HOW TO REGULATE ONLINE PLATFORMS: WHY COMMON CARRIER DOCTRINE IS INAPPROPRIATE TO REGULATE SOCIAL NETWORKS AND ALTERNATE APPROACHES TO PROTECT RIGHTS

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INTRODUCTION

Following the insurrection and attempted coup on January 6, 2021, many social media platforms finally[1] banned then-President Trump and many of his followers from using their services in what is called the "Great Deplatforming."[2] This renewed concerns over the enormous power Meta (primarily through Facebook and Instagram), Twitter, and other online platforms have over the flow of information and ideas in our society and how to remedy the imbalance.[3]

Platforms like Facebook enjoy the freedom to run their services as they please in part based on their *own* First Amendment free speech rights that protect their ability to choose what content to display to users in their newsfeeds.[4] Facebook extracts value from its network of users based on the volume of advertising impressions it delivers to them, which is a function of the amount of time the users spend on their platforms. It achieves this by extracting and analyzing enormous volumes of data about each user so it can show users the content that it believes will drive the most engagement, which

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1. *See* Danielle Citron, *It's Time to Kick Trump Off Twitter*, SLATE (Jan. 6, 2021, 5:45 PM), https://slate.com/technology/2021/01/twitter-kick-off-donald-trump.html [https://perma.cc/64XF-8D48] (documenting repeated calls for Trump's access to be revoked prior to the January 6th insurrection based on many instances of violating the platform's content rules as outlined in their Terms of Service).

2. *See* The Lawfare Podcast, *Jonathan Zittrain on the Great Deplatforming*, LAWFARE (Jan. 14, 2021), https://www.lawfareblog.com/lawfare-podcast-jonathan-zittrain-great-deplatforming [https://perma.cc/6TQX-57YN].

3. *See* Genevieve Lakier, *The Great Free-Speech Reversal*, ATLANTIC (Jan. 27, 2021), https://www.theatlantic.com/ideas/archive/2021/01/first-amendment-regulation/617827/ [https://perma.cc/YJT3-3N2W].

4. *See infra* Part I.A.1.

in turn keeps the user on the platform for a longer period of time.[5] This system requires the amplification of some content at the expense of minimizing other content, and further requires the moderation of inappropriate content to provide an environment users will want to come to.[6] Facebook and other online platforms can make these content decisions because of their own First Amendment protection that permits them to decide what content to display.[7] Without that protection, the viability of their attention model could be severely compromised.

Concerns about the "concentrated control of so much speech in the hands of a few private parties"[8] and their ability to suppress some user speech have led to calls to regulate online platforms like common carriers or public accommodations. Advocates of that regulation theorize that social media platforms host today's public forum[9] and are open to all comers and so should have a responsibility to be content neutral and allow all voices to be heard.[10] Traditionally, the argument that private players, as opposed to only government actors, can violate individuals' free speech rights was a progressive cause,[11] but recently conservative voices have embraced it as well,[12] leading to seemingly unified policy across the aisle.[13]

Classifying platforms as common carriers would place them in the sphere of public actors and impose nondiscrimination policies, preventing them from censoring the speech of their users.[14] On the surface it is an appealing

5. *See generally* TIM WU, THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS (2016).

6. *See* Olivier Sylvain, Comments at Limiting the Right to Exclude: Common Carrier and Market Dominance Panel held by the Federalist Society (June 25, 2021), https://fedsoc.org/events/limiting-the-right-to-exclude-common-carrier-and-market-dominance [https://perma.cc/35EA-4NA6] (describing how companies make decisions about what content to permit or block because there is presumably consumer interest in making sure the service is moderated).

7. *See infra* Part I.A.1.

8. Biden v. Knight Inst., 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring).

9. *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017) (where the Court declared that the internet is "the modern public square").

10. *See infra* Part I.B.

11. *See* Lakier, *supra* note 3 (explaining that Professors Felix Cohen and Robert Hale "argued against the notion that the Constitution protects rights including freedom of speech from only government action" and that because private corporations "wield tremendous power over individuals' lives and fortunes," overlooking that power when interpreting the scope and meaning of constitutionally protected rights would not make any sense).

12. *See* Exec. Order No. 13925, 85 Fed. Reg. 34,079 (May 28, 2020), *revoked by* Exec. Order No. 14029, 86 Fed. Reg. 27,025 (May 14, 2021) (describing free speech as a "bedrock of American democracy" and a right that is protected with the First Amendment, and then stating that allowing online platforms to pick the speech that Americans convey on the internet is "fundamentally un-American"); @SteveDaines, TWITTER (Jan. 8, 2021, 9:01 PM), https://twitter.com/SteveDaines/status/1347725221818736643 [https://perma.cc/C96X-9Y6J] (tweet of Republican Senator from Montana comparing "Big Tech censor[ship]" of "the free speech of American citizens" to that of China and North Korea).

13. *See* Sylvain, *supra* note 6 (discussing how "discussions about big tech these days have found odd bedfellows among a variety of people").

14. *See* Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 415 (2021). *See generally* Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J.L. & TECH. 391 (2020).

position that could limit Big Tech's power to control content and shape the public conversation. Unfortunately, however, not only are these platforms likely outside the scope of existing common carrier doctrine,[15] but even if such obligations were imposed on them, this would not address the underlying problem: the role the platforms play in developing the harmful content in the first place. Common carrier regulation may be appropriate in cases where information intermediaries are mere conduits of information, but it would not work in the social media context because those platforms are not mere conduits; instead, they actively participate in the facilitation and amplification of user content.[16]

The key to overcoming mis- and dis-information, and harmful and abusive content, is *not* to remove all content moderation such that there is more speech to drown out what is unwanted. However, leaving the platforms to decide how they want to treat such content under the status quo also has not solved the problem because the current financial incentives disfavor much intervention. Instead, free speech doctrine and § 230[17] protection should be adjusted to recognize the disproportionate power that corporate platforms have and help recognize the active role they play in shaping speech. This could permit the government to hold platforms accountable for the active role they play in the facilitation and amplification of damaging content, which would hopefully do a better job of incentivizing more productive business practices that do not immunize them for actively benefitting from the harmful speech of their users.

This Essay proceeds in two parts. Part I outlines the current protections that online platforms have under First Amendment and § 230 doctrines. It also previews how those protections would be changed if they were regulated as common carriers and why that ultimately is an inappropriate fit for online platforms. Part II suggests that a better way to regulate online platforms is by adjusting § 230 liability to account for the active role platforms play in online speech. Instead of further limiting liability for the powerful parties that are in the best position to reign in harmful user speech, this approach would incentivize them to prevent the spread of harmful speech before it causes harm.

I. OVERVIEW OF CURRENT DOCTRINAL LANDSCAPE: PLATFORM PROTECTION UNDER FIRST AMENDMENT SPEECH RIGHTS AND § 230 VERSUS POTENTIAL COMMON CARRIER OBLIGATIONS

On one end of the First Amendment speech spectrum are the near untouchable rights of traditional content publishers to make editorial decisions about what they publish. On the other end is something like a

15. *See* Limiting the Right to Exclude: Common Carrier and Market Dominance Panel held by the Federalist Society (June 25, 2021), https://fedsoc.org/events/limiting-the-right-to-exclude-common-carrier-and-market-dominance [https://perma.cc/TJ7S-WHYP].

16. *See generally* TARLETON GILLESPIE, CUSTODIANS OF THE INTERNET: PLATFORMS, CONTENT MODERATION, AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA (2018).

17. 47 U.S.C. § 230 (2018).

telephone company, which does not have the right to decide which speakers can have access to their telephone network to make phone calls.[18]

A baseline understanding of these doctrinal approaches is helpful to grasp why online platforms do not operate like common carriers and, therefore, why classifying them as such is not an appropriate solution to the harms they facilitate. Part I.A.1 describes current First Amendment protections online platforms enjoy, and Part I.A.2 explains how courts have interpreted § 230 to give practical immunity from liability. Part I.B contrasts those protections with the affirmative obligations common carriers are charged with to protect the speech rights of their users rather than themselves and what it might look like if such obligations were applied to online platforms.

A. Protections for Online Platforms

1. First Amendment Speech Rights

The First Amendment occupies a hallowed space in the psyche of this country.[19] Sitting atop the Bill of Rights, it protects, among other rights, against government interference with individuals' freedom of speech and the freedom of the press.[20]

For online platforms, the First Amendment provides protection for their own speech. It is consistently employed to support companies' constitutional right to "decide which ideas to distribute or promote and which ideas to demote or block."[21] *Search King v. Google*[22] is a foundational case that applied First Amendment protection to anticompetitive "speech" intended to suppress a competitor. There, Search King was a search engine optimizer, helping websites with their search engine optimization (SEO) so that the website appeared higher on Google's PageRank, which directly impacted their position on search results.[23] Google did not approve of Search King's services because it threatened to diminish the legitimacy and value of its product, the PageRank system that determines the order of search results.[24] Therefore, Google lowered Search King's position in Google search results

18. *See infra* notes 69–71 and accompanying text.

19. *See* Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2301 (2021) ("The strength and size of the modern First Amendment have given it a powerful cultural status. They also make it easy to equate the free speech tradition in the United States with the First Amendment tradition. Like the sun, the First Amendment's size and brightness tend to blot out all else."). *See also generally* MARY ANNE FRANKS, THE CULT OF CONSTITUTION (2021) (comparing religious fundamentalism and constitutional fundamentalism, where people revere the Constitution as a sacred document created by the founding father demigods, and "focus on individual rights of speech . . . while disregarding the equal protection guarantees of the Fourteenth Amendment").

20. U.S. CONST. amend I.

21. Olivier Sylvain, *Platform Realism, Informational Inequality, and Section 230 Reform*, 131 YALE L.J.F. 475, 488 (2021), https://www.yalelawjournal.org/pdf/F7.SylvainFinalDraftWEB_366qiqhf.pdf [https://perma.cc/2AH7-ANG9].

22. No. CIV-02-1457, 2003 WL 21464568 (W.D. Okla. May 27, 2003).

23. *See id.* at *1.

24. *See id.* at *2.

so it dropped off the first page of results (which drastically reduced traffic to Search King).[25]

Search King sued Google for tortious interference with its business, but Google defended its actions by arguing that its PageRank results are protected speech under the First Amendment.[26] The district court agreed.[27] The result feels counterintuitive considering how society uses Google as a functional tool to find information, almost like an index. But the court found Google's algorithmic search results to be speech because those results are a subjective output.[28] That output is an opinion.[29] It is not falsifiable (a different search engine could produce a different result and also be correct).[30] On that basis, the court held it to be speech, establishing that this online information intermediary's decision to elevate or demote results was entirely permissible.[31]

The Southern District of New York held similarly more than a decade later in *Zhang v. Baidu.com*,[32] another case where a search engine suppressed search results.[33] China required the search engine, Baidu, to suppress dissident content (from results in the United States) and the court held that Baidu's decisions to suppress pro-democratic content in its results was itself protected speech under the First Amendment.[34] The irony, of course, is the suppressed political speech is a core speech concern, but the actions were permissible because the corporation itself is entitled to speak too, and so it gets its own First Amendment protection.

More recently, the Ninth Circuit explained that not only do online platforms have First Amendment rights, but they have no responsibility to protect their users' First Amendment speech because they are not "public squares."[35] In *Prager University v. Google*,[36] Prager sued YouTube, invoking the First Amendment's state action doctrine, arguing that Google's decision to demonetize Prager's video content on the platform (removing Prager's ability to run advertising on its videos on YouTube) was a violation of Prager's First Amendment rights.[37] The Ninth Circuit disagreed, holding that YouTube is not a public forum and so it is not subject to First Amendment restrictions in a way a public square would be.[38]

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25. *See id*. at *1–2.
26. The First Amendment was relevant in this civil dispute between private parties because the government regulation would have been a court injunction for Google to stop its practice. *See id.* at *2.
27. *See id.* at *3.
28. *Id.* at *3–4.
29. *See id.*
30. *See id.*
31. *Id.*
32. 10 F. Supp. 3d 433 (S.D.N.Y. 2014).
33. *See id.* at 433.
34. *See id.* at 437.
35. *See* Prager Univ. v. Google LLC, 951 F.3d 991, 996–97 (9th Cir. 2020).
36. 951 F.3d 991 (9th Cir. 2020).
37. *See id.* at 996.
38. *See id.* at 998.

To be a public forum, an entity must provide functions that are both traditionally and exclusively governmental.[39] The paradigmatic example is the company town that is privately owned, but available to anyone in the public, as was the case in *Marsh v. Alabama*.[40] That town was required to operate as a public entity, a state actor, and so it must abide by the First Amendment rather than enjoy those protections itself.[41] In *Marsh*, the Court held that "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the . . . constitutional rights of those who use it."[42]

YouTube, however, does not satisfy the high functionality requirement of the company town. The *Prager* court characterized its only function as hosting speech on a private platform, which is "hardly 'an activity that only governmental entities have traditionally performed.'"[43] If by "inviting public discourse on its property," YouTube now performed a public function, then "'every retail and service establishment in the country' would be bound by constitutional norms."[44]

This is a significant decision because it addresses one potential avenue about whether Big Tech companies have certain obligations based on their size, function, and market power. But ultimately the case law does not impose different obligations just because an online platform is big; instead, *Prager* reinforced the requirement that to have neutrality obligations, the company must have a governmental function.[45]

It is an interesting requirement that may not align with the practical reality that, in many cases, online platforms *are* the new public forum.[46] It is on that basis that many raise the argument that perhaps the doctrine should be adapted to the market reality and the online platforms should be charged with those obligations.[47]

2. Section 230 Liability Shield

In addition to First Amendment speech protections, online platforms also have protection in the form of § 230 of the Communications Decency Act (CDA).[48] This 1996 statute was enacted in response to *Stratton Oakmont v. Prodigy*,[49] a New York State trial court decision that imposed publisher liability on an online platform for the harmful content of its users.[50] The

39. *See id*.
40. 326 U.S. 501 (1946).
41. *Id.* at 505–08.
42. *Id.* at 506.
43. *Prager*, 951 F.3d at 998 (quoting Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019)).
44. *Id.* (quoting Cent. Hardware Co. v. NLRB, 407 U.S. 539, 547 (1972)).
45. *See id.*
46. *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017) (referring to the internet as "the modern public square").
47. *See infra* Part I.B.2.
48. 47 U.S.C. § 230 (2018).
49. No. 031063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).
50. *Id.*

court determined that because that platform held itself out to be a "family oriented computer network" and its leadership stated publicly that it "exercised editorial control over the content of messages posted on its computer bulletin boards," it was "likening itself to a newspaper" or publisher, and so was liable when it failed to moderate the harmful third-party speech.[51]

Concerned about the effect such liability would have on the nascent Internet, Congress enacted § 230 to shield online platforms for their moderation decisions.[52] Section 230(c)(1) states that no online platform "shall be treated as the publisher or speaker of any information provided by" a third party,[53] and § 230(c)(2)(A) states that no platform will be "held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the [platform] considers to be . . . objectionable, whether or not such material is constitutionally protected."[54] The first part overturns *Stratton Oakmont* by removing liability for leaving material up, while (c)(2)(A) is meant to encourage "Good Samaritan" blocking of offensive material.

Shortly after going into effect, the Fourth Circuit interpreted the scope of § 230's protection such that it disincentivizes any content moderation on the part of platforms. In *Zeran v. America Online, Inc.*,[55] the plaintiff argued that § 230 only grants immunity based on publisher liability for third-party content.[56] "Publishers can be held liable for defamatory statements contained in their works even absent proof that they had specific knowledge of the statement's inclusion . . . [but] [d]istributors cannot be held liable . . . unless it is proven at a minimum that they have actual knowledge of the defamatory statements."[57] Therefore, when the plaintiff repeatedly notified AOL of posts listing plaintiff's phone number which led to constant harassment, the defendant possessed notice of defamatory material, so distributor liability was still appropriate.[58]

The court disagreed and instead held that § 230 "immunizes computer service providers like AOL from liability for information that originates with third parties" and did not differentiate between traditional publisher versus distributor roles.[59] It reasoned that distributors are a type or subcategory of publishers, and while there are different standards of liability for each, § 230 applies to the entire class of publishers and not merely certain types of publishers.[60] Further, the court assessed how the logic of plaintiff's argument was inconsistent with the stated purpose of § 230. If platforms

51. *Id.* at *2.
52. *Id.*
53. 47 U.S.C. § 230(c)(1) (2018).
54. *Id.* § 230(c)(2)(A).
55. 129 F.3d 327 (4th Cir. 1997).
56. *Id.* at 331.
57. *Id.* (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113 810–11 (5th ed. 1984)).
58. *Id.*
59. *Id.* at 328.
60. *Id.* at 332.

faced distributor liability each time they were notified of potentially defamatory content, they would be forced to take action. The extraordinary volume of user posts means it would be untenable to properly assess each complaint, and because platforms would only be liable for content they kept up under this approach, there would be an incentive to remove any and all complained-about material.[61] The result of "liability upon notice [would have] a chilling effect on the freedom of Internet speech."[62]

Whose speech was the court referring to? It appears that it meant the speech of platform users, acting on a fear that complaints will lead to unwarranted removal of their speech in contradiction to the promise of an Internet that would be a new world full of equality and free expression.[63] But it also meant the platform's own speech. The platforms' ability to self-regulate would be compromised if liability were imposed for notice but not for ignorance. The court explained both of these goals were aligned with the dual-purpose of § 230 to not chill the "vigor of Internet speech" or "service provider self-regulation."[64]

Section 230 and the *Zeran* court's interpretation of its protections established the prevailing rule that online platforms "are free to leave up or take down unlawful or harmful content as they please. This is a policy that, in practice, disincentivizes moderation and incentivizes the distribution of third-party material."[65] This protection has acted as an incredibly powerful shield for platforms to avoid almost any potential liability for disseminating harmful speech. Armed with First Amendment speech rights combined with practical immunity from liability for whatever it chooses to do with user generated content on its platform (unless they are found to have materially contributed to the content),[66] Big Tech platforms' only real incentive to moderate the content on their services is to drive more user engagement and data collection. The holding may have been consistent with Congress's intent at the time the statute was passed, but a quarter of a century later, it is more difficult to reconcile this rule with the practical reality of how platforms control all aspects of the user experience and leverage the liability shield to exploit incendiary content for their own gain.[67] In part because of the

61. *See id.* at 333.

62. *Id.*

63. *See* John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. (Feb. 8, 1996), https://www.eff.org/cyberspace-independence [https://perma.cc/6P4Z-ANVA] ("We are creating a world that all may enter without privilege or prejudice accorded by race, economic power, military force, or station of birth. We are creating a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity.")

64. *Zeran*, 129 F.3d at 333.

65. Sylvain, *supra* note 21, at 494.

66. *See* Lemmon v. Snap Inc., 995 F.3d 1085 (9th Cir. 2021); Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1168 (9th Cir. 2008) (interpreting 47 U.S.C. § 230(c)(1) to impose a material-contribution requirement for liability).

67. *See* Olivier Sylvain, *Intermediary Design Duties*, 50 CONN. L. REV. 203, 258 (2018) ("[T]he most popular intermediaries today engineer almost every aspect of users' online experience. Courts may in this regard no longer presume that the underlying injury originates with a third-party user's objectionable volitional act.").

apparent disconnect between the goal of public discourse with platforms' wealth maximization incentives, the prospect of instituting common carrier obligations has gained traction.

B. Common Carrier Obligations

1. Traditional Non-Discrimination and the Duty to Carry

At the other end of First Amendment freedom are the duties *imposed* on common carriers. Instead of being a source of editorial content or a broadcaster that publishes or amplifies content, some services are treated more like information conduits that merely transfer or carry information in the public interest. As such, these services are more likely to have a duty to carry, requiring them "not to discriminate based on viewpoint in choosing what material they host."[68]

The common example is a telephone network. A telephone network is prohibited from "mak[ing] any unjust or unreasonable discrimination" in the services they provide.[69] While the scope of what is "unreasonable" is not always clear, there is little question that content-based discrimination is generally considered unreasonable.[70] For example, telephone companies are generally precluded from refusing to host phone numbers for parties with whom they disagree, even when the phone line is used for harmful conduct.[71] Often, common carriers will receive some benefit in exchange for assuming these duties, and that could be in the form of "protection from application of antitrust laws, special access to rights of way and even condemnation, or the relaxation of liability as for carrier's immunity of liability for the content of the messages these carry."[72]

In *Miami Herald v. Tornillo*,[73] the U.S. Supreme Court considered such a duty in the newspaper context and ruled in favor of editorial discretion rather than compelled speech. In that case, a Florida statute required newspapers to give political candidates the right to reply to editorials it printed attacking the candidate's character.[74] The *Miami Herald* printed two editorials criticizing a candidate, and then refused to print the candidate's response.[75] The Court held Florida's statute to be unconstitutional because it violated the First Amendment's protection of freedom of the press.

The Court assessed the role of the free press,[76] particularly newspapers, both at the time of the country's founding and in the contemporary period of

68. Volokh, *supra* note 14, at 1.
69. 47 U.S.C. § 202(a) (2018).
70. *See* Lakier, *supra* note 19, at 2317 n.85.
71. *See* Volokh, *supra* note 14, at 384.
72. *See* Candeub, *supra* note 14, at 406.
73. 418 U.S. 241 (1974).
74. *See id*. at 243.
75. *Id.*
76. While freedom of the press is a distinct First Amendment right from freedom of speech, the Supreme Court generally does not distinguish between the two. *See* Lakier, *supra*

the case.[77] Dwindling newspaper competition and "concentration of control of media outlets to inform the public" across print and broadcast was a top of mind concern for the Court.[78] "The First Amendment interest of the public in being informed is said to be in peril because the 'marketplace of ideas' is today a monopoly controlled by the owners of the market."[79]

The Court was aware that the so-called marketplace of ideas now had only a few merchants who controlled the product and that because of the economic forces that led to this consolidation it was also extremely difficult to enter the market as a new voice. This made it difficult or impossible to respond to debate in a meaningful way,[80] but the Court failed to see a way for the law to facilitate a robust marketplace. "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."[81]

The decision continued to support allegiance to a press with editorial control free from government intervention, perhaps at the sacrifice of facilitating more and varied speech, which was what it contended to be the underlying purpose of the First Amendment in the first place.

2. Proposed Application to Online Platforms

Calls to apply common carrier or public utility doctrine to online speech networks received a boost in April 2021, when Justice Thomas seemed to endorse the concept in his concurrence in *Biden v. Knight First Amendment Institute at Columbia University*.[82] There, Justice Thomas argued that "digital platforms that hold themselves out to the public resemble traditional common carriers. Though digital instead of physical, they are at bottom communications networks, and they 'carry' information from one user to another."[83] Emphasizing the enormous market share and central control of Facebook and Google, he observed "[m]uch like with a communications utility, this concentration gives some digital platforms enormous control over speech."[84]

He reasoned common carrier duties could be especially permissible in the digital platform context because "space constraints on digital platforms are practically nonexistent (unlike on cable companies), so a regulation restricting a digital platform's right to exclude might not appreciably impede the platform from speaking."[85]

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note 19, at 2301 n.3 (citing Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1027–29 (2011)).

77. *See Tornillo*, 418 U.S. at 249–51.
78. *Id.* at 250.
79. *Id.* at 251.
80. *Id.*
81. *Id.* at 256.
82. *See* Biden v. Knight Inst., 141 S. Ct. 1220 (2021) (Thomas, J., concurring).
83. *Id.* at 1224.
84. *Id.*
85. *Id.* at 1226.

Proponents of the idea agree—arguing that major Big Tech platforms have risen to such prominence in society that they should be regulated as common carriers and charged with some version of a "non-discrimination requirement."[86] But how feasible is it to institute that sort of policy when the value of online platforms is built on discrimination? The platforms use the vast array of data it has about its users to determine what content will drive the best engagement and keep them on the platform for longer. Transparency into the platforms' algorithms could help determine how those decisions are made,[87] but that alone would not change the fundamental way platforms operate.

The counterargument then is to place the "powers of curation" in the hands of users rather than the platforms.[88] Currently, the curation process is passive to users. They engage with content, and the platforms learn the user behavior and serve content accordingly. Presumably, empowering the user to affirmatively curate their own experience by blocking what they want and indicating desire to see more of another type of post, particularly for highly sensitive content, gives more of the speech power to the user.[89]

The problem is that still would not give users curation power. Whatever system platforms would institute for that sort of user control would necessarily be dictated by the design, and by dictating the design they will continue to play a primary role in speech curation.[90] Consider the existing process: users choose what posts to engage with by clicking on them, using the "like," "love," "dislike," or a few other action buttons, or blocking the content as they choose. Facebook might argue that the existing curation experience is already controlled by users and the actions that Professor Adam Candeub describes are basically the same thing. Facebook could implement a new system where next time a user logs on they are presented with an environment to affirmatively make selections that will be the exclusive inputs from which the algorithm makes is "decisions." But that does not change Facebook's role one iota; the platform itself would still design the curation process and the algorithmic judgments. Those are essential features to the platforms' services. Without them, there is no service.[91]

Social media platforms' speech—the sophisticated and mostly automated decision-making as to what user content appears to every other user—is the value of their product. Imposing common carrier restrictions could fundamentally change that because not only would it impose an affirmative

86. *See* Candeub, *supra* note 14, at 429; *see also* Comments of Eugene Volokh at Free Speech and Compelled Speech: First Amendment Challenges to a Marketplace of Ideas held by the Federalist Society (June 11, 2021), https://fedsoc.org/events/free-speech-and-compelled-speech-first-amendment-challenges-to-a-marketplace-of-ideas [https://perma.cc/2J55-BAXH].

87. *See generally* Frank Pasquale, *Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries*, 104 NW. U. L. REV. 105 (2010).

88. Candeub, *supra* note 14, at 431.

89. *See id.*

90. *See generally* Sylvain, *supra* note 67.

91. Any discussion as to whether society would be better off without Facebook and Twitter in general is outside the scope of this Essay.

duty on platforms to accept all users (something which they explicitly say they do not do in their terms of service with users),[92] but it would require them to deprioritize some speech over others. Would that require Instagram to return to a chronological feed? That may help with perceived infringements on user access to speech, but it will diminish the value (engagement) of the platforms' service and fail to remedy any of the problems posed by the problematic speech (hate speech, that which incites violence or disclosed intimate personal information, or the overwhelming volume of grotesque and offensive speech content that these platforms do manage to moderate).[93]

Imposition of common carrier obligations would be a false solution because it fails to effectively account for the platforms' control of the user experience. The trade-off of requiring platforms to host all comers without liability would further shield their culpability for the role they play in not just hosting, but facilitating, cultivating, and amplifying harmful third-party speech. Non-discrimination requirements cannot remove the platform itself, as designer of the user experience, from the harmful speech it delivers. It would be more appropriate if these platforms were simply information conduits, the way some early Internet message boards essentially were. Instead the requirements would be ill-suited to address content problems for platforms as they exist today.

II. ALTERNATIVE REGULATION MECHANISMS FOR ONLINE INTERMEDIARIES

Instead of expanding platform liability in exchange for allowing all third-party content, a better legal solution is to follow the guidance of some courts that have started to consider the material contributions platforms make to user speech.[94] Updating the interpretation of § 230 to align with the reality of platform dynamics on the Internet as it is today rather than as it was when written could incentivize platforms to implement better content moderation to protect users.

Chief Judge Robert Katzmann's dissent in *Force v. Facebook*[95] reflects a perspective that begins to acknowledge the platform's own role in speech

92. *See* Mary Anne Franks, *Beyond the Public Square: Imagining Digital Democracy*, 131 YALE L.J.F. 427 (2021) (describing how analogies to the public square are erroneous because private platforms affirmatively do not welcome all comers); Limiting the Right to Exclude, *supra* note 15 (examining how platform terms of service limit use by the public).

93. *See* Adam Satariano & Mike Isaac, *The Silent Partner Cleaning Up Facebook for $500 Million a Year*, N.Y. TIMES (Oct. 28, 2021), https://www.nytimes.com/2021/08/31/technology/facebook-accenture-content-moderation.html [https://perma.cc/LGV9-VYW3]; Josh Sklar, *I Was a Facebook Content Moderator. I Quit in Disgust.*, NEW REPUBLIC (May 12, 2021), https://newrepublic.com/article/162379/facebook-content-moderation-josh-sklar-speech-censorship [https://perma.cc/8F7F-PBYB].

94. *See e.g.*, Lemmon v. Snap Inc., 995 F.3d 1085 (9th Cir. 2021); Force v. Facebook, Inc., 934 F.3d 53 (2d Cir. 2019) (Katzmann, C.J., concurring in part and dissenting in part); Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1168 (9th Cir. 2008).

95. 934 F.3d 53 (2d Cir. 2019).

dissemination. The complaint was brought under federal statutes that forbid providing material support for terrorism and alleged that Facebook provided such material support.[96] Hamas, which is designated a foreign terrorist organization by the United States, carried out attacks against five Americans in Israel between 2014 and 2016.[97] Plaintiffs alleged that Hamas used Facebook to post material that encouraged attacks, which these attackers viewed, and also to celebrate these attacks, send messages, and generally support further violence.[98]

Plaintiffs argued that not only did Facebook fail to remove this content that violated its terms of service, but that its algorithms "directed such content to the personalized newsfeeds of the individuals who harm[ed] the plaintiffs."[99] This allegation addresses Facebook's affirmative participation in the amplification of user content. Basically, if not for Facebook's ability to show and recommend content to other users, the attackers would not have seen the content in support of terrorist activities. Plaintiffs' argument was that Facebook was not merely a "publisher" or "speaker" of content provided by Hamas (which would permit 230(c)(1) immunity under the doctrine), but that it "contributed to the content through its algorithms."[100] Facebook determines the user's interests and what they like and then connects the user with others who are similar, and this "matchmaking" function is not publishing under § 230(c)(1), but something else that is like materially contributing to the content.[101] They also argued Facebook aided in the development of the terrorist content "by directing such content to users who are most interested in Hamas and its terrorist activities, without those users necessarily seeking that content."[102]

The court disagreed with plaintiffs' argument. The majority held that making decisions about how to arrange third party information to make connections is a feature of online publishing.[103] Then it assessed Facebook's role in development based on the "material contribution" test from the Ninth Circuit, which "draws the line at the crucial distinction between, on the one hand, taking actions . . . to . . . display . . . actionable content and, on the other hand, responsibility for what makes the displayed content itself illegal or actionable."[104] Applying the test, it determined Facebook was not responsible for the Hamas-related content because: (1) it does not edit content for its users, and (2) Facebook's acquiring of information from users does not make it a developer under § 230.[105]

96. *Id.* at 57.
97. *Id.*
98. *Id.* at 59.
99. *Id.*
100. *Id.* at 62.
101. *Id.* at 66.
102. *Id.* at 68.
103. *Id.* at 67.
104. *Id.* at 68.
105. *Id.* at 70.

Chief Judge Katzmann concurred in the decision but wrote a separate dissent in which he challenged the court's treatment of Facebook's friend and content suggestion algorithms.[106] He explained that "[a]fter collecting mountains of data about each user's activity on and off its platform, Facebook unleashes its algorithms to generate friend, group, and event suggestions based on what it perceives to be the user's interests."[107] He recognized that in this context, the complaint did not seek to punish Facebook for the content posted by third parties, but for its "affirmative role in bringing terrorists together."[108]

Under Chief Judge Katzmann's reading, that affirmative role is not protected under § 230 because: (1) "Facebook uses the algorithms to create and communicate its own message: that it thinks you, the reader—you, specifically—will like this content,"[109] and (2) "Facebook's suggestions contribute to the creation of real-world social networks . . . . Sometimes, Facebook's suggestions allegedly lead the user to become part of a unique global community, the creation and maintenance of which goes far beyond and differs in kind from traditional editorial functions."[110]

This is a significantly different reading of § 230 than most courts have articulated since the CDA was enacted. It is one that acknowledges and embraces that platforms are not mere conduits that host content provided by third parties, but are entities that use all of the content and data provided by users to make their *own* speech. The First Amendment protects their rights to make that speech, but they have been shielded from liability based on judicial interpretation of what it means to be a "publisher" of third party content under § 230(c)(1). Chief Judge Katzmann's reading is consistent with the modern Internet landscape and would hold platforms appropriately accountable for their own contributions to spreading harmful speech.

Other courts have also started to embrace a reading that acknowledges more of platforms' contributions.[111] Recognizing platforms' role in developing harmful user speech allows them to be held liable for their contributions, which could incentivize better content moderation practices because platforms will be incentivized to prevent harm before they are liable, which was the goal of § 230 in the first place.

CONCLUSION

Social media platforms have grown so large that they are the most prevalent fora of speech and debate for the general public. There are growing concerns about how that power to suppress or control individuals' speech in what is the de facto place for debate and conversation undermines free speech principles, even if it does not violate the First Amendment. Some call for

106. *Id.* at 76 (Katzmann, C.J., concurring in part and dissenting in part).
107. *Id.* at 77.
108. *Id.*
109. *Id.* at 82.
110. *Id.*
111. *See supra* note 94 and accompanying text.

these major platforms to be regulated as common carriers, which would impose obligations on them to not discriminate against the speech users put on their platforms.[112]

Common carrier regulation, however, will not solve the problem, and it may even exacerbate the harms society experiences from these platforms by further removing them from any culpability and liability for failing to moderate harmful and offensive material. It would attempt to solve the problem of Big Tech's outsized power to control and dictate speech by imposing content neutral obligations, which cannot work when the platforms themselves play an active role in content creation. Instead of trying to apply a regulation framework designed for neutral information conduits onto platforms that make subjective speech decisions, a better option would be to address the role that social media platforms play in the creation and distribution of harmful speech by holding them liable for the harm they cause. Instead of moving platforms further away from liability for the speech of its users, it could hold them responsible for their participation in creating damaging speech.

112. *See supra* Part I.B.2.