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Jane R. Bambauer
University of Arizona, janebambauer@email.arizona.edu

James Rollins
University of Arizona, jamesrollins@email.arizona.edu

Vincent Yesue
University of Arizona, vincentyesue@email.arizona.edu

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Platforms: The First Amendment Misfits

JANE BAMBAUER*, JAMES ROLLINS**, AND VINCENT YESUE***

This Essay explains why previous First Amendment precedents that allowed government to require a private entity to host the speech of others have limited applicability to online platforms like Twitter and Facebook. Moreover, the backdrop of an open internet makes platforms sufficiently vulnerable to competition and responsive to "listener" preferences that the dominance of some firms like Facebook and Google is not really a chokepoint: aggressive changes to content curation will lead to user dissatisfaction and defection, whether those changes are made by the government or the companies themselves. As a result, there are no close analogies in First Amendment precedent for internet platforms.

We identify the similarities between social media platforms and more traditional venues for speech (like mail, malls, and television) but ultimately conclude there are critical differences that break the analogies. We then compare the role of social media platforms to basic internet service providers to better understand how the line between speech participants and mere conduits should be drawn in an online context. We find that First Amendment caselaw and the reasoning that flows through it would categorize platforms like Twitter and Facebook as speech participants. Next, we consider whether public perception of platforms standing in the role of a "public square" should significantly alter the First Amendment protections afforded to platforms, arguing that it should not. Finally, we argue that online platforms are their own free speech creature that deserve strong protection from government intervention in hosting and curation choices. However, they may be good targets for transparency requirements.

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** TechLaw Fellow, University of Arizona James E. Rogers College of Law.

*** TechLaw Fellow, University of Arizona James E. Rogers College of Law.

INTRODUCTION

When it comes to legal protections, online platforms are the darlings of a free speech world. Under Section 230 of the Communications Decency Act, they are completely protected from legal responsibility for publishing defamatory, harassing, or other illegal content, even where the authors or traditional newspaper publishers would not be. In this sense, they are treated like mere conduits who have no legal or moral responsibility for the content that they distribute.

And yet, unlike other conduits (such as telephone service or even broadband internet service), platforms are free to pick and choose between which authors and messages to host. Indeed, the dominant conception of Section 230 actually *encourages* platforms to do this sort of purging in order to help internet users avoid the toxic effects of illegal or lawful-but-awful content. Thus, under current law, platforms enjoy all the curatorial powers of traditional publisher and all the legal immunities of mere conduits. It's the best of both worlds, as far as the law goes.

Of course, public perception is another matter. Some Americans are upset that online platforms haven't done enough content moderation while others believe they are doing too much, and in a biased manner. Both of these perspectives have found their way to court.[1] And all were dismissed. But the states of Texas and Florida have passed laws constraining content moderation to some degree and are inching closer to a "must-carry" rule for online platforms. This Essay explains why previous First Amendment precedents that allowed government to require a private entity to host the speech of others have limited applicability to online platforms like Twitter and Facebook. Moreover, the backdrop of an open internet makes platforms sufficiently vulnerable to competition and responsive to "listener" preferences that the dominance of some firms like Facebook and Google is not really a chokepoint: aggressive changes to content curation will lead to user dissatisfaction and defection, whether those changes are made by the government or the companies themselves. As a result, there are no close analogies in First Amendment precedent for internet platforms.

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1. Constituents for Thoughtful Governance v. Twitter, Inc., No. CGC-20-583244 (Cal. Super. Ct. July, 13 2020) (not enough content removal); Rutenberg v. Twitter, Inc., No. 4:21-cv-00548-YGR (N.D. Cal. Apr. 9, 2021) (too much content removal); Newman v. Google LLC, No. 20-CV-04011-LHK, 2021 WL 2633423 (N.D. Cal. June 25, 2021) (content removal performed in a racially biased manner).

This Essay finds practical and doctrinal limits to analogizing content moderation practices to other contexts with more established First Amendment precedent. We identify the similarities between social media platforms and more traditional venues for speech (like mail, malls, and television) in Part I but explain their critical differences in Part II. In Part III, we compare the role of social media platforms to basic internet service providers (ISPs) to better understand how the line between speech participants and mere conduits should be drawn in an online context. We find that First Amendment caselaw and the reasoning that flows through it would categorize platforms like Twitter and Facebook as speech participants. In Part IV, we consider whether public perception of platforms standing in the role of a "public square" should significantly alter the First Amendment protections afforded to platforms, arguing that it should not (for similar reasons as the critical differences we noted in Part II—namely, that online forums cannot dominate and lock in participants.) In Part V, we argue that online platforms are their own free speech creature that deserve strong protection from government intervention in hosting and curation choices, but also that platforms may be good targets for transparency requirements.

I. (SUPERFICIAL) SIMILARITIES BETWEEN PLATFORMS AND THE DOMINANT INFORMATION CURATORS OF THE PAST

The federal government has a long history of regulating curators of information. Before the enactment of Section 230,[2] the government often used free speech theory as a reason to intervene in the activities of dominant information curators, including the U.S. Post Office, newspapers, broadcast and cable television providers, and private property owners. This Part explores the government's justifications for significantly regulating these curators, and it highlights the features they share with major internet platforms today. However, as we will explain in later Parts, these similarities are more superficial than they first appear.

We begin with the first user-generated social media: mail. The U.S. Postal Service (USPS) was "premised on the notion that a communications network was central to an educated populace."[3] Publishers' access to exclusive below-cost mailing rates, first established by the 1792 Post Office Act,[4] became a flashpoint for First Amendment rights. In 1921, in the *Burleson* case, the Supreme Court upheld the exclusion of a socialist daily paper from low-cost second-class mailing prices on the grounds that the publication's anti-war statements constituted non-mailable matter under the Espionage Act.[5] The publisher argued that the exclusion infringed the company's right to free speech.[6] Asserting that the publisher's access to the second-

2. 47 U.S.C. § 230 (1996).

3. Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 HASTINGS L.J. 671, 687 (2007).

4. *Id.* at 692–93 (discussing the Congressional debates over reduced newspaper mailing rates and the "selective" vs. "general" admission of newspapers into the program).

5. United States *ex rel.* Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407, 408 (1921).

6. *Id.* at 409, 411.

class rates was a "privilege," the majority held that the Postmaster General could exclude the publisher indefinitely.[7]

But Justice Holmes, whose quotable dissenting opinions in this period would later transform American free speech law, found merit in the publisher's First Amendment argument. He noted that refusing second-class rate access to a newspaper made it cost prohibitive for that publication to distribute information as widely as other newspapers.[8] The dissent argued that the Postmaster General had conflated the Espionage Act, which punished publications for promoting unlawful content, with the Mail Classification Act, which set forth the requirements of a "newspaper" entitled to the second-class rate.[9] "The United States may give up the Post Office when it sees fit," said Holmes, "but while it carries it on[,] the use of the mails is almost as much a part of free speech as the right to use our tongues."[10]

The Court later adopted this reasoning in two cases expanding public access to information. In *Hannegan v. Esquire*, the Court held that the Postmaster General was without power to set standards for which mailable periodicals meet the standards of public good or welfare.[11] In *Blount v. Rizzi*, it held that a statute prohibiting the mailing of letters containing materials deemed by the Postmaster General as "obscene" violated appellees' First Amendment rights to free speech and expression.[12] There, the Court emphasized that judicial participation in any censorship was required, and the burden was on the government to initiate that procedure.[13]

The analogy to modern platforms is irresistible. Media censorship by modern platforms shares many features with the *Burleson*-era censorship by the post office. Without access to online publication, publishers have little hope of reaching a sizable audience.[14] Online platforms have administrative procedures for removing users' posts based on their rules and terms of service.[15] Many include clauses prohibiting loosely-defined offensive or inappropriate content; this is arguably similar to the Postmaster General deeming which publications served the "public good."[16] And

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7. *Id.* at 416.
8. *Id.* at 437–38 (Holmes, J., dissenting).
9. *See id.* at 425–27, 437 (first Brandeis, J., dissenting; then Holmes, J., dissenting).
10. *Id.* at 437 (Holmes, J., dissenting).
11. 327 U.S. 146, 156–57 (1946).
12. 400 U.S. 410, 416 (1971).
13. *Id.* at 417–18.
14. *See* Elisa Shearer, *Social Media Outpaces Print Newspapers in the U.S. as a News Source*, PEW RSCH. CTR. (Dec. 10, 2018), https://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/ [https://perma.cc/KZ87-K4W4].
15. *See, e.g.*, *App Store Review Guidelines*, APPLE, https://developer.apple.com/app-store/review/guidelines/#legal [https://perma.cc/TVC2-MKF5] (June 7, 2021) (companies that host applications for smartphones); *The Twitter Rules*, TWITTER, https://help.twitter.com/en/rules-and-policies/twitter-rules [https://perma.cc/9ZUU-5ML6] (social media companies); *AWS Acceptable Use Policy*, AMAZON, https://aws.amazon.com/aup/ [https://perma.cc/B9G5-LF57] (July 1, 2021) (cloud hosting services).
16. *See Recognize and Report Spam, Inappropriate, and Abusive Content*, LINKEDIN, https://www.linkedin.com/help/linkedin/answer/37822 [https://perma.cc/CKV8-4GGE] (July

while users can appeal a deleted post or suspended account, repeated offenses can lead to a permanent ban.[17] Moreover, currently there are no remedies afforded in these companies' terms of use agreements or recognized by courts despite numerous attempts by suspended users to get courts and legislatures to create one.[18]

The Court has also approved of federal intervention through antitrust law to prevent coordinated censorship across newspapers. When the Associated Press (AP) allowed in its by-laws the exclusion of news delivery to non-members and the blockage of new members by competitors, the Court upheld the district court's partial grant of summary judgment enjoining the AP from enforcing them.[19] The AP argued that applying the Sherman Act to the association violated the association's First Amendment rights.[20] The Court rejected this argument, stating that the government had the power to protect publishers' freedom to publish from private interests because of the overriding principle that the public welfare is best served by the free flow of information from opposing viewpoints.[21] "Freedom of the press from governmental interference," said the Court, "does not sanction repression of that freedom by private interests."[22] The issues in *Associated Press* have modern relevance in light of the debates about the dominant market position of the social media firms that were responsible for the "Great Deplatforming"—that is, the decision to suspend Donald Trump's social media accounts.[23]

The government has also regulated content moderation by broadcast companies. In *Red Lion Broadcasting Co. v. FCC*, the Supreme Court upheld regulations

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2021); *About Offensive Content*, TWITTER, https://help.twitter.com/en/safety-and-security/offensive-tweets-and-content [https://perma.cc/7XGK-5ZGK].

17. *Account/Content Restricted or Removed*, LINKEDIN, https://www.linkedin.com/help/linkedin/answer/82934 [https://perma.cc/3ALD-NPUY] (July 2021); *Our Approach to Policy Development and Enforcement Philosophy*, TWITTER, https://help.twitter.com/en/rules-and-policies/enforcement-philosophy [https://perma.cc/A7HL-22J5].

18. *See* Eric Goldman, *Comments on Trump's Lawsuits Against YouTube, Facebook, and Twitter*, TECH. & MKTG. L. BLOG (July 12, 2021), https://blog.ericgoldman.org/archives/2021/07/comments-on-trumps-lawsuits-against-youtube-facebook-and-twitter.htm [https://perma.cc/3RXV-43YN] (Trump cases against Twitter, Facebook, YouTube); Mitchell Ferman, *Twitter's Lawsuit Against Texas Attorney General Ken Paxton Tossed by Federal Judge*, TEX. TRIB. (May 11, 2021 8:00 PM), https://www.texastribune.org/2021/05/11/twitter-texas-ken-paxton/ [https://perma.cc/38S3-YB9B] (courts striking down Florida law).

19. Associated Press v. United States, 326 U.S. 1, 23 (1945); *see also* United States v. Associated Press, 52 F. Supp. 362, 375 (S.D.N.Y. 1943) (describing the grant of summary judgment).

20. *Associated Press*, 326 U.S. at 19–20.

21. *See id.* at 18–20.

22. *Id.* at 20.

23. *See, e.g.*, Erin Carroll, Anupam Chander, David Vladeck, & Hillary Brill, *Technology and Democracy After the "Great Deplatforming"*, GEO. L. SCH. (Jan. 29, 2021), https://www.facebook.com/events/240336104333480/?active_tab=discussion [https://perma.cc/ZP2N-3MSL]; Jane Bambauer, Genevieve Lakier & Adam White, *The First Amendment, Section 230, and Content Moderation*, ANTONIN SCALIA L. SCH. (March 3, 2021), https://masonlec.org/events/the-first-amendment-section-230-and-content-moderation/ [https://perma.cc/2GZQ-XLFP].

requiring broadcasters to give individuals and political candidates opportunities to respond to attacks and editorials carried on their broadcasts.[24] In so doing, the Court found that the Federal Communications Act of 1934 actually enhanced the freedoms of speech and press.[25] The Court borrowed from its reasoning in *Associated Press* and warned against giving station owners and networks the power to censor all views on public issues other than their own.[26] The Court based its decision on several factors, including a perceived scarcity in broadcast capabilities and, importantly, the government's role in allocating that scarce spectrum through licenses. The licensing process bolstered "the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views."[27] High entry costs for new competitors and the advantages afforded existing broadcasters—including confirmed habits of consumers, operational experience, and network affiliation—furthered the rationale for imposing requirements that existing broadcasters be fair and balanced.[28]

In the same vein, existing online platforms have a strategic advantage that could invite government regulation. A tech startup looking for a cloud computing vendor that provides networking, storage, and servers has relatively few options: the five largest cloud computing vendors own over 80% of the market share in this sector.[29] For social media companies, the concentration is even more pronounced: the five largest platforms own more than 98% of the market share, with Facebook alone accounting for nearly 70%.[30] While the scarcity in this context may not be a function of physical limitations, network "lock-in" effects may still create barriers to entry.[31] Although the practical importance of network effects in social networking markets is still a matter of live debate,[32] a small group of companies host most of the

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24. 395 U.S. 367 (1969).

25. *Id.* at 375.

26. *See id.* at 392.

27. *Id.* at 400.

28. *See id.*

29. *Cloud Computing Market Share, Market Size and Industry Growth Drivers, 2018-2024*, T4 LABS, https://www.t4.ai/industry/cloud-computing-market-share#:~:text=The%20leading%20vendor%20in%20the%20IaaS%20Cloud%20Computing%20Industry%20was,others%20with%2019.9%25%20market%20share [https://perma.cc/4297-2GAP] (Feb. 15, 2021). As of 2019, Amazon is the largest with a 45% market share, followed by Microsoft at 17.9% and Alibaba at 9.1%. *See id.* Some commentators advise startups to avoid using cloud computing vendors. *See The Three Infrastructure Mistakes Your Company Must Not Make*, FIRST ROUND REV., https://review.firstround.com/the-three-infrastructure-mistakes-your-company-must-not-make [https://perma.cc/3EF7-XUFQ]. However, content delivery networks might be a real bottleneck; a new social media platform would certainly need content delivery network services even if it can avoid cloud service providers.

30. *Social Media Market Share, Market Size and Industry Growth Drivers, 2018-2023*, T4 LABS (Jan. 23, 2021), https://www.t4.ai/industry/social-media-market-share#:~:text=The%20leading%20platform%20in%20the,with%202%25%20social%20media%20market [https://perma.cc/J24W-PMRW].

31. Tejvan Pettinger, *Network Effects – Definition and Examples*, ECON. HELP, https://www.economicshelp.org/blog/glossary/network-effects/ [https://perma.cc/2UMQ-HE8Q].

32. James C. Cooper, *Antitrust & Privacy*, GLOB. ANTITRUST INST. REP. ON THE DIGIT.

information produced and consumed by end users, and therefore wield significant power over the information environment. And because, as described above, these companies implement their own guidelines for removing content and banning users, such "moderation" may amount to little more than platforms bending to the demands of their most vocal users.[33]

Similar to broadcasting, governmental restrictions on cable networks have been upheld when such restrictions are content-neutral and promote low-cost access to a spectrum of information and opinions.[34] In *Turner*, the Court upheld sections of the Cable Television Consumer Protection and Competition Act of 1992 which required cable television networks to reserve a portion of channels to local broadcasters.[35] The Court clarified that these "must-carry" provisions did not discriminate against particular views or ideas, but simply put two types of content providers on more equal economic footing.[36]

There isn't enough data to determine whether platforms are biased against conservative or liberal voices.[37] At the very least, conservatives overwhelmingly feel they are the target of censorship, and a majority of Americans believe platforms censor political viewpoints they find objectionable.[38] After all, as discussed above, these companies have a dominant market share and set their own definitions of "offensive" or "misleading" content. However, while in cable television this prompted government regulation in the form of must-carry provisions, for online platforms there has been no action taken.

The right of individuals to receive a fair balance of information has been acknowledged even where private companies wholly own the land and community in which those individuals live. In *Marsh v. Alabama*, the Supreme Court affirmed

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ECON. 32, at 1189 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733752 [https://perma.cc/VH45-RTQ4]. One reason the impact of lock-in effects is difficult to gauge is because the "market" for social networking is poorly defined. Facebook, Twitter, YouTube, and TikTok have similarities, particularly in the sense of competing for users' time and attention, but they offer differentiated experiences, with some exceptions (e.g., Parler may simply be Twitter for Trump supporters). LinkedIn, GitHub, Substack, etc., are even more different. Moreover, while network effects may cause users to join or remain with one particular platform such as Facebook, there is relatively little that prevents the same user from joining and maintaining profiles on other platforms at the same time. This differs from the network effects of consumer goods with non-zero prices, which form the basis for the economic models of "network effects."

33. Andrew Marantz, *The Importance, and Incoherence, of Twitter's Trump Ban*, THE NEW YORKER (Jan. 15, 2021), https://www.newyorker.com/news/daily-comment/the-importance-and-incoherence-of-twitters-trump-ban [https://perma.cc/RG8F-4EZ2].

34. *See, e.g.*, Turner Broad. Sys. v. FCC, 520 U.S. 180 (1997).

35. Cable Television Consumer Protection and Competition Act, 47 U.S.C. § 609 (1992).

36. *Turner*, 520 U.S. at 185–86, 194.

37. *See* James Clayton, *Social Media: Is It Really Biased Against US Republicans?*, BBC (Oct. 27, 2020), https://www.bbc.com/news/technology-54698186 [https://perma.cc/37N9-RSGC].

38. Emily A. Vogels, Andrew Perrin, & Monica Anderson, *Most Americans Think Social Media Sites Censor Political Viewpoints*, PEW RSCH. CTR. (Aug. 17, 2020), https://www.pewresearch.org/internet/2020/08/19/most-americans-think-social-media-sites-censor-political-viewpoints/ [https://perma.cc/Q6P8-TYKZ].

the right of an individual to distribute religious pamphlets in the "business block" of a company-owned town.[39] The town's management requested the woman leave the town and, when she declined, arrested and charged her for criminal trespass.[40] The Supreme Court reversed her conviction and held that the State of Alabama could not enforce a trespass judgment against her, because such action infringed her First and Fourteenth Amendment freedom of press and religion.[41] In so doing, the Court reaffirmed that individuals' First Amendment rights occupy a "preferred position" over the rights of property owners.[42] "The more [a property owner] . . . opens up his property for use by the public," said the Court, "the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[43] The Court has upheld such limitations on property owners in much less extreme cases. Short of company towns, the Court has prohibited the use of trespass laws to remove individuals exercising their First Amendment rights on properties that serve as freely accessible community business centers.[44] And in *PruneYard*, the Supreme Court has recognized states' rights to interpret their own constitutions to require free speech access to private spaces like shopping malls, within reason.[45]

Thus, in the digital landscape, lawmakers and legal scholars point to these precedents to argue that internet platforms, too, are privately-owned public forums that should have affirmative obligations to provide a venue for free speech.[46] For example, Facebook—which began as a local networking site for Harvard students[47]—now averages 255 million monthly users in the United States and Canada alone.[48] More than half of Americans now get a substantial portion of their news from social media.[49] These companies have opened up their "property" (i.e., their servers and infrastructure) for all sorts of public discourse and activity. It stands to

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39. 326 U.S. 501, 507 (1946).

40. *Id.* at 503.

41. *Id.* at 508–09.

42. *Id.* at 509.

43. *Id.* at 506.

44. *See* Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, 391 U.S. 308, 318–19, 325 (1968).

45. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

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

47. Sarah Phillips, *A Brief History of Facebook*, GUARDIAN (July 25, 2007, 5:29 EDT), https://www.theguardian.com/technology/2007/jul/25/media.newmedia [https://perma.cc/SJU2-SNU9].

48. Tyler Sonnemaker, *Facebook Reported a Decline of 2 Million Daily Active Users in the US and Canada*, BUS. INSIDER (Oct. 29, 2020, 5:29 PM), https://www.businessinsider.com/facebook-decline-2-million-daily-users-us-canada-q3-earnings-2020-10 [https://perma.cc/G448-8AEE].

49. Elisa Shearer & Elizabeth Grieco, *Americans Are Wary of the Role Social Media Sites Play in Delivering the News*, PEW RSCH. CTR. (Oct. 2, 2019), https://www.journalism.org/2019/10/02/americans-are-wary-of-the-role-social-media-sites-play-in-delivering-the-news/ [https://perma.cc/CSQ5-U6DN] (reporting that 55% of Americans in 2019 received news from social media, up from 47% in 2018).

reason, then, that users' rights to free speech should take priority over platforms' eagerness to remove undesirable information.

At first glance, the similarities between online platforms and historical carriers of information are striking. As the next Part discusses, however, these similarities are more superficial than they appear and do not warrant the level of federal intervention used in the contexts of the USPS, cable television, or a company town. As the next Part will explain, online platforms like Twitter cannot lock in listeners. This fact knocks the bottom out from the free speech theories described so far because platforms have little to exploit other than their users' conditional willingness to engage. Platforms are thus much more responsive to the demands and preferences of users.

II. CRITICAL DIFFERENCES BETWEEN ONLINE PLATFORMS AND THE DOMINANT INFORMATION CURATORS OF THE PAST

The digital landscape in which platforms like Facebook and Twitter operate is materially different from that of the last century. Free speech law is not a one-size-fits-all solution; the steps taken to rein in the issues surrounding online platforms should likewise reflect the unique features of the online environment.

First, when comparing online platforms to historical information curators, it is misleading to treat online platforms as a static set of durable institutions that will dominate the market for generations. It's true that the five largest online platforms represent the center of gravity of the market, but it's wrong to assume that they will always dominate users' attention (ask Orkut, MySpace, Friendster, and GeoCities).[50] It is not at all clear yet that platforms like Facebook face less competition than traditional media firms like *The New York Times* or *NBC*.

Moreover, online platforms offer a range of differentiated substitutes to consumers.[51] Dimensions along which these differences can be measured include their purpose and ownership, the extent and manner in which they curate or remove their users' speech, the format or medium of the speech (e.g., short-form text, long-form text, or video), the devices on which they are accessible (e.g., phone, personal computers, or both), and the degree to which they are open or closed to new subscribers (e.g., open to the public like Twitter versus closed like Clubhouse).[52]

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50. SuccessiveTech, *What Made Your Favourite Social Networking Sites Go Down?*, MEDIUM (Sept. 11, 2019), https://medium.com/successivetech/what-made-your-favourite-social-networking-sites-go-down-5d7e92f23549 [https://perma.cc/ST7M-ADAT].

51. *See* FACEBOOK, https://www.facebook.com/ [https://perma.cc/35TA-K5WB]; YOUTUBE, https://www.youtube.com/ [https://perma.cc/625F-MGGZ]; TWITTER, https://twitter.com/ [https://perma.cc/YU8E-W3H6]; REDDIT, https://www.reddit.com/ [https://perma.cc/ZHE5-67G6]; GAB, https://gab.com/ [https://perma.cc/LBD4-2392]; PARLER, https://parler.com/main.php [https://perma.cc/L9XW-966L]; FORTNITE, https://www.epicgames.com/fortnite/en-US/home [https://perma.cc/69EB-BJ2G].

52. Karen Petrauskas, *What Are the Differences Between the Big Social Media Platforms?*, KJP CREATIVE (Apr. 10, 2019), https://kjpcreative.com/what-are-the-differences-between-the-big-social-media-platforms [https://perma.cc/C2RM-BM9F]; Heather Kelly & Nitasha Tiku, *Clubhouse 101: What You Should Know About the Invite-Only, Audio Social App*, WASH. POST (Feb. 10, 2021),

Together, these dissimilarities make platforms quite different from historical curators of information like newspapers, radio, and television. Indeed, as we explain in this Part, some of the decisions made by online platforms that garner the greatest amount of criticism are very likely caused by *competition*. Both deplatforming and failure to remove offensive content can be understood and explained as attempts to slavishly cater to the segment of users that the platform is trying to attract or retain. Thus, the theory that undergirds the "must-carry" rules in existing First Amendment precedent does not fit the current circumstances.

Let's begin with the USPS, which is the easiest to distinguish. The USPS is part of the federal government, which makes it both a public forum for private speech *and* regulable insofar as it engages in government speech.[53] Both of these matter. From the perspective of a user of the mail like a newspaper publisher, a user's access to the USPS can be considered critical public infrastructure for the act of speech, particularly in the 1920s. A decision *not* to carry a particular newspaper is made by the government, providing a direct route to challenge state action that burdens speech.

In *Burleson*, for example, dissenters Holmes and Brandeis argued that the federal government was central to the distribution of information, and the core issue involved access to mailing rates, not access to readers.[54] They advocated that the Postmaster General could not designate a publication as obscene or treasonable and then essentially tax that publication out of existence by denying access to lower mailing rates.[55]

Holmes' and Brandeis' critique of the USPS does not extend to private companies—including social media companies—even if the companies' services include the carriage of speech. The federal government does not own the cloud servers that host Facebook, Twitter, and other social media websites.[56] Moreover, from the perspective of the entity carrying the speech, the public mail service is also at a disadvantage. As a state-created agency, the USPS must respect the regulations enacted by Congress to control it in the Mail Classification Act. If that Act had required all media publications to be carried at the less expensive rate, the USPS would have no First Amendment challenge to vindicate *its own rights* to curate information as it pleases. This puts the USPS in a different stead from private companies that might have expressive interests in defining what is acceptable and unacceptable content on their platforms.[57]

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https://www.washingtonpost.com/technology/2021/02/10/what-is-clubhouse-faq/ [https://perma.cc/36P8-TC6W].

53. *See* 39 U.S.C. § 201.

54. United States *ex rel.* Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407, 417 (1921) (Brandeis, J., dissenting); *id.* at 436 (Holmes, J., dissenting).

55. *Id.* at 431 (Brandeis, J., dissenting); *id.* at 436–37 (Holmes, J., dissenting).

56. In fact, the converse appears to be true. For instance, AWS hosts servers for the U.S. Department of Veterans Affairs, Medicare and Medicaid Services, and the National Oceanic Atmospheric Administration, among other governmental departments. *Cloud Computing for Federal Government*, AMAZON WEB SERVS., https://aws.amazon.com/federal/ [https://perma.cc/G47N-4XTY].

57. Mail Classification Act, ch. 180, 20 Stat. 355 (1879).

Neither is the antitrust approach from *Associated Press* palatable. There, the deplatforming, so to speak, was a product of the association's bylaws, which restricted membership at the whim of a publisher's competitors.[58] The Supreme Court deemed this to be an arrangement that stifled competition between publishers[59] and found the Associated Press members' First Amendment rights were not violated by forcing reform of the association's membership rules.[60]

Large technology companies likely do engage in some anticompetitive behavior.[61] However, unlike the print media companies governed by *Associated Press*, the attempts of online platforms to control the use of their services are not intended to block other competitors from marketing their own services. In fact, the control exercised by online platforms to shape usage through content moderation is itself a driver of market fragmentation and competition; that is, when existing online platforms control their uses too much, they create the demand for new online platforms that have different philosophies about how their services should be used. For example, when it launched in 2018, Parler advertised itself as an alternative to Twitter and Facebook.[62] When Parler was taken offline in January of 2021, it had around 15 million users.[63] After Amazon withdrew its hosting services, Epik began hosting the site in February 2021.[64] By banning accounts and purging certain content, the largest social media platforms *increased* their competition in the marketplace rather than reducing it. If the subsequent revolt of the hosting companies (including Amazon) suggests there is a bottleneck that can be controlled by a few companies, the entire episode shows that it is *hosting* services rather than *social media* services that have such power. Amazon's conduct, rather than Twitter's, may provide the right place for an analogy to *Associated Press*.

The government has the responsibility of protecting publishers' rights to speak freely, and thus had the responsibility to restrain the Associated Press from blocking this right.[65] Since online platforms' content moderation tends to induce competition

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58. Associated Press v. United States, 326 U.S. 1, 4 (1945).

59. *Id.* at 11.

60. *Id.* at 20.

61. *See, e.g.*, Press Release, Fed. Trade Comm'n, FTC Sues Facebook for Illegal Monopolization (Dec. 9, 2020), https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization [https://perma.cc/45K9-VKYN] (arguing that Facebook's acquisition of rivals Instagram and WhatsApp, along with the conditions imposed on its software developers, stifles competition).

62. *See, e.g.*, Mike Isaac & Kellen Browning, *Fact-Checked on Facebook and Twitter, Conservatives Switch Their Apps*, N.Y. TIMES, https://www.nytimes.com/2020/11/11/technology/parler-rumble-newsmax.html [https://perma.cc/D54Q-DZ6N] (Nov. 18, 2020) (listing Parler, Newsmax, MeWe, and Rumble as new upstarts benefitting from Big Tech censorship).

63. Jeff Horwitz & Keach Hagey, *Parler CEO Says He Was Fired as Platform Neared Restoring Service*, WALL ST. J., https://www.wsj.com/articles/parler-ceo-says-he-was-fired-by-conservative-political-donor-rebekah-mercer-11612397380 [https://perma.cc/5QMP-XGAR] (Feb. 3, 2021, 11:13 PM).

64. Adi Robertson, *Parler Is Back Online After a Month of Downtime*, THE VERGE (Feb. 15, 2021, 11:48 AM), https://www.theverge.com/2021/2/15/22284036/parler-social-network-relaunch-new-hosting [https://perma.cc/LHB9-X57Y].

65. *Associated Press*, 326 U.S. at 20.

rather than suppress it, *Associated Press* provides no justification for courts stepping in to resolve disputes between online platforms and their users who seek relief from restraint of their speech.

The precedents related to broadcast media are the next easiest to differentiate, because although tech companies appear superficially similar to broadcasting and cable companies of the twentieth century, the technical limitations that called for regulations of the latter do not exist on the internet. New entrants to broadcast media are limited by the scarcity of available transmission bandwidth across the frequency spectrum, and this resource is controlled by the federal government. In *Red Lion*, for instance, the Court repeatedly emphasized that the government had an interest in allocating a scarce resource like broadcasting frequencies so that Americans could receive balanced information.[66] And to the extent the Court recognized that new entrants to the market needed help against established players, the Court also recognized that it assisted those earlier competitors through the licensing agreements.[67] Analogously, part of the reason cable systems like those in *Turner* justified limiting the carriage of free local stations was that there is only so much data that can be squeezed into a cable and thus there is a physical limit on the number of stations that such a system can carry.[68]

The nature of the internet is different; no government license is necessary to operate a new website, and assuming market demand exists, the network is wide open to new entrants. While the capacity of cloud computing services is finite,[69] the problem is fundamentally different than that of broadcasting and *Associated Press*. While physics limits the spectrum of broadcast frequencies, computing power is a function of engineering and investment, and over the last five years, the total amount of cloud storage has consistently increased.[70]

The scarcity inherent in EMF bandwidth compared to the nearly boundless capacity of the internet to support new, innovative services means that it's not necessary to put burdens on existing services to support messages that are inconsistent with their philosophies, because there is an alternative for those with different philosophies: they can send their message out on their own using the same public web. It's fair to argue, then, that the justifications for imposing must-carry provisions on broadcast and cable television do not apply to social media companies.

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66. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 392 (1969).

67. *Id.* at 400.

68. Chris Williams, *Cable's Crunched Signals Irritate HD Die-Hards*, ABC NEWS (Apr. 20, 2008, 5:43 PM), https://abcnews.go.com/Technology/story?id=4691553&page=1 [https://perma.cc/W29B-L8UT].

69. *See, e.g.*, Caroline Donnelly, *Coronavirus: Microsoft Azure Suffers Datacentre Capacity Shortages in Europe*, COMPUT. WKLY. (Apr. 7, 2020, 9:02 AM), https://www.computerweekly.com/news/252481265/Coronavirus-Microsoft-Azure-suffers-datacentre-capacity-shortages-in-Europe [https://perma.cc/RK4N-839E]; Tom Coughlin, *Will COVID-19 Drive Data Center Memory Shortages?*, FORBES (Mar. 21, 2020, 1:33 PM), https://www.forbes.com/sites/tomcoughlin/2020/03/21/will-covid-19-drive-data-center-memory-shortages/?sh=3c69bea97be7 [https://perma.cc/3JPD-EPWN].

70. *See Data Center Storage Capacity Worldwide from 2016 to 2021, by Segment*, STATISTA (Mar. 2018), https://www.statista.com/statistics/638593/worldwide-data-center-storage-capacity-cloud-vs-traditional/ [https://perma.cc/8QAU-8RDK].

That leaves the demand and decisions of individual users themselves as the critical constraint for online speech. Does the behavior of individual users, and the pragmatic consequences of a large number of private decisions, make online speech platforms like Facebook and Twitter the equivalent of a public forum?

To explore this question, we start with the cases involving private physical spaces, such as the company town in *Marsh*. The justification for treating company towns as equivalent to public fora in *Marsh* is that there are very few avenues for open public discourse when a single firm owns the land in which employees live, shop, and access public services like post offices. Because the company town offered its residents nearly every conceivable good and service, whether purely recreational or of practical necessity, residents had little reason to leave. Thus, the private operation of the town of Chickasaw was "essentially a public function."[71] Since nearly all of the needs of ordinary life were fulfilled in the company town, speakers with disfavored content had little chance of exposing residents to their speech.

Moreover, the remedy in *Marsh* was different than what many seek with respect to social media. There, the company town had used Alabama's penal code and law enforcement to censor the appellant. "Insofar as the *State* has attempted to impose criminal punishment," said the *Marsh* Court, "[that] action cannot stand."[72] The Court in essence prevented the town from enforcing the Alabama statutes, which were said to violate the townspeople's First and Fourteenth Amendments. Similarly, in *Logan Valley*, the Court prevented the shopping center from using state trespass law to stop picketing on its property.

The shopping mall in *PruneYard* shared some similarities to the company town of Chickasaw. The shoppers at a mall do not live and work in the mall, and therefore have other avenues for speech to reach them. However, at the height of mallrat culture, the mall *was* the place to see and be seen. The California Supreme Court even noted that 25,000 people visited the PruneYard shopping center each day, which is remarkable considering that the town where it was located (Campbell, California) had only 26,000 residents at the time the *PruneYard* decision was handed down.[73] A local mall therefore exercised considerable power over access to the attention of town residents. The difference between the mall and the company town is one of degree; malls in the 1970s and 1980s dominated some of the attention and experience of its visitors—enough to justify a state-imposed "must carry" rule—but not enough to reach the practical equivalent of a sovereign state.

Precedents like *Turner* regulating the common carriage of cable companies can be understood along the same lines as the continuum between *Marsh* and *PruneYard*: even though cable customers could theoretically reconfigure their televisions to use bunny-ear antennae when they want to watch broadcast television instead of cable television, as a practical matter, they did not. That stickiness that locked users into the cable programming persuaded the Court that cable companies could be

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71. Marsh v. Alabama, 326 U.S. 501, 506 (1946).

72. *Id.* at 509 (emphasis added).

73. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 78 (1980); *Campbell, California*, WIKIPEDIA, https://en.wikipedia.org/wiki/Campbell,_California [https://perma.cc/P4CL-836W] (Jan. 15, 2022, 23:08) (stating 1980 census figures).

compelled to use some of their channel capacity to run local broadcast channels. When it came to television programming, cable services were the company town.[74]

Online platforms have no control over the physical space and immersive experiences of their users, and users can (and frequently do) visit multiple online platforms in a single day. No one corporation holds "title" to the entire internet, and a ban from one website does not preclude a user posting on another. Online platforms do not fall at the extremes of the company town. And while it's difficult for users to move their content over to other platforms, from the perspective of users-as-listeners, there is complete freedom of movement. Online platforms don't have any of the practical pain-in-the-neck switching costs (like changing a cord in the back of the television) for users that want to go see content in another place. At most, one may argue that they hold a position of power over the time and attention of their users similar to the shopping mall in *PruneYard.* But this analogy, too, strikes us as strained since people can only be in one physical space at a time. By contrast, a user can access what has been said on several different social networks at several different times with ease.

The remedies given to those affected by privately-owned towns and "public" spaces does not apply to social media companies who handle suspensions, bans, and appeals "in house." For example, while Facebook, Twitter, and Snapchat banned Donald Trump's accounts on their sites on January 6, 2021, Twitch did not ban him until January 7, and YouTube waited until January 13.[75] And while Parler's ban from app stores and web hosting admittedly does more closely resemble an effective removal from the internet,[76] that decision concerned a set of private actors in a wholly different industry than the platforms (like Facebook and Twitter) that are targets of state attempts to create must-carry rules.

Given these significant distinctions between platforms and information curators in the physical and broadcast context, it might make sense to compare platforms to the internet companies that actually *have* been placed under legal restrictions that require common carriage: basic ISPs. We do this next.

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74. Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189–90 (1997).

75. Mike Isaac & Kate Conger, *Facebook Bars Trump Through End of His Term*, N.Y. TIMES, https://www.nytimes.com/2021/01/07/technology/facebook-trump-ban.html [https://perma.cc/HF8A-ASTP] (May 18, 2021) (discussing the bans for Facebook and Instagram); Jay Peters, *Twitch Disables Trump's Account Indefinitely*, THE VERGE (Jan. 7, 2021, 2:27 PM), https://www.theverge.com/2021/1/7/22219144/twitch-trump-ban-indefinitely-capitol-attack [https://perma.cc/2HU8-9NQ6]; Brian Fung, *YouTube Is Suspending President Donald Trump's Channel*, CNN BUS., https://edition.cnn.com/2021/01/12/tech/youtube-trump-suspension/index.html [https://perma.cc/6TQW-KCZW] (Jan. 13, 2021, 17:15).

76. *See, e.g.*, Brian Fung, *Parler Has Now Been Booted by Amazon, Apple and Google*, CNN BUS., https://www.cnn.com/2021/01/09/tech/parler-suspended-apple-app-store/index.html [https://perma.cc/T33B-AJXC] (Jan. 11, 2021, 6:54 AM) (noting that, without access to "the internet's two largest app stores," the bans threatened "to cut Parler off from its entire audience").

III. ANALOGIES FROM THE INTERNET AGE

So far, analogies to speech distributors, publishers, and venues in traditional media have not provided a clear route for a government to compel a platform like Twitter or Facebook to host all messages. Next, we consider whether an analogy to basic ISPs could support this sort of regulatory imposition on platforms. After all, basic internet providers like Comcast were reclassified during the Obama administration as common carriers under Title II of the Federal Communications Commission Act. In *U.S. Telecom Ass'n v. FCC*, the majority of a D.C. circuit panel concluded that net neutrality rules can be promulgated and administered on basic ISPs without implicating First Amendment protections.[77]

The distinction between basic service providers and content platforms can be drawn and defended quite easily if it isn't pressed too hard: the elaborate community norms that are designed and enforced by platforms like Facebook are curation decisions that have meaningful expressive value. Facebook's terms of service prohibit not only certain categories of legal-but-objectionable content (such as pornography, racist speech, and harassing language) but also require that content be "authentic."[78] Users must use their real names in their profiles, for example.[79] As a whole, the rules and the (at least occasional) enforcement of the rules communicate a Facebook ethos—that the messages available here, while diverse across many measures, meet some vague standard of decency and are posted without the protective veil of anonymity. It's not much of a message, but it is at least as articulable as the expressive interest of the parade organizer in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*.[80] *Hurley* involved a privately-run St. Patrick's Day parade that took place on the streets of Boston. The organizers granted requests from nearly all groups that wanted to participate and procession in the parade, but they denied permission to the gay and lesbian organization.[81] While the Massachusetts Supreme Court found that the parade as a whole lacked expressive meaning, the Supreme Court disagreed: even a "big tent" parade that accepts nearly every application still communicates a message in its selection process. "[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech . . . ."[82]

By contrast, basic internet providers really do act as mere conduits, like a parcel service. As a descriptive matter, the ISPs that challenged the Federal Communications Commission (FCC) order seemed to want to preserve the right to make throttling decisions without communicating any particular value or principle to their users. These were not basic service providers that offered a family-friendly internet experience or any other particular form of content filtering. Rather, they aimed to preserve the opportunity to throttle service for any or no reason. The

77. 825 F.3d 674, 740–44 (D.C. Cir. 2016).

78. *Facebook Community Standards*, META, https://transparency.fb.com/policies/community-standards/.

79. *Id.*

80. 515 U.S. 557 (1995).

81. *Id.*

82. *Id.* at 569–70.

concern from the public, whether justified or not, is that some broadband service providers might use the capability to give an advantage to their own subsidiaries and business partners. This threat would *not* convey the sort of minimal message described in *Hurley.* If Time Warner wanted to favor content produced by its own subsidiaries, or if AT&T elected to provide faster broadband speeds for content creators that paid for special treatment,[83] those promotions or throttling decisions would relate only to the firms' profits. The only message that is sent by such content management decisions is "I love money!"

Thus, platforms like Twitter and basic internet providers like Comcast fall on opposite sides of an important constitutional distinction—the consideration of whether the firm claiming a First Amendment right has what Eugene Volokh calls a "coherent speech product."[84] The boundary precedents for this concept can be found in the Supreme Court's analysis of compelled speech doctrine on university campus recruiting fairs (*FAIR*) on one side and in pregnancy centers (*NIFLA*) on the other.

In *FAIR,* the Supreme Court found that there are many contexts on campus, including at recruiting fairs, in which a university does not actively engage in the creation of a coherent speech environment or product. Unlike a classroom, where a coherent message is crafted with the influence of institutional rules and standards, the quad, the student union, and the campus recruiting fairs are spaces in which students are exposed to a hodgepodge of uncontrolled messages. Thus, the Solomon Amendment, which required campuses to allow the U.S. military to participate in career fairs, did not violate a school's First Amendment rights because it encroached on a function of the school that did not cultivate and craft a selected message.

By contrast, a California statute requiring crisis pregnancy centers (which generally counsel visitors to not seek abortions) to post a notice advising visitors that abortion services are available elsewhere was struck down. The Court reasoned that the compelled disclosure was in conflict with the crisis pregnancy center's own

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83. The FCC was particularly concerned that dominant content producers like Netflix or Amazon would collocate servers with certain broadband providers so that packets could be delivered to users without having to interconnect with the "backbone" of the internet. Fears that broadband service providers would start favoring content based on side deals or subsidiary ownership was still speculative and theoretical at the time the D.C. Circuit made its decision in the open internet order. *See* Ken Engelhart, Opinion, *Why Concerns About Net Neutrality Are Overblown,* N.Y. TIMES (Dec. 4, 2017), https://www.nytimes.com/2017/12/04/opinion/net-neutrality-overblown-concerns.html [https://perma.cc/Q7QF-4FW4].

84. Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 361–66 (2018). The hardest cases to categorize along these lines are *Hurley* (parades) and *National Institute of Family & Life Advocates v. Becerra* (crisis pregnancy centers), which were both found to *have* a coherent speech product, and *Turner Broadcasting* (cable channel selection) and *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (military recruiting at law schools), which were both found to *not have* a coherent message. Given that reasonable minds could differ on how to interpret the expressiveness of each of these entities attempting to restrict access, we could expect reasonable disagreement as to the interpretation of a platform like Facebook, too. As we said above, on balance, we think the pluralist-but-still-somewhat-discriminating parade in *Hurley* is the best analogy. *See Hurley*, 515 U.S. at 557; Nat'l Inst. of Fam. & Life Advocs. v. Becerra (*NIFLA*), 138 S. Ct. 2361 (2018); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994); Rumsfeld v. F. for Acad. & Institutional Rts., Inc. (*FAIR*), 547 U.S. 47 (2006).

speech, and therefore had the effect of muddling the message and meaning of the center.

To our minds, these precedents help clarify why Facebook and Twitter retain First Amendment rights to be free from government compulsion to host or promote content even if Comcast can be compelled to treat all web packets equally (for the most part). A basic ISP that wants to compete with others as a clean or decent alternative, and that refuses carriage of traffic to and from websites that it has deemed indecent, would transcend the criteria that were considered by the D.C. Circuit Court when it concluded that basic ISPs could be regulated as common carriers. Indeed, the court explained:

> If a broadband provider . . . were to *choose* to exercise editorial discretion—for instance, by picking a limited set of websites to carry and offering that service as a curated internet experience—it might then qualify as a First Amendment speaker. But the Order itself excludes such providers from the rules. The Order defines broadband internet access services as a "mass-market retail service"—i.e., a service that is "marketed and sold on a standardized basis"—that "provides the capability to transmit data to and receive data from all or substantially all Internet endpoints."[85]

The court is implying that a broadband service provider that decided to offer a filtered experience to end users would be treated as a First Amendment speaker. Since users of platform services like Facebook or Twitter (and especially for highly specialized platforms like Petzbe)[86] choose those services in part because of the way they restrict and curate information, they presumably qualify (or at least *might* qualify) as a First Amendment speaker under the D.C. Circuit's reasoning.

However, there is one way in which platforms would be better equipped than broadband ISPs to tolerate a must-carry rule: platforms could disavow a message that it is required to carry. That is, even if Twitter had to carry all (legal) content posted by its members, it could make clear that the content is visible by direction of the applicable law rather than at Twitter's discretion.

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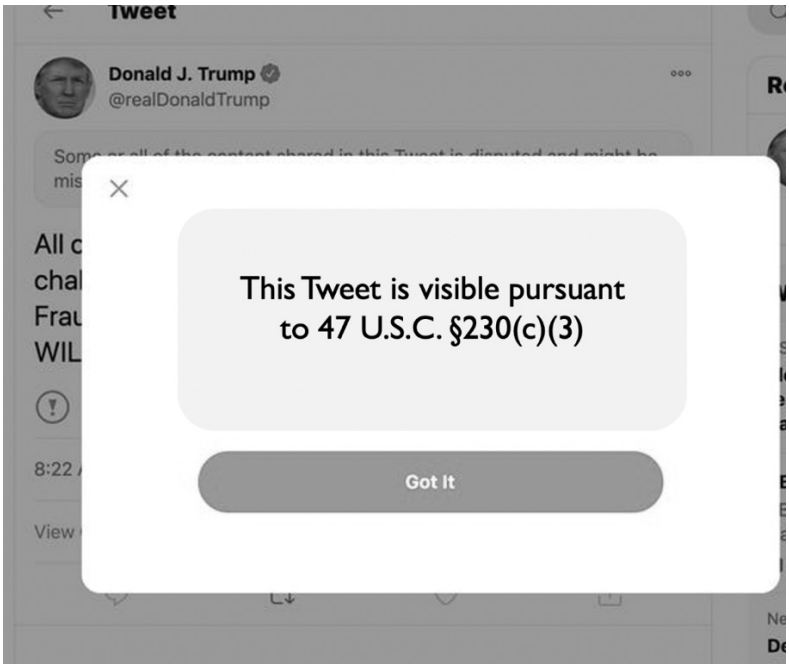
85. U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 743 (D.C. Cir. 2016) (quoting *In re* Protecting & Promoting the Open Internet, 30 FCC Rcd. 5601, 5745–46 ¶ 336 & n.879 (2015)).

86. This is a social media app where all profiles must be pets. *See About Petzbe*, PETZBE, https://petzbe.com/about-us [https://perma.cc/LYU7-T4XU].



A platform could place a warning on any content that violates its own community norms, and they could presumably even give *users* the opportunity to opt into a newsfeed filter that blocks content containing the warning—a power that would presumably be fully protected under First Amendment listener rights. Sure enough, misattribution or source confusion is a theme in the analyses of many compelled speech cases. When there is little risk that viewers would associate a message with the entity claiming First Amendment protection, courts are more likely to find that a regulation avoids interfering with the entity's right to free expression.[87]

That said, if the platform has an expressive interest in restricting content across its site so that it adheres to certain subjects or interests, or so that it adheres to minimum levels of decency, then a must-carry order would directly interfere with that message (just as the disclosure in *NIFLA* interfered with the messages of crisis pregnancy centers) regardless of whether the platform could signal disagreement and disavowal of the content. Having the content at all would "alter the content of [petitioners'] speech."[88] For these reasons, the holding and reasoning of *Hurley* seems the most appropriate to us. The contents of any one individual's Twitter feed are going to be a multifaceted, borderline incoherent parade, but it's still an expressive collaboration between the user and the particular social media platform.

Next, we consider whether the expressive rights of a social media platform should be curtailed in light of the practical importance that the forum has to many users who want an audience on them.

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87. *See Turner*, 512 U.S. at 654; *FAIR*, 547 U.S. at 65.

88. *NIFLA*, 138 S. Ct. at 2371 (quoting Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795).

IV. PRIVATE PUBLIC SQUARES

Another argument that might suggest common carriage requirements are consistent with the First Amendment stems from the common assertion, endorsed by the Supreme Court, that the largest social media companies are essential access points for public discourse. In *Packingham v. North Carolina*, for example, the Court identified social media as "the most important place[] . . . for the exchange of views."[89] Although *Packingham* struck down a government-imposed deplatforming of a criminal defendant, the sentiment that the largest social media companies exert control over the information ecosystem without a sufficient check from other companies is widely shared. That thinking, consistent with antitrust scrutiny of large tech firms, could plausibly support an argument that a monopoly held by any one tech firm on critical infrastructure for public discourse should rightfully be regulated to expand access to as many speakers and ideas as possible.[90]

Internet platforms are not exploiting their market power to make discretionary content decisions over a captive audience. To the contrary, they are locked in competition with other online platforms. When they use their control to moderate user content, they do so not for anticompetitive purposes (as in *Associated Press*) and not even for idiosyncratic purposes, but rather in order to satisfy their users' interests as proverbial listeners. Each firm is part of a nearly limitless internet, where new, competing services are created daily, unconstrained by the bandwidth and licensing limitations of broadcast media (as in *Red Lion*) or the physical technological limitations of cable media (as in *Turner II*). Thus, the rules that have occasionally justified a deviation from First Amendment protections of editorial discretion do not apply to online platforms, at least not on the basis of any of their justifications. Arguments to the contrary do not understand the true nature of the power and motivations of social media companies.

It's true that social media plays an increasingly important role in the information ecosystem. Social media has recently undergone explosive growth.[91] In the first quarter of 2005, the Pew Research Center estimated that 5% of U.S. adults used social media, while in the second quarter of 2010, they estimated that 48% of the same group used social media, representing an annual growth rate of 189%.[92] But within the realm of social media, there is great competition, notwithstanding the fact that a small number of firms are "winning" at the moment. When a market is growing, everyone wants a slice of the pie, and conditions were ripe between 2005 and 2010 for many new market entrants and a great deal of investment to strengthen those entrants' position in the market.

The extent to which competition between content providers and platforms drives curation decisions is debatable. It's difficult to study, as platforms' executives don't

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89. 137 S. Ct. 1730, 1735 (2017).

90. *See* Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?,* 1 J. FREE SPEECH L. 377 (2021).

91. *See Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/social-media/ [https://perma.cc/6VUK-YBCJ].

92. *Id.*

always make public pronouncements and when they do, they aren't always true.[93] But there are some hints that users are driving curation decisions as opposed to passively accepting them. For instance, in late October 2019, when Jack Dorsey said Twitter was banning political ads because of concerns that "democratic infrastructure" couldn't handle it, media commentators noted that the announcement came "minutes before Facebook posted its quarterly results," a clue that the decision might have been made for the purpose of differentiating Twitter from Facebook.[94] Recent Pew data shows that between the first quarter of 2019 and the first quarter of 2021, the share of U.S. adults that used social media was *completely flat* at 72%.[95] Dorsey and his team made a bold move to ban political ads after about three quarters of completely flat growth in Twitter's total addressable market. Between 2019 and 2021, the percentage of U.S. adults who said they use Twitter has increased a tick from 22% to 23%.[96] Publicly traded U.S. companies are under tremendous pressure to grow quarter over quarter.[97] For a company like Twitter, there are two options for growth: more customers or more revenue per customer. In a scenario where both the total market and the company's userbase is essentially flat, the only option is more revenue per customer, and one of the ways to achieve that is to increase the average amount of engagement per customer. (The other is hypertargeted advertising—a practice that gets platforms in trouble out of concern for user privacy.)

Economics research on social media suggests that "when sites pursue differentiated feature designs, the likelihood of winner-take-all outcome is reduced."[98] This is so because "product differentiation typically makes it easier for the firms to co-exist."[99] Accordingly, although the motivation of Twitter is not explicit, it can be inferred that they are in a tough spot vis-à-vis growth. They are making decisions about their product and the speech they allow in their offering based on two factors: increasing engagement per user in a time of almost negligible user growth and differentiating their product in order to prevent losing the winner-take-all battle to Facebook.[100] That begs the question whether changes to the

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93. Ben Thompson, *Facebook and the Feed,* STRATECHERY (Apr. 22, 2015), https://stratechery.com/2015/facebook-and-the-feed/ (comparing Facebook's stated motivation for its 2015 newsfeed algorithm change and the business incentives for it).

94. Georgia Wells & Emily Glazer, *Twitter to Ban Political Ads*, WALL ST. J., https://www.wsj.com/articles/twitter-to-no-longer-accept-political-ads-11572466313 [https://perma.cc/LXG2-Z2XB] (Oct. 30, 2019, 8:11 PM).

95. PEW RSCH. CTR., *supra* note 91.

96. *Id.*

97. For example, Standard & Poore's technology sector index has grown on average 22% each year over the last five years. S&P DOW JONES INDICES, S&P NORTH AMERICAN TECHNOLOGY SECTOR INDEX, https://www.spglobal.com/spdji/en/indices/equity/sp-north-american-technology-sector-index/#overview.

98. KAIFU ZHANG & MIKLOS SARVARY, SOCIAL MEDIA COMPETITION: DIFFERENTIATION WITH USER-GENERATED CONTENT 24–25 (2012), https://www.parisschoolofeconomics.eu/IMG/pdf/PSE-comm-and-beliefs-june2012-Sarvary-Zhang.pdf [https://perma.cc/ZW7W-ZRYJ].

99. *Id.* at 25.

100. It is worth noting that over the same period, 2019–21, Pew shows Facebook's user growth is even flatter than Twitter's, but Facebook has a commanding lead in the race for U.S. users. This suggests that Facebook's speech moderation is aimed at increasing engagement

acceptable content policies on Twitter seem like they are intended to differentiate from other online platforms. It certainly seemed so in January 2021 when TechCrunch noted that "[u]sers are surging on small, conservative, social media platforms after President Donald Trump's ban from the world's largest social networks."[101] Even before the catalytic events related to Donald Trump's suspension in early January of 2021, though, Facebook and Twitter were well aware that their content moderation decisions were becoming part of their brand identity. The firms were fumbling for their place and reputation within the spectrum between "nanny state" and "grossly inadequate" moderation policies.[102]

Each online platform tries, via design choices and/or machine learning algorithms, to develop a service which is more enticing to the kind of user they want to attract. These choices naturally make their service less attractive to users with different preferences. Users who don't like a certain strategy may, over time, migrate away from online platforms with differentiation strategies that they dislike in favor of online platforms with strategies that they find appealing. This might be a good strategy for every online platform other than Facebook to preserve a niche audience, but we believe there are dangers to social cohesiveness lurking within this outcome.

To be clear, we are troubled by the proliferation of "filter bubbles" that Eli Pariser described ten years ago. That is, it is not good for the psychological health, the social cohesion, or the epistemic future of our country that individuals can effortlessly wind up in an internet echo chamber where their preconceived preferences and beliefs are reinforced. It is tempting to directly regulate dominant platforms to try to pop the filter bubbles.[103] But if the bubbles are the result of users' authentic and agentic choices about which type of curated environment they actually want to be in, a "must-carry" style of rule will flout the preferences of users as listeners. It will also diminish opportunities for non-Facebook platforms to compete for users based on different, perhaps more virtuous methods of information curation. It is therefore not at all clear that a "must-carry" rule is more respectful of free speech from the listener's perspective than the private censorial decisions of platforms that are better matched to the listener's choices.

While it's tempting to want to ensure that the most popular platforms are available for all who wish to speak, that instinct on balance runs against the First Amendment

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more than it is at avoiding the winner-take-all effect. Brooke Auxier & Monica Anderson, *Social Media Use in 2021*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021/.

101. Jonathan Shieber, *Parler Jumps to No. 1 on App Store After Facebook and Twitter Ban Trump*, TECHCRUNCH (Jan. 9, 2021, 1:45 PM), https://techcrunch.com/2021/01/09/parler-jumps-to-no-1-on-app-store-after-facebook-and-twitter-bans/ [https://perma.cc/8KFT-2UF5].

102. PAUL M. BARRETT, WHO MODERATES THE SOCIAL MEDIA GIANTS? A CALL TO END OUTSOURCING 2 (2020) ("grossly inadequate"). *See* Kate Conger, *Facebook, Google and Twitter C.E.O.s Return to Washington to Defend Their Content Moderation*, N.Y. TIMES (Oct. 28, 2020), https://www.nytimes.com/2020/10/28/technology/facebook-google-and-twitter-ceos-return-to-washington-to-defend-their-content-moderation.html [https://perma.cc/R489-X58M] ("Republicans argue the companies—Twitter, in particular—are being heavy-handed in their content moderation and are unfairly silencing conservative voices.").

103. *See generally* ELI PARISER, THE FILTER BUBBLE: WHAT THE INTERNET IS HIDING FROM YOU (2011).

interests not only of platforms but of (most) users as well. Too much of the debate on platforms and common carriage treats users of platform services as passive consumers, who accept with few outside options the terms by which Facebook, Twitter, and other platforms perform their content moderation. But if we take seriously the undisturbed assumptions that undergird *Reno v. ACLU*—a case in which the Supreme Court recognized that the internet is a fundamentally different medium because it can make all content accessible at once, and at low cost—then platforms large and small can be understood as competing on the quality of their content recommendations and moderation decisions. When users can join a nearly limitless number of social networking services, their choice to stay with Facebook or to migrate to Parler, to use a vivid example, will depend to some extent on how well the platform provided the right sort of filtered experience for each particular user. Each platform is attempting to provide the ultimate "coherent speech product" by promoting what is most interesting, demoting what is less interesting, and by signaling a community stand against certain content either because it's off topic or downright repugnant.

Thus, social media platforms have no neat First Amendment analogies. They dominate attention like television, radio, and newspapers once did, but they dominate by matching the interests of their users. The dominance is precariously reliant on serving listeners' interests. In the next Part, we explore what sorts of policies make sense given the peculiar features of platforms.

V. ONLINE PLATFORMS ARE THEIR OWN FREE SPEECH BEAST

The justifications that were used to regulate historical information curators can't be stretched far enough to cover the restrictions that some policymakers and legal scholars have proposed for internet platforms. To be sure, the First Amendment precedent leaves some ambiguity in the contours of protection and uncertainty in its application to online platforms. But the trouble with regulating online platforms is evident from the incoherence and weakness of the existing proposals. A Florida law forbids what it calls "post-prioritization" and "shadow banning" of several categories of content (except advertising, hilariously) which, given the broad definitions of both terms, effectively bars Facebook from running a newsfeed.[104] Proposals by Senator Josh Hawley and by prominent legal scholars Erwin Chemerinsky and Prasad Krishnamurthy avoid eliminating or radically altering recommendation algorithms like the Facebook newsfeed and allow for content removal based on the platform's established standards, but they forbid content removal based on political viewpoint.[105] But as the history of President Trump's tweets vividly demonstrate, there is no neat separation between community standards and political signaling. The fact that commenters across the political spectrum cannot even articulate a workable rule (regardless of its constitutionality) that can address real threats of political bias

104. S.B. 7072, 2021 Leg., 123d Reg. Sess. (Fla. 2021).

105. Ending Support for Internet Censorship Act, S. 1914, 116th Cong. (2019); Prasad Krishnamurthy & Erwin Chemerinsky, *How Congress Can Prevent Big Tech from Becoming the Speech Police*, THE HILL (Feb 18, 2021, 8:00 AM), https://thehill.com/opinion/judiciary/539341-how-congress-can-prevent-big-tech-from-becoming-the-speech-police [https://perma.cc/Y4H5-EJCD].

without disturbing the platform's power to purge terrible content shows that online platforms, as a medium, are not good candidates for common carriage.

What, then, should online platforms be encouraged to do in order to preserve the user experience that people want to have without alienating users by purging too much, or too little, content?

One solution is to increase transparency. In a world where online platforms disclosed to the public why they make the content judgments that they make, online platforms could build confidence that their moderation decisions are conducted in a manner that is free from at least deliberate bias. If online platforms were transparent and consistent in their analysis of content and in their decision-making process concerning what speech to endorse, what speech to tag with editorial disclaimers, and what speech to ban, it would give both legislators and consumers the means to check whether the online platforms are generally motivated to deliver the experience that their users want and are not pursuing a political agenda.[106]

Another option is to lean into user controls as a way to fine-tune the listener experience. Many platforms already allow users to provide input about what types of messages they do or do not want to see (in addition, of course, to the constant feedback loop every recommendation algorithm creates based on the user's actual clicking behavior). Facebook allows users to hide posts or friends. These actions allow the newsfeed to learn what sort of content to not serve for each user, but the user interface could be enhanced to encourage users to set their own standards by more actively moderating their own feeds.

CONCLUSION

Regulating curators of information is not a new idea; this paper has traced a hundred years of the phenomenon. The kinds of regulation explored here are appropriate within the confines of historical regulation, but online platforms are fundamentally dissimilar and thus the justifications that made sense in the past do not make sense today.

In the twenty-first century, communications platforms on the internet might be as crucial to an educated populace—or, at least, an engaged and informed populace—as the U.S. Postal Service was in the 1920s. But the critical differences between a unitary, publicly funded government service intended as the glue to bind an immense new country and the plethora of privately-owned online platforms are twofold and convincing: consumers have a wide array of online platforms from which to choose and the owners of those platforms have the right to create the user experience that they feel is appropriate to attract the kinds of customers they think will form a successful business.[107]

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106. *But see* Eric Goldman, *The Constitutionality of Mandating Editorial Transparency*, 73 HASTINGS L.J. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4005647 [https://perma.cc/Y3D4-LVUE].

107. The question of how to interpret Justice Holmes's dissent in *Burleson* as it applies to online platforms is complicated. Should it be read as elevating the First Amendment rights of would-be users of online above the private property interests of the owners of those platforms, much like the rights of the newspaper publishers who wanted to use the mail challenged the rights of the government to regulate the U.S. Postal Service? Or should it be considered as a

The Associated Press was using its power in an anticompetitive way, but online platforms wield their power with exactly the opposite motivation to compete with one another in a dynamic market that requires differentiation to avoid market consolidation by a single platform. Analogizing users of online platforms who do not like the consequences of their viewpoints or the repercussions of their speech in the context of the chosen strategy of the platform where they speak to competitors of the Associated Press who were the victims of unfair competition is to draw a similarity where there is none.

The limitations of bandwidth and technology that dissenting voices and disadvantaged speakers leveraged to convince courts to carve out protection for their messages across the broadcast spectrum and on cable networks don't exist on the internet. The nature of the internet as a nearly infinite fertile ground for new businesses and new ideas means that these arguments fall far short of convincing when it comes to hollowing out private property rights when speakers with viewpoints contrary to the philosophy of the companies they wish would amplify their speech.

Finally, the application of logic that justifies forcing the "company town" open to potentially objectionable speech is misguided. Facebook is a good tool for communication and commerce, but we don't have to live there. And there is no exclusivity to our attention the way there is in a physical space like a shopping mall: we don't lose access to other online content even when we are logged into Facebook.

The most productive reforms that the federal government could encourage and possibly impose on social media companies are transparency tools. This includes more open communication about the criteria that leads to certain posts being banned, deprioritized, flagged, or endorsed; lifting the veil to educate users on why they are seeing some polarizing content; feedback loops that allow users to more actively participate in the moderation of the content that *they* view; and site features to allow users to gauge whether they are viewing a distorted subset of content.

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limitation on the power of the government to dictate how online platforms are allowed to act justified by an appeal to foundational American principles–now, private property rights, then, free speech? The distinction between a government agency and a private company seems to suggest the latter.