SECTION 230'S DEBTS

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ABSTRACT

Much attention has been paid to the unknown First Amendment permissibility of the government regulating social media platforms' carriage practices. The Supreme Court's impending resolution of the *NetChoice* cases poses a high-stakes First Amendment question: "Can the government permissibly dictate what types of content platforms publish?"

But how did the First Amendment stakes in *NetChoice* get so high? This Article identifies a long-standing gap in the Supreme Court's First Amendment jurisprudence for platform regulation following its decision in *Reno v. ACLU*. This Article attributes that gap to the accumulation of both *interpretive* and *legislative debts* by Section 230 of the Communications Act that effectively have obviated the development of a substantive law of platform regulation. This Article explores three case studies for paying down Section 230's debts: copyright law, the Fight Online Sex Trafficking Act (FOSTA), and the Florida and Texas social media laws at issue in *NetChoice*. Each case study highlights the possibilities and challenges for the tripartite gauntlet of substantive law, the First Amendment, and Section 230 itself that courts and legislatures must run to regulate platform carriage and moderation decisions.

INTRODUCTION

The nature and extent of the government's ability to dictate carriage and moderation of user-generated speech by Internet platforms in the United States—i.e., the nature and scope of Internet platforms' First Amendment rights—sits at the core of the legal and policy battles constituting the "techlash"

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against platforms.[1] On one front, the Supreme Court's docket[2] and the literature[3] are replete with efforts to articulate the permissibility of government officials informally urging social media platforms to remove or carry their users' speech, or *jawboning*—what we might call *retail* dictation of publication.

This Article turns, however, to *wholesale* dictation—the application of formal legal rules requiring platforms to carry or moderate certain kinds of content or users—the permissibility of which hinges on the scope of platforms' First Amendment rights.[4] The Supreme Court's anticipated rulings on the constitutionality of the Florida[5] and Texas[6] legislatures' "anti-censorship" carriage mandates for social media platforms in *NetChoice v. Moody*[7] and *NetChoice v. Paxton*[8] promise to provide some new clarity about the permissibility of platform regulation under the First Amendment.[9]

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[1] *See generally* Blake E. Reid, *Uncommon Carriage*, 76 STAN. L. REV. 89, 98–101 (2024) (providing background on the techlash).

[2] Missouri v. Biden, 83 F.4th 350, 373–74 (5th Cir. 2023), *cert. granted*; Murthy v. Missouri, No. 23-411, 144 S.Ct. 7 (2023) (Mem.) (additional procedural history omitted).

[3] *E.g.*, Genevieve Lakier, *Informal Government Coercion and The Problem of "Jawboning,"* LAWFARE (July 26, 2021), https://www.lawfaremedia.org/article/informal-government-coercion-and-problem-jawboning [https://perma.cc/HYB6-2WQZ]; Ashutosh Bhagwat, *Persuasion or Coercion? The Fifth Circuit's Muddled View of Missouri v. Biden*, KNIGHT FIRST AMENDMENT INSTITUTE (Sept. 15, 2023), https://knightcolumbia.org/blog/persuasion-or-coercion-the-fifth-circuits-muddled-view-of-missouri-v-biden [https://perma.cc/5SJK-HFVK]; Katie Harbath & Matt Perault, *Jawboned*, KNIGHT FIRST AMENDMENT INSTITUTE (Oct. 4, 2023), https://knightcolumbia.org/blog/jawboned [https://perma.cc/2NB5-297L].

[4] Among others, the Journal of Free Speech Law has published numerous pieces debating these issues, including in Volume 1, Issue 1 and Volume 3, Issue 1, https://www.journaloffreespeechlaw.org [https://perma.cc/SA34-NL7S].

[5] S.B. 7072, 27th Leg., 1st Reg. Sess. (Fla. 2021).

[6] H.B. 20, 87th Leg., 2d Called Sess. (Tex. 2021).

[7] NetChoice, LLC v. Att'y Gen., 34 F.4th 1196 (11th Cir. 2022) (largely affirming NetChoice, LLC v. Moody, 546 F.Supp.3d 1082 (N.D. Fla. 2021)), *cert. granted*, No. 22-277, 144 S.Ct. 478 (2023) (Mem.).

[8] NetChoice, LLC v. Paxton, 49 F.4th 439 (5th Cir. 2022) (overruling NetChoice v. Paxton, 573 F. Supp.32 1092 (W.D. Tex. 2021)), *cert. granted*, No. 22-555, 144 S.Ct. 477 (2023) (Mem.).

[9] Precisely how much clarity the ruling will bring, however, remains unclear after an oral argument that dwelled significantly on the cases' complexity and the potential pitfalls of aggressive rulings either in favor of or against the states. *See, e.g.*, Will Oremus, *Justices seemed to recognize the cases' nuances, scholars say*, WASHINGTON POST (Feb. 26, 2024) (quoting James Grimmelmann: "I believe that the court recognizes the problems with a sweeping ruling for either side, though we will have to see what the final opinions say.").

But this Article seeks to answer an underexplored threshold question: why, more than a quarter-century into the life of the commercial Internet, do we not *already* have more concrete answers from the Supreme Court about the permissibility of platform carriage and moderation regulations?

Part I of this Article explains that we lack concrete answers because courts and legislatures have promulgated very little *substantive law* to regulate platform carriage and moderation that would even prompt First Amendment scrutiny in the first instance.

Part II of this Article ascribes this dearth of substantive law to the *interpretive* and *legislative debts* of Section 230[10] of the Communications Act.[11] Section 230 effectively immunizes platforms from liability for most moderation and carriage decisions[12] and has posed a substantial legal and political barrier to new liability regimes for those decisions. Section 230's effective obviation of both common law application of pre-Internet bodies of law and new statutory regimes regulating carriage and moderation decisions has incurred what software engineers might describe as a sort of *technical debt*.[13]

Technical debt describes the dynamic that occurs when programmers take shortcuts in programming software that speed development in the short term but incur long-term "debt" that eventually makes the code unmaintainable.[14] The debt eventually must be "paid back" by rewriting the code to be more scalable and maintainable. A failure to pay back the debt in a timely fashion can effectively destroy the firm when the software cannot be scaled to meet the business case or the only

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[10] This Article builds on a short blog post authored after the Supreme Court surprisingly punted on reinterpreting the contours of Section 230 of the Communications Act in *Gonzalez v. Google*, 143 S.Ct. 1191, 1192 (2023) (per curiam). Blake E. Reid, *Gonzalez, Taamneh, and Section 230's Interpretive Debt* (Feb. 23, 2023), https://blakereid.org/gonzalez-taamneh-and-section-230s-interpretive-debt/ [https://perma.cc/S6LC-QVUX].

[11] *See generally* Blake E. Reid, *Section 230 of… what?* (Sept. 4, 2020), https://blakereid.org/section-230-of-what/ [https://perma.cc/5JPV-TYQY] (explaining the citational context of Section 230).

[12] *See* 47 U.S.C. § 230(c)(1), (c)(2)(A).

[13] *See* Ward Cunningham, *The WyCash Portfolio Management System* (Mar. 26, 1992), http://c2.com/doc/oopsla92.html [https://perma.cc/47Y6-2U2M].

[14] *Id.* Debt may accumulate because the early practices involve techniques that do not scale to the level required for a firm's business model, or because the techniques are so idiosyncratic that only the programmer that originally wrote the code can understand how it works.

programmer who knows how to maintain the code leaves the firm.[15]

In the context of Internet platforms, then, the concepts of interpretive debt and legislative debt respectively describe the courts' and legislatures' long-running reliance on Section 230 as a blunt instrument for resolving the application of substantive law to Internet platforms. That is: Section 230 effectively has obviated the need for either courts or legislatures to resolve difficult questions about how to address social problems on Internet platforms by preempting the application of most legal regimes to most platforms under most circumstances involving the carriage or moderation of user-generated content.[16]

Section 230's interpretive and legislative debts not only have raised the stakes of *NetChoice*, but also have limited the development of normative consensus about the substantive regulation of moderation and carriage decisions by Internet platforms. Part III of this Article closes with three case studies that illustrate the patterns and challenges of developing substantive law for platforms even beyond the reach of Section 230 and the First Amendment: copyright law, the Fight Online Sex Trafficking Act (FOSTA), and the Florida and Texas social media laws at issue in *NetChoice*.

I. THE SUPREME COURT'S MISSING FIRST AMENDMENT JURISPRUDENCE FOR INTERNET PLATFORM REGULATION

The contours of the First Amendment's application to modern Internet platforms that intermediate a vast array of speech might seem like a critical dimension of contemporary U.S. Internet law and policy. But the Supreme Court's quarter-century-old holding in *ACLU v. Reno*[17] stands as the Court's primary First Amendment holding on a substantial legal regime regulating content on the Internet. *Reno* granted a preenforcement facial challenge to the non-Section 230 provisions of the Communications Decency Act ("CDA") that sought "to protect minors from 'indecent' and 'patently offensive' communications on the Internet,"[18] concluding that

[15] *See id.*
[16] *See* discussion *infra*, Part II.
[17] 521 U.S. 844 (1997).
[18] *Id.* at 885.

there was "no basis for qualifying the level of First Amendment scrutiny that should be applied" to the Internet.[19] As this Part explains, however, *Reno* is an increasingly stale holding on a topic which the Court has not significantly revisited over the long life of the commercial Internet.[20]

Of course, some commenters believe that *Reno* resolves the First Amendment's application to Internet regulation to a substantial degree.[21] As Alan Rozenshtein explains, "*Reno* . . .

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[19] *Id.* at 870, 885.

[20] Four other decisions—two directly following on from *Reno* and legislative efforts to rekindle the CDA—warrant brief mention. First, in *Ashcroft v. ACLU*, the Court upheld a preliminary injunction against the Child Online Protection Act (COPA) (codified as Section 231 of the Communications Act of 1934, informally codified at 47 U.S.C. § 231), Pub. L. 105-277 tit. XIV, 112 Stat. 2681-736–2681-741, Congress's 1998 attempt to resurrect a narrower version of the CDA. 542 U.S. 656, 660–61 (2004). However, *Ashcroft* was a relatively narrow and muted rehash of *Reno*, culminating in 5-4 decision, with two of the Justices in the majority joining a concurrence emphasizing the possibility that "Congress might have accomplished [its goals] by other, less drastic means," *see id.* at 675 (Stevens, J., concurring), and two separate dissents that would have upheld the statute as affirmatively constitutional, *see id.* at 676 (Scalia, J., dissenting); *id.* at 677–91 (Breyer, J., dissenting). Second, in *United States v. American Library Ass'n*, 539 U.S. 194 (2003), the Court *upheld* the constitutionality of the even narrower Children's Internet Protection Act (CIPA), Pub. L. 106-554, 114 Stat. 2763A-335–2763A-352 tit. XVII, which did not involve direct regulation of content but instead hinged federal funding for Internet access in public libraries on the installation of user-removable filters for obscenity and child sexual abuse materials. *Id.* at 198–99. *American Library Ass'n* is even more muddled than *Ashcroft*, yielding no majority opinion, two separate concurrences in the judgement, *id.* at 214–15 (Kennedy, J., concurring in the judgment); *id.* at 215–20 (Breyer, J., concurring in the judgment), and two separate dissents, *id.* at 220–231 (Stevens, J., dissenting); *id.* at 231–243 (Souter, J., dissenting). Third, *Packingham v. North Carolina*, 582 U.S. 98 (2017), overturned a statute outright barring access to various Internet services including social media platforms by registered sex offenders, *id.* at 101, though its focus on the First Amendment rights of sex offenders to use social media platforms shed little direct light on the First Amendment rights of the platforms themselves. Finally, *303 Creative v. Elenis*, 600 U.S. 570 (2023), concluded that the application of an anti-discrimination statute to a web designer violated her First Amendment rights, *id.* at 577–78, though its holding is only tangentially focused on the Internet, *id.* at 587 (noting that "All manner of speech . . . qualify for the First Amendment's protections; no less can hold true when it comes to speech . . . conveyed over the Internet.").

[21] *E.g.*, Rodney A. Smolla, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 27:22 (October 2023 update) (arguing that *Reno* "se[t] forth for the first time the constitutional principles applicable to freedom of speech on the Internet"); AMERICAN CIVIL LIBERTIES UNION, *Technology and Liberty: Internet Free Speech* (Jan. 1, 2004), https://www.aclu.org/documents/technology-and-liberty-internet-free-speech [https://perma.cc/QL22-6QV5] (describing *Reno* as underpinning a vision of "an uncensored Internet" and a "declar[ation]" of "the Internet [as] a free speech zone"); Stuart N. Brotman, *Twenty years after Reno v. ACLU, the long arc of internet history returns*, BROOKINGS (June 26, 2017), https://www.brookings.edu/articles/twenty-years-after-reno-v-aclu-the-long-arc-of-

has always been considered the kind of Magna Carta of [I]nternet–First Amendment cases."[22] In part, this is due to *Reno*'s recognition that "the First Amendment is really foundational and really important" on the Internet,[23] which inextricably intertwines speech with a wide range of social, cultural, democratic, and economic activity.

But a closer look at *Reno* reveals the potential limitations of its holding. In particular, *Reno* scrutinized the sweeping mechanics of the CDA, drafted for the rudimentary array of proto-Internet applications that existed in 1996, which categorically prohibited certain content[24] and did not neatly map on to the world of user-generated content platforms that Section 230 enabled.[25] In fact, it is not clear the extent to which the CDA's prohibitions even would have applied to user-generated content platforms, such as social media services, or whether their application was intended to be precluded by Section 230,[26] which *Reno* mentions only in passing.[27]

As a result, it is at best unclear how *Reno*'s reasoning bears on the broad range of possible carriage and moderation regulations for user-generated content platforms that have been

internet-history-returns/ [https://perma.cc/NUT4-FD4M] (describing *Reno* as "a constitution law . . . firewall for U.S. government restrictions on any non-obscene content" on the Internet).

[22] Caroline Mimbs Nyce, *The Supreme Court Cases That Could Refine the Internet*, THE ATLANTIC (Sept. 30, 2023), https://www.theatlantic.com/technology/archive/2023/09/scotus-social-media-cases-first-amendment-internet-regulation/675520/ [https://perma.cc/K852-FBLT] (interviewing Alan Rozenshtein).

[23] *Id.*

[24] *See Reno*, 521 U.S. at 877–79 ("The breadth of the CDA's coverage is wholly unprecedented" and "imposes an especially heavy burden on the Government to explain why a less restrict provision would not be as effective as the CDA.").

[25] The CDA's main prohibitions apply to people who directly "initiat[e] . . . transmission" "by means of a telecommunications device" or "us[e] an interactive computer service to send [or] display" proscribed illicit content, or who secondarily "permit the use of . . . telecommunications facilit[ies] under [their] control" to be used for the same. 47 U.S.C. § 223(a), (d). COPA's main prohibitions are similarly general, applying to people who "mak[e] any communication." *See* 47 U.S.C. § 231(a)(1).

[26] COPA, by contrast, specifically carved out liability for platforms of both unaltered carriage of communications *and* takedowns of content immunized under Section 230(c). *See* 47 U.S.C. § 231(b)(4).

[27] *See* Reno v. Am. C.L. Union, 521 U.S. 844, 857 n.24 (1997). Neither *Ashcroft* nor *American Library Ass'n* mention Section 230 at all. *See* Ashcroft v. Am. C.L. Union, 542 U.S. 656 (2004); United States v. Am. Library Ass'n, 539 U.S. 194 (2003).

theorized[28] in the intervening twenty-six years. On the one hand, *Reno* refused to extend the justifications that warranted a lower level of First Amendment scrutiny for broadcast indecency regulations in *FCC v. Pacifica* to the Internet.[29] This suggests that the Court might impose ordinary First Amendment scrutiny on regulations that strictly compel platforms to *moderate* certain types of content. But *Reno*'s actual application of that scrutiny is highly focused on the CDA's antiquated idiosyncrasies, leaving unclear how the First Amendment might apply to a modern moderation regulation drafted specifically with user-generated content platforms in mind.[30]

Given *Reno*'s focus on the CDA's content-banning provisions, it is also unsurprising that *Reno* has had minimal impact on the evaluation of *carriage* regulations like those at issue in the *NetChoice* cases. *Reno* did conclude that there was "no basis for qualifying the level of First Amendment scrutiny that should be applied to th[e] [Internet],"[31] distinguishing the decision in *Red Lion v. FCC* to dilute the scrutiny of the complex carriage obligations imposed on broadcasters under the Fairness Doctrine based on the scarcity of the right to broadcast without interference.[32] But *Reno* has not proven a reliable basis for rejecting or even deeply scrutinizing Internet carriage regulations beyond the CDA.

One prominent example of *Reno*'s absence from contemporary debates about Internet carriage regulations is the Federal Communications Commission's net neutrality rules,

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[28] *See generally* Daphne Keller, *The Long Reach of Taamneh: Carriage Removal Requirements for Internet Platforms*, BROOKINGS (Oct. 19, 2023) [hereinafter *Keller*, BROOKINGS], https://www.brookings.edu/articles/the-long-reach-of-taamneh-carriage-and-removal-requirements-for-internet-platforms/ [https://perma.cc/ALR2-DKAA] (exploring the range of carriage and moderation requirements for platforms); Daphne Keller, *Carriage and Removal Requirements for Internet Platforms: What* Taamneh *Tells Us*, 4 J. OF FREE SPEECH L. 87, 95–115 (2023) (same); Mark A. Lemley, *The Contradictions of Platform Regulation*, 1 J. OF FREE SPEECH L. 304, 304 (2021) (exploring the broader range of policy interventions proposed for platforms).

[29] *Reno*, 521 U.S. at 867–68 (citing FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978)).

[30] *See id.* at 867–68 (drawing fine distinctions about the CDA's scope and provisions to distinguish prior precedent), 870–74 (critiquing the CDA's many ambiguities), 874–79, 881–82 (critiquing the CDA's failed tailoring), 885 (critiquing the government's asserted interests in enacting the CDA).

[31] *Reno*, 521 U.S. at 870.

[32] 395 U.S. 367 (1969).

which impose broad carriage mandates on broadband access providers. In evaluating the First Amendment permissibility of the rules, the D.C. Circuit made clear in *USTA v. FCC* that carriage regulations could be permissibly applied to Internet service providers (ISPs) because ISPs "d[o] not—and [are] not understood by users to—'speak' when providing neutral access to [I]nternet content."[33] Even the pointed dissent in *USTA* from then-Judge Brett Kavanaugh arguing that the rules were unconstitutional did not invoke *Reno*, focusing instead on the Court's earlier decisions evaluating carriage regulations for cable television in the *Turner* cases.[34]

Though *USTA* did not consider regulations of carriage and moderation decisions by platforms that host user-generated content, one might have expected *Reno* to play a key role in the *NetChoice* litigation over Texas and Florida's efforts to regulate social media platforms. But *Reno* was only narrowly invoked by the Florida[35] and Texas[36] district courts and the Eleventh Circuit[37] to contest arguments for reduced First Amendment scrutiny of Internet platform regulation, not mentioned at all by the Fifth Circuit in upholding the Texas law[38] or by the Supreme Court in its preliminary consideration of the Texas law's stay on

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[33] United States Telecom Ass'n v. FCC, 825 F.3d 674, 743–44 (D.C. Cir. 2016).
[34] *Compare* United States Telecom Ass'n v. FCC, 855 F.3d 381, 388 (D.C. Cir. 2017) (Srinivasan, J., concurring in the denial of rehearing en banc) (arguing that "[n]o Supreme Court decision suggests" a First Amendment problem with such regulations) *with* 855 F.3d at 433–35 (Kavanaugh, J., dissenting from the denial of rehearing en banc) (arguing that the First Amendment bars such regulations under the Supreme Court's decisions in Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994) (*Turner I*) and Turner Broad. Sys. v. FCC, 520 U.S. 180 (1997) (*Turner II*)). *See generally* Reid, *supra* note 1, at 114–15 (further elaborating on the dispute in *United States Telecom Ass'n*).
[35] *See* NetChoice, LLC v. Moody, 546 F.Supp.3d 1082, 1091, 1095 (N.D. Fla. 2021) (citing *Reno* only for the broad propositions that "the First Amendment applies to speech over the [I]nternet" and that regulations must be narrowly tailored).
[36] NetChoice, LLC v. Paxton, 573 F. Supp.3d 1092, 1106, 1115 n.5 (W.D. Tex. 2021) (citing *Reno*, 521 U.S. at 870, only for the notion that First Amendment's application to the Internet is not qualified like it is for broadcast).
[37] NetChoice, LLC v. Atty. Gen., 34 F.4th 1196, 1220, 1228 (11th Cir. 2022) (citing *Reno*, 521 U.S. at 868–70, only for a similarly general point about the application of the First Amendment to the Internet and noting *Reno*'s rejection of the *Red Lion* scarcity doctrine).
[38] *See* NetChoice, LLC v. Paxton, 49 F.4th 439 (5th Cir. 2022). *Paxton* is the lone decision in the *NetChoice* saga to make even passing mention of *Ashcroft*, which it cites in *support* of its upholding of the Texas social media law. *See id.* at 485 n.35 (citing Ashcroft v. Am. C.L. Union, 542 U.S. 656, 666 (2004)).

appeal,[39] and only off-handedly referenced by the attorneys in the *NetChoice* oral arguments.[40]

Why, then, has the Court not revisited the permissibility of platform regulation since *Reno*? As a practical matter, the application of the First Amendment is a reactive event.[41] While the First Amendment nominally protects the freedom of speech, definitively identifying the freedom's contours requires a legislature to violate the accompanying command to "make no law . . . abridging" that freedom.[42] The Constitution's case-or-controversy requirement[43] all but ensures that the Supreme Court will never issue a binding advisory opinion about the government's ability to regulate Internet platforms or the platforms' First Amendment rights.[44]

Judicial illumination of the First Amendment's limitations on the government's authority, then, requires either the common-law application of existing laws or a new statutory scheme to regulate a platform's carriage or moderation practices, followed by a responsive First Amendment challenge. But across the lifespan of the commercial Internet, very few efforts to regulate platforms' carriage or moderation practices have provided the Supreme Court with an opportunity to assess the First Amendment rights of platforms.

II. SECTION 230'S DEBTS

One key reason for the dearth of opportunity for the Supreme Court to develop First Amendment jurisprudence for

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[39] *See* NetChoice, LLC v. Paxton, 142 S. Ct. 1715, 1716 (2022) (Alito, J., dissenting from grant of application to vacate stay).

[40] *See* NetChoice, LLC v. Moody, Tr. at *63, *110 (Feb. 26, 2024), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-277_8n59.pdf [https://perma.cc/2TK6-W56U] (referencing *Reno* only briefly with no followup from the Justices); NetChoice, LLC v. Paxton, Tr. at *16, *28 (Feb. 26, 2024), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-555_omq2.pdf [https://perma.cc/SQS3-YRUF] (same).

[41] *See* Reid, *supra* note 1, at 48–49.

[42] *See* U.S. CONST. amend. I. This command also can be implicated by executive officials engaged in jawboning, see discussion *supra*, notes 2–3 and surrounding text, or by administrative or law enforcement agencies engaging in rulemaking, adjudication, or other activities.

[43] U.S. CONST. art. III, § 2, cl. 1.

[44] *But cf.* Reid, *supra* note 1, at 104–05, 124 (describing Justice Clarence Thomas's free-floating concurrence on the regulatability of platforms in Biden v. Knight First Amend. Inst., 141 S. Ct. 1220, 1221–27 (2021)).

Internet platforms is Section 230. Alongside the provisions of the CDA struck down in *Reno*, Congress encoded in Section 230 a presumption against regulating the carriage and moderation practices of Internet platforms.[45] Section 230 effectively immunizes platforms from liability for moderation or carriage decisions about user-generated content in most circumstances.[46] In doing so, Section 230 obviates, at least in principle, the need for courts to apply the First Amendment to carriage and moderation decisions,[47] acting as a sort of meta-rule (in the rules-versus-standards sense) of non-regulation.[48]

These dynamics have accumulated two legal versions of the technical debt described *supra*.[49] First, Section 230 has accumulated *interpretive debt*—the absence of a common law applying existing substantive legal regimes or the First Amendment to platforms' carriage and moderation practices.[50]

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[45] *See generally* JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 2 (2019) ("[W]ith few exceptions, websites and Internet service providers are not liable for the comments, pictures, and videos that their users and subscribers post, no matter how vile or damaging . . . even if they edit or delete some user content.")

[46] *See* 47 U.S.C. § 230(c)(1), (c)(2)(A). *See generally* Jeff Kosseff, *A User's Guide to Section 230, and a Legislator's Guide to Amending It (Or Not)*, 37 BERKELEY TECH. L.J. 757, 773–79 (2022) (describing Section 230's mechanics in detail). As Kosseff has explained, the two primary circumstances where courts decline to extend Section 230 immunity are "(1) where the platform at least partly developed or created the content; and (2) where the claim did not treat the platform as the publisher or speaker of third-party content." *Id.* at 779–80. Section 230 also contains built-in exceptions for actions under federal criminal law, 47 U.S.C. § 230(e)(1), intellectual property law, 47 U.S.C. § 230(e)(2), "consistent" state laws, 47 U.S.C. § 230(e)(3), certain communications privacy laws, 47 U.S.C. § 230(e)(4), and certain sex trafficking laws, 47 U.S.C. § 230(e)(5). For further discussion of developments in the context of the intellectual property and sex trafficking exemptions, see *infra* Part III.

[47] This Article distinguishes discussion of Section 230's preemption of carriage and moderation regulations from the line of cases addressing Section 230's (non-) application to claims based on platform design decisions. *E.g.*, In re: Social Media Adolescent Addition/Personal Injury Products Liability Litigation, 4:22-md-03047-YGR, 2023 WL 7524912 (N.D. Cal. Nov. 14, 2023); Lemmon v. Snap, Inc., 995 F.3d 1085, 1087 (9th Cir. 2021); Ziencik v. Snap, Inc., 2024 U.S. Dist. LEXIS 12105 (C.D. Cal. Jan. 19, 2024)

[48] *See generally* Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 379 (1985).

[49] *See* discussion *supra*, Introduction.

[50] Reid, *supra* note 10. Scholars have described similar dynamics in other areas. One example is in the area of qualified immunity, which Joanna Schwartz argues has "made it increasingly easy for courts to avoid defining the contours of constitutional rights." Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1814 (2018). Another is the "expanding application" of the good faith exception and the inevitable discovery doctrine, which Justin Marceau argues will

Second, Section 230 has accumulated *legislative debt*—the inability of legislatures to develop new laws or adapt existing laws to regulate platforms' carriage and moderation decisions. Legislative debt has accumulated at the state level—because of Section 230's preemptive effect on state laws regulating platforms—and at the federal level—because amending Section 230, a political third rail,[51] is effectively required to pass new federal laws that regulate platforms.[52] These ever-accumulating debts require both courts and legislatures to engage in ever-more complex efforts to rewrite or develop new common law or statutory "code" if they seek to regulate the carriage and moderation practices of ever more technologically sophisticated platforms.

Before proceeding, a caveat: I do not invoke the term "debt" in a pejorative sense, but merely in the technical sense described *supra*.[53] Though I explore some normative dimensions of platform regulation *infra*,[54] this Article is not meant to stake out a full-fledged normative position for or against particular modes of regulation of platform carriage and moderation decisions, or critique the normative positions that others have staked out. My past work has promoted a nuanced understanding of the First Amendment that recognizes the need for carefully tailored government interventions to promote public goods, such as accessibility,[55] while guarding against the dangers of sophistic invocations such as "common carriage" to justify draconian government control of discourse.[56] *NetChoice*

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make the "development of Fourth Amendment law in the context of criminal appeals . . . increasingly uncommon." Justin F. Marceau, *The Fourth Amendment at A Three-Way Stop*, 62 ALA. L. REV. 687, 733 (2011). These dynamics sit adjacent to the canon of constitutional avoidance, which guides judicial interpretation to avoid unnecessary interpretation of constitutional issues. *See, e.g.,* Eric Berger, *Constitutional Conceits in Statutory Interpretation*, 75 ADMIN. L. REV. 479, 532–33 (2023).

[51] Scott R. Anderson, Quinta Jurecic, Alan Z. Rozenshtein, & Benjamin Wittes, *The Supreme Court Punts on Section 230*, LAWFARE (May 19, 2023), https://www.lawfaremedia.org/article/the-supreme-court-punts-on-section-230 [https://perma.cc/Q2ZQ-6MSA] (describing "the third rail of Section 230").

[52] For discussion of how Section 230 might snarl the application of federal laws to platforms without corresponding amendments to Section 230, see *supra*, note 26 and accompanying text and *infra*, notes 68–69 and surrounding text.

[53] See discussion *supra*, Introduction.

[54] See discussion *infra*, Part III.

[55] *E.g.*, Blake E. Reid, *Internet Architecture and Disability*, 95 IND. L.J. 591, 603 & n.64, 624–25 & n.186 (2020) (noting the important First Amendment values advanced by applying disability law to various technological and social contexts).

[56] Reid, *supra* note 1, at 93–94.

puts my hope for nuanced Internet law and policy between the Scylla of an urgent need to stop creeping authoritarianism by state legislatures seeking to punish their political enemies and the Charybdis of a Lochnerized First Amendment[57] that would put the vast social problems of a complex digital society entirely out of policymakers' reach.[58] But this Article simply invokes the term "debt" as an explanatory construct to describe how Section 230 has, for better and for worse, effectively precluded the development of platform regulation in courts and legislatures and brought us to *NetChoice*'s high-stakes doorstep.

A. Section 230's Interpretive Debt

At a November 1995 University of Chicago symposium on *The Law of Cyberspace*,[59] Judge Frank Easterbrook famously dismissed the notion that a specialized field of "cyberlaw" was necessary for the Internet, declaring that "the best way to learn the law applicable to specialized endeavors" such as the Internet was "to study general rules."[60] As Larry Lessig explained, Easterbrook's prescription was for would-be Internet law scholars (or "multidisciplinary dilettant[es]," as Easterbrook had snidely labeled them[61]) to "just stand aside as judges . . . worked through the quotidian problems that this souped-up telephone [i.e., the Internet] would present."[62]

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[57] *See generally* Genevieve Lakier, *The First Amendment's Real* Lochner *Problem*, 87 U. CHIC. L. REV. 1241 (2020) (discussing the concept of First Amendment Lochnerism).
[58] *Cf.* Brief of the Knight First Amendment Institute as *Amicus Curiae* in Support of Neither Party at 2, Moody v. NetChoice, LLC, No. 22-277, & NetChoice, LLC v. Paxton, No. 22-555 (U.S. Dec. 7, 2023) (comparing Florida's and Texas's arguments that "the platforms' content-moderation decisions do not implicate the First Amendment at all"—which, "[i]f accepted, . . . would give governments sweeping authority over the digital public sphere"—with the platforms' "diametrically opposed position . . . that any regulation implicating their content-moderation decisions must be subjected to the most stringent First Amendment scrutiny, or perhaps even regarded as unconstitutional per se"—which "would make it nearly impossible to enact even carefully drawn laws that serve First Amendment values").
[59] *See* Larry Irving, *Safeguarding Consumers' Interests in Cyberspace*, 1996 U. CHI. LEGAL F. 1.
[60] Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 207–08. Which areas of law Judge Easterbrook intended to encompass within the scope of "general rules" is unclear. The remarks begin by invoking "property, torts, commercial transactions and the like, but retreat to a Coasean preference for private ordering built around a system of property rights. *Id.* at 208, 215–16.
[61] *Id.* at 207.
[62] Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 501 (1999).

Under Judge Easterbrook's approach to Internet law, courts would have developed the common law of user-generated content services over time by carefully building a body of decisions interpreting tort, contract, property, civil rights, and other bodies of law and their application to novel circumstances involving Internet-based user-generated content services. This "gradual accretion of special instances" would have followed in the long-standing American tradition of "try[ing] before juries even the most complicated issues of fact characteristic of our . . . business and scientific world."[63]

While scholars have debated at length the merits of Judge Easterbrook's approach to Internet law,[64] less attention has been paid to the fact that it was explicitly obviated by Section 230, passed just months after the *Cyberspace* symposium, with respect to regulation of platform carriage and moderation decisions. Section 230 effectively absolved judges of having to decide how non-Internet-specific bodies of law—contract, property, tort, civil rights, and the like—would apply to Internet platforms in most circumstances involving the carriage or moderation of user-generated content.[65]

As a result, Internet platforms for user-generated content have developed technologically, socially, and culturally for more than a quarter century with little corresponding development of common law to regulate their carriage and moderation practices.[66] In other words, Easterbrookian "general rules" typically cannot regulate the carriage and moderation decisions of platforms if they fall within the ambit of Section 230.

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[63] *See* Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 6 (1936).

[64] *E.g.*, Margot Kaminski, *Technological 'Disruption' of the Law's Imagined Scene: Some Lessons from Lex Informatica*, 36 BERKELEY TECH. L.J. 883, 884 (2022); Alicia Solow-Niederman, *Emerging Digital Technology and the "Law of the Horse,"* UCLA L. REV. (Feb. 19, 2019), https://www.uclalawreview.org/emerging-digital-technology-and-the-law-of-the-horse/ [https://perma.cc/4ZV9-RHRX].

[65] *See supra* notes 45–46 and accompanying discussion.

[66] According to Oona Hathaway, "legal change is characterized by periods of stability punctuated by periods of rapid change . . . [such as] the reversal of an earlier decision by a higher court . . . [that] offer a brief opportunity for legal actors to realign legal arrangements that may gradually have grown out of sync with underlying societal conditions. . . . [W]here punctuations occur more frequently, the system 'self-corrects' more frequently." Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in A Common Law System*, 86 IOWA L. REV. 601, 655 (2001). Section 230 effectively obviates the need for courts to introduce such punctuations.

This is not to say that Section 230 has altogether precluded the development of common law for platforms. Though a full-fledged empirical study of Section 230 jurisprudence is beyond the scope of this Article, it suffices to observe that courts sometimes recognize the application of how common law might otherwise regulate platforms in the absence of Section 230's preemptive effect. For example, the District of Massachusetts affirmed in *National Association of the Deaf v. Harvard* that Title III of the Americans with Disabilities Act and the Rehabilitation Act, both laws that predate the commercial Internet, applied to Harvard's websites.[67] The *NAD* court concluded that disability law would have imposed an obligation on Harvard to make third-party content it hosted accessible to people with disabilities but for Harvard's immunity under Section 230.[68] The *NAD* court even went so far as to affirm that the "[p]laintiff's plea for access [was] compelling" and lamented the "tension" between Section 230 and disability law's goals.[69]

However, courts that look beyond Section 230 to address the substantive merits of laws may also conclude that existing bodies of law simply do not apply to platforms, or at least not in the ways that plaintiffs desire. One flavor of this dynamic is courts using common law interpretation as belt-and-suspenders with Section 230 to absolve a platform of liability. In one prominent recent example, the Eastern District of California dismissed the Republican National Committee's lawsuit against Google over allegations of bias in Gmail's spam filter.[70] The court concluded not only that the platforms were immunized by Section 230,[71] but also that the RNC's substantive claims under

[67] NAD v. Harvard, 377 F.Supp.3d 49, 61, 63 (D. Mass. 2019); *cf.* Divino Grp. v. Google, No. 19-cv-04749-VKD, 2022 WL 4625076, at *10, *17 (N.D. Cal. Sept. 30, 2022) (holding that allegations of a violation of California's Unruh Act were "very thin" but sufficient to survive a motion to dismiss, yet barred by Section 230).
[68] *NAD*, 377 F.Supp.3d at 61, 63.
[69] *See id.* at 66.
[70] RNC v. Google, No. 222-CV-01904-DJC (JBP), 2023 WL 5487311, at *1 (E.D. Cal. Aug. 24, 2023). *See generally* Blake E. Reid, *The Conservative Bias Panic Comes for Gmail's Spam Detection*, LAWFARE (Nov. 9, 2022), https://www.lawfaremedia.org/article/conservative-bias-panic-comes-gmails-spam-detection [https://perma.cc/2858-MX8S]. For similar examples, *see, e.g.*, Zhang v. Twitter, No. 23-CV-00980-JSC, 2023 WL 5493823, at *3 (N.D. Cal. Aug. 23, 2023); Murphy v. Twitter, Inc., 60 Cal. App. 5th 12, 17 (2021); Craft v. Musk, No. 23-CV-01644-JCS, 2023 WL 2918739, at *3 (N.D. Cal. Apr. 12, 2023); Amuze v Better Bus. Bureau, 2023 WL 2366823, at *5 (N.Y. Sup. Ct. Mar. 3, 2023).
[71] *RNC*, 2023 WL 5487311, at *8.

California common carrier law failed.[72] The court pointedly "decline[d] to be the first" court to "f[in]d an e-mail service provider to be a common carrier."[73]

Moreover, courts also may reach the conclusion that existing law does not apply to platforms even when they have *not* invoked the platforms' immunity under Section 230. The most prominent recent example of this dynamic arose in the context of the Supreme Court's consideration of *Google v. Gonzalez*[74] and *Twitter v. Taamneh.*[75] Both *Gonzalez* and *Taamneh* involved similar claims against platforms under the Antiterrorism Act (ATA).[76] However, the peculiar procedural posture of the cases gave the Court the opportunity to determine the application of Section 230 in *Gonzalez*[77]—the first Section 230 case ever taken up by the Court—and to address the merits of the ATA claim in *Taamneh*.[78] Though it was widely anticipated that the Court might narrow the scope of Section 230 in *Gonzalez*,[79] the Court instead simply chose to reject the ATA claims against the platforms in *Taamneh*[80] and punt on Section 230's application in *Gonzalez*, concluding that it was not worth "address[ing] the application of [Section] 230 to a complaint that appears to state little, if any, plausible claim for relief."[81]

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[72] *Id.*
[73] *Id.*
[74] 598 U.S. 617 (2023).
[75] 598 U.S. 471 (2023).
[76] *Gonzalez*, 598 U.S. at 620–21; *Taamneh*, 598 U.S. at 477–78.
[77] 598 U.S. at 622.
[78] 598 U.S. at 477–78.
[79] *See, e.g.*, Jennifer Stisa Granick, *Is This the End of the Internet As We Know It?*, AM. C.L. UNION (Feb. 22, 2023), https://www.aclu.org/news/free-speech/section-230-is-this-the-end-of-the-internet-as-we-know-it [https://perma.cc/EA75-F9RM] (noting that *Gonzalez* "could drastically alter the way we interact online").
[80] *Taamneh*, 598 U.S. at 478.
[81] *Gonzales*, 598 U.S. at 622. The outcome in *Gonzalez* was perhaps a result of a disastrous oral argument for the plaintiffs, during which Justice Amy Coney Barrett pointedly asked the plaintiffs' attorney "if you lose tomorrow [in *Taamneh*], do we even have to reach the Section 230 question here?" Transcript of Oral Argument at 58, Google v. Gonzalez, 598 U.S. 617 (2023) (No. 21-1333); *see also* Eric Goldman, *Quick Debrief on the Gonzalez v. Google Oral Arguments*, TECH. & MKTG. L. BLOG (Feb. 21, 2023), https://blog.ericgoldman.org/archives/2023/02/quick-debrief-on-the-gonzalez-v-google-oral-arguments.htm [https://perma.cc/K5MK-NR4X] (correctly predicting the "'horse-trading' between the two cases" that ultimately materialized); Adi Robertson, *The Supreme Court hears arguments for two cases that could reshape the future of the Internet*, THE VERGE, https://www.theverge.com/23608495/supreme-court-section-230-gonzalez-google-oral-arguments/archives/2 [https://perma.cc/HZV7-BVV2] (collating reactions to the *Gonzalez* oral arguments).

Courts also may decline to apply substantive law to regulate platform decisions even after going out of their way to affirmatively conclude that Section 230 does *not* immunize a platform for some particular conduct.[82] The most prominent example of this dynamic occurred in *Fair Housing Council v. Roommates.com*,[83] where the Ninth Circuit articulated an elaborate doctrine for the inapplicability of Section 230 in circumstances where platforms were partially responsible for the "development" of user content that might give rise to liability.[84] The Ninth Circuit initially concluded that Roommates.com was not immunized by Section 230 for various features of its service that facilitated discrimination in the selection of roommates in alleged violation of the Fair Housing Act (FHA).[85] The Ninth Circuit even noted that Section 230 "was not meant to create a lawless no-man's-land on the Internet."[86] But in the ultimate resolution of the litigation many years later, the Ninth Circuit concluded that the FHA did not actually outlaw discriminatory roommate selection.[87]

Moreover, empirical study by others casts non-trivial doubt on the likelihood that courts would broadly apply pre-Internet substantive laws to regulate the carriage and moderation practices of platforms, regardless of Section 230. For example,

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For another example of the dynamic in *Gonzalez* and *Taamneh*, *see, e.g.*, Webber v. Armslist, 70 F.4th 945, 955–57, 965–67 (7th Cir. 2023) (discussing in dicta the court's perceived complexity of the application of Section 230 and instead rejecting the plaintiff's claims on the substantive merits). Courts may have other reasons for dismissing cases by interpreting substantive law instead of applying Section 230. *E.g.*, Herrick v. Grindr, 765 Fed.Appx. 586, 590–93 (2d Cir. 2019) (rejecting some claims under Section 230 and others on the substantive merits); *Hall v. Twitter, Inc.*, No. 20-cv-536-SE, 2023 WL 3322952, at *5 (D.N.H. May 9, 2023) (declining to address Section 230 for unexplained reasons).

[82] See *supra* note 46 and accompanying discussion.

[83] 521 F.3d 1157 (9th Cir. 2008).

[84] *See id.* at 1169.

[85] *Id.* at 1164–67.

[86] *Id.*

[87] *Fair Hous. Council v. Roommate.com, LLC*, 666 F. 3d 1216, 1222 (2012). For another result in this vein, see Roland v. Letgo, 644 F.Supp.3d 907, 917 (D. Colo. 2022) (finding that a platform was not responsible for a user's violent acts despite being ineligible for Section 230 because of contributions to related content). These sorts of results also can materialize in cases that do not implicate controversial questions about the scope of Section 230, but rather involve claims that are more clearly outside the ambit of Section 230 because they aren't limited to liability for user-generated content. *E.g.*, *Hall v. Meta, Inc.*, No. 322-CV-03063-TLB (MEF), 2022 WL 18109625, at *5 (W.D. Ark. Dec. 14, 2022) (addressing a constitutional challenge to Section 230), *report and recommendation adopted,* No. 3:22-CV-3063, 2023 WL 51752 (W.D. Ark. Jan. 4, 2023).

David Ardia's pathbreaking study of platform case law predicted that many platforms "invok[ing] [S]ection 230 likely would not have faced eventual liability under the common law."[88] Ardia also noted that while "more than a third of the claims" he surveyed were not preempted by courts under Section 230, the "majority of those decisions" did not reach Section 230 because "the claims . . . warranted dismissal on other grounds."[89] More recently, Eric Goldman and Jess Miers analyzed many dozens of lawsuits bringing constitutional, anti-discrimination, contract, consumer protection, and other types of claims against platforms for the removal of content and the termination of user accounts.[90] Goldman and Miers observed that platforms won "essentially all" of the cases without directly relying on Section 230 in a majority of them.[91]

Of course, these empirical studies raise the possibility that platforms' generally unregulated carriage and moderation practices substantively hinge on Section 230 less than is sometimes advertised. This would be a somewhat surprising result given Section 230's hallowed status in the folklore of the commercial Internet's ascendance in the United States.[92]

Then again, it may be the case that Section 230's presence casts a halo effect even when it is not invoked, leading judges to consciously or subconsciously put a thumb on the scale in declining to apply pre-Internet substantive law to platforms. Likewise, it may be that the First Amendment, which almost certainly forecloses at least some common law regulation of platform carriage and moderation decisions regardless of Section

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[88] 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 OF L.A. L. REV. 373, 480 (2010).
[89] *Id.* at 493.
[90] Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. OF FREE SPEECH L. 191, 192, 196–98, 200–01 (2021).
[91] *Id.* Another survey of more than five-hundred cases by the Internet Association found that Section 230 was dispositive only 42% of the time, and that cases were dismissed on substantive grounds 28% of the time. Elizabeth Banker, *A Review of Section 230's Meaning & Application Based on More Than 500 Cases*, INTERNET ASSOCIATION 6–8 (2020), https://internetassociation.org/wp-content/uploads/2020/07/IA_Review-Of-Section-230.pdf [https://perma.cc/6RHB-BAT4].
[92] *See, e.g.*, Eric Goldman, *Why Section 230 is Better Than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33, 33–34 (2019).

230,[93] similarly limits courts' willingness to extend common law to platforms, despite the precise contours of the First Amendment's preclusive effect standing mostly unresolved by the Supreme Court and up for grabs in *NetChoice*.[94]

This dynamic also may just be a function of the substance of pre-Internet bodies of law. Perhaps Judge Easterbrook was wrong and those laws face fundamental barriers to their application in the exceptional context of platform carriage and moderation decisions. Or perhaps Judge Easterbook was right and courts' decisions not to apply pre-Internet law to platform carriage and moderation decisions simply reflects some truth about the laws' underlying values.

Regardless, as Internet platforms have become increasingly complex, dominant, and entrenched in American life, Section 230's interpretive debt continues to accumulate. That is: the longer the courts do not regulate platform carriage and moderation through common law, the harder the task becomes. This is because the architecture and practices of platforms' carriage and moderation decisions have drastically increased in scale and complexity.[95] Meanwhile, the application of substantive law to regulate those decisions has not progressed beyond preliminary efforts of courts to wrestle with tort liability for proto-Internet platforms in cases such as *Cubby v. Compuserve*[96] and *Stratton Oakmont v. Prodigy*.[97]

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[93] *See, e.g.*, James Grimmelmann, *No ESC*, LAW.COM: THE RECORDER (Nov. 10, 2017, 2:00 AM), https://www.law.com/therecorder/2017/11/10/no-esc/ [https://perma.cc/B2ZW-HQHJ]; Goldman & Miers, *supra* note 90, at 200; Cary Glynn, Note, *Section 230 as First Amendment Rule*, 131 HARV. L. REV. 2027, 2028 (2018); Jess Miers, *Your Problem Is Not With Section 230, But The First Amendment*, TECHDIRT (Nov. 2, 2020, 9:35 AM), https://www.techdirt.com/2020/11/02/your-problem-is-not-with-section-230-1st-amendment/ [https://perma.cc/QHB9-HJSP]; Kosseff, *A User's Guide to Section 230*, *supra* note 46, at 789–91. *But cf.* Goldman, *supra* note 92, at 34 (arguing that Section 230 "provides significant and irreplaceable substantive and procedural benefits beyond the First Amendment's free speech protections").

[94] See discussion *supra*, Part I.

[95] For varying metaphors to describe this complexity, see Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech,* 131 HARV. L. REV. 1598 (2018) (moderation as a governance system), and Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV 526, 528 (2022) (moderation as a "project of mass speech administration").

[96] 776 F.Supp. 135 (S.D.N.Y. 1991).

[97] *See* Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995); *see generally* Kosseff, *A User's Guide to Section 230*, *supra* note 46 at 761–68 (chronicling pre-Internet distributor liability law).

Though the "pacing problem" ascribed to law's supposed failure to "keep up" with technology often is significantly overstated,[98] Section 230's debts confront courts with a significant and ever-growing discontinuity between un- or under-evolved pre-Internet bodies of law and an Internet that has steadily developed for more than two decades. As platforms and their carriage and moderation decisions and associated technology have evolved, the courts often have not adopted stepwise applications of substantive law to the platforms[99]—or simply have determined that the platforms are beyond the reach of substantive law. And to come full circle, this dynamic largely has obviated the need for the Supreme Court to construct the platforms through the lens of the First Amendment.[100]

Bridging that discontinuity now implicates a huge volume of difficult, resource-intensive, and complex legal work needed to bring a vast range of laws up to speed in a new context. But it also raises the specter of substantial consequences of disrupting the surrounding social, cultural, political, democratic, and economic contexts of platforms that have evolved for the entire life of the commercial Internet in reliance on a mostly laissez-faire treatment of carriage and moderation. Whether courts immunize platforms under Section 230, decline to apply substantive law, or both, every case that chooses not to regulate a platform makes all the more freighted any future decision to do so.

Moreover, the mounting discontinuity between the evolution of law and the evolution of platforms amplifies the difficulty for courts to significantly reinterpret Section 230 itself. In contrast to the large interpretive debt in applying existing law to regulate platforms, the interpretation of Section 230 itself has been surprisingly robust and stable across the lifespan of the

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[98] Meg Jones, *Does Technology Drive Law? The Dilemma of Technological Exceptionalism in Cyberlaw*, 2 U. ILL. J. L., TECH. & POL'Y 249, 256 (2018); Margot E. Kaminski & Meg Leta Jones, *Constructing AI Speech* 133 YALE L.J. FORUM 1212, 1217–18, (2024), https://www.yalelawjournal.org/forum/constructing-ai-speech [https://perma.cc/LD4P-4K6E].

[99] For exceptions to this general point, see discussion *infra*, Part III.

[100] See discussion *supra*, Part I.

law.[101] Its proponents might regard this stability as an interpretive credit, while its opponents might regard it as a toxic asset.[102]

Whatever the normative valence of Section 230's ongoing stability, its consequence is that any substantial narrowing of Section 230's scope would force courts to bridge across the discontinuity in every case no longer covered by Section 230 by interpreting both the contours of the substantive law at issue and the application of the First Amendment. As Alan Rozenshtein has explained, reinterpreting Section 230 to begin "grappling with foundational questions of common law liability" risks destabilizing the Internet and "flood[ing] lower courts with years of litigation."[103] Although some individual judges have called for narrowing Section 230,[104] the broad unwillingness to sign the courts up for a deluge of novel substantive and constitutional questions seems to have been at least a subtextual motivation for the Supreme Court's decision in *Gonzalez* to kick the can down the road on Section 230 in favor of slogging through the (non-)application of the ATA to social media platforms in *Taamneh*.[105]

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Again, none of this is to stake out a normative position on whether or how the courts *should* apply existing bodies of law to platform carriage and moderation decisions.[106] Indeed, the daunting complexity of mapping the substantive contours of a wide range of legal doctrines onto platform carriage and moderation decisions in a post-Section 230 world goes beyond the apparent capacity of the American judiciary, much less the scope of this modest Article, which simply observes that we have surprisingly little certainty about what might happen in a world

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[101] *See* Alan Rozenshtein, *Interpreting the Ambiguities of Section 230*, BROOKINGS (Oct. 26, 2023), https://www.brookings.edu/articles/interpreting-the-ambiguities-of-section-230/ [https://perma.cc/S54P-FB5G]; Kosseff, *A User's Guide to Section 230*, *supra* note 46, at 785. *But cf.* Malwarebytes v. Enigma Software Grp., 141 S. Ct. 13, 14 (2020) (Thomas, J. respecting the denial of certiorari) (questioning whether the "text of this increasingly important statute [Section 230] aligns with the current state of immunity enjoyed by Internet platforms.").

[102] Credit for this coinage belongs to James Grimmelmann (e-mail on file with author).

[103] Rozenshtein, *supra* note 101.

[104] *See generally* Kosseff, *A User's Guide to Section 230*, *supra* note 46, at 785–88 (chronicling examples).

[105] Reid, *supra* note 10.

[106] See discussion *supra*, Part II.

without (or with a substantially narrowed version of) Section 230.

Nevertheless, this uncertainty yields a narrow but critical normative point: good-faith proponents *and* opponents of regulating platforms' carriage and moderation decisions should be more focused on the substantive law that might (or might not) and should (or should not) apply to platforms absent Section 230. For good-faith opponents of regulation, such as Eric Goldman, Section 230's effective preclusion of a common law of carriage and moderation regulation has been one of the most important features of American Internet policy, not a bug.[107] For them, then, preserving a narrow substantive law of platform regulation under bodies of law like tort and civil rights is likely to become a critical battleground in the wake of any modifications to Section 230.

For good-faith proponents of regulation, such as Danielle Citron, Mary Anne Franks, and Olivier Sylvain, Section 230 stands as a key barrier to addressing "how our legal system . . . does not serve . . . the victims of online harassment and other serious injuries."[108] But if Section 230 is removed as a barrier, the uncertain substantive law of platform regulation remains as a critical path dependency for any project aimed at regulating the carriage and moderation decisions of platforms.

B. Section 230's Legislative Debt

A knock-on consequence of Section 230's proactive anti-regulatory stance is that Congress and state legislatures largely have failed to step in and provide the kind of incremental error

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[107] *See, e.g.*, Goldman, *supra* note 92, at 33–34. *But cf.* Jeff Kosseff, *What Was the Purpose of Section 230? That's a Tough Question*, 103 B.U. L. REV. 763, 765 (2023) (describing Section 230's dynamic and evolving purpose).

[108] Danielle Keats Citron, *How to Fix Section 230*, 103 B.U. L. REV. 713, 750 (proposing to exclude certain "bad actors" from the scope of Section 230(c)(1)), 753 (proposing to condition Section 230(c)(1) on the satisfaction of a heightened duty of care in some circumstances) (2023); MARY ANNE FRANKS, REFORMING SECTION 230 AND PLATFORM LIABILITY, STANFORD CYBER POLICY CENTER at 6 (proposing to exclude platforms that "demonstrate deliberate indifference to harmful content"), 8 (proposing "incentivizing intervention"), https://fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/cpc-reforming_230_mf_v2.pdf [https://perma.cc/P26S-NAHH]; Olivier Sylvain, *Platform Realisim, Informational Inequality, and Section 230 Reform*, 131 YALE L.J. F. (Nov. 16, 2021), https://www.yalelawjournal.org/forum/platform-realism-informational-inequality-and-section-230-reform [https://perma.cc/9EFJ-Q6DR]. *See generally* Kosseff, *supra* note 107, at 764 (chronicling Citron's prodigious scholarship on Section 230 reform).

correction—or fundamental resets—that can accompany common law development where doctrine evolves in ways that contradict sound public policy.[109] Just as the stakes of courts tipping Section 230's apple cart seemingly have scared them away from broadly applying common law to regulate platforms' carriage and moderation decisions, Congress and state legislatures have forged surprisingly little consensus around a substantive policy agenda for regulating platform moderation or carriage.

Instead, a significant proportion of multipartisan (though not necessarily *bipartisan*) congressional ire toward tech companies has instead been directed toward amending or repealing Section 230.[110] Of course, some scholars like Citron and Franks, and more recently, Spencer Overton and Catherine Powell, have acknowledged and taken on the importance of developing new substantive law alongside Section 230 reform,[111] and a few of the dozens of Congressional proposals to amend Section 230 create complementary—though often unserious and poorly drafted[112]—new laws alongside carveouts to Section 230.[113] But a great many reform proposals are focused primarily

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[109] *Cf.* Evelyn Atkinson, *Telegraph Torts: The Lost Lineage of the Public Service Corporation*, 121 MICH. L. REV. 1365, 1367–69, 1368 n.8 (2023) (chronicling state legislatures' development of new tort regimes for telegraph companies).

[110] Lemley, *supra* note 28, at 304. Danielle Keats Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 45, 46–47 (2020).

[111] *E.g.*, Citron, *supra* note 108, at 751 nn.281–283 (discussing the various strands of underlying substantive law and additional proposals); Franks, *supra* note 108, at 12 (calling on "Congress to pass clear and effective legislation addressing severe online harms disproportionately targeted at women and minorities."); Spencer Overton & Catherine Powell, *The Implications of Section 230 for Black Communities*, ___ WM. & MARY. L. REV. ____ , manuscript at *45–46 (forthcoming 2024) (draft on file with author and cited with permission)

[112] *E.g.*, The Big-Tech Accountability Act of 2023, H.R. 2635, 118th Cong. (2023) (vaguely purporting to ban "de-platform[ing]"); Curbing Abuse and Saving Expression In Technology (CASE-IT) Act, H.R.573, 118th Cong. (2023) (creating a private right of action against certain platforms for engaging in content moderation practices that are "[in]consistent with the First Amendment.").

[113] *E.g.*, Online Consumer Protection Act, H.R. 4887, 118th Cong. (2023) (imposing various consumer protection obligations); Fentanyl Trafficking Prevention Act, S.2264, 118th Cong. (2023) (imposing obligations related to drug trafficking); Strengthening Transparency and Obligations to Protect Children Suffering from Abuse and Mistreatment (STOP CSAM) Act of 2023, S.1199, 118th Cong. (2023) (expanding civil causes of action relating to child sexual abuse material).

or entirely on narrowing or eliminating Section 230 itself without regard to what substantive law might apply in its absence.[114]

For example, many bills would simply repeal Section 230 altogether,[115] while others narrow its protections in ways that do not make clear what substantive law, if any, is intended to apply in its wake.[116] Some others carve out from Section 230 specific existing laws, but without clarifying the particular application of the exempted laws to platforms.[117] One notable bill in this vein is the SAFE TECH Act, sponsored by Sen. Mark Warner, which would have amended Section 230 to broadly exempt state and federal civil rights laws, antitrust laws, stalking, harassment, and intimidation laws, certain international human rights law, and wrongful death actions.[118]

While some of these proposals obviously are intended to incentivize platforms to engage in some specific behavior to

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[114] *See generally* Meghan Anand, et. al, *All the Ways Congress Wants to Change Section 230*, Slate (Mar. 23, 2021) (updated Sept. 19, 2023), https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html [https://perma.cc/9AKF-RF4T]; Aram Sinnreich, et. al, *Performative Media Policy: Section 230's Evolution from Regulatory Statute to Loyalty Oath*, 27 COMM. L. & POL'Y 167 (2022) (cataloguing proposals from 1996 to 2002).

[115] *E.g.*, S. 2972, 117th Cong. (2021); H.R. 874, 117th Cong. (2021); S. 5085 § 2, 116th Cong. (2020); S. 5020, 116th Cong. (2020); H.R. 8896, 116th Cong. (2020).

[116] *E.g.*, S.1993, 118th Cong. (2023) (waiving Section 230 immunity for causes of action related to generative artificial intelligence); Curtailing Online Limitations that Lead Unconstitutionally to Democracy's Erosion (COLLUDE) Act, S.1525, 118th Cong. (2023) (narrowing Section 230 immunity in cases involving jawboning); Eliminating Abusive and Rampant Neglect of Interactive Technologies (EARN IT) Act of 2023, S.1207, 118th Cong., § 5 (2023)(adding a new carveout for civil and criminal CSAM cases and allowing the introduction of evidence regarding platforms' use of encryption technologies) (parallel and earlier versions of EARN IT include H.R.2732, 118th Cong. (2023)); Disincentivizing Internet Service Censorship of Online Users and Restrictions on Speech and Expression (DISCOURSE) Act, S.921, 118th Cong. (2023) (narrowing the scope of Section 230(c)(2)(A) and adding a religious liberty exception), Removing Section 230 Immunity for Official Accounts of Censoring Foreign Adversaries Act, S.941, 118th Cong. (2023) (eliminating Section 230 protection for platforms that host "censoring foreign adversaries"); Internet Platform Accountability and Consumer Transparency (Internet PACT) Act, S.483, 118th Cong., § 5 (2023) (proposing to condition Section 230 immunity on various transparency and process requirements, such as the provision of a complaint processing system); See Something, Say Something Online Act of 2023, S.147, 118th Cong., § 5 (2023) (proposing to condition Section 230 immunity on the submission of "suspicious transmission" reports to the Department of Justice); Platform Accountability and Transparency Act, S.5339 § 8, 117th Cong. (2022) (conditioning Section 230 immunity on compliance with research transparency obligations).

[117] *E.g.*, Deplatform Drug Dealers Act, H.R. 4910, 118th Cong. (2023) (carving out certain civil actions under the Controlled Substances Act and the Federal Food, Drug, and Cosmetic Act).

[118] Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms (SAFE TECH) Act, S.560, 118th Cong., § 2 (2023).

retain their immunity under Section 230, all of them raise the possibility of what, precisely, is supposed to happen if platforms *lose* their Section 230 immunity. This question is particularly acute for bills such as SAFE TECH, which explicitly contemplates that plaintiffs will be able to bring a wide range of claims under existing bodies of law without Section 230 imposing a barrier.[119]

Proposals like these illustrate in real time Section 230's *interpretive debt* compounding into *legislative debt*. Setting aside the merits of their high-level goals,[120] many of these proposals seemingly conflate the *denial of immunity* with *affirmative liability*. That is, they presume that abrogating Section 230 in whole or in part will engender some legal risk for the platform under some existing law that will in turn spur or restrain some behavior on the platforms' part.

But as the foregoing discussion explains, it is difficult to predict with any confidence whether, or if so, how, courts will consistently apply existing law to regulate platforms' moderation and carriage decisions even in the absence of Section 230.[121] While it is theoretically possible that courts may begin upholding claims that apply existing substantive law to moderation and carriage decisions, there is ample evidence to suggest that they will not in many cases, limiting the impact of reform proposals to embroiling platforms and aggrieved plaintiffs in litigation that fails to advance any specific policy goal.[122] Moreover, it is difficult to predict whether particular applications of substantive law will survive the requisite level of First Amendment scrutiny.[123]

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[119] *Id.* § 2(2) (amending Section 230 to add exceptions for civil rights laws, antitrust laws, stalking/harassment/intimidation laws, international human rights law, and wrongful death actions).

[120] Many of these proposals are mere "messaging" bills that are not carefully crafted with the intent of passing, but rather bills intentionally released "in 'bad faith'" and intended not to be read or debated, but rather "to telegraph absolute fealty" to President Trump. *See* Sinnreich et al., *supra* note 114, at 182–84.

[121] See discussion *supra*, Part II.A.

[122] Some proponents of Section 230 reform may simply wish to give litigants a chance to flesh out the merits of their claims in court even if they ultimately are doomed fail. While this goal is a critical tenet of the rule of law, seeking to vindicate it alone without any notion of what relief the process should yield in prototypical circumstances is not a compelling *policy* goal.

[123] See discussion *supra*, Part I.

Of course, to good faith *opponents* of platform regulation, avoiding the costs of meritless litigation is a critical and intentional part of Section 230's policy impact.[124] From that perspective, Section 230's second-order accumulation of legislative debt is just as desirable as its direct accumulation of interpretive debt to the extent that it avoids the application of new regulation to platforms.

However, Section 230's legislative debt has accumulated atop its interpretive debt. Reform that targets Section 230 without specifying the contours of the underlying substantive law may lead to an inconsistent patchwork of state and federal regulation of platforms. Courts likely will struggle to develop common law in navigating through a deluge of ensuing litigation—and to apply whatever the Supreme Court makes of the First Amendment in *NetChoice*.

Good faith *proponents* of platform regulation may see Section 230 as such a large barrier to progress that they are nevertheless willing to dismantle the statute's immunity. They may hope that courts will fill in the void with substantive law that matches their policy preferences, or that the resulting chaos will tip the political economy for legislatures to do the same.[125]

But the possibility that reforming Section 230 might not actually spur or restrain the desired behavior by platforms should give reformers pause about reforming Section 230 without a corresponding post- 230 substantive agenda.[126] The next Part illustrates this point by reviewing the few key efforts that *have* been undertaken to legislate in Section 230's gaps.

III. PAYING DOWN SECTION 230'S DEBTS

The combination of Section 230's interpretive and legislative debts puts into relief a gauntlet that proponents of regulating platform moderation and carriage must run for legislative proposals to stick and achieve some specific and desirable policy effect. As I have explained in previous work,

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[124] *E.g.*, Goldman, *supra* note 92, at 33–34.

[125] *E.g.*, Rozenshtein, *supra* note 101 (urging courts to "interpre[t] Section 230 narrowly" to "prod Congress into action").

[126] *See id.* (predicting that the "uncertainty [of a narrow interpretation] would in turn lead platforms to act far more conservatively . . . [and] likely censor and remove a lot of non-tortious content just to avoid litigation risk"—"disruptive effects" that would risk "fester[ing] for years" if Congress did not act).

proponents of regulation must at a bare minimum identify or create:

a. An existing or new law that generates a clear substantive obligation for platforms to (not) carry, (not) moderate, or (not) do something else with respect to user-generated content;
b. An applicable carveout from or sustainable interpretation of Section 230 that permits the application of the substantive obligation to a platform; and
c. A sustainable theory of how the substantive obligation either avoids or survives applicable First Amendment scrutiny.[127]

Considering Section 230's debts, the most obvious approach to satisfying these requirements is for Congress to pair a carveout to Section 230 with either a new substantive law regulating platforms, or specific recognition of an existing law whose application to platforms is well-understood, coupled with a careful effort to tailor and refine the substantive obligations to ensure that they survive the First Amendment's familiar means-ends-tailoring analysis.

Three episodes illustrate valuable lessons from efforts to "pay down" Section 230's debts within this framework: (1) the development of copyright law for platforms within Section 230's intellectual property exception; (2) the controversial enactment and aftermath of the Fight Online Sex Trafficking Act (FOSTA); and (3) returning to the impetus of this Article, the Texas and Florida laws at issue in the *NetChoice* cases. These tales differ in their details, but highlight the looming political, technocratic, and normative challenges to developing regulations of platform carriage and moderation decisions even in the absence of Section 230. This Part considers each in turn.

A. Copyright's Payment

The most prominent regime for the regulation of platform carriage and moderation decisions—but one often missing from contemporary debates about the First Amendment and Section

[127] Blake E. Reid, *So You Want to Reform Section 230* (Jan. 28, 2021), https://blakereid.org/so-you-want-to-reform-section-230/ [https://perma.cc/L3PZ-9WT4].

230—is copyright law. Though it is perhaps counterintuitive, copyright can be conceived of as the earliest and most elaborate payment of Section 230's interpretive and legislative debts.[128] This payment manifests both in Congress's initial decision to exempt intellectual property claims from Section 230's immunity,[129] its replacement of Section 230's immunity with a more qualified set of safe harbors built around the complex notice-and-takedown procedures in 17 U.S.C. § 512, part of the Digital Millennium Copyright Act of 1998 (DMCA),[130] and the Supreme Court's 2003 decision in *Eldred v. Ashcroft*[131] addressing the First Amendment implications of regulating copyright infringement.

Broadly speaking, copyright stands as perhaps the most stable and elaborate regime regulating platform carriage and moderation decisions in all of American law. Some commenters have labeled copyright "the only functional law on the [I]nternet."[132] As Daphne Keller has observed, "the operation of copyright's notice-and-takedown regime provides some of the richest information about what U.S. litigation and platform behavior might look like in a world without Section 230."[133] Though its analysis was not specific to Internet platform regulation, the Supreme Court has also broadly upheld the permissibility of regulating copyright infringement under the First Amendment, notably rejecting the application of even intermediate scrutiny in *Eldred*.[134]

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[128] *See* Sarah Jeong, THE INTERNET OF GARBAGE at 44, https://cdn.vox-cdn.com/uploads/chorus_asset/file/12599893/The_Internet_of_Garbage.0.pdf [https://perma.cc/LAJ5-E6ZN] ("The biggest gaping hole in CDA 230, however, is copyright. That's where most of the action regarding legally required deletion on the [I]nternet happens . . . .").
[129] *See* 47 U.S.C. § 230(e)(2).
[130] *See* Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. ON TELECOMM. & HIGH TECH. L. 101, 112–15 (2007) (comparing and contrasting Section 230 and 17 U.S.C. § 512).
[131] 537 U.S. 186 (2003).
[132] Adi Robertson & Nilay Patel, *The tangled truth about NFTs and copyright*, THE VERGE (June 8, 2022 8:30AM), https://www.theverge.com/23139793/nft-crypto-copyright-ownership-primer-cornell-ic3 [https://perma.cc/JD83-863J]; *see also* Jeong, *supra* note 128, at 48 (describing copyright as "how one successfully manages to reach through a computer screen and punch someone in else in the face.").
[133] *See* Keller, BROOKINGS, *supra* note 28.
[134] *Eldred*, 537 U.S. at 218–19; Golan v. Holder, 565 U.S. 302, 327–35 (2012) (reaffirming *Eldred*).

While it may be tempting to draw lessons from copyright law for platform regulation more broadly, copyright's regime for Internet platforms is unique in ways that pose challenges to its adaptation to other contexts. Setting aside the doctrinal nuances of copyright infringement disputes that must be hashed out on platforms, and how they might differ from the full range of substantive legal questions that might unfold in a post-Section 230 world, copyright's survival under the First Amendment is particularly idiosyncratic. *Eldred* justifies its unusual derogation of typical First Amendment scrutiny of copyright law on the grounds that the Progress Clause—the enumerated power under which Congress enacts copyright law—was "adopted close in time" to the First Amendment.[135]

Of course, there is nothing about *Eldred*'s "close in time" reasoning that is specific to congressional exercise of the Progress Clause power to enact copyright law and not, say, congressional exercise of the Commerce Clause power to enact a law regulating platforms—though *Eldred*'s reasoning perhaps would counsel against *states* developing regulation. Then again, *Eldred* specifically distinguishes copyright law from the broader skein of carriage and moderation regulations, noting that the First Amendment "bears less heavily when speakers assert the right to make other people's speeches" but "securely protects the freedom to make—or decline to make—one's own speech."[136]

More broadly, the winding, difficult, and contested evolution of copyright law's application to platforms over the past-quarter century is an illustrative but cautionary tale about the effort required to develop common law and new legislative regimes in other areas of law. On the one hand, the hard-fought notice-and-takedown compromise in 17 U.S.C. § 512 in the late 1990s has endlessly rankled rightsholders who think it imposes too much burden on them to police infringing content on platforms and unfairly lets platforms off the hook for the infringing actions of their users.[137] On the other hand, evolving debates over 17 U.S.C. § 512 have led to private "DMCA-plus"

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[135] *Eldred*, 537 U.S. at 219. *Eldred* also rests its conclusion on copyright's "built-in First Amendment accommodations"—namely, the idea-expression dichotomy and fair use. *Id.* at 219–20.

[136] *Id.* at 221.

[137] *See* Pamela Samuelson, *Pushing Back on Stricter Copyright ISP Liability Rules*, 27 MICH. TECH. L. REV. 299, 301–02 (2021).

agreements between rightsholders and platforms that "ha[ve] in many cases decoupled decisions about . . . [publication] . . . from the actual content of copyright law," making it "vulnerable to . . . overreaching claims by rightsholders."[138] And even with Congress's intervention, judges have been pressed into high-stakes disputes to resolve key substantive questions about the contours of the statutory scheme.[139]

These themes, which have animated extensive policy debates both internationally and in the U.S. for the better part of the last decade, underscore the difficult normative battles that will come in a post-Section 230 world. Then again, copyright illustrates that relatively stable platform regulation is *possible*, however contestable. But for regulation to evolve, copyright demonstrates that the debate must shift beyond the Section 230-era binary question about *whether* to regulate platform carriage and moderation decisions at all to much more complex questions of *how* to calibrate the context-sensitive substance of such regulations.[140]

B. FOSTA's Payment

Notwithstanding the recent fusillade of Section 230 reform bills advanced by Congress,[141] Congress has passed only one major contemporary federal platform regulation initiative that creates a new exemption to Section 230: the controversial 2018 Fight Online Sex Trafficking Act (FOSTA), supposedly enacted to protect sex workers from human trafficking schemes.[142] FOSTA contains a number of complex provisions but can be broadly divided into new and expanded federal causes of action relating to contributing to sex trafficking ventures and corresponding exceptions to Section 230 that exempt both the new and expanded federal causes of action and parallel state

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[138] *See* Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 NOTRE DAME L. REV. 499, 503–06 (2017).
[139] *E.g.*, Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 25 (2d Cir. 2012) (addressing the scope of 17 U.S.C. § 512(c)'s safe harbor for user-generated content platforms).
[140] Reid, *supra* note 1, at 150–57.
[141] *See* discussion *supra*, Part II.B.
[142] *See* Pub. L. 115–164, §§ 3–4, 132 Stat. 1253, 1253–55 (2018) (adopting new substantive laws imposing secondary liability for prostitution and sex trafficking in § 3 and adding a corresponding exemption to Section 230 in § 4).

causes of action.[143] FOSTA expanded on an earlier federal effort, the SAVE Act, which attempted to target the online classified service Backpage.com, host to a range of commercial sex advertising, but within the ambit of Section 230's existing exemption for federal criminal prosecutions.[144] FOSTA also opened up the possibility of state-level sex trafficking legislation, following in the wake of a Washington (state) bill aimed specifically at establishing secondary liability for Internet platforms that had been preempted in part by Section 230.[145]

At first blush, FOSTA superficially checks the boxes of the aforementioned framework for paying down Section 230's debts[146] in a relatively narrow context. It pairs a detailed federal liability scheme with a specific complementary exemption to Section 230. The exemption opens the door to parallel state causes of action, but those causes are substantively circumscribed by the bounds of federal law. Moreover, the D.C. Circuit recently rejected a wide range of First Amendment challenges to FOSTA's new causes of action and corresponding amendments to Section 230,[147] suggesting that perhaps it will withstand constitutional scrutiny.

But as Kendra Albert has documented in detail, FOSTA has resulted in "massive" practical harms and impacts to the communities it was nominally supposed to protect.[148] Most notably, FOSTA's amendments to Section 230 "caus[ed] changes to content moderation guidelines and widespread efforts to kick off sex workers" on general-purpose online platforms, while the new causes of action also led more specialized platforms "provid[ing] harm reduction or wish[ing] to support

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[143] *See generally* Kendra Albert et al., *FOSTA in Legal Context*, 52.3 COLUM. HUM. RTS. L. REV. 1084, 1114, 1131–32 (2021) (describing FOSTA's mechanics in detail); Eric Goldman, *The Complicated Story of FOSTA and Section 230*, 17 FIRST AMEND. L. REV. 279, 284-85 (2018) (summarizing the same); Citron, *supra* note 108, at 736–38.

[144] *See generally* Goldman, *supra* note 143, at 282 (citing Justice for Victims of Trafficking Act of 2015, Pub. L. 114-22, 129 Stat. 227) (describing the background of the SAVE Act).

[145] *See generally* Albert et al., *supra* note 143, at 1103–04 (citing Backpage.com v. McKenna, 881 F. Supp. 2d 1262, 1268 (W.D. Wash. 2012); WASH. REV. CODE § 9.68A.104 (2012)) (describing pre-FOSTA state efforts to regulate platforms in this context).

[146] *See* discussion *supra*, Part III.

[147] *See* Woodhull Freedom Found. v. United States, 72 F.4th 1286, 1297–1307 (D.C. Cir. 2023).

[148] Kendra Albert, *Five Reflections from Four Years of FOSTA/SESTA*, 40 CARDOZO ARTS & ENT. L.J. 413, 424 (2022).

sex workers" to cease operations, with "[n]iche, free, and queer websites . . . among the first to shut down."[149] Albert argues that FOSTA's combination of new causes of action and complementary Section 230 exceptions—two critical legislative elements for any platform regulation regime—not only resulted in "devastating" deplatforming from social media, but more broadly "accelerated . . the 'gentrification' of the Internet" via the "eliminat[ion of] sexual content from public life,"[150] making it "a law with a body count."[151]

More broadly, Albert powerfully chronicles a variety of pathologies with FOSTA's development. Albert summarizes FOSTA as "represent[ing] the worst of our legislative process—a combination of bad drafting, Congressional failure to take stakeholders with significant expertise seriously about likely outcomes, and . . . the desire to be seen as 'doing something' trumping any real meaningful policy intervention . . . ."[152] Albert is hardly alone in critiquing FOSTA.[153] Albert is joined not only by Section 230's most ardent defenders, such as Goldman, who laments FOSTA's "misery for sex workers and sex trafficking victims with zero offsetting policy benefits,"[154] but by Section 230's most enthusiastic reformers, including Danielle Citron, who argues that FOSTA "ha[s] undermined civil rights and civil liberties while failing to secure greater safety for the most vulnerable among us."[155] Citron, like Albert, acknowledges that "FOSTA's shortcomings serve as a roadmap of what *not* to do."[156]

FOSTA highlights that even superficially narrow efforts to pay down Section 230's debts, circumscribed to specific

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[149] *Id.* at 425.
[150] *Id.* at 426 (citing *FOSTA, 230 and Digital Gentrification*, HACKING//HUSTLING (May 28, 2021), https://hackinghustling.org/fosta-230-and-digital-gentrification/ [https://perma.cc/AKM9-FKZW]; Jennifer Musto et al., *Anti-Trafficking in the Time of FOSTA/SESTA: Networked Moral Gentrification and Sexual Humanitarian Creep*, 10 SOC. SCIS. 58 (2021); Elizabeth Nolan Brown, *The New Campaign for a Sex-Free Internet*, REASON, (May 2022), https://reason.com/2022/04/09/the-new-campaign-for-a-sex-free-internet/ [https://perma.cc/UQU3-RPAS]).
[151] Albert, *supra* note 148, at 438 (internal citations omitted).
[152] *Id.* at 440.
[153] *E.g.*, Kosseff, *supra* note 46, at 794–95.
[154] Goldman, *supra* note 143, at 292.
[155] *See generally* Citron, *supra* note 108, at 736–42 (chronicling FOSTA's harms); *see also* Danielle Keats Citron & Quinta Jurecic, *FOSTA's Mess*, 26 VA. J. L. & TECH 1 (2023) (also chronicling FOSTA's harms).
[156] Citron, *supra* note 108, at 742.

contexts, can cause substantial harms to marginalized communities via what Felix Wu describes as "collateral censorship."[157] The chaos that has unfolded in the wake of FOSTA provides a grim preview of how even well-intended reform efforts—not to say that FOSTA was well-intended—can result in widespread unintended consequences. While FOSTA's substanstive-law-and-corresponding-230-exception pattern provides a possible model for targeted reform, it underscores that serious *ex ante* attention must be paid to narrowly tailoring the underlying substantive law and corresponding exceptions to Section 230 to avoid substantial harms to vulnerable users.

C. Texas' and Florida's Payment

Finally, this Article comes full circle to perhaps the most aggressive and sweeping contemporary efforts to regulate platforms' moderation practices: the social media bills enacted by the Florida[158] and Texas legislatures.[159] These laws now stand before the Supreme Court for First Amendment scrutiny in the *NetChoice* cases,[160] presenting the possibility that they may form the tip of a new substantive spear of platform regulation led by state legislatures.

Yet, as this part details, *Section 230* itself remains lurking in the background of *NetChoice*. There are underexplored possibilities that Section 230 will wind up simply preempting the Texas or Florida laws, or, even more dramatically, that the Court might take up the states' invitations to revisit Section 230 in the course of addressing the First Amendment issues in *NetChoice*.

At the outset, that the vast majority of attention to *NetChoice* has focused on the First Amendment is not surprising. The Court may pay down some part of Section 230's debts by shedding new light on how the First Amendment applies to

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[157] *See* Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Liability*, 87 NOTRE DAME L. REV. 293, 295–96 (2013); *see also* Kosseff, *supra* note 46, at 791–95 (describing the importance of certainty and the sweeping impacts of carveouts).

[158] An Act Relating to Social Media Platforms, S. 7072, 2021 Leg., Reg. Sess. (Fla. 2021) (enacted).

[159] An Act Relating to Censorship of or Certain Other Interference with Digital Expression, Including Expression on Social Media Platforms or Through Electronic Mail Messages, H.B. 20, 87th Leg., Reg. Sess. (Tex. 2021) (enacted).

[160] Moody v. NetChoice, LLC, 144 S.Ct. 478 (2023) (Mem.); NetChoice, LLC v. Paxton, 144 S.Ct. 477 (2023) (Mem.). The context surrounding the grants of certiorari are discussed further *infra* in note 116.

efforts to regulate platform carriage and moderation decisions. And to be clear: this Article makes no effort to predict the likely outcome in *NetChoice*. But a sweeping holding from the Court suggesting that all or most regulations of platform moderation decisions (and perhaps in dicta, regulations of carriage decisions) violate the First Amendment would obviate many of the thorny questions about the substantive law of platform regulation by constitutionalizing Section 230's laissez-faire policy prescription.

However, if the Court upholds one or both of the Florida and Texas laws, the complexity of the laws will add new entries to the ledger of Section 230's interpretive debt. Though a thorough disentangling of the byzantine structure of the poorly-conceived and drafted Texas and Florida laws is beyond the scope of this Article,[161] it is useful here to briefly recount the *Moody* and *Paxton* district courts' high-level overviews of the laws.

As Judge Robert Hinkle explains in *Moody*, S.B. 7072 (Florida's law) contains a number of direct regulations of platforms' moderation decisions, including restrictions on barring candidates for political office, restricting access to posts "by or about" a political candidate, and the "censorship," "deplatforming," and "shadow banning" of "journalistic enterprises," as well as a requirement for platforms to allow users to display posts in sequential or chronological order and another requirement for platforms to apply their publishing standards in a "consistent manner."[162] As Judge Robert Pittman explains in *Paxton*, H.B. 20 (Texas's law) is a blunter instrument, barring discrimination on the basis of "(1) the viewpoint of the user or another person; (2) the viewpoint represented in the user's expression; or (3) a user's geographic location in [Texas]," with limited exceptions for child sexual exploitation material and direct incitement or specific threats of protected-class-based

[161] *See generally* Dawn Nunziato, *The Old and the New Governors: Efforts to Regulate and to Influence Platform Content Moderation*, 22 FIRST AMEND. L. REV. 291 (2024).

[162] *See generally* NetChoice, LLC v. Moody, 546 F.Supp.3d 1082, 1086–88 (N.D. Fla. 2021). S.B. 7072 also contains a number of transparency requirements, including mandates to publish its standards for publication decisions both generally and specifically with respect to users' content, as well as a limitation on state contracting with firms alleged to have violated antitrust laws. *Id.* at 1088–89.

violence.[163] Commenters already have raised substantial questions about how these laws might actually be applied in practice.[164]

As much as the Florida and Texas laws implicate questions about the First Amendment and the operation of their complex provisions, recounting their operation also shines a spotlight on an elephant in the room: Section 230. Both the Florida and Texas laws overtly and aggressively regulate platform moderation decisions in ways that place them at least in the ballpark of Section 230's mechanics. But neither law was coordinated with any sort of Congressional initiative to create corresponding new exceptions in Section 230 to avoid preemption.

How, then, did the *NetChoice* cases manifest before the Supreme Court with neatly teed up questions about the First Amendment, and with Section 230 seemingly nowhere in sight? And won't Section 230 preempt the Florida and Texas laws even if they survive First Amendment scrutiny in *NetChoice*, as well as platform regulations crafted by other states if the Court issues a more equivocal First Amendment holding?

Review of the unusual proceedings before the district and circuit courts and the briefing to the Supreme Court in *Moody* and *Paxton* yields answers about Section 230's curious absence in *NetChoice*. The proceedings also shed light on the possibility that Section 230 may yet preempt the Texas and Florida laws even if they avoid or survive First Amendment scrutiny. Perhaps most surprisingly, they raise the possibility that the Court could aggressively reinterpret Section 230 *in Netchoice*—though again, this Article makes no confident prediction of this outcome.

First, the proceedings reveal that platforms made a series of decisions from the outset of both *Moody* and *Paxton* to assert but deemphasize Section 230 as an instrument of preemption for

[163] NetChoice, LLC v. Paxton, 573 F. Supp. 1092, 1099 (W.D. Tex. 2021). Like S.B. 7072, H.B. 20 imposes various transparency and procedural requirements. *Id.* at 1100.

[164] *See generally* Nunziato, *supra* note 161; Reid, *supra* note 1 at 140–41 (discussing the mechanics of the laws); Brief for Francis Fukuyama as Amici Curiae Supporting Respondents in No. 22-277 and Petitioners in No. 22-555 at 27-31, Moody v. NetChoice, LLC, No. 22-277, & NetChoice, LLC v. Paxton, No. 22-555 (U.S. Dec. 7, 2023) (arguing that the Florida and Texas laws are unconstitutionally vague).

both the Florida[165] and Texas[166] laws. Though the reasons for these strategic choices are not explicit in the briefing, perhaps they stem from the fact that not all of the Texas and Florida laws' provisions neatly implicated Section 230,[167] the uncertainty about how the Court's then-unresolved decision in *Gonzalez* might disrupt Section 230,[168] and/or because of limits on the length of briefing.

Second, however: the proceedings also underscore that Section 230 may preempt both laws to some degree—a possibility that arose at the *NetChoice* oral arguments.[169] As to the Florida law, the district court in *Moody* quietly concluded that Section 230 preempted the parts of the Florida law "that purport to impose liability for other decisions to remove or restrict access to content."[170] The Eleventh Circuit did not address or disturb

[165] For example, the platforms' complaint and requests for relief in *Moody* focused first and primarily on First Amendment challenges to S.B. 7072 as a whole, mounting only a brief Section 230 preemption challenge only as the final count of the complaint. Complaint for Declaratory and Injunctive Relief at 2, 44-54, 64-68, Moody v. NetChoice, LLC, 546 F.Supp.3d 1082 (N.D. Fla. May 27, 2021) (No. 4:21cv220-FH-MAF), ECF No. 1.

[166] As with *Moody*, the platforms' complaint and requests for relief in *Paxton* focused first and primarily on the First Amendment, again turning only briefly to Section 230 preemption in a latter count. Complaint for Declaratory and Injunctive Relief at 31–38, 41-44, NetChoice, LLC v. Paxton, 573 F. Supp. 1092 (W.D. Tex. Sep. 22, 2021) (No. 1:21-CV-840-RP), ECF No. 1.

[167] *See supra* notes 162–163 and accompanying text (noting transparency mechanics in both S.B. 7072 and H.B. 20 that were not neatly amenable to Section 230 preemption) and *infra* notes 170–171 and accompanying text (noting the district court and Eleventh Circuit's decision not to apply Section 230 preemption to some of S.B. 7072's provisions).

[168] *See* discussion *supra*, Part II.A.

[169] *E.g.*, *Moody*, Tr., *supra* note 40 at *28 (Justice Neil Gorsuch: "What about Section 230, which preempts some of this law? How much of it?") *Paxton*, Tr. at *11–12 (Justice Gorsuch: Section 230 is "perfectly relevant here and very important because, of course, 230 preempts things, and we don't know how much of this law it preempts), *42–44 (Solicitor General Elizabeth Prelogar: "I would warn the Court away from trying to resolve exactly how much conduct CDA 230 protects and exactly how that interacts with the Texas law here.").

[170] NetChoice, LLC v. Moody, 546 F.Supp.3d 1082, 1090–91 (N.D. Fla. 2021). The court also concluded that Section 230 precluded claims under the law "based on alleged inconsistency of a platform's removal of some posts but not others . . . ." *Id.* However, the court concluded that other provisions that were not "applicable to a social media platform's restriction of access to posted material" were not preempted by Section 230 but rather had to "rise or fall with [the platforms'] constitutional claims." *Id.* at 1090.

the district court's conclusions about preemption of the carriage provisions.[171]

As for the Texas law, the district court offhandedly acknowledged but did not address the platforms' Section 230 preemption arguments.[172] Before the Fifth Circuit, the platforms briefly reasserted that Section 230 preempted H.B. 20, but declared that there was "no need for [the Fifth Circuit] to address [Section 230 preemption]."[173] The Fifth Circuit castigated the platforms for addressing preemption so briefly, concluding that the treatment was "insufficient to adequately brief [the] claim" and that the platforms had "forfeited their preemption argument."[174] Yet even if the Fifth Circuit's ruling on preemption in *Paxton* itself holds following the Supreme Court's ruling, the possibility remains that platforms will be able to reassert Section 230 preemption in future facial or as-applied challenges.

Finally, the proceedings underscore that Florida and Texas did not undertake aggressive efforts to pay down Section 230's legislative debt in ignorance of the possibility that Section 230 might preempt their laws even if they shot the moon on the First Amendment with the Supreme Court. Both Texas and Florida aggressively urged the courts from the early stages of both *Moody* and *Paxton* to narrow the scope of Section 230.[175] And while the Supreme Court's grant of certiorari in the *NetChoice* cases nominally is limited to questions about the First Amendment,[176] both Florida and Texas have sought throughout

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[171] The Eleventh Circuit briefly stated in a footnote, however, that the transparency provisions of S.B. 7072 likely were not preempted. NetChoice, LLC v. Att'y Gen., 34 F.4th 1196, 1231 n.26 (11th Cir. 2022).

[172] NetChoice, LLC v. Paxton, 573 F.Supp.3d 1092, 1101 (W.D. Tex. 2021).

[173] Brief of Appellees at 32, NetChoice, LLC v. Paxton, 49 F.4th 439 (5th Cir. 2022) (No. 21-51178), 2022 WL 1046833.

[174] *See Paxton*, 49 F.4th at 468 n.24.

[175] Florida mounted a detailed Section 230 challenge that urged the district court not only to reject the platforms' preemption arguments, but to more broadly interpret the scope of Section 230. Defendants' Response in Opposition to Plaintiff's Motion for Preliminary Injunction at 5–8, NetChoice, LLC v. Moody, 546 F.Supp.3d 1082 (N.D. Fla. Sept. 22, 2021) (No. 4:21cv220-FH-MAF). Texas deployed a similar strategy. *See* Defendant's Response to Motion for Preliminary Injunction at 30–34, NetChoice, LLC v. Paxton, 573 F.Supp.3d 1092 (W.D. Tex. Nov. 22, 2021) (No. 1:21-CV-840-RP).

[176] The grant of certiorari was limited to the First Amendment issues around the state laws' carriage provisions and some of their transparency provisions, as framed by the first two questions in the Solicitor General's brief, which mentions Section 230 only in passing. *See* Moody v. NetChoice, LLC, 144 S.Ct. 478 (2023) (Mem.); NetChoice,

the litigation to sneak Section 230 back into the cases using the First Amendment as a Trojan horse.[177] Without regard to the contestable substance of the arguments, it is underappreciated how aggressively the states have urged the Court to revisit its decision to punt on the scope of Section 230 in *Gonzalez*[178] with a vehicle potentially more likely to appeal to the Court's conservative justices.[179]

LLC v. Paxton, 144 S.Ct. 477 (2023) (Mem.); Brief for the United States as Amicus Curiae at i, 25, Moody v. NetChoice, LLC, No. 22-277, & NetChoice, LLC v. Paxton, No. 22-555 (U.S. Dec. 7, 2023).

[177] Florida's Trojan horse attack on Section 230 centers on the S.B. 7072's savings clause, which purports to limit the law's enforcement to circumstances "not inconsistent with federal law and 47 U.S.C. § 230(e)(3)," FLA. STAT. § 501.2041(9), Section 230's express preemption clause for "inconsistent" state laws. Essentially, Florida argues that applying First Amendment scrutiny to S.B. 7072 requires understanding the full scope of the S.B. 7072's operation, which as a result of the savings clause hinges on an authoritative ruling about the scope of Section 230, and in turn affords the Court another bite at the apple of Section 230 reinterpretation that it passed on in *Taamneh* and *Gonzalez*. *See* Reply Brief for Petitioner at 4, Moody v. NetChoice, LLC, No. 22-277 (U.S. Nov. 23, 2022). The Florida attack arose briefly during the *Moody* oral arguments. *See Moody*, Tr., *supra* note 40, at *28–29, *91.Texas' Trojan horse attack on Section 230, by contrast, essentially argues that by asserting or otherwise benefitting from immunity for moderation decisions under Section 230, platforms either subjectively or objectively disclaim their status as publishers or speakers of the content at issue and thus effectively waive First Amendment protection for those decisions. Defendant's Response to Motion for Preliminary Injunction, at 5–13, NetChoice, LLC v. Paxton, 473 F.Supp.3d 1092 (W.D. Tex. Nov. 11, 2021) (No. 1:21-CV-840-RP); Respondent's Opposition to Application to Vacate Stay of Preliminary Injunction at 14, 20–21, 34, 36–37, NetChoice, LLC v. Paxton, No. 21A720 (U.S. May 18, 2022); Response to Petition for Writ of Certiorari at 12, 17, 23–24, 26, NetChoice, LLC v. Paxton, No. 22-555 (U.S. Dec 20, 2022). The Fifth Circuit affirmatively adopted a version of Texas's argument, framing Section 230 as a "factual determination" by Congress about the status of platforms that the platforms have "extensively affirmed, defended, and relied on." NetChoice, LLC v. Paxton, 49 F.4th 439, 467 (5th Cir. 2022). In dissenting from the Supreme Court's vacatur of the Fifth Circuit's stay of the district court's preliminary injunction against H.B. 20, Justice Alito noted without overtly endorsing the argument. *See* NetChoice v. Paxton, 142 S. Ct. 1715, 1717 n.2 (2022) (Alito, J., dissenting). By contrast, the Eleventh Circuit rejected a version of this argument, explaining that Section 230(c)(2)(A) affirms, not derogates, the First Amendment rights of platforms by "explicitly protect[ing] [their] ability to restrict access to a plethora of material that they might consider 'objectionable.'" NetChoice, LLC v. Att'y Gen., 34 F.4th 1196, 1220–21 (11th Cir. 2022) (quoting 47 U.S.C. § 230(c)(2)(A)). Texas's attack was discussed repeatedly during both the *Moody* and *Paxton* oral arguments. *See, e.g.*, *Moody*, Tr., *supra* note 40, at *65–*66, *85–*87, *117–*118, *122–*124; *Paxton*, Tr. at *8–*14, *23–*26, *50–*51.

[178] The plaintiffs from *Gonzalez* and *Taamneh* appeared as cert-stage amici in the *NetChoice* cases, urging the Court again to take up Section 230. Brief Amicus Curiae of Reynaldo Gonzalez, Mehier Taamneh, et al. in Support of Neither Party 1-2, 6-7, Moody. v. NetChoice, LLC, No. 22-277 (U.S. Oct. 24, 2022).

[179] Both Texas and Florida pressed their arguments in their merits-stage briefs to the Supreme Court. Brief for Respondent at 24, NetChoice, LLC v. Paxton, No. 22-555

These dynamics are likely to be important as states take an increasing role in efforts to regulate carriage and moderation decisions. Last year, Congress did not pass a single bill attempting to regulate the tech companies, while states passed sixty-five.[180] Though most are directed at other issues, such as child safety, Section 230 stands as a path dependency for increasing state efforts to regulate carriage and moderation.[181] While this dynamic may further ramp up political pressure in Congress to amend Section 230, it may be that Section 230 simply continues to stand as a largely insurmountable barrier to state activity on this front as it has for the past quarter-century.

IV. CONCLUSION

On the eve of *NetChoice*'s resolution by the Supreme Court, we stand to learn much more about the permissibility of regulating platform carriage and moderation decisions under the First Amendment. But this Article demonstrates that, absent a sweeping determination in *NetChoice* that all such regulation is unconstitutional, Section 230's interpretive and legislative debts will continue to stand as substantial barriers to platform regulation. Regulating platform carriage and moderation decisions requires not only addressing Section 230 itself, but simultaneously paying down its debts by setting norms for how platforms should be regulated.

(U.S. Texas Brief at 24 (U.S. Jan. 16, 2024); Brief for Petitioners, Moody v. NetChoice, LLC, No. 22-277 (U.S. Jan. 16, 2024).

[180] Scott Babwah Brennen & Matt Perault, *The State of State Technology Policy*, CENTER ON TECH. POL'Y at 3 (2023), https://techpolicy.unc.edu/wp-content/uploads/2023/12/CTP_state-tech-policy-2023.pdf [https://perma.cc/5E99-TLRS].

[181] *Id.* at 7.