



## TREATING SOCIAL MEDIA PLATFORMS LIKE COMMON CARRIERS?

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The rise of massively influential social media platforms—and their growing willingness to exclude certain material that can be central to political debates—raises, more powerfully than ever, the concerns about economic power being leveraged into political power. There is a plausible (though far from open-and-shut) argument that these concerns can justify requiring the platforms not to discriminate based on viewpoint in choosing what material they host, much as telephone companies and package delivery services are barred from such viewpoint discrimination. *PruneYard Shopping Center v. Robins*, *Turner Broadcasting System v. FCC*, and *Rumsfeld v. FAIR* suggest such common-carrier-like mandates would be constitutional. On the other hand, platforms do have the First Amendment right to choose what to affirmatively and selectively recommend to their users.

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## INTRODUCTION

Say that the U.S. Postal Service refused to allow the mailing of KKK, Antifa, or anti-vax publications.<sup>1</sup> That would be unconstitutional,<sup>2</sup> however much we might appreciate the desire of USPS managers to refuse to participate in spreading evil and dangerous ideas. And though UPS and FedEx aren't bound by the First Amendment, they are common carriers<sup>3</sup> and thus can't refuse to ship books sent by "extremist" publishers.<sup>4</sup>

Likewise for phone companies, whether land-line monopolies or competitive cell phone providers.<sup>5</sup> Verizon can't cancel the Klan's recruiting phone number, even if that number is publicly advertised so that Verizon can know how it's being used without relying on any private information.<sup>6</sup> To be precise, the companies

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<sup>1</sup> Assume that it wouldn't need to open sealed envelopes, because the nature of the material is clear from the identity of the mailer or from the cover of an unwrapped magazine.

<sup>2</sup> See *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965).

<sup>3</sup> See, e.g., *FedEx Corp. v. United States*, 121 F. App'x 125, 126 (6th Cir. 2005).

<sup>4</sup> See 49 U.S.C. § 13101(a)(1)(D) (setting forth general policy against "unreasonable discrimination"), § 14101(a) (requiring common carrier to provide "transportation or service on reasonable request"); *Mitchell v. United States*, 313 U.S. 80, 94–95 (1941) (interpreting predecessor to this statute as banning race discrimination by common carriers, because such discrimination "would be an invasion of a fundamental individual right" if done by the government). Common carriers may sometimes be expected to monitor shipments for illegal content, see, e.g., U.S. Dep't of Justice, *UPS Agrees To Forfeit \$40 Million In Payments From Illicit Online Pharmacies For Shipping Services* (Mar. 29, 2013), <https://perma.cc/DEX3-WNSU>, but they can't block publications simply because they don't like the ideas expressed within them.

<sup>5</sup> 47 U.S.C. § 202(a); Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2317 (2021); Michael Kent Curtis & Eugene D. Mazo, *Campaign Finance and the Ecology of Democratic Speech*, 103 KY. L.J. 529, 557 (2014).

<sup>6</sup> See *infra* note 20.

need not be common carriers as to all aspects of their operation: They can, for instance, express their views to their customers in mailings accompanying their bills, without having to convey others' views.<sup>7</sup> But they are common carriers as to their function of providing customers with telephone communications services.

And this seems to me to be a valuable feature of our regulatory system, not just an odd side effect of common carrier law. Certain kinds of important infrastructure, under these rules, are available equally to all speakers, regardless of the speakers' ideologies. Government enterprises (such as the post office) shouldn't decide which organizations or ideas should be handicapped in public debates. And neither should large private businesses, such as phone companies or package delivery services.

That is important even as to groups and viewpoints that are seen as extreme. But it is especially important as to viable political candidates, ideas, or media outlets that are serious competitors in democratic life. When elections are closely divided, even small interferences with various groups' ability to affect public opinion can make a big difference in outcomes.<sup>8</sup> FedEx and Verizon shouldn't have the power to thus affect elections by refusing to carry certain views. Such corporations might sometimes be inclined to use their power to restrict left-wing speech, sometimes right-wing speech, or sometimes some other speech—but whatever their politics, they should be denied such power.

On the other hand, say the *Los Angeles Times* refuses to run an ad promoting the KKK, or promoting Antifa, or opposing vaccination. There is good reason to support the *Times*' right to do this. People read the *Times* in part precisely because they trust its editorial judgment—they believe its editors will winnow the good and sensible views out of the vast mass of nonsense and folly. Treating the *Times* as a common carrier would thus make it useless. And indeed, the *Times* has a First Amendment right to refuse to publish whatever material it chooses.<sup>9</sup>

A bricks-and-mortar bookstore, which also aims to screen the universe of books to select the ones that readers might find especially interesting, likewise has

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<sup>7</sup> *Pacific Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1 (1986), so held as to public utilities generally, and there is no reason why this analysis would be different for common carriers.

<sup>8</sup> Cf. Jonathan Zittrain, *Engineering an Election*, 127 HARV. L. REV. F. 335 (2014).

<sup>9</sup> *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

a First Amendment right to choose which books to distribute. Perhaps both the newspaper and the bookstore might be condemned as unduly narrow-minded, if they go too far in excluding material, at least unless they promote themselves as being ideologically focused. But for material that is seen as sufficiently extreme, newspapers' and bookstores' rejecting such material is quite normal.

The question, of course, is where we might fit the various functions of social media platforms.<sup>10</sup> This Article will offer some (often tentative) thoughts on this question. I'll begin by asking in Part I whether it's wise to ban viewpoint discrimination by certain kinds of social media platforms, at least as to what I call their "hosting function"—the distribution of an author's posts to users who affirmatively seek out those posts by visiting a page or subscribing to a feed.

I'll turn in Part II to whether such common-carrier-like laws would be consistent with the platforms' own First Amendment rights, discussing the leading Supreme Court compelled speech and expressive association precedents, including *PruneYard Shopping Center v. Robins*; *Turner Broadcasting System v. FCC*; *Rumsfeld v. FAIR*; *Miami Herald Co. v. Tornillo*; *Wooley v. Maynard*; *Pacific Gas & Electric Co. v. Public Utilities Commission*; *Riley v. National Federation of the Blind*; *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*; *NIFLA v. Becerra*; *Boy Scouts of America v. Dale*; and *Janus v. AFSCME*. (I discuss elsewhere whether such laws, if enacted on the state level, would be barred by 47 U.S.C. § 230(c)(2)(A) and the Dormant Commerce Clause.<sup>11</sup>) And then I'll turn in Part III to discussing whether Congress may offer 47 U.S.C. § 230(c)(1) immunity only for platform

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<sup>10</sup> For earlier calls to treat social media platforms like common carriers, see, e.g., K. Sabeel Rahman, *Regulating Informational Infrastructure: Internet Platforms as the New Public Utilities*, 2 GEO. L. TECH. REV. 234 (2018); Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J. L. & TECH. 391, 433 (2020); Tunku Varadarajan (interviewing Richard Epstein), *The 'Common Carrier' Solution to Social-Media Censorship*, WALL ST. J., Jan. 15, 2021; Richard Epstein, *Should Platforms Be Treated as Common Carriers? It Depends—Perhaps* (working paper) (on file with author). For an early suggestion along those lines, not aimed at modern social media platforms, see David J. Goldstone, *A Funny Thing Happened on the Way to the Cyber Forum: Public vs. Private in Cyberspace Speech*, 69 U. COLO. L. REV. 1, 40–47 (1998).

<sup>11</sup> See Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. § 230(c)(2)*, 1 J. FREE SPEECH L. 175 (2021); Eugene Volokh, *Does 47 U.S.C. § 230(c)(2) Violate the First Amendment?* (in draft); Eugene Volokh, *State Social Media Mandates and the Dormant Commerce Clause* (in draft).

functions for which the platform accepts common carrier status, rather than offering it (as is done now) for all platform functions.

On balance, I'll argue, a common-carrier-like model might well be constitutional, at least as to the hosting function. But I want to be careful not to oversell such a model: As to some of the platform features that are most valuable to content creators—such as platforms' recommending certain posts, including to users who aren't already subscribed to their authors' feeds—platforms retain the First Amendment right to choose what to include in those recommendations and what to exclude from them.

I also don't want to claim that platforms are "common carriers" under existing law, or are precisely identical to existing common carriers.<sup>12</sup> I think the analogy to

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<sup>12</sup> Social media platforms today might not be common carriers under some definitions of the term, because they don't hold themselves out as "neutral conduits of information." Matthew Feeney, *Are Social Media Companies Common Carriers?*, CATO INST. (May 24, 2021, 3:39 PM), <https://perma.cc/V2C5-NH84>; Berin Szóka & Corbin Barthold, *Justice Thomas's Misguided Concurrence on Platform Regulation*, LAWFARE (Apr. 14, 2021, 10:30 AM), <https://perma.cc/97CY-P972>; cf. RICHARD L. HASEN, CHEAP SPEECH: HOW DISINFORMATION POISONS OUR POLITICS, AND HOW TO CURE IT text accompanying notes 84–85 (forthcoming 2021); cf. Nat'l Ass'n of Reg. Util. Comm'rs v. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976) ("the primary sine qua non of common carrier status is a quasi-public character, which arises out of the undertaking to carry for all people indifferently" (cleaned up)). But even a common carrier or public utility that publicly announces that it wants to exclude some people may still have to include them—after all, one facet of common carrier status is that the common carrier is barred from discriminating in various ways, see, e.g., 47 U.S.C. § 202(a), and that common carriers must provide "fair and equal access to the carrier's service," Midwest Video Corp. v. FCC, 571 F.2d 1025 (8th Cir. 1978), *aff'd as to other matters*, 440 U.S. 689 (1979). Common carrier status, for instance, barred railroads from discriminating among passengers based on race, even before such discrimination was expressly forbidden by public accommodations statutes. See, e.g., Mitchell v. United States, 313 U.S. 80, 97 (1941). Likewise, telephone companies were barred from excluding people based on a mere suspicion that they were using the service for illegal purposes, such as gambling. Andrews v. Chesapeake & Potomac Tel. Co., 83 F. Supp. 966, 968–69 (D.D.C. 1949); Nadel v. N.Y. Tel. Co., 170 N.Y.S.2d 95, 98 (N.Y. Sup. Ct. 1957); *supra* note 26 and accompanying text. Common carrier status is more than just a truth-in-advertising law.

The key feature of common carriers appears to be that they do not routinely "make individualized decisions, in particular cases, whether and on what terms to deal." Nat'l Assn' of Reg. Util. Comm'rs v. FCC, 525 F.2d 630, 641 (D.C. Cir. 1976). Social media platforms, which make "individualized decisions" about particular users or posts in only a tiny fraction of all situations, seem to me to be quite close to the traditional definition. But in any event the question is whether legislatures

certain familiar common carriers, such as phone companies and package delivery services, is helpful; but it's only an analogy. Even if it proves to be a helpful analogy, there's little reason to think that all the details of common carrier law ought to be fully adopted for social media platforms,<sup>13</sup> or that the threshold for regulation should be defined by traditional common carrier rules.

Other analogies can also be helpful: As Part II.A will argue, the clearest First Amendment analogs would be cable must-carry rules (which are sometimes labeled “quasi-common-carrier” rules<sup>14</sup>) and rights of access to the real estate of shopping malls and universities. Justice Thomas has recently suggested that public accommodation laws might be useful analogies as well.<sup>15</sup> Indeed, some courts have recently treated media web sites as places of public accommodations for purposes of disability law,<sup>16</sup> and laws in some jurisdictions already ban discrimination based on

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should view social media platforms, as to certain of their functions, as sufficiently close to common carriers to merit some public access mandates.

Cases such as *Rumsfeld* and *Turner Broadcasting* also show that common-carrier-like access mandates may be imposed even on institutions—such as universities and cable operators—that are far from neutral conduits in many of their operations (*e.g.*, defining their curriculum, hiring faculty, organizing conferences, or selecting what channels to include) and that may seek to be nonneutral in further ways (say, in selecting who may recruit on campus). Similarly, *PruneYard* was required to allow leafleters even though it had an express “policy not to permit any visitor or tenant to engage in any publicly expressive activity, including the circulation of petitions, that is not directly related to its commercial purposes.” *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 77 (1980).

<sup>13</sup> For instance, telegraph companies weren't treated exactly as common carriers in the late 1800s, for example for purposes of liability, but they were still seen as sufficiently “resembl[ing] . . . common carriers” “in that they exercise a public employment, and are therefore bound to serve all customers alike, without discrimination.” *Primrose v. W. Union Tel. Co.*, 154 U.S. 1, 14 (1894). Likewise, traditional common carrier rules related to rates or to liability for physical injury to customers or their property may be inapt for social media platforms. *Cf. Candeub, Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, *supra* note 10, at 407–09.

<sup>14</sup> See, *e.g.*, Yoo, *infra* note 20, at 534–39; Lakier, *supra* note 5, at 2317 & n.89; Brent Skorup & Joseph Kane, *The FCC and Quasi-Common Carriage: A Case Study of Agency Survival*, 18 MINN. J.L. SCI. & TECH. 631, 649–50, 661 (2017).

<sup>15</sup> *Biden v. Knight First Am. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1224, 1227 (2021) (Thomas, J., concurring).

<sup>16</sup> See *Winegard v. Crain Commc'ns, Inc.*, No. 20-CV-01509 (AJN), 2021 WL 1198960 (S.D.N.Y. Mar. 30, 2021); *Sullivan v. BDG Media, Inc.*, 71 Misc.3d 863 (N.Y. Sup. Ct. 2021); *Nat'l*

political affiliation or ideology.<sup>17</sup> The point is simply that the insights behind how certain communication and distribution services—and certain forms of property more generally—may and may not be regulated could also be helpful for thinking about various functions of social media platforms.

## I. SHOULD WE WORRY ABOUT PLATFORM POWER?

### A. *Economic Power Being Leveraged to Control Political Discourse*

Let's begin with the policy question, and ask: Why might we want phone companies to be barred from cutting off service based on subscribers' viewpoints?

Say a phone company argues: We don't want our service to be used to promote racial hatred or advocacy of Communism or conspiracy theories, and our other account holders don't want it, either. We want to be able to cancel phone lines of people or organizations who are publicly known to be engaging in "hate speech" or advocating violence or revolution.<sup>18</sup> That speech is "terrible," and it "hurts society."<sup>19</sup> Why does the law preclude the companies from doing this<sup>20</sup>—even when

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Fed'n of the Blind v. Scribd Inc., 97 F. Supp. 3d 565 (D. Vt. 2015); Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196 (D. Mass. 2012); see also Sullivan v. Study.com LLC, No. 18-CV-1939 (JPO), 2019 WL 1299966 (S.D.N.Y. Mar. 21, 2019) (likewise, but noting that the defendant did not contest such treatment). For more on whether web sites that are ancillary to the sale of other goods and services are places of public accommodations for purposes of federal disability discrimination law, see Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266, 1277 (11th Cir. 2021) (saying no); Robles v. Domino's Pizza, LLC, 913 F.3d 898, 905–06 (9th Cir. 2019) (saying yes); Blake E. Reid, *Internet Architecture and Disability*, 95 IND. L.J. 591, 597–99 (2020) (summarizing the dispute); Johanna Smith & John Inazu, *Virtual Access: A New Framework for Disability and Human Flourishing in an Online World*, \_\_ WISC. L. REV. \_\_, pt. IV (forthcoming 2021).

<sup>17</sup> See Eugene Volokh, *Bans on Political Discrimination in Places of Public Accommodation*, 15 NYU J. L. & LIBERTY \_\_ (forthcoming 2022). Some of the laws ban only discrimination based on party affiliation, but others ban discrimination based on broader political beliefs as well. The main federal public accommodations law, Title II of the Civil Rights Act of 1964, doesn't currently treat social media platforms as places of public accommodation, Lewis v. Google LLC, No. 20-16073, 2021 WL 1423118, (9th Cir. Apr. 15, 2021), and in any event doesn't ban discrimination based on ideological belief; but the question would be whether it, and similar laws, should be extended.

<sup>18</sup> Assume all this is done without listening in on private phone calls, but just by consulting public statements (e.g., public ads that list a phone number).

<sup>19</sup> Cf. Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH L. 191, 211 (2021).

<sup>20</sup> Christopher Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net*



they're not monopolies, such as landline companies might be,<sup>21</sup> but are highly competitive cell phone providers?<sup>22</sup>

I take it one answer might be something like this: We don't want large business corporations deciding what Americans can say in a particular medium of public communication. Sometimes, in the few areas where the First Amendment permits government regulation, the people's representatives decide that. Usually, individual speakers and listeners decide that.<sup>23</sup> But companies that provide communications infrastructure should provide the infrastructure, not control what may be communicated on it.<sup>24</sup> When "dominant digital platforms" have the power "to cut off speech," we should be as concerned about that power as we are about, say, government power to exclude people from limited public forums.<sup>25</sup> To quote one 1944

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*Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463, 491–92 (2021), notes cases holding that allowed phone companies some power to block certain uses of their services, chiefly for dial-a-porn. But those all involved statutes that the courts read as specially limiting the common carrier obligation. *Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1293–95 (9th Cir. 1987) (state law "prohibiting the distribution of sexually explicit material to minors," which was seen as "embod[ying]" a "public policy" of "protecting minors from 'adult entertainment'"); *Carlin Comnc'ns, Inc. v. S. Bell Tel. & Tel. Co.*, 802 F.2d 1352, 1361 n.5 (11th Cir. 1986) (47 U.S.C. § 201 exclusion of the service from common carrier obligations); *Network Commc'ns v. Mich. Bell Tel. Co.*, 703 F. Supp. 1267, 1275 (E.D. Mich. 1989) (same); *Info. Providers' Coal. for Def. of First Amend. v. FCC*, 928 F.2d 866, 877 (9th Cir. 1991) (47 U.S.C. §§ 233(b), (c)(1) exclusion of "indecent" communications).

<sup>21</sup> These days, even landline phone companies often face competition from cable operators, which can provide phone service, as well as from cellular companies.

<sup>22</sup> Goldman & Miers also argue that, "[t]o the extent that consumers trust the Internet services, lawful-but-awful content will get unwarranted credibility boosts from being carried on reputable services and gaining the implicit imprimatur of their brands," Goldman & Miers, *supra* note 19. at 213, and that might not apply to material delivered by phone companies. But I don't think it applies to YouTube or Facebook, either, precisely because consumers don't trust the user-generated content on Internet services: Who thinks, "Oh, that's probably a credible argument, because someone shared it on Facebook"?

<sup>23</sup> When speakers and listeners disagree, telephone companies can implement viewpoint-neutral technologies that help listeners, such as call blocking; but let's focus here on speakers speaking to willing listeners.

<sup>24</sup> See Angela J. Campbell, *Publish or Carriage: Approaches to Analyzing the First Amendment Rights of Telephone Companies*, 70 N.C. L. REV. 1071, 1133 n.326 (1992).

<sup>25</sup> *Biden v. Knight First Am. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1224, 1227 (2021)

court decision,

Public utilities and common carriers [such as telephone companies] are not the censors of public or private morals, nor are they authorized or required to . . . regulate the public or private conduct of those who seek service at their hands.<sup>26</sup>

This is generally the attitude, I think, even as to many platforms that aren't legally common carriers. For instance, though the FCC has held phone companies are not common carriers as to text messaging, the rationale for that decision was the need to block unwanted robotexting—and as to messages among willing customers, a concurring opinion assured readers that, “Tomorrow, like today, our text messages will go through.”<sup>27</sup>

Likewise, e-mail systems are generally not treated as common carriers, and can in theory legally screen messages based on their viewpoints or on their supposedly spreading conspiracy theories or misinformation. Still, I suspect that most people would be surprised if Microsoft and Google decided to control Outlook and Gmail messages this way. In the words of New York's high court, an e-mail system's “role in transmitting e-mail is akin to that of a telephone company, which one neither wants nor expects to superintend the content of its subscribers' conversations.”<sup>28</sup>

Of course, phone companies or delivery companies might well use their power wisely, to block speech that the government can't suppress but that is still bad—bad for its subjects who are being insulted or harassed or defamed, bad for democ-

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(Thomas, J., concurring).

<sup>26</sup> *Pa. Pubs. Inc. v. Pa. Pub. Util. Comm'n*, 36 A.2d 777, 781 (Pa. 1944) (cleaned up); *People v. Brophy*, 120 P.2d 946, 956 (Cal. App. 1942); *Commonwealth v. W. Union Tel. Co.*, 67 S.W. 59, 60 (Ky. 1901).

<sup>27</sup> *In re Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service*, 33 FCC Rcd. 12107 (2018) (O'Rielly, Comm'r).

<sup>28</sup> *Lunney v. Prodigy Servs. Co.*, 723 N.E.2d 539, 542 (N.Y. 1999). The court so held in concluding that e-mail systems should be categorically immune from libel liability for their users' messages to each other, just as phone companies are; the case arose before 47 U.S.C. § 230 was enacted, so the court chose to decide it as a matter of state libel law, rather than considering whether § 230 should be applied retroactively. *Id.* at 543.

racy, bad for public health, bad for the victims of crimes that the speech might inspire.<sup>29</sup> But such companies, like all human institutions, can act unwisely as well. And common-carrier law allows us “not to place all one’s hopes in the good will of corporate actor.”<sup>30</sup>

To be sure, phone companies and delivery services are often conceptualized as means for one-to-one communication rather than for publishing. But I doubt the distinction is particularly sharp, or particularly relevant.

First, such supposedly one-to-one media have long been used to distribute material to the public at large. The post office has long been a means for publishers to distribute magazines to the public; in the past, it has even been used to distribute newspapers. Both the post office and delivery services can be tools for publishers and bookstores to ship books to readers. Telephones are routinely used to communicate the same message to the public at large—consider election campaigns’ get-out-the-vote calls to potentially sympathetic voters before an election; charitable fundraising campaigns;<sup>31</sup> telephone lines promoted for the public to call to join a group or learn its message; and more.

Indeed, broad publication is generally just the aggregate of individual one-to-one deliveries. Books and newspapers are delivered to customers one copy at a time, whether through a newsstand or store, or by mail or home delivery. Likewise, web sites or social media networks publish to the world by delivering to each user an individual set of communications.<sup>32</sup>

Second, it’s not clear why platforms should have more authority to control

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<sup>29</sup> See, e.g., Mary Anne Franks, *The Free Speech Black Hole: Can the Internet Escape the Gravitational Pull of the First Amendment?*, KNIGHT FIRST AMEND. INST. COLUM UNIV. (Aug. 21, 2019), <https://perma.cc/HAX8-3RZN>.

<sup>30</sup> Genevieve Lakier & Nelson Tebbe, *After the “Great Deplatforming”: Reconsidering the Shape of the First Amendment*, LAW & POLITICAL ECONOMY [LPE] PROJECT (Mar. 1, 2021), <https://perma.cc/56F3-KMBE>.

<sup>31</sup> Such calls are generally fully protected by the First Amendment precisely because they are tools for charities to spread their ideological message and not just to raise money. See, e.g., *Riley v. Nat’l Fed’n for the Blind of N.C., Inc.*, 487 U.S. 781 (1988).

<sup>32</sup> Over-the-air broadcasting might be conceptualized as an exception, since the publisher just broadcasts the signal once, though even there each individual viewer or listener receives it as a result of an individual choice.

mass publication than UPS or phone companies have over the narrower publication involved in the typical mailing or phone bank. If the platforms—or their other users—are worried about their moral complicity with evil users’ plans, that worry would be equally present whether the user is putting up a web page promoting racism or Communism or rioting, or instead setting up a phone line which people can call to get such messages. Likewise, if Facebook is concerned about people coordinating plans for a riot online, a phone company can be at least as concerned about people coordinating such plans by phone.

If platforms are indeed treated like common carriers, and barred from discriminating against users based on the viewpoint they express, I don’t think the platforms could properly appeal to Terms of Service that run contrary to the viewpoint neutrality obligation, even if users are required to sign the Terms of Service. The closest analogy is the traditional common carrier duty to “exercise . . . care and diligence” towards their customers and their property, which the Court has held could not be waived: “[I]f a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the *essential duties* of his employment.”<sup>33</sup>

Likewise, if a nondiscrimination duty is imposed on a social media platform (analogous to such a duty imposed on traditional common carriers), the platform can’t stipulate not to be bound by that duty.<sup>34</sup> And of course there’s no reason to think that *Rumsfeld v. FAIR*, for instance,<sup>35</sup> would have come out differently if a university required all recruiters to sign agreements that they will recruit only if their employers forswear sexual orientation discrimination.

### ***B. The Citizens United Dissent***

Indeed, the Court’s majority in *Austin v. Michigan Chamber of Commerce* and the four dissenters in *Citizens United v. FEC* raised an argument very similar to the

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<sup>33</sup> N.Y. Cent. R. Co. v. Lockwood, 84 U.S. 357, 378 (1873).

<sup>34</sup> See also *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) (holding that employers can’t require employees to preemptively waive their rights under nondiscrimination statutes as a condition of employment).

<sup>35</sup> See *infra* Part II.A.1.a.

one given above: that the power of immensely rich corporations may “give corporations unfair influence” and “distort public debate.”<sup>36</sup> Or, in the words of the liberal think tank Demos, criticizing *Citizens United*: “Concentrated wealth has a distorting effect on democracy[;] therefore, winners in the economic marketplace should not be allowed to dominate the political marketplace.”<sup>37</sup>

I think the *Citizens United* majority was right to hold that this couldn’t justify restricting corporations’ own speech. But the argument for limiting the power of massive corporations strikes me as especially strong—and, as Part II will argue, consistent with the First Amendment—when the corporations are using their immense “financial resources” not just to try to persuade listeners through the corporations’ own speech, but to suppress others’ speech.

Indeed, much of Justice Stevens’ argument in his *Citizens United* dissent would apply to such selective blocking decisions by infrastructure companies:

A legislature might [reasonably] conclude that unregulated general treasury expenditures will give corporations “unfair influence” in the electoral process, and distort public debate in ways that undermine rather than advance the interests of listeners. The legal structure of corporations allows them to amass and deploy financial resources on a scale few natural persons can match. . . . [Because of the speech of corporations,] the opinions of real people may be marginalized. . . . “[Corporate] expenditure restrictions . . . are thus meant to ensure that competition among actors in the political arena is truly competition among ideas.”

Corporate “domination” of electioneering can [also] generate the impression that corporations dominate our democracy. . . . The predictable result is cynicism and disenchantment: an increased perception that large spenders call the tune and a reduced willingness of voters to take part in democratic governance.

To the extent that corporations are allowed to exert undue influence in electoral races, the speech of the eventual winners of those races may also be chilled. Politicians who fear that a certain corporation can make or break their reelection chances may be cowed into silence about that corporation. . . . Unregulated corporate electioneering might diminish the ability of citizens to hold officials accountable to the people, and

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<sup>36</sup> *Citizens United v. FEC*, 558 U.S. 310, 469, (2010) (Stevens, J., dissenting) (cleaned up).

<sup>37</sup> Liz Kennedy, *10 Ways Citizens United Endangers Democracy*, DEMOS (Jan. 19, 2012), <https://perma.cc/NMX4-NNUE>; see also Adam Candeub, *Reading Section 230 as Written*, 1 J. FREE SPEECH L. 139, 140–41 (2021).

disserve the goal of a public debate that is uninhibited, robust, and wide-open.<sup>38</sup>

Though Justice Stevens wrote this about corporate speech about particular candidates,<sup>39</sup> I think it also applies to corporate restrictions on speech about public issues more broadly, since such restrictions can obviously affect elections, whether imminent ones or future ones. And of course such speech about public issues can range from detailed ideological argument to short slogans (“Fuck the Draft” / “God Hates Fags”<sup>40</sup>) and to the personal-as-political (such as sexual minorities’ coming out of the closet or some speakers’ refusal to use transgender people’s preferred names or pronouns<sup>41</sup>).

These concerns also apply to social media platforms as much as to phone companies and other business corporations. For many advocacy groups, social media presence is as important as having a phone line, and might even be more so.<sup>42</sup>

It’s true that groups could communicate even without Facebook or Twitter, and historically had of course done so before social media was invented. But likewise they could communicate without phone lines, as political movements did throughout much of American history. In an environment where advocacy groups compete with each other for support and attention—and do so by communicating to the public—denying a group a vastly important means of public communication is a serious burden. And such denial of access seriously leverages the platforms’

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<sup>38</sup> *Citizens United*, 558 U.S. at 469 (cleaned up in part).

<sup>39</sup> See also Kyle Langvardt, *Can the First Amendment Scale?*, 1 J. FREE SPEECH L. 273, 277 (2021) (likewise suggesting that social media platforms’ decisions “selectively amplifying and tamping newspaper coverage and get-out-the-vote messaging around competing candidates based on pure partisan preference” would raise similar concerns).

<sup>40</sup> *Cohen v. California*, 403 U.S. 15, 16 (1971); *Snyder v Phelps*, 562 U.S. 443, 448 (2011).

<sup>41</sup> See, e.g., *Gay Law Students Ass’n. v. Pac. Tel. & Tel. Co.*, 595 P. 2d 592, 610–11 (Cal. 1979) (concluding that people’s “identify[ing] themselves as homosexual” is a form of “political activity”); *Meriwether v. Hartop*, 992 F.3d 492, 506 (6th Cir. 2021) (concluding that not using a person’s preferred pronouns “touches on gender identity—a hotly contested matter of public concern”).

<sup>42</sup> Phone lines might be necessary for individuals’ outgoing calls, if they need to call 911 or deal with various necessities of life (e.g., making a doctor’s appointment). But a phone company’s decision to cancel an advocacy group’s publicly advertised phone line—or at least block incoming phone calls to that line—wouldn’t generally jeopardize individual health and safety.

economic power into a means of affecting the community's political life.<sup>43</sup>

Indeed, it much more seriously leverages such economic power, I think, than does corporate election-related speech as such. Corporate independent expenditures related to political campaigns are a relatively minor portion of all campaign-related expenditures (likely only about 5–10%), roughly the same as unions.<sup>44</sup> “While corporations and unions gained potential political power as a result of *Citizens United*, it's individual donors who are fueling the explosion of money in recent elections.”<sup>45</sup> Speech by any individual corporation is only a minor portion of that. Social media platforms, on the other hand, have far greater influence on the speech marketplace (even individually, but especially put together).

Justice Stevens also argued that, “The legal structure of corporations allows them to amass and deploy financial resources on a scale few natural persons can match.”<sup>46</sup> Likewise, 47 U.S.C. § 230(c)(1) immunity from libel and similar lawsuits has allowed platforms to amass and deploy financial resources on a scale that can be matched by few people and even by few corporations.

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<sup>43</sup> By way of analogy, Adam Smith wrote against taxing “necessar[y]” commodities, meaning “whatever the custom of the country renders it indecent for creditable people, even of the lowest order, to be without. A linen shirt, for example, is, strictly speaking, not a necessary of life. The Greeks and Romans lived, I suppose, very comfortably though they had no linen. But in the present times, . . . a creditable day-labourer would be ashamed to appear in public without a linen shirt, the want of which would be supposed to denote that disgraceful degree of poverty which, it is presumed, nobody can well fall into without extreme bad conduct.” ADAM SMITH, *THE WEALTH OF NATIONS* 368 (1843). So it is with social media: Our forebears lived just fine without it, but in our society access to the major social media platforms is a necessity for political groups, especially in a competitive political environment.

<sup>44</sup> Corporations contributed about \$300 million to outside spending groups in the 2012–18 federal election campaign cycles, and unions contributed about \$275 million. Karl Evers-Hillstrom, *More Money, Less Transparency: A Decade Under Citizens United*, OPENSECRETS.ORG (Jan. 14, 2020), <https://perma.cc/KQ46-VUQM>. The corporate contributions “made up 10 percent of funding to these groups in the 2012 cycle, a high water mark,” falling to 5% in 2018. *Id.* There is also an unknown amount of undisclosed spending (which includes some corporate spending) through groups such as 501(c)(4) organizations that engage in both political and nonpolitical activities; the government could in principle require disclosure of contributions to such groups, but current law does not comprehensively do so.

<sup>45</sup> *Id.*

<sup>46</sup> *Citizens United v. FEC*, 558 U.S. 310, 469 (2010).

And recall that Justice Stevens was concerned about a fairly indirect form of speech restriction: “corporations grabbing up the prime broadcasting slots on the eve of an election” and thus “drowning out . . . noncorporate voices”<sup>47</sup> (something that appears not to happen that much). Corporations actually restricting what people can say on hugely important social media platforms seems like an even more significant interference with public debate. “That private technology platforms exert unparalleled power over political discourse is deeply undemocratic,” write Prasad Krishnamurthy and Erwin Chemerinsky,<sup>48</sup> and I’m inclined to agree.

This is particularly so for platforms that are near monopolies in their particular fields. But even in the absence of a monopoly, “similar terms, similar market forces, and the societal pressures all services face regarding a controversial or distasteful product” may end up broadly restricting viewpoints that Big Tech managers and employees dislike.<sup>49</sup> One platform’s restriction on certain kinds of speech is unlikely to arise in a vacuum: Such restrictions usually flow from a broader movement urging such exceptions, a movement that many platforms’ executives, employees, and influential business partners (such as advertisers) may support.<sup>50</sup>

To be sure, all this doesn’t mean that diminishing this power is necessarily a wise idea. Perhaps some solutions to the problem are even more undemocratic, or perhaps the platforms’ free speech rights justify even such undemocratic results (more on that in Part II). But we should seriously consider whether something can

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<sup>47</sup> *Id.* at 470 (cleaned up).

<sup>48</sup> Prasad Krishnamurthy & Erwin Chemerinsky, *How Congress Can Prevent Big Tech from Becoming the Speech Police*, HILL (Feb. 18, 2021), <https://perma.cc/645W-LMLP>; see also Fred Hiatt (Wash. Post editorial page editor), *Legally, Trump’s Tech Lawsuit Is a Joke. But It Raises a Serious Question*, WASH. POST, July 8, 2021 (“It just doesn’t feel right, in other words, that company CEOs Mark Zuckerberg, Jack Dorsey and Sundar Pichai get to decide which politicians Americans can hear and which ones we can’t.”).

<sup>49</sup> See, e.g., Jennifer Huddleston, *Consequences of Classifying Elements of the Internet as a Common Carrier*, AM. ACTION F. (Feb. 23, 2021), <https://perma.cc/FC6A-FA6U> (so arguing, in the process of arguing against regulating social media platforms); Goldman & Miers, *supra* note 19, at 195 (likewise); Epstein, *supra* note 10, at 5–6 (so arguing, in the process of tentatively arguing in favor of regulating social media platforms).

<sup>50</sup> See Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1308–09 (2005) (discussing this phenomenon as to content-based speech restrictions more broadly).



and should be done about that power—and treating the platforms’ hosting function like we treat phone companies seems like one plausible option.

These days, calls to treat social media platforms as common carriers are mostly coming from the Right, likely because such platforms are perceived (rightly or wrongly) as run by progressives who are especially likely to censor conservative voices. But the link to the argument in the *Citizens United* dissent may help explain why some top scholars on the Left, such as Erwin Chemerinsky,<sup>51</sup> Michael Dorf,<sup>52</sup> Genevieve Lakier,<sup>53</sup> and Nelson Tebbe,<sup>54</sup> have suggested similar regulations.<sup>55</sup>

Some advocacy groups on the Left have likewise accused platforms of improperly restricting their speech.<sup>56</sup> And of course even many conservatives, while generally more skeptical of government regulation of private actors, have long been open to some regulation, especially when the private companies have been seen as monopolies or close to it.<sup>57</sup> (By way of analogy, note that some arguments for wedding providers’ right to refuse service to same-sex weddings—generally seen as a conservative position—have acknowledged that those exemptions might be denied if there are too few other alternatives to those businesses’ services.<sup>58</sup>)

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<sup>51</sup> *Id.*

<sup>52</sup> Michael C. Dorf, *Could Clarence Thomas Be Right About Twitter?*, VERDICT (Apr. 14, 2021), <https://perma.cc/D7AB-8Z4M>.

<sup>53</sup> Genevieve Lakier & Nelson Tebbe, *After the “Great Deplatforming”: Reconsidering the Shape of the First Amendment*, LAW & POLITICAL ECONOMY [LPE] PROJECT (Mar. 1, 2021), <https://perma.cc/56F3-KMBE>.

<sup>54</sup> *Id.*

<sup>55</sup> Rebecca Tushnet had long before likewise expressed some concern about excessive intermediary power. Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986, 1010, 1015 (2008).

<sup>56</sup> See, e.g., Natasha Lennard, *Facebook’s Ban on Far-Left Pages Is an Extension of Trump Propaganda*, INTERCEPT (Aug. 20, 2020), <https://perma.cc/Z2JC-YEEB> (arguing that Facebook was banning a wide variety of “anarchist[] and anti-fascist[]” groups); Andre Damon, *Facebook Purges Left-Wing Pages and Individuals*, INT. COMM. OF THE FOURTH INTERNATIONAL [WORLD SOCIALIST WEB SITE] (Jan. 23 2021), <https://perma.cc/7EX8-ADUY>.

<sup>57</sup> See, e.g., Ryan Cooper, *Even Republicans Are Getting Fed Up with Monopolies. Here’s Why*, THE WEEK (Apr. 1 2016), <https://perma.cc/Z876-N337>.

<sup>58</sup> See, e.g., Douglas Laycock, *Afterword*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 189, 200–01 (2008) (“Religious dissenters can live their own values, but not

And this, I think, helps explain why the debates on this subject have aroused the interest even of people who had sat out the Net Neutrality debates. Those debates often focused on costs to consumers and on technological innovation—important matters, to be sure, but ones that seemed somewhat economic and technocratic, so many left them to economists and technocrats.<sup>59</sup> The prospect of “Comcast and Verizon” using their “enormous . . . power” “to suppress particular views”<sup>60</sup> was a possibility, but (at least in 2003–15, when the Net Neutrality debate bloomed) mostly just a possibility. But social media giants’ using their enormous power to suppress particular views is reality. To quote Justice Scalia in *Morrison v. Olson* (the independent counsel case),

Frequently an issue of this sort will come before [us] clad, so to speak, in sheep’s clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.<sup>61</sup>

Hard-core libertarians, who oppose virtually all government regulation of pri-

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if they occupy choke points that empower them to prevent same-sex couples from living their own values.”); Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1485 (2012); Executive Summary of Statement of William Bassett et al. on Religious Liberty Implications of Proposed Hawaii Marriage Equality Act of 2013, Hearing on S.B. 1, Haw. S. Comm. on Jud. & Lab. 9–10 (Oct. 28, 2013), <https://perma.cc/LW3R-XT4M>; Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595, 1629–30 (2018); cf. *Att’y Gen. v. DeSilets*, 636 N.E.2d 233, 240, (Mass. 1994) (concluding that whether landlords should get religious exemption from bans on housing discrimination against unmarried couples should turn on “whether the rental housing policies of people such as the defendants can be accommodated, at least in the [particular geographical] area, without significantly impeding the availability of rental housing for people who are cohabiting,” and in particular on whether “a large percentage of [housing] units are unavailable to cohabitants”); see also JOHN INAZU, *LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* 172 (2012) (calling for a similarly “fact-specific contextual analysis” for private clubs’ right to exclude).

<sup>59</sup> I’m one example of that; I had no firm opinions on the net neutrality debates, because I hadn’t looked closely enough at the matter.

<sup>60</sup> Klint Finley, *The WIRED Guide to Net Neutrality*, WIRED (May 5, 2020, 7:00 AM), <https://perma.cc/HTR3-2WPP>.

<sup>61</sup> 487 U.S. 654 (1988).

vate business transactions, are likely to oppose common carrier status for platforms, and perhaps common carrier law altogether.<sup>62</sup> And of course many liberals, moderates, and conservatives may conclude that, even if such common carrier rules aren't theoretically impermissible, they are likely to be unsound in practice. But it's unsurprising that the concerns about platform power are not exclusively a matter for one or another side of the ideological divide.

### C. *Censorship Creep*

Now so far the influence of Facebook and Twitter removal decisions on political life has been relatively modest. These companies haven't, for instance, visibly tried to deploy their power to block legislation that would specifically harm their business interests. Nor have they, to my knowledge, substantially blocked major candidates' speech during an actual campaign.<sup>63</sup> (The deplatforming of President Trump happened two months after the election.)

At the same time, they have certainly been willing to restrict opinions that are well within the American political mainstream. Twitter, for instance, famously blocked a New York Post story based on the material from Hunter Biden's laptop on the theory that it involved sharing of "hacked materials," though that hacked material policy has since been changed.<sup>64</sup> Yet newspapers have long published stories based on likely illegally leaked material—consider the *Pentagon Papers*<sup>65</sup>—and

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<sup>62</sup> See, e.g., Katherine Mangu-Ward, *Don't Try to Fix Big Tech with Politics*, REASON, July 2021, <https://perma.cc/8CQ7-2J6T> (Mangu-Ward is the editor-in-chief of *Reason* magazine, the most prominent libertarian publication in the U.S.); John Samples, *Why the Government Should Not Regulate Content Moderation of Social Media*, CATO INST. (Apr. 9, 2019), <https://perma.cc/XKR4-8V6Z> (Samples is Vice President of the Cato Institute, one of the most prominent libertarian think tanks in the U.S.); Ilya Somin, *The Case Against Imposing Common Carrier Restrictions on Social Media Sites*, VOLOKH CONSPIRACY (July 8, 2021, 8:41 PM) (Somin is a prominent libertarian law professor).

<sup>63</sup> For a minor exception, focused on one particular post, see Salvador Rodriguez, *Facebook and Twitter Punish Trump Over Video Where He Says Children 'Almost Immune' to Covid-19*, CNBC (Aug. 5, 2020, 6:35 PM), <https://perma.cc/VYC9-YBLV>.

<sup>64</sup> Twitter, *Distribution of Hacked Material Policy* (Oct. 2020), <https://perma.cc/H6ML-8Z3L>. Consistently with the change, Twitter now sometimes even promotes hack-based stories. Luke Rosiak, *Paper Uses 'Breached' Data to Dox Police Who Donated to Innocent Colleague Targeted by BLM; Twitter Promotes*, DAILY WIRE (Apr 17, 2021), <https://perma.cc/58JN-HCXE>.

<sup>65</sup> Or, just for one recent example, see Kevin Draper, *A Disparaging Video Prompts Explosive Fallout Within ESPN*, N.Y. TIMES, July 4, 2021.

there's little basis for treating differently a story based on material taken from a laptop that had allegedly been abandoned at a repair shop.

Facebook blocked another New York Post story, posted in February 2020, about COVID possibly leaking from a Chinese virology lab.<sup>66</sup> While it's not clear whether that allegation is correct, it's far from clear that it's incorrect, either, as many have recently acknowledged.<sup>67</sup>

Facebook blocked yet another Post story, about expensive real estate bought by a Black Lives Matter cofounder, on the grounds that the story allegedly revealed personal information.<sup>68</sup> Yet the information was apparently drawn from public records, and though the story included photos, it didn't give the addresses of the houses. Stories about house purchases by prominent people are routine in mainstream media.<sup>69</sup>

Newt Gingrich was apparently suspended from Twitter for "hateful conduct," for a Tweet saying that "The greatest threat of a covid surge comes from Biden's untested illegal immigrants pouring across the border. We have no way of knowing how many of them are bringing covid with them."<sup>70</sup> While such a threat may be overstated, it seems quite plausible: Many Latin American countries, including

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<sup>66</sup> Post Editorial Board, Opinion, *Facebook's COVID Coverup*, N.Y. POST, Jan. 5, 2021; Emily Jacobs, *Twitter Won't Confirm if Users Can Post About Lab Leak COVID Origin Theory*, N.Y. POST, May 28, 2021.

<sup>67</sup> E.g., Nicholson Baker, *The Lab-Leak Hypothesis*, N.Y. MAG.: INTELLIGENCER (Jan 4, 2021), <https://perma.cc/HM42-VERH>; Statement on the Investigation Into the Origins of COVID-19, 2009 DAILY COMP. PRES. DOC. (May 26, 2021); Glen Kessler, *Timeline: How the Wuhan Lab-Leak Theory Suddenly Became Credible*, WASH. POST, May 25, 2021 ("In some instances, important information was available from the start but was generally ignored."); Sohrab Ahmari, *Facebook's Lab-Leak Censors Owe the Post, and America, an Apology*, WASH. POST, May 27, 2021; Katherine Eban, *The Lab-Leak Theory: Inside the Fight to Uncover COVID-19's Origins*, VANITY FAIR, June 3, 2021; Rowan Jacobson, *How Amateur Sleuths Broke the Wuhan Lab Story and Embarrassed the Media*, NEWSWEEK, June 2, 2021.

<sup>68</sup> Post Editorial Board, Opinion, *Social Media Again Silenced The Post for Reporting the News*, N.Y. POST, Apr. 16, 2021.

<sup>69</sup> E.g., Mark David, *Ben Affleck Snags Stately \$19 Million Pacific Palisades Mansion*, VARIETY, Apr. 12, 2018; *Builder Says Rush Bought His House*, TAMPA BAY TIMES, Sept. 15, 2005.

<sup>70</sup> Sarah Rumpf, *Newt Gingrich Fires Back at Twitter After His Account Gets Suspended for 'Hateful Conduct'*, MEDIAITE (Mar. 5, 2021), <https://perma.cc/JST7-AE72>.

Mexico, have very high COVID rates, and of course international travel is indeed a potential vector of disease transmission.

YouTube deleted a video in which Florida Gov. Ron DeSantis and a panel of scientists were discussing COVID, because it “contradicts the consensus of local and global health authorities regarding the efficacy of masks to prevent the spread of Covid-19”—the scientists apparently stated that children should not wear masks, and the CDC calls for children age 2 and above to wear masks.<sup>71</sup> But as recently as August 2020, the World Health Organization took a different view for 2-to-5-year-olds (who it said shouldn’t wear masks) and perhaps 6-to-11-year-olds (for whom it said the decision should turn on various contextual factors).<sup>72</sup>

More broadly, platforms’ restrictions on viewpoints, under the rubric of “hate speech” now extend to a considerable range of opinions. Twitter, for instance, bans viewpoints that “reinforce negative or harmful stereotypes” about various kinds of groups.<sup>73</sup> Facebook bans criticizing not just people but “concepts, institutions, ideas, practices, or beliefs,” when Facebook moderators believe the criticism risks “harm, intimidation, or discrimination” against various kinds of groups.<sup>74</sup> Twitter bans labeling transgender people as belonging to their birth sex,<sup>75</sup> including when that is part of a the ongoing debate about whether transgender athletes who are born male but identify as female should be allowed to compete against athletes who were born female.<sup>76</sup>

To be sure, even businesses’ suppression of “extremist” views, such as those of

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<sup>71</sup> Corky Siemaszko, *YouTube Pulls Florida Governor’s Video, Says His Panel Spread COVID-19 Misinformation*, NBC NEWS (Apr. 9, 2021), <https://perma.cc/L6FD-5J5R>.

<sup>72</sup> Kelly Young, *WHO Recommends Against Face Masks for Kids in Community Settings Under Age 5*, NEJM J. WATCH (Aug. 24, 2020), <https://perma.cc/L4SM-6B9P>.

<sup>73</sup> Twitter, *Hateful Conduct Policy*, <https://perma.cc/CQ7E-G5D4>. Facebook’s policy on this seems narrower, limited to “dehumanizing comparisons that have historically been used to attack, intimidate, or exclude specific groups, and that are often linked with offline violence.” Facebook, *Community Standards: 12. Hate Speech*, <https://perma.cc/3QGV-YNGN>.

<sup>74</sup> Facebook, *supra* note 73.

<sup>75</sup> See, e.g., Twitter, *supra* note 73; Valerie Richardson, “Laurel Hubbard Is a Man” Tweet Lands Erick Erickson in Twitter Jail, WASH. TIMES, Aug. 7, 2021.

<sup>76</sup> See Doriane Lambelet Coleman, *Sex in Sport*, 80 L. & CONTEMP. PROBS. 63 (2017).

Louis Farrakhan or Milo Yiannopoulos,<sup>77</sup> or of Naomi Wolf's claims that the COVID vaccines are a "software platform that can receive uploads,"<sup>78</sup> may undermine democracy.<sup>79</sup> But the actual impact of the platforms on political life is especially great if they choose to block material that is seriously being debated.

Consider, too, that the app for the conservative-focused Twitter competitor Parler was removed by Apple and Google from their app stores, and blocked by its hosting company, Amazon Web Services, because of concerns that some of Parler's users were encouraging violence.<sup>80</sup> Parler was merely refusing to forbid certain speech, much of which is constitutionally protected—thus voluntarily acting in a way close to how the post office and phone companies are required by law to act.<sup>81</sup>

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<sup>77</sup> Oliver Darcy, *Louis Farrakhan, Alex Jones and Other 'Dangerous' Voices Banned by Facebook and Instagram*, CNN BUSINESS (May 3, 2019, 6:14 AM), <https://perma.cc/CP83-U4JH>.

<sup>78</sup> Joseph Guzman, *Famous Feminist Naomi Wolf Banned From Twitter*, THE HILL: CHANGING AMERICA (June 7, 2021), <https://perma.cc/TM8K-HCWJ>.

<sup>79</sup> See also Natasha Lennard, *Facebook's Ban on Far-Left Pages Is an Extension of Trump Propaganda*, INTERCEPT (Aug. 20, 2020, 12:30 PM), <https://perma.cc/LF6N-TYZB> (arguing that Facebook was banning a wide variety of "anarchist[] and anti-fascist[]" groups).

<sup>80</sup> Alex Fitzpatrick, *Why Amazon's Move to Drop Parler Is a Big Deal for the Future of the Internet*, TIME, Jan. 21, 2021; Jay Peters, *Google Pulls Parler from Play Store for Fostering Calls to Violence*, VERGE (Jan. 8, 2021, 7:57 PM), <https://perma.cc/2GVY-N6PE>; Shirin Ghaffary, *Parler Is Back on Apple's App Store, With a Promise to Crack Down on Hate Speech*, VOX: RECODE (May 17, 2021, 6:50 PM), <http://tinyurl.com/c4pu897n>.

One reader suggested that Amazon Web Services may have been risking federal criminal liability for hosting incitement of violence by Parler users (which means Parler would have been, even more clearly). But I don't think that's so. Incitement liability turns on the defendant's intent to produce a criminal act, *Hess v. Indiana*, 414 U.S. 105, 109 (1973); a hosting company would lack such an intent. The same is generally true of aiding and abetting. *Rosemond v. United States*, 572 U.S. 65, 76 (2014). And conspiracy generally requires both an intent to further the underlying crime and an agreement to commit it. *United States v. Williams*, 974 F.3d 320, 369–70 (3d Cir. 2020). Some specialized statutes, such as the ban on "knowingly provid[ing] material support or resources" (including "communications equipment") "to a foreign terrorist organization," 18 U.S.C. § 2339A(b)(1), 2339B(a)(1), don't require such an intention; and indeed both platforms and hosting companies may be required to block accounts used by designated foreign terrorist organizations once they learn that those accounts are indeed so used. But that is a rare exception, and I know of no reason to think it was involved in Amazon Web Services' deplatforming of Parler.

<sup>81</sup> Close, though not identical: Parler did apparently try to remove "threats of violence" and "illegal activity." Jeff Horwitz & Keach Hagey, *Mercer Cash Backs Upstart App Parler*, WALL ST. J.,

Yet this now seems to be a basis for deplatforming.

And it seems likely that platforms will over time become even more willing to block material they disapprove of.<sup>82</sup> Why wouldn't platforms that get a taste for exercising such power (in a way that they likely think has done good) be inclined to exercise it even more?<sup>83</sup> And if one day social media executives and other influential employees see some speech as not just ideologically offensive but highly economically threatening—for instance, urging regulations that they think would be devastating to their businesses—wouldn't it be especially likely that they would try to tamp it down?<sup>84</sup> Shouldn't we indeed worry “that tomorrow's apex platforms under deregulatory conditions might adopt content regulation policies that are far more at odds with basic liberal norms than anything today's Californian cohort have adopted so far”?<sup>85</sup>

Tech company managers are, after all, just people. Like people generally, they are capable of public-spiritedness, but also of narrow-mindedness and bias and self-interest.<sup>86</sup> Indeed, being people, they are capable of viewing their narrow-mindedness and bias and self-interest as public-spiritedness.<sup>87</sup>

But beyond this, there will likely be increasing public pressure to get Facebook, Twitter, and other companies to suppress other supposedly dangerous speech, such

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Nov. 16, 2020, at B1.

<sup>82</sup> See generally Danielle Keats Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 NOTRE DAME L. REV. 1035, 1049–61 (2018).

<sup>83</sup> See Stewart Baker, *What I Learned When LinkedIn Suppressed My Post*, VOLOKH CONSPIRACY (Apr. 19, 2021, 5:30 PM), <https://perma.cc/DE9S-Q2LU>.

<sup>84</sup> Cf. Langvardt, *supra* note 39, at 332 (discussing the possibility of “suppression of criticism directed against the platform's owners”).

<sup>85</sup> Kyle Langvardt, *Platform Speech Governance and the First Amendment: A User-Centered Approach*, DIGITAL SOCIAL CONTRACT: A LAWFARE PAPER SERIES, Nov. 2020, <https://perma.cc/3U99-W88E>.

<sup>86</sup> Cf. Varadarajan, *supra* note 10 (“[Richard] Epstein describes Mr. Dorsey's Jan. 13 Twitter thread, in which the CEO purports to explain the ban on Mr. Trump, as displaying ‘a rare combination of hubris and ignorance, proof of how dangerous it is to have a committed partisan as an ostensible umpire.’”).

<sup>87</sup> “Man is not a rational animal; he is a rationalizing animal.” Robert A. Heinlein, *Gulf*, in *ASSIGNMENT IN ETERNITY* 542 (1953).

as fiery rhetoric against the police or oil companies or world trade authorities. People will demand: If you blocked A, why aren't you blocking B? Aren't you being hypocritical or discriminatory?

To offer just one example, consider this headline: "Facebook banned Holocaust denial from its platform in October. Anti-hate groups now want the social media giant to block posts denying the Armenian genocide."<sup>88</sup> If that call is accepted, it seems likely that other groups will make similar calls, whether about the treatment of American Indians by the U.S. or other North or South American countries, treatment of the Uyghurs or Tibetans by China, or a wide range of other historical events. And since the Facebook policy bans "[d]enying or *distorting* information about the Holocaust,"<sup>89</sup> the scope of such potential restrictions could be quite broad and quite vague.

We might call this phenomenon "censorship envy."<sup>90</sup> People may sometimes be willing to tolerate speech that they view as offensive and evil, if they perceive that it's protected by a broadly accepted free speech norm. But once some viewpoints get suppressed, foes of other viewpoints are likely to wonder: Why not the viewpoints that we condemn as well?

No-one wants to feel like a chump who isn't getting the moral victories that others are getting, and who has to suffer in silence while others get what they want. Plus trying to suppress speech that one sees as evil may seem like a virtuous cause to many people. Once that avenue for feeling good becomes available to some, others will likely want to use it, too.

And there is little reason to think that the platforms will enforce the rules in any generally politically neutral way, even setting aside the rules' express viewpoint-based prohibitions.<sup>91</sup> It's only human nature for people to think the worst of their

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<sup>88</sup> Isabella Jibilian, *Facebook Banned Holocaust Denial from Its Platform in October. Anti-Hate Groups Now Want the Social Media Giant to Block Posts Denying the Armenian Genocide*, BUSINESS INSIDER (Dec. 31, 2020, 10:24 AM), <https://perma.cc/9KRV-83X4>.

<sup>89</sup> FACEBOOK, *Community Standards: Hate Speech* (2021), <https://perma.cc/9UJU-2BDD>.

<sup>90</sup> Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 HARV. L. REV. 1639, 1656 n.88 (1993); Eugene Volokh, *The U.S. Constitution Says We All Have To Live with Being Offended*, L.A. TIMES, July 18, 2001, § 2, at 13.

<sup>91</sup> See *supra* notes 73–75.



adversaries' views—including by labeling them “hate speech” or “fake news” or “incitement” or promotion of “insurrection”—while giving their allies the benefit of the doubt.

It's likewise only human nature to view even factually defensible but incomplete positions as “distorting” history if they are inconsistent with one's ideology, but as unavoidable simplifications or legitimate judgment calls if they fit one's own views. Orson Welles, when he was married to Rita Hayworth, reportedly said, on hearing a cameraman on a film say Hayworth was sweating, “Horses sweat. People perspire. Miss Hayworth glows.”<sup>92</sup> So it goes with ideas we love and ideas we don't.

We have also seen a different sort of censorship creep: from banning certain viewpoints on the platform (with perhaps a total ban on a speaker if the speaker violates the ban often enough), to banning speakers who express views off the platform, or even who belong to groups that hold such views. Amazon's Twitch live-broadcasting service has recently banned users “even [for] actions [that] occur entirely off Twitch,” such as “membership in a known hate group.”<sup>93</sup> I doubt many of us would have predicted in 2016 that, in five years, social media platforms would start blacklisting users simply for belonging to an ideological group, even if the users say nothing on the platform endorsing that group. Yet this is happening now, and there's little reason to think that the censorship creep has stopped.

Finally, sometimes just the risk of suspension may pressure politicians and other speakers to avoid taking positions a company dislikes, as Justice Stevens warned about in *Citizens United*.<sup>94</sup> To be sure, being banned by Twitter and Facebook might in some situations be good publicity, especially if one is trying to make a name for oneself: It's still rare enough to be a news story. But often the ban would just seriously interfere with one's ability to reach one's constituents. Given how heavily politicians and advocacy groups rely on social media,<sup>95</sup> the threat of losing that outlet can be quite serious.

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<sup>92</sup> Judith Martin, *Forgo, Young Lovers, Wherever You Are*, WASH. POST, May 21, 1978.

<sup>93</sup> TWITCH, *Our Plans for Addressing Severe Off-Service Misconduct* (Apr. 7, 2021), <https://perma.cc/J38R-V4WZ>.

<sup>94</sup> See *Citizens United*, 558 U.S. at 471 (Stevens, J., concurring in part and dissenting in part).

<sup>95</sup> *How Social Media Is Shaping Political Campaigns*, KNOWLEDGE@WHARTON (Aug. 17, 2020), <https://perma.cc/938K-A93H>.

Similarly, in a media world where social media pass-along is often key to a story's success—and therefore to a journalist's success<sup>96</sup>—knowing that a story is likely to be blocked by Twitter or Facebook might well steer the journalists away from the story. Perhaps we might like that, if we trust Twitter and Facebook to block only stories we think are “bad.” But just how much should we trust them?<sup>97</sup>

Likewise, Amazon Web Services' banning Parler didn't permanently destroy Parler; thanks to a billionaire supporter, Parler managed to get back online some weeks later.<sup>98</sup> But Amazon's actions—and Google and Apple's actions in banning Parler from its app store—sent a powerful message to other platforms, and other speakers: Better do what we say, unless you too have a billionaire on your side.

Note that these concerns persist whether or not the platforms' blocking decisions disproportionately and substantially affect conservatives, or progressives, or any other large ideological group. The concern here isn't about group rights or interests, under which the toleration of many conservative or progressive views would theoretically justify the exclusion of other such views.

The concern rather is about platforms' leveraging their economic power into control over public debate; and that concern can exist regardless of whether the aggregate leverage has any particular ideological valence. We may rightly worry about what would happen if phone companies could block phone service to disfavored groups—even if we can't predict the ideological mix of the groups that would be blocked, and even if we expect that it will just nip off some ideological advocacy here and there rather than broadly damaging any particular major political movement. Likewise for social media platforms.

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<sup>96</sup> See, e.g., Archie Bland, *Daily Telegraph Plans to Link Journalists' Pay with Article Popularity*, DAILY TELEGRAPH (UK), Mar. 15, 2021.

<sup>97</sup> “If you are comfortable with this approach, and you have faith that the well-meaning, blandly progressive oligopolists of the West Coast can secure the future of online free speech, ask yourself how you might feel if they were owned by someone with a different political or cultural baseline—the Walton family, or the Koch brothers, or the Breitbart-affiliated hedge-fund billionaire Robert Mercer. And whoever is at the helm, how much faith do you have in the major online platforms to protect robust speech rights online during the next major national security crisis?” Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L.J. 1353, 1388 (2018).

<sup>98</sup> See Rachel Lerman, *Parler Is Back Online, More Than a Month After Tangle with Amazon Knocked It Offline*, WASH. POST, Feb. 15, 2021.

#### *D. Lack of Transparency and Control*

Of course, we also shouldn't overstate the danger of corporate power. Facebook and Twitter, unlike the government, can't send us to jail or tax us. And speech removed from Facebook and Twitter can still be conveyed in other places, though it often won't reach the same audiences in those places.

But at least governmental speech restrictions are implemented in open court, with appellate review.<sup>99</sup> Speakers get to argue why their speech should remain protected. Courts are expected to follow precedents, or explain why they are distinguishing a precedent; this gives some assurance of equal treatment. And the rules are generally created by the people, through their representatives or through judges appointed by those representatives.

Facebook's and Twitter's rules lack such transparency, procedural protections, and democratic pedigrees. Facebook's new oversight board<sup>100</sup> might provide some more transparency—but it's still far short of what the legal system offers. And of course platform-imposed restrictions that stem from behind-the-scenes governmental pressure can be especially dangerous.<sup>101</sup>

#### *E. The Newspaper/Broadcaster Analogy*

Now of course there have also long been rich, powerful organizations with the power to influence public debate: newspapers and broadcasters. Everything Justice Stevens said about business corporations generally in *Citizens United* also applies to newspaper corporations.

To be sure, some media outlets, such as magazines of opinion, acquire power because their audience agrees with their views; that might distinguish them from other businesses whose power has "little or no correlation to the public's support

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<sup>99</sup> See, e.g., *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984); cf. Derek E. Bambauer, *Orwell's Armchair*, 79 U. CHI. L. REV. 863, 902–03 (2012).

<sup>100</sup> Nick Clegg, *Facebook: Welcoming the Oversight Board*, FACEBOOK (May 6, 2020), <https://perma.cc/B5RF-JPAK>.

<sup>101</sup> See generally Derek E. Bambauer, *Against Jawboning*, 100 MINN. L. REV. 51 (2015); Langvardt, *supra* note 97, at 1386–87; Genevieve Lakier, *Jawboning as a First Amendment Problem*, 1 J. FREE SPEECH L. \_\_ (forthcoming 2021).

for the corporation's political ideas."<sup>102</sup> But that's not so for many of the most powerful media outlets, such as newspapers: Especially when there was only one newspaper in town, people often subscribed to it because of its classifieds, coupons, TV listings, sports coverage, or nonpolitical local affairs coverage, not because they agreed with its ideology.

Yet newspapers and broadcasters have long been seen as entitled to pick and choose which opinions to publish. And I support the continued freedom of newspapers and broadcasters to make such choices, both as a policy matter and as a First Amendment right (more on that in Part II.A.2). Newspapers and broadcasters shouldn't be seen as common carriers, because of three related features of such media.

1. The limited space in a newspaper and limited time on a broadcast channel make editorial judgment *necessary*. A newspaper can't publish all the items submitted to it (especially given how many submissions it would get if it had such an obligation). Nor can a newspaper even adhere to a viewpoint neutrality rule, given the number of viewpoints, thoughtful or crank, that could be submitted on any subject. Twitter and Facebook, on the other hand, can host all viewpoints. When they exclude certain viewpoints—a tiny fraction of all the items that are posted on their services—they are certainly not doing it to save disk space.

2. Readers and viewers rely on newspapers and broadcasters to help avoid *information overload*, as well as to exclude material that readers and viewers might find offensive or useless.<sup>103</sup> For these publishers to be useful to the public, they need to publish 1% (or perhaps much less) of all the viewpoints available for them to publish.

Twitter and Facebook, on the other hand, even when they delete some views,

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<sup>102</sup> *Citizens United*, 558 U.S. at 883 (quoting *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

<sup>103</sup> See BENJAMIN FRANKLIN, THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 88 (1850) ("having contracted with my subscribers to furnish them with what might be either useful or entertaining, I could not fill their papers with private altercation, in which they had no concern, without doing them manifest injustice").

likely distribute 99% of all the viewpoints submitted to their services.<sup>104</sup> Readers don't count on social media platforms to fight information overload using their hosting decisions (though readers may count on social media platforms to select the most interesting material in their recommendation decisions).

3. Readers and viewers *tend to consume newspapers and particular broadcasts as a coherent product*—they may read a newspaper (or at least a section) cover to cover, or watch a whole half-hour newscast, or even keep a channel on for hours on end. Even when people visit a newspaper's web site, they might view the front page of that site to see the headlines, or go from one article to another article that the newspaper recommends. They do this to get an aggregate speech product, "today's news" (or perhaps "this weekly magazine's viewpoint on the past week's news"), again trusting the publisher's editorial judgment. Requiring publishers to include certain material in the product denies viewers the coherent speech product that they seek.

The major platforms, on the other hand, are not generally in the business of providing "coherent and consistent messaging"<sup>105</sup> the way that, say, an ideologically minded magazine or cable news channel might be. Even if Facebook and Twitter deliberately exclude some viewpoints, the aggregate of all the material they host is very far from coherent and consistent.<sup>106</sup>

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<sup>104</sup> "Social media providers, in contrast, routinely use algorithms to screen all content for unacceptable material but usually not for viewpoint, and the overwhelming majority of the material never gets reviewed except by algorithms. Something well north of 99% of the content that makes it onto a social media site never gets reviewed further." *NetChoice, LLC v. Moody*, No. 4:21CV220-RH-MAF, 2021 WL 2690876, \*8 (N.D. Fla. June 30, 2021).

<sup>105</sup> Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. FREE SPEECH L. 97, 113 (2021).

<sup>106</sup> The analysis might be different if a social media platform deliberately limited posts to items that express a particular viewpoint (whether it's progressive, conservative, Christian, feminist, or anything else). Such a limitation would also affect, as a policy matter, the concerns about certain platforms becoming too powerful, because any such platform would necessarily have a narrower audience than Facebook and Twitter have.

As Part II.A.1.a will discuss, *Rumsfeld v. FAIR* makes clear that an institution doesn't acquire a First Amendment right to refuse to host speakers on its property simply by (1) overtly espousing a particular belief system (e.g., as in *Rumsfeld*, a belief in equal treatment regardless of sexual orientation and other matters), and (2) seeking to exclude certain speakers based on that belief system (e.g., again as in *Rumsfeld*, by excluding military recruiters on the grounds that the military discriminates

Those, then, are the reasons the platforms' hosting function differs from the media's function. But our legal system has also long been concerned about concentration of economic power, and its influence on democratic debate, even within the media.

We've seen that in the FCC's media cross-ownership rules, which aimed to limit consolidation of newspaper and broadcaster power within the same city.<sup>107</sup> We've seen it in attempts to use antitrust law to preserve two-newspaper towns, for instance by insisting on joint operating agreements that maintain each newspaper's editorial independence even when the newspapers must merge for financial reasons.<sup>108</sup> We've seen it in the Fairness Doctrine,<sup>109</sup> the Personal Attack Rule,<sup>110</sup> the requirement that broadcasters sell ads to political candidates,<sup>111</sup> and the requirement that they not censor ads bought by political candidates.<sup>112</sup>

Not all these policies, to be sure, are wise or constitutionally permissible. I think the Fairness Doctrine, for instance, was a mistake,<sup>113</sup> partly because it required the government to decide (1) when some speech by broadcasters triggered a duty to present other speech, and (2) which other speech broadcasters needed to air in response. Broadcasters had a duty to devote time to "controversial issues of public importance," and then had a "duty to present responsible conflicting views."<sup>114</sup> Policing those vague lines would itself inevitably involve viewpoint discrimination,

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based on sexual orientation). But I expect that if a university wanted to organize a recruiting fair only for organizations that affirmatively promote gay rights, it would have a First Amendment right to exclude organizations that oppose gay rights or are silent on gay rights.

<sup>107</sup> See, e.g., *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775, 780 (1978) (discussing FCC's interest in "preventing undue concentration of economic power" in "mass media ownership"); *Multiple Ownership of Standard, FM and Television Broadcast Stations*, 45 FCC 1476, 1476-77 (1964).

<sup>108</sup> *Newspaper Preservation Act*, 15 U.S.C. §§ 1801-1804.

<sup>109</sup> *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 370 (1969).

<sup>110</sup> *Id.* at 378.

<sup>111</sup> 47 U.S.C. §§ 312(a)(7), 315(a).

<sup>112</sup> *Id.* § 315(a).

<sup>113</sup> See generally THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., *REGULATING BROADCAST PROGRAMMING* 240-74 (1994); Samples, *supra* note 62, text accompanying nn.47-48.

<sup>114</sup> *NBC v. FCC*, 516 F.2d 1101, 1110 (D.C. Cir. 1974); *In re Responsibility Under the Fairness*

unless the FCC were prepared to insist, for instance, that any pro-tolerance views triggered a duty to present racist views.

And the Fairness Doctrine limited broadcasters' own speech, both by diminishing the time available for that speech and by creating a disincentive to air controversial speech that would yield Fairness Doctrine obligations. I'm glad that *Reno v. ACLU* essentially foreclosed the implementation of a Fairness Doctrine for Internet sites.<sup>115</sup> But a rule of viewpoint neutrality in platform hosting, where the massive platforms have essentially unlimited storage space—unlike broadcasters, who face a sharply limited broadcasting day—wouldn't pose the same problems.<sup>116</sup>

In any event, the history of these policies, with all its missteps, shows an enduring concern about undue domination of political debate by powerful economic entities. Congress and the courts have not treated broadcasters as "common carriers" because of the countervailing reasons for publisher editorial discretion that I laid out above.<sup>117</sup> But while that decision makes sense for such publishers, it may not make sense for other platforms.

It seems to me that social media platforms, in their hosting function (rather than their recommendation function), are more like phone companies (whether often-monopoly landlines or competitive cellular companies) than like newspapers or broadcasters. They can indeed host all viewpoints. Their decisions to stop hosting certain feeds don't help readers deal with information overload, since they reduce the number of hosted feeds by only a small fraction. And people don't go to Facebook and Twitter to see the aggregate of all the pages they host, the way some people read a newspaper section or a magazine cover to cover.

Moreover, there are hundreds of newspapers throughout the nation and several major TV networks. Facebook and Twitter have no major rivals in their media niches.<sup>118</sup> And actions such as Amazon Web Services' and the Google and Apple

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Doctrine, 40 F.C.C. 576, 577 (1963).

<sup>115</sup> 521 U.S. 844, 868–69 (1997).

<sup>116</sup> Krishnamurthy & Chemerinsky, *supra* note 48. To be precise, server space does cost money; but there's little reason to think that the relatively few items that platforms choose to block based on viewpoint occupy a material fraction of the space that Facebook uses.

<sup>117</sup> See, e.g., *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979); 47 U.S.C. § 153(11).

<sup>118</sup> "[T]he power that platforms such as Twitter and Facebook possess is far greater than that of

Stores' blockade of Parler<sup>119</sup> help make such near-monopoly status likely to endure.<sup>120</sup>

**F. Social Media Platforms' Many Functions: Hosting, Recommendation, Conversation, and More**

Of course, like many other businesses, social media platforms (and other Big Tech infrastructure providers) have multiple functions.<sup>121</sup>

- (1) *Hosting*: So far, I've focused on companies' hosting function—their letting a user 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 in reverse chronological order mode.<sup>122</sup> Some Big Tech companies' services focus largely on their hosting function (consider WordPress, or Amazon Web Services). Domain name registrars, such as GoDaddy, also offer something close to the hosting function, though they don't do the hosting themselves.
- (2) *Recommendation*: Social media platforms also often provide what I call the

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individual broadcasters who compete with one another as well as with satellite and cable networks.” Krishnamurthy & Chemerinsky, *supra* note 39. Of course, they do have some rivals, and they in some measure compete with companies in other niches; some Twitter users, for instance, might just quit Twitter and start their own blogs, hosted on blogging platforms. But within their (important) niches, they are overwhelmingly dominant.

<sup>119</sup> See *supra* note 80.

<sup>120</sup> For an argument that such monopoly status is overstated, and in any case is unlikely to endure, see Samples, *supra* note 62, at text accompanying nn.38–42. Epstein, *supra* note 10, at 5, responds briefly, expressing some sympathy for Samples' position but also some doubt.

<sup>121</sup> This multiplicity of functions has long been recognized, even as to the early Internet. See, e.g., Eric Goldman (writing as Eric Schlachter), *Cyberspace, the Free Market and the Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions*, 16 HASTINGS COMM/ENT 87 (1993).

<sup>122</sup> See Twitter, *About Your Twitter Timeline*, <https://perma.cc/9FBC-AYLU>; Twitter, *Find Your Way Around Twitter*, <https://perma.cc/TEW3-ZKA7>; Lucas Matney, *Twitter Rolls Out 'Sparkle Button' to Let Users Hide the Algorithmic Feed*, TECHCRUNCH (Dec. 18, 2018, at 9:03 AM), <https://perma.cc/7VQ9-DJQ2>. Naturally, these posts could be the user's own original work, or forwards, re-Tweets, and the like of others' material; and they could contain links to others' material as well. The important point is that these are materials that users themselves choose to generate, and that would be seen by readers who choose to visit the user's page or to follow the user's posts.



“recommendation function,” for instance when they 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. Other Big Tech features, such as Google’s search or Google News, are almost entirely about this function.

- (3) *Conversation Management*: And social media platforms also often provide what I call the “conversation management function,” when they allow users to comment on each other’s posts.

It seems to me that the case for common carrier status is strongest (whether or not one thinks it’s strong enough) as to the hosting function, which is close to what phone companies and UPS and FedEx do. The decision to remove an account or delete a post, and thus to interfere with the author’s communication to those who deliberately subscribe to the account, is similar to a phone company’s decision to cancel a phone line. It seems at least potentially reasonable to impose a common carrier requirement that prevents such decisions.<sup>123</sup>

And this is especially so when the hosted material is made visible just to people who seek it out, for instance when Twitter lets people’s posts be seen by their followers or people who deliberately visit the feed page, Facebook lets people visit someone’s web page, YouTube lets people watch a video, or WordPress lets people visit a WordPress-hosted blog. I may think lots of material out there is “terrible,”<sup>124</sup> but that needn’t interfere with my ability to visit good content, just as the existence of terrible books doesn’t keep me from reading good ones.<sup>125</sup> (Indeed, Twitter, unlike Facebook, allows porn feeds, though it labels them “sensitive material.” To my

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<sup>123</sup> If a company has many competitors to whom one can easily switch without losing access to one’s audience—domain name registrars or web hosting companies may be examples—there may be less reason for common carrier treatment, since that company will have less power to use its deplatforming decisions to influence public debate. Still, there is danger that many companies will all be pressured to deplatform sufficiently unpopular views, *see supra* note 49 and accompanying text; and while switching might not be that hard for an established media operation, it might be much harder for ordinary citizens. Perhaps because of this, common carrier status isn’t limited to monopolies, and applies, for instance, to cell phone companies (which famously compete with each other) and to UPS and FedEx (which compete with each other and with the U.S. Postal Service).

<sup>124</sup> Goldman & Miers, *supra* note 19, at 208–09.

<sup>125</sup> In the words of science fiction writer Theodore Sturgeon, “ninety percent of everything is

knowledge, Twitter users who don't want to see the porn generally don't run across it by accident, and they don't find the utility of Twitter diminished by the fact that some other people are using Twitter to view porn.)

On the other hand, the case for editorial discretion—including for a First Amendment right to exercise such discretion, which I discuss in the next Part—is strongest as to the recommendation function, which is close to what newspapers, broadcasters, and bookstores do.

What about platforms' exercising their conversation management function—for instance, blocking certain comments posted to others' pages, or blocking users because they had repeatedly posted comments that violated platform rules? This is particularly important when it comes to spam (generally defined as mass off-topic posts, usually involving commercial advertising but sometimes political advertising as well). Indeed, unchecked spam could make the comment section of platforms virtually impossible to use, as readers will have to slog through many spam comments to see each real comment.<sup>126</sup>

Yet it can also apply to other kinds of comments, such as personal insults (bigoted or otherwise) and vulgarities, whether addressed to the page owner or to other commenters. As people who have tried to manage conversations know, such messages can often ruin the conversation, as other readers and commenters decide just to stop participating rather than having to deal with the nastiness.<sup>127</sup>

Platforms give users various tools to deal with this problem: A user can generally block any commenter from commenting on the user's page; and the user can do this for any reason, without special approval from the platform. Much of the conversation policing on social media is done through this largely uncontroversial mechanism. And of course platforms encourage people to use this mechanism,

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crap," OXFORD ENGLISH DICTIONARY, <https://perma.cc/XUR2-MGUR>, whether it's books or web pages. So long as I don't need to read what I view as terrible, I don't think it should matter that others who seek it out (perhaps because they don't think it's so terrible) can read it on the same site.

<sup>126</sup> Cf. Goldman & Miers, *supra* note 19, at 209–11 (noting the practical value of platforms being able to police content, in an argument that I think is apt for comments and other material that is visible to users who haven't affirmatively sought it out).

<sup>127</sup> See generally Eugene Volokh, *Freedom of Speech in Cyberspace from the Listener's Perspective: Private Speech Restrictions, Libel, State Action, Harassment, and Sex*, 1996 U. CHI. LEG. F. 377, 398–401 (1996).

since it involves minimum work and decisionmaking for them—hence, for instance, the “What should I do if I’m being bullied, harassed or attacked by someone on Facebook?” page offers these recommendations as the first two options:

Things you can do on Facebook

Facebook offers these tools to help you deal with bullying and harassment. Depending on the seriousness of the situation:

- Unfriend the person. Only your Facebook friends can contact you through Facebook chat or post on your timeline.
- Block the person. This will prevent the person from adding you as a friend and viewing things you share on your timeline.
- Report the person or any abusive things they post.<sup>128</sup>

But sometimes unwanted commenters can get more insistent, for instance creating new accounts under new names, and then the social media platforms may block those people altogether (though even this is hardly infallible, precisely because people can create new accounts).

Note the differences between this sort of policing of comments (which I’ll use as shorthand for restricting speech posted on others’ pages without their explicitly seeking it out) and policing of hosted content (which I’ll use as shorthand for restricting speech posted on a person’s page or feed that will be visible to those who do affirmatively seek it out). When it comes to comments, you may indeed want to rely on the platform—much as you rely on a newspaper—to save you from unwanted material, especially spam overload but also trash-talking. And when it comes to comments, the platform may therefore valuably provide a coherent speech product: a curated conversation, with the useful contributions included and the toxic ones eliminated.

But typical readers who want to see a particular author’s account aren’t really seeking an edited version of that account from the platform. The readers generally know what they’d be getting from that account, and can just unsubscribe or stop visiting if they don’t like it.

There might thus be reason to leave platforms free to moderate comments (rather than just authorizing users to do that for their own pages), even if one wants

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<sup>128</sup> FACEBOOK, *Help Center: What Should I Do If I’m Being Bullied Harassed or Attacked by Someone on Facebook?* (2021), <https://perma.cc/33P7-N2EQ>.

to stop platforms from deleting authors' pages or authors' posts from their pages. And platform authority to restrict comments is much less likely to affect public debate than would platform authority to delete pages or posts.

### **G. A Cautionary Note**

I've tried, then, to lay out what I think is a plausible case for treating platforms as something like common carriers, at least as to their hosting function. But I should stress that this is just a tentative case, and there are at least four possible bases for doubt.

1. I appreciate the value of private property rights. Though the government may sometimes require property owners to serve people they'd prefer not to serve—indeed, as it does for common carriers—this should be the rare exception and not the general rule.

2. In particular, the problems laid out above may not be serious enough to justify such interference. Perhaps people are just so concerned by a few incidents over a few years that they have lost a sense of perspective about what might ultimately be a minor problem.

3. One value of private property rights is that sometimes private property owners can enforce valuable norms that the government can't; protect us from violence and other harms that stem from violation of those norms; or at least create diverse and competing norms, which might itself provide valuable choice to users. We probably profit greatly, for instance, from the fact that our friends can eject rude people from their parties, and that most businesses can eject rude speakers from their property. Such ejections might be rare, but perhaps their very availability makes them less necessary.

Likewise, perhaps there was value to an earlier, much more constrained media environment in which extremists (by the standards of the time) found it hard to reach a large audience. And perhaps it's better to trust Big Tech companies to regulate public debate—subject to what market pressure may be placed on them—than to trust an unregulated public debate.<sup>129</sup>

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<sup>129</sup> Cf. Goldman & Miers, *supra* note 19, at 208 (praising social networks for removing “terrible” content); CASS SUNSTEIN, *LIARS: FALSEHOODS AND FREE SPEECH IN AN AGE OF DECEPTION* 8 (2021) (urging social networks to “do[] more than they are now doing to control the spread of falsehoods”); Samples, *supra* note 62, text following n.131 (“Private content moderators permit false speech.

4. Government regulation can easily make problems worse.<sup>130</sup> Some regulations may actually help entrench incumbents (for instance, by imposing costs that are too expensive for upstart rivals) and diminish future competition.<sup>131</sup> Other regulations may create new governmental bureaucracies that could be indirectly used to suppress certain viewpoints, for instance if the common carrier rules are enforced by some Executive Branch agencies. If the rules are enforced in court, they may practically be too costly for most speakers to litigate (though the hope is that platforms might voluntarily comply, perhaps because they would rather not make certain kinds of content moderation decisions, so long as they can blame the unmoderated content on government mandate).

5. If access rules are not too costly to litigate, then they may unduly chill even legitimate removals of material—e.g., viewpoint-neutral removal of vulgarities, pornography, and the like, if a statute restricts only viewpoint-based removals—because platforms will worry that authors will wrongly assume that the removals were actually improper, and therefore file lawsuits that will be costly to defend.<sup>132</sup> This is of course a common cost of antidiscrimination rules, which the legal system nonetheless often chooses to impose; but perhaps it might be unjustified in this context.<sup>133</sup>

For all these reasons, the best solution might well be to stay the course, and to expect market competition to resolve what problems there might be. Or perhaps

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However, they manage such speech much more efficiently than the government.”); Lemley, *infra* note 135, at 375–76 (arguing that, the absence of any societal consensus on “what should be allowed on the Internet” “is a pretty good reason we shouldn’t mandate any one model of how a platform regulates the content posted there”); cf. Jack M. Balkin, *How to Regulate (and Not Regulate) Social Media*, 1 J. FREE SPEECH L. 71, 76–77 (2021) (“Generally speaking, the free speech principle allows the state to impose only a very limited set of civility, safety, and behavioral norms on public discourse, leaving intermediate institutions free to impose stricter norms in accord with their values. . . . [But i]f private actors are going to impose norms that are stricter than what governments can impose, it is important that there be many different private actors imposing these norms, reflecting different cultures and subcultures, and not just two or three big companies.”).

<sup>130</sup> See Samples, *supra* note 62, text accompanying nn.42–48.

<sup>131</sup> See, e.g., Huddleston, *supra* note 49.

<sup>132</sup> Cf. Goldman & Miers, *supra* note 19, at 207 (discussing the possibility that new statutes may create a flood of litigation that will “pose[] an existential threat” to platforms).

<sup>133</sup> See *infra* p. 459.

the law should operate on deeper levels of the communications infrastructure, for instance imposing common carrier obligations only on pure hosting companies, such as Amazon Web Services,<sup>134</sup> or requiring platforms to make their services interoperable with rivals and thus diminishing monopoly-producing network effects.<sup>135</sup> Again, though, I want to suggest that the phone company analogy is something that we should seriously consider, even if we ultimately come to reject it.

## II. FIRST AMENDMENT LIMITATIONS

Say that Congress does require platforms not to discriminate based on content, or at least based on viewpoint.<sup>136</sup> And assume for now that this is limited to material that readers deliberately choose to read (what I've called the platforms' hosting function), such as:

- posts on a person's own Facebook page,
- posts on the Twitter feeds that the person has created, or

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<sup>134</sup> See, e.g., Ben Thompson, *A Framework for Moderation*, STRATECHERY (Aug. 7, 2019), <https://perma.cc/659R-J9XY>. Whether to impose such obligations on hosting companies (or on cable companies and the like) is a separate question from whether to impose them on social media platforms. One can imagine arguments for why hosting companies should be treated as common carriers but social media platforms shouldn't be (for instance, hosting companies don't generally engage in as much speech to end users as social media platforms do). Or one can imagine arguments for why hosting companies shouldn't be treated as common carriers but social media platforms should be (for instance, perhaps—withstanding the Amazon Web Services/Parler incident—the market for hosting companies is more competitive than for social media platforms, and it's easier for speakers to switch hosting companies in a way that appears seamless to readers).

<sup>135</sup> See, e.g., Mark A. Lemley, *The Contradictions of Platform Regulation*, 1 J. FREE SPEECH L. 303, 329–30 (2021); Daphne Keller, *Amplification and Its Discontents: Why Regulating the Reach of Online Content Is Hard*, 1 J. FREE SPEECH L. 227, 268–69 (2021); Przemysław Palka, *The World of Fifty (Interoperable) Facebooks*, 51 SETON HALL L. REV. 1193 (2021); Samuel Hammond, *The Impoverished Debate Over Section 230*, COMMONS (AMERICAN COMPASS) (July 13, 2020), <https://perma.cc/WYW2-R4UH>.

<sup>136</sup> Determining whether a certain form of discrimination is viewpoint discrimination can sometimes be complicated, but this test is seen as clear and administrable enough for evaluating the constitutionality of restrictions imposed in government-owned limited public fora and nonpublic fora, as well as other government-run programs. See, e.g., *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *Bd. of Regents v. Southworth*, 529 U.S. 217 (2000); *Arkansas Ed. Television Comm'n v. Forbes*, 523 U.S. 666 (1998).

- videos the person posts on YouTube.

### A. *The General Constitutionality of Compelled Hosting*

I think this sort of common carrier rule would be constitutionally permissible, chiefly on the strength of three precedents:

1. *PruneYard Shopping Center v. Robins*, which upheld a state law rule that required large shopping malls to allow leafleters and signature gatherers (a rule that has since been applied by some lower courts to outdoor spaces in private universities<sup>137</sup>);
2. *Turner Broadcasting System v. FCC*, which upheld a statute that required cable systems to carry over-the-air broadcasters; and
3. *Rumsfeld v. FAIR*, which held that the government could require private universities<sup>138</sup> to provide space to military recruiters, alongside other recruiters.<sup>139</sup>

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<sup>137</sup> *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1979); *Commonwealth v. Tate*, 432 A.2d 1382 (Pa. 1981); *State v. Schmid*, 423 A.2d 615 (N.J. 1980).

<sup>138</sup> *Rumsfeld* also involved First Amendment objections brought by public universities; the First Amendment rights of public institutions are not well settled, *see* David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637 (2006), but it is clear that public institutions sometimes have a constitutional obligation to host speakers that they would rather reject, *see, e.g.*, *Widmar v. Vincent*, 454 U.S. 263 (1981). But the significant First Amendment holding of *Rumsfeld* is that the law could require even private universities to host certain kinds of speakers.

<sup>139</sup> The statute in *Rumsfeld* required universities to host military recruiters as a condition of getting government funds. But the Court declined to rely on that spending hook, and held that “the First Amendment would not prevent Congress from directly imposing the Solomon Amendment’s access requirement.” 547 U.S. 47, 59–60 (2006).

Some readers have suggested that *Rumsfeld* is limited to laws involving the military, on the theory that the interest in national defense is compelling in ways that other interests aren’t. But I don’t think that’s right. *Rumsfeld* did discuss the government interest in Part III of the opinion, 547 U.S. at 58 (which was necessary given that the expressive conduct section applied *United States v. O’Brien*, which calls for an inquiry into the government’s interest, *id.* at 67–68), and mentioned that “‘judicial deference . . . is at its apogee’ when Congress legislates under its authority to raise and support armies,” *id.* at 58. But the rest of the opinion applies normal First Amendment rules, and later cases have consistently applied *Rumsfeld* in matters entirely unrelated to the military, with no suggestion that it’s at all limited to military-related cases. *See, e.g.*, *Janus v. AFSCME*, 138 S. Ct. 2448, 2468 (2018); *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017); *Agency for*

These cases, put together, establish several basic principles.

**1. No First Amendment right not to host**

**a. *PruneYard*, *Turner*, and *Rumsfeld***

“Requiring someone to host another person’s speech is often a perfectly legitimate thing for the Government to do.”<sup>140</sup> So wrote Justice Breyer, and the cases he cited (*PruneYard* and *Rumsfeld*), as well as *Turner*, support that view. *PruneYard* expressly rejected the claim “that a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others.”<sup>141</sup> *Turner* and *Rumsfeld* rejected similar claims.<sup>142</sup>

Even the district court opinion striking down a particular Florida social media access statute in *NetChoice, LLC v. Moody* noted that “*FAIR* and *PruneYard* establish that compelling a person to allow a visitor access to the person’s property, for the purpose of speaking, is not a First Amendment violation, so long as the person is not compelled to speak, the person is not restricted from speaking, and the message of the visitor is not likely to be attributed to the person.”<sup>143</sup> Likewise, I think, social media platforms may be made “a forum for the speech of others,” at least as to their hosting function, and at least so long as the platforms (like the shopping center in *PruneYard*) are generally “open to the public” rather than being “limited

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*Int’l Dev. v. Alliance for Open Soc’y Int’l*, 570 U.S. 205, 213 (2013); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011); *Nevada Comm’n on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011); *Davenport v. Washington Educ. Ass’n*, 551 U.S. 177, 187 n.2 (2007).

<sup>140</sup> *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 140 S. Ct. 2082 (2020) (Breyer, J., dissenting, joined by Ginsburg & Sotomayor, JJ.). The majority, which took a less speech-restrictive position than Justice Breyer did, did not disagree with him on this.

<sup>141</sup> *PruneYard*, 447 U.S. at 86.

<sup>142</sup> *Turner Broadcasting System v. FCC*, 520 U.S. 180, 224–25 (1994); *Rumsfeld v. FAIR*, 547 U.S. 47, 70 (2006).

<sup>143</sup> No. 4:21CV220-RH-MAF, 2021 WL 2690876, \*9 (N.D. Fla. June 30, 2021). The statute was struck down in part because it was considerably broader than the possible access mandates I discuss here; among other things, “unlike the state actions in *FAIR* and *PruneYard*, [the statute] explicitly [forbade] social media platforms from appending their own statements to posts by some users.” *Id.*; see also Alan Z. Rozenshtein, *Silicon Valley’s Speech: Technology Giants and the Deregulatory First Amendment*, 1 J. FREE SPEECH L. 337, 366 (2021).



to the personal use” of the platforms.<sup>144</sup>

*Rumsfeld* also expressly rejected the claim that compelled hosting is a form of compelled association. The freedom of association protects an organization’s right to refuse to allow someone to speak on its behalf, as the Court held in *Boy Scouts of America v. Dale*.<sup>145</sup> That freedom may entitle an organization to generally refuse “to accept members it does not desire,”<sup>146</sup> and in particular to control who speaks on behalf of the organization (such as the Assistant Scoutmasters in *Boy Scouts*<sup>147</sup>). But that freedom doesn’t protect an organization’s right to refuse to allow speakers onto its property.<sup>148</sup>

The law schools say that allowing military recruiters equal access impairs their own expression by requiring them to associate with the recruiters, but . . . a speaker cannot “erect a shield” against laws requiring access “simply by asserting” that mere association “would impair its message.”<sup>149</sup>

In a sense, then, when it comes to statutorily created rights of access to social media platforms, the law would likely be much the same as what the Court held with regard to such rights of access to wire service stories in *Associated Press v. United States*:

[The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.

Surely a command that the government itself shall not impede the free flow of ideas

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<sup>144</sup> 447 U.S. at 87. *PruneYard* also held that the California rule, under which shopping malls had to allow speech by members of the public, didn’t implicate the Takings Clause. *Id.* at 82–85; cf. Szóka & Barthold, *supra* note 12 (suggesting that social media access mandates might implicate the Takings Clause). Later cases made clear that this was because “[l]imitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public.” *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021). In this respect, social media platforms are again much like shopping malls, since both derive their value precisely from being broadly open to the public.

<sup>145</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648, 653–54 (2000).

<sup>146</sup> *Rumsfeld*, 547 U.S. at 69 (quoting *Boy Scouts*, 530 U.S. at 648); see also *Christian Legal Society v. Martinez*, 561 U.S. 661, 680 (2010).

<sup>147</sup> *Boy Scouts*, 530 U.S. at 649–50.

<sup>148</sup> *Rumsfeld*, 547 U.S. at 69.

<sup>149</sup> *Id.* (citations omitted).

does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.

Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.<sup>150</sup>

The Court held this with regard to the Associated Press, an alliance of newspapers, but its rationale would also apply to one mega-company as well.

Thus we see that:

- Under *Associated Press*, though the government may not tell wire services what to write or what not to write, it may constitutionally choose to require them to *share their intellectual property* with others.<sup>151</sup>
- Under *PruneYard* and *Rumsfeld*, private property owners who open up their property to the public (or to some segment of the public, such as military recruiters) may be required by state or federal law to *share their real estate* with other speakers.<sup>152</sup>

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<sup>150</sup> 326 U.S. 1, 20 (1945) (paragraph breaks added); *see also* Lakier & Tebbe, *supra* note 53.

<sup>151</sup> *Id.* at 4–5, 21.

<sup>152</sup> When I refer to the *PruneYard* doctrine, I’m referring to the U.S. Supreme Court’s holding that states *may*, without violating the First Amendment, require shopping malls to allow people to speak on their property. I am not endorsing the California Supreme Court’s earlier holding in the litigation interpreting the state constitution as securing such a right—that holding has only been followed by a few states. *Green Party v. Hartz Mountain Industries, Inc.*, 752 A.2d 315 (N.J. 2000); *New Jersey Coalition Against War in the Middle East v. J.M.B.*, 650 A.2d 757 (N.J. 1994); *Commonwealth v. Tate*, 432 A.2d 1382 (Pa. 1981); *Western Pa. Socialist Workers 1982 Campaign v. Connecticut General Life Ins. Co.*, 515 A.2d 1331 (Pa. 1986); *Batchelder v. Allied Stores Int’l, Inc.*, 445 N.E.2d 590 (Mass. 1983) (election-related signature gathering only); *Waremart, Inc. v. Progressive Campaigns, Inc.*, 989 P.2d 524, 528 (Wash. 1999) (same). The U.S. Supreme Court has expressly (and, I think, correctly) held that the First Amendment itself does not *require* such a public access rule. *Hudgens v. NLRB*, 424 U.S. 507 (1976) (mostly recently reaffirmed in *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019)). *But see* Andrei Gribakov Jaffe, Note, *Digital Shopping Malls and State Constitutions—A New Font of Free Speech Rights?*, 33 HARV. J.L. & TECH. 269 (2019) (arguing in favor of applying the logic of the California Supreme Court’s *PruneYard* decision to social media platforms). Nor am I arguing in favor of applying to social media platforms *Marsh v. Alabama*, 326 U.S. 501 (1946), which recognizes a First Amendment right of access to the streets of a privately-owned “company town.” *But see* Benjamin F. Jackson, *Censorship and Freedom of Expression in the Age of Facebook*, 44 N.M. L. REV. 121, 146 (2014) (making such an argument).

- Likewise, a legislature may tell social media platforms that they must (at least in some contexts) *share their online “virtual estate”* with others, on the same terms that they offer other users.

If social media are “the modern public square,”<sup>153</sup> the law may constitutionally treat them (at least as to certain of their functions) the way physical public squares can be treated.<sup>154</sup> The New Jersey Supreme Court’s rationale for adopting a public access rule much like the one the California Supreme Court adopted in *PruneYard* seems largely apt here, at least as to such a rule’s consistency with the property owner’s First Amendment rights:

The private [shopping mall] property owners in this case . . . have intentionally transformed their property into a public square or market, a public gathering place, a downtown business district, a community; they have told this public in every way possible that the property is theirs, to come to, to visit, to do what they please, and hopefully to shop and spend; they have done so in many ways, but mostly through the practically unlimited permitted public uses found and encouraged on their property.<sup>155</sup>

*Turner* did mention that cable systems “exercis[e] editorial discretion over which stations or programs to include in [their] repertoire,” and noted that “must-carry rules regulate cable speech” in part by “reduc[ing] the number of channels over which cable operators exercise unfettered control.”<sup>156</sup> But such a reduction in

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Rather, I’m asking: If a legislature sets up a similar rule for social media platforms, would such a statute be constitutionally permissible? It is the U.S. Supreme Court’s *PruneYard* decision, not the California Supreme Court’s decision in that case, that most bears on that question.

<sup>153</sup> *Packingham v. N.C.*, 137 S. Ct. 1730, 1737 (2017).

<sup>154</sup> For a similar analysis, see Philip Primeau, Comment, *ESICA: Securing—Not Compelling—Speech on the “Vast Democratic Forums” of the Internet*, 26 ROGER WILLIAMS U. L. REV. 160 (2021); cf. also JOHN INAZU, CONFIDENT PLURALISM 61 (2016) (“Our social and economic interactions in shopping centers are increasingly outpaced by online commerce sites like Amazon and online social networks like Facebook”).

<sup>155</sup> *N.J. Coalition v. JMB*, 650 A.2d 757, 776 (N.J. 1994). As note 152 noted, I wouldn’t use this as a basis for creating such a public access rule as an interpretation of a state constitution, much less of the federal constitution; but this argument does support the view that a statutory right of access wouldn’t violate the First Amendment rights of the platform owners, just as it doesn’t violate the First Amendment rights of mall owners.

<sup>156</sup> *Turner*, 512 U.S. at 636–37; see also Bhagwat, *supra* note 105, at 107–08.

unfettered control wasn't seen as by itself posing a serious First Amendment problem: *Turner* rejected cable operators' "editorial control" claims as an argument for strict scrutiny<sup>157</sup>—and when it applied intermediate scrutiny, it didn't view the interference with editorial control as a basis for potentially invalidating the statute.<sup>158</sup>

**b. *Janus***

Nothing in the recent *Janus v. AFSCME*,<sup>159</sup> which held that the government may not require government employees to contribute to unions, undermined these holdings. *Janus* didn't discuss *Turner* or *PruneYard*, and mentioned *Rumsfeld* only for the narrow proposition that "government may not 'impose penalties or withhold benefits based on membership in a disfavored group' where doing so 'ma[kes] group membership less attractive.'"<sup>160</sup>

And the compelled contribution cases, of which *Janus* is the most recent, have drawn a line between compelling people to fund the views expressed by a particular private speaker (such as the union in *Janus*) and compelling people to fund a wide range of views expressed by a wide range of speakers selected via viewpoint-neutral criteria (such as the student groups in *Board of Regents v. Southworth*<sup>161</sup>). A requirement that platforms host speakers without regard to viewpoint would be more comparable to the requirement that compulsory student fees go to student groups without regard to viewpoint (*Southworth*) or the requirement that shopping malls host speakers without regard to viewpoint (*PruneYard*) than to a requirement that employees fund a particular advocacy group (*Janus*).<sup>162</sup>

**c. *Wooley***

Nor does *Wooley v. Maynard* support a general right not to host. In *Wooley*, the Court held that requiring car owners to display the motto "Live Free or Die" on

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<sup>157</sup> 512 U.S. at 653–57.

<sup>158</sup> *Id.* at 664–68. Neither did the Court in 1997 when it finally confirmed that the statute passed intermediate scrutiny. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 215–26 (1997).

<sup>159</sup> 138 S. Ct. 2448 (2018).

<sup>160</sup> *Id.* at 2468.

<sup>161</sup> 529 U.S. 217, 221 (2000).

<sup>162</sup> For more on this, see Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 374–76 (2018).

their license plates is unconstitutional.<sup>163</sup> But in *Rumsfeld*, the Court concluded that compelled hosting generally “is a far cry” from that in *Wooley*,<sup>164</sup> even when a property owner (such as a university) is being compelled to allow a particular kind of government speech (such as military recruiting).

The *Rumsfeld* Court appeared to treat the *Wooley* mandate as involving a “situation in which an individual must personally speak the government’s message,” and not just a requirement that a “speaker . . . host or accommodate another speaker’s message.”<sup>165</sup> “Speak” is often used in First Amendment cases to refer not just to oral statements but to writing or to display of material: For instance, the Court in *Cohen v. California* viewed Cohen’s display of “Fuck the Draft” on his jacket as “speech”;<sup>166</sup> *City of Ladue v. Gilleo* described posting a sign in one’s window as speaking;<sup>167</sup> and *Wooley* itself described Maynard’s claim as involving “the right to refrain from speaking.”<sup>168</sup> Likewise, the *Rumsfeld* Court seemed to distinguishing between (1) forbidden compulsion to display a message on one’s car, which is closely associated with the “personal” speech of the “individual” motorist, and (2) permissible compulsion to host speakers in rooms within an institution’s building, however obviously those rooms may be associated with the institution.<sup>169</sup>

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<sup>163</sup> 430 U.S. 705, 717 (1977).

<sup>164</sup> 547 U.S. at 62.

<sup>165</sup> *Id.* at 63; see also *PruneYard*, 447 U.S. at 87 (distinguishing *Wooley* in part on the grounds that *Wooley* involved “personal property that was used ‘as part of [the car owner’s] daily life’”).

<sup>166</sup> 403 U.S. 15, 18, 19, 21, 22 (1971).

<sup>167</sup> 512 U.S. 43, 56 (1994).

<sup>168</sup> *Maynard*, 430 U.S. at 714.

<sup>169</sup> Similarly, even if videographers or even bakers have a First Amendment right not to create materials for same-sex weddings (or other expressive events), the rationale for that too would be the personal nature of the creative process. The Eighth Circuit, for instance, held that requiring videographers to create videos of same-sex weddings is presumptively unconstitutional, because any such videos would necessarily “carry [the videographers’] ‘own message,’” whereas requiring people “to provide a forum for the speech of others” would be permitted under *PruneYard* and *Rumsfeld*. *Telescope Media Group v. Lucero*, 936 F.3d 740, 757–58 (8th Cir. 2019). Likewise, Justice Thomas’s concurrence in the judgment (joined by Justice Gorsuch) in *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission* distinguished compelled “use of [one’s] artistic talents to create a well-recognized symbol,” which is generally unconstitutional, from “being forced to provide a forum for a third party’s speech,” which is often constitutional. 138 S. Ct. 1719, 1743, 1744–45 (2018).

d. *U.S. Telecom Association*

To be sure, then-Judge Kavanaugh took a narrow view of *Turner* in his dissent in the D.C. Circuit net neutrality case (*U.S. Telecom Ass’n v. FCC*), arguing that, under *Turner*, “the First Amendment bars the Government from restricting the editorial discretion of Internet service providers, absent a showing that an Internet service provider possesses market power in a relevant geographic market.”<sup>170</sup> (Judge Kavanaugh did not discuss *PruneYard* or *Rumsfeld*.) His view was that even Internet service providers could not be constitutionally required to carry content they wish to exclude. Presumably he would apply the same logic to social media platforms, unless he changes his mind about the matter generally or about whether Facebook, Twitter, and YouTube have market power.<sup>171</sup>

Justice Kavanaugh may thus well disagree with Justice Thomas’s openness to possible common carrier treatment of social media platforms.<sup>172</sup> Where the other Justices are on the subject, though, is not clear. And my argument in this Article aims at interpreting existing precedents, not at trying to predict exactly how each Justice would likely apply those precedents.

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<sup>170</sup> 855 F.3d 381, 418, 426–31 (D.C. Cir. 2017); see also Raymond Shih Ray Ku, *Free Speech & Net Neutrality: A Response to Justice Kavanaugh*, 80 U. PITT. L. REV. 855 (2019); Joel Timmer, *Promoting and Infringing Free Speech? Net Neutrality and the First Amendment*, 71 FED. COMM. L.J. 1, 14–22 (2018). For more on the First Amendment and net neutrality, see Stuart Minor Benjamin, *Choosing Which Cable Channels to Provide Is Speech, but Offering Internet Access Is Not*, VOLOKH CONSPIRACY (May 1, 2017, 6:22 PM), <https://perma.cc/R5F7-3FS6>; Stuart Minor Benjamin, *Transmitting, Editing, and Communicating: Determining What ‘The Freedom of Speech’ Encompasses*, 60 DUKE L.J. 1673 (2011); Susan Crawford, *First Amendment Common Sense*, 127 HARV. L. REV. 2343 (2014).

<sup>171</sup> *U.S. Telecom Ass’n*, 855 F.3d at 433.

<sup>172</sup> *Biden v. Knight First Am. Inst.*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring). Note that, though Justice Thomas joined Justice O’Connor’s dissent in *Turner*, 512 U.S. at 674, he did so because he thought the must-carry law was content-based, and expressly declined to join the part of the opinion that reasoned that the law was unconstitutional even under the scrutiny applicable to content-neutral restrictions. Indeed, Part III of that opinion, which he did join, (1) drew the link between certain content-neutral access mandates and *PruneYard*, and (2) suggested “that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies.” *Id.* at 684.

## 2. The lack of a sufficient “common theme” on the large social media platforms

### a. *Hurley, Miami Herald, Riley, McIntyre, and NIFLA*

Now of course requiring that material be included within a coherent speech product—a newspaper, a parade, a fundraising pitch—is generally unconstitutional, not because it involves compelled hosting as such, but because it interferes with the host’s own speech. To quote *Rumsfeld*, the problem in those cases was “that the complaining speaker’s own message was affected by the speech it was forced to accommodate”:

[B]ecause “every participating unit affects the message conveyed by the [parade’s] private organizers,” a law dictating that a particular group must be included in the parade “alter[s] the expressive content of th[e] parade.” As a result, we held [in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*] that the State’s public accommodation law, as applied to a private parade, “violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.”<sup>173</sup>

Likewise,

- The right-of-reply statute in *Miami Herald* was unconstitutional in part because the newspaper is the aggregate of all the items that it chooses “to print or omit.”<sup>174</sup> Requiring a newspaper to include certain material that it would prefer to omit thus changes the content of the newspaper. (*Miami Herald* also held that a right of access is unconstitutional if it’s triggered by the content of what the property owner says, for instance by a newspaper’s publishing criticism of candidates. Such a content-based trigger would in effect be a content-based penalty on the speech that triggers the hosting

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<sup>173</sup> 547 U.S. at 63–64. The *Rumsfeld* Court also pointed out that a speech compulsion could also be a speech restriction because it takes up space that could otherwise be used by other speech: “In *Tornillo*, we recognized that ‘the compelled printing of a reply . . . tak[es] up space that could be devoted to other material the newspaper may have preferred to print,’ and therefore concluded that this right-of-reply statute infringed the newspaper editors’ freedom of speech by altering the message the paper wished to express.” *Id.* at 64. “[I]n *Pacific Gas*,” “the utility company regularly included its newsletter . . . in its billing envelope,” so “when the state agency ordered the utility to send a third-party newsletter four times a year, it interfered with the utility’s ability to communicate its own message in its newsletter.” *Id.* (cleaned up).

<sup>174</sup> See *PruneYard*, 447 U.S. at 98 (internal quotation marks omitted).

obligation, just as a content-based tax would be.<sup>175</sup>)

- The law in *Riley v. National Federation of the Blind* requiring fundraisers to mention certain information within their pitches was unconstitutional in part because, in that situation, “[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech.”<sup>176</sup>
- The law in *McIntyre v. Ohio Elections Commission* requiring people to sign any campaign materials was unconstitutional in part because “decisions concerning omissions or additions to the content of a publication” (including just concerning the omission or inclusion of the author’s name) are protected by the First Amendment.<sup>177</sup>
- The law in *NIFLA v. Becerra* was similarly a speech compulsion because “requiring [anti-abortion clinics] to inform women how they can obtain state-subsidized abortions—at the same time [the clinics] try to dissuade women from choosing that option—. . . plainly ‘alters the content’ of [the clinics’] speech.”<sup>178</sup> The clinics’ “speech” referred to the aggregate content of all the speech that the patrons received from the clinics, just as the *Hurley* parade organizers’ speech was the aggregate of all the speech that viewers would see in the parade. And people go to clinics precisely to hear the clinics’ speech (whether or not they anticipate that the clinics’ speech will come from a particular viewpoint).

*Hurley* explains well this right to create a coherent speech product. In *Hurley*, the Court held that a parade could not be required to include floats that the organizers disapproved of:

Since every participating unit affects the message conveyed by the private organizers, the state courts’ application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade.<sup>179</sup>

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<sup>175</sup> *Miami Herald Co. v. Tornillo*, 418 U.S. 241, 256 (1974); see also *Turner*, 512 U.S. at 655 (distinguishing *Miami Herald* as having involved a statute that “exact[ed a] content-based penalty” on such criticisms of candidates).

<sup>176</sup> *Riley*, 487 U.S. at 795.

<sup>177</sup> *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995).

<sup>178</sup> *Nat. Inst. of Fam. & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

<sup>179</sup> *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572–73 (1995).



Though “in spite of excluding some applicants, the [parade organizer was] rather lenient in admitting participants,”<sup>180</sup> the parade still had a broad general message, presumably having to do with “what merits celebration on [St. Patrick’s Day].”<sup>181</sup>

**b. Back to *PruneYard*, *Turner*, and *Rumsfeld***

Yet *PruneYard*, *Turner*, and *Rumsfeld* show that some hosting mandates are *not* seen as interfering with a coherent speech product. As the *Pacific Gas & Electric Co. v. Public Utilities Commission* plurality noted, “[n]otably absent from *PruneYard* was any concern that [compelled hosting of public speech] might affect the shopping center owner’s exercise of his own right to speak.”<sup>182</sup>

Similarly, in *Rumsfeld*, the Court didn’t view the aggregate of all the recruiting on the law school campus as a coherent speech product the way a parade might be. “A law school’s recruiting services”—here, presumably referring to the sum of all the recruiting—“lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper.”<sup>183</sup> “[A]ccommodating the military’s message does not affect the law schools’ speech, because the schools are not speaking when they host interviews and recruiting receptions.”<sup>184</sup>

The military recruiters, of course, were themselves speaking; their own recruiting pitches surely had at least as much “expressive quality” as did the fundraising pitches in *Riley*.<sup>185</sup> But the *law schools* weren’t the ones speaking, because they

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<sup>180</sup> *Id.* at 569.

<sup>181</sup> *Id.* at 574.

<sup>182</sup> 475 U.S. 1, 12 (1986) (plurality opin.).

<sup>183</sup> *Rumsfeld v. FAIR*, 547 U.S. 47, 64 (2006).

<sup>184</sup> *Id.*

<sup>185</sup> See *id.* at 65 (discussing “speech by recruiters”); *Thomas v. Collins*, 323 U.S. 516, 532 (1945) (recognizing that a union organizer’s right “to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them” is “part of free speech,” logic that would also apply to urging people to join the military); *Village of Schaumburg v. Citizens for Better Env’t*, 444 U.S. 620, 632 (1980) (treating fundraising pitches as protected speech, because they involve “communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes”). The District Court in *Rumsfeld* had “determin[ed] that recruiting is conduct and not speech,” 547 U.S. at 53, but the Supreme Court didn’t endorse that position; it labeled as “conduct” law schools’ decisions to include or exclude recruiters, *id.* at 60, but didn’t label as conduct the “speech by recruiters,” *id.* at 65.

weren't like parade organizers, creating a coherent whole out of all the recruiting interviews—they were merely “host[s],” “not speak[ers].” A law school’s “accommodation of a military recruiter’s message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school.”<sup>186</sup>

Likewise with *Turner*, which *Hurley* expressly distinguished:

[W]hen dissemination of a view contrary to one’s own is forced upon a speaker intimately connected with the communication advanced, the speaker’s right to autonomy over the message is compromised. . . .

Unlike the programming offered on various channels by a cable network, the parade does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience. Although each parade unit generally identifies itself, each is understood to contribute something to a common theme, and accordingly there is no customary practice whereby private sponsors disavow “any identity of viewpoint” between themselves and the selected participants. . . . [T]he parade’s overall message is distilled from the individual presentations along the way, and each unit’s expression is perceived by spectators as part of the whole.<sup>187</sup>

That “the programming offered on various channels by a cable network” “consist[s] of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience” could equally be said of the recruiting in various law school rooms in *Rumsfeld*, or the leafleters’ and signature gatherers’ speech in various places at the mall in *PruneYard*.

Likewise for Twitter letting people go to individual pages such as <http://twitter.com/RealDonaldTrump>, Facebook letting people go to individual Facebook pages, YouTube letting people view individual videos, and the like. There too the pages are “individual, unrelated segments that happen to be [hosted] together for individual selection by members of the audience.” The platforms are hardly “intimately connected” with the hundreds of millions of pages they host. The set of all the Tweets on Twitter, posts on Facebook, or videos on YouTube lacks any “common theme” or “overall message.”<sup>188</sup> There are no “spectators” to “the whole” of

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<sup>186</sup> *Id.*

<sup>187</sup> *Hurley*, 515 U.S. at 576 (paragraph deleted).

<sup>188</sup> One could describe the overall content of Twitter as being “all things posted by Twitter users,” or perhaps “things that people throughout the world think are worth discussing, and that don’t

Twitter, Facebook, or YouTube, except maybe a few computer-assisted researchers.

I do think that a platform's recommendations count as the platform's own speech (see p. 451). The conversations that a platform facilitates between users may likewise count as a coherent speech product (see p. 452). But the pages or feeds that a platform hosts, and that users visit or subscribe to as they prefer, are properly seen as "individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience."

Nor is the coherent speech product doctrine triggered merely by property being "intentionally designed to provide a specific experience to users."<sup>189</sup> Shopping malls, after all, routinely try to provide a specific experience for their customers—an experience of happy consumption, often mixed with socializing with fellow consumers, and undiluted by possibly offensive political expression. Universities may try to provide a specific experience for their students, for instance an experience of exposure to what they view as inclusiveness and social justice, undiluted by recruiters for institutions that discriminate based on sexual orientation.

Yet this doesn't give those entities a right to exclude speakers that they see as inconsistent with that experience: The sum of all the sights and sounds in a mall, or all the channels on a cable system, or all the speech available from outside speakers in a university, doesn't qualify as a coherent speech product over which the property owner has the constitutional right of editorial choice.

Indeed, under the California law approved in *PruneYard*, a shopping mall may not even exclude anti-abortion protesters who display gruesome images of aborted

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run afoul of Twitter Rules." But that is still not a "common theme" or an "overall message," just as all the channels distributed on a cable system lack a common theme or overall message.

Szóka & Barthold, *supra* note 12, argue that social media sites have a "common theme" in the sense of seeing themselves "as 'a place for expression,' one that 'give[s] people a voice'" (Facebook) and aiming "to enable people to 'participate in the public conversation freely and safely'" (Twitter). See also HASEN, *supra* note 12, text accompanying note 85. But under that definition, *all* property owners could have the First Amendment right to be free an access mandate—a shopping mall could say it is "a place for shopping, enjoyment, and friendly conversations," a cable system could that it is "a place for high-quality television," and a university could say it is "a place for speech free of discrimination based on sexual orientation." *PruneYard*, *Turner*, and *Rumsfeld* tell us that such general and largely vacuous statements of common theme cannot suffice to defeat an access mandate.

<sup>189</sup> Bhagwat, *supra* note 105, at 111.

fetuses—surely something that interferes with the “experience” that the mall is generally trying to provide its customers.<sup>190</sup> Likewise, a shopping mall doubtless wants to create an “experience” in which all its shops are presented positively. Yet it may be required to tolerate leafleters who urge customers to boycott one of the shops.<sup>191</sup>

### 3. Compelled hosting isn’t rendered unconstitutional by mistaken public assumptions of endorsement

Of course, whenever someone (let’s call him Visitor) speaks on Host’s property, there is always some possibility that some observers will assume that Host at least views Visitor’s speech as acceptable (even if Host didn’t choose the speech and doesn’t expressly endorse it). After all, property owners are usually allowed to decide what behavior, including speech, is allowed on their property, and a decision not to expel a speaker may be seen as in some measure approving of the speaker.

But say the law requires Host—such as a shopping mall owner, a cable system, a university, a phone company, or a shipper such as FedEx or UPS—to let certain speakers use its property. Once people know this is the law, they can no longer reasonably assume that Visitor is on the property with Host’s approval. And Host can generally explain to the public that it’s hosting such speakers as a matter of legal command, not of voluntary decision.

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<sup>190</sup> *Ctr. for Bio-Ethical Reform, Inc. v. Irvine Co., LLC*, 249 Cal. Rptr. 3d 391, 399 (App. 2019). The mall specifically argued that it was trying to create “family-oriented centers” to which parents would be willing to bring or send their children; yet the court concluded that the *PruneYard* right of access applied even so. *Id.* at 400.

And this result flows naturally from the California law scheme as the U.S. Supreme Court described it in *PruneYard*, when it upheld that scheme against First Amendment challenge: California law let platforms “restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions,” 447 U.S. at 83, and “time, place, and manner regulations” refers to *content-neutral* restrictions. *See, e.g.,* *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 536 (1980) (“a constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech”); *see also* *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 132 (1981) (likewise); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) (likewise).

<sup>191</sup> *Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742, 870 (Cal. 2007) (rejecting the argument that the mall “‘has the right to prohibit speech that interferes with the intended purpose of the Mall,’ which is to promote ‘the sale of merchandise and services to the shopping public’”).

Such an ability by property owners to “expressly disavow any connection with the message” (a message that is itself clearly written by others), and to point out that the message is only allowed “by virtue of [the] law,”<sup>192</sup> suffices to prevent any First Amendment violation based on the possibility of misattribution. Observers can be expected to “appreciate the difference between speech [the property owner] sponsors and speech the school permits *because legally required to do so*, pursuant to an equal access policy,” especially when nothing “restricts what the [property owner] may say about” the third party’s speech.<sup>193</sup> And the same is true for platforms, which can easily inform readers that they aren’t endorsing particular writers, or more generally that they aren’t endorsing speech on their sites as a whole.<sup>194</sup>

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<sup>192</sup> 447 U.S. at 87. The Court suggested that “[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner,” because the mall is generally “open to the public to come and go as they please.” *Id.* But even for those observers who make the “not likely” assumption that the speech is endorsed by the mall, “appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law.” *Id.*

Compare *Hurley*, where the Court held that disclaimers wouldn’t suffice, because “each parade unit . . . is understood to contribute something to a common theme, and accordingly there is no customary practice whereby private sponsors disavow ‘any identity of viewpoint’ between themselves and the selected participants.” *Hurley*, 515 U.S. at 576–77. For reasons discussed in Part II.A.3 below, that analysis doesn’t apply to social media posts. And *Hurley* expressly declined to “decid[e] on the precise significance of the likelihood of misattribution,” because it found it “clear that in the context of an expressive parade, . . . the parade’s overall message is distilled from the individual presentations . . . , and each unit’s expression is perceived by spectators as part of the whole.” *Id.* at 577.

<sup>193</sup> *Rumsfeld*, 547 U.S. at 65 (emphasis added); see also *Turner*, 512 U.S. at 655–56 (noting that “there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator,” especially since “it is a common practice for broadcasters to disclaim any identity of viewpoint between the management and the speakers who use the broadcast facility”).

<sup>194</sup> Nor would the platforms need to put up such disclaimers every time an item from the platform is seen (for instance, every time a Tweet is embedded in some post). If a law does require the platforms to host various materials, platforms would just need to sufficiently publicize that law—something the Facebooks and Twitters of the world have ample power to do, for instance using a clickthrough warning that they can show once or a few times to their users.

Of course, there's always the risk that some people wouldn't understand that a social media platform that hosts, say, a Nazi or Communist page is merely following the law. There's even a risk that they would understand, but would still be upset at the platform, or even threaten to boycott it.

But the same risk was present in *Rumsfeld*; indeed, it was greater in *Rumsfeld*, because the Solomon Amendment merely threatened universities with loss of federal funds if they excluded military recruiters, so universities weren't exactly "legally required" to include them. "[S]tudents will in fact perceive their schools as endorsing the military's discriminatory policies" if they hosted military recruiters, reasoned an amicus brief by various law student associations, "particularly if schools provide the type of affirmative assistance demanded under the Solomon Amendment."<sup>195</sup> Yet the Court viewed this possible inaccurate perception as irrelevant.

This risk of mistaken perception of endorsement was likewise present in *PruneYard*—yet the property owner's opportunity to "expressly disavow any connection with the message" was seen as sufficient to preclude any First Amendment challenge to the common-carrier-like requirement. The same should apply to social media platforms. A passage from *Board of Ed. of Westside Community Schools v. Mergens*,<sup>196</sup> which *Rumsfeld* expressly quoted in rejecting the risk of misperception,<sup>197</sup> is particularly apt here:

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To be sure, some compulsions to display material on one's own property are unconstitutional even if no-one thinks that the owner is endorsing the message: Consider the license plate motto in *Wooley v. Maynard*, which in 1974 any passerby would have understood as being endorsed by the New Hampshire government, not by all New Hampshire drivers. But that simply reflects the difference between having to display speech on one's own car, which the Court held was a speech compulsion, and having to host speakers in a shopping mall or at a university, which the Court held wasn't such a compulsion. See *supra* notes 163–169 and accompanying text; see also note 169 (discussing why the opinions recognizing a videographer's or even wedding cake baker's right not to create materials for same-sex weddings treat such compulsions more like compelled motto display in *Wooley* rather than like the compelled hosting in *PruneYard* and *Rumsfeld*).

<sup>195</sup> Brief *Amici Curiae* of Nat'l Lesbian & Gay Law Ass'n, Law Student Ass'ns, et al., *Rumsfeld v. FAIR*, 2005 WL 2347167, \*7.

<sup>196</sup> 496 U.S. 226 (1990).

<sup>197</sup> 547 U.S. at 65 (quoting *Mergens*, 496 U.S. at 250 (plurality opin.) and a similar passage in *id.* at 268 (Marshall, J., concurring in the judgment)). *Mergens* upheld against an Establishment Clause

[P]etitioners' fear of a mistaken inference of endorsement [as a result of a school hosting a religious club in compliance with the federal statute that is being challenged] is largely self-imposed, because the school itself has control over any impressions it gives its students. To the extent a school makes clear that its recognition of respondents' proposed club is not an endorsement of the views of the club's participants, students will reasonably understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech.<sup>198</sup>

The school's control over students' perceptions is of course imperfect, but it's sufficient to make the "mistaken inference of endorsement" irrelevant. And the same is true for social media networks, which likewise have many tools to influence readers' perceptions, and to "make[] clear" that their hosting various views "is not an endorsement of the views." As the Court later put it, there can be no "modified heckler's veto," in which speech could be excluded based on what some "members of the audience might misperceive."<sup>199</sup>

To be sure, a social media platform might not want to have to disclaim any connection with offensive speech by its users, and might prefer just to block such speech so as to avoid giving such a disclaimer. Yet *Rumsfeld* and *PruneYard* show that such a preference doesn't make the mandated hosting unconstitutional. The lower court decision in *Rumsfeld*, for instance, struck down the law in part because

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challenge a statute that required public schools to allow religious or ideological clubs on the same terms as other clubs. Justice Marshall's separate opinion expressed the concern that students might not get the message if all they see are religious clubs: "If a school has a variety of ideological clubs, . . . I agree with the plurality that a student is likely to understand that 'a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.' When a school has a religion club but no other political or ideological organizations, however, that relatively fine distinction may be lost." *Id.* at 268. But of course a massive social media platform notoriously contains "a variety of ideological" messages.

<sup>198</sup> *Id.* at 251. The argument begins on p. 250 of *Mergens* ("we note that Congress specifically rejected the argument that high school students are likely to confuse an equal access policy with state sponsorship of religion") and continues onto p. 251.

<sup>199</sup> *Good News Club v. Milford Central School*, 533 U.S. 98, 119 (2001). As with *Mergens*, *Good News Club* involved the question whether student groups' religious speech could or should be restricted in public schools, based on a concern that other students will misperceive the speech as being endorsed by the school. But this Establishment Clause question is closely analogous to the Free Speech Clause of when compelled access rules violate the compelled speech doctrine, based on a concern that other visitors will misperceive the speech as being endorsed by the property owner—as the Court recognized in relying on *Mergens* in *Rumsfeld*.

it pressured universities into responding to the recruiters:

[S]peech with which the law schools disagree [has] resulted in, according to the record, hundreds (if not thousands) of instances of responsive speech by members of the law school communities (administrators, faculty, and students), including various broadcast e-mails by law school administrators to their communities, posters in protest of military recruiter visits, and open fora held to “ameliorate” the effects of forced on-campus speech by military recruiters. All of these represent instances in which the schools were “force[d] . . . to respond to a hostile message when they would prefer to remain silent.”<sup>200</sup>

But the Court was unmoved by this concern, and instead noted the university’s ability to respond (whether or not it would have “prefer[red] to remain silent”) as a basis for upholding the hosting requirement.<sup>201</sup> While the plurality in *Pacific Gas & Electric Co. v. Public Utilities Comm’n* seemed to take the view that such pressure to respond made a hosting compulsion unconstitutional,<sup>202</sup> that plurality has not carried the day;<sup>203</sup> and in any event the plurality seemed to limit its analysis to exclude cases where, as in *PruneYard*, the government “simply award[s] access to the public at large.”<sup>204</sup> *Rumsfeld* implicitly limited the *Pacific Gas* plurality further, to situations where the speech that someone is compelled to host “tak[es] up space”—presumably referring to scarce space—that the host would otherwise use “to communicate its own message.”<sup>205</sup>

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<sup>200</sup> *FAIR v. Rumsfeld*, 390 F.3d 219, 239 (3d Cir. 2004), *rev’d*, 547 U.S. 47 (2006).

<sup>201</sup> 547 U.S. at 65.

<sup>202</sup> 475 U.S. 1, 15–16 (1986).

<sup>203</sup> For more on *PG&E* and its tension with the other cases I discuss here, see Volokh, *The Law of Compelled Speech*, *supra* note 162, at 383–86. “The result in *Pacific Gas* may have been justifiable on the grounds that the law offered access only to certain speakers, or offered access that was in part triggered by *Pacific Gas*’s speech, or otherwise interfered with *Pacific Gas*’s speech (for instance, by decreasing the amount of space that *Pacific Gas* could use for its own messages). But the ‘pressure to respond’ argument does not seem adequate as an independent basis to strike down speech restrictions, and indeed *PruneYard*, *Turner*, and *FAIR* appear inconsistent with it.” *Id.* at 386.

<sup>204</sup> 475 U.S. at 12.

<sup>205</sup> 547 U.S. at 64 (internal quotation marks omitted).



#### 4. **Compelled hosting isn't rendered unconstitutional by the host's being a speaking organization**

The precedents I discuss show that the law may require certain private property owners to allow public access even when they are themselves in the speech business:

- Cable systems, the Court made clear, are “entitled to the protection of the speech and press provisions of the First Amendment,” and indeed sometimes supply “original programming” of their own.<sup>206</sup>
- Universities of course engage in massive amounts of their own speech on their property (including by curating others' speech, for instance when organizing symposia or guest speaker programs).
- Even shopping malls usually display and distribute their own speech on their property.

Yet all three can still be required to host others' speech.

Likewise for social media platforms. They indubitably speak themselves, for instance when they choose to recommend particular material to readers (more on that at p. 451). The government can't demand that they include sites they dislike within those recommendations. And, as with *Rumsfeld*, the platforms retain the right to “voice their disapproval of [users'] message,”<sup>207</sup> for instance by posting fact-checks or warnings, if they wish.<sup>208</sup> But this speech by the platforms, like the speech engaged in by universities, doesn't give them the First Amendment right to stop hosting speakers they dislike.

#### 5. **Compelled hosting isn't rendered unconstitutional by disapproval of the third party's message**

These principles apply even when the property owner disapproves of the third party's message, or when the property owner's other visitors do the same.

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<sup>206</sup> 512 U.S. at 636 (cleaned up).

<sup>207</sup> 547 U.S. at 69–70; *see also id.* at 65.

<sup>208</sup> One of the reasons that *NetChoice, LLC v. Moody* struck down the Florida social media rules was that they, “unlike the state actions in *FAIR* and *PruneYard*, explicitly forbid social media platforms from appending their own statements to posts by some users.” No. 4:21CV220-RH-MAF, 2021 WL 2690876, \*9 (N.D. Fla. June 30, 2021).

In *Rumsfeld*, for instance, the universities seriously objected to military recruiters (in particular, to the military’s “Don’t Ask, Don’t Tell” policy), arguing that “the Solomon Amendment requires law schools to collaborate with military recruiters in an effort—discriminatory recruiting—that the schools consider fundamentally unjust.”<sup>209</sup> Many students were also upset at the presence of military recruiters on campus.<sup>210</sup>

Yet the Court held that “[a] military recruiter’s mere presence on campus does not violate a law school’s right to associate, regardless of how repugnant the law school considers the recruiter’s message,”<sup>211</sup> and that the recruiter’s presence doesn’t violate the law school’s right to be free from compelled speech. Likewise, California courts have followed up on *PruneYard* by making clear that shopping malls can’t block even speech they, their business partners, or many of their visitors might disapprove of, such as speech urging listeners to boycott the mall’s tenants, or speech displaying gruesome images of aborted fetuses.<sup>212</sup>

In *PruneYard*, Justices Powell and White did note that the mall owners “have not alleged that they object to the ideas contained in the appellees’ petitions,” and that the owners didn’t claim that some likely future speakers “will express views that are so objectionable as to require a response even when listeners will not mistake their source.”<sup>213</sup> But the majority didn’t rely on this, and thought that the possibility that *PruneYard* would have to respond (by “disavow[ing] any connection

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<sup>209</sup> See, e.g., Brief for Respondents, *Rumsfeld v. FAIR*, 547 U.S. 47, No. 04-1152, 2005 WL 2347176, \*17.

<sup>210</sup> See *supra* note 195 and accompanying text.

<sup>211</sup> *Rumsfeld*, 547 U.S. at 70.

<sup>212</sup> See *supra* notes 190–191 and accompanying text. Similarly, it is doubtless true that content moderation policies “express[] the company’s view that [certain] content is ‘objectionable,’” and “express to users, and to the entire world, that the company maintains a certain viewpoint about an idea or topic—or even a single word.” Lily A. Coad, Note, *Compelling Code: A First Amendment Argument Against Requiring Political Neutrality in Online Content Moderation*, 106 CORNELL L. REV. 457, 485 (2021). Yet the universities in *Rumsfeld* likewise argued that their policy of excluding military recruiters expressed their views that the military’s discrimination against gays and lesbians was “objectionable,” and “express[ed] to [students], and to the entire world, that the [university] maintains a certain viewpoint about an idea or topic”; that did not make the Solomon Amendment, the Court held, into a violation of the universities’ First Amendment rights.

<sup>213</sup> *Id.* at 101 (Powell, J., concurring in part and concurring in the judgment).

with the message”) was perfectly acceptable.<sup>214</sup>

## 6. Compelled hosting isn’t rendered unconstitutional by the property owner’s economic interests

Of course, sometimes compelled hosting can undermine the property owner’s economic interests. Cable systems, for instance, would usually choose to carry those channels that are most profitable for them to include. The must-carry rule, by requiring them to drop some of their preferred channels to make room for others, would likely cost the systems something. Yet *Turner* upheld the must-carry rule.

Likewise, allowing leafleters and signature gatherers at a shopping mall, as in *PruneYard*, might cost the shopping center: Any such speakers might offend some patrons, and offended patrons are less likely to be in a shopping mood. Indeed, the California rule upheld in *PruneYard* protected even speech that urged boycotting stores in that very shopping center,<sup>215</sup> yet this didn’t stop the Court from rejecting the shopping mall’s First Amendment claim.<sup>216</sup>

The Ninth Circuit likewise interpreted the California *PruneYard* principle as invalidating a mall rule that banned handbills “naming a [mall] tenant,” “speech that may adversely affect [the mall owners’] business.”<sup>217</sup> “In restricting such critical speech about their tenants, owners, or managers, Petitioners’ rule contravenes the purpose of California free speech protections: the preservation of discussion of issues even when they are contrary to a regulating party’s belief or interest.”<sup>218</sup> And the California Supreme Court later reaffirmed that “[i]t has been the law since we

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<sup>214</sup> *Id.* at 87 (majority opin.).

<sup>215</sup> *Robins v. Pruneyard Shopping Center*, 592 P.2d 341, 346 (Cal. 1979) (quoting and describing *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers’ Union*, 394 P.2d 921 (1964)).

<sup>216</sup> The Takings Clause analysis in the U.S. Supreme Court’s *PruneYard* decision did note that the California rule wouldn’t “*unreasonably* impair the value or use of their property as a shopping center.” 447 U.S. at 83 (emphasis added). But some impairment would be tolerable, so long as it isn’t “so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a ‘taking.’” *Id.* at 84.

<sup>217</sup> *Glendale Assocs., Ltd. v. NLRB*, 347 F.3d 1145, 1153–58 (9th Cir. 2003); *see also* *United Bhd. of Carpenters & Joiners of Am. Local 586 v. NLRB*, 540 F.3d 957, 965 (9th Cir. 2008).

<sup>218</sup> *Glendale Assocs.*, 347 F.3d at 1158.

decided [an earlier precedent] in 1964, and remains the law, that a privately owned shopping center must permit peaceful picketing of businesses in shopping centers, even though such picketing may harm the shopping center's business interests."<sup>219</sup>

This, I think, responds to the argument that requiring platforms to host offensive material violates the First Amendment because it might cost the platforms some money, for instance through lost advertising.<sup>220</sup> To begin with, if advertisers just don't want to have their material placed alongside a page that contains certain material, platforms can likely simply block advertising on that page instead of deleting the page outright. (Some platforms already do that in some situations.<sup>221</sup>) That would mean that the platforms would have to host certain material without getting financial benefit from such hosting. But that sort of modest "harm [to] the [platform's] business interests" doesn't create a First Amendment right on the platform's part to remove the offensive material.

Now in theory it's possible that an advertiser would go further, and demand that a platform purge all material of some sort from its computers, or else the advertiser would stop advertising.<sup>222</sup> But, first, that seems unlikely in a world where platforms are treated as common carriers, precisely because the platform can reasonably explain that it's just complying with its legal obligation (and because social media platforms are seen as important, valuable places to advertise<sup>223</sup>).

And, second, this sort of advertiser threat just can't suffice to create a First

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<sup>219</sup> *Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742, 750 (Cal. 2007).

<sup>220</sup> *Cf. Goldman & Miers*, *supra* note 19, at 210–11.

Note that common carriers have historically been given some flexibility to impose "just" and "reasonable" regulations of their services. *See, e.g.*, 47 U.S.C. § 201(b); *W. Union Tel. Co. v. Bolling*, 91 S.E. 154, 155 (Va. 1917). Likewise, a social media hosting mandate might except, for instance, spam pages, which the platform may define in certain content-based ways. But the legislature could well conclude that viewpoint-based exclusions are not permitted.

<sup>221</sup> *See, e.g.*, YouTube Help, *Advertiser-Friendly Content Guidelines*, <https://perma.cc/KNKG2-WFE5>.

<sup>222</sup> *See Szóka & Barthold*, *supra* note 12 (making this argument)

<sup>223</sup> "[S]ocial media advertising revenues reached \$41.5 billion in 2020. That 16.3% year-over-year growth attributes social media with [29.6%] of all internet advertising revenue . . ." Interactive Advertising Bureau, *IAB Releases Internet Advertising Revenue Report for 2020* (Apr. 7, 2021), <https://perma.cc/H9HY-RHNF>.

Amendment objection to common carrier obligations. If a massive phone user tells Verizon, “Stop handling phone service for this unpatriotic advocacy group, or we’ll switch our millions of dollars of phone service to T-Mobile instead,” I doubt that would justify Verizon’s canceling the unpatriotic group’s phone lines.

Likewise, say Robinsons-May (the boycotted business in *Fashion Valley Mall, LLC v. NLRB*<sup>224</sup>) had told a mall owner,

We’re your anchor tenant, and we demand that you stop leafleters from urging a boycott of our store, or else we won’t open any more stores in malls owned by your company; instead, we’ll just open stores that aren’t in the large shopping malls that are governed by the *PruneYard* right of public access.

That can’t have given the mall owner a get-out-of-the-*PruneYard*-doctrine-free card. The First Amendment viewpoint-neutrality rules often require the government to incur some costs and to lose some revenue because of public reaction to speech.<sup>225</sup> Similarly, common-carrier rules may permissibly require common carriers (or their analogs, like shopping malls) to incur some costs and to lose some revenue because of public hostility to offensive speech.

#### **7. Compelled hosting isn’t rendered unconstitutional by the host’s not being a monopoly**

*PruneYard* and *Rumsfeld* show that the government can also impose these sorts of hosting mandates even when the property owner lacks anything close to monopoly power. Monopoly status was important in *Turner*, where the Court did note the cable operator’s “bottleneck, or gatekeeper, control over most (if not all) of the television program that is channeled into the subscriber’s home,” and expressed concern about “[t]he potential for abuse of this private power over a central avenue of communication.”<sup>226</sup> But it wasn’t important in *PruneYard* or *Rumsfeld*: shopping malls aren’t generally seen as monopolies, and neither are university campuses. (Neither, for that matter, are cell phone providers, UPS, or FedEx.)

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<sup>224</sup> 172 P.3d at 744.

<sup>225</sup> See, e.g., *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 136–37 (1992) (striking down requirements that organizers of controversial parades pay for the city’s security costs).

<sup>226</sup> 512 U.S. at 656–57; see also *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 431–32 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting) (reading *Turner* as limiting common-carrier rules to such monopoly situations).

Leafleters and signature gatherers could reach voters in other places, and military recruiters could reach students off campus. Access to the shopping mall or university was useful to the speakers, but not really necessary. Yet a law creating a right of access to shopping malls or universities was still viewed as constitutionally permissible. So whether or not one concludes that platforms have “gatekeeper[] control” over “a critical pathway of communication,”<sup>227</sup> *Pruneyard* and *Rumsfeld* should still apply.

#### 8. No general need for strict scrutiny

Such public access mandates also don’t generally call for particularly demanding scrutiny. *PruneYard*, for instance, didn’t apply even intermediate scrutiny. It didn’t even try to talk up California’s interest in promoting its citizens’ speech (except when concluding that the law passed the rational basis scrutiny applicable to regulations of private property<sup>228</sup>).

Likewise for *Rumsfeld*. The Court briefly stressed the importance of Congress’s power to raise armies,<sup>229</sup> and applied intermediate scrutiny to FAIR’s claim that the Solomon Amendment interfered with its expressive conduct.<sup>230</sup> But it didn’t apply heightened scrutiny in its Part III.A.1–2, the discussion of compelled speech.

In *Turner*, the Court did apply intermediate scrutiny, but there the law was *both* a speech compulsion and a speech restriction. The must-carry statute in *Turner* required cable operators to set aside certain channels for over-the-air broadcasters. It thus not only compelled them to host the broadcasters, but kept them from hosting other channels they would have preferred (since there were only so many channels available on each cable system<sup>231</sup>).

The Court concluded “that the appropriate standard by which to evaluate the constitutionality of must-carry is the intermediate level of scrutiny applicable to

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<sup>227</sup> 512 U.S. at 656–57; see Bhagwat, *supra* note 105, at 112 (arguing that platforms “lack the sort of market power enjoyed by traditional common carriers”).

<sup>228</sup> 447 U.S. at 84–85 (applying the rational basis test from *Nebbia v. N.Y.*, 291 U.S. 502 (1934)).

<sup>229</sup> 547 U.S. at 58.

<sup>230</sup> *Id.* at 63–65.

<sup>231</sup> “More than half of the cable systems in operation today have a capacity to carry between 30 and 53 channels,” and those had “to set aside up to one-third of their channels for commercial broadcast stations that request carriage.” 512 U.S. at 628, 630.

*content-neutral restrictions* that impose an incidental burden on speech.”<sup>232</sup> The Court didn’t hold that such intermediate scrutiny would have been required had the must-carry rules compelled only hosting of channels (as did the rules in *Prune-Yard* and *Rumsfeld*) without restricting the distribution of other channels.

Now *Turner* and *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*<sup>233</sup> may well require intermediate scrutiny of platform common-carrier regulations simply because they target social media platforms. In *Turner*, the Court held (citing *Minneapolis Star*) that, because “the must-carry provisions impose special obligations upon cable operators . . . , some measure of heightened First Amendment scrutiny is demanded.”<sup>234</sup> But intermediate scrutiny would be all that is required, at least if the law applies to all social media platforms that share certain important features (such as being generally open to the public and to a vast range of topics), and is “justified by some special characteristics of the particular medium being regulated”<sup>235</sup> (such as social media platforms’ unparalleled role as a conduit for individuals to speak to the public).

And the Court made clear that such intermediate scrutiny would be satisfied by the interest in “assuring that the public has access to a multiplicity of information sources,” which the Court labeled “a governmental purpose of the highest order, for it promotes values central to the First Amendment.”<sup>236</sup> “It has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”<sup>237</sup> That was a separate government interest from the interest “in eliminating restraints on fair competition.”<sup>238</sup>

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<sup>232</sup> *Id.* at 662 (emphasis added).

<sup>233</sup> *Minneapolis Star & Trib. Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 583 (1983).

<sup>234</sup> 512 U.S. at 641.

<sup>235</sup> *Id.* at 660–61 (cleaned up); *see also id.* at 660 (“It would be error to conclude . . . that the First Amendment mandates strict scrutiny for any speech regulation that applies to one medium (or a subset thereof) but not others.”).

<sup>236</sup> *Id.* at 663.

<sup>237</sup> *Id.* (cleaned up); *see also* Rozenshtein, *supra* note 143, at 417–18 (discussing the strength of this interest).

<sup>238</sup> *Id.* at 664.

### B. *Compelled Nondiscrimination in the Subscription Function*

Of course, social media platforms do much more than letting people visit a particular page or view a particular video. Among other things, they let people subscribe to others' materials, so that all or some of those materials appear in the subscribers' feeds. (This is the "follow" feature on Twitter, Instagram, and Facebook, the "add friend" feature on Facebook, and the "subscribe" feature on YouTube.) Indeed, this subscription function in large measure distinguishes *social* media from mere user-generated content.

Could the government bar platforms from discriminatorily declining to show subscribers certain materials posted by users to whose feeds they have subscribed? I'm inclined to say that it can, though the argument there is more complex than it is for the pure hosting function.

The key precedent on this is *Rumsfeld*. We've discussed above how in that case, like in *PruneYard* and *Turner*, the Court held that property owners (there, universities) could be required to host speakers they disliked.<sup>239</sup> But say that a university told recruiters: "OK, we have to let you on our property, so you can be in Room 217. But we won't speak to anyone about your being in Room 217: We won't include this in any printed materials where we list all the recruiters, and we won't send out the e-mails with information about you the way we do about other recruiters. Good luck getting students to find you!"

*Rumsfeld* held that this too is constitutionally unprotected: As part of requiring universities not to discriminate against military recruiters in choosing whom to host on its property, the university could also be required not to discriminate in choosing whom to inform students about:

The compelled speech to which the law schools point is plainly incidental to the Solomon Amendment's regulation of conduct, and "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.* (1949). Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading "White Applicants Only" hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct. See *R.A.V. v. St. Paul* (1992) ("[W]ords can

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<sup>239</sup> See *supra* Part II.A.1.a.



in some circumstances violate laws directed not against speech but against conduct”). Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah’s Witness to display the motto “Live Free or Die,” and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.<sup>240</sup>

The record in *Rumsfeld* suggests that this means military recruiters could likely have to be included in “recruiting receptions,”<sup>241</sup> and that “an unwilling institution” would have to “distribute, post, and maintain the military’s literature, send emails promoting the military, include the military’s listing in printed publications, and make introductions and arrange meetings.”<sup>242</sup>

Now as with most discussions of the *Giboney* “conduct . . . carried out by means of language” doctrine, this analysis is quite opaque;<sup>243</sup> and the analogy to the “White Applicants Only” signs is not entirely helpful, because it involves speech restrictions rather than speech compulsions. But the underlying principle does indeed arise in a vast range of antidiscrimination rules.

Private schools and private universities, for instance, have broad First Amendment rights to speak, including for instance to “promote the belief that racial segregation is desirable.”<sup>244</sup> Nonetheless, the government may require them not to discriminate based on race in admitting students.<sup>245</sup>

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<sup>240</sup> 547 U.S. 47, 62 (2006) (cleaned up, some citations simplified).

<sup>241</sup> *Rumsfeld v. FAIR*, 390 F.3d 219, 240 (3d Cir. 2004) (discussing such compelled inclusion), *rev’d*, 547 U.S. 47 (2006).

<sup>242</sup> Reply Brief for Appellants, *FAIR v. Rumsfeld*, No. 03-4433, 2004 WL 5215238, \*5–\*6 (3d Cir. Mar. 5, 2004) (citations omitted).

<sup>243</sup> Eugene Volokh, *The “Speech Integral to Criminal Conduct” Exception*, 101 CORNELL L. REV. 981, 997 (2016).

<sup>244</sup> *Runyon v. McCrary*, 427 U.S. 160, 176 (1976). The Court stated that “it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions.” But while this is cast in light of the rights of parents and children, it presupposes a comparable right of schools, including their right to engage in “the ‘[e]ffective advocacy of both public and private points of view, particularly controversial ones’ that the First Amendment is designed to foster.” *Id.* at 175.

<sup>245</sup> *Id.*

Given this nondiscrimination rule, it must be equally permissible for the government to compel the schools and universities (whatever messages those institutions are free to teach in the classroom) to speak to the students in ways necessary to give those students equal access to the education—to hand students schedules of classes, homework assignments, grades, feedback on papers, and the like. Likewise, the schools and universities could be required to speak to third parties about their students without regard to race, for instance by sending copies of transcripts to anyone who asks.<sup>246</sup>

Nor is this limited to bans on discrimination based on race, religion, and the like. Say a phone company tells the Socialist Party, “we understand that we have to let you use our private property for your evil anti-private-property speech, but we can’t be compelled to speak to you, so we won’t inform you of the phone number that we have selected for you.” Surely common carriage laws can forbid that, and can require the phone company to communicate information equally to all customers. Likewise, such laws can require the phone company to equally communicate information *about* all customers, for instance in its telephone directories.<sup>247</sup>

The same, I think, may apply for platforms’ nondiscrimination obligations with regard to their users: If I’m right that platforms can be required to host all users’ speech (or at least not to discriminate based on viewpoint), they might also be required to provide that speech to the users’ subscribers, on a viewpoint-neutral basis.<sup>248</sup> Under that approach, if someone goes to, say, <http://twitter.com/VolokhC>, or

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<sup>246</sup> Whether the schools or teachers could be required to provide letters of recommendations, which are supposed to include candid opinions about the qualities of the student, is a harder question. See Eugene Volokh, *Professor Refuses to Write Letters of Recommendations for Creationists*, VOLOKH CONSPIRACY (Jan. 30, 2003, 11:46 AM), <https://perma.cc/73K2-TELJ#90255714>.

<sup>247</sup> See, e.g., *US W. Commc’ns, Inc. v. Hix*, 93 F. Supp. 2d 1115, 1131 (D. Colo. 2000) (applying the Telecommunications Act of 1996, 471 U.S.C. § 251(b)(3), which requires that telephone companies provide “nondiscriminatory access to ‘directory listings,’” including to customers of competing telephone companies); *US W. Commc’ns, Inc. v. Colo. Pub. Utils. Comm’n*, 978 P.2d 671, 674 (Colo. 1999) (likewise, with regard to similar state law requirement).

<sup>248</sup> I use “viewpoint neutrality” as a shorthand for viewpoint neutrality within the category of constitutionally protected speech. Thus, for instance, whether or not the threats exception to First Amendment protection is seen as viewpoint-neutral (I think it probably is, but I can see the contrary argument), a platform’s blocking of threats should be permissible.

follows @VolokhC while viewing Tweets in reverse chronological order mode,<sup>249</sup> Twitter would have to show them the posts from my Volokh Conspiracy blog, without blocking any based on viewpoint.

Now the platforms might reasonably want to provide subscribers some subset of all the posts from accounts to which they are subscribed. If a Twitter user is following 500 Twitter accounts, for instance, then perhaps Twitter might want to show not every single post from those accounts (which in practice would just mean that the follower would see only the few most recent posts), but some subset, for instance the most retweeted posts.

Yet *Rumsfeld* suggests that the law could require that any such screening be done in a suitably neutral way—e.g., without discrimination based on viewpoint or based on whether the platforms views certain claims expressed in a post as accurate. By way of analogy, say that a university was sending out a special e-mail about recruiters who are hiring people at starting salaries of over \$100,000, or was conducting a job fair for students interested in public interest impact litigation. The statute upheld in *Rumsfeld* (the Solomon Amendment) wouldn't require the university to include military recruiters there, because they wouldn't fit the neutral criteria for that particular mailing: The Solomon Amendment merely forbids discrimination against military recruiters, rather than compelling the inclusion of military recruiters in every item of speech related to recruiting. Likewise, a requirement that platforms not discriminate based on certain criteria in implementing users' subscriptions may be valid even if it leaves platforms free to use other criteria.

To be sure, *Rumsfeld* isn't a perfect analogy here. The Solomon Amendment, for instance, prohibited universities from discriminating against military recruiters even in its speech to students as a whole, not just in speech to students who had expressed an interest in military jobs. My analysis here is limited to discrimination in implementing subscriptions, where the recipients of the speech had expressly asked to be shown material from certain users.

Still, I think *Rumsfeld* reaffirms that the government may require that hosts—whether universities or social media platforms—let listeners access speech on a nondiscriminatory basis. Such a requirement, when coupled with a mandate that a platform provide space for speakers on a nondiscriminatory basis, doesn't violate

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<sup>249</sup> See *supra* note 122.

the First Amendment's prohibition on compelled speech.

**C. Compelled Nondiscrimination in Simple Directory Functions**

As the previous subsection noted, *Rumsfeld* held that universities could be ordered not just to host recruiters on their property, but also to “send e-mails and post notices on behalf of the military” on the same terms as they do for other recruiters.<sup>250</sup> Such compulsion, the Court held, was permissible because it (1) simply required universities to provide the same speech for military recruiters as it chose to provide for others, (2) did not “approach[] a Government-mandated pledge or motto that the school must endorse,” and (3) was “incidental to the Solomon Amendment’s regulation of conduct”<sup>251</sup> (i.e., to the Solomon Amendment’s prohibition on discrimination against military recruiters).

And the Court was seemingly allowing such compulsions even though they likely interfered with what might otherwise be seen as a coherent speech product (see *supra* Part II.A.2, p. 423). When recruiting notices are “post[ed] . . . on bulletin boards,”<sup>252</sup> presumably the entirety of the bulletin board could be seen as the school’s directory of recruiters. When military recruiters must be included in “recruiting receptions,”<sup>253</sup> the reception as a whole might have been seen as akin to a stationary parade (though *Rumsfeld* did not so treat it). Likewise, if a school sent one group e-mail about all recruiters, rather than one e-mail per each recruiter, military recruiters would have to be included in that e-mail, even though such a recruiter directory e-mail would likely be seen as a coherent speech product (much like the fundraising pitch in *Riley*, the leaflet in *McIntyre*, or the newspaper in *Miami Herald*).<sup>254</sup>

Like so much about the “speech incidental to the regulation of conduct” doctrine,<sup>255</sup> the exact scope of this facet of *Rumsfeld* is unclear. The *Rumsfeld* analogy seems strongest for pure directory information: For instance, when Twitter shows a list of all the feeds that a particular feed is following (in response to a person’s

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<sup>250</sup> *Rumsfeld*, 547 U.S. at 61–62.

<sup>251</sup> *Id.* at 62.

<sup>252</sup> *Id.* at 61.

<sup>253</sup> *Id.* at 64.

<sup>254</sup> See Volokh, *The Law of Compelled Speech*, *supra* note 162, at 361–63.

<sup>255</sup> See generally Volokh, *The “Speech Integral to Criminal Conduct” Exception*, *supra* note 243.

clicking on the “Following” tag on a feed page), that appears to be much like a university e-mailing a list of all the recruiters visiting next week. A nondiscriminatory hosting rule imposed on Twitter can thus also likely require nondiscriminatory inclusion of Following feeds in the Following list; likewise in the Facebook “mutual friends” list.

Likewise, when people search for “Volokh Conspiracy” on Twitter, for instance, that will let them find our feed, which is under the handle @VolokhC. A common-carrier mandate might require Twitter to provide this finding tool for all feeds, including ones that Twitter would rather hide.

But I doubt that *Rumsfeld* would justify interfering with, say, platforms’ choice about what to include in their news feeds, where the links are carefully selected out of a vast range of possible links (see Part II.E, p. 451). That sort of choice seems much closer to the newspapers’ editorial judgment in *Miami Herald Publishing Co. v. Tornillo*, where there was indeed a “compelled-speech violation” “result[ing] from the fact that the complaining speaker’s own message was affected by the speech it was forced to accommodate.”<sup>256</sup>

To be sure, the lines here can be hard to draw—but that stems from the holding in *Rumsfeld*. Some compelled inclusion of directional information in a list of pointers, incidental to a nondiscrimination rule, is constitutionally permissible, *Rumsfeld* holds. Compelled inclusion of replies to criticism is constitutionally impermissible. And in between there will doubtless be some close cases.

#### ***D. Viewpoint-Neutrality Mandates Must Themselves Be Viewpoint-Neutral***

##### **1. Forbidden: Viewpoint discrimination among particular speakers**

Of course, there are limits to what the government can do here. First, any right of access for the public has to be viewpoint-neutral (though, as in *Rumsfeld*, a right of access can prefer governmental speakers over other speakers). In *PruneYard*, for instance, the Court stressed that “no specific message is dictated by the State to be displayed on appellants’ property. There consequently is no danger of governmental discrimination for or against a particular message.”<sup>257</sup> The plurality opinion in

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<sup>256</sup> 547 U.S. at 63 (discussing *Miami Herald*, 418 U.S. at 258).

<sup>257</sup> *PruneYard*, 447 U.S. at 87.

*Pacific Gas & Electric Co. v. Public Utilities Commission* echoed this.<sup>258</sup> Thus, for instance, if the government requires platforms to allow all speakers, it can't exclude from that protection pro-terrorist speakers or racist speakers or anti-police speakers.<sup>259</sup>

This might prove to be a poison pill that would keep some legislators from supporting common carrier mandates. Better to leave platforms free to pick and choose what to include, the legislators might think, than to create a law that benefits Nazis or ISIS supporters. Yet again this is a familiar feature of common carrier status: The price of requiring phone companies or delivery companies to serve all customers is that they will have to serve even those customers who seek to spread evil ideas. Legislators have accepted that as to other common carriage obligations; they might be willing to accept it here as well.

It's possible, though, that the government might be allowed to impose some compelled hosting requirements that are viewpoint-neutral but content-based. The Massachusetts and Washington high courts, for instance, have held that private shopping malls must allow people to solicit signatures for initiatives, referenda,<sup>260</sup> and candidate nominating petitions<sup>261</sup>—yet the Washington court held that they need not equally allow other speakers or even other signature gatherers, and the Massachusetts court left open that question.<sup>262</sup> Though the courts didn't discuss the content discrimination issue expressly, they appeared to be open to the view that

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<sup>258</sup> 475 U.S. 1, 28 (1986).

<sup>259</sup> See, e.g., Online Freedom and Viewpoint Diversity Act, S. 4534, 116th Cong., sec. 2(1)(b)(II) (2020) (exempting from the common-carrier-like requirement speech “promoting self-harm” or “promoting terrorism”); Online Content Policy Modernization Act, S. 4632, 116th Cong., sec. 201(B)(i)(II) (same).

Of course, *Rumsfeld v. FAIR* held that the law may compel universities to selectively allow access to military recruiters, without compelling them to allow access to critics of military recruitment. For a discussion of how this fits with the Court's generally viewpoint-neutrality mandate for compelled access, see Volokh, *The Law of Compelled Speech*, *supra* note 162, at 373–75.

<sup>260</sup> *Batchelder v. Allied Stores Int'l, Inc.*, 445 N.E.2d 590 (Mass. 1983); *Walmart, Inc. v. Progressive Campaigns, Inc.*, 989 P.2d 524, 528 (Wash. 1999).

<sup>261</sup> *Glovsky v. Roche Bros. Supermarkets*, 17 N.E.3d 1026 (Mass. 2014).

<sup>262</sup> *Walmart*, 989 P.2d at 528 (citing *Southcenter Joint Venture v. Nat'l Democratic Pol'y Comm.*, 780 P.2d 1282, 1290 (Wash. 1989)); *Glovsky*, 17 N.E.3d at 1030 n.4.

some broad categories of speech can be more protected than others.

Likewise, federal law protects labor-related speech (for or against unions) in private workplaces against private employer and union retaliation, without protecting other speech.<sup>263</sup> The California Supreme Court concluded that a similar California statute allowing labor-related picketing on private property (but not other picketing) was constitutional,<sup>264</sup> though the D.C. Circuit had taken the opposite view.<sup>265</sup> Federal broadcasting regulations (which, to be sure, are subject to the more relaxed First Amendment scrutiny applicable to broadcasting) require broadcasters to sell space to candidates for office;<sup>266</sup> this speaker-based restriction is content-based, because it is justified by a desire to promote speech of a certain content—candidates’ explanations of why they should be elected.<sup>267</sup>

And these content-based but viewpoint-neutral protections against ejection from private property are a special case of a broader range of content-based but viewpoint-neutral protections against private action. Various state statutes, for instance, ban employers from punishing their employees for “political activity,”<sup>268</sup> which protects only political speech. (Some protect “espousal of a candidate or a cause” but not speech unrelated to some social or political cause,<sup>269</sup> and some protect only speech related to elections.<sup>270</sup>) Other statutes protect whistleblowers reporting violations of various laws, but not other speakers.<sup>271</sup> I’m inclined to think

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<sup>263</sup> 29 U.S.C. §§ 157, 158(a)(1), 158(a)(3), 158(b)(1)(A), 158(b)(2); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803, 805 (1945); *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 204 (1978).

<sup>264</sup> *Ralphs Grocery Co. v. United Food & Com. Workers Union Loc. 8*, 290 P.3d 1116 (Cal. 2012).

<sup>265</sup> *Walmart Foods v. NLRB*, 354 F.3d 870, 874–75 (D.C. Cir. 2004).

<sup>266</sup> 47 U.S.C. §§ 312(a)(7), 315(b).

<sup>267</sup> *Cf. Reed v. Town of Gilbert*, 576 U.S. 155, 157 (2015) (“laws favoring some speakers over others” are treated as content-based “when the legislature’s speaker preference reflects a content preference” (citation and internal quotation marks omitted)).

<sup>268</sup> See Eugene Volokh, *Private Employees’ Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295 (2012).

<sup>269</sup> *Id.* at 313.

<sup>270</sup> *Id.* at 326.

<sup>271</sup> See, e.g., 29 U.S.C. § 660(c) (OSHA violations); 18 U.S.C. § 1514A(a) (securities law violations); 42 U.S.C. § 2000e-3(a) (employment discrimination law violations).

such content-based speech *protections* against private restriction are generally constitutional if they are viewpoint-neutral, even though content-based speech *restrictions* imposed by the government are generally unconstitutional.

## 2. Not forbidden: Legislators' concern about supposed discrimination against particular viewpoints

Of course, many calls for common carrier treatment arise from concerns that the platforms are suppressing particular views. Today, the concern is mostly about conservative views, though some Socialists and others on the Left have also argued that their views are being disproportionately suppressed,<sup>272</sup> and some have claimed that certain anti-racist messages are routinely blocked, too.<sup>273</sup> As a result, it is often conservative legislators who promote such proposals, though so have some prominent liberal legal scholars.<sup>274</sup>

But of course that's true of many sorts of regulations. The ban on residential picketing upheld in *Frisby v. Schultz*, for instance, was enacted in response to anti-abortion protesters picketing the home of a doctor who performed abortions.<sup>275</sup> Human nature being what it is, it seems likely that at least some who supported the ban did so in part because they disapproved of the anti-abortion position, or at least of the militant branches of the anti-abortion movement.<sup>276</sup>

Of course, others may have supported the ban because they disapproved of residential picketing regardless of the message. And for many, the motivations were likely a mix: People often most easily notice the non-viewpoint-related harms of speech (such as its intrusion on residential privacy, regardless of its message) in the

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<sup>272</sup> See *supra* note 56.

<sup>273</sup> See, e.g., Jessica Guynn, *Facebook While Black: Activists Say They Are Unfairly Censored, Call It Getting 'Zucked,'* USA TODAY, May 1, 2019, at 1B.

<sup>274</sup> See *supra* text accompanying notes 48 & 52–53.

<sup>275</sup> 487 U.S. 474, 476 (1988).

<sup>276</sup> Even if you think the council members and their constituents in Brookfield, Wisconsin (the Milwaukee suburb from which *Frisby* came) were likely not deeply hostile to the viewpoint of the picketers, and only objected to their mode of expression, similar ordinances may of course be enacted in strongly pro-abortion-rights towns as well. See, e.g., Tony Perry, *Lawmakers Target Anti-Abortion Tactic*, L.A. TIMES, May 10, 1993, at A3 (discussing similar ordinances enacted in various California towns).



speech of their political adversaries, even though they would subconsciously downplay such harms if the speech came from their friends. Yet the Court upheld the law as a content-neutral restriction, despite its having been prompted by speech of a particular sort.

The Court confronted this directly in *Hill v. Colorado*, where it treated as content-neutral a restriction on approaching people within eight feet outside medical facilities, which also stemmed from speech by anti-abortion advocates:

[T]he contention that a statute is “viewpoint based” simply because its enactment was motivated by the conduct of the partisans on one side of a debate is without support. The antipicketing ordinance upheld in *Frisby v. Schultz* . . . was obviously enacted in response to the activities of antiabortion protesters who wanted to protest at the home of a particular doctor to persuade him and others that they viewed his practice of performing abortions to be murder. We nonetheless summarily concluded that the statute was content neutral.<sup>277</sup>

Likewise, in *McCullen v. Coakley*, the Court held that an ordinance didn’t become viewpoint-based even when it restricted only speech outside abortion clinics, and thus obviously affected one viewpoint more than others:

It is true, of course, that by limiting the buffer zones to abortion clinics, the Act has the “inevitable effect” of restricting abortion-related speech more than speech on other subjects. But a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics. On the contrary, “[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.”<sup>278</sup>

And this makes sense. Law professors can talk dispassionately and abstractly about what sorts of content-neutral speech restrictions are needed to protect residential privacy, the ability to use health care facilities without undue difficulty, or the rights of citizens not to have their speech unduly trammled by powerful corporations. Indeed it’s good practice for us law professors to consider how these restrictions would affect the wide range of viewpoints to which they would likely be

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<sup>277</sup> 530 U.S. 703, 724–25 (2000) (citations omitted). I think the ordinance in *Hill* might well be properly seen as content-based for other reasons, see *id.* at 742–43 (Scalia, J., dissenting), but I think the Court was right to conclude that it wasn’t content-based “simply because its enactment was motivated by the conduct of the partisans on one side of a debate.”

<sup>278</sup> *McCullen v. Coakley*, 573 U.S. 464, 480 (2014) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

applied in the decades to come, and to try as best we can to step behind the “veil of ignorance” in evaluating their merits.

But in the real political world, many such proposals are not enacted just with an eye towards the hypothetical future. They are often prompted by particular actions performed by actors with a particular ideological perspective—anti-abortion protesters, Westboro Baptist Church funeral picketers,<sup>279</sup> corporate contributors to election campaigns,<sup>280</sup> anti-globalization protesters,<sup>281</sup> and more. Yet so long as the restriction is facially neutral and seems focused on the noncommunicative effects of the speech (such as intrusion on residential privacy, danger of quid pro quo corruption, or potential for violence), it is treated as content-neutral.

The same applies to laws limiting viewpoint discrimination by social media. Today, such laws might end up predominantly benefiting conservative speakers, but they may also benefit Socialist or other left-radical speakers—and in the future, they may benefit other speakers who may run afoul of whatever restrictions social media corporations may later impose. (Wealthy business corporations, after all, are hardly certain to always take the side of the Left; one can imagine them using their power some day against speakers who are anti-capitalist or for that matter just anti-Big-Tech.)<sup>282</sup>

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<sup>279</sup> See *Phelps-Roper v. City of Manchester*, 697 F.3d 678 (8th Cir. 2012) (en banc) (upholding a restriction on such picketing); *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008) (same). “[T]he ‘plain meaning of the text controls, and the legislature’s specific motivation for passing a law is not relevant, so long as the provision is neutral on its face.’” 697 F.3d at 688 (quoting *Phelps-Roper v. Nixon*, 545 F.3d 685, 691 (8th Cir. 2008), *overruled on other grounds by Phelps-Roper v. City of Manchester*).

<sup>280</sup> *FEC v. Beaumont*, 539 U.S. 146, 152 (2003) (upholding ban on direct contributions by corporations to candidate campaigns). *Citizens United v. FEC* struck down a ban on independent corporate expenditures, but didn’t reconsider the constitutionality of the ban on direct corporate contributions. 558 U.S. 310, 358–59 (2010).

<sup>281</sup> *Menotti v. City of Seattle*, 409 F.3d 1113, 1128–29 (9th Cir. 2005).

<sup>282</sup> I thus disagree with *NetChoice, LLC v. Moody*, No. 4:21CV220-RH-MAF, 2021 WL 2690876, \*10 (N.D. Fla. June 30, 2021), which reasoned that:

The plaintiffs assert, too, with substantial factual support, that the actual motivation for this legislation was hostility to the social media platforms’ perceived liberal viewpoint. Thus, for example, the Governor’s signing statement quoted the bill’s sponsor in the House of Representatives: “Day in and day out, our freedom of speech as conservatives is

The laws target a particular harm, though we can debate how much of a harm it is: they tackle large social media corporations' use of economic power to unduly influence political debate. They do so by equally protecting all speakers' viewpoints. That is true even if some of those viewpoints may be seen as practically needing less protection right now (though they might need such protection in the future), and even if the laws' supporters were motivated in part by the normal political desire to protect their political friends.

#### *E. The General Unconstitutionality of Compelled Recommendations*

Social media platforms, of course, provide more than just a way for readers to read speakers whom they choose to read (whether by going to a page or subscribing to a feed). They also, in effect, recommend new material to readers, for instance under "What's happening" or "Who to follow" in the right sidebar on Twitter; on the front page of YouTube; and much more. This is even more clear for Facebook's news feeds or Google News.<sup>283</sup>

Now this, I think, is indeed the platforms' own speech, and the government may not tell the platforms how to compose it.<sup>284</sup> If they want to recommend "Who

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under attack by the 'big tech' oligarchs in Silicon Valley. But in Florida, we said this egregious example of biased silencing will not be tolerated." Similarly, in another passage quoted by the Governor, the Lieutenant Governor said, "What we've been seeing across the U.S. is an effort to silence, intimidate, and wipe out dissenting voices by the leftist media and big corporations. . . . Thankfully in Florida we have a Governor that fights against big tech oligarchs that contrive, manipulate, and censor if you voice views that run contrary to their radical leftist narrative." This viewpoint-based motivation, without more, subjects the legislation to strict scrutiny, root and branch.

See also Rozenshtein, *supra* note 143, at 416–17 (agreeing with the court on this). A law banning residential picketing wouldn't be rendered viewpoint-based simply because its backers were especially incensed by anti-abortion residential picketers, or talked about how "day in and day out, our residential privacy is under attack by anti-abortion fanatics." That the legislators' worries about residential privacy, which lead to a general residential picketing ban, may have been prompted by anti-abortion picketers doesn't render that general residential picketing ban viewpoint-based. Likewise, that the legislators' worries about platforms' "censor[ing]" and "silenc[ing]" users are prompted by perceived anti-conservative restrictions doesn't render a general restriction on such platform "censorship" viewpoint-based.

<sup>283</sup> See Langvardt, *supra* note 39, at 331.

<sup>284</sup> See *supra* Part II.E. This is one of the reasons a federal court struck down Florida's social media access mandates: "[T]he statutes compel the platforms to change their own speech in other

to follow” based on who expresses views that the platforms like, they have to be free to do that—just as the shopping malls in *PruneYard*, the cable operators in *Turner*, and the universities in *Rumsfeld* remained free to choose which speakers or cable channels or recruiters to specially promote. And that remains so even if the decisions are made in part by algorithms; I have made that argument as to search engine results, and I think the same is true for social media platform recommendations.<sup>285</sup>

### F. The Conversation Management Function

The closest call, when it comes to the compelled speech doctrine, has to do with platforms’ decisions involved in managing conversations, for instance Facebook’s, Twitter’s, or YouTube’s choices about which comments to allow on other people’s posts or pages. This sort of management is often protected by the First Amendment. In *Hurley*, the parade case, the Court noted that,

Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent’s expression in the Council’s eyes comports with what merits celebration on that day.<sup>286</sup>

The same is true for many offline conversations. Teachers shape conversations not just through the questions they ask, but through the rules they set for student participation, and through occasionally declining to call on a student who had violated the rules (or had just talked too much). Conference moderators shape Q & A exchanges by cutting off questioners who are rude or who go on too long or who orate instead of asking questions. They may not be trying to promote particular messages of their own, but “a narrow, succinctly articulable message is not a condition of

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respects, including, for example, by dictating how the platforms may arrange speech on their sites. This is a far greater burden on the platforms’ own speech than was involved in *FAIR* or *PruneYard*.” *NetChoice*, 2021 WL 2690876, at \*9 (N.D. Fla. June 30, 2021).

<sup>285</sup> Eugene Volokh & Donald M. Falk, *First Amendment Protection for Search Engine Results*, 8 J.L. ECON. & POL. 883 (2012). I cowrote that article as a paper commissioned by Google, but I endorse those views wearing my academic hat and not just wearing my lawyer hat. *But see* Langvardt, *supra* note 39, at 332 (suggesting that even the recommendation function might be properly regulated); James Grimmelman, *Speech Engines*, 98 MINN. L. REV. 868, 950 (2014) (arguing for a model that focuses on whether the search engines is loyally advising its users).

<sup>286</sup> *Hurley*, 515 U.S. at 574.

constitutional protection.”<sup>287</sup>

My Twitter feed or my Facebook page is pretty much an “individual, unrelated segment[] that happen[s] to be transmitted together” with others’ feeds and pages on Twitter and Facebook servers “for individual selection by members of the audience.”<sup>288</sup> Such members of the audience view my feed and your feed and someone else’s feed as separate items that they have individually selected to follow or visit.

But my comments on your Twitter feed or Facebook page don’t just “happen to be transmitted together” with others’ comments on the same material: They are consumed by readers (including both you and your other readers) together, as part of a conversation. Editorial judgments whether to remove or allow posts can help influence whether it’s a polite conversation or a rude one—and if the conversation is polite, that will usually encourage more people to participate in it. That’s true of editorial judgments by the operator of a particular Facebook page or Twitter feed. But it also seems to be true if the judgments are made by the platforms, which may want to shape such coherent, interactive conversations as well.

I thus tentatively think that barring platforms from editing will unconstitutionally “interfere[] with [the platform’s] desired message,” by “alter[ing] the expressive content” of the conversations that they are seeking to create.<sup>289</sup> A curated conversation will no longer be a form of speech that the platform can legally provide.

Now of course some degree of conversation takes place even among separate feeds—just as the speech in *PruneYard* or *Rumsfeld* could have created a conversation. Passersby who receive a leaflet or who are asked to sign a petition could start a discussion or an argument with the speaker, and others could join in. Indeed, such speech at a mall could lead to organized counterspeech; and, as noted above, military recruiting on university campuses led to plenty of “responsive speech”:

[S]peech with which the law schools disagree [has] resulted in, according to the record, hundreds (if not thousands) of instances of responsive speech by members of the law school communities (administrators, faculty, and students), including various

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<sup>287</sup> *Id.* at 569; see generally Volokh, *Freedom of Speech in Cyberspace from the Listener’s Perspective*, *supra* note 127, at 385–98.

<sup>288</sup> *Hurley*, 515 U.S. at 576.

<sup>289</sup> *Rumsfeld*, 547 U.S. at 63–64.

broadcast e-mails by law school administrators to their communities, posters in protest of military recruiter visits, and open fora held to “ameliorate” the effects of forced on-campus speech by military recruiters.<sup>290</sup>

Nonetheless, the Court has sharply distinguished the hosting cases, like *PruneYard* and *Rumsfeld*, from the coherent speech product cases, like *Hurley*. Platforms’ decisions not to host speech strike me as quite close to the decisions not to host in *PruneYard* and *Rumsfeld*. Platforms’ decisions about what to allow in a comment thread seem closer to parade organizers’ decisions about what to allow in a parade.

### III. COMMON CARRIER STATUS AS QUID PRO QUO FOR § 230(C)(1) IMMUNITY

For all these reasons, I think Congress could categorically treat platforms as common carriers, at least as to their hosting function. But Congress could also constitutionally give platforms two options as to each of their functions:

- (1) claim common carrier status, which will let them be like phone companies, immune from liability but also required to host all viewpoints, or
- (2) be distributors like bookstores, free to pick and choose what to host but subject to liability (at least on a notice-and-takedown basis).<sup>291</sup>

A platform could then, for instance, choose to be a common carrier as to hosting, but as a distributor as to its recommendation function—or, if it prefers, a distributor as to all its functions.

Indeed, this would just return the law to something close to the pre-§ 230 common-law rules, as modified by the First Amendment protections developed starting with *New York Times v. Sullivan*. Historically, American law has divided operators of communications systems into three categories—publishers,<sup>292</sup> distributors,<sup>293</sup> and conduits<sup>294</sup>—and has set up different standards of liability for each:

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<sup>290</sup> 390 F.3d 219, 239 (3d Cir. 2004), *rev’d*, 547 U.S. 47 (2006).

<sup>291</sup> *Cf.* Tushnet, *supra* note 55, at 988.

<sup>292</sup> RESTATEMENT (SECOND) OF TORTS § 578 (1976).

<sup>293</sup> *Id.* § 581.

<sup>294</sup> *Id.* cmt. b; *Anderson v. New York Tel. Co.*, 320 N.E.2d 647 (N.Y. 1974).

Class	Examples	Rights	Liability
Publishers	Newspapers, magazines, and broadcasters, which themselves print or broadcast material submitted by others (and by their own employees).	Free to choose what to include.	Fully liable for material they include, as for their own speech. <sup>295</sup>
Distributors	Bookstores, newsstands, and libraries, which distribute copies printed by others; also property owners on whose property people post things. <sup>296</sup>	Free to choose what to distribute.	Liable on a notice-and-takedown basis. <sup>297</sup>
Conduits	Telephone companies, cities on whose sidewalks people demonstrate, or broadcasters running candidate ads that they are required to carry.	Mostly forbidden from controlling what's said on their property. <sup>298</sup>	Not liable at all. <sup>299</sup>

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<sup>295</sup> A newspaper, for instance, can be sued for libel in a letter to the editor. *See id.* In practice, there is some difference between liability for third parties' speech and for the company's own—a newspaper would be more likely to have a culpable mental state as to the words of its own employees. But, still, publishers are pretty broadly liable, and have to be careful in choosing what to publish.

<sup>296</sup> *Hellar v. Bianco*, 111 Cal. App. 2d 424, 425 (1952) (dealing with "libelous matter [written on a tavern restroom wall] indicating that appellant was an unchaste woman").

<sup>297</sup> A bookstore, for instance, isn't expected to have vetted every book on its shelves, the way that a newspaper is expected to vet the letters it published. But once it learns that a specific book included some specific likely libelous material, it can be liable if it kept selling the book. *See id.* § 581 cmt. e; *Janklow v. Viking Press*, 378 N.W.2d 875, 881 (S.D. 1985).

<sup>298</sup> Phone companies are common carriers. Cities are generally barred by the First Amendment from controlling what demonstrators say. Federal law requires broadcasters to carry candidate ads unedited. 47 U.S.C. § 315(a). New York's high court likewise adopted conduit immunity in 1999 for e-mail systems, even apart from § 230; though e-mail services are not legally forbidden from excluding certain messages based on viewpoint, the court stressed that their "role in transmitting e-mail is akin to that of a telephone company, which one neither wants nor expects to superintend the content of its subscribers' conversations." *Lunney v. Prodigy Servs.*, 94 N.Y.2d 242, 249 (1999).

<sup>299</sup> Even if a phone company learns that an answering machine contains a libelous outgoing message, and doesn't cancel the owner's phone service, it can't be sued for libel. *See Anderson v. N.Y. Tel. Co.* 320 N.Y.2d 746 (1974); RESTATEMENT (SECOND) OF TORTS § 612 & cmt. g. A city isn't liable for material on signs that someone carries on city sidewalks (though a bar could be liable once

The two pre-§ 230 internet libel decisions, *Cubby v. Compuserve, Inc.* and *Stratton Oakmont, Inc. v. Prodigy Services Co.*, seemed to roughly distinguish services that edited—which were treated as publishers and were thus potentially legally liable for others’ material that they didn’t edit out—from services that didn’t edit, which were treated as distributors and were thus at least largely immune.<sup>300</sup> The *Cubby / Stratton Oakmont* results encouraged providers not to restrict speech in their chat rooms and other public-facing portions of their service: If they were to block or remove vulgarity, pornography, or even material they thought was libelous or threatening, they would lose their protection as distributors, and would become potentially strictly liable for material their users posted. At the time, that looked like it would be ruinous for many service providers (perhaps for all but the unimaginably wealthy, will-surely-dominate-forever America Online).

Congress, then, chose to reject the *Cubby / Stratton Oakmont* approach, and instead chose to deliberately provide conduit immunity to all entities—including those that, unlike traditional conduits, could and did select what user content to keep up. It did so precisely to encourage (though without requiring) conduits to block or remove certain speech, by removing a disincentive (loss of immunity) that would have otherwise come with such selectivity. It gave them this flexibility regardless of how the entities exercised this function. And Congress chose conduit liability (categorical immunity) rather than distributor liability (notice-and-

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it learned of libelous material on its walls). A broadcaster can’t be liable for defamatory material in a candidate ad. *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 528–29, 531 (1958).

<sup>300</sup> *Cubby* held that ISPs (such as Compuserve) were entitled to be treated as distributors, not publishers. *Stratton Oakmont* held that only ISPs that exercised no editorial control (such as Compuserve) would get distributor treatment, and service providers that exercised some editorial control (such as Prodigy)—for instance, by removing vulgarities—would be treated as publishers. *Cubby v. Compuserve*, 776 F. Supp. 135, 140–41 (S.D.N.Y. 1991); *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at \*4 (N.Y. Sup. Ct. May 24, 1996).

Neither case considered the possibility that an ISP could actually be neither a publisher nor a distributor but a categorically immune conduit, perhaps because at the time only entities that had a legal obligation not to edit were treated as conduits. And *Stratton Oakmont*’s conclusion that Prodigy was a publisher because it “actively utilize[d] technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and ‘bad taste’” is inconsistent with the fact that distributors (such as bookstores) have always had the power to select what to distribute (and what to stop distributing), without losing the limited protection that distributor liability offered. *Id.* at \*4.



takedown immunity). Online sites thus had the best of both worlds: the selection power of distributors, but the liability of conduits.<sup>301</sup>

But that was Congress's decision in 1996. It's not set in stone, and not constitutionally mandated. Publisher and distributor liability is consistent with the First Amendment, despite the chilling effect it might sometimes create, so long as it complies with the *New York Times v. Sullivan* / *Gertz v. Robert Welch* rules immunizing honest mistakes (or sometimes just reasonable mistakes).

If Congress wants to return to a world where social media immunity for libel (and other torts) turns on whether social media platforms act as common carriers, it can. I'm not at all sure that would be wise, especially since immunity from tort liability has helped many small and midsize online platforms thrive, and those platforms' editorial power has often been valuable. But it does reflect an important practical reality: Immunity from tort liability is what also helped the major platforms become so big, powerful, and capable of influencing public debate—thus helping create the problems to which common-carrier-like treatment might be a solution.<sup>302</sup>

This sort of conditional immunity might also apply to platforms' recommendation and conversation management functions. (Again, I'm not certain that such conditional immunity would be a good idea, but here I'm speaking only of the constitutional question.) As I mentioned, platforms have a First Amendment right to choose what to recommend, just as newspapers have such a right. But it doesn't follow that they have complete First Amendment immunity from (say) defamation

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<sup>301</sup> See Tushnet, *supra* note 55, at 1010 n.100 (distinguishing “equal” “treatment of privilege and liability” for traditional conduits like telephone companies from “disjoined” treatment for Internet intermediaries).

<sup>302</sup> Cf. Balkin, *supra* note 129, at 93 (suggesting that intermediary immunity for social media platforms could be conditioned “on accepting obligations of due process and transparency,” though concluding that it would be a bad idea to require viewpoint-neutral moderation). But see Eric Goldman, *Want to Kill Facebook and Google? Preserving Section 230 Is Your Best Hope*, BALKINIZATION (June 3, 2019), <https://perma.cc/3FKL-WN4V> (arguing that § 230(c)(1) immunity, by “reduc[ing] barriers to enter the online republishing marketplace,” “keeps the marketplace open for the next generation of startups that hope to usurp the current Internet giants”).

liability when they recommend something that proves to be libelous.<sup>303</sup> And Congress can offer this extra immunity, but offer it only as to recommendations or conversation management actions that operate in viewpoint-neutral ways.

Some such conditional benefits may violate the unconstitutional conditions doctrine. But I tentatively think that a narrowly crafted and viewpoint-neutral condition such as this one would be constitutional.

When the government offers speakers a benefit not mandated by the First Amendment, it can generally attach conditions to that benefit, so long as the speakers remain free to say what they want when they aren't using the benefit. Thus, for instance, the government may provide that charitable contributions to advocacy groups are tax-deductible, but only if those groups don't use such contributions for electioneering, so long as the groups remain free to engage in electioneering using non-tax-deductible funds.<sup>304</sup>

The government may set forth "conditions that define the limits of the government spending program—those that specify the activities [the government] wants to subsidize."<sup>305</sup> The conditions become unconstitutional only if they "seek to leverage funding to regulate speech outside the contours of the program itself."<sup>306</sup>

I think the same would apply to subsidies that come in the form of financially valuable immunity from tort law claims, and not just to subsidies in the form of financial grants or tax deductions. Congress can't say to a platform, "so long as *any*

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<sup>303</sup> Of course, they would have the immunity secured by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), for speech about public officials, public figures, and private figures (on matters of public concern), respectively. But even the strongest such immunity allows liability for speech conveyed with knowledge that it's false or likely false; it doesn't amount to categorical immunity regardless of mental state.

<sup>304</sup> *Regan v. Taxation with Representation of Wash.*, 461 U.S. 1983 (1997). This is generally done by allowing groups to set up two separate affiliates, a 501(c)(3) that takes tax-deductible contributions but doesn't electioneer, and a 501(c)(4) that electioneers (so long as supporting or opposing candidates isn't its primary activity) but doesn't take tax-deductible contributions. See IRS, *Operational Requirements: Endorsing Candidates for Public Office* (updated Dec. 8, 2020), <https://perma.cc/ZWX4-X8L6>.

<sup>305</sup> *Agency for Int'l Dev. v. All. for Open Soc'y Int'l*, 570 U.S. 205, 214 (2013).

<sup>306</sup> *Id.* at 214–15.

of your actions are immune under § 230(c)(1), you must accept restrictions on *all* your First-Amendment-protected activities, even if those don't take advantage of the immunity": That would be unconstitutionally "leverag[ing] funding to regulate speech outside the contours of the program." But it can say, for instance, "if you want § 230(c)(1) immunity for your decisions about which material to recommend—so that if you recommend something defamatory, for which you might be held liable under standard defamation principles, you would be immunized from such liability—that will only be available if you commit to providing recommendations in a viewpoint-neutral way."<sup>307</sup>

What, though, should be the consequence of a platform (1) claiming a modified § 230(c)(1) immunity for libel, (2) committing to viewpoint neutrality in its editing decisions as the price for such immunity, but then (3) breaking that commitment? I think it should be the risk of liability for viewpoint discrimination against the person they were discriminating against—but it should *not* be the forfeiture of libel immunity in lawsuits by entirely different people.

The downside of all antidiscrimination rules is that people will routinely (and often sincerely) claim that facially neutral decisions were really discriminatorily motivated. Say I post a comment on your platform, and you delete my comment for violating a viewpoint-neutral rule against vulgarities. I might suspect that you really deleted the comment because of the political statements in my post, and were using the vulgarity just as an excuse. Indeed, I might have some evidence that you haven't deleted some other comments that contain vulgarities—unsurprising, given that moderation systems are rarely perfect (even when they are genuinely viewpoint-neutral).

Any sort of moderation would thus pose *some* risk of litigation over alleged

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<sup>307</sup> Such a commitment could be manifested simply by the platform's posting a notice on its page. An analogy might be the DMCA, 17 U.S.C. § 512(c)(2), which requires a service provider (including even an ordinary web site operator) that wants limited immunity from copyright liability for third-party posts to "mak[e] available through its service, including on its website in a location accessible to the public" certain information as a condition of such immunity. To be sure, this deals only with posting information, and not posting an acceptance of an obligation of viewpoint neutrality—the DMCA doesn't involve the quid pro quo I describe. But it shows how an immunity scheme can indicate what a site needs to do to claim the immunity.

viewpoint discrimination—just as any sort of firing or exclusion decision by employers or landlords or businesses covered by antidiscrimination rules poses some risk of litigation over alleged discrimination based on race, religion, sex, sexual orientation, political speech, other political activity,<sup>308</sup> and the like. Indeed, government entities that are bound by viewpoint discrimination prohibitions (such as the Patent and Trademark Office administering rules with regard to trademarks,<sup>309</sup> government agencies moderating comments on their social media accounts,<sup>310</sup> city councils administering public comment periods,<sup>311</sup> and the like) likewise have to face such risk of litigation.

So long as the possible loss is just damages for the wrongful deletion, which are likely to be modest, as well as the legal fees expended in litigating the matter, this chilling effect on even viewpoint-neutral moderation will likewise be modest. (The potential expense of litigation, after all, deters plaintiffs as well as prospective defendants.) But if a finding of viewpoint-discriminatory moderation risks forfeiting the § 230(c)(1) immunity for alleged libels, invasion of privacy, and the like—causes of action that could yield millions of dollars in damages—then all moderation will become extra risky.

Libel plaintiffs, including ones who haven't themselves been discriminated against by the platform, would dig hard for evidence that maybe the platform has discriminated against others, and thus lost the § 230(c)(1) immunity that is blocking the libel claim. Platforms might thus be quite reluctant to engage in any moderation, including moderation that is viewpoint-neutral but might be wrongly perceived as viewpoint-discriminatory. And the libel plaintiffs would get a needless windfall, winning their libel cases simply because other, unrelated, parties were supposedly victimized by viewpoint discrimination.

#### CONCLUSION

How should the law deal with large tech companies that use their power to

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<sup>308</sup> See Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, *supra* note 268 (noting the many jurisdictions that ban employment discrimination based on political speech or activity).

<sup>309</sup> *E.g.*, *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019).

<sup>310</sup> *E.g.*, *Davison v. Loudoun County Bd. of Supervisors*, 267 F. Supp. 3d 702 (E.D. Va. 2017).

<sup>311</sup> *E.g.*, *Norse v. City of Santa Cruz*, 629 F.3d 966 (9th Cir. 2010).

block certain viewpoints, as a means of influencing public debates throughout the nation? (By large, I mean companies such as Facebook, Google, and Amazon, the 5th, 4th, and 3rd largest American corporations by market capitalization, with valuations from \$1 trillion to \$1.7 trillion.<sup>312</sup>)

One solution would be to leave this to market forces and private property rights, allowing those companies to decide what user speech to allow on their platforms, disciplined only by their own judgment and the fear of loss of users. This may well be the right approach, which after all is how we predominantly ensure product quality and customer service in other areas. Absence of governmental regulation must always be one of the choices that we seriously consider.

A second possible solution would be to focus on structural changes, such as antitrust law.<sup>313</sup> Perhaps it's not good to have corporations as large as Amazon, which have yearly revenue that's greater than the yearly GNP of most countries (\$280 billion for Amazon in 2019,<sup>314</sup> comparable to the GNP of Bangladesh, Egypt, Chile, or, to cite a rich Western country, Finland<sup>315</sup>). Or perhaps it's specifically bad for such companies to have near-monopoly status in various important communications niches, as Facebook and Twitter do.<sup>316</sup> Maybe they should be required to provide interoperable access, to diminish the monopoly-producing advantages of network effects.<sup>317</sup>

A third possible solution would be to treat social media conduits—at least as to their hosting functions—much like we treat some other conduits, such as phone

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<sup>312</sup> *Largest American Companies by Market Capitalization* (as of July 1, 2021), <https://perma.cc/CHX9-KRSQ>. I set aside here the important question whether, if there is to be any regulation, it should be imposed only on particularly large platforms—*cf.* *City of Chicago v. Mayer*, 124 N.E. 842, 844 (Ill. 1919) (interpreting state common carrier statute as limited to those “carrying on a large and extensive business”)—or on platforms more generally. *See* Eric Goldman & Jess Miers, *Regulating Internet Services By Size*, COMPETITION POLICY INT’L (May 25, 2021), <https://perma.cc/YH4K-L9CN>; Rozenshtein, *supra* note 143, at 418–21 (discussing the large platforms’ market power as a basis for regulating them).

<sup>313</sup> *See, e.g.*, Balkin, *supra* note 129, at 91–92; *cf.* Keller, *supra* note 135, at 267–69.

<sup>314</sup> *Amazon*, FORTUNE: FORTUNE 500 (as of June 2, 2021), <https://perma.cc/KVE2-8Z6B>.

<sup>315</sup> These countries have populations of roughly 160, 100, 20, and 5 million, respectively.

<sup>316</sup> *See supra* note 118 and accompanying text.

<sup>317</sup> *See supra* note 135 and accompanying text.

companies and mail and package delivery services. Those conduits are often not even monopolies, in part because phone and mail services already provide interoperable access. But we limit their ability to pick and choose among customers, including based on customer viewpoint.

I'm not sure what the right answer is, but in this article I've tried to lay out some of the strongest arguments in favor of the third solution, so that we can better consider all our options.