

# Don't Confuse the Platform with the Train

The Case against Regulating  
Social Media Companies  
as Common Carriers

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## The Case against Common Carrier Social Media Regulation

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### Executive Summary

Should social media companies be regulated like common carriers? To answer that question, this paper describes the functions and origins of social media and the legal framework that supports it. It then summarizes the arguments advanced by advocates of regulating social media platforms as common carriers. For background, it then provides an account of the

nature and development of common carrier regulation and the problems it is generally supposed to address. It then describes the many problems that common carrier regulation of social media would create. It concludes by explaining how America's most successful system of regulation—the one that rests on private property, free markets, and constitutional rights—is the best kind of regulation for social media.

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## **Introduction: Social Media and Private Property**

Man is a social animal.<sup>1</sup> From time immemorial, human beings have solidified both their communications and their relationships with one another by means of technology. Technology that has furthered social networks includes physical innovations—such as pen and paper, letters, and newspapers—and social institutions—such as clubs, churches, and private property. Old technologies have long helped social networks grow and thrive. More recently, the modern technology of the Internet has expanded and strengthened social networks as well.

When the Internet first came into widespread use, social media users and companies acquired unprecedented powers of mass communication. With that new power came new legal problems. One problem was the question of who should be held liable when a user posts something seen as defamatory, obscene, or threatening. As the Internet's user base expanded in the 1990s, courts began to sort out who should be held liable for such content online. Should the Internet service provider or the creator of the content bear legal responsibility?

Precedent concerning similar circumstances had led courts to assign liability to information distributors when it appeared reasonable that the

distributors would know what information the content conveyed. For instance, bookstores and newsstands have historically been subject to liability only when a knowledge requirement has been satisfied—that is, a bookstore can bear liability for legally actionable content in a magazine it offers for sale only when the bookstore is notified of that content or should have known about it.<sup>2</sup> However, this notification rule was not always easily applicable in the context of brick-and-mortar bookstores, and seemed even less appropriate for online forums with millions of user-generated posts.

Two popular early online services, CompuServe and Prodigy, allowed users to view and discuss content posted by other users. Because questions of liability for online content were not then settled, the two companies took diametrically opposite approaches toward moderating their virtual bulletin boards and chat rooms. CompuServe took a hands-off approach, perhaps hoping that its lack of moderation would imply a lack of knowledge about its users' posts and thus immunize the company from liability for its users' actions.<sup>3</sup> In contrast, Prodigy wanted to create a more user-friendly environment and created and enforced standards for posted content, but in doing so made itself more vulnerable to lawsuits.<sup>4</sup>

The prevailing incentives appeared to encourage benign neglect and discourage administrative monitoring and editorial actions. This is known as the moderator’s dilemma.

This battle of business models led to multiple court cases. In the 1991 case *Cubby, Inc. v. CompuServe, Inc.*, the District Court for the Southern District of New York found that CompuServe was not liable for user comments in its forums, largely because the litigants had offered no evidence about whether CompuServe “knew or had reason to know” about the contents of those forums.<sup>5</sup> (In other words, CompuServe won its case because its absence of knowledge demonstrated its absence of liability.) The court’s finding left a fundamental question unresolved: Would Internet service providers be subject to liability if they acted as more than passive distributors? That issue came to a head in 1995, when a New York appellate court found that Prodigy was liable for third-party content because it chose to moderate its online forums.<sup>6</sup> That verdict made resolving the moderator’s dilemma more urgent. Ultimately, it led to the bipartisan drafting of Section 230 of the Communications Decency Act in 1996.<sup>7</sup>

In part, Section 230 reads:

No provider or user of an interactive computer service shall be treated as the publisher or

speaker of any information provided by another information content provider.<sup>8</sup>

This clause made the person who posts content on an electronic platform legally responsible for the post, while the website or platform where the content appears bears no such liability. For example, if you tweet something, you, not Twitter, are legally responsible for the content of that message. Suppose that Twitter decides to remove your tweet from its platform; the First Amendment protects its right to do so, because it guarantees Twitter’s—and everyone’s—editorial discretion to choose which content to carry.<sup>9</sup> Section 230 also protects Twitter from liability if it decides to leave up a potentially libelous tweet or takes no action on the tweet at all.

These two protections function differently. There is occasional confusion about their consequences, so we describe their operations at greater length below.<sup>10</sup>

One major success of Section 230 was that it ended the moderator’s dilemma. It protects platforms from liability even if they curate and remove content created and posted by third parties. By clarifying the legal rights and duties of various parties, Section 230 eliminates the costs and burdens of countless lawsuits by immunizing information providers from third-party liability.

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*Section 230 facilitated the Internet ecosystem of today by making some types of litigation impossible.*

Section 230 thus facilitated the Internet ecosystem of today by making some types of litigation impossible. User-generated content online has flourished, and speech is more egalitarian and abundant than at any point in history.

But progress inevitably brings challenges. Failures, mistakes, and shortcomings are unavoidable at the frontier of innovation. Some on the left fret about the consequences of harmful information circulating online. They want regulation to encourage platforms to remove user-generated content. Some on the right think that conservative views are disproportionately targeted for removal, hidden, or deemphasized based on the political bias of tech companies. They want regulation to discourage platforms from removing or discriminating against user-generated content.

Twenty bills have been introduced this year in Congress to repeal or curtail Section 230's liability protections.<sup>11</sup> Multiple legislative proposals are pending in state capitals that appear to be driven by frustration about conservative content being removed from social media sites. These measures include proposals to repeal or curtail Section 230, create carveouts from Section 230's protections, and impose certification requirements for platforms to retain Section 230's benefits.

As noted above, Section 230 immunizes platforms from liability, but it is the First Amendment of the Constitution that empowers platforms to take down content they do not wish to carry. Perhaps in reaction to this constitutional constraint, a few conservative theorists and policy makers have pivoted to a new regulatory tactic. They now propose federal regulation of social media platforms as common carriers—which are complex legal constructs that are described below.

**The Case for Treating Social Media Companies as Common Carriers: Extraordinary Privilege, Extraordinary Power**

Many of the arguments for regulating social media titans like Twitter and Facebook as “common carriers” rest on a theory that social media companies have special privileges, that they have used those privileges to attain extraordinary political and economic power, and therefore that state of affairs needs to be addressed via social media regulation.

In the words of regulation advocates, social media companies get a “giant government subsidy.”<sup>12</sup> More precisely, social media companies receive an atypical allocation of rights and duties under the law as compared to other business enterprises, essentially because of several provisions of

Section 230. Furthermore, they describe social media companies as being “immune to liabilities to which other First Amendment actors like newspapers are subject,” and claim that this “liability shield” is a “privilege”<sup>13</sup> and a “special giveaway and protection” that has granted social media immense power, both political and economic.<sup>14</sup>

The concerns of regulation advocates are not confined to social media’s immense revenues. The market dominance of these “modern-day robber barons”<sup>15</sup>—combined with the fact that many Americans’ first source of news is social media—“presents an insidious threat to our free society.”<sup>16</sup> When social media companies make affirmative decisions about the nature of the content they carry—when “tech companies pull the plug on disfavored posts, websites, and even people”—“it harms Americans’ livelihoods, muzzles them in the increasingly electronic public square, distorts political and cultural conversations, influences elections, and limits our freedom to sort out the truth for ourselves.”<sup>17</sup> This, they claim, is “Big Tech censorship.”<sup>18</sup> In other words, regulation advocates believe that some social media businesses “exert state-like monopoly power over America’s minds and markets, and they simply cannot be allowed to endure.”<sup>19</sup> Therefore, these “mighty tech behemoths”<sup>20</sup> must be killed, broken up, or, at the very least, regulated into new forms.<sup>21</sup>

### *Understanding Social Media Companies’ Array of Rights*

In order to appreciate the rights protected by Section 230, it is helpful to highlight the fact that it secures different kinds of rights for different kinds of businesses. The particular rights that are at issue here are twofold: a) the right to control what is published and b) the right to immunity from liability when publishing what others say. Different kinds of business models entail different kinds of rights for the following entities:

- **Publishers**, such as newspapers and television broadcasters, generally control the messages they distribute. Broadly speaking, they bear liability for those messages, and are vulnerable to lawsuits if they send out defamatory messages. For example, a newspaper could be vulnerable to lawsuit if it were to publish a defamatory letter to the editor.
- **Distributors**, such as newsstands and bookstores, generally control the books and magazines that they buy and sell. Generally, they bear liability for the materials they sell, but only if they know, or should know, that the texts in question may be defamatory. In other words, some kind of foreknowledge is a necessary element of liability. For example, a bookstore could

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be vulnerable to lawsuit if it sold a defamatory book, but only after its managers are informed that the book is defamatory.

- **Conduits**, such as phone companies or television broadcasters that are required to broadcast certain political advertisements, generally are forbidden to control the messages they distribute. In general, they bear no liability for those messages, and are not vulnerable to defamation suits. So, for instance, a phone company could not be held liable for defamation even if its managers learned that an answering machine on its phone lines was regularly transmitting a defamatory outgoing message.

Importantly, the above analysis describes the rights and liabilities that are created by a particular class of content: messages that outside parties produce and are then distributed or transmitted by a particular business, as opposed to the messages that a publisher, distributor, or conduit might produce and distribute itself.<sup>22</sup>

As regulation advocates have noted, Section 230 has led to something like a fourth business model, known as “social media.” Under Section 230, social media businesses seem to be a

hybrid of “distributors”—bookstores and newsstands—and “conduits”—phone companies and broadcasters. Distributors get to decide what to carry, but they face some notice-and-takedown liability for the third-party speech they carry. In contrast, conduits have little or no control over the messages they carry, but they face little or no liability for those messages. Under Section 230, social media companies get a different and contrasting set of rights that, from their perspective, could be called the best of both worlds: Social media companies in practice have the *rights* of distributors but the *liability shield* of conduits. For purposes of comparison, these rights can be described thusly:

- **Social media platforms**, such as Twitter and Facebook, generally control the messages they choose to distribute. Broadly speaking, they bear no liability for those messages, and are not vulnerable to defamation suits. So, for instance, Facebook could not be held liable for defamation under Section 230, even if the website’s managers knew that one of its users was transmitting defamatory information.

This fourth legal set of rights and liabilities stands as an addition to the traditional, tripartite array of business

models in the information economy. It is a relatively new, disruptive market entrant that has triggered the ire of advocates of social media regulation.

### ***Understanding the Classic Common Carrier's Array of Rights***

Advocates of increased regulation argue that, because social media companies enjoy the “special” and “extraordinary ... public privileging” described above, they should be treated as common carriers—either because they are structurally similar to common carriers or because, in some sense, they already are common carriers.<sup>23</sup> Designating an entity as a common carrier carries a cluster of legal and economic implications, which may be helpful to describe here. Following are some fundamental facts about the common carrier concept.

- The job of a common carrier is to safeguard things as they travel from one place to another: to ship packages back and forth, to transmit electrical power or speech from the producer to the receiver, and so on.
- A common carrier is generally disallowed from excluding customers or users who want to buy its services. It offers its services either to large classes of users or to the general public. Furthermore, a common carrier does not discriminate, in that it offers the same services

at the same prices to everyone.

- A common carrier's inability to exclude customers is often just one of several characteristics that distinguish its business model from that of the typical private business. Common carriers typically owe their passengers and customers a higher degree of care than businesses do generally. They often operate under a system of regulation that may include elements like price control, profit control, and competition control.
  - The services the common carrier offers and the prices it charges are often determined by a regulatory body.
  - The regulatory body's decisions about prices and services are supposed to satisfy multiple ends. Typically, one of those goals is convenience to the public; another is to allow the business to cover its costs and earn an appropriate rate of return. This regulatory scheme can produce a quasi-monopolistic set of privileges that have the effect of excluding competitors from the market.

*A common carrier acquires certain rights and privileges, but at the cost of losing other rights and privileges.*

- Similarly, the regulatory body, or the government of which it is a part, sometimes offers various subsidies or prohibitions that are designed to make it easier for the common carrier to operate—which can have the effect of excluding competitors from the market.

Historically, a central rationale for common carrier status appears to have been that some companies have acquired a monopoly or quasi-monopoly status, and regulation is therefore needed to prevent rapacious monopolistic or quasi-monopolistic behavior by those firms.<sup>24</sup>

That fear of abusive monopolistic behavior is often coupled with a second rationale: that there is a public interest in ensuring the availability of the services that the common carrier provides. Dire social consequences would ensue if a railroad, electrical power grid, or telephone network were to go bankrupt and end its provision of services to the public. This two-headed theory of the common carrier—an enterprise so dangerous that it must be regulated, but also so crucial that it must be subsidized—supplies the justification for the legal structure that surrounds and supports it. Common carriers receive a license that guarantees their access to customers in

exchange for obeying a set of rules that protects capital investment, creates duties to serve the public universally and indiscriminately, and prevents entrance into the market for provision of services by competitors.

In short, a business that becomes a common carrier acquires certain rights and privileges, but at the cost of losing other rights and privileges. For example, a railroad receives a set of exclusive rights to various parcels of property and assurances that competing firms will not be allowed to enter the market; in exchange, the railroad agrees to conform to a schedule of prices and services that anyone is allowed to purchase.

#### ***Understanding the Communications Common Carrier's Array of Rights***

The nature of the common carrier concept has changed over time. Much of its development took place in the world of case-driven common law. However, Congress borrowed the common-law idea from laws covering transportation companies and applied it to communications companies<sup>25</sup> when it passed the Communications Act of 1934, which codified what had hitherto been a common-law concept.<sup>26</sup>

Under the Communications Act, a common carrier is “any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign

radio transmission of energy ... but a person engaged in radio broadcasting shall not, insofar as such a person is so engaged, be deemed a common carrier.” Some parts of this statutory definition deserve further elaboration:

- **Common.** A *common* carrier offers its services to large classes of customers, or to all. More precisely, the Communications Act imposes a duty upon common carriers to provide “communication services upon reasonable request.”<sup>28</sup> Generally, a common carrier’s duty to provide services depends on what services it offers; common carriers are not required to provide services that they do not offer.
- **Engaged.** The Federal Communications Commission’s (FCC) jurisdiction is confined to the communications that the common carrier is *engaged* in. For instance, the FCC can regulate telegram companies as common carriers, but not candygrams or flowergrams (that is, boxes of candy or bouquets of flowers that are ordered over wire).<sup>29</sup>
- **For Hire.** Services *for hire* are regulated, but services that are offered for free, or “gratuitously,” are not regulated.

- **Who “shall not ... be deemed a common carrier”?** Some communications enterprises are disqualified from common carrier status. Some of these disqualifications are contained in or implied by the text of the Act, but the list of disqualified entities has grown over time. The following are not common carriers:

- **Radio stations.** Congress statutorily exempted radio stations from common carrier status. The Communications Act’s drafters worried that regulation might stunt the development of the radio industry and intrude on First Amendment rights.
- **Press associations.** Organizations like the Associated Press and United Press International have not been treated as common carriers under Communications Act case law; nor would they be treated as common carriers under the common law.<sup>30</sup> These organizations are not simply carriers of the goods of others; rather, they are creators of goods and therefore have some intellectual property rights in the goods they carry.<sup>31</sup>

*A communications business that either creates or modifies the information it carries will not fit easily into the common carrier's legal framework.*

- **Cable television operators.** For the most part, cable operators choose and determine the signals they send to viewers.<sup>32</sup> They arguably have intellectual property rights and interests in the programs they produce and transmit, essentially because they have made choices about them.<sup>33</sup>
- **Enhanced computer services and information services.**<sup>34</sup> Basic communications services are regulated as common carriers, but “enhanced” information services that *process* information, rather than just transmit it unmediated, lack common carrier status. This new nomenclature became formalized under the 1996 Telecommunications Act.

This list of exceptions to common carrier status suggests a general rule: A communications business that either *creates or modifies* the information it carries, rather than simply transmitting it unmediated from one place or person to another, will not fit easily into the common carrier's legal framework. Examples include the water, electricity, natural gas, and telecommunications

industries, which are regulated by the committees of the National Association of Regulatory Utility Commissioners, and offer goods that are not curated by the carrier.

### **The Case for Treating Social Media Companies as Common Carriers in a Nutshell**

To summarize, the case for regulating social media companies as common carriers is that some business enterprises now convey not people, and not packages, but speech and ideas. Because we do not allow common carriers to pick and choose their customers based on their political opinions, we should also ensure that social media participants have similar non-discrimination protections.

A central theme of this argument is that social media now serves as a kind of public square—in the Internet era, citizens meet and talk to others about matters of public import through social media, not just when standing on the courthouse steps. Social media, through its exercise of editorial judgment, has acquired extraordinary economic and political power. The upshot of this argument is that common carrier regulation is needed to stop social media platforms from picking and choosing which speakers it broadcasts and which speakers it downgrades or squelches. In short,

assigning common carrier status to social media companies will ensure that everyone receives equal and fair treatment by requiring common carriers to broadcast everyone's voice.

### **The Case Against Treating Social Media Companies as Common Carriers**

The arguments described above for social media common carrier regulation are fundamentally flawed. These regulatory schemes are based on fundamental misunderstandings of the nature of common carriers and are likely to lead to an array of bad outcomes, as explained below.

- Common carrier regulation will likely diminish both the scope and the value of free expression on the Internet.
- Common carrier regulation poses significant legal and constitutional problems, not the least of which is that such regulation does not clearly fit its putative objectives.
- Common carrier regulations proposed by conservatives appears to be at odds with traditional conservative values.
- The common carrier regulations that have been proposed for social media appear to be fundamentally unlike common carrier regulation generally.

Ultimately, it is a mistake to understand social media platforms as either a monopoly or a quasi-monopoly. A regulatory structure that situates these platforms in a universe of private property, constitutional rights, and free markets is most likely to lead to the best consequences.

### ***Speech in The United States Today—***

### ***Bigger, Louder, and Freer than Ever***

Few of us like to have our speech moderated. However, the social media ecosystem contains no systemic barriers to free speech that justify common carrier-style regulation. What critics decry as “a government subsidy” or “a special privilege” has resulted in an unprecedented flourishing of speech, content sharing, and connectivity on an extraordinary scale. In fact, it is precisely because “interactive computer service(s)” were granted the dual rights codified in Section 230—the First Amendment right to control what is published and the legislative right to immunity from liability for third-party content—that more Americans than ever have access to a platform from which to disseminate their speech far and wide.

Social media, and the legal framework that has fostered its growth, is arguably the largest and most egalitarian multiplier of free speech since the adoption of the First Amendment itself. Section 230's framework

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dramatically expanded the ability of everyday Americans, not just media titans, to speak. Every minute of every day, electronic speech continues to grow. Every minute, Twitter hosts around 456,000 new posts and Instagram users upload more than 46,000 new photos.<sup>35</sup> As of October 2021, 4.55 billion people used social media—roughly 58 percent of everyone on Earth.<sup>36</sup> This ubiquitous adoption is in large part due to Section 230’s allocation of rights and liability protections. Furthermore, the new platforms provided by social media have not silenced long-established traditional platforms, such as radio call-in shows and newspaper letters to the editor.

Notably, these platforms have been successful not simply because they serve as a conduit that allows speakers to send messages to larger and larger audiences. Rather, they provide platforms that are designed and intended to deliver curated communications. Just as a museum curator would fail to create a popular art exhibit if he or she simply tossed every piece of art in the museum’s custody into a display room, social media administrators cannot serve merely as pipelines for user communications and expect to succeed in the marketplace.

The artistic and political freedoms that we think of as being central to a free

society serve as an engine that drives the design of apps and websites that attract user views. Separating wheat from chaff—showing users what administrators reasonably believe their audiences want to see and sparing them content they would not be interested in—is part of the platform’s product and part of what distinguishes it from its competitors. Indeed, private decisions not to engage in such practices could form part of a competitive advantage (Parler, for instance, posts user comments in purely chronological order).

Many who claim to take First Amendment freedoms seriously have overlooked the First Amendment rights of the platforms that make all of this communication possible. As noted, it is the First Amendment that protects the modes of artistic and political expression on which these platforms rely. Those rights include both the right not to be compelled to broadcast the speech of others and the right to decide in what order to display the speech featured on one’s own platform.

The description of Section 230’s immunity as “special” often seems to function more as a rhetorical, rather than analytical, claim; that immunity is only one of many distinctive allocations of rights for different kinds of property. Section 230’s assignment of rights to online entities has the consequence of benefiting not simply

the rights holder, but the public generally. The public benefits because Section 230 magnifies the avenues and opportunities that speakers have. Another example of assignment of rights that benefits not only rights holders but also the public generally is copyright law, which rewards creative work by granting sets of exclusive rights of copying and distribution to the creators of intellectual property.

It is impossible to say what the Internet would look like today if Section 230 had never been enacted. Would the American judicial system eventually have produced new rules that resolved the moderator’s dilemma that the *Prodigy* ruling created? It is certainly possible; some have hypothesized that courts would ultimately have generated a body of law that is more congenial to free expression than the *Prodigy* ruling implies, but theories about alternate worlds do not lend themselves to confirmation.<sup>37</sup> Nonetheless, it appears beyond debate that, in practice, Section 230 vastly expanded the amount of speech and the number of people speaking.

***Social Media Is Not a Monopoly—  
or a Quasi Monopoly***

Advocates of social media regulation also argue that assigning common carrier status to social media firms is necessary because of their monopolistic or quasi-monopolistic status. Although

being a monopoly is not a strict requirement for common carrier status, that circumstance is often present among historical examples.

The claim that these platforms have a collective monopoly on speech falls flat. Furthermore, those who make the more qualified argument that Facebook has a monopoly of speech on its own platform appear to overlook the fact that there are many platforms—including Twitter, TikTok, YouTube, Parler, Gettr, Clubhouse, and MeWe, to say nothing of chat rooms or email—that compete with Facebook for eyeballs.

While it is a fair point that consumers will find incumbent platforms with established networks of users attractive and that moving from one network is not without costs, the history of firms in this realm suggests a significant amount of competition. Consider that Tiktok, which was first launched in late 2016, has now surpassed 3 billion downloads globally. It is reasonable to anticipate that future social networks will draw the attention of consumers away from incumbent providers. The practice of “multi-homing”—having multiple social media apps on one’s device—also suggests that the inertial power of network effects is sometimes overstated. In the age of Facebook, Twitter, TikTok, Instagram, and other platforms, most social media users do not limit their consumption to just one

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platform. Globally, the average user of social media engages with 6.6 accounts.<sup>38</sup> There is no cost and little work involved in signing up for as many social networks as one would like.

Political concerns about the “bigness” of businesses have a long history, even though older big businesses now seem small when compared to today’s corporate titans. Indeed, the history of business is littered with defunct companies that once seemed invincible.<sup>39</sup> Furthermore, some firms may need to grow even bigger in the future to provide for the economies of scale that are needed to take advantage of tomorrow’s innovations and advancements. In any event, all of these platforms add to the universe of speech—they increase the myriad number of other means of expression and information flow that, until relatively recently, comprised the entire universe of communication. Newspapers, broadcast television, cable news, terrestrial radio, satellite radio, traditional publishing in books and magazines—all of these entities’ own websites, as well as physical public places (actual town squares), still qualify as viable sources of information and platforms of communication.

### ***Real-World Consequences of Common Carrier Regulation on Social Media***

Schemes to treat social media platforms as common carriers vary, but the common aim is to circumvent each platform’s First Amendment right to moderate user-generated content or choose the speech it carries. Such proposed policies would make tech companies less able to hide or remove content or users from their platforms. As discussed above, the repeal of Section 230 would not accomplish this goal. Its repeal would leave First Amendment protections intact, thus allowing platforms both to refuse to carry speech to which they object and to downgrade its position.

The power of Section 230 lies in its simplicity. Speakers are responsible for their speech; hosts are not. Hosts can decide what speech they want to carry and what speech they prefer to discard. Various proposals to amend Section 230, instead of repealing it altogether, threaten to muddy these waters. Any policy that discards simple rules in a complex world is likely to produce regulations that are more difficult to administer and long-term consequences that are difficult to predict. The repeal or modification of Section 230 would likely lead to more

speech being removed from platforms. In light of this, it appears that some conservative regulation advocates have pivoted to advocate common carrier regulation that would hobble the power of platforms to remove content—a proposal presumably intended to protect more conservative content online.

Even if common carrier regulation focuses on protecting “political speech” or some other preferred category, that zone of protection is likely to include content that is undesirable to some, but is nonetheless invulnerable to removal. In short, such regulation will almost inevitably make it more difficult for social media firms to provide a positive or satisfactory user experience. Common carrier platforms would thus be forced to transmit content that, although not illegal, would be understood as offensive by many.

Common carrier regulation might include restrictions on a social media company’s ability to ban users from its platform or to hide, promote, or remove third-party content. Such restrictions might protect some ideological content from being hidden or removed, but the concurrent mandatory preservation of other content that platforms would otherwise have removed would make

the everyday social media user’s experience far more unpleasant. Users would be far more likely to encounter content with disturbing violence, hate speech, pornography and spam, as platforms stripped of liability for illegal content would presumably end up carrying more of it.<sup>40</sup>

Ultimately, the risk of bad consequences that accompanies new regulatory regimes is a matter of degree. It is certainly possible to advocate regulations of social media that have limited functional jurisdiction—for example, rules that regulate some portions of social media websites but not others—but such regulations serve as a foot in the door. They establish a regulatory beachhead, degrade firms’ ability to innovate and distinguish their products from those of their competitors, and invite politicians and regulators to expand their authority.

Imposing any such common carrier regulation, whether limited or not, would likely result in significant amounts of lost revenue from advertisers—who are the real customers of most social media platforms. Advertisers will not want their brand popping up next to messages that consumers find vile. Making nearly all objectionable

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content mandatory for platforms to carry would likely drive users away from platforms altogether, fundamentally undermining their business model. Such a mass exit would decrease the social communication that is the central reason for the consumption and use of social media. That unintended consequence is precisely the opposite of regulation advocates’ stated goal—the preservation and flourishing of freedom of expression online.

#### ***Legal and Constitutional Problems of Common Carrier Regulation***

Proposals for common carrier regulation at the state level, most prominently in Florida and Texas, are varied. Florida’s statute bans platforms from cutting off political candidates’ posts, changing how posts by or about candidates are displayed, or adding administrative comments to a post by a “journalistic enterprise” based on content.<sup>41</sup> (Notably, such proposals imply that speech by establishment journalists and politicians deserves more protection than speech by the rest of us.<sup>42</sup>) The Florida law also bans labeling a news story as “misinformation” and blocking or limiting the sharing of said article. Meanwhile, the Texas social media statute declares that a “platform may not censor a user, a user’s expression, or a user’s ability to receive the expression of another person based on...the viewpoint of the user or another person.”<sup>43</sup>

These two statutes currently face court challenges by technology trade associations, supported by amicus briefs by various nonprofits and First Amendment advocacy organizations.<sup>44</sup> These statutes are highly politicized, essentially performative exercises that are likely to fail in court, both on First Amendment grounds and for reasons of federal preemption—given that Section 230 is still in place.<sup>45</sup> State politicians, like their federal counterparts, want to be seen as “doing something” about what they view as political bias in content moderation, but it is difficult to believe that any serious lawmaker could think the plans will survive constitutional scrutiny.

University of California, Los Angeles Law Professor Eugene Volokh has provided a skeletal account of a narrower regulatory scheme that may be more likely to pass constitutional muster. (Volokh does not endorse any such scheme of regulation on policy grounds; his analysis is confined to the constitutionality, not the desirability, of the system of regulation he discusses.) To simplify, his argument is based on the theory that regulation of “recommendation functions” is likely unconstitutional, but that regulation of “hosting functions” is constitutionally defensible. He contemplates a regulatory system that only encompasses the “hosting function” of social media platforms,

which allows the user to “post material on what is seen as the user’s own page, and delivering that material to people who deliberately visit that page or subscribe to its feed.”<sup>46</sup> He distinguishes this from the regulation of “recommendation functions,” which “include a certain account or post in a news feed that they curate, or in a list of ‘trending’ or ‘recommended’ or ‘you might enjoy this’ items,” or the “‘conversation function,’ when they allow users to comment on each other’s posts.” He argues that common carrier regulation that prevents platforms from interfering with hosting functions—such as preventing platforms from removing accounts or deleting posts, and thus blocking communications between authors and their intentional subscribers—might survive First Amendment scrutiny if adopted by statute at the federal level.

Perhaps the distinction that Volokh draws is correct; perhaps it is true that it is constitutionally permissible to regulate platforms when they host others’ speech, but that it is impermissible to regulate such platforms when they recommend others’ speech.<sup>47</sup> But this does not speak to the question of whether such regulation is good policy. The history of regulatory schemes that rest on the selective curtailment of property rights is not promising. As a general matter, publicly owned or regulated infrastructure makes innovation more

difficult and dampens efficiency for whatever is built on top of that infrastructure.<sup>48</sup> Smart cities financed by taxpayers, driverless cars on public roads, and municipal broadband will all suffer the consequences of hobbling private-sector dynamism with a cumbersome and unresponsive regulatory structure. To apply common carrier regulations to already existing private infrastructure would impose the burdens of government inefficiency on one of the most dynamic sectors of the U.S. economy.<sup>49</sup>

### ***The Curious “Conservative” Attack on Free Markets and Internet Freedom***

The demands for regulation of social media from “national conservatives”<sup>50</sup> are in significant tension with the First Amendment corporate protections that conservatives have historically defended as crucial to the marketplace of ideas.<sup>51</sup> The notably non-traditional enthusiasm of “national conservatives” for government intervention implies that competition and consumer welfare must be propped up by means of politics, rather than being sufficiently advanced by market forces. That runs counter to conservatives’ historical respect for free markets and limited government. The rise of populism on the right and the frustration with perceived leftist bias from “Big Tech” have overpowered traditional conservative instincts—which are typically embodied in caution about or

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resistance to large regulatory schemes—for many voters, pundits, and politicians.

A recent *New York Post* op-ed by Rachel Bovard entitled “How Many Times Must Facebook Be Caught Censoring the Truth?” is representative of this trend.<sup>52</sup> The answer to her question is, apparently, two: Certain perspectives about Kyle Rittenhouse and the coronavirus were temporarily blocked from circulating on Facebook. Those two judgment calls lead Bovard to conclude that Facebook “bears no accountability for being wrong about major cultural questions.” This claim reveals a world view with remarkable implications. In fact, the proper accountability for controversial editorial judgments already operates when consumers increase or decrease their attention on a given platform. Taken to its logical conclusion, Bovard’s arguments imply that every media outlet should be turned into something like government-managed talk radio, featuring only programs into which everyone is entitled to call and no one is entitled to edit.

Those who want government policy to establish “accountability” for transmitting the opinions of others and exercising judgment about what a private platform should publish are playing with fire—it is extremely dangerous to confuse opinions and

judgments with “the truth.” Notably, when President Ronald Reagan addressed similar issues with the repeal of the Fairness Doctrine, he explained:

History has shown that the dangers of an overly timid or biased press cannot be averted through bureaucratic regulation, but only through the freedom and competition that the First Amendment sought to guarantee.<sup>53</sup>

Similarly, it is a mistake to view the *New York Post* as engaging in censorship because it publishes Rachel Bovard’s opinions but not those of others: regrettably, some “national conservatives” appear to confuse censorship with editorial discretion. Some might consider websites that allow mass entry by contributors as categorically distinct from op-ed pages that are necessarily selective in their choice of contributors. Nonetheless, both kinds of platforms are curated to one extent or another, and both kinds of platforms have to exercise artistic and expressive freedoms in order to remain afloat in a competitive world. Media platforms, when viewed as a whole, serve valuable functions, both as curators and as gatekeepers, in no small part because they provide the public with a broad spectrum of news and commentary. But it does not follow that some particular

platform should be saddled with common carrier obligations to publish everything that everybody says.

The most notorious recent example of social media platforms' alleged misbehavior in this area concerns the blocking of recirculation of a *New York Post* story about Hunter Biden. Regulation advocates have argued that the downgrading and temporary banning of this story, on Facebook and Twitter respectively, influenced the outcome of the 2020 presidential election. But the backlash to these moderation decisions triggered an instance of the Streisand Effect—a dynamic in which the attempt to tamp down information leads instead to its increased circulation. After Twitter suppressed the Hunter Biden story, shares of the story doubled on that platform. On Facebook, the story was shared 400,000 times on the week of its publication. It had 2.59 million likes, shares, and comments on the two platforms combined, and it was the sixth most engaged-with article that month.<sup>54</sup> This pre-election news explosion suggests that the prospects are poor for social media executives who use their platforms to try to control discussion of matters in which their users are genuinely interested.

While some on the right have developed “a newfound love of regulating private companies,” all of

the costs and perils of government incursion upon property rights still loom, even online.<sup>55</sup> Incentives to invest and innovate are diminished when property rights are sacrificed for other priorities or preferred short-term outcomes. Common carrier regulation will turn existing dynamic platforms into passive, regulated entities that are significantly less valuable, useful, and enjoyable for consumers. If platforms cannot curate their sites to distinguish themselves from competitors—as nearly all do currently—how do they create value?

To the extent that the world of platforms becomes a world of dumb pipes, each one will become indistinguishable from the next, which will shrink the incentive to build new platforms with differentiations as competitive advantages. Such regulatory barriers will dampen the incentives for capital accumulation and investment that produces nascent competitors. Common carrier regulation threatens to short-circuit the market solutions that would otherwise develop to address shortcomings and solve consumer problems, as it interferes with the creative destruction that typifies healthy market competition. Even more narrowly tailored common carrier classification is likely to reduce social media platform values and lock in incumbents. In short, those who would wield regulation to

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defeat temporary market outcomes they do not like run the risk of creating permanent stagnation.

Property rights act as a bulwark against all sorts of regulatory mischief. Government interference brings with it a host of harmful, unintended consequences. Among them are regulatory capture, regulatory creep, crony capitalism, politicization of matters better left to markets, and the inadvertent erecting of barriers to entry by raising regulatory compliance costs above what new firms with fewer resources can afford.

This parade of horrors can be observed in the history of electricity,<sup>56</sup> telephone,<sup>57</sup> and rail regulation.<sup>58</sup> Government-granted exclusive franchises to electric utilities kept customers captive to one firm and made vast swaths of infrastructure obsolete—thus dampening the prospects for consumer choice, competitive innovation, and lower consumer costs.

The open access “reregulation” of power generation decades later—not accompanied by changes in power distribution—did little to address the problem, but it did dampen the incentives for grid operators to invest in their infrastructure.<sup>59</sup>

Similarly, the common carrier status of telephone infrastructure resulted in the embedding of extensive, distorting subsidies into the regulatory system.

This phenomenon was largely driven by political interests in keeping local telephone prices low and industry efforts to prevent competition. Ultimately, these transfers burdened taxpayers and benefited AT&T, but not consumers.<sup>60</sup>

The same unseemly forces were at work with freight rail. Former Interstate Commerce Commission member and economist Marcus Alexis finds that it was the rail industry seeking political favors, not farmers trying to remedy alleged market failures, that acted as the driving force behind early federal railroad regulation.<sup>61</sup> He describes the shape that regulations took as “a classic in terms of the pursuit of economic interests, or rent-seeking behavior.”<sup>62</sup>

If history is any guide, policy failures that have been encouraged by heavy-handed regulation will be followed by a new set of recommended reforms. Regulation begets regulation; new layers of rules and restrictions push firms further and further away from the optimum efficiency, innovation, and responsiveness that would have otherwise existed. Economic distortions arising from government regulatory interventions will lead to calls for additional government intervention using antitrust actions or open access mandates. These risks can be understood as the cost of regulation to today’s and tomorrow’s consumers.

These costs stubbornly persist even when regulations are applied with the best of intentions. Social media platform regulation will be no exception.

### ***An Often-Overlooked Condition of Carriage***

Businesses that are—or are like—common carriers have one job: to take goods and services from one place to another in an efficient, non-discriminatory way. Common carriers help us ship packages and travel on mass transit. But the viability of those services rests on an important but often overlooked fact: A business will not remain viable unless it can bar access to customers who use its services in ways that threaten the business' mission. A shipper of packages that spread noxious smells or drip with biohazards will likely lose access to shipping services. A commuter who boards a train and brawls with other passengers will be unceremoniously ejected at the next station. A traveler who regularly tracks mud onto the hotel's carpet—even if an exemplary customer in all other respects—will eventually be asked to remove his boots before entering. Imposing rules that abolish owners' right to refuse service in such cases will threaten the viability, or even the existence, of such enterprises.

These facts explain why the obligation of common carriers to accept business

from all customers has limits, and why common carriers, as a matter of necessity, are allowed to set private rules that govern what they carry. They also underscore a fallacy sometimes embraced by advocates of social-media common carriage regulation—the idea that the more speakers and opinions that a social media platform carries, the better it is doing its job. Generally, consumers do not use social media because of their desire to hear from the maximum number of speakers possible. Rather, it is social media administrators who aggressively compete to attract the maximum numbers of *viewers* possible by means of, among other things, content moderation.

Social media, at its center, is a consumer product that allows people some degree of choice in the perspectives they want to hear about and discuss. Common carrier regulation advocates appear to be lobbying for the mandatory delivery of a consumer product that consumers do not want. (If not, why haven't non-moderated versions of social media businesses swamped the moderated incumbents? Notably, the almost zero-moderation Gettr platform was flooded with fake accounts, spam, and pornography within hours of its launch. Parler does not use an algorithm to filter, hide, or recommend content, which leads to an experience that some users find underwhelming.)

*Social media, at its center, is a consumer product that allows people some degree of choice in the perspectives they want to hear about and discuss.*

*The biggest costs of regulation are the market solutions it prevents.*

The argument that platforms should not discriminate on the basis of a speaker's political views is based on a misunderstanding of how social media works. For the most part, platform administrators do not care about speakers' political views in the slightest. What they care about is how to attract spectators to their platforms. In short, a fundamental reason that social media platforms should not be regulated like common carriers is that social media platforms are not like common carriers at all.

#### ***The Market Solution Alternative***

As social media users' discontent with moderation grows, the more financial incentives there will be for private actors to provide alternatives. There is already significant progress from innovators to disintermediate current "big tech" players using distributed technology solutions, such as open-source self-hosted platforms. Examples include Minds, Dispora, MeWe, LBRY, D.Tube, PeerTube, Mastodon, Karma, and Signal. Without getting into the technical details, these alternatives employ blockchain and cryptocurrency so as to create open-source code that is readily available to users.

Such transparency lets users see how the algorithm works, allowing for decentralized control with no central authority dictating the rules. Neither Facebook, Twitter, nor any corporate

entity acts as a content moderator on decentralized media; that control is held by the users themselves. As these technologies improve their user interface, their popularity will likely grow. Capital investment for these approaches is already growing. A recent \$200 million investment in BitClout, a social media application using the recently named Decentralized Social blockchain, demonstrates that at least some investors are bullish on this new form of social media.<sup>63</sup>

These market-oriented media solutions preserve the free exchange of ideas while giving users control over moderation: no government regulation, degrading of First Amendment rights, or market distortion is necessary. These nascent technologies illustrate why it is so important to prevent regulatory schemes, like designating social media platforms as common carriers, that short-circuit innovations and new paradigms. In short, the biggest costs of regulation are the market solutions it prevents.

#### **Conclusion: Private Owners and Social Benefits**

The legendary *New Yorker* columnist A.J. Liebling famously wrote that "freedom of the press is guaranteed only to those who own one."<sup>64</sup> Similarly, advocates of regulating social media platforms as common

carriers seem to have concluded that freedom of expression in social media is guaranteed only to those who own social media platforms. In reality, the extraordinary benefits that spring from the protection of free expression have not accrued merely to the benefit of platform owners, but have been dispersed far beyond them. The protection of First Amendment freedoms has benefited not just a small group of property owners, but the public as well. When free expression flourishes, it helps make the nation and the world a better place—even though, for the vast majority of human history, every communications platform was owned and controlled by a relatively tiny number of people. The prospects for improving this newly created universe of conversation and commerce through central planning ought to be viewed with great skepticism.

The First Amendment protects every American against government interference with free expression. The First Amendment does not imply the commandeering of other people's private property, such as social media platforms, to facilitate someone else's speech. Yet, calls to regulate social media platforms as common carriers—which would essentially transform

them into public utilities—are based on precisely that misconception.

The technological advances we benefit from today rest on the protection of speech and property; those legal protections deserve preservation if citizens and consumers want continued progress, innovation, and improvement. Moreover, the owners of social media platforms have inherent incentives to satisfy the choices and interests of their users. We overlook the moral, intellectual, and artistic rights of free expression that the creators and administrators of social media applications have relied on at our peril.

Policy makers would do well to appreciate the deep wisdom of Liebling's maxim. Platforms that are managed and controlled by private decision makers have led us into a new world of interpersonal and international communication that was unimaginable a generation ago. If regulation advocates achieve their goal of turning platforms into common carriers, they will succeed only in hobbling the social coordination, advancement, and innovation that these platforms have made possible.

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## NOTES

- 1 Aristotle's famous epigram meant something different to him than it does to us. For Aristotle, this proposition was part of an extensive argument about the way nature had equipped people with speech, which gave us the capacity to form larger social structures like households, villages, and city-states. Politics 1253 a1-18.
- 2 *Janklow v. Viking Press*, 378 N.W.2d 875, 881 (S.D. 1985),  
<https://law.justia.com/cases/south-dakota/supreme-court/1985/14657-1.html>.
- 3 *Smith v. California*, 80 S. Ct. 215 (1959), created a strong, if not unlimited, incentive for distributors to know as little as possible about the content of the materials they distributed in order to avoid liability.
- 4 Jeff Kosseff, *The Twenty-Six Words That Created the Internet* (Ithaca, New York: Cornell University Press, 2019). For a detailed review of the evolution and conflicts of liability law and the reactions they prompted in the marketplace, see chapters 1 and 2.
- 5 *Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp 135 (S.D.N.Y. 1991),  
<https://law.justia.com/cases/federal/district-courts/FSupp/776/135/2340509/>.
- 6 *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL323710 (N.Y. Sup. Ct. 1995),  
<https://h2o.law.harvard.edu/cases/4540>. This case is notable not only because of its unusual holding and the backlash that it created, but also because the litigant that initiated suit, the felonious brokerage firm of Stratton Oakmont, was eventually immortalized in Martin Scorsese's film *The Wolf of Wall Street*.
- 7 Chris Cox, "Policing the Internet: A Bad Idea in 1996—and Today," *Real Clear Politics*, June 25, 2020,  
[https://www.realclearpolitics.com/articles/2020/06/25/policing\\_the\\_internet\\_a\\_bad\\_idea\\_in\\_1996\\_-\\_and\\_today.html](https://www.realclearpolitics.com/articles/2020/06/25/policing_the_internet_a_bad_idea_in_1996_-_and_today.html).
- 8 The Telecommunications Act of 1996, 47 U.S. Code Section 230.
- 9 The authors' understanding of First Amendment freedoms here is not fundamentally precedential; it is philosophical. That is, our reliance on the notion of First Amendment freedoms here is not entirely constrained by case law; rather, it is inspired by the Constitution's text, the history that surrounds that text, and certain common-sense inferences. We believe that those freedoms are animated by important and time-tested values, such as freedom of expression generally and the freedom to acquire, control, use, and dispose of property as one sees fit. Notably, a person's right to free expression would be valueless if it were not accompanied by the power to control some means of expression—say, one's mouth, typewriter, or microphone.
- 10 Jess Miers, "Your Problem Is Not with Section 230, But The 1<sup>st</sup> Amendment," *Techdirt*, November 2, 2020,  
<https://www.techdirt.com/articles/20201030/09165945621/your-problem-is-not-with-section-230-1stamendment.shtml>.
- 11 Section 230 Reform Legislative Tracker, Future Tense, the Tech, Law & Security Program at the Washington College of Law at American University and the Center on Technology Policy at the University of North Carolina, Chapel Hill,  
<https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html>.
- 12 Rachel Bovard, "Section 230 Makes Big Tech Bulletproof," *Bucks County Courier-Times*, December 16, 2020.  
<https://www.buckscountycouriertimes.com/story/opinion/columns/your-voice/2020/12/16/section-230-wasnt-supposed-bullet-proof/3904503001/>.
- 13 Josh Hawley, *The Tyranny of Big Tech* (Washington, D.C.: Regnery Publishing, 2021).
- 14 Bovard, "Bulletproof."
- 15 Hawley, *The Tyranny of Big Tech*.
- 16 Rachel Bovard, "The FCC Should Address Distortions of Section 230," Regulatory Transparency Project, September 22, 2020, <https://regproject.org/the-fcc-should-address-distortions-of-section-230/>.
- 17 Philip Hamburger, "The Constitution Can Crack Section 230," *Wall Street Journal*, January 29, 2021,  
<https://www.wsj.com/articles/the-constitution-can-crack-section-230-11611946851>.
- 18 Ibid.
- 19 Rachel Bovard, "What the New Right Must Do Next Time It Earns Power," November 4, 2021, *The Federalist*,  
<https://thefederalist.com/2021/11/04/national-conservatism-must-prioritize-fights-over-american-values-not-just-legislation/>.
- 20 Hawley, *The Tyranny of Big Tech*.
- 21 Bovard, "What the New Right Must Do."
- 22 The authors are indebted here to Eugene Volokh, whose paper "Treating Social Media Platforms Like Common Carriers?" lays out this tripartite division of communications carriers in a clear and helpful way. Eugene Volokh, "Treating Social Media Like Common Carriers?" *Journal of Free Speech Law*, Vol. 1 (2021), pp. 377-462,  
[https://escholarship.org/content/qt0bz3d1fx/qt0bz3d1fx\\_noSplash\\_b99cb60adb98d4a349b4d3466a9479d1.pdf](https://escholarship.org/content/qt0bz3d1fx/qt0bz3d1fx_noSplash_b99cb60adb98d4a349b4d3466a9479d1.pdf).
- 23 Philip Hamburger and Clare Morell, "The First Amendment Doesn't Protect Big Tech's Censorship," updated July 31, 2021, *Wall Street Journal*,  
<https://www.wsj.com/articles/big-tech-twitter-facebook-google-youtube-sec-230-common-carrier-11627656722>.

24 Historically, entities subject to common carrier regulation in the United States have not always been monopolies. For instance, beginning in the 1970s, several telecom companies began to compete against AT&T—a longstanding telecommunications monopoly with common carrier status for long-distance telephone service. *MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218, 220–22 (1994); *Policy & Rules Concerning Rates for Competitive Common Carrier Services & Facilities Authorizations Therefor*, Fourth Report and Order, 95 F.C.C.2d 554, 557, at para. 5 (1983) (<https://supreme.justia.com/cases/federal/us/512/218/>) (MCI classified by FCC as a “non-dominant . . . specialized common carrier.”). The textbook definition of an oligopoly is an “industry that consists of only a small number of firms.” Jack Hirshleifer, Amihai Glazer, and David Hirshleifer, *Price Theory and Applications: Decisions, Markets, and Information*, at 280 (7<sup>th</sup> ed. 2005). But many of today’s large tech firms coexist as both monopolies and oligopolies in markets characterized by dynamism and uncertainty. Market boundaries are amorphous, and firms may seek to diversify their products to manage a highly unpredictable future. Nicolas Petit, *Big Tech and the Digital Economy: The M oligopoly Scenario* (New York: Oxford University Press, 2020).

25 It is arguably more precise to assign the first codification of the idea of the communications common carrier to the Railway Rate Act of 1910, also known as the Mann-Elkins Act. The Communications Act of 1934 is the first communications common carrier legislation of the modern era, given that it set the stage institutionally for the communications revolution that followed. Essentially, the 1934 Act transformed the Federal Radio Commission into the Federal Communications Commission and moved the locus of the regulation of interstate telephone services from the Interstate Commerce Commission to the Federal Communications Commission.

26 47 U.S. Code Section 151 et seq. Title II of the Communications Act covered wire and radio communications transmission. This section of the Communications Act required common carriers to charge reasonable and nondiscriminatory rates, the receipt of approval by the FCC to add or stop services, compliance with FCC orders to expand services, approval by FCC of mergers and acquisitions, and so forth.

27 47 U.S. Code Section 153 (h).

28 47 U.S. Code Section 201.

29 E. William Henry, “Activities of Regulatory and Enforcement Agencies Relating to Small Business,” testimony before Subcommittee No. 6 of the House Select Committee on Small Business, 89<sup>th</sup> Congress, Second Session, 18-19 (1966).

30 H.R. CONF. REP. No. 1918, 73<sup>d</sup> Cong., 2<sup>d</sup> Sess. 46 (1934); H.R. RP. No. 1850, 73<sup>d</sup> Cong., 2<sup>d</sup> Sess. 4 (1934).

31 *International News Service v. Associated Press*, 248 U.S. 215, 234 (1918), <https://supreme.justia.com/cases/federal/us/248/215/>.

32 Cable television operators have “must-carry” obligations for broadcast stations. The Supreme Court viewed those obligations to be content-neutral (and therefore non-violative of the First Amendment rights of operators) in *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622 (1994), <https://www.law.cornell.edu/supct/html/93-44.ZS.html>.

33 24 F.C.C. 251 (1958).

34 677 F.C.C.2d 384 (1980).

35 Bernard Marr, “How Much Data Do We Create Every Day? The Mind-Blowing Stats Everyone Should Read,” Bernard Marr & Co., accessed February 15, 2022, <https://bernardmarr.com/how-much-data-do-we-create-every-day-the-mind-blowing-stats-everyone-should-read/>.

36 Kepios, DataReportal, Global Social Media Stats, accessed February 15, 2022, <https://datareportal.com/social-media-users>.

37 For the argument that common law jurisprudence would have arrived at a liability regime similar to section 230, see Brent Skorup and Jennifer Huddleston, “The Erosion of Publisher Liability in American Law, Section 230, and the Future of Online Curation,” Mercatus Working Paper, Mercatus Center, July 11, 2019, <https://www.mercatus.org/publications/regulation/erosion-publisher-liability-american-law-section-230-and-future-online>.

38 University of Maine, Social Media Statistics Detail, September 2, 2021, <https://umaine.edu/undiscoveredmaine/small-business/resources/marketing-for-small-business/social-media-tools/social-media-statistics-details/#:~:text=The%20average%20social%20media%20user,6.6%20various%20social%20media%20platforms.&text=In%20the%20US%2C%2054%25%20of,%2C%20and%2054.4%25%20for%20male>.

39 The counterargument that social media incumbents have accumulated user bases that make those incumbent platforms invulnerable to competition is not strong. There have been too many allegedly unstoppable social media juggernauts that were later brought low for this notion to have much force. Victor Keegan, “Will MySpace Ever Lose Its Monopoly?” *The Guardian*, February 8, 2007, <https://www.theguardian.com/technology/2007/feb/08/business.comment>.

40 In fairness, it is certainly possible to conceive of rules that would both eliminate some of these problems and respect constitutional norms. For instance, it is certainly possible to have constitutional rules against spam and depictions of violence, but not against some kinds of content that almost everyone agrees are undesirable, such as “hate speech.” Any regime that attempts to identify hate speech is likely to make two kinds of errors with alarming frequency: 1) overlook some instances of hate speech and 2) identify instances of perfectly innocent speech as hateful.

41 An Act Relating to Social Media Platforms, S.B. 7072, <https://www.flsenate.gov/Session/Bill/2021/7072/BillText/e1/PDF>.  
42 The law only protects “journalistic enterprises” that meet certain requirements. Those requirements might include publication  
of a specified number of words or a specified amount of audio or video, possession of a specified number of subscribers or  
active users, or operation under a federal communications license.  
43 Texas, H.B. 20, 87<sup>th</sup> Legislature, 1<sup>st</sup> Special Session, <https://legiscan.com/TX/text/HB20/2021/X1>.  
44 NetChoice and The Computer and Communications Industry Association in both, *NetChoice and CCIA v. Moody*, United  
States District Court for the Northern District of Florida Tallahassee Division,  
<https://netchoice.org/wp-content/uploads/2021/05/NetChoice-CCIA-Complaint-for-Declaratory-and-Injunctive-Relief-5.27.21.pdf>  
and *NetChoice and CCIA v. Moody*, United States District Court for the Western District of Texas Austin Division, Civil  
Action No. 1:21-cv-00840, <https://netchoice.org/wp-content/uploads/2021/09/1-main.pdf>. Amicus briefs include Brief of the  
Cato Institute as Amicus Curiae in support of plaintiffs-appellees, Ilya Shapiro, counsel of record, November 15, 2021,  
<https://www.cato.org/sites/cato.org/files/2021-11/Netchoice-Eleventh-Circuit-Filed.pdf>. Amicus Curiae Brief of TechFreedom  
in support of plaintiffs NetChoice and CCIA’s motion for preliminary injunction, October 8, 2021,  
<https://techfreedom.org/wp-content/uploads/2021/10/File-Stamped-Amicus-Brief.pdf>.  
45 Adam Candeub and Eugene Volokh, “Interpreting 47 U.S.C. § 230I(2),” *Journal of Free Speech Law*, Vol. 1 (2021),  
pp. 175-190, <https://www.journaloffreespeechlaw.org/candeubvolokh.pdf>.  
46 Eugene Volokh, Treating Social Media Like Common Carriers? *Journal of Free Speech Law*, Vol. i (2021), p. 32,  
<https://www2.law.ucla.edu/volokh/carrier.pdf>.  
47 Perhaps it is not true. Some questions remain about Volokh’s analysis. There is a reasonable argument that the holdings he  
cites do not extend to the constitutionality of regulating the hosting function of platforms at all.

First, in *Turner Broadcasting System vs. FCC*, 512 U.S. 622 (1994), which required cable operators to carry signals from  
competing local broadcast television stations, the Court expressly distinguished cable operators’ duty to carry rival broadcaster  
content from, say, a broader duty by other media platforms to carry the expression of others. The Court’s analysis rested on  
the fact that the control of the physical infrastructure exercised by the cable systems allowed cable operators to “silence the  
voice of competing speakers with a mere flick of the switch.” In contrast, the Court noted that a “daily newspaper,” even one  
that enjoys “monopoly status in a given locale,” “no matter how secure its local monopoly, does not possess the power to  
obstruct readers’ access to other competing publications.” In short, a world with multiple real and virtual platforms that provides  
for competitive distribution of speech therefore fails to provide a justification for the constitutionality of regulating hosting  
functions at all.

Second, in *Pruneyard Shopping Center v. Roberts*, 447 U.S. 74 (1980)  
(<https://supreme.justia.com/cases/federal/us/447/74/>), the Court held that shopping malls were required to allow expressive  
activity—petitioners, leafleters, and protestors—on the company’s private property. In that case, the Court also distinguished  
the protection of such rights from other regulatory schemes that would create “an intrusion into the function of editors.”  
More precisely, the *PruneYard* court echoed its previously-expressed concern that overriding the decisions of editors might  
“damp[en] the vigor and limi[t] the variety of public debate.”

Ultimately, the force of these cases is unclear: Is a social media application more like a newspaper’s op-ed page or a  
shopping mall? In any event, these cases appear to leave some substantial questions open about the constitutionality of  
“requiring someone to host another person’s speech” (the phrase which Justice Breyer once used in dissent. *Agency for  
International Development v. Alliance for Open Society International*, 140 S. Ct. 2082 (2020)  
(<https://www.scotusblog.com/case-files/cases/united-states-agency-for-international-development-v-alliance-for-open-society-international-inc/>)  
(Breyer, J., dissenting, joined by Ginsburg & Sotomayor, JJ.) when social media platforms are the focus of  
analysis—at least those social media platforms that rely on the operation of editorial functions. More generally, although  
Volokh is correct to point out that mandates to public access can sometimes constitutionally defeat an enterprise’s desire to  
provide a “coherent speech product” to its users, the boundaries of First Amendment defenses to these mandates in the realm  
of social media appear largely undertheorized and underdeveloped by the passage of case law.

48 Because government assigned managers are not directly compensated on the basis of the underlying asset’s performance, they  
do not gain financially when the values of the resources they manage increase, nor do they face financial costs when those  
values fall; they lack market incentives to attend to changes in market-revealed values. Resources are therefore not put to  
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