dismiss after determining that Section 230 applied and protected defendant because the plaintiff's claims were "inextricably related to Grindr's role in editing or removing offensive

[339] *Id.* at 1092.

[340] *Id.* at 1093.

[341] The Ninth Circuit noted that in fact, "[t]his case present[ed] a clear example of a claim that simply [did] not rest on third-party content." *Id.*

[342] *See id.* at 1093–95.

[343] 306 F. Supp. 3d 579 (S.D.N.Y. 2018).

[344] *Id.* at 588–92.

[345] *Id.* at 854.

[346] *Id.*

content," and "based on content provided by another user."[347] The Second Circuit affirmed the district court, concluding that defendant was a publisher and was protected by Section 230 because plaintiff's claims hinged on defendant's decisions to publish or remove content—traditional editorial functions.[348]

While other cases would further illustrate both the intricacies and boundaries of the application of Section 230, as a general rule, after *Zeran*, interactive service providers cannot be held liable for third party content on their websites, unless the interactive service provider helped to create or develop the illegal content, or the interactive service provider was not performing a traditional publishing function, such as making editorial decisions about including or excluding content.

[347] *Id.* at 588–89. Distinguishing plaintiff's "failure-to warn-claim" from the dispute in *Doe*, the district court found that here, plaintiff's claim was more directly related user generated content and defendant's publishing functions. *Id.* at 592.

[348] Herrick v. Grindr LLC, 765 F. App'x 586, 590 (2d Cir.), *cert. denied*, 140 S. Ct. 221 (2019).

CHAPTER 3: THEORY AND METHODOLOGY

This Chapter presents the First Amendment theory and the communications theory that served as the justification and framework for this study. The First Amendment theory of self-governance and the communications theories of agenda-setting and framing were used to analyze and critique the media's coverage of Section 230. A discussion of the theory and its relevance to the study will be followed by a description of the methodology used to carry out this study.

I. Theory

The public's engagement with revisions to Section 230 is important to the concept of self-government—the ability of citizens to have a say in the laws that govern them. Freedom of speech has long been regarded as critical precondition for effective self-governance[349]—the idea that citizens should "make and obey their own laws."[350] To self-govern effectively, "[t]he voters . . . must be made as wise as possible," because "[t]he welfare of the community require that those who decide issues shall understand them."[351]

[349] Legal scholars have identified three main theories of purpose for the First Amendment: cognitive, ethical, and political. *See* ROBERT C. POST, DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE: DEMOCRATIC LEGITIMATION AND THE FIRST AMENDMENT 6 (2012) [hereinafter *Democratic Legitimation and the First Amendment*]. First, the marketplace of ideas theory—"advancing knowledge and discovering truth;" second, autonomy and self-fulfillment; and third, facilitating the communication necessary for democratic self-governance. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–9 (1970); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1965) [hereinafter *The Constitutional Powers of the People*].

[350] *Free Speech and Its Relation to Self-Government*, *supra* note 25, at 15 (1948).

[351] *Id.* at 25.

"Representative democracy requires that public policy outputs and the wishes of citizens are closely related."[352] Communications scholars Christopher Williams and Martijn Schoonvelde argue that media coverage of policy issues increases the information available about a policy area, which in turn allows the public to respond predictably to policy outputs.[353] Williams and Schoonvelde's work contributes to growing literature demonstrating that "media content can strengthen public responsiveness to a policy."[354] "Democracy requires that policymakers respond to the public," and public responsiveness to policy outputs can incentivize policymakers to provide the public with its preferred policies.[355] "[W]ithout the presence of widespread media coverage of a policy, democratic representation and responsiveness may be much less likely to occur."[356] Media coverage of policy issues is an important part of the self-governance chain, linking the will of the people and the people's preferred policy outcomes.[357] As discussed below, self-governance theory, agenda-setting theory, and framing theory considered together, suggest that journalists play an important role in the democratic process by educating the public on issues, such as Section 230, so that citizens can make informed decisions about who their representatives are and what they want their representatives to do.

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[352] Williams & Schoonvelde, *supra* note 27, at 1627.

[353] *See id.* at 1628.

[354] *Id.*

[355] *See id.* at 1635.

[356] *Id.* (The evidence we have presented in this study suggests that without media coverage of policies, we will see little responsiveness in public preferences to policy outputs.").

[357] *See id.* at 1629 ("In order to increase the likelihood of reelection, policymakers respond to public policy preferences by changing policy outputs. In turn, the public updates its policy preferences in response to those outputs.").

A. Self-Governance Theory

Alexander Meiklejohn, philosopher and free-speech advocate, is well-known for his position that "free speech is indispensable to the informed citizenry required to make democratic self-government work."[358] From the "intention and structure of the Constitution" Alexander Meiklejohn identified the following principles, first: "All constitutional authority to govern the people of the United States belongs to the people themselves, acting as members of a corporate body politic."[359] Meiklejohn considered "political freedom," to be "self-government."[360] Second, the Constitution allows the people to create subordinate agencies, such as our three branches of government, and give each branch only the powers necessary to govern as assigned.[361] Next, the Constitution establishes the voting power of the people as an electorate, through which individuals "actively participate in governing both themselves, as the subject of their laws, and their agencies, as the makers, administrators, and interpreters of the laws."[362] Finally, Meiklejohn identified the importance of the First Amendment to self-government—"to deny all subordinate agencies' authority to abridge the freedom of the electoral power of the people."[363] Meiklejohn understood the First Amendment as a prohibition, guarding the "freedom of speech, press, assembly, and petition" from the other three branches of government.[364] This protection, he

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[358] Alexander Meiklejohn, *The First Amendment Is an Absolute*, SUPREME CT. REV. 245, 262–63 (1961) [hereinafter *The First Amendment Is an Absolute*].

[359] *Id.* at 253.

[360] *Id.* at 254.

[361] *Id.*

[362] *Id.*

[363] *Id.*

[364] ALEXANDER MEIKLEJOHN, THE FREEDOM OF THE ELECTORATE, 97 (1948) [hereinafter *The Freedom of the Electorate*].

believed, allows citizens to establish themselves as the electorate, or the Fourth Branch of government, "co-ordinate with the other three branches."[365]

> Public discussion of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing we have sovereign power.[366]

Therefore, the First Amendment protects the peoples' governing powers from being abridged by the agents that are "servants" of the people.[367]

While the First Amendment is often referred to as the "freedom to speak," Meiklejohn understood the purpose of First Amendment to be "protect[ing] the freedom of those activities of thought and communication by which we 'govern.'"[368] In his view, under a self-governance theory of the First Amendment, the First Amendment is not concerned with a private right, but rather with governmental responsibility.[369] This responsibility, "self-government[,] can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare . . . ."[370] Accordingly, "[w]e, the people who govern, must try to understand the issues which, incident by incident, face the nation."[371] This requires citizens to consider the

[365] *Id.*

[366] *The First Amendment Is an Absolute*, *supra* note 358, at 257.

[367] *Id.* at 254.

[368] *Id.* at 255.

[369] *Id.* ("It is concerned, not with a private right, but with a public power, a governmental responsibility.").

[370] *Id.*

[371] *Id.*

decisions made by the legislatures, executives, and judiciaries and to consider how those decisions might be improved.[372]

Self-governing people, according to Meiklejohn make two demands: (1) the evaluation of public issues "must be free and independent," and must be done by the electorate alone; and (2) citizens must be free to express their conclusions about public issues at the polls.[373] Meiklejohn viewed the legislature as the agent of the citizens, therefore, he believed, the citizens should direct public policy.[374] The purpose of free speech, according to Meiklejohn, is to educate the people so the people can govern themselves efficiently.[375] Therefore, it follows that the primary hinderance of self-government is that citizens are not educated.[376] Education, or "adequate intelligence" is a pre-condition to effective self-governance, or political freedom.[377] This means that good and bad ideas alike, must have a hearing, and the First Amendment protects against the "mutilation of the thinking" to those bad ideas.[378] The First Amendment condemns any suppression of ideas related to the common good; "[t]o be afraid of any ideas is to be unfit for

[372] *See id.*

[373] *Id.* at 117.

[374] *See The Freedom of the Electorate*, *supra* note 34, at 106 ("And as we play our sovereign role in what Hamilton calls 'the structure and administration of the government,' that agent has no authority whatever to interfere with the freedom of our governing. As we go about that work neither Congress nor any committee of Congress may use force upon us to drive us toward this public policy or that, or away from this public policy or that.").

[375] *See The First Amendment Is an Absolute*, *supra* note 358, at 263.

[376] *Id.* ("We are terrified by ideas, rather than challenged and stimulated by them.").

[377] *The Freedom of the Electorate*, *supra* note 364, at 98 ("Men are politically free if, and only if, with adequate intelligence, with unremitting zeal for the nation's welfare, and by Constitutional authorization, they actively govern themselves.").

[378] *Id.* ("And that means that in our popular discussions, unwise ideas must have a hearing as well as wise ones, dangerous ideas as well as safe, un-American as well as American. Just so far as, at any point, the citizens who are to decide issues are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to those issues, just so far the result must be ill-considered, ill-balanced planning for the general good.").

self-government."[379] When men and women govern themselves, it is their responsibility to pass judgment on public policies.[380] A focus on creating an informed electorate inevitably led to Meiklejohn elevating the right of citizens to hear over the right of all citizens to speak.[381] Meiklejohn famously wrote: "What is essential is not that everyone shall speak, but that everything worth saying shall be said."[382]

Judge and legal scholar Robert Bork agreed with Meiklejohn's view of the First Amendment as a means to protect the activities by which individuals can self-govern.[383] Similar to Meiklejohn, Bork understood representative democracy to require "open and vigorous debate about officials and their policies."[384] However, while Meiklejohn believed that First Amendment protection should extend beyond speech that was "explicitly political,"[385] Bork believed in a restrictive application of First Amendment protection—extending only to purely political speech regarding matters pertinent to elections.[386] Bork wrote:

> [t]he category of protected speech should consist of speech concerned with governmental behavior, policy or personnel. . . . Explicitly political speech is speech about how we are governed, and the category includes a wide range of evaluation, criticism, electioneering and propaganda. It does not cover scientific, education, commercial or literary expressions as such. A novel may have impact upon attitudes that affect politics, but it would not for that reason receive judicial

[379] *The Freedom of the Electorate*, *supra* note 364, at 124.

[380] *Id.* at 109.

[381] *The Constitutional Powers of the People*, *supra* note 349, at 26.

[382] *Free Speech and Its Relation to Self-Government*, *supra* note 25, at 25.

[383] Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, 26 (1971).

[384] *Id.*

[385] *Id.*

[386] *Id.*; *see also Democratic Legitimation and the First Amendment*, *supra* note 349, at 16.

> protection. . . . The line drawn must . . . lie between the explicitly political and all else.[387]

Bork articulated that the First Amendment cannot be interpreted to protect all communication that influences political attitudes; therefore, he ascribed to the limiting principle that the First Amendment only protected the "explicitly political."[388] This category of speech includes "criticisms of public officials and policies, proposals for the adoption or repeal of legislation or constitutional provisions and speech addressed to the conduct of any governmental unit in the country."[389] Political speech, according to Bork, is the "discovery and spread of political truth."[390]

Robert Post, a more contemporary legal scholar, discusses the concepts of democratic legitimization and democratic competence, as two offshoots of the more general theory of self-governance.[391] Post argues that First Amendment protection for speech is "necessary, although not sufficient for ensuring democratic legitimacy."[392] Accordingly, Post contends that First Amendment protection should "extend to all efforts deemed normatively necessary for influencing public opinion," because individuals need the opportunity to participate in "the

[387] Bork, *supra* note 383, at 27–28.

[388] *See id.* at 28.

[389] *Id.* at 29.

[390] *Id.* at 30.

[391] *See generally Democratic Legitimation and the First Amendment*, *supra* note 349.

[392] *Id.* at 17 ("If persons are prevented from participating in the formation of public opinion so as to render public opinion responsive to their own point of view, they are not likely to regard themselves as potentially the authors of government decisions that affect them.").

formation of public opinion" in order to feel that they are the "authors of government decisions that affect them."[393]

Post takes a broader view of First Amendment protection than Bork—that the First Amendment protects "all communications that form public opinion."[394] Post further prioritizes protection for communication from the media, such as newspapers, magazines, and the internet, "which are the primary vehicles for the circulation of the texts that define and sustain the public sphere."[395] The media contributes to the "open process[ ] by which public opinion is constantly formed and reformed."[396] Post argues that the constant consideration, reconsideration, and evaluation of state decision-making is central to the concept of democracy and that elections are the most observable mechanism to subordinate government to the public opinion.[397]

Post deviates from Meiklejohn's traditional theory of self-governance that the First Amendment primarily protects the right of individuals to hear and be educated by public discussion.[398] Post argues that this prioritization of the audience's First Amendment right to access information does not necessarily align with the First Amendment as it applies to public discourse, as the First Amendment has been interpreted to guarantee the right of every citizen to participate in public debate.[399] Instead, Post contends that the First Amendment should be

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[393] *Id.* at 17–18.

[394] *Id.* at 19–20.

[395] *Id.* at 20.

[396] *Id.* at 21.

[397] *Id.* at 20–21.

[398] *See id.* at 21.

[399] *See* ROBERT C. POST, DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE: DEMOCRATIC COMPETENCE AND THE FIRST AMENDMENT 22 (2012) [hereinafter *Democratic Competence and the First Amendment*].

understood to protect "the autonomy of speakers, not merely the rights of audiences."[400] Post places a higher priority on the rights of speakers because if individuals are prevented from communicating what they want to communicate, then individuals will not "experience participation in public discourse as a means of making government responsive to their own personal views"[401]—which is critical to the concept of self-governance. On the other hand, Post acknowledges, and agrees with Meiklejohn that within First Amendment doctrine, "equality of status in the field of ideas" is crucial.[402] "This equality reflects the premise that in a democracy every [citizen] possesses an equal right to seek to shape the content of public opinion and so to influence government action."[403]

Post agrees with Meiklejohn and Bork, regarding the link between the First Amendment and democracy—voting.[404] However, Post rejects Bork's strict view that the First Amendment only protects the rights of voters to receive information, arguing instead that the First Amendment also protects the "autonomy interest of speakers."[405] Post criticizes early First Amendment scholars like Meiklejohn and Bork for hyper-focusing on decision-making techniques (such as majoritarianism and elections), and instead contends that democracy rests upon the value of self-government.[406] Returning back to the theories of Meiklejohn, Post does

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[400] *Id.*at 21.

[401] *Id.*

[402] *Id.* at 10, 22.

[403] *Id.* at 22.

[404] *Id.* at 15 ("Early theorists of the connection between the First Amendment and democracy understood the essence of democracy to lie in the principle of majoritarianism, as expressed through the mechanism of elections.").

[405] *Id.* at 16–17.

[406] *Id.* at 17.

agree that democracy embodies self-government "by rendering government decisions responsive to public opinion and by guaranteeing to all the possibility of influencing public opinion."[407]

In addition to democratic legitimacy, Post argues that "democratic competence" is required for effective self-governance. "Democratic competence refers to the cognitive empowerment of persons within public discourse, which in part depends on their access to disciplinary knowledge."[408] "Cognitive empowerment is necessary both for intelligent self-governance and for the value of democratic legitimization."[409] While democratic legitimization requires that individual speakers be treated equally, democratic competence "requires that speech be subject to a disciplinary authority that distinguishes good ideas from bad ones."[410]

Post explains that democratic competence is crucial to self-governance because "an educated and informed public opinion will more intelligently and effectively supervise the government."[411] Post emphasizes the role that "experts" play as reliable sources of belief in forming public opinion,[412] and concludes that "[e]xpert knowledge is prerequisite for intelligent self-governance" and necessary to promote democratic legitimization.[413]

However, Post argues that democratic legitimacy trumps democratic competence within the public discourse because the First Amendment does guarantee the opportunity for all

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[407] *Id.*

[408] *Id.* at 21.

[409] *Id.*

[410] *Id.*

[411] *Id.* at 22.

[412] *Id.* at 20.

[413] *Id.* at 21.

individuals to participate in public debate.[414] The concept of democratic competence within the context of the First Amendment "prevents the state from obliterating independent sources of expert knowledge,"[415] and helps to contribute to a more well-informed public discourse, through which citizens can self-govern more effectively.

Analyzing self-governance theory scholars' understanding of the First Amendment two important principles emerge: (1) when engaged in self-governance, citizens must understand the policy issues confronting them; and (2) an educated and well-informed citizenry will better and more effectively supervise government and make it more responsive to their policy desires. This study is premised on the belief that self-governance theory suggests that the media can play an important role in providing access to the disciplinary knowledge required to understand and evaluate policy issues such as Section 230.

With multiple proposals pending before Congress, Section 230 is a policy issue ripe for discussion and debate. In order for American citizens to engage in effective self-governance, it is important for individuals to understand the policy issues before them. The media can play an important role in providing citizens the disciplinary knowledge regarding Section 230 through the media's access to experts and those with institutional knowledge. Substantive and accurate reporting regarding Section 230 will assist individuals to make determinations regarding their policy preferences and subsequently hold their representatives accountable for effectuating the public's preferred policies.

[414] *See id.*

[415] *Id.* at 30.

B. Agenda Setting

Self-governance as a form of government and as a justification for the First Amendment, acknowledges the role of the press in informing and shaping public opinion and therefore implies some underlying agenda-setting function of the media. Agenda-setting theory was first introduced in 1972 by McCombs and Shaw and sought to demonstrate that the media's focus on certain issues determines the focus of the public and suggests what the public should care about.[416] The role of the news media in setting the political agenda for the public and for policy makers is well documented.[417] However, while it is clear the media plays a role in what issues are covered by the media, the news media as a whole is complex, with different actors seeking different agendas and outcomes.[418] In an attempt to understand how the media produces news, researchers have identified key factors that influence the news media including (1) "influential news sources (like the president of the United States);" (2) "real world events (like high profile court cases);" and (3) "routines of journalism (heavy reliance on available government officials and press releases; use of episodic framing)."[419]

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[416] Maxwell E. McCombs & Donald L. Shaw, *The Agenda-Setting Function of Mass Media*, 36 PUB. OP. Q. 176 (1972); *see also Agenda Setting Theory*, MASS COMM. THEORY, https://masscommtheory.com/theory-overviews/agenda-setting-theory/.

[417] *See* McCombs & Shaw, *supra* note 416, at 176 (" In choosing and displaying news, editors, newsroom staff, and broadcasters play an important part in shaping political reality. Readers learn not only about a given issue, but also how much importance to attach to that issue from the amount of information in a news story and its position. In reflecting what candidates are saying during a campaign, the mass media may well determine the important issues--that is, the media may set the "agenda" of the campaign.").

[418] *See* Carolina Foster, Jim Thrasher, Sei-Hill Kim, India Rose, John Besley & Ashley Navarro, *Agency-Building Influences on the New Media's Coverage of the U.S. Food and Drug Administration's Push to Regulate Tobacco, 1993–2009*, J. HEATH HUM. SERVS. ADMIN. 303, 305–306 (2012).

[419] *Id.* at 306 (citing GLADYS ENGEL LANG & KURT LANG, WATERGATE: AN EXPLORATION OF THE AGENDA-BUILDING PROCESS *in* MASS COMMUNICATIONS REVIEW YEARBOOK 447 (SAGE PUB., 1981) (eds. G. Cleveland Whilhoit & Harold de Bock, 1981) and Julia B. Corbett & Motomi Mori, *Medicine, Media, and Celebrities: News Coverage of Breast Cancer, 1960–1995*, 76 J. & Mass Comms. Q. 229 (1999)).

For the purpose of this thesis, it is more important that agenda-setting theory is recognized as yet another link in the self-governance process. The media's role in determining what priority is given to social issues impacts the public's perception of policies, which in turn affects public opinion.[420] "In this sense, media sets the agendas for public policy debates."[421] From this premise, this thesis focuses on how the media covers the issue of Section 230, specifically considered how the law is framed and contextualized.

C. Framing Theory

The public depends on the media for political information and when they consume news, and the public is "exposed to editorial decisions about what constitutes news, what issues are important, and how policy debates are packaged."[422] Journalists structure information for readers, and this structuring involves many choices, such as what frame to use when presenting the information.[423] "Framing should be particularly significant as a determinant of choice when the choice problem involves politics."[424] This is because "political issues are typically complex, political discourse is ambiguous, and levels of public knowledge about and interest in politics is low."[425] Framing can have an effect on the public's support for different policy issues, especially

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[420] *See* Braden Bagley & Candace Forbes Bright, *"Those People Count": Naloxone Media Coverage in Mississippi*, 30 QUAL. HEALTH RSCH. 1237, 1237 (2020) (citing Candace Forbes Bright & Braden Bagley, *Elections, News Cycles, and Attention to Disasters*, 26 DISASTER PREVENTION & MANAGEMENT 471 (2017); Kaye D. Sweetser, Guy J. Golan & Wayne Wanta, *Intermediate Agenda Setting in Television, Advertising, and Blogs During the 2004 Election*, 11 MASS COMM. & SOC'Y 197 (2008); and Guy Golan, *Inter-Media Agenda Setting and Global News Coverage*, 7 JOURNALISM STUDIES 323 (2007)).

[421] *Id.* at 1238.

[422] Nayda Terkildsen & Frauke Schnell, *How Media Frames Move Public Opinion: An Analysis of the Women's Movement*, 50 POL. RSCH. Q. 879, 879 (1997).

[423] *See id.* at 882.

[424] SHANTO IYENGAR, IS ANYONE RESPONSIBLE?: HOW TELEVISION FRAMES POLITICAL ISSUES 13 (1991).

[425] *Id.*

when an issue can be presented in several ways.[426] Frames "structure the public debate" and influence readers' access to information."[427] Therefore, different frames produce different attitudes in readers making frames a "potent source of public opinion orchestration."[428]

Gamson and Modigliani defined "frame" as "a central organizing idea or story line that provides meaning to an unfolding strip of events, weaving a connection among them."[429] Therefore, "[t]he frame suggests what the controversy is about, the essence of the issue."[430] Frames indicate a "policy direction" and imply a solution to a given problem.[431] Entman described framing as "to select some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation."[432] In the context of framing, Entman describes "salience" as "making a piece of information more noticeable, meaningful or memorable to audiences."[433]According to Entman, frames "define problems," "diagnose causes," "make moral judgments," and "suggest remedies."[434] While frames can be found at four places in the communication process—the communicator, the text, the receiver, and the culture—in texts,

[426] *See* Terkildsen & Schnell, *supra* note 422, at 880–81.

[427] *Id.* at 881.

[428] *Id.* at 893–94.

[429] William A. Gamson & Andre Modigliani, *The Changing Culture of Affirmative Action*, EQUAL EMPLOYMENT OPPORTUNITY: LABOR MARKET DISCRIMINATION & PUB. POL'Y 373, 376 (1987).

[430] *Id.*

[431] *Id.*

[432] Robert M. Entman, *Framing: Toward Clarification of a Fractured Paradigm*, 43 J. COMM. 51, 52 (1993).

[433] *Id.* at 53.

[434] *Id.*

frames "are manifested by the presence or absence of certain keywords, stock phrases, stereotyped images, sources of information, and sentences that provide thematically reinforcing clusters of facts or judgment."[435]

> [T]he frame determines whether most people notice and how they understand and remember a problem, as well as they evaluate and choose to act upon it. The notion of framing thus implies that the frame has a common effect on large portions of the receiving audience, though it is not likely to have a universal effect on all.[436]

In the context of political news, framing "call[s] attention to some aspects of reality while obscuring other elements, which might lead audiences to have different reactions."[437] Entman explains that framing is the "imprint of power" and "plays a major role in the exertion of political power."[438]

American political scientist Santo Iyengar hypothesized that all news stories could be classified as either "episodic" or "thematic."[439] Iyengar described that the episodic news frame presents an issue as a "case study or an event-oriented report," and discusses it as a discrete instance.[440] On the other hand, the thematic news frame "places public issues in some more general or abstract context."[441] "The essential difference between episodic and thematic framing is that episodic framing depicts concrete events that illustrate issues, while thematic framing

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[435] *Id.*

[436] *Id.*

[437] *Id.* at 55.

[438] *Id.*

[439] *See* IYENGAR, *supra* 424, at 13–14.

[440] *Id.* at 14.

[441] *Id.*

presents collective or general evidence."[442] Despite this theoretical dichotomy, "few news reports are exclusively episodic or thematic," but rather reporting often contains aspects of both episodic and thematic framing, with one predominating.[443]

Since distinguishing between an episodic and thematic frame is not always straightforward, conceptualizing the two news frame by what is *triggering* the coverage can be helpful. Episodic coverage often presents a specific issue and is often prompted by a distinct event and approaches the audience as "consumers."[444] On the other hand, thematic coverage "approach[es] the audience as citizens" and focuses on how to fix the conditions that contribute to the underlying problem.[445] Considering this difference, episodic framing of specific events often lacks context, which is more often present in thematic coverage and presents issues as "'public' in nature, and therefore appropriately solved in the realm of policy."[446]

The difference between the two frames is significant because whether an episodic or thematic frame is used, "affects how individuals assign responsibility for political issues."[447] Assignment of responsibility is a critical consideration because it is a "primary factor that determines opinions concerning political issues."[448] Episodic framing "elicit[s] individualistic

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[442] *Id.*

[443] *Id.* ("Even the most detailed, close-up look at a particular poor person, for instance, invariably includes lead-in remarks by the anchorperson or reporter on the scope of poverty nationwide. Conversely, an account of the legislative struggle over budgetary cuts in social welfare programs might include a brief scene of children in a day-care center scheduled to close as the result of the funding cuts.").

[444] *See Episodic vs. Thematic Stories*, FRAMEWORKS (June 2, 2017), https://www.frameworksinstitute.org/article/episodic-vs-thematic-stories/.

[445] *Id.*

[446] *Id.*

[447] *Id.* at 15.

[448] *Id.* at 8.

rather than societal attributions of responsibility, while thematic framing has the opposite effect."[449] This difference can affect whether people believe the solution to a given problem can be achieved by individual means, or whether a broader social or institutional solution is required.[450]

Iyengar proposes that "episodic framing contributes to the trivialization of public discourse and the erosion of electoral accountability,"[451] both of which are critical to self-governance. Iyengar concluded that episodic framing "glosses over national problems" because the frame diverts attention away from societal and government responsibility.[452] On the other hand, thematic frames approach the audience as citizens and discuss how to fix the underlying issues that led to the problem.[453]

Since legal scholars and policymakers are actively debating Section 230 reform efforts and proposals, how journalists frame the issues presented by Section 230 can have an effect in driving public understanding, public opinion, and the public's desire for a solution. What frame—episodic or thematic—is used by the media when covering Section 230 could play an important role in the discussion about if and how Section 230 should be changed. The use of a thematic frame would present Section 230 as a collective issue regarding collective action and would suggest that institutional solutions are required to solve the problems commonly

[449] *Id.* at 15–16.

[450] *See Episodic vs. Thematic Stories*, *supra* note 444.

[451] IYENGAR *supra* 424, at 143.

[452] *Id.*

[453] *See Episodic vs. Thematic Stories*, *supra* note 444 ("The more thematic and contextual the coverage, the more likely it is that citizens will see the issue as one appropriate for collective action.").

associated with the law.[454] Therefore, how Section 230 is framed by the media will indicate if Section 230 is being effectively presented in a way that would spur citizens to rely on self-governance principles to solve the perceived problems with the law.

II. Methodology

A. Justification of Method

Content analysis, either quantitative or qualitative, requires a "systematic reading of a body of texts, images, and symbolic matter."[455] The method requires the analysis of "manifest and latent content of a body of communicated material" in order to "ascertain its meaning and probable effect."[456] For the purpose of this study, qualitative content analysis was defined as "a research method for the subjective interpretation of the content of text data through the systematic classification process of coding and identifying themes or patterns."[457]

Analysis of textual data has several advantages. First, textual data, such as news articles, provides rich content that can be analyzed closely for its subtleties.[458] Next, texts influence how readers view the world and act.[459] This is especially true with respect to the role that news coverage of political issues plays in the formation of public opinion and the democratic process.[460] The media plays an important role in the self-governance chain—the media brings

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[454] *See id.*

[455] KLAUS KRIPPENDORFF, CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODS 3 (2d ed. 2004).

[456] *Id.* at 1.

[457] Hsiu-Fang Hsieh & Sarah E. Shannon, *Three Approaches to Qualitative Content Analysis*, 15 QUALITATIVE HEALTH RSCH. 1277, 1278 (2005).

[458] DAVID SILMAN, INTERPRETATING QUALITATIVE DATA 230 (4th ed. 2011).

[459] *Id.*

[460] *See* Williams & Schoonvelde. *supra* note 26, at 1635.

attention to a policy area, which in turn impacts the public's knowledge of that policy issue, creating more accountability for representatives to provide the public with their preferred policy outcomes.[461] Next, texts are naturally occurring and therefore their content is not created by nor influenced by the researcher.[462] Finally, texts are easily available and can be gathered quickly for analysis.[463]

While prior research and an understanding of the case law surrounding Section 230 is helpful in predicting how Section 230 *should* be covered in the media, there is no research, save the Reynolds study mentioned in Chapter 1,[464] that indicates *how* Section 230 is covered by journalists. Therefore, a conventional approach to a qualitative content analysis was most appropriate.[465] While research questions provided a framework for the study, the categories and codes used during the coding process were designed to be flexible to account for emerging data,[466] mimicking a semi-grounded theory approach[467]

An understanding of how the media is currently covering Section 230 can help inform how coverage of the law can be improved to better educate the public. Ultimately this study will serve as the foundation for developing recommendations for journalists to improve their

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[461] *See id.*

[462] *See* SILMAN, *supra* note 458, at 230.

[463] *Id.*

[464] *See supra* notes 91–106.

[465] Hsieh & Shannon, *supra* note 457, at 1279.

[466] *Id.*

[467] *See* THE SAGE HANDBOOK OF GROUNDED THEORY: INTRODUCTION 2 (Anthony Bryant & Kathy Charmaz, eds. 2007) (Grounded theory "is designed to encourage researchers' persistent interaction with their data, while remaining constantly involved with their emerging analyses. Data collection and analysis proceed simultaneously and each informs and streamlines the other.").

coverage of Section 230—emphasizing the most effective and accurate way to convey the legal realities of the law in a way that the public can understand.

B. Sample

This study used a content analysis to examine contemporary news coverage of Section 230 by *The New York Times* and *The Wall Street Journal* over the last two years. Since March 2020, thirty-eight bills have been introduced in Congress proposing various changes to Section 230.[468] In addition to the legislative attention on Section 230, both 2020 Presidential candidates denounced Section 230[469] and leveraged discussion of the law to bolster other policy positions.[470] This two-year time frame is important to examine in light of the introduction of several reform bills, coupled with the attention brought to Section 230 prior to, during, and after the 2020 election.[471]

The articles used for analysis were selected from two of the top-ten highest circulating U.S. daily newspapers archived by ProQuest: *The New York Times* and *The Wall Street Journal.* The *New York Times* is regarded as the most important agenda-setting news organizations in the country,[472] and *The Wall Street Journal* is the largest circulating newspaper in the United

[468] *See All the Ways Congress Wants to Change Section 230*, *supra* note 17.

[469] *See supra* note 16 and accompanying text.

[470] *See All the Ways Congress Wants to Change Section 230*, *supra* note 17 ("Both Republicans and Democrats used Section 230 as a political football to bolster their arguments on racism, misogyny, censorship, elitism, public health, and tech company power.").

[471] *See* Sarah Morrison, *How the Capitol Riot Revived Calls To Reform Section 230*, VOX (Jan. 11, 2021, 4:55 PM), https://www.vox.com/recode/22221135/capitol-riot-section-230-twitter-hawley-democrats ("Big Tech companies from Facebook to Apple took swift action in the wake of the attack on the US Capitol, banning the people and content that helped incite and organize a violent mob that left at least five people dead and dozens injured.").

[472] *See* Kruvand, *supra* note 86, at 41.

States.[473] These newspapers were chosen because they are national newspapers of record, meaning they are believed to be rigorous in their reporting and uphold integrity in their journalist processes.[474] Further, these publications have a national view and aim to create a record that reflects what is going on nationwide, instead of in just one particular geographic area.[475] Additionally, these publications have the most access to politicians, organizations, and other key players in policy debates, as well as the most resources to cover niche issues such as Section 230.[476]

The aim of this content analysis was descriptive in nature, therefore analysis of reporting from these two newspapers is important given their influence and institutional respect. *The New York Times* and *The Wall Street Journal* have a certain agenda-setting role within the media ecosystem itself. News tends to "filter vertically within the news hierarchy," with elite newspapers such as *The New York Times* and *The Wall Street Journal* setting the agenda for more local news organizations.[477] Thus, if any traditional newspaper outlet is properly motivated

[473] *See Top 10 U.S. Newspapers by Circulation*, AGILITY PR SOLUTIONS, https://www.agilitypr.com/resources/top-media-outlets/top-10-daily-american-newspapers/ (updated July 2021) [hereinafter *Top 10 U.S. Newspapers by Circulation*]; Paul Glader, *10 Journalism Brands Where you Find Real Facts Rather Than Alternative Facts*, FORBES (Feb. 1, 2017, 1:10 PM), https://www.forbes.com/sites/berlinschoolofcreativeleadership/2017/02/01/10-journalism-brands-where-you-will-find-real-facts-rather-than-alternative-facts/?sh=3d76b904e9b5.

[474] *See 28 National Newspapers of Record*, PRESSBOOKS: WEB LITERACY FOR STUDENT FACT-CHECKERS, https://webliteracy.pressbooks.com/chapter/national-newspapers-of-record/ [hereinafter *28 National Newspapers of Record*].

[475] *See id.*

[476] *See* Paul Farhi, *The White House's New Press Briefing Seat Chart Says a lot About Where Each Reporter Stands*, WASH. POST (Feb. 2, 2022, 7:00 AM), https://www.washingtonpost.com/lifestyle/media/whca-seating-chart-2022/2022/02/01/77820ba2-807b-11ec-bf02-f9e24ccef149_story.html (Both *The New York Times* and *The Wall Street Journal* have seats on the second row of the White House Correspondents' Association seating chart for press briefings, "a marker of a news organization's prominence.").

[477] Kruvand, *supra* note 86, at 43.

and equipped to report on Section 230, it would be elite media institutions such as *The New York Times* and *The Wall Street Journal*. Therefore, the coverage of Section 230 in *The New York Times* and *The Wall Street Journal* represents some of the most influential reporting on the issue of interest.

The decision to focus analysis on articles only published in *The New York Times* and *The Wall Street Journal* was further guided by discretion in sampling. To understand how Section 230 has recently been covered by the media, considering a census of coverage focused on the top two highest-circulating newspapers, as opposed to a smattering of coverage including more media outlets, would be more helpful to ensure the full scope of coverage is analyzed. Analyzing all of the articles from the two publications over the designated time frame ensured that all Section 230 reporting was analyzed and created a seamless timeline of coverage over the two years.

C. Sampling Procedure

1. Article Collection

To collect articles for analysis, the author used the commercial database ProQuest using the "U.S. Newsstream" database. The bounded search term "Section 230" was used in a full-text search. The results were narrowed by limiting the date range to January 1, 2020 to December 31, 2021. As previously discussed, this timeframe represents the most current coverage of the issue which is most relevant for providing a recommendation for how media coverage of Section 230 can be improved. Further, during this period of time, Section 230 has been a top issue for both legislators and the Executive. The results were further narrowed by limiting the results to only articles from *The New York Times* and *The Wall Street Journal.* Finally, results were limited to only "news," which returned a total of 383 articles.

Next, during a pre-coding process, the author refined the total population to include only articles relevant to Section 230. Duplicate articles that were published on the same day were removed. Articles were also discarded if (1) the article was part of a newsletter, (2) appeared in the opinion section of the publication, (3) was not written by staff of either *The New York Times* or *The Wall Street Journal*, or (4) was not relevant to Section 230. Articles were considered relevant and included in the total population if they met at least one of three conditions: (1) the term "Section 230" appeared in one of the first three paragraphs of the article, (2) "Section 230" was mentioned at least twice in the article; or (3) there was at least one full paragraph dedicated to discussing Section 230 within the article (i.e., provides a definition or description of Section 230 or discusses Section 230's associated impacts). After eliminating articles that did not meet the coding criteria, 222 articles were substantively coded using the codebook in **Appendix A**. The coding process involved three coding blocks, Section I, Section II, and Section III, corresponding to Research Question 1, Research Question 2, and Research Questions 3 and 4, respectively.

2. Coding Protocol

A random sample of 10% of the articles (the "Test Sample") was coded using a preliminary version of the codebook in **Appendix A**. After reading and coding 25 articles, the variables in the codebook were better operationalized and some additional categorical variables were identified and incorporated into the final version of the codebook in **Appendix A.**

III. Code Book

A. Section I – Research Question 1

Research Question 1 asked "What is the nature of contemporary news coverage of Section 230 in *The New York Times* and *The Wall Street Journal*?" Research Question 1 included

three nominal variables: (1) news outlet, (2) date of publication, and (3) news frame. Each article was coded based on the publisher (either *The New York Times* or *The Wall Street Journal*) and the date of publication (Month, Day, Year).

Next, articles were coded based on their news frame—either an episodic or thematic news frame. The news frame variable was operationalized using Iyengar's conception of episodic and thematic framing.[478] This approach offered a basic framework for the study, most specifically as it related to the concept of attribution of responsibility of remedying public issues.[479] Operational definitions were as follows:

News Frames

- Episodic: Reporting that presented an issue as a case study or an event-oriented report and discussed the issue as a discrete instance. Episodic reporting used concrete events to illustrate specific policy issues.[480] Often episodic reporting would introduce a policy issue by signaling to some related event that triggered coverage of the issue, such as a hearing, a speech, or the passage of a new law.
- Thematic: Reporting that placed public issues in some more general or abstract context, relying on collective or general evidence to illustrate policy issues.[481] Thematic reporting often focused on trends over time, the effect of issues on the public more generally, and advocated for better policies.[482]

[478] *See* IYENGAR, *supra* note 424; *see also supra* Chapter 3, Part I.C.

[479] IYENGAR, *supra* note 424, at 14.

[480] *Id.* at 14.

[481] *Id.*

[482] *See Episodic vs. Thematic Stories*, *supra* note 444.

B. Section II – Research Question 2

Research Question 2 asked: "What are the legal frames and associated impacts of the law present in characterizations of Section 230?" Five variables were used to answer Research Question 2: (1) whether Section 230 was defined (dichotomous variable), (2) the dominant legal frame of the definition of Section 230 (nominal variable), (3) the tone of the definition of Section 230 (nominal variable), (4) impacts associated with Section 230 (nominal variable), and (5) the tone of the characterization of the associated impact (nominal variable).

First, each article was analyzed to see if Section 230 was defined and was coded either (1) yes or (2) no. If the article did include a definition of Section 230, the definition was recorded for qualitative analysis. "Definition" was interpreted broadly to capture any description of Section 230 within the article, technical or colloquial.[483]

Next, if the article did include a definition of Section 230, the definition was coded based on its legal frame, either (1) publisher function, (2) content moderation function, (3) both, or (4) neither. The legal frames were operationalized using the text of Section 230, specifically sections 230(c)(1) and 230(c)(2), as well as subsequent judicial interpretations of how the law is applied. The frames used to define Section 230 were analyzed to determine which functions of Section 230 were most commonly discussed in coverage of the law and to evaluate which functions, if any, were overlooked. Operational definitions were as follows:

[483] An example of a description that would be considered a "definition" of Section 230 for the purposes of this study might be: "Section 230 provides legal immunity from liability for internet services and users for content posted on the internet." *See* Dan Patterson, *What Is "Section 230," and Why do Many Lawmakers Want To Repeal It?*, CBS NEWS (Dec. 16, 2020, 10:59 AM), https://www.cbsnews.com/news/what-is-section-230-and-why-do-so-many-lawmakers-want-to-repeal-it/ (note, this is an example pulled from the Internet, and not from the study sample).

Legal Frames

- Publisher Liability:[484] The definition focused on platforms not being treated as publishers of or having liability for the content that individual third-party users post on their sites.[485] The definition focused on platforms performing a traditional publisher role,[486] such as acknowledging that platforms host third-party user-generated content.
- Content Moderation: Definition focused on platforms' content moderation practices and platforms' standards for what type of content they allow on their sites.[487] The definition focused on platforms' decisions to restrict access to or remove content.
- Both: Definition incorporated both concepts of Publisher Liability and Content Moderation as defined above. Articles coded as "both" either contained multiple definitions of Section 230, with at least one definition that could be coded as Publisher Liability and one that could be coded as Content Moderation, or contained a single definition that incorporated both concepts of Publisher Liability and Content Moderation.
- Neither: Definition incorporated neither concepts of Publisher Liability nor Content Moderation as defined above, but included a more general description of Section 230 without discussing its specific legal applications.

[484] The text of 47 U.S.C. § 230(c)(1) makes clear that platforms are *not* treated as publishers. The "Publisher Function" legal frame was used to categorize definitions that described platforms and their functions in terms of the traditional concept of a "publisher" under the First Amendment. The nomenclature of this frame is not intended to suggests platforms are publishers in a legal sense under Section 230.

[485] 47 U.S.C. § 230(c)(1).

[486] Although platforms are not considered "publishers" from a legal perspective.

[487] *Id.* § 230(c)(2).

Next, a sentiment analysis was used to determine the tone of the definitions in each article. Each definition was coded as (1) positive, (2) negative, or (3) neutral. Tone of media coverage of an issue is important because positive or negative textual descriptions of issues of interest affects readers' preferences.[488] Therefore, the evaluative tone of media coverage of an issue plays an important role in the agenda-setting process, which ultimately affects the readers' evaluation of the issue,[489] and subsequently their likely view of the policy. Each definition was coded for tone based only on the words included in the definition. Operational definitions were as follows:

Tone

- Positive: Definitions were coded as "positive" if some aspect of the definition highlighted the benefits of Section 230.
- Negative: Definitions were coded as "negative" if some aspect of the definition highlighted that there was a harm associated with Section 230.

  Neutral: Definitions were coded as "neutral" if the definition did not highlight a positive nor a negative aspect of Section 230.

Next, the impact Section 230 has on individuals, corporations, and society was considered. Articles were coded as (1) discussing an individual impact, (2) discussing a corporate impact, (3) discussing a societal impact, or (4) other. Articles coded as "other" either

[488] Jakob-Moritz Eberl & Carolina Plescia, *Coalitions in the News: How Saliency and Tone in News Coverage Influence Voters' Preferences and Expectations About Coalitions,* 55 ELECTORAL STUDIES 30, 32 (2018) ("[T]he tone of media coverage is important because audiences' inferences about candidate traits are rather automatically made from positive or negative descriptions in texts." (citing Jason N. Druckman & Michael Parkin, *The Impact of Media Bias: How Editorial Slant Affects Voters*, 67 J. POLI. 1030 (2005)).

[489] *See* Tamir Sheafer, *How To Evaluate It: The Role of Story-Evaluative Tone in Agenda Setting and Priming*, 57 J. COMM. 21, 35 (2007).

had (1) no discussion of impact or (2) included a discussion of multiple types of impact. A textbox was used for text entry to explain why impact was coded as "other." Operational definitions were as follows:

Associated Impact

- Individual: Articles included a discussion about defamation,[490] discrimination, harassment, or privacy concerns as the effects relate to how platforms currently operate under Section 230.[491] Individual impact also encompassed effects on individual platform users (individuals or entities) such as children.[492]
- Corporate: Articles discussed how Section 230 impacts businesses, such as lowering the barriers of entry and lowering financial burdens such as litigation costs.[493] Corporate effects also included how platforms' algorithms and algorithmic biases affect companies.[494]
- Societal: Articles included a discussion regarding how Section 230 affects society. The article focused on misinformation and disinformation as it relates to elections, public

[490] *Section 230 Protections*, EFF, https://www.eff.org/issues/bloggers/legal/liability/230.

[491] David Morar & Chris Riley, *A Guide for Conceptualizing the Debate Over Section 230*, BROOKINGS (April 9, 20201), https://www.brookings.edu/blog/techtank/2021/05/14/section-230-reform-deserves-careful-and-focused-consideration/ [hereinafter *A Guide for Conceptualizing the Debate Over Section 230*].

[492] Derek E. Bambauer, *What Does the Day After Section 230 Reform Look Like?*, BROOKINGS (Jan. 22, 2021), https://www.brookings.edu/techstream/what-does-the-day-after-section-230-reform-look-like/.

[493] Jennifer Huddleston, *Section 230 as a Pro-Competition Policy*, AMERICAN ACTION FORUM (Oct. 27, 2020), https://www.americanactionforum.org/insight/section-230-as-a-pro-competition-policy/.

[494] Jacob Metcalf, Brittany Smith & Emmanuel Moss, *A New Proposed Law Could Actually Hold Big Tech Accountable for Its Algorithms*, SLATE (Feb. 9, 2022, 12:22 PM), https://slate.com/technology/2022/02/algorithmic-accountability-act-wyden.html.

health, education, or affecting our legislative process.[495] Perception of partisan bias was also considered a societal impact.[496]

- Other: Articles either (1) did not include a discussion regarding Section 230's impact, or (2) included a discussion of multiple types of impacts.

Finally, articles were coded based on the tone of the impact as either (1) positive, (2) negative, or (3) neutral. Operational definitions are as follows:

Tone

- Positive: The associated impact of Section 230 was discussed in terms of how it benefits an individual, corporations, or society.
- Negative: The associated impact of Section 230 was discussed in terms of how it harms an individual, corporations, or society.
- Neutral: The associated impact of Section 230 was merely acknowledged and was not discussed in terms of how it benefits or harms an individual, corporations, or society.

C. Section III – Research Questions 3 and 4

Research Question 3 asked: "How and to what extent are Section 230's legal components misrepresented in coverage?" Research Question 4 asked: "What is the source of the legal misrepresentation." Two variables were used to answer Research Questions 3 and 4: (1) whether the article contained a legal misrepresentation (dichotomous variable), and (2) the cited origin of the misrepresentation (nominal variable).

[495] *A Guide for Conceptualizing the Debate Over Section 230*, *supra* note 491.

[496] *Id.*

Articles were coded as containing a legal misrepresentation if the article incorrectly represented how Section 230 has been interpreted to operate by the courts.[497] Articles were coded either "yes" there was a misrepresentation, or "no" there was not a misrepresentation. If the article contained a misrepresentation, the misrepresentation was recorded for qualitative analysis.

To begin, several misrepresentations cited by Jeff Kosseff were used as an initial coding framework for identifying misrepresentations. For example, the literature has identified several misrepresentations about Section 230 such as (1) misidentifying the legal provision that allows content moderation,[498] (2) stating that without Section 230, platforms could be held liable for hate speech,[499] (3) stating that without Section 230, platforms could be held liable for disinformation,[500] (4) stating Section 230 requires neutrality,[501] or (5) characterizing Section 230 as a "safe harbor."[502] Further determinations regarding if a statement was a legal misrepresentation were based on the text of the statute[503] or subsequent judicial interpretations of the law, as discussed in Chapter 2.

If an article was coded "yes" for containing a legal misrepresentation, the cited origin of the misrepresentation was coded. Operational definitions are as follows:

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[497] For a comprehensive discussion and analysis of how courts have interpreted Section 230 since its enactment, see Ardia, *supra* note 37.

[498] Kosseff, *supra* note 66, at 3.

[499] *Id.* at 30.

[500] *Id.*

[501] Jason Kelley, *Section 230 is Good, Actually*, EFF (Dec. 3, 2020), https://www.eff.org/deeplinks/2020/12/section-230-good-actually [hereinafter *Section 230 is Good, Actually*].

[502] *See CRS Section 230 Overview*, *supra* note 6, at 32.

[503] 47 U.S.C. § 230.

Sources

- Journalist: Misrepresentation was unattributed to an external source.
- Politician or Elected Official: Misrepresentation was attributed to an individual such as the President of the United States or a Congressman.
- Legal or Media Scholar: Misrepresentation was attributed to an individual with legal, academic, or media expertise.
- Big Tech Stakeholder: Misrepresentation was attributed to an individual representing large platforms such as Facebook, Google, Twitter, etc.
- Other Platform Stakeholder: Misrepresentation was attributed to an individual representing a platform that does not fit into the traditional "Big Tech" category but is affected by Section 230.
- Affected/Aggrieved Party: Misrepresentation was attributed to an individual or a business, other than another platform, that has been affected in some way by Section 230.
- Case Law or Statute: Misrepresentation was attributed to a statute or a judicial interpretation of how Section 230 should be applied.
- Institution: Misrepresentation was attributed to an institution such as a think tank, or other non-profit or academic group.
- Other: Misrepresentation was attributed to a source that does not fit into one of the other categories.

The theories drove the design and method, looking at news coverage as an important part of the deliberative process in considering legal changes to 230.

CHAPTER 4: RESEARCH QUESTION 1

I. Results

The first research question asked: What is the nature of contemporary news coverage of Section 230 in *The New York Times* and *The Wall Street Journal*?" To answer this question about the nature of Section 230 coverage, Research Question 1 included three variables: (1) publication, (2) date of publication, and (3) news frame.

Table 1.
News frame by publication.

	New York Times		Wall Street Journal			
	n	*%*	*n*	*%*	*Total n*	*%*
Episodic	112	88.2	81	85.3	193	86.9
Thematic	15	11.8	14	14.7	29	13.1
Total	127		95		222	

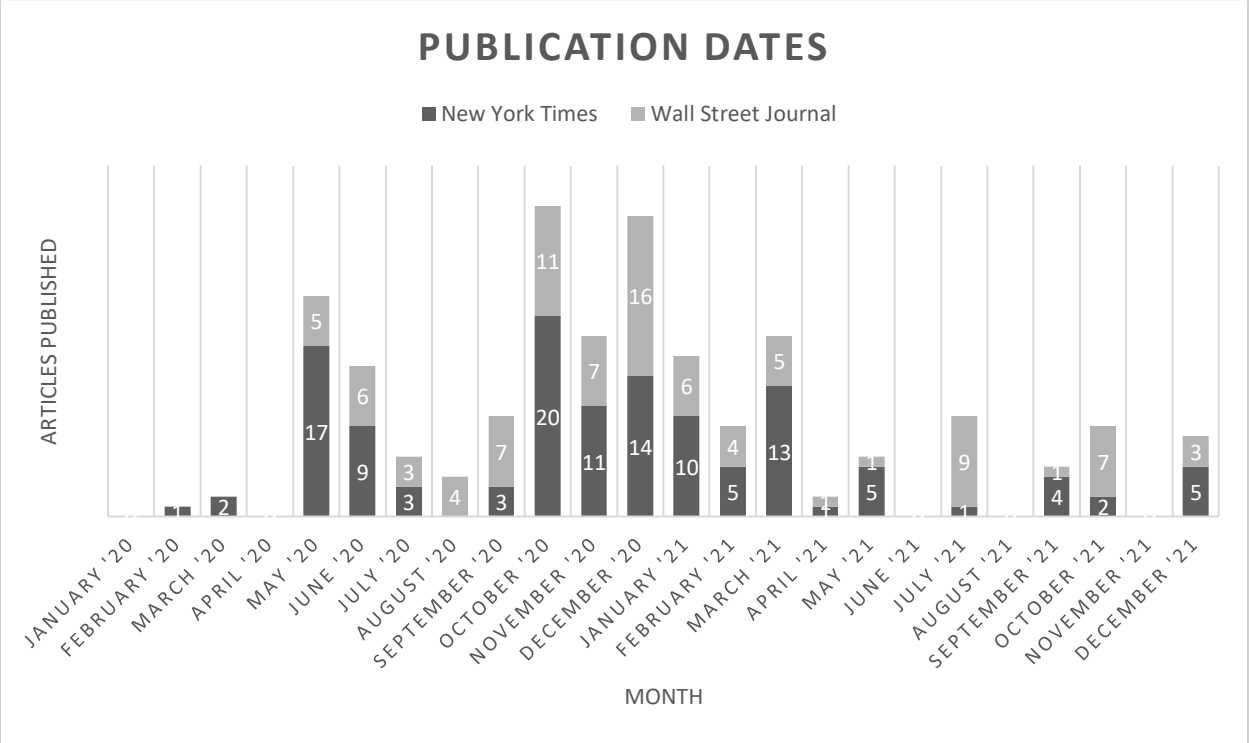
Notes. *N*=222.

First, with respect to publication, as previously discussed in Chapter 3, the articles used for analysis were selected from two of the top-ten highest circulating U.S. daily newspapers archived by ProQuest: *The New York Times* and *The Wall Street Journal.* Both papers are known for their reach and their elite status among traditional newspapers.[504] The frequency of news coverage of Section 230 over the two years was comparable between the two publications. Both *The New York Times* and *The Wall Street Journal* dedicated a fair amount of reporting in 2020 and 2021 to issues related to Section 230—many of which focused on growing concerns regarding "Big Tech's" role in our society.[505] A total of 222 articles were coded for this study. Of the total sample, 56.8% (n= 127) of the news coverage analyzed was published in *The New York Times*, and 43.2% (n=95) was published in *The Wall Street Journal*, as outlined in Table 1.

[504] *See Top 10 U.S. Newspapers by Circulation*, *supra* note 473; Glader, *supra* note 473.

[505] *See, e.g.*, Nellie Bowles, The Complex Debate Over Silicon Valley's Embrace of Content Moderation, N.Y. TIMES (June 5, 2020), https://www.nytimes.com/live/2020/07/29/technology/tech-ceos-hearing-testimony ("Section 230 of the federal Communications Decency Act, passed in 1996, shields tech platforms from being held liable for the third-party content that circulates on them. But taking a firmer hand to what appears on their platforms could endanger that protection, most of all, for political reasons. One of the few things that Democrats and Republicans in Washington agree on is that changes to Section 230 are on the table. Mr. Trump issued an executive order calling for changes to it after Twitter added labels to some of his tweets. Former Vice President Joseph R. Biden Jr., the presumptive Democratic presidential nominee, has also called for changes to Section 230.").

Figure 1.
Publication dates by month from January 2020 through December 2021, by publication. In months with high Section 230 coverage (greater than 15 articles published in a month), articles focused on major events related to Section 230.



Next, the publication date of each article was considered. Figure 1 shows that during some months, either paper dominated coverage of Section 230 issues, but overall, coverage between the publications was fairly even. Figure 1 illustrates the number of articles from the sample published in each month of 2020 and 2021, separated by publication. Publication of articles relating to Section 230 appeared to coalesce around major political events that triggered coverage related to the law. For example, in May 2020, coverage including discussion of Section 230 focused primarily on Twitter appending fact check labels to former President Trump's tweets[506] and his subsequent executive order that sought to reinterpret how Section 230 should be

[506] *See* Davey Alba, Kate Conger & Raymond Zhong, *Twitter Adds Warnings to Trump and White House Tweets, Fueling Tensions*, N.Y. TIMES (May 29, 2020), https://www.nytimes.com/2020/05/29/technology/trump-twitter-minneapolis-george-floyd.html ("Twitter said the tweets, which implied that protesters in Minneapolis could be

applied.[507] In June 2020, Facebook removed posts and ads for President Trump's reelection campaign, citing organized hate as its reasoning.[508] In October 2020, articles discussing Section 230 primarily focused on either a Senate Commerce Committee hearing with the leaders of Twitter, Facebook, and Google, the purpose of which was to probe big tech leaders about online speech,[509] or Twitter's removal of the New York Post's article on Hunter Biden in the weeks leading up to the 2020 Presidential election.[510] In November 2020, Section 230 was mentioned primarily in articles discussing how online speech affects elections.[511] In December 2020,

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shot, glorified violence — the first time it had applied such warnings to any public figure's posts.") (updated June 3, 2020);

[507] *See* Matthew Feeney & Will Duffield, *A Year of Content Moderation and Section 230*, CATO (Nov. 2, 2020, 3:14 PM), https://www.cato.org/blog/year-content-moderation-section-230; Laura Forman & Dan Gallagher, *Trump's Twitter Storm Court Soak Social Media*, WALL ST. J. (May 29, 2020, 10:37 AM), https://www.wsj.com/articles/this-twitter-storm-could-soak-social-media-11590763018 ("Then came an executive order signed late Thursday that threatens major changes to the way social-media platforms operate. The order effectively seeks a redesign of the Communications Decency Act (Section 230), which provides legal immunity for social-media platforms from the content posted by users on their sites.").

[508] *See* Emily Glazer, *Facebook Removes Trump Campaign Ads Over for Violating Policy on Use of Hate Symbol*, WALL ST. J. (June 19, 2020, 3:34 AM), https://www.wsj.com/articles/facebook-removes-trump-campaign-posts-ads-for-violating-policy-11592504003 (Facebook Inc. said it took down posts and ads for President Trump's re-election campaign because they violated the social-media giant's policy against "organized hate," marking the latest confrontation in an escalating battle over how tech companies handle controversial political content.").

[509] *See* Ryan Tracy & John D. McKinnon, *Tech CEOs Square Off With Senators in Hearing Over Online Speech*, WALL ST. J. (Oct. 28, 2020, 5:35 PM), https://www.wsj.com/articles/senate-tech-hearing-facebook-twitter-google-11603849274 ("Chiefs of the largest social-media companies tangled with U.S. senators over their role in public discourse amid a contentious election that has stoked bipartisan criticism of the companies' policies. Facebook Inc. Chief Executive Mark Zuckerberg, Twitter Inc. CEO Jack Dorsey and Sundar Pichai, CEO of Google and YouTube owner Alphabet Inc., have spent the years since the 2016 election rewriting their policies and taking a more active role in moderating online speech -- in part to avoid a spotlight like the one placed on them Wednesday. Instead, the Senate Commerce Committee hearing reflected deep discontent with social-media platforms' power and equally deep divisions about how to address it.").

[510] *See* David McCabe & Cecilia King, *Republicans Blast Social Media C.E.O.s While Democrats Deride Hearing*, N.Y. TIMES (Dec. 15, 2020), https://www.nytimes.com/2020/10/28/technology/senate-tech-hearing-section-230.html ("But unlike previous tech hearings, this one put the partisan divide on full display. Republicans attacked Twitter and Facebook for what they said was censorship of posts by conservative politicians and for downplaying a recent New York Post article about Hunter Biden, the son of the Democratic presidential nominee, Joseph R. Biden Jr.").

[511] *See* John D. McKinnon & Ryan Tracy, *Zuckerberg, Dorsey Tout Progress in Combating Political Misinformation*, WALL ST. J. (Nov. 17, 2020, 4:24 PM), https://www.wsj.com/articles/facebook-twitter-ceos-brace-for-another-grilling-before-senate-committee-11605620848 ("The chief executives of Facebook Inc. and Twitter Inc. told lawmakers they did better in fending off election interference in 2020, while acknowledging mistakes and signaling an openness to more regulation. The tough tone of questions from both parties at a congressional hearing

coverage including Section 230 was overwhelmingly related to coronavirus-relief legislation, in which former President Trump wanted to include unrelated legislative items such as pairing back Section 230.[512] In January 2021[513] and March 2021,[514] Section 230 was mentioned frequently in the context of how online platforms might have played a role in the incident on January 6th at the U.S. Capitol.

As demonstrated in Figure 1, there were five months over the two years covered by this study where neither *The New York Times* nor *The Wall Street Journal* published a dedicated news article discussing Section 230. Other than the seven months with high Section 230 coverage (months with at least 15 articles), a handful of articles were published each month discussing the law in some form or another.

Next, articles were coded based on their news frame—either as episodic or thematic news. The news frame variable was operationalized using Iyengar's conception of episodic and

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Tuesday suggested that social-media giants face higher risks of new regulation in the next Congress that begins in January.").

[512] *See* Andrew Duehren, *Push for Bigger Stimulus Checks Is Running Out of Time*, WALL. ST. J. (Dec. 30, 2020, 6:54 PM), https://www.wsj.com/articles/push-for-bigger-stimulus-checks-is-running-out-of-time-11609362713 ("On Wednesday, Senate Majority Leader Mitch McConnell (R., Ky.) blocked a vote on the checks, the second time he has objected to Senate Minority Leader Chuck Schumer's (D., N.Y.) requests to vote on the House bill. Instead, he introduced legislation that joins the increased checks with other demands from Mr. Trump that lack bipartisan backing: eliminating Section 230 liability protections for social-media companies and reviewing purported voter fraud in the 2020 election. Mr. McConnell hasn't announced a plan to take up that legislation.").

[513] *See* Ryan Tracy & John D. McKinnon, *Capitol Riot Puts More Scrutiny on Big Tech*, WALL ST. J. (Jan. 11, 2021, 8:49 AM), https://www.wsj.com/articles/capitol-riot-puts-more-scrutiny-on-big-tech-11610372968 ("The storming of the Capitol by supporters of President Trump is expected to turbocharge Congressional efforts to regulate big tech—and many lawmakers are expected to focus on scaling back the liability shield that protects internet companies.").

[514] *See* Ryan Tracy & John D. McKinnon, *Lawmakers Hammer Tech CEOs for Online Disinformation, Lack of Accountability*, WALL ST. J. (Mar. 25, 2021, 5:57 PM), https://www.wsj.com/articles/tech-ceos-to-face-questions-on-online-disinformation-trump-ban-11616664602#:~:text=WASHINGTON%E2%80%94Lawmakers%20blamed%20big%20technology,shield%20enjoyed%20by%20online%20platforms. ("Pressed on Facebook's responsibility for the Jan. 6 event, he said, "I believe that the former president should be responsible for his words and that the people who broke the law should be responsible for their actions.") [hereinafter *Lawmakers Hammer Tech CEOs for Online Disinformation*].

thematic framing.[515] Iyengar's research demonstrated differing effects on viewers' attributions of responsibility for political issues based on how news coverage was framed. [516] Of the total sample, the large majority (n=193, 86.9%) of articles were written with an episodic news frame, as outlined in Table 1. Only 13.1% (n=29) of articles were written with a thematic news frame. The two publications had comparable amounts of thematic reporting (*The New York Times*: n=15, 11.8%; *The Wall Street Journal*: n=14, 14.7%).

The episodic news frame presented issues related to Section 230 as event-oriented reports, discussed the effects associated with Section 230 as discrete instances, or used concrete events to illustrate issues related to Section 230.[517] Often episodic reporting would introduce a policy issue by signaling to some related event that triggered coverage of the issue, such as a hearing, a speech, or the passage of a new law. Language that indicated that an article was written with an episodic frame included examples such as: "Three influential GOP senators introduced legislation Tuesday . . . ,"[518] or "House lawmakers signaled Wednesday . . . ."[519]

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[515] *See* IYENGAR, *supra* note 424.

[516] Shanto Iyengar, *Framing Responsibility for Political Issues*, 546 MEDIA & POL. 59, 61–62 (1996).

[517] IYENGAR, *supra* note 424, at 14.

[518] John D. McKinnon, *Senate Republicans Push Bill to Weaken Liability Shield for Online Platforms*, WALL. ST. J. (Sept. 8, 2020, 6:36 PM), https://www.wsj.com/articles/senate-republicans-push-bill-to-weaken-liability-shield-for-online-platforms-11599603303 ("Three influential GOP senators introduced legislation Tuesday that would make social-media platforms more responsible for their online content, an initiative likely to face fierce resistance from Silicon Valley. The legislation takes aim at Section 230 of the 1996 Communications Decency Act, which gives online companies broad immunity from legal liability for user-generated content on their platforms.").

[519] John. D. McKinnon, *Big Tech's Liability Shield Is Under Siege*, WALL. ST. J. (Dec. 1, 2021, 4:03 PM), https://www.wsj.com/articles/big-techs-liability-shield-under-siege-11638374930 ("House lawmakers signaled Wednesday they would press forward with legislation to make internet platforms more accountable to online users, in what is expected to be a showdown between Washington and Silicon Valley. Legislators are seeking to scale back the legal protections that generally allow social-media platforms such as Twitter Inc. and Meta Platforms Inc.'s Facebook to post user content without being liable for it. That shield was granted in Section 230 of the Communications Decency Act of 1996, a provision that big-tech companies view as a cornerstone of the modern internet.").

Conversely, thematic reporting placed the Section 230 discussion in some more general or abstract context and relied on collective or general evidence to illustrate issues related to Section 230.[520] Thematic reporting often focused on trends over time and the effect of Section 230 on the public more generally.[521] Thematic articles considered, for example, the then newly-elected Biden Administration's technology policies[522] or a general discussion of how Section 230 is "under attack."[523]

While episodic articles were not always focused on Section 230 specifically, but rather discussed Section 230 as enabling or playing a part in the event being discussed, thematic articles almost always focused explicitly on Section 230—what it is, what it does, and its effects. Some thematic articles outlined the law's origins[524] and discussed subsequent judicial interpretations of

[520] IYENGAR, *supra* note 424, at 14.

[521] *See Episodic vs. Thematic Stories*, *supra* note 444.

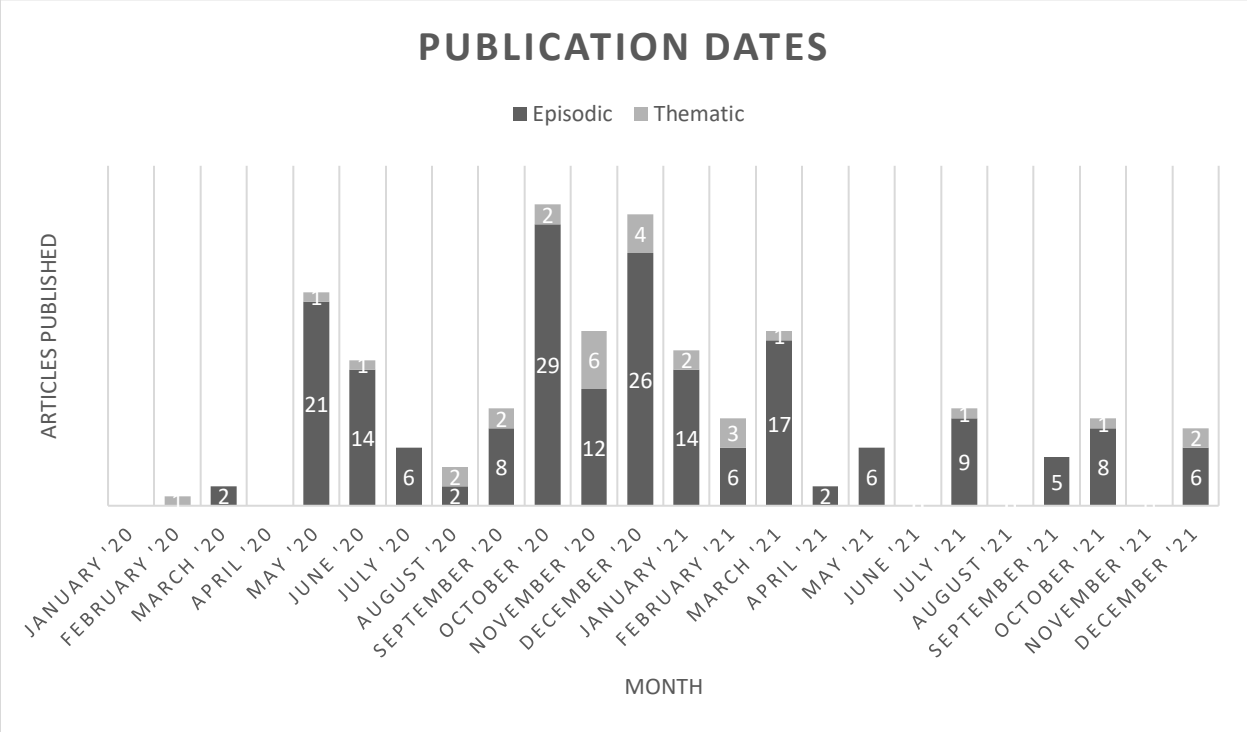
[522] *See* Christopher Mims, *Joe Biden's 5 Tech Priorities*, WALL. ST. J. (Dec. 19, 2020, 12:00 AM), https://www.wsj.com/articles/joe-bidens-5-tech-priorities-11608354009; Eliza Collins, *Kamala Harris, Biden Differed on Trade, Medicare for All. Here's a Guide to Their Positions.*, WALL. ST. J. (Aug. 12, 2020, 3:12 PM), https://www.wsj.com/articles/kamala-harris-biden-differed-on-trade-medicare-for-all-heres-a-guide-to-their-positions-11597259611 (Both Ms. Harris and Mr. Biden have supported changes to Section 230 of the Communications Decency Act, which immunizes tech companies when they moderate content online. Ms. Harris helped pass a law that makes tech platforms responsible when they facilitate sex trafficking, while Mr. Biden has floated the idea of revoking Section 230. Both have said social media platforms need to be held accountable for the spread of misinformation.").

[523] *See* Ryan Tracy, *Social Media's Liability Shield Is Under Assault*, WALL. ST. J. (Nov. 26, 2020), https://www.wsj.com/articles/social-medias-liability-shield-is-under-assault-11606402800 ("The law that enabled the rise of social media and other internet businesses is facing threats unlike anything in its 24-year history, with potentially significant consequences for websites that host user content.") [hereinafter *Social Media's Liability Shield Is Under Assault*].

[524] *See Social Media's Liability Shield Is Under Assault*, *supra* note 523 ("Congress enacted Section 230 in 1996, during the internet's adolescence. Courts had held early online services liable when they tried to moderate posts, similar to a newspaper's liability for what it decides to publish. Lawmakers overrode those court decisions to encourage websites to be Good Samaritans and remove objectionable content."); Daisuke Wakabayashi, *Legal Shield for Social Media Is Targeted by Lawmakers*, N.Y. TIMES (May 28, 2020), https://www.nytimes.com/2020/05/28/business/section-230-internet-speech.html (including a discussion of Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (S.D.N.Y. May 24, 1995)).

the law.[525] Such thematic articles illustrated a more complete picture of the function and purpose of Section 230, as compared to episodic articles.

Figure 2.
Publication dates by month from January 2020 through December 2021, by news frame. In months with high Section 230 coverage (greater than 15 articles published in a month), the predominate news frame was overwhelmingly episodic.



Similar to Figure 1 above, Figure 2 demonstrates much of Section 230 reporting is in response to major political events that bring to the forefront questions about the power of Big Tech and the importance of online speech. The majority of articles published in every month

[525] *See Social Media's Liability Shield Is Under Assault*, *supra* note 523 ("In Force v. Facebook, one case Justice Thomas cited, the social network had been sued by victims of terrorist attacks in Israel. They alleged Facebook's algorithms connected terrorists with one another and promoted content directing the attacks. The U.S. Court of Appeals for the Second Circuit dismissed the suit in 2019. Even if the victims' claims were true, two judges ruled, Section 230 would immunize Facebook. Making connections 'has been a fundamental result of publishing third-party content on the Internet since its beginning,' they wrote."); Wakabayashi, *supra* note 524 ("The Section 230 amendment was folded into the Communications Decency Act, an attempt to regulate indecent material on the internet, without much opposition or debate. A year after it was passed, the Supreme Court declared that the indecency provisions were a violation of First Amendment rights. But it left Section 230 in place. Since it became law, the courts have repeatedly sided with internet companies, invoking a broad interpretation of immunity.").

(with the exception of February, July, and August 2020) were episodic (May ’20: 95.4%; June ’20: 93.3%; July ’20: 100%; Sept. ’20:80%; Oct. ’20: 93.5%; Nov. ’20: 66.7%; Dec. ’20: 86.7%; Jan. ’21: 87.5%; Feb. ’21: 66.7%; Mar. ’21: 94.4%; Apr. ’21: 100%; May ’21: 100%; July ’21: 90%; Sept. ’21: 100%; Oct. ’21: 88.9%; Dec. ’21: 75%). In the months with high Section 230 coverage, the episodic news frame also dominated. This finding is consistent with Iyengar’s findings that episodic news coverage predominates thematic coverage, in part due to the competitive nature of the news business.[526] Episodic reporting can occur more quickly because it generally does not require reporters with expertise of the subject-matter and does not provide in-depth interpretive analysis of issues,[527] making it more adaptable to the twenty-four hour news cycle.

II. Qualitative Analysis and Discussion

Despite the theoretical dichotomy between episodic and thematic reporting, most articles contained aspects of both thematic and episodic news frames.[528] Articles were coded based on which frame predominated.[529] Distinguishing between an episodic and thematic frame was not always straightforward, therefore the two frames were conceptualized and coded based on what is prompted the news coverage.

As previously discussed, articles were coded as episodic if the article presented a policy issue by signaling to some related event that triggered coverage of the issue, such as a hearing, a

[526] *See* Iyengar, *supra* note 516, at 62.

[527] *Id.*

[528] *Id.* (“Even the most detailed, close-up look at a particular poor person, for instance, invariably includes lead-in remarks by the anchorperson or reporter on the scope of poverty nationwide. Conversely, an account of the legislative struggle over budgetary cuts in social welfare programs might include a brief scene of children in a day-care center scheduled to close as the result of the funding cuts.”).

[529] *Id.*

speech, or the passage of a new law: "Three influential GOP senators introduced legislation Tuesday that would make social-media platforms more responsible for their online content, an initiative likely to face fierce resistance from Silicon Valley."[530] Articles that did not indicate coverage was prompted by some specific occurrence and presented Section 230 in a more general or abstract context, focused on trends over time, or relied on collective or general evidence to illustrate issues related to Section 230 were coded as thematic.[531]

A. Analysis of Thematic and Episodic Reporting

1. Thematic Reporting

Thematic articles (n=29) placed Section 230 within a historical and legal context[532] by providing information such as (1) an explanation of what the law is and does, (2) why the law was enacted, (3) critiques of the law and its effects, (4) perspective from the beneficiaries of Section 230's protections, (5) reform efforts and consequences of reform, and (6) judicial interpretations of the law. By providing a multi-faceted description of Section 230, the thematic

[530] John D. McKinnon, *Senate Republicans Push Bill to Weaken Liability Shield for Online Platforms*, WALL. ST. J. (Sept. 8, 2020, 6:36 PM), https://www.wsj.com/articles/senate-republicans-push-bill-to-weaken-liability-shield-for-online-platforms-11599603303 [hereinafter *Senate Republicans Push Bill to Weaken Liability Shield for Online Platforms*].

[531] IYENGAR, *supra* note 424, at 14; *see Episodic vs. Thematic Stories*, *supra* note 444; Christopher Mims, *Joe Biden's 5 Tech Priorities*, WALL. ST. J. (Dec. 19, 2020, 12:00 AM), https://www.wsj.com/articles/joe-bidens-5-tech-priorities-11608354009; Eliza Collins, *Kamala Harris, Biden Differed on Trade, Medicare for All. Here's a Guide to Their Positions.*, WALL. ST. J. (Aug. 12, 2020, 3:12 PM), https://www.wsj.com/articles/kamala-harris-biden-differed-on-trade-medicare-for-all-heres-a-guide-to-their-positions-11597259611 (Both Ms. Harris and Mr. Biden have supported changes to Section 230 of the Communications Decency Act, which immunizes tech companies when they moderate content online. Ms. Harris helped pass a law that makes tech platforms responsible when they facilitate sex trafficking, while Mr. Biden has floated the idea of revoking Section 230. Both have said social media platforms need to be held accountable for the spread of misinformation."); *See Social Media's Liability Shield Is Under Assault*, *supra* note 523 ("The law that enabled the rise of social media and other internet businesses is facing threats unlike anything in its 24-year history, with potentially significant consequences for websites that host user content.").

[532] *See* Iyengar, *supra* note 516, at 62.

article provided the important background information the public needs to engage in meaningful public debate about the law, which is necessary for self-governance.[533]

Thematic articles demonstrated several key aspects Section 230 such the law's historical context, critiques of the law, how the law has benefitted platforms, and proposed avenues for reform. This breadth of coverage was indicative of thematic reporting. A discussion of multiple characteristics of Section 230 helped to contextualize the current debate around the law, providing and building upon background information related to Section 230 to develop a more complete analysis for readers.

Not all thematic articles included a full discussion of the historical context of the law or a complete background regarding the debate around Section 230. One particular article that included many of the characteristics of thematic reporting is illustrative of the potential depth of reporting on Section 230. The article began by placing the debate around Section 230 into a historical context:

> The law that enabled the rise of social media and other internet businesses is facing threats unlike anything in its 24-year history, with potentially significant consequences for websites that host user content. Section 230 of the Communications Decency Act was instrumental to the success of Silicon Valley tech giants such as Facebook Inc., Twitter Inc. and Alphabet Inc.'s Google and YouTube by giving them broad immunity for the content they publish from users on their sites.[534]

Next, the article articulated some of the common Section 230 critiques, focusing on both political parties' assessments of the law and its effects.[535] Following a discussion of concerns regarding

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[533] Education, or "adequate intelligence" is as a pre-condition to effective self-government, or political freedom. *The Freedom of the Electorate*, *supra* note 364, at 98 ("Men are politically free if, and only if, with adequate intelligence, with unremitting zeal for the nation's welfare, and by Constitutional authorization, they actively govern themselves.").

[534] *Social Media's Liability Shield Is Under Assault*, *supra* note 523.

[535] *Id.* ("Democrats say the immunity has allowed companies to ignore false and dangerous information spreading online, since the companies generally aren't liable for harmful content. Republicans focus their ire on another aspect

Section 230, the article considered how platforms have reacted to the criticism of how their services operate: "Tech companies acknowledge they need to improve their content moderation practices, but they deny negligence or political bias. With attacks coming from both sides, some tech industry leaders have begun to accept the need to make changes."[536]

After considering some of the negative effects of Section 230, the article pivoted and acknowledged how all types of platforms, not just Big Tech, have come to rely on the law, and how a repeal of Section 230 would negatively affect the speech environment online:

> "There are literally thousands of companies whose business model is based upon the protections afforded by Section 230," said Bradford Young, associate general counsel of Tripadvisor Inc., which publishes user reviews of hotels, restaurants and attractions.
>
> If the law were revoked, Mr. Young said, Tripadvisor could find itself either not moderating content at all, leaving up irrelevant posts, or removing negative reviews challenged by business owners to avoid potential liability for publishing false statements.[537]

In discussing the consequences of repealing Section 230, the article discussed more of Section 230's historical context, particularly the standards around content moderation before the law was enacted: Courts had held early online services liable when they tried to moderate posts, similar to a newspaper's liability for what it decides to publish. Lawmakers overrode those court decisions to encourage websites to be Good Samaritans and remove objectionable content."[538]

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of Section 230, which says companies broadly aren't liable for taking down content they deem objectionable. President Trump and others contend liberal-leaning tech companies have used that provision to block conservative views.").

[536] *Id.*

[537] *Id.*

[538] *Id.*

Next, the article provided a brief summary of calls for reform by former President Trump and President Biden, as well as recently proposed reform legislation.[539] Finally, the article concluded with a brief and general discussion of judicial interpretations of Section 230:

> Last month, when the Supreme Court declined to take up a Section 230 case, Justice Clarence Thomas invited further challenges.
>
> "Many courts have construed the law broadly to confer sweeping immunity on some of the largest companies in the world," the conservative justice wrote in a statement published by the court, pointing to companies granted immunity for allegedly altering content or selling faulty products. These decisions, he said, "eviscerated the narrower liability shield Congress included in the statute."[540]

On the whole, thematic articles contained more contextual information and provided a more comprehensive illustration of Section 230 than episodic articles. As discussed next, episodic reporting often focused on only one the key aspects of Section 230, resulting in articles that lacked much of the helpful context provided in thematic articles.

2. Episodic Reporting

Although often focused on only a particular event, episodic articles did not necessarily do a poor job describing or discussing Section 230. In fact, some episodic articles provided comprehensive explanations for how Section 230 is applied:

> A 1996 law, Section 230 of the Communications Decency Act, essentially bars people from suing providers of an "interactive computer service" for libel if users post defamatory messages on their platforms.
>
> It says intermediary website operators —a category ranging from social media giants like Twitter, Facebook and YouTube to blogs that let readers post comments —will not be treated as the publisher or the speaker for making others' posts available.
>
> A related provision also protects the sites from lawsuits accusing them of wrongfully taking down content. It gives them immunity for "good faith"

[539] *Id.*

[540] *Id.*

> decisions to remove or restrict posts they deem "obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable, whether or not such material is constitutionally protected."[541]

Other episodic articles provided helpful background information regarding the legal history of Section 230 and its subsequent judicial interpretations:

> It is a provision that was intended to protect then-emerging internet companies, such as CompuServe and Prodigy, from potentially crippling defamation lawsuits over negative comments posted by users. It gave online companies broad immunity from liability for their users' actions, and very wide latitude to police content on their sites. It has been interpreted expansively by the courts, and critics argue it gives today's giant tech companies too much power; the platforms counter that it is essential to the modern internet's functioning.[542]

Further, a handful of episodic articles provided helpful commentary regarding reforming Section 230 by presenting some of the benefits and harms caused by the law: "The protections provided by Section 230 have allowed Silicon Valley's giants to grow rapidly. But the companies' critics say the law gave them a free pass from policing content like explicit images of children and videos produced by terrorist groups."[543] In the same vein, some episodic articles illustrated the debate around repealing Section 230, by explaining the potential consequences related to speech online if the law was to be repealed:

> Section 230 has given online companies broad immunity from legal liability for their users' actions and wide latitude to police content on their sites. But it has emerged in recent years as a source of frustration for the president and his allies, who allege that social media companies are misusing the provision to limit conservative viewpoints on their sites. Democrats have raised separate concerns

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[541] Charlie Savage, *Trump's Order Targeting Social Media Sites, Explained*, N.Y. TIMES (May 28, 2020), https://www.nytimes.com/2020/05/28/us/politics/trump-twitter-explained.html.

[542] Byron Tau & John D. McKinnon, *Trump's Move to Crack Down on Social Media Sets Up Legal Battle*, WALL ST. J. (May 29, 2020, 6:00 AM), https://www.wsj.com/articles/trumps-move-to-crack-down-on-social-media-sets-up-legal-battle-11590746401.

[543] Catie Edmonson & David McCabe, *Congress Will Press Ahead on Military Bill. Defying Trump's Veto Threat*, N.Y. TIMES (Dec. 2, 2020), https://www.nytimes.com/2020/12/02/us/politics/defense-bill-trump-veto.html.

> about parts of Section 230, arguing it has allowed companies to ignore false and dangerous information spreading online, and President Joe Biden has also called for revoking it.
>
> If Section 230 were to be revoked, internet companies could be forced to invest heavily in monitoring content. Alternatively, they might decide to stop moderating user posts or cease hosting them altogether. Many lawmakers don't support revoking Section 230 altogether and instead propose narrowing the liability shield or placing new obligations on large companies that benefit from it.[544]

As demonstrated above, while some episodic articles accurately conveyed the most important information about Section 230, the main difference between episodic reporting and thematic reporting was the breadth of coverage, with episodic reporting generally lacking much of the background information regarding Section 230 required to capture the complex nature of the law at issue.[545] While episodic news coverage plays its own role in educating the public on current events and stories as they develop, episodic reporting can provide "a distorted depiction of public affairs," because "[t]he portrayal of reoccurring issues as unrelated events prevents the public from cumulating the evidence toward any logical, ultimate consequence."[546]

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[544] Andrew Restuccia & Lindsay Wise, *Trump Threatens To Veto Defense Bill if Tech Liability Shield Stands*, WALL ST. J. (Dec. 1, 2020, 11:30 PM), https://www.wsj.com/articles/trump-threatens-to-veto-defense-bill-if-tech-liability-provision-stands-11606879398.

[545] For example, some articles discussed the interplay between Section 230 and the First Amendment, Maggie Haberman & Kate Conger, *Trump Prepares Orders To Limit Social Media Companies' Protections*, N.Y. TIMES (May 28, 2020), https://www.nytimes.com/2020/05/28/us/politics/trump-executive-order-social-media.html ("Along with the First Amendment, Section 230 has helped social media companies flourish. They can set their own lax or strict rules for content on their platforms, and they can moderate as they see fit."), or made helpful comparisons between platforms and traditional media companies, Jeremy Peters, *Senate Republicans Take Aim at Facebook and Twitter Executives for Sharing of Election Content.*, N.Y. TIMES (Nov. 17, 2020), https://www.nytimes.com/2020/11/17/us/senate-republicans-take-aim-at-facebook-and-twitter-executives-for-sharing-of-election-content.html ("Some lawmakers have favored removing that liability shield and treating the companies more like traditional news media companies, which are less protected because they exercise their own editorial decisions.").

[546] IYENGAR, *supra* 424, at 143.

A primary reliance on episodic reporting instead of thematic reporting has significant implications from a self-governance standpoint because the primary hinderance of self-government is that citizens are not educated.[547] Episodic reporting often does not provide the context necessary for readers to develop an adequate understanding of Section 230. [548] This gap in knowledge makes it difficult for citizens to self-govern in an informed manner because they are not armed with the information to make accurate cost-benefit analyses and therefore are not forming educated policy preferences.

On the other hand, much of the episodic reporting analyzed in this study did not provide a helpful discussion of how Section 230 is applied when discussing issues and current events that directly implicated Section 230. Compared to thematic articles that covered multiple key aspects of Section 230, a common episodic article instead focused on a few narrow issues. For example, an episodic article often identified an issue such as misinformation or censorship, the technology industry is labeled the source of the problem, then Section 230 was cited as enabling the technology industry.[549]

The article, *Senate Takes Sharper Aim at Facebook and Twitter*, coded in the sample demonstrates this trend well.[550] The article itself was written in response to a Senate Judiciary Committee hearing with Mark Zuckerberg of Facebook and Jack Dorsey of Twitter that focused

[547] *Free Speech and Its Relation to Self-Government*, *supra* note 25, at 25 ("The voters . . . must be made as wise as possible . . . [because] . . [t]he welfare of the community require that those who decide issues shall understand them.").

[548] *The Freedom of the Electorate*, *supra* note 364, at 98 ("Men are politically free if, and only if, with adequate intelligence, with unremitting zeal for the nation's welfare, and by Constitutional authorization, they actively govern themselves.").

[549] *See, e.g.*, Celia Kang, David McCabe, Mike Isaac & Kate Conger, *Senate Takes Sharper Aim at Facebook and Twitter*, N.Y. TIMES, Nov. 18, 2020, at B1 [hereinafter *Senate Takes Sharper Aim at Facebook and Twitter*].

[550] *See id.*

heavily on platforms' content moderation practices. First, the article failed to provide a helpful definition of how Section 230 and content moderation relate[551]—creating a weak logical link between the law and the perceived problem, especially for individuals unfamiliar with Section 230. Next, the article described how various lawmakers have proposed that Section 230 be changed to address concerns over content moderation practices; however, there was no discussion of what those changes should be or how those changes would solve the identified problem. Perhaps more troubling, there was little discussion about what impact those changes would have on the online speech atmosphere.[552] Overall, this article, as well as many other similar episodic articles, relied almost exclusively on the events and the actors, in this case the lawmakers and the stakeholders, and not enough on substantive information regarding Section 230. While news coverage of events implicating Section 230 play an important role in contextualizing the issue for the public, details about the news triggering event often bypass the opportunity to educate the public through the reporting.

B. Discussion

Iyengar's research regarding episodic versus thematic news frames has important implications regarding present news coverage of Section 230. The public's engagement with issues surrounding Section 230 is related to the ability of citizens to actively engage in public debate regarding the various proposals for reforming the law. Not only does news coverage play a role in informing the public so that they can understand policy issues, but the framing of news

[551] For an in-depth discussion of definitions used to describe Section 230, see *infra* Chapter 5, Part II.

[552] Notably, the article quotes lawmakers who provide non-specific recommendations that Section 230 be changed. *See Senate Takes Sharper Aim at Facebook and Twitter*, *supra* note 549. For example, Senator Lindsey Graham is cited stating: "We have to find a way when Twitter and Facebook make a decision about what's reliable and what's not, what to keep up and what to keep down, that there is transparency in the system . . . . Section 230 has to be changed because we can't get there from here without change." *Id.*

coverage by the media plays an important role in the discussion about attribution of responsibility for solving those issues.[553] Therefore whether news coverage of Section 230 is written with an episodic frame versus a thematic frame is relevant to whether the media's audience—the citizens—believe the effects of Section 230 can be "traced to private actions and motives" or conversely are "deep-seated . . . political conditions."[554] Episodic framing "breeds" the former, while thematic framing attributes responsibility to society.[555]

The use of an episodic frame to discuss Section 230 reduces a complex issue down to anecdotal event, "shielding society and government from responsibility." On the other hand, the use of a thematic frame to discuss Section 230 presents the effects of the law as a more diverse and comprehensive set of issues, requiring collective action and institutional solutions to solve the perceived problems.[556]

Self-governance theory contemplates the legislative process as representing each citizen.[557] Therefore, self-governance theory would suggest that the responsibility to remedy harms lies with the collective. Thus, how Section 230 is framed by the media is critical, as it affects whether information is presented in a way that spurs citizens to rely on self-governance principles to solve the perceived problems with Section 230. As such, the most effective and influential reporting with respect to Section 230 from a self-governance perspective would be thematic coverage.

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[553] *See* Iyengar, *supra* note 516, at 61–62.

[554] *Id.* at 62.

[555] *See id.*

[556] *See id.*

[557] *See The Freedom of the Electorate*, *supra* note 364, at 106.

Accurate episodic reporting can be helpful in educating readers about certain aspects of Section 230 but generally lacks much of the needed context for understanding the law, its effects, and any consequences of reforming it. Lack of appropriate content can lead to a distorted depiction of the law, preventing the public from forming logical opinions with respect to important issues.[558] This held true for Section 230 coverage. Many of the episodic articles in the sample focused on concerns over content moderation, deplatforming, and misinformation and disinformation; however, most of the reporting failed to connect these issues for readers by providing the historical context or a helpful description of how Section 230 is applied.

As discussed above, approximately one out of every eight articles were thematic (n=29, 13.1%). These results are not surprising considering thematic coverage requires "in-depth, interpretive analysis" which takes longer to research and prepare and might require more specialized knowledge.[559] Nonetheless, the lack of thematic coverage of Section 230 indicates an area of improvement for journalists in their role of informing the public about public issues and encouraging public responsiveness. As demonstrated above in Figure 2, only a handful of thematic articles were published each month discussing Section 230.

These results suggest that journalists should look for opportunities to increase thematic coverage of Section 230. Acknowledging the additional resources, time, and expertise thematic reporting requires, journalists could use some information from their episodic reporting to craft pieces that discuss Section 230 more thoroughly, or provide hyperlinks within articles to create a more thematic effect. This practice could help create a common story-line connecting important

[558] *See* IYENGAR, *supra* 424, at 143 ("The portrayal of reoccurring issues as unrelated events prevents the public from cumulating the evidence toward any logical, ultimate consequence.").

[559] *See id.* at 14.

events and considerations from episodic articles in a way that addresses Section 230 more holistically. According to Iyengar, presenting Section 230 in this way would more clearly signal to readers the importance of collective or societal efforts to resolve the problems associated with Section 230. While journalists themselves often do not have the autonomy to shift and allocate their resources, publications like *The New York Times* and *The Wall Street Journal* should consider shifting a portion of their coverage from single, isolated events, to a broader discussion of how Section 230 operates and how it is affecting our society. A change in focus from the specific to the more general will encourage and allow journalists to include discussion of more key aspects of Section 230, presenting the public with more of the information it needs to form an educated opinion about the law.

CHAPTER 5: RESEARCH QUESTION 2

I. Results

The purpose of Research Question 2 was to determine: "What are the legal and impact frames of Section 230 present in characterizations of the law?" To understand how Section 230 was characterized this study focused particularly on if and how Section 230 was defined and how the law's effects were discussed. Five inquiries were used to answer this question: (1) whether Section 230 was defined; (2) the dominant legal frame of the definition of Section 230; (3) the tone of the definition; (4) the impact frames associated with Section 230; and (5) the tone of the impact frames.

A. Definitions of Section 230

Table 2.
Frequency of articles containing a definition of Section 230.

	New York Times		Wall Street Journal			
	n	%	*n*	%	*Total n*	*Total %*
Section 230 Defined	115	52.3	85	38.6	200	90.1
Section 230 Not Defined	12	5.5	10	4.5	22	9.9
Total	127		95		222	100

Notes. N=222.

First, articles were coded based on whether or not the articles included a definition of Section 230. "Definition" was interpreted broadly to capture any description of Section 230 within the article, technical or colloquial. Table 2 shows that 90.1% (n=200) of articles in the sample included a definition of Section 230.

When analyzed by publication, both *The New York Times* and *The Wall Street Journal* included definitions of Section 230 in articles about the same percent of the time. As depicted in Table 2, 90.6% (n=115) of articles from *The New York Times* contained a definition of Section 230, and 89.5% (n=95) of the articles from *The Wall Street Journal* contained a definition. Thus, overall, regardless of news frame or publication source, articles in the sample included a definition of Section 230 about 90% of the time.

Table 3.
Frequency of the legal frame used in Section 230 definitions.

	New York Times		Wall Street Journal			
	n	%	*n*	%	*Total n*	*Total %*
Publisher Activity	80	40.0	39	19.5	119	59.5
Content Moderation	5	2.5	8	4.0	13	6.5
Both	29	14.5	37	18.5	36	33.0
Neither	1	0.5	1	0.5	2	1.0
Total	127		95		220	100

Notes. N=200. Only articles that included a definition were included.

1. Legal Frame

Next, each article that included a definition of Section 230 was coded for the definition's legal frame. Using the text of Section 230[560] and an understanding of subsequent judicial interpretations of the law,[561] definitions were coded as being framed in the context of (1) publisher activity; (2) content moderation activity; (3) both publisher activity and content moderation activity; or (4) neither publisher activity nor content moderation activity. Table 3 show that more than half (n=119, 59.5%) of the articles that defined Section 230 used the publisher activity frame. These articles focused on platforms not being treated as publishers of or having liability for the content that individual third-party users post on their sites[562] or focused on platforms performing a traditional publisher role, despite the Section 230 carveout.[563] Publisher activity was the most common legal frame across articles published by both *The New York Times* (n=80, 69.6%) and *The Wall Street Journal* (n=39, 45.9%), although the publisher activity frame was not as common in *The Wall Street Journal* as compared to *The New York Times.*

As demonstrated in Table 3, definitions that included a description of both publisher activity and content moderation activity were the second-most prevalent overall (n=66, 33.0%). Coverage in *The Wall Street Journal* more frequently defined Section 230 in terms of both

[560] 47 U.S.C. § 230(c).

[561] *See supra* Chapter 2.

[562] 47 U.S.C. § 230(c)(1).

[563] Using the words "publisher function" to describe this legal frame is not to suggest platforms are publishers under 47 U.S.C. § 230(c)(1). The text of the statute clearly indicates they are not to be treated as such. The nomenclature for this frame is intended to describe the actions of platforms that would traditionally be considered publisher functions under the First Amendment.

publisher activity and content moderation activity (n=37, 43.5%) as compared to *The New York Times* (n=29, 25.2%).

Only a small percentage of articles in the total sample framed Section 230's definition in terms of content moderation (n=13, 6.5%). Content moderation framing made up less than ten percent of coverage in both *The New York Times* (n=5, 4.3%) and *The Wall Street Journal* (n=8, 9.4%). Of the 200 articles than included a definition of Section 230, only two articles (1.0%) did not use either publisher activity nor content moderation activity framing, but instead provided a more general definition.

2. Tone of Definition

Table 4.
Frequency of tone of definitions of Section 230.

	New York Times		Wall Street Journal			
	n	%	*n*	%	*Total n*	*Total %*
Positive	2	1.0	0	0.0	2	1.0
Negative	3	1.5	2	1.0	5	2.5
Neutral	110	55.0	83	41.5	193	96.5
Total	115		95		200	100

Notes. N=200. Only articles that included a definition were included.

Next, a sentiment analysis was used to determine the tone of the Section 230 definitions in each article. The tone analysis was focused on the sentiment within the text of the definition only. Table 4 indicates the Section 230 definitions were overwhelmingly "neutral" (n=193, 96.5%), and this held consistent across publications (*The New York Times:* n=110, 95.7%; *The Wall Street Journal*: n=83, 97.6%). Since the majority of definitions were neutral, only a small percentage of definitions included language that discussed harms (n=5, 2.5%) or benefits of

Section 230 (n=2, 1.0%). A more in-depth, qualitative assessment of the Section 230 definitions can be found in in Part II.

B. Associated Impacts

1. Impact Frames

Table 5.
Frequency of Section 230 impact discussed in each article.

	New York Times		Wall Street Journal			
	n	%	*n*	%	*Total n*	*Total %*
Individual	3	1.4	1	0.5	4	1.8
Corporate	1	0.5	6	2.7	7	3.2
Societal	90	40.5	62	28.0	152	68.5
Both	33	14.9	26	11.8	59	26.6
Total	127		95		200	100

Notes. N=222.

To determine the impact frame of each article, the full text of each article was analyzed. Impact frames were coded as (1) individual, (2) corporate, (3) societal, or (4) other. Table 5 shows the primary impact frame implicated in discussions surrounding Section 230 across the entire sample was societal (n=152, 68.5%). Accordingly, the societal impact frame was the most common across both publications (*The New York Times:* n=90, 70.9%; *The Wall Street Journal*: n=62, 65.3%). Individual (n=4, 1.8%) and corporate impact (n=7, 3.2%) were discussed much less frequently in both *The New York Times* and *The Wall Street Journal*.

Table 6.
Breakdown of impacts coded as "other."

	New York Times		Wall Street Journal			
	n	%	*n*	%	*Total n*	*Total %*
Societal and Corporate	5	8.5	3	5.1	8	13.6
Individual and Corporate	3	5.1	2	3.4	5	8.5
Individual and Societal	10	16.9	8	13.6	18	30.5
All	4	6.8	6	10.2	10	17.0
None	11	18.6	7	11.9	18	30.5
Total	33		26		59	100

Notes. N=59. Table only includes articles coded as "other" impact.

Articles were coded as "other" impact if no impact was discussed, or if multiple of the defined impacts were mentioned. Table 5 demonstrates that articles coded as "other" impact made up 26.6% (n=59) of the sample. Table 6 indicates that of the articles coded as "other," 18 articles, or 8.1% of the total population, did not include any discussion of impacts associated with Section 230. Only 4.5% of the articles mentioned all three defined impacts (individual, corporate, and societal) (n=10). As demonstrated in Table 6, 33 articles included some combination of individual, corporate, and societal impacts (14.4%). Across both publications, societal and individual impacts were paired the most frequently (n=18, 8.1% of total sample), followed by societal and corporate (n=10, 4.5%) and then individual and corporate impacts (n=5, 2.3%).

Table 7.
Total frequency of discussion of each impact frame in the entire sample .

	New York Times		Wall Street Journal			
	n	%	*n*	%	*Total n*	*Total %*
Individual	20	7.9	17	6.7	37	14.5
Corporate	13	5.1	17	6.6	30	11.9
Societal	109	42.7	79	31.0	188	73.7
Total	142		113		255	100

Notes. N=255. N is equal to the number of times an impact was mentioned in the sample.

When the total number of times each category of impact was mentioned in an article was calculated, there were 255 instances within the 222 articles where impacts were discussed. Results were consistent across news frames and publications. Table 7 shows that societal impacts were identified 73.7% (n=188) of the time an impact was mentioned. Individual (n=37, 14.5%) and corporate (n=30, 11.8%) impacts were mentioned nearly the same amount, but much less often than societal impacts.

2. Tone of Impact Frames

Table 8.
Frequency of tone with respect to Section 230 impacts.

	New York Times		Wall Street Journal			
	n	%	*n*	%	*Total n*	*Total %*
Positive	2	1.0	3	1.5	5	2.5
Negative	107	52.5	80	39.2	187	91.7
Neural	1	0.5	1	0.5	2	1.0
Combination	6	3.0	4	2.0	10	4.9
Total	116		88		204	100

Notes. N=204. This table only includes articles that contained a discussion of an impact associated with Section 230.

Finally, the articles that included defined impact frames (n=204) were coded based on tone When the associated impact of Section 230 was discussed in terms of how the law benefits an individual, corporations, or society, it was coded positive. If the associated impact was discussed in terms of how it is harmful to individuals, corporations, or society, it was coded as negative. Associated impacts that were not discussed in terms of their benefits or their harms were coded as neutral.

Table 8 demonstrates the majority of impacts associated with Section 230 were presented using a negative tone (n= 187, 92.7%). This finding was consistent across both publications (*The New York Times:* n=105, 90.5%; *The Wall Street Journal*: n=82, 93.2%). Only 2.5% of articles with an associated impact discussed the impact positively (n=5), and less than 1% discussed the associated impact in a neutral manner (n=2). Only 10 articles that discussed an associated impact discussed multiple impacts, some positively and some negatively (4.9%).

II. Qualitative Analysis and Discussion

A. Analysis of Definitions

1. Legal Frame

Almost all of articles in the sample included a definition of Section 230 (n=200, 90.1%), as demonstrated in Table 2 Analyzing the definitions used in the articles to describe Section 230, several trends emerged. First, considering definitions of Section 230 primarily focused on the law's protection of traditional publisher functions (either the Publisher Function frame or the frame that encompassed both the Publisher Function and Content Moderation function), many articles included similar language to broadly discuss how Section 230 functions to protect platforms from liability for content posted on their sites by third parties. One of the most

common descriptions of Section 230 in this context was that it functions as a "shield" or "legal shield" for platforms, as exemplified below:

> The First Amendment protects free speech, including hate speech, but Section 230 *shields* websites from liability for content created by their users. It permits internet companies to moderate their sites without being on the hook legally for everything they host. It does not provide blanket protection from legal responsibility for some criminal acts, like posting child pornography or violations of intellectual property.[564]

When Section 230 was not described as a shield, it was often defined as providing "immunity" to platforms for the content posted by third-party users: "The law, an element of the 1996 Communications Decency Act, helped fuel the growth of social media by giving internet platforms *immunity* for comments that users, reviewers, consumers and others post on their sites."[565] This description is functionally equivalent to the description of Section 230 as a "shield," because both conveyed that Section 230 provides considerable protection to platforms for the third-party content on their sites. When specific language such as "shield" or "immunity" was not present in the definitions, more general language conveyed that platforms are not held "liable" for third-party content posted on their sites. This included phrases such as "aren't

[564] Wakabayashi, *supra* note 524 (emphasis added).

[565] *Lawmakers Hammer Tech CEOs for Online Disinformation*, supra note 514 (emphasis added).

liable,"[566] "prevent[s] [companies] from being held liable,"[567] "protects [companies] from being sued,"[568] "limits [companies'] liability,"[569] and "without being liable."[570]

In almost all of definitions that framed Section 230 in terms of its protection of publisher activity, the articles specified that the protection is for third-party or user-generated content: "[Section 23] grants social-media companies broad immunity *for the content they publish from users on their sites*."[571] This limiting language, identifying that protection from liability extends only to user-generated content, conveys a critical aspect of how Section 230 has been interpreted by courts to function.[572] After *Fair Housing Council v. Roommates.com*, it is well-established that a platform is protected under Section 230 when a website does not "directly participate[ ] in

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[566] Ryan Tracy, *Lawmakers Target Social Media's Shield*, WALL ST. J., Nov. 27, 2020, at A3 ("Republicans focus their ire on another aspect of Section 230, which says companies broadly aren't liable for taking down content they deem objectionable.").

[567] *How to Fix Social Media*, WALL ST. J. (Oct. 29, 2021, 5:54 PM), https://www.wsj.com/articles/how-to-fix-social-media-11635526928 ("The Communications Decency Act of 1996 included a provision, known as Section 230, that has up to now prevented social media companies from being held liable for the material they circulate.").

[568] Catie Edmondson & David McCabe, *Congress Defies Veto Threat, Keeping Military Bill Intact*, N.Y. TIMES, Dec. 3, 2020, at A19 ("But with his time in office winding down, the president has become increasingly fixated on the idea of using the popular, must-pass legislation to repeal Section 230 of the Communications Decency Act of 1996, which protects platforms like Facebook and YouTube from being sued over much of the content posted by their users, and how they choose to take that content down.") [hereinafter *Congress Defies Veto Threat*].

[569] Shane Goldmacher & Kate Conger, *2 Rulings Protect Social Media's Control*, N.Y. TIMES, Sept. 14, 2021, at B3 ("Out of office, Mr. Trump has sued Facebook, Twitter and Google, arguing that a provision of the Communications Decency Act known as Section 230, which limits internet companies' liability for what is posted on their networks, is unconstitutional.").

[570] John D. McKinnon, *Tech's Liability Shield Under Siege*, WALL ST. J., Dec. 2, 2021, at A4 ("Legislators are seeking to scale back the legal protections that generally allow social-media platforms such as

Twitter Inc. and Meta Platforms Inc.'s Facebook to post user content without being liable for it.") [hereinafter *Tech's Liability Shield Under Siege*]

[571] Lindsay Wise, *Defense Act Easily Passes in the Senate*, N.Y. TIMES, Dec. 12, 2020, at A3 (emphasis added); *see also* John D. McKinnon, *Online Liability Shield Is Targeted*, WALL ST. J., Sept. 9, 2020, at A4 ("The legislation takes aim at Section 230 of the 1996 Communications Decency Act, which gives online companies broad immunity from legal liability *for user-generated content on their platforms*." (emphasis added))

[572] *See* 47 U.S.C. § 230(c)(1), *see also supra* Chapter 2, Part III.C.1.

developing the alleged illegality."[573] Put another way, when a platform does not contribute to the content at all or only makes minor changes to the third-party content that do not contribute to the illegality of the message, Section 230 protects the platform from liability.[574] Prepositions such as "for" and "from" were critical in definitions to accurately describe to what content Section 230's protection applies because the prepositions specify that the protection applies to third-party content.

Definitions that framed Section 230 as encouraging content moderation used varied language to convey that the law protects platforms from the increased liability they would face for moderating content if Section 230 was not in place. In "Content Moderation" frames, articles tended to lack the nuance necessary to accurately describe how Section 230 affects Content Moderation practices. This trend will be discussed further in Chapter 6.

In definitions framed as highlighting content moderation, definitions used similar language to describe Section 230 that was found in the publisher activity definitions. Words such as "liability shield,"[575] and "immunity"[576] were common. The ability to content moderate was frequently described as the ability to "police content." Almost every definition that focused on content moderation, but did not use the term "moderate," used the term "police":

> Mr. Boyd's letter comes a month after the Justice Department sent a legislative proposal that calls for Congress to curb longstanding legal protections for online

[573] Fair Housing Council v. Roommates.com, 521 F.3d 1157, 1174 (9th Cir. 2008).

[574] *Id.*

[575] Sarah E. Neddleman & Georgia Wells, *Big Tech Firms Flex Muscles With Bans*, WALL ST. J., Jan. 11, 2021, at A1 ("Companies' actions will likely come under even more scrutiny as regulators pursue antitrust cases against several tech giants, and as Congress and the incoming Biden administration look to revamp 25-year-old legislation known as Section 230 that has long provided a liability shield for the platforms' decisions over content regulation.").

[576] Ryan Tracy, *Social-Media CEOs Face Subpoenas*, WALL ST. J., Oct. 2, 2020, at A3 ("Thursday, senators cited the need to review Section 230, a legal provision that grants the companies legal immunity in managing content on their sites, as well as privacy and other issues.").

> platforms under Section 230 of the Communications Decency Act of 1996. Those provisions give them broad latitude to police their sites and shield them from legal liability related to users' actions, except in relatively narrow circumstances.[577]

The language in the definitions focusing on content moderation varied more than the definitions focusing on publisher activity, with fewer common phrases across definitions. Some of those definitions are replicated below:

- " Section 230 provides you with the liability protection for content moderation decisions made in good faith. . . .'"[578]
- "To address that issue, some GOP lawmakers have proposed changes to Section 230, a law that immunizes websites from lawsuits for moderating content."[579]
- "In an apparent response to the two social-media companies' treatment of his posts, Mr. Trump posted on both platforms "REPEAL SECTION 230!!!," referring to the law that gives internet platforms the right to moderate content without taking on the legal responsibilities of publishers." [580]

2. Tone

The tone of the Section 230 definitions was overwhelmingly neutral (n=193, 96.5%). Definitions were coded as neutral if they did not include if overt language that indicated either a harm or a benefit associated with Section 230. For example, the following definition: "[Section

[577] Brent Kendall & Aruna Viswanatha, *DOJ Cites Article Access in Bid To Change Law*, WALL ST. J., Oct. 28, 2020, at A10.

[578] Cecilia Kang, *Republicans Question Bans of Trump and Threaten To Weaken Legal Protections*, N.Y. TIMES (Mar. 25, 2021).

[579] Ryan Tracy, *Divided Congress Takes Aim at Big Tech*, WALL ST. J., July 31, 2020, at A2.

[580] Jeff Horwitz, *Facebook Removes Trump's Post About Covid-19, Citing Misinformation Rules*, WALL ST. J. (Oct. 6, 2020, 4:13 PM), https://www.wsj.com/articles/facebook-removes-trumps-post-about-covid-19-citing-misinformation-rules-11602003910.

230] protects platforms like Facebook and YouTube from being sued over much of the content posted by their users, and how they choose to take that content down,"[581] was coded as "neutral" because no part of the definition included harms nor benefits associated with Section 230.

On the other hand, some definitions, although very few, presented Section 230 as positive (n=5, 2.5%) or negative (n=2, 1%). Definitions were coded as "positive" if some aspect of the definition highlighted the benefits of Section 230:

> The law, considered one of the bedrock regulations that allowed the commercial internet to flourish, was intended to give tech companies broad discretion over moderation, allowing them to set rules for what users could and could not post on their sites. It was meant as a practical solution that would *allow people to express themselves freely online*, while keeping companies off the hook for every comment their users made.[582]

In this definition, Section 230 is discussed as enabling the internet to flourish and allowing users to express themselves freely online. While the media plays an important role in educating the electorate so it can engage in self-governance, the internet also provides a space for citizens to ask questions, seek answers, and engage in debate about important policy issues.[583] Emphasizing that Section 230 enables speech online, creating an environment for education and discussion for the purpose of self-governance, can be an effective way to demonstrate how Section 230 actually furthers self-governance preconditions.

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[581] *Congress Defies Veto Threat*, *supra* note 556.

[582] Kate Conger, *Facebook, Google and Twitter C.E.O.s Return to Washington To Defend Their Content Moderation*, N.Y. TIMES (Oct. 18, 2020), https://www.nytimes.com/2020/10/28/technology/facebook-google-and-twitter-ceos-return-to-washington-to-defend-their-content-moderation.html (emphasis added).

[583] The purpose of free speech, according to Meiklejohn, is to educate the people so the people can govern themselves efficiently. *See The First Amendment Is an Absolute*, *supra* note 358, at 263. Education, or "adequate intelligence" is as a pre-condition to effective self-government, or political freedom. *The First Amendment Is an Absolute*, *supra* note 358, at 255. This responsibility, "self-government[,] can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare . . . ." *Id.* Accordingly, citizens must try to understand the issues which affect them.

Conversely, definitions were coded as "negative" if some aspect of the definition highlighted that there was a harm associated with Section 230: "Last week leaders of the House Energy and Commerce Committee rolled out a new proposal to update the liability shield known as Section 230 that generally insulates internet platforms from liability *for harms caused by users' posts on their sites*."[584] In this definition with a negative tone, the description of Section 230 connected the law to harms that occur on platforms.

Overall, articles contained neutral definitions of Section 230 and did not discuss harms or benefits of the law when explaining what the law is and what it does. Presenting Section 230 in a neutral manner is a more effective way, from a self-governance perspective, for journalists to describe the law because a neutral definition is less likely to bias a reader at the outset. The tone of the description of Section 230 is important because positive or negative textual descriptions of Section 230 can affect readers' preferences—whether or not readers believe that Section 230 is beneficial as is, or if the law should be reformed or repealed.[585]

B. Analysis of Impacts

1. Impact Frames

Next, articles were coded based on how the impact of Section 230 was framed—specifically who or what Section 230 affects. The majority of articles included some discussion of Section 230's impacts on either individuals, corporations, or society (n=204, 91.9%). Only 18 articles (8.1%) in the total sample did not include any discussion of Section 230's impacts. The

[584] John D. McKinnon, *Republican and Democrat Lawmakers Step Up Efforts To Adopt Tougher Tech Laws*, WALL. ST. J. (Oct. 19, 2021, 5:30 AM), https://www.wsj.com/articles/u-s-lawmakers-step-up-pressure-to-adopt-tougher-tech-laws-11634635802 (emphasis added).

[585] Eberl & Plescia, *supra* note 488, at 32. ("[T]he tone of media coverage is important because audiences' inferences about candidate traits are rather automatically made from positive or negative descriptions in texts." (citing Jason N. Druckman & Michael Parkin, *The Impact of Media Bias: How Editorial Slant Affects Voters*, 67 J. POLI. 1030 (2005)).

majority of articles framed Section 230 in terms of societal impact (n=152, 68.5%). Many of these articles focused on Section 230's impact and relationship to misinformation and disinformation, as well as how the law is related to partisan bias:

> The legislation, which has been called a "gift to the internet" because of its pro-speech stance, has recently come under scrutiny from both sides of the political spectrum, though for opposite reasons. Democrats have argued that Section 230 should be repealed so that social media companies can be held accountable for misinformation and hate speech spreading widely on their platforms. Republicans who dislike the law say online platforms are using it to silence conservative views.[586]

The frequently mentioned dichotomy of how each political party views Section 230 aptly demonstrated both concerns of misinformation and partisan bias. Other societal impacts included concerns over misinformation as it related to elections[587] and health.[588]

Only a handful of articles focused primarily on Section 230's impact on individuals (n=4, 1.8%) or corporations (n=7, 3.2%). Articles that discussed impacts associated with individuals focused primarily on how platforms, through the protections from Section 230, have become harmful for children.[589] Articles that discussed Section 230's impact on corporations were mostly focused on how platforms' algorithms are economically harmful to other businesses because the

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[586] Oscar Schwartz, *Australian Media May Rethink Facebook Presence*, N.Y. TIMES, Sept. 25, 2021, at B3.

[587] Emily Bazelon, *The Problem of Free Speech in an Age of Disinformation*, N.Y. TIMES, Oct. 13, 2020 ("[Twitter] recently said that as of Oct. 20, it is making more changes to protect the election, including temporarily warning users if they try to share content that the platform has flagged as false.").

[588] David McCabe & Cecilia Kang, *Tech Chiefs Face Grilling on Riot Role*, N.Y. TIMES, Mar. 26, 2021, at B1 ("Lawmakers also criticized the platforms for the way they have enabled the spread of misinformation about the coronavirus pandemic and the vaccines for Covid-19. Representative Anna Eshoo, a California Democrat who represents part of Silicon Valley, told Mr. Dorsey that Twitter should 'eliminate all Covid misinformation -- and not label or reduce its spread, but remove it.'").

[589] *Tech's Liability Shield Under Siege*, supra note 558. ("'Some of the changes under consideration would allow people seriously hurt by social-media algorithms – including some teenage girls who suffer body image issues -- to recover damages in court,' Mr. Pallone said. 'For years now, these platforms have acted above the law and outside the reach of regulators and the public, and it is time for that to change,' he said.").

algorithms favor the platforms' products and services[590] or how Section 230 can affect and complicate online businesses such as Airbnb.[591]

Only 4.5% of the articles mentioned all three defined impacts (individual, corporate, and societal) (n=10), and 33 articles included some combination of individual, corporate, and societal impacts (14.4%). Across both news frames and publications, societal and individual impacts were paired the most frequently (n=18, 8.1% of total sample), followed by societal and corporate (n=10, 4.5%) and then individual and corporate (n=5, 2.3%).

Almost 20% (n=44, 19.7%) of articles included a discussion of more than one impact of Section 230. The law's reach is significant, and as identified in Chapter 3, affects individuals, corporations, and society in various ways. The more complete the news coverage was in terms of addressing multiple of Section 230's impacts, the more helpful and informative the article would be, as considering the law's multi-faceted effects is important when considering if and how the law might be changed.

2. Tone of Impact Frames

Finally, each article was coded based on the tone of the impact. The majority of articles presented impacts associated with Section 230 using a negative tone. For example, one article discussing the societal impact Section 230 used a negative tone to highlight concerns about

[590] John D. McKinnon, *Bill Aims To Curb Internet Firms*, WALL ST. J., Oct. 15, 2021, at A4 ("In particular, the bill would prohibit a range of practices that are harmful to businesses and consumers, such as requiring a business to buy a dominant platform's goods or services in exchange for preferred placement; misusing a business's data in order to compete against it; biasing search results in favor of the dominant firm; and unfairly preventing another business's product from inter-operating with the dominant platform.").

[591] Heather Somerville, *Airbnb Underscores Reach of Law that Shields Web Firms*, WALL ST. J., Jan. 11, 2021, at B1 ("While Airbnb has repeatedly sought protection under [Section 230], its efforts demonstrate the shield's limitations. In 2019, a federal appeals court upheld home-sharing rules in Santa Monica, Calif., deciding that Section 230 doesn't cover online transactions such as home bookings. The decision made it 'much easier for local governments to do whatever they want in terms of regulating Airbnb,' said Abbey Stemler, assistant professor of business law and ethics at Indiana University Bloomington, who cowrote an amicus brief for the Santa Monica case.").

health misinformation online when the article contained a quote from Senator Klobuchar: "Earlier this year, I called on Facebook and Twitter to remove accounts that are responsible for producing the majority of misinformation about the coronavirus, but we need a long-term solution," she said. "This legislation will hold online platforms accountable for the spread of health-related misinformation."[592] An article discussing Section 230's individual impact was also written with a negative tone, discussing the role Section 230 had played in enabling a website that provided information about suicide, which was used by a seventeen year-old to commit suicide.[593] Finally, some articles with corporate impact frames had negative tones, such as an article focused on how platforms use algorithms and strategic product placement to favor themselves, at the expense of other, non-platform businesses causing competitive and economic harm.[594]

Positive tones were used infrequently in discussion of Section 230's impact. In one article discussing Section 230's societal impact, the article focused on Section 230's role in innovation and promoting free speech online. This article contained a response to former President Trump's May 2020 executive order: "Twitter last week described the executive order as 'a reactionary and politicized approach to a landmark law.' It said Section 230 protects innovation and freedom of

[592] Siobhan Hughes, *Bill Targets Health Misinformation*, WALL ST. J., July 23, 2021, at A6.

[593] *See* Megan Twohey & J.X. Dance Gabriel, *Where the Despairing Learn Ways To Die*, N.Y. TIMES, Dec. 9, 2021, A1.

[594] *See* John D. McKinnon, *Effort To Bar Tech Companies From 'Self-Preferencing' Gains Traction*, WALL ST. J. (Oct. 15, 2021, 12:17 PM), https://www.wsj.com/articles/effort-to-bar-tech-companies-from-self-preferencing-gains-traction-11634202000.

expression, and that "attempts to unilaterally erode it threaten the future of online speech and internet freedoms."[595]

In one thematic article that discussed individual, corporate, and societal impacts of Section 230, the tone of coverage was neutral.[596] The article's purpose of providing more background and context for the law may have allowed for a more neutral presentation of Section 230's effects. While most articles did not present Section 230's impacts with a positive or a neutral frame, several articles had a mixed tone, where the discussion of one impact was positive and the discussion of another impact was negative (n=10, 4.9%). Articles including both tones presented provided readers with a more comprehensive discussion of what Section 230 is and what it does.

C. Discussion

The definitions that journalists used to describe Section 230 are an important component of each article because the legal frame of the definition emphasizes certain aspects about the law and makes certain functions of Section 230 more prominent than others.[597] According to framing theory, what aspects of Section 230 are included in definitions affects how readers understand and remember problems associated with the law, as well as how they evaluate and choose to act upon it.[598] This evaluative process is an important part of self-governance because it is the means

[595] John D. McKinnon, *Tech Group Files Lawsuit Against President's Social-Media Executive Order*, WALL ST. J. (June 2, 2020, 7:48 PM), https://www.wsj.com/articles/tech-group-files-lawsuit-against-presidents-social-media-executive-order-11591141687.

[596] Ryan Tracy, *Section 230: What It Is, and Why Politicians Want To Change It*, WALL ST. J. (Mar. 25, 2021, 9:22 AM), https://www.wsj.com/articles/section-230-what-it-is-and-why-politicians-want-to-change-it-11616664601.

[597] Entman, *supra* note 428, at 52–53.

[598] *Id.* at 53.

by which citizens become educated about the matters that are pending consideration.[599] Section 230 reform is not only an oft-mentioned suggestion—various proposals have been introduced in Congress, making Section 230 certainly a "question of policy . . . 'before the house.'"[600]

Informative and helpful Section 230 definitions accurately describe what Section 230 is and what it does—furthering the public's understanding of the law so they can form their own opinions about Section 230. Therefore, an important consideration as to whether a definition is effective is whether or not the description of Section 230 explains the two main functions of the law: (1) Section 230 allows platforms to perform traditional publisher functions, such as exercising editorial control over content, without being considered "publishers" under the traditional First Amendment framework, and therefore platforms are not held liable for the third-party content they host,[601] and (2) because platforms are not treated as publishers of the third-party content on their sites, platforms are empowered to engage in content moderation, even of otherwise constitutionally protected speech. These two functions of Section 230 were categorized in this study as the "Publisher function" and "Content Moderation function" frames.

As previously discussed, the majority of definitions including only the "publisher" frame. Interestingly, despite a majority of definitions referencing only platforms' protection from liability for the content posted by third-parties (59.5%), a large majority of articles were focused on the societal impacts of censorship and deplatforming. Such issues most closely map to the

[599] *See The First Amendment Is an Absolute*, *supra* note 358, at 263; *The Freedom of the Electorate*, *supra* note 364, at 98 ("Men are politically free if, and only if, with adequate intelligence, with unremitting zeal for the nation's welfare, and by Constitutional authorization, they actively govern themselves.").

[600] *Free Speech and Its Relation to Self-Government*, *supra* note 25, at 27.

[601] 47 U.S.C. § 230(c)(1).

"content moderation" frame. And despite many of the articles' focus on censorship and deplatforming, very few articles included definitions with only the "content moderation" frame.

For the purposes of creating the most informed electorate, the most helpful definitions are those that present both of Section 230's functions. These articles were coded as "Both" when discussed above. Only a third of the definitions of Section 230 included both the publisher and content moderation frame, indicating a weakness in journalists' reporting on this issue. Coverage in *The Wall Street Journal* more frequently defined Section 230 in terms of both publisher activity and content moderation activity than *The New York Times*, but coverage in *The Wall Street Journal* still mentioned both legal frames less than half the time. Journalists could improve coverage could be improved by including definitions that explain both legal frames associated with Section 230, regardless of the focus of the article.

Next, the tone of the definition is an important consideration in evaluating media coverage of Section 230. Tone of media coverage of an issue is important because positive or negative textual descriptions of issues affect readers' preferences.[602] Therefore, if the media is to play the role of informing the electorate, neutral coverage of Section 230 as opposed to positive or negative coverage presents issues relating to Section 230 in a less-biased manner and enables the public to use the information to form their own opinions. The definitions of Section 230 overwhelmingly used facially neutral language to describe the law.[603]

Other than the definitions themselves, the context in which Section 230 was discussed within the articles is another important consideration when evaluating the media's responsibility

[602] Eberl & Plescia, *supra* note 488, at 32 ("[T]he tone of media coverage is important because audiences' inferences about candidate traits are rather automatically made from positive or negative descriptions in texts." (citing Jason N. Druckman & Michael Parkin, *The Impact of Media Bias: How Editorial Slant Affects Voters*, 67 J. POLI. 1030 (2005)).

[603] *See* Chapter 5, Part I.A.2.

to educate the public with respect to the law. Discussion of the impacts of Section 230 is important to educate reader about the effects of Section 230 in its present form and also encourages consideration of what the effects of changing the law might be. Therefore, reporting that discusses a range of Section 230's effects would be more informative for the public and provide the public with a more comprehensive explanation of the benefits and drawbacks of the law in its current form as well as the pros and cons of reforming or repealing it.

As discussed above, about 10% of articles contained no discussion of Section 230's impacts. Almost three-fourths of articles discussed only one of Section 230's impact frames: individual, corporate, or societal. Only about 15% of articles discussed a combination of impact frames, and less than 5% of the articles mentioned all three. These results suggest that Section 230 coverage could be improved by including a discussion of multiple impacts associated with the law. Section 230 affects our country in multiple ways—it effects individuals, corporations, and how our society functions. Journalists' acknowledgment of how Section 230 has become interwoven into our daily lives, and subsequently impacts the world we live in, provides yet another important facet for readers to consider when evaluating whether or not Section 230 should be changed, and if so, how.

Finally, similar to how tone of the definitions of Section 230 impacts how readers form opinions about the law, the tone of the discussion of the law's impacts is also important. Focusing on either the positive or the negative effects of Section 230 could encourage readers to adopt the journalists' beliefs about the law before forming their own independent opinions. Thus, journalists should strive to either present the effects of Section 230 in a neutral fashion or ensure that coverage considers multiple impact frames that illustrate both the benefits and the drawbacks of Section 230 and any proposed reform to the law.

As discussed in Part I of this Chapter, the majority of Section 230's impacts were presented using a negative tone. Only 2.5% of articles with an associated impact discussed the impact positively, and 1% discussed the associated impact in a neutral manner. These results suggest that journalists can improve coverage of Section 230 by incorporating more neutral discussion about the law's impacts. Further, since some impact frames, such as the societal frame naturally lean either positive or negative,[604] journalists should include a more robust explanation of Section 230's effects to better demonstrate the law's wide reach. Understanding not just the harms the law can cause but also how the law can empower and advantage, can help the public more accurately determine whether or Section 230 is a net-good or a net-harm.

From an analysis of *The New York Times* and *The Wall Street Journal*'s coverage of Section 230 in this sample, journalists' reporting can be improved from a self-governance perspective by: (1) including definitions of Section 230 that highlight both how the law affects publisher activity and content moderation practices, (2) present the definition of Section 230 using neutral language, (3) include a discussion of multiple impacts associated with Section 230, and (4) present those impacts using neutral language.

[604] The societal frame was frequently associated with misinformation and disinformation which is generally considered to be harmful to society.

CHAPTER 6: RESEARCH QUESTIONS 3 AND 4

I. Results

Research Question 3 asked: "How and to what extent are Section 230's legal components misrepresented in coverage?" and Research Question 4 asked: "What are the sources of the legal misrepresentations?" To answer these question, two variables were used: (1) whether the article contained a legal misrepresentation, and (2) the cited origin of the misrepresentation.

Table 9.
Frequency of misrepresentations in sample.

	New York Times		Wall Street Journal			
	n	%	*n*	%	*Total n*	*Total %*
Misrepresentation	12	5.5	24	10.8	36	16.2
No misrepresentation	115	51.8	71	32.0	186	83.8
Total	127		95		222	100

Notes. N=222.

Articles were coded as containing a legal misrepresentation if the article incorrectly summarized the law's statutory framework or how Section 230 has been interpreted to operate by the courts.[605] If the article contained a misrepresentation, the misrepresentation was recorded for qualitative analysis and the source identified in the article responsible for the misrepresentation was coded. Sources for misrepresentations were coded as (1) journalist (unattributed); (2) political or elected official; (3) legal or media scholar; (4) Big Tech stakeholder; (4) other platform stakeholder; (5) affected/aggrieved party; (6) case law or statute; (7) institution; or (8) other.

As will be discussed in Part II of this Chapter many statements coded as "misrepresentations" were not overt misstatements of the law but rather statements lacking enough important context or requiring clarification. Shown in Table 9, approximately 16% of articles in the sample were coded as containing a misrepresentation (n=36). Within the sample, coverage in *The Wall Street Journal* contained a higher percentage of articles with misrepresentations (n=22, 23.2%) than coverage in *The New York Times* (n=14, 11.0%).

Every misrepresentation identified in the entire sample could be credited to an unattributed source. Therefore, journalists themselves were the source of each misrepresentation. This finding suggests that either journalists themselves do not fully understand the nuance of how Section 230 is applied or that journalists do understand how Section 230 functions but are not accurately conveying that knowledge to the reader. This lack of understanding or failure to communicate how Section 230 operates creates a breakdown in the self-governance chain. If

[605] For a comprehensive discussion and analysis of how courts have interpreted Section 230 since its enactment, *see* Ardia, *supra* note 37.

journalists are not accurately informing their readers about Section 230, then those readers lack the adequate knowledge to self-govern with respect to Section 230.

II. Qualitative Analysis and Discussion

Overall, only a very small portion of the sample contained misrepresentations, and many of these misrepresentations were not explicit misstatements of the law, but did lack sufficient nuance, making them misleading to readers.

A. Analysis of Misstatements

The majority of misrepresentations identified in the articles either (1) distorted the legal authority that gives platforms the ability to moderate content, or (2) incorrectly categorized Section 230 as a safe harbor statute.

1. Statements About Content Moderation

Most of the misrepresentations in the sample unclearly conveyed what legal authority authorizes platforms to remove content from their sites. The common phraseology used was that Section 230 gives platforms "wide latitude to police content on their sites."[606] Similar iterations included: "broad ability to police content,"[607] and "broad discretion to remove . . . content."[608] One *New York Times* article acknowledged this error and posted a correction: "An earlier version of this article misstated what allows social media firms to remove postings that violate their

[606] Ryan Tracy, *White House Nixes FCC Nominee Who Questioned Bid To Regulate Social Media*, N.Y. TIMES (Aug. 2, 2020, 1:09 PM), https://www.wsj.com/articles/white-house-nixes-fcc-nominee-who-questioned-bid-to-regulate-social-media-11596556660.

[607] John D. McKinnon, *Florida's New Law Bars Twitter, Facebook and Others From Blocking Political Candidates*, WALL ST. J. (May 25, 2021, 12:00 AM), https://www.wsj.com/articles/florida-governor-signs-bill-to-bar-twitter-facebook-and-others-from-blocking-political-candidates-11621915232.

[608] *Lawmakers Hammer Tech CEOs for Online Disinformation*, supra note 514.

standards. It is the First Amendment, not Section 230."[609] All other articles failed to clarify this point of law for readers.

This error is probably most accurately classified as a statement lacking sufficient nuance, but the failure to clarify what law enables platforms to engage in content moderation has considerable negative implications. First, many of the articles in the sample focused on content moderation in one form or another, such as censorship and deplatforming. Thus, the issue of content moderation is a topic of debate and recognized as a potential side effect of Section 230 and should therefore be discussed with full understanding. And second, imprecision regarding what activity Section 230 enables and does not enable distorts conversations about the potential effects of reforming Section 230.

As mentioned in the retraction posted by *The New York Times*, it is the First Amendment—not Section 230—that authorizes platforms to engage in content moderation. Prior to Section 230's enactment, courts had acknowledged that online bulletin boards, the precursor to today's platforms, had the ability to manage, review, delete, and moderate content on their sites, treating the bulletin boards as publishers under the First Amendment.[610] Therefore, it is the First Amendment, not Section 230 that authorizes platforms to engage in content moderation.[611]

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[609] Shane Goldmacher, *Trump Sues Tech Firms for Blocking Him, and Fund-Raises Off It.*, N.Y. TIMES (July 7, 2021), https://www.nytimes.com/2021/07/07/us/politics/trump-lawsuit-facebook-google-twitter.html.

[610] *See* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991); Stratton Oakmont, Inc. v. Prodigy Services Co., 1995 WL 323710 (S.D.N.Y. May 24, 1995).

[611] *See* Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 256 (1974) ("We see the beginning with Associated Press, supra, the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such compulsion to publish that which 'reason tells them should not be published' is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.")

However, prior to Section 230, if a platform chose to engage in content moderation, the platform was likely to be considered a "publisher" of all of the content carried on their site, making them potentially liable for any content they chose to leave up.[612] One of the functions of Section 230 is that it prohibits platforms from being considered "publishers" *even if* they engage in content moderation.[613] Therefore, Section 230 does not function to give platforms the "discretion," or "ability," or "power" to moderate content, but it does encourage content moderation because it precludes platforms from being subject to publisher liability for all of the content they host.

These misrepresentations are significant especially in light of the fact that a majority of definitions of Section 230 presented the law as protecting platforms from publisher liability (59.5%). The distinction between enabling and encouraging content moderation is important because it illustrates the complex nature of Section 230. While not explicitly stated in Section 230(c)(1), the preclusion of platforms from being treated as publishers is what encourages platforms to moderate content—because they cannot be considered publishers of the unlawful content they fail to remove. Thus, while many definitions described Section 230 in terms of protecting platforms from liability for user-generated content, it is the protection from publisher liability that also removed disincentives that previous deterred content moderation.

Understanding that the First Amendment, and not Section 230, enables platforms to moderate content is important to social understanding regarding how platforms would function if Section 230 was reformed or repealed. Without the portion of Section 230 that precludes

[612] The threshold question in *Stratton* was whether Prodigy "exercised sufficient editorial control over its computer bulletin boards to render it a publisher with the same responsibilities as a newspaper." *Stratton*, 1995 WL 323710, at *3.

[613] 47 U.S.C. § 230(c)(1) ("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.").

publisher liability, platforms would still be able to remove content, that for example violated their community standards; however, platforms would be less likely to do so because they would once again, be liable for any unlawful content that they did not remove. One thematic article articulated this concern:

> Taking away the platforms' immunity, however, seems like a bad fit for the problems at hand. The threat of being sued for libel could encourage platforms to avoid litigation costs by pre-emptively taking down content once someone challenges it. Some of that content would be disinformation and hate speech, but other material might be offensive but true —a risk of overcensorship.[614]

This would likely result in platforms carrying significantly less content and implementing stricter take-down policies, crippling the speech environment online.[615] If Section 230 was not in place, there is a good chance platforms would be much more speech restrictive.

In fact, Australia's high court recently ruled that news media outlets are to be treated as "publishers" of the unlawful content that is posted in comments sections on social media.[616] In response, news media outlets began disabling their comments sections due to their inability to constantly moderate all comments.[617] Removing the comments section was the easiest way to protect themselves from legal liability. This anecdote suggests that if Section 230 was changed and platforms were treated as publishers of third-party content,[618] platforms would begin restricting users' ability to post on their sites—severely stifling the ability of the public to share

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[614] Emily Bazelon, *The Problem of Free Speech in an Age of Disinformation*, N.Y. TIMES (Oct. 13, 2020), https://www.nytimes.com/2020/10/13/magazine/free-speech.html.

[615] *See* Kelley, *supra* note 501 ("Without Section 230, any online service that did continue to exist would more than likely opt for censoring more content . . . .").

[616] Associated Press, *Australian Court Rules Media Liable for Facebook Comments*, NBC News (Sept. 8, 2021, 8:18 AM), https://www.nbcnews.com/tech/tech-news/australian-court-rules-media-liable-facebook-comments-rcna1927.

[617] *Id.*

[618] This is especially true if Section 230 was modified to hold platforms liable if they had no knowledge of the unlawful speech.

content and ideas online. Limiting the public's ability to communicate online has negative implication for self-governance beyond just debate and discussion regarding Section 230. The internet provides a forum for citizens to ask questions, seek answers, and engage in debate about important policy issues.[619] As a "vast democratic forum[ ]"[620] the internet has democratized speech by lowering the barrier of entry for individuals to speak, be heard, and engage in debates about important issues facing society.[621] In this way, Section 230 creates a causality dilemma. Section 230 is necessary to create the speech environment online that is required for individuals to debate and discuss issues related to Section 230.

2. Statements About Section 230 As a Safe Harbor

The next most common misrepresentation found in the sample was incorrectly labeling Section 230 as a "safe harbor":

> "Many technology giants and their executives have not only abused their power, but misled the American people, damaged our democracy and evaded any form of responsibility," [spokesman for the Biden campaign] said. "That ends with a President Biden." Mr. Biden's clearest position on internet policy has been his call to revoke a legal shield known as Section 230 of the Communications Decency Act. That *safe harbor* has protected Google, Facebook, Amazon and Twitter from lawsuits for hosting or removing harmful or misleading content. He hasn't elaborated on how he would revoke the shield, a 1996 law that the tech industry will fight vigorously to defend.[622]

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[619] *See The First Amendment Is an Absolute*, *supra* note 358, at 263.

[620] Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017); *see also* Am. Civil Liberties Union v. Reno, 929 F. Supp. 824, 883 (E.D.Pa. 1996) ("As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion.").

[621] *See* Zaryn Dentzel, *How the Internet Has Changed Everyday Life*, OPENMIND BBVA, https://www.bbvaopenmind.com/en/articles/internet-changed-everyday-life/.

[622] Cecilia Kang, David McCabe & Jack Nicas, *Biden Is Expected To Keep Scrutiny of Tech Front and Center*, N.Y. TIMES (Nov. 10, 2020), https://www.nytimes.com/2020/11/10/technology/biden-tech-antitrust-privacy.html (emphasis added); *see also* Cecilia Kang, *Republicans and Democrats Have Similar Goals. They Will Make Different Arguments*, N.Y. TIMES (Oct. 28, 2020), https://www.nytimes.com/2020/10/28/technology/republicans-and-democrats-have-similar-goals-they-will-make-different-arguments.html ("They have the support of President Trump, who issued an executive order this summer aimed at stripping the technology companies of their safe harbor under Section 230 of the Communications Decency Act.").

The use of the safe harbor misnomer is significant for two important reasons. First, it inaccurately describes how Section 230 operates. Second, incorrectly referring to Section 230 as a safe harbor furthers the confusion between Section 230 and the Digital Millennium Copyright Act (DMCA), which *does* operate as a safe harbor.[623] Interestingly, despite the fact that referencing Section 230 as a safe harbor made up 11.1% of the misrepresentations, no article mentioned the DMCA explicitly. Nonetheless, the distinction between Section 230 and the DMCA is significant to the discussion surrounding Section 230 because some reform proponents have suggested changing Section 230 to incorporate "notice and takedown" regimes, similar to the DMCA and these proposals were mentioned in articles included in this study's sample: "[N]ew legislation including a notice-and-takedown mandate, which requires platforms to remove content once they are notified that it is illegal, is 'a reasonable path forward.'"[624]

Black's Law Dictionary defines "safe harbor" as a "provision in a law or agreement that will protect from any liability or penalty as long as set conditions have been met."[625] A plain reading of the text of Section 230 indicates the statute does not impose conditions on platforms before they are protected from liability under § 230(c)(1).[626] While some lawmakers have strongly urged that § 230(c)(2)'s requirement that platforms act in "good faith" when moderating

[623] Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998), *codified at* 17 U.S.C. §§ 512, 1201–05, 1301–22; 28 U.S.C. § 4001.

[624] Heather Somerville, *Airbnb Underscores Reach of Law That Shields Web Firms*, WALL. ST. J. (Jan. 11, 2021), at B1; David Mccabe, *Tech Chiefs Face Grilling on Riot Role*, N.Y. TIMES, Mar. 26, 2921, at B1 ("[Mark Zukerberg] proposed that liability protection for companies be conditional on their ability to fight the spread of certain types of unlawful content. He said platforms should be required to demonstrate that they have systems in place for identifying unlawful content and removing it.").

[625] *Safe harbor*, BLACK'S LAW DICTIONARY (2d ed.), https://thelawdictionary.org/safe-harbor/.

[626] *See* 47 U.S.C. § 230(c)(1).

content operates as a precondition, this requirement has not been interpreted to apply to the protection from liability for third-party content under § 230(c)(1).[627] Considering that § 230(c)(1) is the more common provision used by platforms to protect themselves from liability from their users' content, even if "good faith" was interpreted to function as a safe harbor condition, it would not be invoked often to preclude platforms from liability.[628] This is because platforms will often "short-circuit" litigation by relying on § 230(c)(1) instead of § 230(c)(2) because proving § 230(c)(2)'s "good faith" requirement imposes a higher litigation burden.[629] Therefore, the only potential safe harbor-like requirement for platforms under Section 230 would be that they must act in good faith when removing content that does not qualify under § 230(c)(1)—for example, content that the publisher contributed to its illegality.[630] As discussed above, this represents a relatively narrow set of circumstances and does not reflect the reality of how platforms rely on Section 230 in practice.

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[627] See Levitt v. Yelp! Inc., No. C-10-1321 EMC, 2011 WL 5079526, at *7 (N.D. Cal. Oct. 26, 2011), *aff'd*, 765 F.3d 1123 (9th Cir. 2014) ("The Court is sympathetic to the ethical underpinning of Plaintiffs' argument and is mindful of Judge Patel's reasoning that such a wrongful motive could strip the Defendant of the editorial immunity. However, § 230(c)(1) contains no explicit exception for impermissible editorial motive, whereas § 230(c)(2) does contain a 'good faith' requirement for the immunity provided therein. That § 230(c)(2) expressly provides for a good faith element omitted from § 230(c)(1) indicates that Congress intended not to import a subjective intent/good faith limitation into § 230(c)(1). '[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' Keene Corp. v. United States, 508 U.S. 200, 208 (1993). Accordingly, the text of the two subsections of § 230(c) indicates that (c)(1)'s immunity applies regardless of whether the publisher acts in good faith. Nor have cases interpreting 230(c)(1) established or suggested an intent-based exception to its immunity. Indeed, courts have found the immunity applies to conduct that arguably constitute bad faith. For example, courts have found providers to be immunized from intentional torts like defamation, even when the provider has arguably exercised its publishing functions in bad faith. *See, e.g.*, Zeran v. American Online, Inc., 129 F.3d 327, 331–33 (1997) (finding interactive service providers to be immune from defamation liability even when they have actual knowledge of the statements' falsity).").

[628] *See Back to the Future for Section 230 Reform*, *supra* note 40.

[629] *See id.* The "good faith" requirement has to be proved using evidence gathered through a costly discovery process. *Id.*

[630] *See* Berin Szóka & Ari Cohn, *The Wall Street Journal Misreads Section 230 and the First Amendment*, Lawfare (Feb. 3, 2021, 3;43 PM), https://www.lawfareblog.com/wall-street-journal-misreads-section-230-and-first-amendment.

On the other hand, the DMCA—a law that "protects [platforms] from liability for copyright infringement by their users"—is a safe harbor and conditions protection from liability on meeting certain statutory requirements.[631] Under 17 U.S.C. § 512(c)(1)(A), safe harbor protection from liability is available only if the service provider (i) "does not have actual knowledge that the material or an activity using the material on the system or network is infringing;" (ii) "in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent;" or (iii) "upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material."[632] Internet service providers that fail to meet these requirements can be held liable for secondary and vicarious copyright infringement.

The DMCA § 512 safe harbor has created a "notice and takedown" process for content that has been flagged as infringing on a copyright holder's copyright.[633] Owners of copyrighted content can file a notice of the infringing content to the internet service provider. When this occurs, due to the vagueness of the "expeditiously" requirement, the internet service provider will promptly remove or block the content.[634] The content will remain offline for at least 10-14 days, during which time the content creator or poster of the content has the opportunity to

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[631] *See* 17 U.S.C. § 512; *Digital Millennium Copyright Act: Overview*, Harvard U., https://dmca.harvard.edu/overview.

[632] 17 U.S.C. § 512(c)(1)(A)(i)–(iii).

[633] *What Is the DMCA Notice and Takedown Process?*, COPYRIGHT ALLIANCE, https://copyrightalliance.org/faqs/what-is-dmca-takedown-notice-process/.

[634] *See The DMCA Notice and Takedown Process*, COPYRIGHT ALLIANCE, https://copyrightalliance.org/education/copyright-law-explained/the-digital-millennium-copyright-act-dmca/dmca-notice-takedown-process/#:~:text=After%20receiving%20a%20counter%20notice%2C%20the%20service%20provider,DMCA%20counter%20notice%20they%20must%20wait%2010-14%20days.

respond.[635] There is also an appeals process, during which time the content in question remains offline.[636]

The DMCA's notice and takedown regime is problematic in several respects. First, it creates a "guilty until proven innocent" mentality and places the burden on the content creators to prove their content is not infringing.[637] Second, the regime encourages a "remove now and evaluate later" mindset for service providers due to the requirement to "expeditiously" remove questionable content. While the content is in dispute is not available to the public for viewing.[638] If the content is found to be infringing on another's copyright, this is a just outcome. However, if the content is found to not be infringing, then the "remove now" policy deprives the public from the opportunity to view the content, creating a quasi-prior restraint.

There are several pros to the DMCA's regime, namely that the safe harbor protections create a lower barrier of entry for small, emerging platforms and could incentivize investors to invest in larger, well-established platforms to contribute to their growth. If service providers can comply with the safe harbors, in theory, they would have fewer expenses related to legal disputes over potentially infringing content and could redirect those resources to platform development. In this sense, the regime seems that it might create an ecosystem where more speech can occur. However, there is a compelling argument that the safe harbors create a chilling effect among

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[635] *Id.*

[636] *Id.*

[637] Juan Londoño. *Content Moderation Using Notice and Takedown Systems: A Paradigm Shift in Internet Governance*, AM. ACTION FORUM (Nov. 8, 2021), https://www.americanactionforum.org/insight/content-moderation-using-notice-and-takedown-systems-a-paradigm-shift-in-internet-governance/.

[638] *Id.*

service providers and encourage them to over-moderate content—creating a greater harm than benefit.

While not exactly the same as the DMCA's notice and takedown regime, FOSTA-SESTA created an exception to Section 230 protection for ISPs that "knowingly" facilitate or contribute to the commission of sex-trafficking crimes.[639] FOSTA-SESTA was initially enacted to disincentivize online sex-trafficking on websites such as Craigslist and Backdoor.com and encourage websites to create protocols to monitor their websites for such content.[640] However, since its enactment, it has been criticized for several reasons. First, similar to the DMCA's "expeditiously" requirement, the statute fails to define what constitutes "knowledge."[641] While the mens rea of knowledge is well understood in the world of criminal law, service providers have little guidance or understanding of what this looks like for platforms.[642] This creates several problems. First, it could disincentivize platforms from trying to root out sex-trafficking operations on their sites because if they become aware that there is sex-trafficking content present on their site, are they now "knowingly" facilitating sex-trafficking?[643] Second, in response to the uncertainty, platforms might alter their moderation practices and their algorithms with an abundance of caution to filter out and exclude more content than is really necessary.[644]

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[639] *See* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) (as amended in scattered sections of ch. 18 and 47 of the United States Code).

[640] Alex F. Levy, *Why FOSTA's Restriction on Prostitution Promotion Violates the First Amendment*, Tech. & Mktg. L. Blog (March 18, 2018), https://blog.ericgoldman.org/archives/2018/03/why-fostas-restriction-on-prostitution-promotion-violates-the-first-amendment-guest-blog-post.htm.

[641] Megan McKnelly, *Untangling SESTA/FOSTA: How the Internet's "Knowledge" Threatens Anti-Sex Trafficking Law*, 34 BERKLEY TECH. L.J. 1239 (2019).

[642] *See id.* at 1254.

[643] *See id.* at 1255–56.

[644] *See id.* at 1258.

This raises similar issues as discussed above with respect to the DMCA. Uncertainty about vague standards encourages platforms to be overly-cautious to avoid potential liability. While this is understandable from the perspective of a platform, over-moderating can hinder speech and the free exchange of ideas online. As discussed previously, over-moderating content online can impede self-governance by limiting the ability of platform users to engage in debate and discussion about public issues.

Viewing free speech and the exchange of ideas as common goods, even outside of the protection of the First Amendment on an online platform, would suggest that depriving the public of lawful speech as undesirable. Similarly, the "remove now, evaluate later" mindset is likely to create a system of over-moderating content. The safe harbors are of great value to service providers and therefore service providers are incentivized to be overly cautious, which could lead to taking down more content than is actually necessary. Again, this deprives the public access to lawful content.

Not only has Section 230 been confused with DMCA,[645] one of the Section 230 reform proposals[646] gaining traction includes a notice and takedown provision for intermediary liability,

[645]Jonathan Taplin, *How To Force 8Chan, Reddit and Others to Clean Up*, N.Y. TIMES (Aug. 7, 2019), https://www.nytimes.com/2019/08/07/opinion/8chan-reddit-youtube-el-paso.html#click=https://t.co/pUG8F02xnj ("An earlier version of this article misstated the law containing a provision providing safe haven to social media platforms. It is the Communications Decency Act, not the Digital Millennium Copyright Act.").

[646] *See* Platform Accountability and Consumer Transparency Act, S.B. 797, § 5(c)(1)(B) 117th Cong. (2021)

> (B) POTENTIALLY POLICY-VIOLATING CONTENT.—Subject to subsection (e), if a provider of an interactive computer service receives a complaint made in good faith through the complaint system of the provider established under subsection (b) regarding potentially policy-violating content on the interactive computer service, the provider shall, not later than 14 days after receiving the complaint—

similar to the DMCA.[647] Therefore, it is important for the public to understand current differences between Section 230 and the DMCA so that the effects of implementing a similar notice and take down process for Section 230 can be fully considered. Implementing a notice and take down regime similar to the DMCA could be devastating to the current online speech environment. The DMCA is relatively narrow in scope, applying to only copyright material, yet the notice and take down regime is still over-inclusive and encourages the removal of more speech than is necessary. Comparatively, Section 230 covers much more speech online and largely political speech, which society holds in the highest regard. Implementing a notice and take down regime could seriously hamstring internet service providers and likely subject them to insurmountable liability for the content they host. Platforms would have little choice other than to significantly limit the content they host or institute a "remove now, evaluate later" policy similar to the DMCA to avoid liability. This would be especially problematic for sites such as Facebook and Twitter, where so much of public debate occurs. The danger of over-moderation and the subsequent chilling effect on speech would prevent citizens from accessing vital public discourse and would impact citizens' ability to self-govern effectively.

(i) review the content;

(ii) determine whether the content adheres to the acceptable use policy of the provider; and

(iii) initiate appropriate steps based on the determination made under clause (ii), subject to reasonable extensions in cases requiring extraordinary investigation.

[647] *See* Ashley Johnson & Daniel Castro, *Proposals To Reform Section 230*, ITIF (Feb. 22, 2021), https://itif.org/publications/2021/02/22/proposals-reform-section-230;

This concern over a chilling effect is what was recognized in *Cubby* and *Stratton Oakmont* as a central issue in the, then current, publisher/distributor liability regime prior to Section 230's enactment.[648] Some might even argue that Section 230 was enacted as is, to prevent this very problem. Thus, it would be detrimental both to platforms and the public to implement a notice and take down regime with respect to Section 230. The effects of the DMCA's notice and take down policies strongly suggest that notice and take down regimes encourage over-moderating content which necessarily deprives individuals of access to lawful content online. Considering that no articles mentioned the DMCA, but some articles discussed potential notice and take down policies as they would apply to Section 230, readers were not exposed to discussion that compared the two laws. The effects of the DMCA's notice and takedown regime are being felt today. Discussion of those effects would be helpful for readers when trying to evaluate whether amending Section 230 to include a notice and takedown regime would be wise. Including basic descriptions of the DMCA, explaining how it differs from Section 230, and discussing the effects of the DMCA's notice and takedown regime would be another way for journalists to educate the public with respect to Section 230.

B. Discussion

As discussed in Part II.A of this Chapter, the majority of misrepresentations identified in the articles either (1) distorted the legal authority that gives platforms the ability to content moderate, or (2) incorrectly categorized Section 230 as a safe harbor statute. While the misrepresentations were not explicit misstatements of the law, the statements lacked nuance and

[648] *See* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991); Stratton Oakmont, Inc. v. Prodigy Services Co., 1995 WL 323710 (S.D.N.Y. May 24, 1995).

are potentially misleading to readers. The concern about misleading the public is especially salient with regard to these two issues because both misrepresentations are in the center of the current reform debate. Therefore, understanding how Section 230 actually operates is a prerequisite for the public to understand how various policy proposals would affect our online speech ecosystem and for the public to be able to weigh the benefits and consequences of either reforming or repealing Section 230.

As a threshold matter, journalists should strive to accurately and concisely describe what Section 230 is and what it does. As previously discussed, the results suggest that the journalists themselves were the sources of every identified misrepresentation. This finding is concerning from a self-governance perspective because the journalists must be properly educated in order to adequately educate their readers. Given the confusion among journalists regarding Section 230, journalists should rely more on verified sources of authority such as the statute itself, case law that illustrates the proper application of the law, or experts in this subject area when preparing articles for publication. Using more reliable sources during the preparation phase will help increase the journalists' individual knowledge and understanding of Section 230, thereby helping them more effectively convey ideas to their readers. Further, as a result of more substantial research, the journalists can cite to the authoritative sources in their coverage, providing their readers with additional resources.

Based on the findings in this study, specifically, journalists should make clear that they convey that Section 230 is not what allows platforms to engage in content moderation. Changing language from "Section 230 gives platforms wide latitude to police content on their sites," to "Section 230 incentivizes platforms to engage in content moderation" would more accurately convey the function of Section 230. Such language could be used alongside an explanation that

although the First Amendment enables platforms to content moderate, Section 230 removes disincentives by protecting platforms from traditional publisher liability. Additionally, journalists should avoid using the term “safe harbor” to describe Section 230. Doing so will help further distinguish Section 230 from the DMCA, ideally eliminating confusion between the two provisions. However, journalists could include descriptions of the DMCA in their coverage for the purpose of explicitly contrasting how the two provisions operate. Doing so could also bring more attention to the discussion about amending Section 230 to include a notice and takedown requirement. This comparison would provide helpful context for readers, making them better informed for self-governance purposes. It is helpful for journalists to understand this nuance in how Section 230 operates not only so they report accurately but also so that journalists can evaluate the information provided by their sources and more fully assess the broader societal discussion surrounding Section 230.

CHAPTER 7: CONCLUSION

I. Limitations

Limitations to any study are important to consider. As a threshold matter, there are inherent limitations to content analysis research. More specifically, qualitative research studies lack generalizability to the larger population because they often focus on a specific data set. In this study, articles from two publications published during a specific time period were analyzed. These articles were chosen because they represent the most recent coverage of Section 230, during a time where Section 230 was a popular topic of debate. However, the results from this study cannot be applied to a larger population of articles published by different publications during different times.

While such qualitative studies might not be generalizable, qualitative studies allow researchers to develop a deeper understanding of a given research topic, including topics that have not been previously investigated. Qualitative content analysis is also limited in that researchers must analyze the units themselves and the text is subject to the researcher's interpretations. To combat researcher bias and standardize the coding process, a detailed codebook with definitions for each question and category were used to more consistently operationalize the variables examined in the study.

One of the limitations of this study was the application of the episodic and thematic news frame dichotomy to coverage about Section 230. Episodic framing is often understood as applied to the private realm, with a focus on individuals.[649] As described in Chapter 5, Part I.B., coverage of Section 230 most often focused on the law's societal impact, with little focus on how Section 230 affects individuals. Therefore, the common understanding of episodic framing as "highlight[ing] how to fix the person experiencing a problem"[650] was not helpful in classifying articles as episodic. Similarly, despite many articles discussing how Section 230 presents issues at a societal level, few articles utilized the thematic framed to "highlight[ ] how to fix the conditions that led to the problem."[651] While Section 230 does affect individuals, news coverage predominately presented the law as causing problems for society, making the dichotomy between episodic and thematic more obscure and difficult to code.[652] This limitation could be mitigated in future research by creating a clearer distinction between the impacts associated with Section 230 and *how* Section 230 is framed. This distinction would include articulating how the traditional understanding of episodic reporting as focusing on the "individual" could map onto matters such as Section 230, that are more frequently discussed as presenting issues for society. This would help account for articles that discussed Section 230 by focusing on society (episodically) but did not discuss trends over time, discuss how to fix the conditions that led to the societal problem, or suggest better policies (aspects of the thematic frame).

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[649] *See Episodic vs. Thematic Stories*, *supra* note 444.

[650] *See id.*

[651] *See id,*

[652] *See id.* ("Where an episodic frame would focus on an *individual*, a thematic frame would focus on the *issue*.").

The most significant limitation in this study was the operationalization of "tone" with respect to the Section 230 definitions. Tone of media coverage of an issue is an important consideration because positive or negative textual descriptions of issues affect readers' preferences.[653] Therefore, in order to better understand how the media is portraying Section 230 to the public, it is helpful to understand if the article is presenting Section 230 as positive, negative, or neutral, through the definition used to describe the law. In practice, the tone variable was conceptual and subjective, and therefore more challenging to code than manifest content. Initially, each definition's tone was coded based on surrounding context. However, due to the difficulty in making consistent coding determination using that procedure and the codebook used for the study, the definitions were coded again for tone based only on the words included in the definition. Coding tone based only on the words in the definition yielded an overwhelming majority of definitions coded as "neutral." As a result, potentially rich data regarding how Section 230 was defined was lost. In hindsight, a more nuanced linguistic analysis of word choice, choices regarding the ordering of words, and other considerations about how specific words were used within the definitions would have resulted in richer findings. For example, words like "immunize" and "shield" were coded as neutral, but a more detailed linguistic analysis of the text of the definitions could help to more precisely determine the tone of the definitions. Considering the frequency with which the words "immunize" and "shield" were used in Section 230 definitions, a better understanding of how those words contribute to the tone of

[653] Eberl & Plescia, *supra* note 488, at 32 ("[T]he tone of media coverage is important because audiences' inferences about candidate traits are rather automatically made from positive or negative descriptions in texts." (citing Jason N. Druckman & Michael Parkin, *The Impact of Media Bias: How Editorial Slant Affects Voters*, 67 J. POLI. 1030 (2005)).

the definition would add additional insight as to if the journalists' definitions are biasing readers, either negatively or positively.

While this study considered news articles published by two of the top-ten highest circulating U.S. newspapers and those with substantial access to government officials and other prominent sources, a consideration for future studies is whether articles from more specialized technology sources should be included in the sample. Publications with a specific technology focus were not considered in this study.[654] These technology-focused publications might provide a more nuanced or technical discussion of Section 230 that is altogether missing in traditional news reporting. Comparisons across types of news outlets would provide a more complete understanding of current reporting on the law and could identify additional "best practice" recommendations for journalists.

Regardless of this limitation, the purpose of this study was to understand the role the traditional news media plays in shaping society's understanding of Section 230, as newspapers and freedom of the press have played an important role in educating the public to further the goal of self-governance. Reliance on elite newspapers such as *The New York Times* and *The Wall Street Journal* is a well-established practice in content analysis research because of these publications' agenda-setting function within the news ecosystem,[655] their high-circulation,[656] and reputation for rigor and integrity in their reporting.[657] However, a broader analysis of different media types could provide additional insights as to Section 230 coverage.

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[654] *See* WIRED, https://www.wired.com/; DATA CENTER KNOWLEDGE, https://www.datacenterknowledge.com/.

[655] *See* Kruvand, *supra* note 86, at 41.

[656] *See Top 10 U.S. Newspapers by Circulation*, *supra* note 473; Glader, *supra* note 473.

[657] *See 28 National Newspapers of Record*, *supra* note 474.

II. Conclusion

Section 230 is a hotly debated issue, with twenty related bills pending before Congress that seek to change the law in some way.[658] The internet as we know it has developed within the parameters of Section 230, and the internet without Section 230 is uncertain. The internet has been regarded as a "vast democratic forum[ ],"[659] making reforming Section 230 a high-risk venture. Accordingly, each individual has some stake in how speech online is regulated, and therefore individuals have a fundamental need to be informed regarding what Section 230 is, what it does, its benefits and drawbacks, as well as the consequences of reforming or repealing it.

Given its legislative attention, Section 230 is a policy issue that should be debated and discussed as an issue of public opinion. This public discussion educates the public, helping them to self-govern more effectively—that is to form a policy opinion and elect representatives to effectuate the desired policy outcome. This study was premised on the belief that the media can and should play an important role in providing citizens the disciplinary knowledge regarding Section 230. Connecting First Amendment self-governance theory with agenda-setting and framing theory, this study evaluated how journalists are currently covering Section 230 and if their coverage is adequate to create the informed citizenry self-governance requires.

The study revealed several key findings. First, analysis of the data set indicated that journalists primarily rely on the episodic news frame when covering Section 230. Journalists' tendency to use the episodic frame when reporting on Section 230 raises concerns about the attribution of responsibility for remedying the harms commonly associated with Section 230, as

[658] *See All the Ways Congress Wants to Change Section 230*, *supra* note 17.

[659] Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017); *see also* Am. Civil Liberties Union v. Reno, 929 F. Supp. 824, 883 (E.D.Pa. 1996) ("As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion.").

the episodic frame tends to shift blame away from government and institutions and therefore does not suggest the solution could be governmental. Next, the results demonstrated that more often than not, journalists did define Section 230 in their reporting; however, journalists predominately framed the law in terms of the law protecting platforms from publisher liability. A focus on protecting platforms from publisher liability without discussing how the law has led to increased content moderation provides an incomplete illustration of how Section 230 affects speech online. Further, journalists tended to discuss Section 230 in terms of its negative impact on society, commonly citing misinformation and disinformation as harms associated with law. Finally, analysis of the articles in the sample identified a handful of misrepresentations about Section 230. The two most common misrepresentations were distorted descriptions of the legal authority that gives platforms the ability to content moderate and incorrect categorizations of Section 230 as a safe harbor. The presence of misrepresentations in coverage suggest that journalists do not always fully and accurately convey how Section 230 operates to readers, which has potential negative self-governance implications. These results indicate several areas of improvement for journalists when covering Section 230.

The media's access to experts and those with institutional knowledge, coupled with their reach, make journalists uniquely equipped to provide the public with the information they need to understand Section 230. This study indicated that despite their resources and political connections, *The New York Times* and *The Wall Street Journal*'s reporting on Section 230 could still be improved and was not accurate in every instance. The elite media serves an agenda-setting function within the news ecosystem. Therefore, it is of particular importance that publications such as *The New York Times* and *The Wall Street Journal* cover Section 230

accurately and thoroughly, as other media organizations may look to them as authoritative sources on the issue.

Substantive and accurate reporting of Section 230 can contribute to effective self-governance because it equips individuals to make informed determinations regarding their policy preferences and subsequently hold their representatives accountable for effectuating the public's preferred policies. How the media should cover complex and controversial issues is not always straightforward. This study concludes by providing a set of best practices for journalists to use when reporting on Section 230. This list focuses on helping reporters verify their assertions, check their biases, and provide helpful contextual information to better illustrate the Section 230 debate.

III. Recommendation

"Best Practices"

The following list of "Best Practices" has been formed in light of this study's findings—highlighting some of the gaps in reporting identified by this study. This list is intended to serve as a recommendation to further equip journalists as they report on Section 230, with an eye towards providing the public with a more comprehensive understanding of Section 230. The list concludes with a proposed description of Section 230 for use in news articles.

1. **Consider Ways to Increase Thematic Coverage:** While episodic coverage of issues relating to Section 230 plays *a* role in educating the public about Section 230, episodic articles predominately focus on isolated events related to the law and provide less context that could help readers form a more thought-out an opinion about the law. Further, episodic coverage has been found to be less effective at encouraging collective action to solve problems. For self-governance purposes, it is important that journalists are covering Section

230, so episodic coverage of issues furthers self-governance more than no coverage. However, journalists might consider supplementing episodic coverage of Section 230 with more thematic coverage. Acknowledging that journalists, especially in today's news climate, are constrained by time and a lack of resources[660]—both of which are needed to support thematic coverage—journalists could utilize much of the content they gather for episodic reporting and compile it in such a way to provide a broader discussion of Section 230.[661] Using pre-existing content and research to write more thematically-framed articles could help minimize these constraints.[662] Journalists might also consider using more hyperlinks within articles[663] to connect related Section 230 coverage and create more of a thematic reporting effect within episodic articles. If journalists do have the freedom and bandwidth to incorporate more thematic coverage into their reporting, the following concepts would be helpful for readers to gain a more comprehensive understanding of the law: (1) an explanation of what the law is and what it does, (2) why the law was enacted, (3) critiques of the law and its effects, (4) perspective from the beneficiaries of Section 230's protections, (5)

[660] "Newspaper newsroom employment fell 57% between 2008 and 2020, from roughly 71,000 jobs to about 31,000." *U.S. Newsroom Employment Has Fallen 26% Since 2008*, PEW RSCH. (July 13, 2021), https://www.pewresearch.org/fact-tank/2021/07/13/u-s-newsroom-employment-has-fallen-26-since-2008/.

[661] "Thematic coverage of related background material . . . require[s] in-depth, interpretive analysis, which . . . take[s] longer to prepare and [are] more susceptible to charges of journalistic bias." IYENGAR, *supra* 424, at 14 ("[T]here simply is not airtime available to present thematic background on all issues deemed newsworthy").

[662] Although not explicitly studied in this thesis, it was anecdotally noted that many of the articles from the sample were written by the same hand-full of journalists. This anecdotal finding suggests that many of the journalists covering Section 230 might have the broader knowledge and context regarding Section 230 that is missing in episodic reporting. If this is the case, then the purpose of this Best Practices is to encourage the journalists to work in more Section 230 background information if the structural and cultural standards of their news organizations permit.

[663] This recommendation would turn on whether utilizing hyperlinks was considered a standard practice at the journalist's news organization.

reform efforts and consequences of reform, and (6) judicial interpretations of the law. Providing a multi-faceted discussion of Section 230 will not only better educate the public but is also more likely to spur public responsiveness through self-governance.

2. **Include Clear Definitions:** When journalists introduce Section 230 in an article, they should describe what the law is—for some readers, the article might be their first introduction to the law. One of the most effective ways to do this is to either quote the statute (and cite a source so it is easy for readers to locate on their own) or quote understandable language from court opinions that interpret how the law is applied. In addition to a technical definition, journalists can and should use more colloquial definitions to describe how Section 230 operates. In providing a definition, journalists should describe both of the main effects of the law: (1) that as a general rule, platforms are not held liable for the content posted by third-party users on their sites, and (2) that platforms are incentivized to moderate content and create content moderation policies because under Section 230, platforms cannot be held liable for unlawful content they fail to remove. When discussing how Section 230 impacts content moderation practices, journalists should avoid suggesting Section 230 is the law that *allows* content moderation. Instead, journalists can focus on the original intent of the law—to remove the disincentives that discourage platforms from moderating content, so platforms can create their own moderation policies that reflect their own values.[664]
3. **Discuss the Law's Impacts:** Knowledge about the effects of the law as is, is important to an understanding of how Section 230 affects our online speech environment. Therefore, journalists might consider incorporating a discussion of how the law impacts the world we

[664] *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997) ("Another important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services.").

live in—namely how it affects individuals, corporations, and society. While an in-depth discussion of all of Section 230's effects is not necessary or practical, incorporating the law's impacts when reporting on Section 230 (episodically or thematically) will give readers a more comprehensive understanding of the law's function and reach. Journalists might consider discussing both the law's positive and negative impact on society in articles to provide balanced coverage of the law.

4. **Balanced Reporting:** Whether presenting a definition of Section 230 or discussing the law's impacts, strive for balanced reporting. While journalists often opine on public issues, which contributes to public discourse, journalists should also consider that how they present issues affects readers' opinions of those issues. Journalists might consider providing a basic definition of Section 230 before discussing the laws impacts. Doing so would allow readers to examine the rest of the article, including any discussion of the law's impacts, more independently without the effect of journalists' value judgments. Additionally, journalists should present the various "sides" and opinions about the law and its impacts, as they are relevant to the topic of the article.
5. **Report Accurately and Be Aware of Common Legal Missteps:** While this study focuses only on a narrow set of misrepresentations associated with Section 230, legal scholars have identified various legal errors present in Section 230 coverage. If a journalist is unsure about how a provision of Section 230 operates or has been applied, journalists should refer to the statute, analyze the case law, or better yet, reach out to an expert. Legal scholars routinely take interviews and are passionate about accurate reporting on this subject. Jeff Kosseff's recent law review article, *A User's Guide to Section 230, and a Legislator's Guide to*

Amending it (or Not)[665] is an excellent resource for a concise explanation of Section 230's background, application, and even identifies and rebuts some of the most common Section 230 misunderstandings. Finally, if journalists have the ability to include or link to infographics or other illustrations, adding these elements to articles that might help explain aspects of the law[666] and would also contribute to more thematic-like coverage, as discussed above. Incorporating reference documents,[667] helpful websites,[668] and visual aids using hyperlinks would be a simple way to provide readers with more information, resources, and context.[669]

Recommended Description

Section 230 of the Communications Decency Act says 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." (47 U.S.C. § 230) Under Section 230, online intermediaries that host or republish speech from third-parties are protected against a range of laws that might otherwise be used to hold them legally responsible for what others say and do. The law also encourages platforms to create and enforce content moderation policies because under Section 230, platforms are not held liable as publishers for the content they fail to remove.[670]

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[665] Kosseff, *supra* note 66.

[666] Visual explanations might better help readers consume complex information about Section 230. *See* Ruth C. Clark & Chopeta Lyons, GRAPHICS FOR LEARNING : PROVEN GUIDELINES FOR PLANNING, DESIGNING, AND EVALUATING VISUALS IN TRAINING MATERIALS iv (2010) ("Recent research confirms that, in some cases, people can learn better from graphics and words than from words alone." (citing Richard E. Mayer, MULTIMEDIA LEARNING (2nd ed., 2010))).

[667] If journalists mention pending legislation relating to Section 230, they should also include a hyperlink to the bill at Congress.gov.

[668] Websites such as the Electronic Frontier Foundation provide information about Section 230 in a more digestible manner for readers without legal or media law training. *See Section 230 of the Communications Decency Act*, *supra* note 5.

[669] *See Infographic: Why CDA 230 Is So Important*, EFF, https://www.eff.org/issues/cda230/infographic.

[670] This description was crafted in part using the information provided on EFF's website. *See Section 230 of the Communications Decency Act*, *supra* note 5.

The content analysis conducted as part of this thesis is just one step in the process of understanding how Section 230 can best be explained to the public. As a threshold matter, the frequency with which *The New York Times* and *The Wall Street Journal* covered the law over the past two years is encouraging. Both publications dedicated time and resources to cover Section 230 in a time of increased legislative and political attention. This suggests that journalists understand that Section 230 is an "issue before the house" and they are making information about the law more accessible to the public by reporting on it.

However, in light of the legislative attention and general discussion about the power of Big Tech, it is increasingly important that the public is educated about what Section 230 is and what it does. The reporting analyzed in this study indicated shortcomings that should be addressed to ensure that readers are receiving accurate information about how the law currently affects platforms so that readers can make informed opinions about if and how Section 230 should be modified. Journalists should continue to strive to report accurately about Section 230 and look for opportunities to include more nuance in discussions of the law, as to paint a full picture of the law. This includes providing clear and complete descriptions of the law's effects, namely that it prevents platforms from being considered publishers of third-party user content, and it encourages content moderation by eliminating the disincentive of increased liability for removing content.

It is the hope of the author that the recommendations provided at the conclusion of this Thesis will be considered in earnest and applied in future reporting on Section 230. As the proposed legislation is considered and debated in Congress, journalists will continue to play an important role in educating the public about Section 230 and equipping citizens with the knowledge they need to self-govern with respect to Section 230. These recommendations are

intended to equip journalists so they can provide the best and most accurate information so that readers can form their own, informed opinions about the future of Section 230.

APPENDIX A

CONTENT ANALYSIS: CHARACTERIZATIONS AND MISREPRESENTATIONS OF SECTION 230

Kathryn A. Johnson

Research Questions

RQ 1: What is the nature of contemporary news coverage of Section 230 in *The New York Times* and *The Wall Street Journal*?

RQ 2: What are the legal and impact frames of Section 230 present in characterizations of the law?

RQ 3: How and to what extent are Section 230's legal components misrepresented in coverage?

RQ 4: What are the sources of the legal misrepresentation?

Code Book

Section I					
Label	**Topic**	**Question/Text**	**Scale | Measure**	**Source**	**Notes**
	ID	Copy and paste the ProQuest article ID number	[text entry box]		
	Sample/Check	Is there any reason this article should not be included in the sample and be coded? Examples include that the article is a news round-up, news briefing, or editorial written by someone not on the editorial staff. To be included, Section 230 must also be the main focus of the article. If Section 230 is not the main focus (ex. Section 230 in title of article), the article must contain at least a full paragraph discussing what Section 230 is, Section 230's effects, or discussing it as a subject of current public debate to be included in the sample.	Yes No Textbox		
	Outlet	Indicate the name of the news outlet of the news article.	New York Times Wall Street Journal		
	Date	Identify the date the article was published using the drop down menu for month, day, and year.	[Dropdown] Month Day Year		

	Framing (E/T)	Determine whether the article can be classified as "episodic" or "thematic" in its framing of the issue of Section 230. **Episodic:** Reporting that presents an issue as a case study or an event-oriented report, and discusses the issue as a discrete instance. Episodic reporting uses concrete events to illustrate specific policy issues.[671] Often episodic reporting will introduce a policy issue by signaling to some related event that triggered coverage of the issue, such as a hearing, a speech, or the passage of a new law. **Thematic:** Reporting places public issues in some more general or abstract context, relying on collective or general evidence to illustrate policy issues.[672] Reporting focuses on trends over time, the effect of issues on the public more generally, and advocates for better policies.[673]	Episodic Thematic	Iyengar, 1991[674]	

[671] *Id.* at 14.

[672] *Id.*

[673] *See Episodic vs. Thematic Stories*, *supra* note 444.

[674] *See* IYENGAR, *supra* 424.

Section II					
Label	**Topic**	**Question/Text**	**Scale | Measure**	**Source**	**Notes**
		Is Section 230 defined? The definition might not be explicit or technical. Indicate a definition is provided if the article describes what the law is or what it does or attempts to summarize the law's purpose or effects. Example: "… a legal shield that prevents social media companies from being sued for much of the content users post to their platforms."	Yes No Textbox		*Copy and paste definition so you can determine later if a particular definition is frequently used.*
		What is the dominant legal frame of the definition of Section 230? **Publisher Liability**: Definition focuses on platforms not being treated as publishers of or having liability for the content that individual third-party users post on their sites.[675] The definition focuses on platforms performing a traditional publisher role,[676] such as acknowledging that platforms host third-party user-generated content. **Content Moderation**: Definition focuses on platforms' content moderation practices and platforms' standards for what type of content they allow on	Publisher activity Content moderation Both Neither	CRS[678]	

[675] 47 U.S.C. § 230(c)(1).

[676] Although platforms are not considered "publishers" from a legal perspective.

[678] *See CRS Section 230 Overview*, *supra* note 6.

		their sites.[677] The definition focuses on platforms' ability to restrict access to or remove content **Both**: Definition incorporates both concepts of Publisher Liability and Content Moderation as defined above. Articles should be coded as "both" if the article contains either multiple definitions of Section 230, with at least one definition that can be coded as Publisher Liability and one that can be coded as Content Moderation, or contains a single definition that incorporates both concepts of Publisher Liability and Content Moderation. **Neither**: Definition incorporates neither concepts of Publisher Liability nor Content Moderation as defined above, but includes a more general description of Section 230 without discussing its specific legal applications.			
		What is the tone of the definition of Section 230? **Positive**: Definitions are coded as "positive" if some aspect of the definition highlights the benefits of Section 230. **Negative**: Definitions are coded as "negative" if some aspect of the definition highlights that there is a harm associated with Section 230. **Neutral**: Definitions are coded as "neutral" if the	Positive Negative Neutral	EFF[679]	

[677] *Id.* § 230(c)(2).

[679] Kelley, *supra* note 501.

		definition does not highlight a positive nor a negative aspect of Section 230.			
		How are the effects associated with Section 230 characterized? **Individual**: Articles include a discussion about defamation,[680] discrimination, harassment, or privacy concerns as the effects that relate to how platforms currently operate under Section 230.[681] Individual impact also encompasses effects on individual platform users (individuals or entities) such as children.[682] **Corporate**: Articles discuss how Section 230 impacts businesses, such as lowering the barriers of entry and lowering financial burdens such as litigation costs.[683]	Individual Impact Institutional Impact Societal Impact Other Impact Textbox	ITIF[687] Brookings Institute[688]	*Why do the harms matter? Is framing as one harm more likely to spur change?*

[680] *Section 230 Protections*, *supra* note 490.

[681] *A Guide for Conceptualizing the Debate Over Section 230*, *supra* note 491.

[682] Derek E. Bambauer, *What Does the Day After Section 230 Reform Look Like?*, BROOKINGS (Jan. 22, 2021), https://www.brookings.edu/techstream/what-does-the-day-after-section-230-reform-look-like/.

[683] Jennifer Huddleston, *Section 230 as a Pro-Competition Policy*, AMERICAN ACTION FORUM (Oct. 27, 2020), https://www.americanactionforum.org/insight/section-230-as-a-pro-competition-policy/.

[687] Ashley Johnson & Daniel Castro, *Fact-Checking the Critiques of Section 230: What Are the Real Problems?*, ITIF (Feb. 22, 2021), https://itif.org/publications/2021/02/22/fact-checking-critiques-section-230-what-are-real-problems.

[688] Cameron F. Kerry, *Section 230 Reform Deserves Careful and Focused Consideration*, BROOKINGS (May 14, 2021), https://www.brookings.edu/blog/techtank/2021/05/14/section-230-reform-deserves-careful-and-focused-consideration/.

		Corporate effects also include how platforms' algorithms and algorithmic biases affect companies.[684] **Societal**: Articles include a discussion regarding how Section 230 effects society. The article focuses on misinformation and disinformation as it relates to elections, public health, education, or affecting our legislative process.[685] Perception of partisan bias is also considered a societal impact.[686] **Other**: Articles either (1) do not include a discussion regarding Section 230's effects, or (2) include a discussion of multiple types of effects.			
		How are the effects of Section 230 characterized?	Positive Negative Neutral		

Section III					
Label	**Topic**	**Question/Text**	**Scale | Measure**	**Source**	**Notes**
		Does the article contain a misstatement or an inaccuracy about what Section 230 is or how it operates? Common misconceptions might include: • Section 230 gives platforms ability to moderate content (this is	Yes No Textbox	Jeff Kosseff	*Might be more of a mis contextualization, leaving reader without a holistic understand of what the*

[684] Jacob Metcalf, Brittany Smith & Emmanuel Moss, *A New Proposed Law Could Actually Hold Big Tech Accountable for Its Algorithms*, SLATE (Feb. 9, 2022, 12:22 PM), https://slate.com/technology/2022/02/algorithmic-accountability-act-wyden.html.

[685] *A Guide for Conceptualizing the Debate Over Section 230*, *supra* note 491.

[686] *Id.*

		not true; the First Amendment does that)[689] • Without Section 230, platforms could be held liable for hate speech[690] • Without Section 230, platforms could be held liable for disinformation[691] • Section 230 requires platforms to be "neutral" in order to receive protection from liability[692] • Section 230 is a "safe harbor" like the DMCA[693]			*law is (lack of nuance)*
		What is the source of the misstatement? **Journalist**: Misrepresentation is unattributed to an external source. **Politician or Elected Official**: Misrepresentation is attributed to an individual such as the President of the United States or a Congressman. **Legal or Media Scholar**: Misrepresentation is attributed to an individual with legal, academic, or media expertise. **Big Tech Stakeholder**: Misrepresentation is attributed to an individual representing large platforms	Journalist Politician or Elected Official Legal or Media Scholar Big Tech Stakeholder Other Platform Stakeholder Affected/Aggrieved Party Case Law or Statute Institution Other		

[689] Kosseff, *supra* note 66, at 3.

[690] *Id.* at 30.

[691] *Id.*

[692] Kelley, *supra* note 501

[693] *See* Masnick, *supra* note 221 (discussing how *The New York Times* writer Jonathan Taplin confused Section 230's protections with the Digital Millennium Copyright Act's safe harbors).

		such as Facebook, Google, Twitter, etc. **Other Platform Stakeholder**: Misrepresentation is attributed to an individual representing a platform that does not fit into the traditional "big tech" category but is affected by Section 230. **Affected/Aggrieved Party**: Misrepresentation is attributed to an individual or a business, other than another platform, that has been affected in some way by Section 230. **Case Law or Statute**: Misrepresentation is attributed to a statute or a judicial interpretation of how Section 230 should be applied. **Institution**: Misrepresentation is attributed to an institution such as a think tank, or other non-profit or academic group. **Other**: Misrepresentation is attributed to a source that does not fit into one of the other categories.			
		Other Notes	Textbox		

APPENDIX B

CONTENT ANALYSIS: CHARACTERIZATIONS AND MISREPRESENTATIONS OF SECTION 230 IN NEWS COVERAGE

Copy and paste the ProQuest document ID.

Is there any reason this article should not be included in the sample and be coded?

- ○ Yes
- ○ No

Indicate the name of the news outlet of the news article.

- ○ New York Times
- ○ Wall Street Journal

Publication Date

Month	
Day	
Year	

Is the article episodic or thematic?

- ○ Episodic
- ○ Thematic

Is Section 230 defined or described?

- ○ Yes

- No

Paste definition.

What is the dominant legal frame of the definition of Section 230?

- Publisher activity
- Content moderation
- Both

What is the tone of the definition of Section 230?

- Positive
- Negative
- Neutral

How are the effects associated with Section 230 characterized?

- Individual Impact
- Corporate Impact
- Societal Impact
- Other Impact

What is the tone of the characterization of the effects?

- Positive
- Negative
- Neutral
-

Does the article contain a misstatement or an inaccuracy about what Section 230 is or how it operates?

- Yes
- No

Copy and paste the misstatement.

What is the cited origin of the misrepresentation?

- Journalist (unattributed source)
- Politician/Elected Official
- Legal/Media Scholar
- Big Tech Stakeholder
- Other Platform Stakeholder
- Affected/Aggrieved Party
- Case Law or Statute
- Institution
- Other

If the source (of the misstatement) is named, paste the name here.

Other notes

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