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ARTICLE

PUBLIC ACCOMMODATIONS ORIGINALISM'S INABILITY TO SOLVE THE PROBLEMS OF ONLINE CONTENT MODERATION

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"Facebook . . . wields 'more power [today] in determining who can speak . . . than any Supreme Court justice, any king, or any president.'"[1]

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[1] Marjorie Heins, *The Brave New World of Social Media Censorship*, 127 HARV. L. REV. F. 325, 325 (2013–2014) (quoting Miguel Helft, *Facebook's Mean Streets*, N.Y. TIMES, Dec. 13, 2010, at B1).

ABSTRACT

In response to online platforms' increasing ability to moderate content in what often seems to be an arbitrary way, Justice Clarence Thomas recently suggested that platforms should be regulated as public accommodations such that the government could prevent platforms from banning users or removing posts from their sites. Shortly thereafter, Florida passed the Transparency in Technology Act, which purported to regulate online platforms as public accommodations and restricted their ability to ban users, tailor content through algorithmic decision-making, and engage in their own speech. Texas followed suit by passing a similar law, and Arizona debated a bill purporting to regulate platforms as public accommodations.

Given the obvious First Amendment concerns with regulating an online platform's ability to publish and control content on its own forum, courts and legislatures must ensure that such regulations comport with the original understanding of how public accommodations could be regulated at the time of the founding (public accommodations originalism for short). As this Article argues, businesses could be regulated as public accommodations at the founding because they either: (1) held themselves out to the public as willing to serve all comers (the holding out theory); or (2) were subject to franchise obligations through legislation often because they were natural monopolies (the franchise theory). Most online platforms exhibit the necessary characteristics of public accommodations under both the holding out theory and the franchise theory and can thus be regulated as public accommodations according to the term's original meaning.

That said, public accommodations originalism is subject to significant limitations as applied to online platforms. Specifically, under the holding out theory, an online platform can evade public accommodations status merely by ceasing to hold itself out as willing to serve all comers. Under the franchise theory, platforms must be given an exclusive government benefit in exchange for the corresponding duty to host content. Even where such a benefit exists, the platform cannot be subject to an absolute duty to host. Furthermore, platforms would largely maintain control over their algorithmic decisions and could not be prevented from engaging in their own speech. Therefore, while public accommodations originalism will limit a platforms ability to moderate content, it will not entirely undermine the platform's autonomy. Any law purporting to regulate platforms as public accommodations that does not respect these limitations is unconstitutional since it does not comply with the original public meaning of the First Amendment and the law of public accommodations.

Notwithstanding the limited ability of public accommodations originalism to remedy some of the abuses associated with content moderation, the normative implications of such regulation cannot be ignored. Public accommodations originalism will require online platforms and their users to tolerate immoral, lewd, and otherwise objectionable content. But

it will also prevent platforms from removing content that serves an important public purpose. Balancing these interests are matters that legislatures must contend with when debating whether to impose public accommodations regulations onto online platforms, but the fact of the matter is that such regulations (when appropriately tailored) are constitutional and should be upheld by the courts.

I. INTRODUCTION

Bruce Wyman wrote in 1901 that "[t]he distinction between the private callings—the rule—and the public callings—the exception—is the most consequential division in the law governing our business relations."[2] In the age of Facebook,[3] Google, and social media censorship, Wyman's words are just as, if not more, consequential today than when he wrote them over 120 years ago.

Social media platforms are "the most important places to exchange views" in modern society.[4] These exchanges, however, are increasingly controlled and moderated by a few private corporations who wield unprecedented power over the daily lives of American citizens. In 2016, online platforms' misfeasance resulted in the Cambridge Analytica scandal and Russian interference in the presidential election.[5] More recently, Twitter and Facebook unilaterally deplatformed former President Donald Trump for inciting the January 6th insurrection at the Capitol, although both platforms recently reinstated his accounts.[6] Regardless of one's feelings about how online platforms are enforcing their policies in any particular instance, it cannot be denied that "social media sites . . . are the main arbiters of what gets communicated in the brave new world of cyberspace."[7]

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2. Bruce Wyman, *Law of Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156, 156 (1903–1904).

3. Although Facebook recently changed the name of its parent company to Meta, I will refer to the company as Facebook throughout this Article unless I am specifically referencing the parent company and not its social media platform, Facebook.

4. Packingham v. North Carolina, 137 S. Ct. 1730, 1732 (2017).

5. Issie Lapowsky, *How Cambridge Analytica Sparked the Great Privacy Awakening*, WIRED (Mar. 17, 2019, 7:00 AM), https://www.wired.com/story/cambridge-analytica-facebook-privacy-awakening/ [https://perma.cc/26HU-4ESE].

6. Dylan Byers, *How Facebook and Twitter Decided to Take Down Trump's Accounts*, NBC NEWS (Jan. 14, 2021, 4:01 PM), https://www.nbcnews.com/tech/tech-news/how-facebook-twitter-decided-take-down-trump-s-accounts-n1254317 [https://perma.cc/8TVR-XFKA]; Lauren Feiner, *Donald Trump Can Access His Facebook and Instagram Accounts Again*, CNBC (Feb. 9, 2023, 2:19 PM), https://www.cnbc.com/2023/02/09/donald-trump-facebook-instagram-accounts-reinstated.html [https://perma.cc/T6T6-GX6E].

7. Heins, *supra* note 1, at 325.

In response to the increasing power that online platforms are wielding to affect public discourse, government actors and legal scholars from across the political spectrum are calling for reform.[8] Perhaps most notably, Justice Clarence Thomas has proposed a novel solution to the problems caused by online platforms. Justice Thomas suggests that "[i]f part of the problem is private, concentrated control over online content and platforms available to the public, then part of the solution may be found in doctrines that limit the right of a private company to exclude."[9] Justice Thomas is referring to regulating online platforms as public accommodations akin to mail carriers, inns, and telephone companies.[10] Imposing such regulations would require online platforms to carry the legal speech of any user, regardless of viewpoint, and could curtail the platform's ability to moderate speech on its website.[11]

Justice Thomas's suggestion that online platforms could potentially be regulated as public accommodations prompted significant media attention[12]

8. *See* Ending Support for Internet Censorship Act, S. 1914, 116th Cong. (2019) (proposing that platforms be treated as government actors and held liable for restricting any speech that is protected by the First Amendment); *see also* Justice Against Malicious Algorithms Act, H.R. 5596, 117th Cong. (2021) (proposing that Section 230 be amended to hold companies liable if they knowingly or recklessly make a recommendation that "materially contribute[s] to a physical or severe emotional injury to any person"); Michael C. Dorf, *Could Clarence Thomas Be Right About Twitter?*, VERDICT (Apr. 14, 2021), https://verdict.justia.com/2021/04/14/could-clarence-thomas-be-right-about-twitter [https://perma.cc/8BGL-TQMJ] (rejecting the originalist case for imposing common carrier obligations on online platforms but advocating for reform through non-originalist, progressive regulations).

9. Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1222 (2021) (Thomas, J., concurring).

10. Although Justice Thomas distinguishes between public accommodations and common carriers, the history suggests that common carriers are a subset of public accommodations. *See* Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463, 479 (2021) (arguing that the contours of common carriers and public accommodations "are so similar that the distinction yields few insights"). In fact, common carriers have traditionally been understood to be a *type* of public accommodation along with innkeepers. *Id.* at 476 (emphasis added). Thus, I will use the broader term, public accommodations, throughout this Article. That said, much of the literature uses the phrases "public accommodation," "common carrier," "common carriage," "public employment," and "public callings" somewhat interchangeably. In light of this, these terms may be used interchangeably throughout this Article based on the source material being cited.

11. 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, 196 (2021).

12. *See* Bobby Allyn, *Justice Clarence Thomas Takes Aim at Tech And Its Power 'To Cut Off Speech'*, NPR (Apr. 5, 2021, 1:27 PM), https://www.npr.org/2021/04/05/984440891/justice-clarence-thomas-takes-aims-at-tech-and-its-power-to-cut-off-speech [https://perma.cc/9F7X-YTYG] ("[T]he ruling from Justice Clarence Thomas has drawn intense attention in technology circles."); *see also* Mark MacCarthy, *Justice Thomas Send a Message on Social Media Regulation*, BROOKINGS (Apr. 9, 2021),

that was accompanied by the publication of a series of academic articles both supporting and criticizing the imposition of public accommodations status on online platforms.[13] Some scholars have attempted to justify public accommodations regulations based on existing Supreme Court precedent,[14] while others have relied on the same precedent to repudiate the notion that online platforms could be treated as public accommodations.[15] Still others have turned to historical arguments to explain why online platforms are not public accommodations.[16] Despite the abundance of scholarship on this issue, no scholar has adequately applied the original public meaning of the First Amendment and public accommodations law to support the notion that online platforms can be considered public accommodations.

How public accommodations were understood at the time of the founding (public accommodations originalism for short) is an important component of the current debate surrounding the regulation of online platforms because any attempts to regulate platforms as public accommodations will inevitably be met with First Amendment challenges. Such regulations would most likely require legislation.[17] The legislation would be similar to the kind of legislation that regulated public accommodations at the time of the founding. Although such regulations would have powerful features to reign in the unchecked powers of online platforms, there would be significant limitations that are currently unappreciated and unexplored. In other

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https://www.brookings.edu/blog/techtank/2021/04/09/justice-thomas-sends-a-message-on-social-media-regulation/ [https://perma.cc/L8WX-79UU] ("[S]upreme Court Justice Clarence Thomas kicked off a new round of debate on the right way to regulate social media companies with a thoughtful and creative piece of legal scholarship.").

13. *See generally* Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 1 (2021) (discussing the functions of social media platforms); Yoo, *supra* note 10, at 465 (analyzing "when the law regards an entity as a common carrier or public accommodation"); Alan Z. Rozenshtein, *Silicon Valley's Free Speech: Technology Giants and the Deregulatory First Amendment*, 1 J. FREE SPEECH L. 337 (2021) (studying how courts can determine First Amendment protections for Silicon Valley).

14. *See generally* Volokh, *supra* note 13 (addressing precedents regarding compelled speech and expressive association).

15. *See* Goldman & Miers, *supra* note 11, at 196 ("This widespread shift away from user-generated content would remove, not expand, the opportunity for people to speak online.").

16. *See* Yoo, *supra* note 10, at 465 ("The historical nature of the arguments advanced by the D.C. Circuit and Justice Thomas makes their validity turn largely on the provenance of these doctrinal questions.").

17. As explained *infra* Part III, platforms could be regulated as public accommodations according to the holding out theory, but they could easily subvert the requirements of that theory of public accommodations. Thus, legislating platforms as franchises, based on the fact that they are natural monopolies, is likely the only practical way to impose such obligations on them.

words, laws regulating online platforms as public accommodations would solve some, but by no means all, of the problems associated with social media censorship and content moderation.

Some states have even begun enacting laws purporting to regulate online platforms as public accommodations in response to Justice Thomas's opinion. One month after Justice Thomas released his opinion, Florida enacted the Transparency in Technology Act which purports to regulate platforms as public accommodations.[18] Texas enacted a similar bill in September 2021,[19] and Arizona debated a bill that also purported to regulate online platforms as public accommodations.[20] Legal challenges to the Florida and Texas laws quickly followed and the Supreme Court even weighed in to a limited extent in the case of Texas's law.[21] As states continue to debate the passage of laws regulating platforms as public accommodations and legal challenges inevitably follow, understanding the constitutional framework that informs these regulations has never been more pressing.

This Article advocates for the dual meaning of public accommodations in order to reconcile past failed attempts to define the meaning of the term. Specifically, it contends that a business can be considered a public accommodation if it *either* holds itself out to the public or has become a franchise through the enactment of positive law due to its monopolistic features. Further, it argues that online platforms fall into both of these categories and thus can be considered public accommodations.

Part II contextualizes the potential challenges to imposing a public accommodations framework onto online platforms. Specifically, Part II uses Florida's Transparency in Technology Act as a case study to explore the potential First Amendment challenges that will be brought if Congress attempts to regulate online platforms as public accommodations at the federal level.

Part III begins by tracing the history and development of public accommodations law. Part III then explains why two proffered theories, the affected with the public interest theory and the transportation/communication theory, are too general and do not comport with the original public meaning of public accommodations. Part III concludes by analyzing two additional theories, the holding out theory and the franchise theory, and

18. Transparency in Technology Act, S. 7072, 2021 Leg., Reg. Sess. (Fla. 2021).
19. Tex. H.B. 2020, 87th Leg., R.S. (2021).
20. H.R. 2280, 55th Leg., Reg. Sess. (Az. 2022).
21. NetChoice L.L.C. v. Paxton, 142 S. Ct. 1715, 1717–18 (2022) (Alito, J., dissenting).

ultimately concludes that both theories independently comport with the original public meaning of public accommodations.

Part IV applies both the holding out theory and the franchise theory to online platforms and concludes that online platforms—as they are currently constituted—fit into both categories of public accommodations.

Part V argues that even though online platforms satisfy the requirements of public accommodations, imposing that status upon them will not fix most of the problems proponents of the theory have with online platforms. Part V analyzes the critiques of imposing public accommodations status onto online platforms and explains that the consequences of such regulation are not as bad as critics make them out to be.

II. CONSTITUTIONAL BACKGROUND: THE NEXUS BETWEEN PUBLIC ACCOMMODATIONS AND THE FIRST AMENDMENT

In his *Biden v. Knight First Amendment Institute* concurrence, Justice Thomas explained that "[online] platforms have their own First Amendment interests, but regulations that might affect speech are valid if they would have been permissible at the time of the founding."[22] Thus, if we can determine the kinds of exceptions to the First Amendment that existed at the time of the founding, then we can evaluate whether online platforms satisfy those exceptions such that the government can regulate without triggering heightened scrutiny. Justice Thomas suggested that the common law doctrines related to public accommodations might be one type of regulation that existed at the time of the founding that could be used to regulate online platforms.[23] This Article will evaluate laws that try to influence the content moderation decisions of online platforms that invoke the original public meaning of public accommodations and the First Amendment as a defense to the challenged constitutionality of those laws.

Even if online platforms are public accommodations, the specific provisions of any attempts to regulate them as such must still be the kind of

22. Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1223–24 (2021) (Thomas, J., concurring) (citing United States v. Stevens, 559 U.S. 460, 468 (2010)). My analysis proceeds under the assumption that Justice Thomas's claim in *Biden* is correct as a matter of constitutional interpretation. In other words, it presupposes that the original public meaning of constitutional provisions are both fixed and authoritative. As such, scholars and judges applying other interpretive methodologies might reach different conclusions than this Article regarding the constitutionality of regulating online platforms as public accommodations.

23. *Id.* at 1224 (Thomas, J., concurring) (arguing that "some digital platforms are sufficiently akin to common carriers or places of accommodation to be regulated . . ." in such a way that would not trigger First Amendment protections).

regulation that would have been constitutionally permissible at the time of the founding. Two forms of regulation are particularly relevant to the issues discussed in this Article. The first is compelled hosting, or a law that prohibits online platforms from removing a user's content or deplatforming a user. This form of regulation is not only constitutional under existing precedent,[24] but constitutional as a matter of an originalist interpretation of the First Amendment so long as the platform is a public accommodation. The second form of regulation is compelled recommendations (or the prohibition on recommendations).[25] This form of regulation either compels an online platform to recommend certain content or prevents it from speaking itself by prohibiting the platform from flagging user posts or commenting on them itself as an administrator.[26]

Florida's Transparency in Technology Act (the Act) provides a concrete example of laws that attempt to regulate online platforms as public accommodations by compelling hosting and prohibiting recommendations. The Act, which regulates the moderation decisions of most online platforms, finds that online "platforms have become as important for conveying public opinion as public utilities are for supporting modern society" and that they "hold a unique place in preserving [F]irst [A]mendment protections for all Floridians and should be treated similarly to common carriers" i.e., public accommodations.[27]

The Act prohibits most social media companies from taking a variety of actions against users. First, a platform cannot willfully deplatform[28] a candidate for public office if the company knows the individual is a candidate.[29] If a platform does knowingly deplatform a candidate, it will face a fine of $250,000 per day for statewide office candidates and $25,000 per day for a candidate for other offices.[30] Second, a social media platform may not use

24. *See generally* Volokh, *supra* note 13 (supporting the constitutionality of public accommodations status for online platforms according to existing precedent). Although I reach the same conclusion as Professor Volokh, I do so under an originalist argument as opposed to one according to existing precedent.

25. *Id.* at 451.

26. *Id.* at 452.

27. Transparency in Technology Act, S. 7072, 2021 Leg., Reg. Sess. (Fla. 2021).

28. *Id.* (defining deplatforming as "the action or practice by a social media platform to permanently delete or ban a user or to temporarily delete or ban a user from the social media platform for more than [fourteen] days").

29. *Id.*

30. *Id.*

post-prioritization algorithms[31] or shadow ban[32] material posted by or about a known political candidate.[33] Third, platforms are prohibited from censoring or shadow banning any user's content and from deplatforming any user unless the platform first meets certain criteria.[34] It is important to note that the Act's definition of "censor" is remarkably broad.[35] Not only does it encompass a platform's efforts to remove or regulate a post, but it also prohibits the platform from posting an addendum to any content posted by users.[36] This latter prohibition effectively prevents platforms from factchecking user content or recommending additional resources alongside any content posted by users of the platform.

The Act was almost immediately challenged in federal district court by tech industry groups representing some of the nation's largest social media companies for, among other things, violating their First Amendment rights.[37] The plaintiffs claimed that the Act interferes with the platforms' editorial judgment, compels speech, and prohibits speech.[38] The court refused to characterize online platforms as common carriers or public accommodations and enjoined enforcement of the law.[39] The district court's decision was appealed to the Eleventh Circuit, which similarly struck down the law and refused to recognize platforms as public accommodations.[40]

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31. *Id.* (defining post-prioritization as an "action by a social media platform to place, feature, or prioritize certain content or material ahead of, below, or in a more or less prominent position than others in a newsfeed, a feed, a view, or in search results").

32. *Id.* (defining shadow ban as an "action by a social media platform, through any means, whether the action is determined by a natural person or an algorithm, to limit or eliminate the exposure of a user or content or material posted by a user to other users of the social media platform").

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *E.g.*, NetChoice L.L.C. v. Moody, 546 F. Supp. 3d 1082 (N.D. Fla. 2021)(challenging Florida's regulations that target social media providers in the state).

38. *Id.* at 1085.

39. *Id.* at 1096.

40. NetChoice L.L.C. v. Moody, 34 F.4th 1196, 1209–10 (11th Cir. 2022). While I agree with the Eleventh Circuit's decision that the Transparency in Technology Act is unconstitutional, it is not because social media companies are private actors entitled to the full panoply of First Amendment rights. Rather, it is because Florida's law runs afoul of the permissible type of regulations to which governments can subject public accommodations. In short, the government can treat online platforms as public accommodations and regulate them as such, but in so doing, it must abide by a narrow regulatory framework to avoid infringing on the diminished First Amendment protections to which they actually are entitled. *See* discussion *infra* Part V.A.

The enactment and subsequent challenge to the Transparency in Technology Act provides a concrete illustration of the measures legislatures are willing to take to combat the supposed inability of the legal system to curtail the heavy-handed content moderation policies of online platforms. In fact, even though the Transparency in Technology Act was the first law in existence to assert that social media platforms are common carriers (and thus public accommodations), a number of other states have either enacted or are currently considering laws of their own to regulate platforms and their moderation decisions.[41] Likewise, former President Donald Trump attempted to regulate social media platforms by executive order during his presidency,[42] and Congress is considering ways in which it can regulate online platforms too.[43] In short, Florida's law is not an aberration and other attempts to regulate content moderation are likely to continue appearing in the future.

If other states or the federal government enact legislation to regulate the content moderation policies of online platforms, they are almost certain to be challenged as a violation of the First Amendment. In order to better understand how laws such as Florida's could be evaluated by the courts, Part III of this Article attempts to define public accommodations as they were understood at the time of the founding before discussing the practical implications of regulating online platforms as public accommodations (either through statutory law or through common law doctrines).

III. THE DUALITY OF THE ORIGINAL PUBLIC MEANING OF PUBLIC ACCOMMODATIONS

Any effort to apply a public accommodations framework to online platforms is complicated by the fact that nobody can seem to agree on what exactly constitutes a public accommodation. In fact, even the common law sources—which one must look to in order to discern the original public meaning of public accommodations—are unhelpful, "offering competing

41. Rebecca Kern, *Push to Rein in Social Media Sweeps the States*, POLITICO (July 1, 2022, 4:30 AM), https://www.politico.com/news/2022/07/01/social-media-sweeps-the-states-00043229 [https://perma.cc/76CQ-SB56].

42. Charlie Savage, *Trump's Order Targeting Social Media Sites, Explained*, N.Y. TIMES (Aug. 9, 2020), https://www.nytimes.com/2020/05/28/us/politics/trump-twitter-explained.html [https://perma.cc/7LVY-45DX].

43. Carly Miller, *Can Congress Mandate Meaningful Transparency for Tech Platforms?*, BROOKINGS (June 1, 2021), https://www.brookings.edu/techstream/can-congress-mandate-meaningful-transparency-for-tech-platforms/ [https://perma.cc/GLL8-359T].

and largely inconsistent rationales" for what constitutes a public accommodation.[44] The most comprehensive efforts at discerning the principles undergirding the law of public accommodations were completed in the early twentieth century by Bruce Wyman[45] and Charles Burdick.[46] Wyman thought public accommodations regulations could be justified for industries with virtual monopolies.[47] He also argued the government's use of franchises played a critical role in the regulation of public accommodations.[48] Meanwhile, Burdick believed any business that held itself out as being open to the public was a per se public accommodation.[49]

While Burdick's and Wyman's justifications for public accommodations are the most well-documented, they are not universally accepted.[50] That said, "[m]odern efforts at justifying the parameters of [public accommodations] have not gone much further than Wyman and Burdick."[51] These modern efforts typically claim transportation or communication industries that perform a particularly important public service are public accommodations.[52] Underlying the transportation/communication theory is a more traditional and broader theory of public accommodations that states any business affected with the public interest is a public accommodation.

Scholars have not yet been able to put forth a comprehensive public accommodations framework. To do so, one must critically analyze the history and development of the law in this area to try and discern what the ratifiers of the Constitution would have understood the term "public accommodation" to mean.

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44. Kevin Werbach, *Only Connect*, 23 BERKELEY TECH. L.J. 1233, 1247 (2007); *see* Daniel T. Deacon, *Common Carrier Essentialism and the Emerging Common Law of Internet Regulation*, 67 ADMIN. L. REV. 133, 134–35 (2015) (contending "it is far from clear what comprises the essence of a [public accommodation] . . ."); *see also* Christopher S. Yoo, *Common Carriage's Domain*, 35 YALE J. ON REGUL. 991, 994–95 (2018) ("Over the years, scholars and courts have repeated[ly] attempted to devise a coherent framework for determining when common carriage should apply, without much success.").

45. *See generally* Wyman, *supra* note 2 (discussing the reasons for distinguishing public from common callings).

46. *See generally* Charles K. Burdick, *Origin of the Peculiar Duties of Public Service Companies*, 11 COLUM. L. REV. 514 (1911) (addressing the intricacies of public service law).

47. Wyman, *supra* note 2, at 158.

48. *Id.* at 163.

49. Burdick, *supra* note 46, at 515–16.

50. *See* Thomas B. Nachbar, *The Public Network*, 17 COMMON L. CONSPECTUS 67, 97 (2008) (arguing that "Wyman made his historical claims without any support").

51. Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J.L. & TECH. 391, 405 (2020).

52. *See, e.g.*, Nachbar, *supra* note 50, at 109 (describing the nondiscriminatory access to transportation and communication industries).

The law of public accommodations emerged from the English medieval guild system.[53] During this time, the local guilds and municipalities had an inordinate amount of control over local business. For example, the guild hall in the town of Beverley issued a regulation in the late 1360s that regulated the price of beer for the whole town.[54] The guild published a statement that if any alehouse did not accept the regulated price, thus discriminating against the customer, that the customer should complain to the guild hall and "a remedy shall be found."[55]

Although even purely "private" businesses were heavily regulated similarly to "public" businesses during the medieval period,[56] the regulation of all businesses eventually gave way to the notion that only businesses that were "characterized as having a 'public calling'" should be regulated as public accommodations.[57] These companies often held themselves out to the public as "offering to transport freight or passengers for a fee" or were granted licenses (or franchises) from the government authorizing their operations.[58]

It is universally accepted that the common law definition of public accommodations (or businesses having a public calling) "explicitly included innkeepers and common carriers."[59] Beyond this, there is not much agreement regarding what constitutes a public accommodation. Scholars have developed four theories of the original public meaning of public accommodations, which have typically been understood to be mutually exclusive:

53. *See* Candeub, *supra* note 51, at 403 ("Common carriage emerged from the law of 'public callings' which in turn originally developed from the medieval guild system.").

54. Burdick, *supra* note 46, at 527–28 (quoting 14 Selden Society Publications (Beverly Town Documents) 21).

55. *Id.*

56. *See* Thomas B. Nachbar, *Monopoly, Mercantilism, and the Politics of Regulation*, 91 VA. L. REV. 1313, 1319–20 (2005) ("Control over prices and the factors of production was the rule of the day under the medieval order . . . .").

57. *See* Candeub, *supra* note 51, at 403 ("Common law required these industries to perform upon reasonable request . . . .").

58. *Common Carrier*, BLACK'S LAW DICTIONARY (10th ed. 2015); *see* Landstar Express Am., Inc. v. Fed. Mar. Comm'n, 569 F.3d 493, 494 (D.C. Cir. 2009) (discussing how the "Federal Maritime Commission required agents of Ocean Transportation Intermediaries to obtain licenses"); *see also* TRT Telecomms. Corp. v. FCC, 876 F.2d 134, 137 (D.C. Cir. 1989) ("The FCC licensed the three then-existing earth stations to Comsat alone.").

59. Yoo, *supra* note 10, at 476.

(1) *The Public Interest Theory*: This theory reframes the common law's "public calling" language and holds that any "businesses affected with the public interest" are subject to public accommodations regulations.[60]
(2) *The Transportation/Communication Theory*: This theory holds that transportation and communications industries have historically been regulated as public accommodations—specifically common carriers—and therefore these industries are per se public callings.[61]
(3) *The Holding Out Theory*: This theory contends that by holding itself out to the public as willing to serve all comers, the business becomes a public calling such that it is subject to public accommodations regulations.[62]
(4) *The Franchise Theory*: This theory holds that monopolies (in particular natural monopolies), by virtue of their market power, become public callings since consumers are required to patronize the monopolist's business for goods and services and it is impossible or impractical for another business to serve the customer. This requirement, the theory concludes, justifies government regulation in the form of a franchise where the business is granted some sort of public benefit by the government in return for it owing certain duties to the public.[63]

As previously mentioned, each of these theories has received significant support and criticism throughout the years. Likewise, few attempts have been made to reconcile these theories with one another despite there being no historical evidence one was correct while the others were incorrect. The remainder of Part III traces the historical roots of each theory and attempts, wherever possible, to reconcile one with the others.

60. *See, e.g.*, Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1208–09 (2008) (suggesting that the application of common law duties to public utilities is worth considering with respect to business in the public interest).

61. *See, e.g.*, Nachbar, *supra* note 50, at 109 (arguing that although it is hard to find specific characteristics that lead to public accommodations regulations, "all of the regulated industries relate in some way to transportation and communication networks").

62. Burdick, *supra* note 46, at 515; *see* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1314 (1995–1996) (describing how common carriers often held themselves out as carrying goods for anyone who would employ them).

63. James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM. L.J. 225, 255–57 (2002); *see* Wyman, *supra* note 2, at 163 (explaining the franchise theory and how it was created).

A. *The Public Interest Theory*

The "affected with the public interest" theory has its roots in *Lane v. Cotton*.[64] In that case, the court held a postmaster was not a common carrier and thus not strictly liable for losing a letter he was charged with delivering.[65] Lord Chief Justice Holt argued in dissent that the postmaster should be liable because he was engaged in a "public employment" and as such was "bound to the utmost extent of that employment to serve the public."[66]

Although *Lane* is about the imposition of liability against a common carrier for loss of a letter and not for refusing to deliver the letter (i.e., discrimination), the case is important because it aids in understanding what characteristics early courts looked for when determining whether one should be considered a public accommodation. Lord Holt explained the common law understanding of public accommodations in the following way:

> [W]here-ever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office, under the pain of an action against him . . . . If on the road a shoe fall off my horse, and I come to a smith to have one put on, and the smith refuse to do it, an action will lie against him, because he has made a profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the King's subjects that will employ him in the way of his trade.[67]

Lord Chief Justice Holt's understanding of businesses engaged in a public employment (a more traditional way to refer to public accommodations) is seen as authoritative, even though he made his argument in the dissent, because all of the judges on the panel agreed a public employment involved "a trade which is for the public good."[68] The judges in the majority merely disagreed with Lord Chief Justice Holt on whether the postmaster was

64. Lane v. Cotton (1701) 88 Eng. Rep. 1458 (PC).

65. *Id.* at 1458.

66. *Id.* at 1465 (Lord Holt CJ, dissenting). It is worth noting that the other judges did not disagree with Lord Holt that those engaged in a public employment have different obligations than those engaged in private callings. Instead, they merely disagreed as to whether the postmaster should be classified as being engaged in a public employment because his office was created by statute. The statute did not expressly import the same legal obligations of common law offices onto the postmaster which led the other judges to hold that he was not strictly liable for the loss of the letter.

67. *Id.* at 1464.

68. *Id.*

engaged in a trade for the public good and thus subject to the requirements of a public accommodation.[69]

The "public good" language was later adapted by the United States Supreme Court in *Munn v. Illinois*[70] to reflect the current "affected with the public interest" language.[71] In that case, the Court held grain elevators could be regulated as common carriers because they were "affected with a public interest."[72] Many scholars have used *Lane* and *Munn* as exemplars to justify the public interest theory.[73] These scholars, however, fail to grasp that neither of these cases, or any other cases from before or after the founding, sets forth public interest as the foundation for public accommodations regulations.

Recall that in *Lane*, all the judges agreed that if one is engaged in a "public employment," he should have additional obligations imposed on him.[74] *Lane*, however, failed to define exactly what it meant to be engaged in a public employment. *Gisbourn v. Hurst*[75] decided shortly thereafter provides further insight. In that case, the court had to determine whether a carrier was engaged in a public employment when he purportedly violated his duty to serve the public.[76] The court explained, "[A]ny man undertaking for hire to carry the goods of all persons indifferently, as in this case, is, as to this privilege, a common carrier . . . ."[77] The determinant "of whether or not one was a 'common' carrier, as opposed to an ordinary carrier, was whether one held oneself out as available to take on business from anyone in the public."[78]

Thus, one can conclude *Lane* and its progeny do not stand for the blanket proposition that being involved with the "public good" or being "affected with the public interest" is the test for determining whether a business is a public accommodation. Rather, there must be something else—in this case

69. *Id.* at 1458.

70. Munn v. Illinois, 94 U.S. 113 (1876).

71. *Id.* at 135–36.

72. *Id.* at 130.

73. *See* Bracha & Pasquale, *supra* note 60, at 1208–09 (2008) (describing the history of the phrase "businesses affected with the public interest"); Speta, *supra* note 63, at 256–57 ("The [*Munn*] opinion has two strands: that of common carrier duties regulating monopoly, and that of public interest more generally.").

74. *See supra* notes 64–66 and accompanying text (noting the differences between the plurality and dissenting opinion in *Lane v. Cotton*).

75. Gisbourn v. Hurst (1710) 91 Eng. Rep. 220 (KB).

76. S*ee* Singer, *supra* note 62, at 1304–08 (providing a detailed account of *Lane* and *Gisbourn*).

77. *Id.* at 1307 (quoting Gisbourn v. Hurst (1710) 91 Eng. Rep. 220 (KB)).

78. *Id.* (citing Coggs v. Bernard (1703) 92 Eng. Rep. 107 (KB)).

holding oneself out to the public—that gives a business a sufficient level of "publicness" to be considered a public accommodation.

Likewise, the holding in *Munn* has been mischaracterized in attempts to justify the public interest theory. While *Munn* does hold that businesses affected with the public interest can be regulated as public accommodations, it is hardly clear whether the holding rests solely on that justification. For example, the Court also noted that some businesses become public when the presence of monopoly creates a near universal need for them.[79] Furthermore, the *Munn* Court impliedly endorsed the holding out theory by saying that when one devotes his business to a particular use (such as innkeeping), he "grants to the public an interest in that use."[80]

The Court later recognized the lack of clarity it created when it announced the "affected with the public interest" framework and repudiated it in *Nebbia v. New York*.[81] In that case, the Court held that "there is no closed class or category of business affected with a public interest."[82] The Court further explained that affected with the public interest was "not susceptible of definition and form[ed] an unsatisfactory test."[83]

Notwithstanding its lack of historical support and rejection by the Court, scholars continue to boldly state that businesses affected with the public interest are public accommodations.[84] It is clear, however, that such a claim does nothing to determine what it actually means to be affected with the public interest.[85] The evidence suggests the public interest language is just shorthand for what a business is considered when it either voluntarily holds itself out to the public or is regulated as a franchise because it is a natural monopoly. One who holds himself out to the public or is provided special privileges by the government is, of course, affected with the public interest, but this is the conclusion that follows from regulation, not the justification that leads to it.

79. Munn v. Illinois, 94 U.S. 113, 126–30 (1876).

80. *Id.* at 126.

81. Nebbia v. New York, 291 U.S. 502 (1934).

82. *Id.* at 536.

83. *Id.*

84. *See supra* note 73 and accompanying text.

85. *See* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring) (explaining how defining a public accommodation based on whether it serves the public is "hardly helpful" since "most things can be described as 'of the public interest'").

B. *The Transportation/Communication Theory*

The transportation/communication theory is an outgrowth of the "affected with the public interest" theory.[86] Proponents of this theory claim that the transportation and communication industries provide such an important public service that they are de facto public accommodations.[87] For example, Professor Thomas Nachbar explains "[i]t is hard to find a specific characteristic that leads to nondiscriminatory access and rate regulation . . . . Nonetheless, all of the regulated industries relate in some way to transportation and communication networks, and society has demonstrated a singularly strong interest in their regulation."[88] Likewise, Professor Susan Crawford claims that market power, franchise obligations, and whether a business holds itself out as willing to serve all comers is not relevant when determining the public accommodations status of a communications network. Rather, government oversight of communications networks is justified based on the compelling public interest that the services provided by these networks be reasonable and nondiscriminatory.[89]

But the transportation/communication theory is descriptive at too general a level. Similar to the affected with the public interest theory—it falsely equates the object of historical regulation (transportation and communication industries) with the cause for those regulations.[90] There can be no doubt that the transportation and communication industries have traditionally been considered public accommodations. That said, "the mere existence of a long history of state involvement with [these industries] does not necessarily tell us what the principal basis of that involvement is."[91]

The principal basis for the imposition of public accommodations regulations on transportation and communication industries can be traced back either to the industry imposing the restrictions upon itself by holding itself out to the public or to government-imposed regulations through franchise obligations as a result of monopoly. As it relates to self-imposed public

86. *See* Candeub, *supra* note 51, at 404–05 (discussing how most modern efforts to link public accommodations and the transportation and communication industries have relied on their roles in performing "an important public service").

87. *Id.* at 405.

88. Nachbar, *supra* note 50, at 109.

89. Susan P. Crawford, *Transporting Communications*, 89 B.U. L. REV. 871, 881 (2009).

90. *See* Candeub, *supra* note 51, at 405 (discussing vagueness issues and asking "[h]ow involved in transportation or communications must an industry be before it becomes a common carrier").

91. Crawford, *supra* note 89, at 884; *see also* Yoo, *supra* note 44, at 996 (arguing that a definition based on historical ties is "not specified clearly enough to provide a basis for determining which transportation and communications business fall inside").

accommodations regulations, Blackstone argued that public accommodations have a duty to serve "not because of their function as part of the travel [or communications] industr[ies] but simply because they are open to the public."[92] Similarly, early cases regulating the transportation and communication industries were based on the granting of a franchise from the government based on their monopoly power. In *Beekman v. Saratoga & Schenectady Railroad Co.*,[93] the government's decision to grant eminent domain powers to a railroad company was challenged based on the theory that, as a private company, it would have no obligation to serve the public. Thus, the plaintiffs claimed, the grant of eminent domain power amounted to an unconstitutional taking. The court found that:

> The objection that the corporation is under no legal obligation to transport produce or passengers upon this road . . . is unfounded in fact. The privilege of making a road and taking tolls thereon is a franchise, as much as the establishment of a ferry or a public wharf and taking tolls for the use of the same. The public have an interest in the use of the railroad, and the owners may be prosecuted for the damages sustained, if they should refuse to transport an individual, or his property, without any reasonable excuse, upon being paid the usual rate of fare.[94]

Thus, while transportation and communications industries may be more susceptible to public accommodations regulations, these regulations are based not on their status as communications or transportation businesses, but on the unique characteristics that make those industries more susceptible to either self-imposed or government-imposed regulations through either the holding out or franchise theories respectively.

C. *The Holding Out Theory*

The history and justifications for the holding out theory are well supported and well documented. Charles Burdick's 1911 article, *Origin of the*

92. Singer, *supra* note 62, at 1309 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 165 (Edward Christian ed., 15th ed. 1809)).

93. Beekman v. Saratoga & Schenectady R.R. Co., 3 Paige Ch. 45 (N.Y. Ch. 1831).

94. *Id.* at 74–75; *see also* Shepard v. Milwaukee Gas Light Co., 6 Wis. 539, 547 (1858) ("Odious as were monopolies to the common law, they are still more repugnant to the genius and spirit of our republican institutions, and are only to be tolerated on the occasion of great public convenience or necessity; and they always imply a corresponding duty to the public to meet the convenience or necessity which tolerates their existence."). *See* Singer, *supra* note 62, at 1318–19 (discussing *Beekman* and *Shepard* in further detail).

Peculiar Duties of Public Service Companies, is recognized as the seminal work laying out the historical pedigree of the holding out theory.[95] That said, Joseph William Singer's 1996 article, *No Right to Exclude*, provides a more comprehensive accounting of early English and American law to support the conclusion that the holding out theory is most supported by the history.[96] This section draws heavily on the works of both men in order to explain the nuances of the holding out theory.

References to the "holding out" requirement can be found, albeit implicitly, as early as 1611. In *The Six Carpenters Case*, the court opined that "the law gives authority to enter into a *common* inn or tavern."[97] Twelve years later in an *Anonymous* case, the court said that "[a]n action on the case lyeth against an innkeeper who denies lodging to a travailer for his money, if he hath spare lodging; because he hath subjected himself to keep a *common* inn."[98] In this context, the court's use of the word "common" denotes the fact that the business had held itself out to the public.

As noted above, *Lane* is perhaps the most prominent English case supporting the holding out theory and has been cited ad nauseum by early American courts when discussing public accommodations.[99] Although *Lane* was originally used to justify the "affected with the public interest" theory, *Gisbourn* made clear that the true nexus between public employment and the imposition of public accommodations requirements is the extent to which a business holds itself out to the public as willing to serve all comers.[100]

In fact, early American courts and commentators borrowed heavily from English understandings of public accommodations as set forth in *Lane* and *Gisbourn* to justify the holding out theory. According to James Kent, common carriers were "those persons who undert[ook] to carry goods generally,

95. *See generally* Burdick, *supra* note 46.

96. *See generally* Singer, *supra* note 62. Singer ultimately concludes that the holding out theory is the *only* historical justification for public accommodations regulations notwithstanding historical evidence to the contrary (some of which he even cites in his article). Despite his valiant efforts to pigeonhole this complex legal topic into a one-size-fits-all box, I find the ultimate conclusion (particularly the fact that he discards ample historical evidence regarding franchises and monopolies) unconvincing. That said, Singer's comprehensive accounting of the history of the holding out theory is laudable and worthy of consideration.

97. Burdick, *supra* note 46, at 519 (quoting The Six Carpenters' Case (1610), 8 Co. Rep. 146 a (KB)) (emphasis added).

98. *Id.* (quoting BRUCE WYMAN, CASES ON PUBLIC SERVICE COMPANIES 127 (Harv. L. Rev. Ass'n, 1902)) (emphasis added).

99. Lane v. Cotton (1701) 88 Eng. Rep. 1458 (PC).

100. *See generally* Gisbourn v. Hurst (1710) 91 Eng. Rep. 220 (KB).

and for all people indifferently, for hire."[101] Likewise, Joseph Story "defined common carriers as those who hold themselves out as ready to serve the public." Story explained:

> It is not . . . every person, who undertakes to carry goods for hire, that is deemed a common carrier . . . . To bring a person within the description of a common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally; and *he must hold himself out* as ready to engage in the transportation of goods for hire as a business, not as a casual occupation, *pro hac vice*. A common carrier has, therefore, been defined to be one, *who undertakes for hire or reward to transport the goods of such, as choose to employ him*, from place to place.[102]

Joseph Story later applied the holding out theory as a judge in the case of *Jencks v. Coleman*[103] and held that a steamboat operator had no right to refuse service to a passenger.[104] He stated that since the steamboat operator held himself out to the public, "there is no doubt, that [he was] a common-carrier of passengers for hire; and, therefore, the defendant, as commander, was bound to take the plaintiff as a passenger on board . . . ."[105]

While history makes clear that those who held themselves out as willing to serve the public were considered public accommodations, and thus, lost the ability to discriminate against potential patrons, there are important caveats, clarifications, and limiting principles that must be discussed to understand the full picture of how early Americans understood the holding out justification for public accommodations regulations. The following principles will be discussed below: (1) public accommodations status was self-imposed under the holding out theory; (2) any business (not just innkeepers & common carriers) could be considered a public accommodation; (3) holding oneself out to the public was not necessarily an explicit or affirmative act; (4) monopoly power was not required for the imposition of public accommodations status on a business; and (5) public accommodations did not lose

101. Singer, *supra* note 62, at 1312 (internal quotations omitted) (quoting JAMES KENT, COMMENTARIES ON AMERICAN LAW 464–65 (photo. reprt.) (1826–1830)).

102. *Id.* at 1312–13 (omissions in original) (first and third emphasis added) (quoting JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS, WITH ILLUSTRATIONS FROM THE CIVIL AND THE FOREIGN LAW § 495, at 322 (Hilliard & Brown, 1832)).

103. Jencks v. Coleman, 13 F. Cas. 442 (C.C.D.R.I. 1835) (No. 7,528).

104. *Id.* at 443.

105. *Id.*

the ability to refuse to serve customers for sufficient cause notwithstanding their duty to serve all comers.

1. Public Accommodations Status Was Self-Imposed Under the Holding Out Theory

Some scholars have suggested that the law of public accommodations is not "a truth in advertising law" such that the imposition of public accommodations regulations cannot hinge on whether a particular business holds itself out to the public.[106] Others, such as Professor Christopher Yoo, have made similar criticisms of the holding out theory by claiming that the law of public accommodations would be unsustainable if it hinged on holding oneself out to the public because "any definition that allows a firm's description of the services it offers to determine whether it is a common carrier will inevitably be subject to manipulation."[107] Although Yoo's concern with manipulation may be well founded, his conclusion regarding the unsustainability of the holding out theory is incorrect. In fact, history suggests that one could evade public accommodations status—at least based on the holding out theory—by simply changing one's business model to make it clear that the business does not serve all comers. Frederick Charles Moncreiff, an English treatise writer, defended the notion that public accommodations were required to serve all comers simply because businesses held themselves out to the public.[108] Moncreiff wrote that when an innkeeper "commits any outward act calculated to induce people to think that he is a common innkeeper, he is bound as such to receive those who offer themselves."[109] He further explained that no duty arises "if a man claims to exercise an arbitrary selection of guests, and does not in any way advertise or outwardly profess to be a common innkeeper."[110]

106. *See* Volokh, *supra* note 13, at 382 n.12 (explaining different ways courts have determined whether a service is performed by a common carrier and how common carriers operate).

107. Christopher S. Yoo, *Is There a Role for Common Carriage in an Internet-Based World?*, 51 HOUS. L. REV. 545, 553 (2013).

108. *See generally* FREDERICK CHARLES MONCREIFF, THE LIABILITY OF INNKEEPERS (London, W. Maxwell & Son 1874).

109. *Id.* at 18.

110. *Id.*

2. Any Business (Not Just Innkeepers & Common Carriers) Could Be Considered a Public Accommodation

The prevailing view of public accommodations law suggests that the common law limited the duty to serve to only innkeepers and common carriers. This view is incorrect. There is no reason to believe that innkeepers and common carriers were the only industries to be regulated as public accommodations. In fact, "[t]he case law and leading treatises [at the time of the founding], including Blackstone, Kent, and Story, among others did not explicitly limit public accommodations to these two categories."[111]

Contrary to the view that only innkeepers and common carriers were considered public accommodations, some scholars have suggested that at common law *all* businesses were subject to the duty to serve regardless of whether they held themselves out to the public.[112] Surely this view is also mistaken. As is often the case, the truth is found somewhere in the middle.

At common law, *any* business could be considered a public accommodation, but it must have held itself out as willing to serve all comers as a prerequisite.[113] If another business within the same industry did not hold itself out to the public, that business was not necessarily considered a public accommodation. Burdick provided an apt example of how businesses other than inns and common carriers could be considered public accommodations. Burdick, quoting an unnamed case from 1441, said:

> An action on the case was brought against a surgeon for failure to cure a horse. Paston, J., said: "You have not shown that [the surgeon] is a *common* surgeon

111. Yoo, *supra* note 10, at 476. It is also understood that rate regulation and higher liability standards were imposed on public accommodations historically. *See* David G. Owen, *The Evolution of Products Liability Law*, 26 REV. LITIG. 955, 957–59 (2007) (outlining regulations imposed, including the duty to disclose and the implied warranty of quality); *see also* H.W. Chaplain, *Limitations Upon the Right of Withdrawal from Public Employment*, 16 HARV. L. REV. 555, 556–57 (1903) (discussing the "three fundamental duties" of carriers). That said, there is no evidence to suggest that imposing rate regulation and increased liability onto public accommodations is necessary to their establishment. Thus, this Article will not discuss these minor components of public accommodations regulations except when doing so will be useful to the discussion.

112. *See* Edward A. Adler, *Business Jurisprudence*, 28 HARV. L. REV. 135, 158 (1914–1915) ("Under a true interpretation of the common law all business is public, and the phrase 'private business' is a contradiction in terms.").

113. *See* Singer, *supra* note 62, at 1321–24 (offering a comprehensive accounting of common callings other than innkeepers and common carriers).

> to cure such horses, and, therefore, although he has killed your horse by his medicines you shall have no action against him without an *assumpsit*."[114]

Burdick explained that, if the surgeon held himself out as a "common surgeon," then an *assumpsit* would not be necessary because holding out subjects individuals to general *assumpsit*,[115] and a specific allegation for breach of contract would not be necessary. Most relevant to this discussion, Burdick concluded that "in an action on the case against [a common surgeon] for . . . refusal [to serve], the allegation that he was a common surgeon would sufficiently set out his general *assumpsit*."[116] Thus, according to the 1441 case, a surgeon could be considered a public accommodation based solely on whether he held himself out to the public.

Other early sources, such as Blackstone, discussed the duty to serve of "farriers," "taylors," and "other workmen."[117] Likewise, *Lane v. Cotton* considered blacksmiths to be involved in a common calling.[118] There is also ample evidence to suggest that in addition to innkeepers and common carriers, food sellers and veterinarians were common callings and could have a duty to serve under English common law.[119] Given the breadth of historical evidence suggesting there were common callings other than innkeepers and common carriers, it stands to reason that early Americans would have understood common callings (or public accommodations) to include any business that held itself out as willing to serve the public.

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114. Burdick, *supra* note 46, at 519 (first emphasis added).

115. *Id.* at 519–20. A general or universal *assumpsit* is essentially a promise to serve any potential customer seeking the service that the business has advertised as being open to the public. *Id.* The act of the business holding itself out to the public was viewed as an "offer" while the act of the customer seeking the service from the company was viewed as an "acceptance" such that a formal contract was not required for one to pursue an action to recover damages. *Id.*

116. *Id.* at 520.

117. Singer, *supra* note 62, at 1324 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 165 (Edward Christian ed., 15th ed. 1809)); *see also* WILLIAM JONES, AN ESSAY ON THE LAW OF BAILMENTS 100–01 (Hogan & Thompson, 1836) (discussing "common traders" and "common builders").

118. Lane v. Cotton (1701) 88 Eng. Rep. 1458, 1464 (PC) ("If on the road a shoe fall off my horse, and I come to a smith to have one put on, and the smith refuse to do it, an action will lie against him, because he has made profession of a trade which is for the public good . . . .").

119. *See* Matthew O. Tobriner & Joseph R. Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 CALIF. L. REV. 1247, 1249–50 (1967) (describing occupations that were likely understood as common carriers under English common law and the obligations imposed on those occupations).

3. Holding Oneself Out to the Public Was Not Necessarily an Explicit or Affirmative Act

While most businesses subjected themselves to the duty to serve by affirmatively "hanging out a sign" to indicate that they would serve all comers, such an explicit act was not necessary to be considered a public accommodation. Joseph Story suggested that:

> An innkeeper may be defined to be the keeper of a common inn for the lodging and entertainment of travelers and passengers, their horses and attendants, for a reasonable compensation. It must be a common inn, or *diversorium*, that is, an inn kept for travelers generally, and not merely for a short season of the year, and for select persons, who are lodgers. *But it is not necessary, that the party should put up a sign as keeper of an inn. It is sufficient, if in fact he keeps one.*[120]

There is no reason to conclude that other industries, such as common carriers, should be subject to a different rule.

4. Monopoly Power Was Not Required for the Imposition of Public Accommodations Status on a Business

Many scholars attempt to justify a public accommodation's duty to serve based on the argument of necessity.[121] For example, one might argue that an innkeeper could not turn away a traveler because there were no other inns in the area and refusing a customer arbitrarily would leave them without a place to stay. As previously mentioned, such attempts conflate the dual nature of public accommodations regulations (self-imposed and government-imposed) in an attempt to unify all justifications for public accommodations law under the holding out theory. That said, history provides little support for the notion that necessity was a primary justification for imposing the duty to serve on an industry that held itself out to the public as willing to serve all comers. Rather, "the necessity rationale is subordinate to the holding out principle since it only justifies a duty to serve for property owners who have voluntarily become 'public servants' by the act of holding themselves out as open to the public."[122]

120. Singer, *supra* note 62, at 1312 (quoting JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS, WITH ILLUSTRATIONS FROM THE CIVIL AND THE FOREIGN LAW, § 475, at 310 (Hilliard & Brown, 1832)) (second emphasis added).

121. *See supra* note 66 and accompanying text.

122. Singer, *supra* note 62, at 1308.

Consider Lord Holt's statement in *Lane* that "if there [are] several inns on the road, and yet if I go into one when I might go into another, and am robbed . . . the election I had of using that, or any other inn, shall not excuse the inn-keeper."[123] Lord Holt's statement implies that an innkeeper does not receive immunity from his common law duties simply because competition exists. The lack of immunity does not simply apply to the innkeeper's increased liability; it must apply to all his common law duties equally, including his duty to serve. For example, public accommodations could not charge a stranded traveler a higher price than they charged other customers simply because the stranded traveler had other options for food, drink, and lodging in the area. The justification for such liability is that members of the public rely on public accommodations to honor the implied representations they make regarding their availability.[124] In other words, "the crucial act is the act of 'hanging out a sign'—holding oneself out as having made a public invitation to come to one's property for certain services."[125]

5. Public Accommodations Retained the Ability to Refuse to Serve Customers for Sufficient Cause Notwithstanding Their Duty to Serve All Comers

Although public accommodations have a duty to serve generally, that obligation is not absolute; there are some instances where a public accommodation could refuse to serve a potential customer.

The most notable example of a public accommodation's right to refuse service is its inability to accommodate the services requested by a member of the public. *White's Case*, an English case from 1586, held that innkeepers had a general duty to serve all comers unless the inn was full.[126] Lord Holt endorsed the exception to the innkeeper's duty to serve in *Lane* by noting that an innkeeper "is bound to receive all manner of people into his house *till it be full*."[127] He also expanded the exception to include not just innkeepers, but other public accommodations as well: "If an innkeeper refuse[s] to entertain a guest where his house is not full, an action will lie against him, and so against a carrier, if his horse be not loaded, and he refuse to take a packet proper to be sent by a carrier . . . ."[128] Since the incapability

123. Lane v. Cotton (1701) 88 Eng. Rep. 1458, 1468 (PC).
124. Singer, *supra* note 62, at 1310.
125. *Id.*
126. *Id.* at 1304 (citing White's Case, 2 Dyer 343 (1586)).
127. *Lane*, 88 Eng. Rep. at 1464 (emphasis added).
128. *Id.* at 1464–65.

exception applies to innkeepers and carriers—the quintessential examples of public accommodations—we can conclude that the exception likely applies to all other public accommodations under the holding out theory.

In addition to the incapability exception to the duty to serve, public accommodations also had the right to refuse service to potential customers if they had a reasonable objection to that individual's character or conduct. This exception is vague and ill-defined in the literature. For example, Blackstone argued that an action would lie against an innkeeper if he "*without good reason* refuse[d] to admit a traveler" but he does not define what a good reason would be.[129] Likewise, Justice Story explained in *Jencks v. Coleman* that a steamboat operator was required to take a passenger since "there was no reasonable objection to the character or conduct of the plaintiff."[130] Justice Story, however, failed to explain what sort of character or conduct would be sufficient to refuse service to an otherwise eligible passenger.

Perhaps the most specific example of a public accommodations right to exclude was provided in *Markham v. Brown*.[131] In that case, the court held that an innkeeper had a duty to serve all comers although the patron could forfeit his right of entry:

> [B]y his misconduct, so that the [innkeeper] might require him to depart, and expel him; and if, by reason of several instances of misconduct, it appeared to be necessary for the protection of his guests or of himself, the [innkeeper] might prohibit the [patron] from entering again . . . . Thus if affrays or quarrels were caused through his fault, or he was noisy, disturbing the guests in the house—interfered with its due regulation—intruded into the private rooms—remained longer than was necessary, after being requested to depart—or otherwise abused his right, . . . the [innkeeper] would have a right to reform that, and, if necessary, to forbid the [patron] to enter . . . .[132]

According to *Markham*, a patron could be refused service for misconduct, quarrels, disturbances, or otherwise abusing his right as a patron.[133] Even these standards are too vague to elucidate a rule of decision for when a public accommodation may refuse service to a potential customer. It appears that at a minimum, inciting violence or engaging in illegal conduct was

129. Singer, *supra* note 62, at 1309 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 165 (Edward Christian ed., 15th ed. 1809)).

130. Jencks v. Coleman, 13 F. Cas. 442, 443 (C.C.D.R.I. 1835) (No. 7,258).

131. Markham v. Brown, 8 N.H. 523 (1837).

132. *Id.* at 531.

133. *Id.* at 530–31.

sufficient to refuse to serve a member of the public or remove a customer from one's establishment. That said, based on the writings of Blackstone and Story, the exception likely has a broader application that would allow one to refuse service based on something less than violent or illegal conduct (although it is unclear how broad the exception is).[134] For now, however, it is enough to note that the duty to serve all comers was not absolute; the owners of public accommodations still reserved some right to refuse service either because they were incapable of serving the customer or for good cause (however that term was defined).

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Based on the historical evidence presented above, a public accommodation under the holding out theory can be defined as *any* business that holds itself out, either explicitly or through its conduct, as willing to serve all comers whether the products or services offered by the business are necessary. Such status is self-imposed on the business, and the business owner can be excused from his duty to serve if he is incapable of serving a customer or has a reasonable objection to serving a particular customer (although it is unclear what constitutes a reasonable objection in most cases).

D. *The Franchise Theory*

Although most cases and commentaries on the law of public accommodations from both before and immediately after the founding era justify the duty to serve on the holding out theory, a number of sources justify the duty to serve under the franchise theory.[135] The franchise theory justifies the duty to serve based on the government's granting of a franchise to a business or entire industry.[136] The government traditionally imposed public accommodations status on industries that operated as natural monopolies, but it also imposed the duty to serve on companies in exchange for allowing them to form a monopoly.[137] Regardless, the franchise theory rests on the

134. *See* Singer, *supra* note 62, at 1309 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 165–66) (Edward Christian ed., 15th ed. 1809) (asserting that "good reason" to refuse a traveler would suffice)); *see also Jencks*, 13 F. Cas. at 443 ("[Steamboat proprietors] are not bound to admit passengers on board, who refuse to obey the reasonable regulations of the boat, or who are guilty of gross and vulgar habits of conduct . . . .").

135. *See, e.g.*, Eric R. Claeys, *Public Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877, 903 (2004).

136. *Id.*

137. *See id.* (opining that public accommodations status was historically imposed on "private beneficiaries of a state franchise or another form of state monopoly, or to companies that operated in conditions of natural monopoly"). In a natural monopoly, "the ordinary laws of competition either

proposition that the government can confer benefits onto a business or industry in exchange for imposing certain requirements, such as the duty to serve.[138]

As we saw earlier, some have conflated the independent franchise theory of public accommodations with the entirely different notion of necessity under the holding out theory in an effort to reconcile public accommodations regulations for monopolies.[139] The history, however, is clear that many industries or individual businesses were subjected to the duty to serve *even if* they did not hold themselves out to the public as serving all comers; their franchise obligations were sufficient to confer public accommodations status upon them.

The justifications for the franchise theory can be traced back to the very beginning of public accommodations law: the English medieval guild system.[140] The guilds had monopolistic control over their trades because they could determine who was and was not permitted to enter the trade.[141] In return, however, the government imposed strict liability and a duty to serve on the guild and all its tradesmen.[142]

Franchise obligations for monopolies persisted throughout the sixteenth and seventeenth centuries and were extremely prevalent in early American society. Take, for example, the Mill Acts that many states enacted at the

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practically fail to operate, or act but feebly." BRUCE WYMAN, 1 THE SPECIAL LAW GOVERNING PUBLIC SERVICE CORPORATIONS AND ALL OTHERS ENGAGED IN PUBLIC EMPLOYMENT § 90 (1911). That said, it is possible for a natural monopoly to exist even if there is more than one firm in the relevant market. Judge Richard Posner explains the concept in the following way:

> If the entire demand within a relevant market can be satisfied at lowest cost by one firm rather than by two or more, the market is a natural monopoly, whatever the actual number of firms in it. If such a market contains more than one firm, either the firms will quickly shake down to one through mergers or failures, or production will continue to consume more resources than necessary. In the first case competition is short-lived and in the second it produces inefficient results. Competition is thus not a viable regulatory mechanism under conditions of natural monopoly.

Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 548 (1969). The fact that it might be most efficient to only have one firm in the market is not the only factor to consider when determining whether a natural monopoly exists; high barriers to entry should also be taken into account. Otherwise known as economies of scale, a natural monopoly has an inherent advantage over potential competitors because its cost of production decreases as its output expands. *Id.* at 561.

138. *See* Candeub, *supra* note 51, at 407 (noting that "a requirement to serve all without discrimination" was imposed on guilds in Europe in exchange for the power to control their trade).

139. *See* discussion *supra* Part III.C.

140. Candeub, *supra* note 51, at 407.

141. *Id.*

142. *Id.*

time of the founding.[143] These acts empowered private actors, the owners of grist mills, to exercise the power of eminent domain by flooding lands upstream of their property. The government conferred the power to flood upstream property onto the mill owners because they were necessary to the public and operated as monopolies in many towns throughout the Union.[144] In return for this benefit, the mills were "compelled to serve the public" *even if* they did not hold themselves out as serving all comers.[145]

Also consider the later case of *Weymouth v. Penobscot Log Driving Co.*[146] In that case, the Penobscot Log Driving Company was granted the exclusive privilege of driving logs on the Penobscot River because having only one company navigating the river was the safest and most economically efficient method of driving logs up the river.[147] In other words, it was a natural monopoly (albeit in a limited sense). In an action against the company for failing to deliver Weymouth's logs, the court held that when the company accepted the exclusive privilege of driving logs on the river, it assumed a duty to deliver all the logs of any customer with care and diligence.[148] The court reasoned that when the government excluded the owner of the logs from being able to drive the logs on the river himself, the Penobscot Log Driving Company "assumed an obligation corresponding to, and commensurate with its privilege."[149] The fact that the owner of the logs could technically drive his logs to their destination over land was irrelevant since doing so "would not be a commercial possibility."[150] *Weymouth* provides further evidence that a private company—which might not normally hold itself out to the public—has a duty to serve when it is granted special privileges by the government.

It is important to note that the existence of a natural monopoly in and of itself does not confer any benefits or obligations upon the holder of the

143. *See* John F. Hart, *The Maryland Mill Act, 1669–1766: Economic Policy and the Confiscatory Redistribution of Private Property*, 39 AM. J. LEGAL HIST. 1, 1–2 (1995) (discussing the Maryland Mill Act, one of the first mill acts in America).

144. JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN § 178, at 246 n.3 (1888).

145. *Id.* at 246; *see* Kelo v. City of New London, 545 U.S. 469, 512 (2005) (Thomas, J., dissenting) (discussing the power of grist mills to flood the land above their property).

146. Weymouth v. Penobscot Log Driving Co., 71 Me. 29 (1880).

147. *Id.* at 30.

148. *Id.* at 39.

149. *Id.*

150. *See* Wyman, *supra* note 2, at 165–66 (discussing *Weymouth*).

monopoly.[151] In fact, some scholars have argued that the lack of government regulation of monopolies in some instances undercuts the validity of the franchise theory.[152] These critiques fail to recognize that the government always has the ability not to interfere with a monopoly or to break it up through antitrust law. The fact that a monopoly has not been regulated as a public accommodation is not enough, by itself, to conclude that it *could not* be regulated as such. It only proves that the legislature has, thus far, chosen not to subject that industry to public accommodations regulation.[153] A business or industry can only become a public accommodation under the franchise theory through the enactment of positive law that explicitly confers upon it a benefit in exchange for certain obligations, such as the duty to serve.[154]

Thus, not only does the legislature create a franchise—often because of the existence of a natural monopoly—but it can also determine that an industry or business no longer needs the special benefits and obligations of a franchise based on changing market conditions.[155] For example, when driving logs over land became the preferred method of transportation for that industry, the government could have rescinded its deal with the Penobscot Log Driving Company. In that case, the company would lose the exclusive right to drive logs on the Penobscot River, but it would also no longer be subject to the duty to serve. Likewise, if market conditions changed such that the barriers to entry that created a natural monopoly were no longer present, and other players began to enter the market, the government *could* choose to revoke the special privileges it gave to the original monopolist and remove its duty to serve in the process.[156]

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151. *But see* Tunku Varadarajan, *The 'Common Carrier' Solution to Social-Media Censorship*, WALL ST. J. (Jan. 15, 2021, 12:39 PM), https://www.wsj.com/articles/the-common-carrier-solution-to-social-media-censorship-11610732343 [https://perma.cc/86FQ-7S4H] (acknowledging that the "common-law rule is that 'no private monopoly has the right to turn away customers'").

152. *See* Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925, 933–36 (2001) (discussing the FCC's policy history and its effects on the regulation of a major telecommunications company).

153. *See* William N. Eskridge Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 70 (1988) (arguing that "legislative inaction should rarely be given much, or any, weight").

154. *See* California v. Pac. R.R., 127 U.S. 1, 40 (1888) (explaining that "[u]nder our system, [the existence and disposal of a franchise is] under the control of the legislative department of the government, and [it] cannot be assumed or exercised without legislative authority").

155. *See* Lemley & Lessig, *supra* note 152, at 970–71 (noting that the changing market conditions in regard to the internet were grossly underestimated by technology corporations, such as Microsoft).

156. For example, although retail distribution of electricity is still considered a natural monopoly, due to technological advances, electrical generation is no longer considered a natural monopoly.

The natural retort to the preceding point regarding the dissolution of franchise obligations—and indeed one made by many critics of the franchise theory[157]—is that if changing market conditions (i.e., a monopoly no longer being present) justifies the dissolution of a franchise, why are non-monopolies—such as inns—still subject to public accommodations regulations? These critics, once again, fail to recognize the dual nature of public accommodations law by disregarding the separate and independent justification of public accommodations regulation through the holding out theory. Not only could a business become a public accommodation through the voluntary act of holding itself out to the public, but it could also have public accommodations status thrust upon it through the franchise theory.[158]

IV. APPLYING THE ORIGINAL PUBLIC MEANING OF PUBLIC ACCOMMODATIONS TO ONLINE PLATFORMS

The historical evidence elucidated in Part III suggests public accommodations regulations historically fell into two categories: self-imposed and government-imposed. An industry or business could impose upon itself the restrictions of public accommodations law by holding itself out to the public as serving all comers. An industry or business falling under the self-imposed category generally had control over whether it would be subject to public accommodations restrictions. On the contrary, an industry could have public accommodations regulations imposed on it by the government due to the nature of the industry. Specifically, and most importantly for purposes of this discussion, the government has traditionally imposed public accommodations regulations on industries with natural monopolies by giving them certain franchise rights.[159]

This Part suggests that online platforms—as they are currently constituted—hold themselves out to the public such that they have imposed

Bernard S. Black & Richard J. Pierce Jr., *The Choice Between Markets and Central Planning in Regulating the U.S. Electricity Industry*, 93 COLUM. L. REV. 1339, 1430 (1993) (discussing the future of the electricity industry). Likewise, the telephone company is no longer considered a natural monopoly because of technological advancements that made competition useful and efficient. *See* Lemley & Lessig, *supra* note 152, at 970 (noting that competitors of AT&T were allowed into the equipment and long-distance segments of the market, which "cemented in the consent decree breaking up AT&T").

157. *See* Nachbar, *supra* note 50, at 97 (noting that nondiscrimination restrictions have been placed on trucking, taxis, and railroads even in the absence of market power); *see generally* Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323 (1998).

158. *E.g.*, Burdick, *supra* note 46, at 515–16.

159. Speta, *supra* note 63, at 255–56.

public accommodations status on themselves. Notwithstanding this self-imposed status of being public accommodations, the government could impose public accommodations regulations on online platforms through positive law because online platforms are natural monopolies regardless of whether they continue to hold themselves out to the public.

A. *Contrary to Popular Belief, Online Platforms Do Hold Themselves Out to the Public*

Twitter's terms of service state that anyone over the age of thirteen may create an account if they agree to be bound to Twitter's terms of service and no applicable laws bar them from having social media.[160] That said, the terms of service also state that Twitter "may suspend or terminate [an] account or cease providing [one] with all or part of the [s]ervices at any time for any or no reason . . . ."[161] Similarly, Facebook's "Who can use Facebook" section in their terms of service explains that the company tries "to make Facebook broadly available to *everyone*."[162] Like Twitter, Facebook also prohibits individuals under the age of thirteen and registered sex offenders from using its service.[163] It also prohibits access to its services if such access would violate applicable laws.[164] Additionally, Facebook prohibits individuals whose accounts have previously been disabled for violations of Facebook's terms or policies from creating new accounts.[165] Both platforms also impose a number of restrictions on what users can use the platform for or post on the platform once they create their accounts.[166]

Ostensibly, the apparent tension in both Twitter and Facebook's terms of service makes it hard to believe that they hold themselves out to the public. How can a company who reserves the right to terminate one's account

160. TWITTER TERMS OF SERVICE, https://twitter.com/en/tos [https://perma.cc/KDQ2-T9WB].

161. *Id.*

162. FACEBOOK TERMS OF SERVICE, https://www.facebook.com/terms.php [https://perma.cc/2EDE-V3H4] (emphasis added).

163. *Id.*

164. *Id.*

165. *Id.*

166. *See* TWITTER RULES AND POLICIES, https://help.twitter.com/en/rules-and-policies#twitter-rules [https://perma.cc/987Y-5MRK] (banning "[v]iolence, harassment and other similar types of behavior" to promote safety and free public conversation); *see* FACEBOOK COMMUNITY STANDARDS, https://transparency.fb.com/policies/community-standards/?from=https%3A%2F%2Fwww.facebook.com%2Fcommunitystandards [https://perma.cc/6D46-APNJ] (restricting the ability of users to post violent or harassing content).

for any reason or no reason at all be said to hold itself out as willing to serve all comers? Recent discussions on social media and the law of public accommodations use the arbitrary nature of Twitter's removal terms and the conditions placed on Facebook's use as conclusive proof that these companies do not hold themselves out to the public.[167]

This conclusion, however, is hastily made and inappropriate for several reasons. First, there is a significant difference between a company that holds itself out as open to the public subject to certain limitations and a company that is clear in both policy and practice that it is not willing to serve the public at large. For example, if a mail carrier held itself out to the public as willing to deliver mail for everyone, but later refused to deliver mail for a particular individual, one would not say this mail carrier is no longer holding themselves out to the public such that they are absolved from liability for their failure to serve. Instead, it is appropriate to analyze the reason why they refused to serve the customer and thus determine if it was within their rights as a common carrier to refuse service in that particular instance. If it was not, the mail carrier would be held liable. The mail carrier who purports to serve all comers yet refuses service in a particular instance is entirely different from the one who refuses service to a customer when the mail carrier has never, or no longer, purports to serve all comers. Barring any other applicable legal requirements beyond the scope of public accommodations law, the mail carrier in the latter example is not liable for refusing to serve the customer. As this Part will discuss, online platforms are more so the former than they are the latter.

Assuming Facebook's policies regarding disabling accounts do not violate its duty to not discriminate, the policy that a previously banned user is not permitted to create a new account is consistent with the original understanding of public accommodations law. As previously mentioned, a public accommodation could refuse re-entry to a patron who had previously been expelled for just cause.[168] Furthermore, the ability of a public accommodation at the time of the founding to refuse service for "good reason," while murky and ill-defined, is likely permissive of the other minor impediments

167. *See generally* Matthew Feeney, *Are Social Media Companies Common Carriers?*, CATO INST. (May 24, 2021, 3:39 PM), https://www.cato.org/blog/are-social-media-companies-common-carriers [https://perma.cc/4HAX-KS5J] (arguing that social media platforms are not neutral conduits because of their content removal policies).

168. *See* discussion *supra* Part III.C.5.

to creating a social media account.[169] At the time of the founding, it was unlikely that a child would have had an action against an inn or tavern for refusing to serve them in the absence of an adult, thus justifying Facebook and Twitter's policies that their users must be over the age of thirteen. It is also unlikely that a stagecoach or other common carrier could knowingly participate in a violation of applicable law through their services, which justifies the prohibition on using platforms in contravention of applicable laws. Finally, being a registered sex offender is likely sufficient to form a "reasonable objection to the character or conduct" of the person such that refusing them service is acceptable.[170]

All public accommodations at the time of the founding were permitted to have some reasonable limitations regarding whom they would serve.[171] Considering that the aforementioned policies of Facebook and Twitter appear to conform with the expectations the Founders would have had of public accommodations, it seems clear they are holding themselves out to the public.

If platforms are holding themselves out to the public, the question becomes whether the limitations they are placing on their users are justifiable for a business engaged in a common calling. In other words, even though platforms are permitted to maintain standards regarding the use of their platforms, they are not permitted to discriminate against users based on the content of their posts unless a public accommodation at the time of the founding would have been permitted to refuse service to a potential customer for the same or similar reason.[172]

There is a decent argument to be made that Facebook and other online platforms are discriminating against users based on the content of their speech or in response to political pressure.[173] Assuming this is true, it seems

169. *See* Speta, *supra* note 63, at 254 n.142 (noting that an innkeeper who served all travelers was likely to face liability for damages if they refused serve to a traveler without good cause).

170. *See* Jencks v. Coleman, 13 F. Cas. 442, 443 (C.C.D.R.I. 1835) (No. 7,528) (stating that businesses may apply reasonable regulations to prevent harassment and vulgarity without violating a customer's rights).

171. *See* discussion *supra* Part III.C.5.

172. *See* Jencks, 13 F. Cas. at 443 (holding that a common carrier may not refuse service unless there is a reasonable objection).

173. *See* Natasha Lennard, *Facebook's Ban on Far-Left Pages is an Extension of Trump Propaganda*, INTERCEPT (Aug. 20, 2020, 2:30 PM), https://theintercept.com/2020/08/20/facebook-bans-antifascist-pages/ [https://perrma.cc/57FT-96ZT] (arguing that Facebook was improperly restricting progressive viewpoints); *see also* Rebecca Heilweil, *Facebook is Taking a Hard Look at Racial Bias in its Algorithms*, VOX (Jul. 22, 2020, 1:12 PM), https://www.vox.com/recode/2020/7/22/21334051/facebook-

reasonable to conclude that the platforms' terms of service likely violate their obligations as public accommodations to varying degrees. It is also likely true that even if their policies are not in violation of their duty to not discriminate, their enforcement of those policies are often discriminatory. That said, public accommodations regulations for online platforms are still not a panacea for the many critiques of the growing power and influence of social media.

Even if online platforms' terms of service are not explicit enough to convincingly argue that they are holding themselves out to the public, an explicit or affirmative act is not necessary to conclude that a business holds itself out to the public; it is sufficient if a business's practices induce one to believe that it holds itself out to the public. Thus, one can look beyond online platforms' terms of service and analyze how they conduct themselves generally to determine whether they hold themselves out to the public.

The public manifestations of Facebook and other online platforms would induce people to believe that they are holding themselves out to the public. In his founder's letter announcing Facebook's rebranding as Meta, Mark Zuckerberg wrote that Meta is all "about bringing people together" and that it is in his company's "DNA."[174] In addition to implying that Facebook is open for all people, Mark Zuckerberg has also described Facebook as "more like a government than a traditional company."[175] Online platforms self-describing as a form of government is not unique to Facebook. Reddit's former CEO, Yishan Wong, once explained that Reddit "consider[s itself] not just a company running a website where one can post links and discuss them, but the government of a new type of community."[176] Likewise, Reddit's Transparency Report from 2020 stated that its approach to content moderation is "akin to a democracy."[177]

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news-feed-instagram-algorithm-racial-bias-civil-rights-audit [https://perma.cc/6FXE-KM2D] (discussing the history of Facebook's algorithms discriminating against people of color).

174. *Founder's Letter, 2021*, META (Oct. 28, 2021), https://about.fb.com/news/2021/10/founders-letter/ [https://perma.cc/VA8D-SL4n].

175. Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L.J. 1353, 1357 (2018).

176. Jack Smith IV, *Reddit Declares Itself a 'Government'*, OBSERVER (Sept. 9, 2014), https://observer.com/2014/09/reddit-declares-itself-a-government/ [https://perrma.cc5KNH-HF8W] (quoting Yishan Wong, *Every Man Is Responsible for His Own Soul*, REDDIT BLOG (Sept. 6, 2014), https://redditblog.com/2014/09/06/every-man-is-responsible-for-his-own-soul/).

177. TRANSPARENCY REPORT 2020, https://www.redditinc.com/policies/transparency-report-2020-1 [https://perma.cc/8UPZ-ST9M]); *see* TARLETON GILLESPIE, CUSTODIANS OF THE INTERNET PLATFORMS, CONTENT MODERATION, AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA 45–46 (2018) (opining that content moderation policies on the major social media platforms are more like a constitution than they are to instruction manuals); *cf.* Kate Klonick, *The New*

When online platforms use language to suggest they are here to bring everyone together and analogize themselves to democratic governments, it is difficult to argue that they are not inducing the public to believe that the company's services are open to everyone, even if their stated policies on that front are inconsistent; the purpose of a democratic self-government is to serve *all* the people after all.[178]

Not only do online platforms induce people to believe that anyone can visit their site and create an account, but the process to create an account on both Twitter and Facebook—which is akin to the process of walking into an inn to book a room or hiring a mail carrier to deliver a package—indicates that both services are open to all comers. According to Facebook's Help Center, a Facebook account can be created in four steps.[179] The webpage says, to "[c]reate a Facebook account":

> 1. Go to facebook.com and click Create New Account.
> 2. Enter your name, email or mobile phone number, password, date of birth and gender.
> 3. Click Sign Up.
> 4. To finish creating your account, you need to confirm your email or mobile phone number.[180]

Other than providing a small text box indicating that one must be over the age of thirteen to create an account, Facebook does not provide any impediments to any person's ability to create a Facebook account; any person over the age of thirteen would be induced to believe they could use Facebook by visiting the platform's signup webpage and creating an account.[181] The lack of any structural impediments to creating an account, coupled with the dominant social media platform's rhetoric regarding the

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Governors: The People, Rules, and Processes Governing Online Speech, 131 HARV. L. REV. 1598, 1644 (2018) (explaining that companies such as Reddit use "American Law and Legal Reasoning" as the foundation of their guiding principles).

178. *See* MacCarthy, *supra* note 12 ("This conception of social media companies as common carriers . . . corresponds to the way they present themselves to the world as platforms for others to speak. It also reflects our intuitive understanding of what we are doing when we use social media platforms.").

179. *Creating an Account*, FACEBOOK HELP CTR., https://www.facebook.com/help/570785306433644/?helpref=breadcrumb [https://perma.cc.UT7W-TT8Y]. The process to create accounts on Twitter, Instagram, and Reddit are substantially similar to Facebook's approach.

180. *Id.*

181. *Id.*

universal nature of their services indicates that online platforms are holding themselves out as willing to serve all comers even if some argue that their terms of service are unclear.

Notwithstanding the fact that the dominant social media platforms hold themselves out to the public, imposing public accommodations status on them through the holding out theory raises important questions regarding the status of other online platforms. Do all websites that host third-party content become public accommodations under the holding out theory? And do the providers of third-party content become public accommodations themselves if they are offering a product or service to customers who visit the hosting website? The answer to these questions depends on the nature of the business and whether it holds itself out to the public or induces the public to believe it does.

Etsy provides an appropriate case study to consider the applicability of public accommodations status on non-dominant online platforms and their third-party content providers. It is highly unlikely that Etsy would be considered a public accommodation under the holding out theory. Etsy's webpage clearly states it is a "marketplace for unique and creative goods" and in the era of increasing automation, "it's [their] mission to keep human connection at the heart of commerce."[182] Likewise, Etsy's Seller's Policy limits the types of items that can be sold to items that are "handmade, vintage, or a craft supply."[183] Although sellers on Etsy are permitted to have production partners that may use some forms of automation in their process, the seller must disclose that to Etsy, and Etsy reserves the right to review the partner's methods to determine if they are consistent with the website's values.[184] Based on these limitations, a website like Etsy does not present itself to the public as willing to serve all comers. Etsy's policies would not entice a mass producer of goods or someone who exclusively uses automated processes in the creation of their products to try and sell their products on the platform. As a result, Etsy is free to impose whatever limitations it wants on who can sell on their platform and what can be sold so long as they are complying with applicable laws.

182. *Keep Commerce Human*, ETSY, https://www.etsy.com/about?ref=ftr [https://perma.cc/4PZY-77WA].

183. *Seller Policy*, ETSY (Dec. 1, 2022), https://www.etsy.com/legal/sellers/?ref=list [https://perma.cc/8LVX-LMCJ].

184. *Working with Production Partners on Etsy*, ETSY HELP CTR., https://help.etsy.com/hc/en-us/articles/360000336547?segment=selling [https://perma.cc/PF7C-5EHE].

Individual sellers on Etsy might, however, be subject to a limited form of public accommodations status depending on whether they hold themselves out as willing to serve any customers who visit their page. If they do, then they would be required to accommodate any request made by a potential customer, as long as they were capable of accommodating the request and did not have good cause for refusing to serve the customer. For example, assume there is a business on Etsy that makes and sells custom wedding cake toppers. Assume also that the seller's account indicates that they are willing to make a custom wedding cake topper for any wedding and that the customer can customize the topper in any manner they choose. Here, the seller would be obligated to accommodate any request to make a wedding cake topper for a wedding subject to certain limitations. First, the seller likely could not include a message on the cake topper that violated Etsy's terms of service regarding prohibited items (since Etsy itself is not a public accommodation).[185] Second, the seller could refuse to accommodate a request if he or she was incapable of making the topper because he or she could not get the necessary supplies or did not have any available craftspeople to make it. Third, and finally, the seller could refuse to make the topper for good cause. For example, if someone wanted a cake topper that incited violence, then the seller could refuse to make it for the customer.

Individual sellers could also make it clear on their Etsy webpage that they are unwilling to accommodate certain requests or are only willing to serve certain customers (subject to applicable antidiscrimination law) to avoid public accommodations status. Likewise, social media companies could change their terms of service to reflect that they are not in fact open to all comers. For example, say Facebook changes its terms of service to indicate that it is now only a forum for registered Democrats to connect with one another and that all others are not permitted on the platform. Facebook's new policy states that all posts espousing views that are not in line with those of the Democratic Party (or any other party to the political left of the Democratic Party) will be removed by Facebook's content moderators. Finally, in addition to banning children under the age of thirteen and registered sex offenders, Facebook bans anyone who has ever run for office as a Republican and all federal judges nominated by Republican Presidents.

185. For example, even an Etsy seller who holds oneself out to the public would not be required to create a product that included hate speech or obscene material because Etsy bans the use of those materials on their site.

Assume Twitter does the same but is favorable to Republicans and bans all Democrats. Putting aside any potential claims against Facebook and Twitter for other violations of state or federal law for their new terms of service, can anything be done about these changes from a public accommodations standpoint under the holding out theory? The answer is no. Under Facebook's and Twitter's new terms of service, they are not holding themselves out to the public as willing to serve all comers; they have become a private forum for Democrats and Republicans, respectively.

There are plenty of practical reasons why online platforms would not become so outwardly restrictive in their terms of service, but that is not the focus of this Article. For now, it is enough to note that online platforms can evade public accommodations status under the holding out theory by simply changing their terms of service in such a way that it cannot be argued they are holding themselves out to the public. Changing their terms of service, however, would not allow online platforms to evade government-imposed public accommodations regulations if they are natural monopolies.

B. *Online Platforms Are Natural Monopolies and Thus Can Be Regulated Under a Franchise Theory of Public Accommodations*

There is no shortage of rhetoric describing the "social media giants" and the "unprecedented level of control" that they have over our daily lives.[186] The fact that online platforms—particularly social media companies—are natural monopolies, fuels this argument.[187] Ostensibly, the claim that online platforms are natural monopolies (or even monopolies at all) might seem weak. If one is unsatisfied with Facebook's services or policies, they can always migrate to another platform.[188] This freedom to choose suggests that

186. *See* James Grimmelmann, *Anarchy, Status Updates, and Utopia*, 35 PACE. L. REV. 135, 135 (2014) (describing social media companies as "sovereigns" who have "absolute and dictatorial control over their domains"). *See generally* Klonick, *supra* note 177 (describing the power of social media companies based on their opaque content moderation policies)

187. *See* Dipayan Ghosh, *Don't Break Up Facebook—Treat it Like a Utility*, HARV. BUS. REV. (May 30, 2019), https://hbr.org/2019/05/dont-break-up-facebook-treat-it-like-a-utility [https://perma.cc/9ZPF-HT3D] (detailing why social media companies should be considered natural monopolies).

188. *See* Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. FREE SPEECH L. 97, 113 (2021) (arguing that users remain "free to seek . . . alternative platform[s] more to their liking" if they are not satisfied with a platform's content moderation decisions); *see also* Ilya Somin, *The Case Against Imposing Common Carrier Restrictions on Social Media Sites*, REASON: THE VOLOKH CONSPIRACY (July 8, 2021), https://reason.com/volokh/2021/07/08/the-case-against-imposing-common-carrier-restrictions-on-social-media-sites/ [https://perma.cc/CX9G-XWAM] (asserting that if other online platforms are not as popular as Facebook or Twitter, it is "not because of a lack of competition, but

online platforms do not enjoy the same market power as more traditional public accommodations. The freedom to choose to leave Facebook, however, says nothing about the practicality or efficiency of that choice.

As the FTC has alleged in a recent lawsuit, "Facebook's dominant position in the U.S. personal social networking market is durable due to significant entry barriers, including direct network effects and high switching costs."[189] Furthermore, "a network effect is a feature that makes a network more valuable as the number of users increases."[190] The FTC asserts that online platforms exhibit network effects "because a core purpose of personal social networking is to connect and engage with personal connections."[191] Thus, it is nearly impossible for new entrants to the market to displace existing social networks. As the District Court for the District of Columbia explained in its order denying Facebook's motion to dismiss, "why would new users go to a social space that does not include their important contacts?"[192]

The FTC also alleges new market entrants would struggle to overcome the high switching costs faced by users who want to switch to a new platform:

> "Over time, users of Facebook's and other personal social networks build more connections and develop a history of posts and shared experiences, which they cannot easily transfer to another personal social networking provider." . . . "[S]witching costs can increase over time" as a "user's collection of content and connections, and investment of effort in building each, continually builds with use of the service."[193]

Based on both network effects and high switching costs, it is clear that even if competition is a technical possibility, it is neither practical nor is it efficient.

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because fewer consumers like them" and if the dominant online platforms "annoy enough customers" or if a better platform is developed, then customers will gravitate to the new, supposedly better platform).

189. FTC v. Facebook Inc., 581 F. Supp. 3d 34, 50 (D.D.C. 2022) (mem. op.) (quoting Redacted Amended Complaint at ¶ 212) (internal quotation marks omitted).

190. *Id.* (quoting 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 421h, at 95 (4th ed. 2015)) (internal quotation marks omitted).

191. *Id.* (quoting Redacted Amended Complaint at ¶ 212) (internal quotation mark omitted).

192. *Id.*

193. *Id.* at 50–51 (quoting Redacted Amended Complaint at ¶ 212).

The traditional understanding of natural monopolies supports the concept that competition is possible, albeit impractical, to bolster classification of a business or industry as a natural monopoly, even if natural effects of monopolies are more prevalent today than they were at the founding. Recall that in *Weymouth v. Penobscot Log Driving Co*, it was possible for the customer to drive his logs over land, as opposed to on the river, but this fact was irrelevant since it would not be practical.[194] Justice Thomas made a similar point in *Biden v. Knight First Amendment Institute*:

> It changes nothing that these platforms are not the sole means for distributing speech or information. A person always could choose to avoid the toll bridge or train and instead swim the Charles River or hike the Oregon Trail. But in assessing whether a company exercises substantial market power, what matters is whether the alternatives are comparable. For many of today's digital platforms, nothing is.[195]

Thus, it does not matter whether another platform exists that a person *could* use as their preferred social media platform when they are not—and likely will never be—comparable to the existing social media giants.

The impacts of comparability become even more important considering how vital online platforms are today for the dissemination of information. Just as output from mills or products made from logs being driven up the river were necessary to the everyday lives of early Americans, many of the products and services provided by online platforms are necessary for modern Americans.[196] Not only are online platforms the dominant methods by which people communicate and receive their news, but they are important tools for the maintenance and protection of our democracy. Advocacy groups increasingly use social media to communicate with citizens, and the livestream function available on most social media apps creates a near-foolproof method of documenting government abuses in real time, such that

194. Weymouth v. Penobscot Log Driving Co., 71 Me. 29, 41 (1880); *see supra* note 150 and accompanying text (explaining how possibility is irrelevant when impractical).

195. Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1225 (2021) (Thomas, J., concurring).

196. *See* Zeynep Tufekci, *Google Buzz: The Corporatization of Social Commons*, TECHNOSOCIOLOGY (Feb. 17, 2010), https://technosociology.org/?p=102 [https://perma.cc/W96G-HD89] ("Presence on the Internet is effectively a requirement for fully and effectively participating in the 21st century as a citizen . . . .").

the video cannot be deleted before it is broadcast.[197] Again, it is immaterial that advocacy groups or individuals could spread their message by telephone, newspaper, or even leafleting on the streets; "necessity needs to be measured based on the realities of current life, not of the past."[198] As Eugene Volokh notes, "[o]ur forebears lived just fine without [social media], but in our society access to the major social media platforms is a necessity . . . ."[199] Given the need for access to information, it would be inefficient to have numerous versions of Facebook-like companies in existence because the aggregation of users and information into one online platform is what drives economic value in the information age.[200]

Social media platforms are natural monopolies, similar to natural monopolies regulated as public accommodations throughout history. Therefore, Congress need only pass a law that imposes public accommodation requirements—such as a duty to serve in a nondiscriminatory manner—in exchange for some public benefit conferred to the platform. Although monopolies have traditionally lost their right to exclude in exchange for government protection from competition, the benefits conferred on franchises can vary.[201] Thus, imposing franchise obligations onto online platforms is permissible as long as the government imposes a public benefit (the carrot) in exchange for the platform's duty to serve (the stick).

V. REGULATING ONLINE PLATFORMS AS PUBLIC ACCOMMODATIONS WILL NOT RESOLVE THE MAJORITY OF CRITICS' COMPLAINTS

Supporters of a public accommodations framework for online platforms claim that it will serve as a panacea, solving most—if not all—of the problems with how platforms moderate content and oversee users. For example,

197. *See generally* Emily Krings, *What is Live Streaming Technology, and How Does Video Streaming Work?*, DACAST (Aug. 22, 2022), https://www.dacast.com/blog/what-is-live-streaming/ [https://perma.cc/4T6U-965A] (explaining that the intent of live streaming is to get a video out to viewers "over the internet in real-time," and it is often used in local governments, as well as by organizations to "engage with their audiences").

198. Eugene Volokh, *Economic Power Being Leveraged to Control Political Discourse*, REASON: THE VOLOKH CONSPIRACY (July 6, 2021), https://reason.com/volokh/2021/07/06/economic-power-being-leveraged-to-control-political-discourse/#_ftnref18 [https://perma.cc/AMJ3-9X6Q] (citing ADAM SMITH, THE WEALTH OF NATIONS 368 (1843)).

199. Volokh, *supra* note 13, at 391 n.43.

200. *See generally The Evolution of Social Media: How Did It Begin and Where Could It Go Next?*, MARYVILLE UNIV. BUS. EXPERIENCE, https://online.maryville.edu/blog/evolution-social-media/#back-to-top [https://perma.cc/3NJ6-YWBT] (explaining how an increased amount of user data equates to profit for both platforms and advertisers).

201. *See* discussion *supra* Part III.D.

Professor Richard Epstein has implied that a public accommodations framework for online platforms will solve the political polarization that is becoming increasingly prevalent online.[202] Professor Epstein also suggested that a public accommodations framework will prevent platforms from deplatforming users. While arguing for the reinstatement of President Donald Trump's Twitter account, Epstein explained that "'no private monopoly has the right to turn away customers' [and that it] must take them all on 'fair, reasonable and nondiscriminatory' terms."[203] This Part critically evaluates Epstein's claim by discussing the scope and limits of a maximally applicable public accommodations law regulating online platforms and examining the greatest extent to which Congress could regulate online platforms under a franchise theory of public accommodations in order to determine what problems such regulations would (and would not solve).[204] Further analysis will shed light on whether the solutions—or lack thereof—presented by public accommodations are features or bugs of such a regulatory framework. While this analysis stops short of wholly endorsing the public accommodations framework, it is important to note that the analysis is a plausible, constitutional approach to regulating platforms that still requires many policy and practical considerations before enactment.

A. *Public Accommodations Regulation Will Only (Partially) Regulate Platforms' Hosting Functions, Not Their Algorithmic Decisions or Their Own Speech*

As an initial matter, this Article must make clear that all public accommodations regulations of online platforms (whether maximally applicable or not) must confer some benefit onto the platform in exchange for imposing a corresponding burden. Once a benefit and burden (or a carrot and stick)

202. In an interview with Professor Richard Epstein published by the Wall Street Journal, Epstein advocated for a public accommodations framework for online platforms. He claimed that Facebook and Twitter are unwilling to tolerate "conservative talk on their networks." Varadarajan, *supra* note 151. As a result, Epstein claims, platforms will become increasingly conservative or increasingly liberal based on the political preferences of a platform's moderators. *See id.* ("What you'll get now is conservative networks and liberal networks, and they won't overlap." (internal quotation marks omitted)). Epstein's argument suggests that he believes imposing a public accommodations framework on online platforms will decrease political polarization.

203. *Id.* (internal quotation marks omitted).

204. No further analysis is necessary as to the holding out theory. While most online platforms would be considered public accommodations under the holding out theory, the ease with which they could alter that distinction makes it unlikely that courts would ever be successful in enforcing that theory against platforms in the long term. Thus, the franchise theory is the only way for public accommodations originalism to meaningfully regulate the moderation policies of online platforms.

relationship has been established, Congress could attempt to regulate at least three categories of moderation to varying degrees (and with different levels of success). First, Congress could compel platforms to host certain content. Such regulations, however, would be subject to important limitations, which are discussed below. Second, Congress could regulate a platforms' algorithmic or ranking decisions. Such regulations would be subject to even stricter limits than a duty to host and are unlikely to be constitutional in most instances. Finally, Congress could attempt to regulate a platform's own speech. Such regulations would be considered almost per se unconstitutional unless a broadly applicable exception to the First Amendment applied.[205] There are a wide variety of acceptable regulations Congress could impose within the three categories identified above. This Article largely analyzes the constitutional ceiling (i.e., the limits of Congress's authority) and notes areas where more limited regulation could be acceptable when relevant.

Florida's Transparency in Technology Act acts as a foil compared with requirements imposed by public accommodations originalism. The Act violates every component of a public accommodations regulatory framework, in at least one way, and should serve as a warning to future legislative efforts that merely invoking the terms "public accommodation" or "common carrier" is not enough to save legislation from constitutional review.

Use of the term "Congress" as opposed to "legislature" in the preceding paragraph is intentional. While every current example of a law regulating online platforms as public accommodations has come from state legislatures, there is a fair argument to be made that public accommodations originalism cannot be used by the states to regulate online platforms since Congress has likely preempted the field through § 230 and other regulations.[206] Further research is needed to conclusively determine the preemptive effect of § 230 and other laws under public accommodations originalism.

1. A Benefit (Carrot) Required in Order to Impose a Burden (Stick)

A legislature cannot impose any restrictions it desires onto platforms merely because it passes a law regulating them as a franchise. In other words, the restrictions imposed upon, and the benefits conferred onto

205. *See* Volokh, *supra* note 13, at 421 n.169 (explaining regulations that compel speech in violation of the First Amendment).

206. *See* 47 U.S.C. § 230 (providing immunity for websites regarding third-party content).

platforms must not contravene the original understanding of the benefits and burdens associated with public accommodations status.[207] Laws regulating platforms as public accommodations must, as an initial matter, confer some sort of public benefit onto the platform in exchange for imposing franchise obligations upon it.[208] Under the franchise theory, imposing the duty to serve on a monopoly was permissible because the increased burden on private industry corresponded with the grant of a benefit that the company would not otherwise enjoy.[209] For example, in *Weymouth*, the inability of the Penobscot Log Driving Company to refuse to transport any customer's logs up the river was premised on the fact that the legislature granted it the exclusive right to transport logs on the river.[210] Likewise, the Mill Acts enacted in the founding era conditioned the grant of eminent domain powers onto grist mills on the mills' inability to refuse customers.[211] Therefore, laws that do not confer a public benefit onto platforms but try to regulate them as public accommodations fail to adhere to public accommodations originalism and are patently unconstitutional.

Consider, once again, Florida's Transparency in Technology Act, which provides a great example of a law that purports to regulate online platforms as public accommodations but is nonetheless unconstitutional because it fails to confer an appropriate public benefit onto the platforms it seeks to regulate.[212] Specifically, the Act compels hosting and infringes on each platform's own speech without simultaneously conferring a public benefit onto the platform.

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207. *See* JONES, *supra* note 117, at 10 (explaining the benefit and burden theory between bailee and bailor).

208. *Id.*

209. *See* Singer, *supra* note 62, at 1320 ("A 'special license' or franchise grants the licensee a right to do something that is otherwise prohibited as inimical to the public good.").

210. *See* Weymouth v. Penobscot Log Driving Co., 71 Me. 29, 39 (1880) (stating that Penobscot accepted the right to transport the logs up the river, which became an exclusive right).

211. LEWIS, *supra* note 144, § 178, at 246; *see* Kelo v. City of New London, 545 U.S. 469, 512 (2005) (Thomas, J., dissenting) (discussing the power of grist mills to flood the land above their property).

212. Although the Act has already been held unconstitutional by the Northern District of Florida and the Eleventh Circuit, it was not held unconstitutional on originalist grounds. *See* NetChoice LLC v. Moody, 546 F. Supp. 1082, 1096 (N.D. Fla. June 30, 2021) (determining that the content-based legislation does not withstand strict scrutiny); NetChoice LLC v. Moody, 34 F.4th 1196, 1231 (11th Cir. 2022) (holding provisions of the Act are "substantially likely to violate the First Amendment"). It is beyond the scope of this Article to evaluate the efficacy of the court's holding in *NetChoice*. Rather, the analysis that follows reaches the same conclusion as the court in *NetChoice* but does so under an originalist public accommodations framework.

It could be argued that the Act's antitrust provisions provide a sufficient benefit to online platforms to save the Florida law (at least on this prong of the analysis), but this is not the case. The Act stipulates that if online platforms violate the law, their actions constitute an antitrust violation.[213] The Florida Attorney General is empowered to bring an action against the platform[214] and if it is found that the platform violated antitrust law, then the platform will be prohibited from contracting with public entities.[215] Ostensibly, it appears that Florida is conditioning the ability of online platforms to contract with public companies on their adherence to principles of nondiscrimination, which is not principally different from the early cases of franchise obligations. But there is one key difference between the Florida law and the types of franchises in existence at the time of the founding that ultimately invalidates Florida's regulatory scheme. Notwithstanding the fact that burdens imposed on online platforms under the Florida law are themselves unconstitutional,[216] the benefit conferred onto platforms—the ability to contract with the state government—is of a private nature. In contrast, the franchise theory requires a public benefit conferred to a private entity to justify public accommodations regulation. As demonstrated in *Weymouth* and the Mill Acts, private entities were granted public benefits—that is exclusive use of a river and the power of eminent domain respectively—in exchange for the requirement that they serve all comers. Likewise, Eugene Volokh's proposal of conditioning § 230 immunity on platforms adhering to a duty of nondiscrimination would confer a public benefit (immunity from suit) onto platforms.[217] The "economic benefit" of contracting with public entities, on the other hand, is quintessentially a private benefit (if it can even be classified as a benefit at all) and, thus, does not create a franchise under the franchise theory of public accommodations that conforms to the understanding of such franchises at the time of the founding.

213. Transparency in Technology Act, S. 7072, 2021 Leg., Reg. Sess. (Fla. 2021).

214. *See id.* ("'Antitrust violation' means any failure to comply with a state or federal antitrust law as determined in a civil or criminal proceeding brought by the Attorney General . . . . ").

215. *See id.* ("A person or an affiliate who has been placed on the antitrust violator vendor list following a conviction or being held civilly liable for an antitrust violation may not submit a bid, proposal, or reply for any new contract to provide any goods or services to a public entity . . . .").

216. *See* discussion *infra* Part V.A.4.

217. *See* Volokh, *supra* note 13, at 388 (claiming that the duty of nondiscrimination imposed on social media platforms would be absolute (citing Alexander v. Gardner-Denver, Co., 415 U.S. 36, 51 (1974))).

2. Compelled Hosting in Some but Not All Situations

Under the current paradigm, platforms have nearly unfettered discretion to remove posts or deplatform users without consequence. So long as a platform has a good faith reason to remove or restrict access to content that it believes is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable," then its moderators can do whatever is necessary to restrict access to such content even if the material is constitutionally protected.[218] If platforms were regulated as public accommodations, the existing paradigm would shift away from platform freedom to remove or restrict access to content thus curtailing the platform's power to censor individuals. That said, platforms would not lose the ability to deplatform users so long as they complied with the requirements of public accommodations at common law. Likewise, they would not be prohibited from removing individual posts subject to the same conditions.

Online platforms' minor impediments in creating accounts that do not violate the law of public accommodations under the holding out theory is previously discussed.[219] Such impediments provide only one example of how platforms will not be compelled to host all users or content under a public accommodations framework. But a platform's power to exclude goes even further than merely being able to deny customers at its "front door."

Admittedly, it is difficult to determine exactly when a platform could deplatform a user or remove a particular post under a public accommodations framework in part because the common law sources are not themselves all that clear. Recall that the common law sources are only clear that inciting violence or engaging in illegal conduct are sufficient to refuse service to a user, but that public accommodations can also refuse service for "good reason" or if the operator of the accommodation has a "reasonable objection to the character or conduct of the plaintiff."[220] How should online platforms apply these vague standards when deciding whether to deplatform a user or remove individual posts?

Consider the deplatforming of former President Donald Trump from Facebook and Twitter for inciting the January 6, 2021 insurrection at the

218. 47 U.S.C. § 230.

219. *See* discussion *supra* Part IV.A.

220. *See* Singer, *supra* note 62, at 1309 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 165 (Edward Christian ed., 15th ed. 1809)); Jencks v. Coleman, 13 F. Cas 442, 443 (C.C.D.R.I. 1835).

Capitol.[221] Although the deplatforming of President Trump is the most extreme case of an online platform deplatforming a user, it provides a great example of the limits of public accommodations originalism because Trump's deplatforming is often cited by critics of the current content moderation framework as the quintessential example of the unchecked powers enjoyed by platforms.[222] Thus, if public accommodations originalism does not result in Donald Trump's ability to retain access to his social media accounts, then it is unlikely that public accommodations regulations of online platforms will address all of the problems cited by critics of online platforms.

Not only does growing evidence suggest that President Trump committed illegal acts to prevent the certification of Joe Biden's electoral victory,[223] but he arguably incited violence based on the actions of his supporters in response to both his statements at the "Stop the Steal" rally and some of his social media posts. For example, one of his Twitter posts from January 6 calls on Republicans to "get smart" and "FIGHT!" following a number of Tweets where he claimed that Democrats were injecting false ballots into the official ballot counts of a number of states.[224] Even if President Trump's tweets did not, in fact, incite violence on January 6, Twitter arguably removed his posts and his account based on a good faith belief that the content was illegal, which is sufficient under a public accommodations framework.

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221. *See, e.g.*, Byers, *supra* note 6 (describing suspensions Facebook and Twitter enforced on Donald Trump's social media accounts).

222. Recall that Richard Epstein cited the deplatforming of Donald Trump as one of the reasons for why online platforms should be regulated as public accommodations. *See* Varadarajan, *supra* note 151 (asserting First Amendment implications in banning Donald Trump's social media accounts because there are no alternatives in that sector). Furthermore, Florida's Transparency in Technology Act was passed in large part because the legislature believed that online platforms should not have the power to censor the views of political candidates regardless of what those views are. *See* Transparency in Technology Act, S. 7072, 2021 Leg., Reg. Sess. (Fla. 2021) (imposing criminal and civil penalties to entities who "willfully deplatform a candidate for office").

223. *See* Benjamin Siegel et al. , *Jan. 6 Committee: Evidence Trump Engaged in 'Criminal Conspiracy,' May Have Broken Laws*, ABC NEWS (Mar. 3, 2022), https://abcnews.go.com/Politics/jan-committee-trump-engaged-criminal-conspiracy-broken-laws/story?id=83220758 [https://perma.cc/3DMX-SY4T] ("The House committee investigating the Jan. 6 Capitol attack said Wednesday it has evidence that former President Donald Trump and some of his associates may have illegally tried to obstruct Congress' count of electoral votes . . . .").

224. Donald Trump (@realDonaldTrump), Twitter (Jan. 5, 2021, 11:43 PM), https://twitter.com/realdonaldtrump/status/1346693906990305280?lang=en. [https://perma.cc/H5N4-4BHQ].

While refusing to host users or their content based on illegal activity or inciting violence is somewhat (although not entirely) clear under a public accommodations regulatory framework, it is certainly unclear how online platforms would be permitted to address objectionable content under the vague standards elucidated by Blackstone and Story.[225] That is to say, when can a platform censor an individual because it has a reasonable objection to his character or conduct? And what is a removal for good reason? While these standards likely broaden the ability of a platform to remove users or content, it is unclear how broad these exceptions sweep. Further research is needed to answer these questions, but this Article tentatively submits that these standards would not allow platforms to remove content for many of the reasons that they remove content for today. Legal pornography, misinformation, content promoting white supremacy (as long as it falls short of inciting violence), and any other immoral or reprehensible conduct are likely to be the types of content that platforms will be compelled to host under public accommodations originalism.

For example, the removal of conspiracy theorist Alex Jones from Facebook, Twitter, YouTube, Apple, and Spotify—described as "one of the biggest purges of popular content by internet giants in recent memory"[226]—might not have taken place under public accommodations originalism. Jones was banned, in part, for "using dehumanizing language to describe people who are transgender, Muslims[,] and immigrants."[227] This speech, while immoral and objectionable for a variety of reasons, is the type of speech that platforms would have to tolerate under a public accommodations framework because it does not violate any laws and is unlikely to violate the "reasonable objection" common law standard.

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225. Singer, *supra* note 62, at 1309 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 165 (Edward Christian ed., 15th ed. 1809)); *see also id.* at 1312–13 (citing JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS, WITH ILLUSTRATIONS FROM THE CIVIL AND THE FOREIGN LAW § 494, at 322 (Hilliard & Brown, 1832)).

226. Jane Colston, *YouTube, Facebook, and Apple's Ban on Alex Jones, Explained*, VOX (Aug. 6, 2018, 3:05 PM), https://www.vox.com/2018/8/6/17655658/alex-jones-facebook-youtube-conspiracy-theories [https://perma.cc/BVW5-HP3B]; *see also* Avie Schneider, *Twitter Bans Alex Jones and InfoWars; Cites Abusive Behavior*, NPR (Sept. 6, 2021, 5:34 PM), https://www.npr.org/2018/09/06/645352618/twitter-bans-alex-jones-and-infowars-cites-abusive-behavior?t=1649077835078 [https://perma.cc/T4J6-8HB2] (explaining the terms under which Twitter banned Alex Jones).

227. Colston, *supra* note 226. Note, however, that Jones was also accused of inciting violence in some instances, so it is possible that his removal could be justified on the basis that he engaged in illegal conduct. Nonetheless, his posts dehumanizing marginalized groups and any posts containing hate speech that fell short of inciting violence would likely not be taken down under a public accommodations framework.

Consider also the dominant online platforms' responses to the Russian invasion of Ukraine and their attempts to curb the use of misinformation and the spread of propaganda. Meta (Facebook and Instagram's parent company) recently banned "Russian state-run media such as Russia Today and Sputnik."[228] It also "removed two anti-Ukrainian 'covert influence operations'"; one originating in Russia and one in Belarus.[229] The Russian campaign created fake accounts and used AI-generated photos to give the impression that Ukrainian reporters were supportive of Russia's invasion.[230] Some of the talking points shared by the fake Ukrainian reporters included claims that President Volodymyr Zelensky "is building a neo-Nazi dictatorship in Ukraine" and stories about "[w]hy Ukraine will only get worse."[231] According to Facebook, it removed forty profiles associated with the disinformation operation.[232] While the Russian operation relied simply on fake accounts and AI generated images, the Belarusian operation consisted of hacking the accounts of existing users and pushing anti-Ukraine propaganda.[233]

Meta is not the only dominant platform to remove users and posts related to Russia's invasion of Ukraine. Twitter recently suspended more than a dozen accounts for using deepfake technology and creating fake accounts to artificially inflate engagement.[234] It also began adding warning labels to any post linking to a Russian state-run media outlet and even began labeling the personal tweets of Russian anchors and columnists with a warning message as well.[235] Meanwhile, Reddit—which is normally hailed as the least restrictive of the dominant online platforms when it comes to censorship or moderation decisions—recently announced a universal ban on all links to Russian state-run media accounts.[236] It also "'quarantined' r/Russia and r/RussiaPolitics in order to curb the spread of misinformation that was

228. Matt Binder, *What Social Media Platforms Are Doing to Stop Misinformation About Russia's Invasion of Ukraine*, MASHABLE (Mar. 3, 2022), https://mashable.com/article/social-media-misinformation-ukraine-russia [https://perma.cc/UD85-L8QJ].

229. Ben Collins & Jo Ling Kent, *Facebook, Twitter Remove Disinformation Accounts Targeting Ukrainians*, NBC NEWS (Feb. 28, 2022, 11:33 AM), https://www.nbcnews.com/tech/internet/facebook-twitter-remove-disinformation-accounts-targeting-ukrainians-rcna17880 [https://perma.cc/E97Q-U8XL].

230. *Id.*

231. *Id.* (internal quotation marks omitted).

232. *Id.*

233. *Id.*

234. Binder, *supra* note 228.

235. *Id.*

236. *Id.*

running rampant in those subreddits."[237] As a result of the quarantine, neither of those subreddits will "appear in search results, recommendations, or feeds."[238]

While admirable, many of these responses might be impermissible—at least in the U.S.—under public accommodations originalism. It is unlikely that platforms would be able to ban the fake accounts created by Russian actors even though they create the false impression that Ukrainian journalists are spreading anti-Ukraine propaganda or other accounts using deepfakes to spread misinformation. Likewise, platforms would not be able to ban access to Russian state-media or prevent groups or subreddits from appearing in search results because of the content of those groups. Such prohibitions on the ability of platforms to remove content or users undoubtedly make it more difficult to protect democratic values and could even impede the free flow of ideas and information online. Nonetheless, they do not run afoul of the common law exceptions to public accommodations regulations—at least so far as those exceptions can be understood—and are unlikely to be removed under public accommodations originalism.

Note, however, that the inability to remove the aforementioned posts would only exist under a public accommodations framework that regulates all the way up to the constitutional ceiling. Congress could, in its crafting of regulations, choose to make additional statutory exceptions that did not exist at common law. For example, Congress could create an exception that allows platforms to censor foreign propaganda in order to allow them to prevent the spread of misinformation regarding international incidents. While such carveouts would be permissible, if exceptions become too numerous, the public accommodations framework would be undermined. As a result, policymakers should be cautious before creating statutory carveouts in addition to the common law exceptions already in existence.

The duty to host will not only result in objectionable content remaining visible online where today it would be taken down. Platforms currently abuse their moderation powers to censor speech that is not objectionable or violative of the platforms' own policies.[239] Censorship of this kind undoubtedly damages the free flow of ideas and violates individuals' right to freedom of expression. Under public accommodations originalism, content that is

237. *Id.*

238. *Id.*

239. *See* Volokh, *supra* note 13, at 395–98 (discussing several cases where social media platforms censored stories in apparent violation of their own policies).

currently censored unjustifiably will also be subject to a platform's duty to host. Platforms have a history of being culturally insensitive in their moderation decisions, often removing posts based on a misapplication of the platforms' terms of service. For example, moderators have removed posts of famous artwork for violating platforms' policies on nudity without paying any consideration to the cultural importance of artistic expression.[240] They have also mistakenly removed posts and suspended the accounts of activists advocating for social reform. In one instance of these mistaken removals, almost eighty members of the Occupy movement with a collective following of over five million people were suspended because Twitter misidentified their accounts as "pro-Trump 4chan members masquerading as liberal activists."[241] In a similar crackdown on fake accounts, Facebook suspended the pages of the Free Thought Project, a free speech group with over three million followers, and End the Drug War, a page with nearly half a million followers.[242]

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Laws purporting to regulate platforms as public accommodations must contend with the limitations on their ability to compel hosting to ensure that they do not run afoul of the Constitution. For example, Florida's Transparency in Technology Act's hosting requirements go too far and infringe on a platform's rights under public accommodations originalism.[243] The Act prohibits platforms from removing a certain class of people (political candidates) without providing any of the exceptions traditionally recognized at the time of the founding.[244] Under the Act, platforms are prohibited from knowingly deplatforming a political candidate regardless of the content that the candidate posts.[245] Although the Act cannot be enforced in such a way that is inconsistent with § 230,[246] that does not save it from being inconsistent with public accommodations originalism. Without explicit carve outs

240. *See The Campaign*, DON'T DELETE ART, https://www.dontdelete.art/thecampaign [https://perma.cc/EGY3-TEWM] (providing a collection of artwork removed by online platforms).

241. Sanjana Varghese, *Twitter Has Purged Left-Wing Accounts with No Explanation*, WIRED (Oct. 10, 2018, 7:00 AM), https://www.wired.co.uk/article/twitter-political-account-ban-us-mid-term-elections [https://perma.cc/Y7K4-CVX8].

242. *Id.*

243. *See* FLA. STAT. § 106.072 (2022) (broadly prohibiting the deplatforming of political candidates).

244. *Id.* § 106.072(d)(2).

245. *Id.*

246. *Id.* § 106.072(5).

that permit platforms to deplatform political candidates under specified conditions, the Act cannot pass constitutional muster.

Under public accommodations originalism, platforms will be required to host immoral and dangerous content, but they will also be prevented from violating the rights of users and impeding the communication of important information. Policymakers must determine whether this tradeoff is a feature or a bug of public accommodations originalism when determining whether to subject platforms to a public accommodations regulatory framework. Policymakers must also consider the tools that will still be available to platforms to reduce the availability or permissibility of objectionable content under public accommodations originalism. The Sections below and Part V.B provide additional considerations for policymakers by: (1) explaining both how platforms can mitigate the negative impacts that public accommodations originalism will have on the spread of information online notwithstanding a platform's duty to host the objectionable content; and (2) providing further illustrations of the inability of public accommodations originalism to address all of the systemic problems associated with content moderation today.

3. Autonomy Over Algorithmic Decisions Largely Maintained

While online platforms would be restricted in their ability to deplatform users or remove their posts outright, they would be less restricted in their ability to curate their algorithms to promote some users' content over others. Under a public accommodations framework, an online platform would still be permitted to screen content or design its algorithm however it wanted as long as it did it in a neutral way (i.e., without discriminating based on viewpoint).[247] For example, an algorithm similar to Reddit's up/down vote system likely complies with public accommodations originalism.[248] When users upvote a particular post, it gets pushed higher up on other user's feeds.[249] But when users downvote content, the post gets relegated to a position further down on the feed.[250] Although users are likely upvoting or

247. Volokh, *supra* note 13, at 383.

248. The analysis here is focused solely on the up/downvote algorithm employed by Reddit. Any other algorithms employed by the company or content moderation performed by its moderators or administrators do not factor into this analysis.

249. *See* Kevin Morris, *The Greatest Story Reddit Ever Told*, THE KERNEL (Nov. 2, 2014), http://kernelmag.dailydot.com/issue-sections/headline-story/10727/dante-orpilla-youngluck-reddit-gifts/ [https://perma.cc/MH7A-KHAQ] (explaining how users can affect content on the site).

250. *Id.*

downvoting content based on viewpoint, Reddit's algorithm does not consider the viewpoint of these posts when it rearranges them on the feeds of its main page or in particular subreddits. Since the basis for the algorithm is user input as opposed to the content of any particular post, the prioritization of posts is viewpoint neutral and thus not violative of public accommodations originalism.

Platforms could also maintain their algorithms that prioritize posts based on who a user engages with most on the platform. If User A engages with User B's posts regularly, then the platform's algorithm could prominently place User B's posts on User A's timeline to encourage further interaction and engagement. Again, the algorithm does not make a decision based on *what* User B is posting. Rather, it makes a decision based on the fact that User A is engaging with User B's post, whatever the post might contain.

Another common algorithmic tool employed by online platforms that would still be permissible under a public accommodations framework is the prioritization of posts based on geography. Oftentimes, an online platform's algorithm accounts for a user's geographic location to recommend content that is in a similar geographic profile as the user.[251] Here, location determines the prominence of posts as opposed to the post's content.

There are surely many other examples of algorithms currently employed by online platforms that would still be perfectly acceptable under a public accommodations framework. In fact, some of the only algorithms that would be impermissible under a public accommodations framework are those that do or do not recommend content to users based primarily on the user's previous engagement with similar posts or algorithms that remove content from the platform based on the content of the post (such as its political viewpoint). In other words, only algorithms that consider the actual content of the post when deciding how prominently to place it contravene public accommodations originalism.

As a result of platforms' ability to retain some autonomy over their algorithmic decisions, public accommodations originalism only partially addresses the censorship problem. For example, the Transparency in Technology Act attempts to regulate platforms' algorithmic decisions in an impermissible way by preventing platforms from using any method of post-prioritization algorithms or from shadow banning users, once again without

251. Maria Alessandra Golino, *Algorithms in Social Media Platforms*, INST. FOR INTERNET & THE JUST SOC'Y (Apr. 24, 2021), https://www.internetjustsociety.org/algorithms-in-social-media-platforms [https://perma.cc/3Q24-2P3R].

providing for any exceptions, for any posts by or about a political candidate.[252] By not providing an exception for viewpoint neutral algorithmic ranking, Florida's law is in tension with public accommodations originalism.

Note, in addition to public accommodations originalism's inability to prevent algorithmic sorting in most instances, it also does not even begin to address the prevalence of doomscrolling[253] or the availability of bias reinforcing information. If platforms can still use their algorithms to provide a tailored experience to users based on the types of pages that they often access or the specific users with whom the user engages, then a public accommodations regulatory framework will do little to address these concerns.

4. Platforms' Own Speech Unaffected by Framework

Finally, under a public accommodations framework, a platform's ability to: (1) flag content as misinformation; (2) provide a link below or above the user's post to another source offering an alternative perspective; or (3) denounce the user's post as not being consistent with the values of the platform would not be limited because such actions are the platform's own speech.[254] For example, at the time of the founding, an action would not lie against a mail carrier who told the recipient of a message that he disagreed with the contents of the message so long as he delivered it with care and diligence. Likewise, nothing would have prevented an innkeeper from disagreeing with a patron's perspective on the news of the day or calling him out for lying. The innkeeper could then presumably have fact checked the information espoused by the patron and provided those who heard the statement with the local newspaper—or some other source—that contradicted the patron's claims. If no claim could be brought against the mail carrier or innkeeper for speaking themselves, then the same should be true for online platforms even if some people would prefer that platforms act solely as a conduit of information and not exercise their own speech rights (which are also protected by the First Amendment).

The retention of a platform's speech rights also provides a solution to its inability to remove most objectionable content under public

252. FLA. STAT. § 106.072(d)(2) (2022).

253. *See* Angela Watercutter, *Doomscrolling is Slowly Eroding Your Mental Health*, WIRED (Jun. 25, 2020, 7:00 AM), https://www.wired.com/story/stop-doomscrolling/ [https://perma.cc/2C7J-GXLD] (defining "doomsurfing" or "doomscrolling" as "falling into deep, morbid rabbit holes" of negative content (internal quotation mark omitted)).

254. *Cf.* Volokh, *supra* note 13, at 433 (arguing that the government cannot force a social media platform to recommend particular material to its users).

accommodations originalism. Since the 2016 presidential election, platforms have become very active in labeling posts as containing misinformation or providing links to additional resources for users to consider. This practice continued and reached its height after the onset of the COVID-19 pandemic.[255] Today, "post labeling" is a staple for most of the dominant online platforms and is a powerful tool for combatting the spread of misinformation and objectionable content more broadly. For instance, some platforms began flagging posts linking to Russian state-media in the wake of Russia's invasion of Ukraine in order to inform users of the potential bias or misinformation that the post might contain.[256]

Such actions are not prohibited by public accommodations originalism, and any effort to prevent platforms from engaging in their own speech is a violation of the First Amendment. The Transparency in Technology Act commits this foul and is yet another reason that it is unconstitutional under public accommodations originalism. The Act's broad definition of "censor" prohibits platforms from posting addendums to user content.[257] Such regulations are contrary to public accommodations originalism because even though public accommodations lose some of their First Amendment rights, they do not lose the ability to freely express themselves. Thus, the Florida law is overly broad because it prohibits platforms from engaging in constitutionally protected speech.

Not only is post labeling constitutional, but it is beneficial because it allows the platform to inform users that it objects to material contained therein for one reason or another without preventing users from making up their own minds about whether they want to view the content. This is not to say that posts containing misinformation have inherent value in furthering debate and discussion online. It is undeniable that COVID-19 vaccine misinformation and deepfakes purporting to show Ukrainians in support of Russia's invasion of Ukraine are not only false but intensely undesirable and

255. *Targeted Advertising and COVID-19 Misinformation: A Toxic Combination*, NEW AM., https://www.newamerica.org/oti/reports/getting-to-the-source-of-infodemics-its-the-business-model/targeted-advertising-and-covid-19-misinformation-a-toxic-combination/ [https://perma.cc/2LF5-RZUL] (recounting efforts made by Facebook, Twitter, Google, and YouTube to combat the spread of misinformation regarding COVID-19).

256. *E.g.*, Binder, *supra* note 228 (describing blockages of Russian state-run media outlets on social media platforms, such as Facebook and Instagram).

257. FLA. STAT § 501.2041(1)(b) (defining censor to include "any action taken by a social media platform to delete, regulate, restrict, edit, alter, inhibit the publication or republication of, suspend a right to post, remove, or post an addendum to any content or material posted by a user").

dangerous.[258] That said, public accommodations originalism is not concerned with the content or value of one's speech. The whole point is that except in the most extreme circumstances, it is not the place of online platforms to determine when speech is allowed to be disseminated. Post labeling allows the speech of one party to spite the speech of another instead of giving the party with more control and power—the platform—the power to censor another's speech.

Notwithstanding the benefits of post labeling as it relates to identifying instances of misinformation, it might not be an adequate solution with regard to sensitive or violent content—such as pornography, instances of hate speech, and videos of police brutality or mass shootings—at least in its current form. Currently, platforms prevent access to sensitive or violent content that does not technically violate their terms of service by blacking out the image or video on the screen, displaying a message that indicates that the post contains violent or sensitive content, and asking the user if he or she consents to seeing the content anyway.[259] Only if the user consents will the post be visible. This practice arguably violates the duty to host under a public accommodations framework because the platforms are blocking access to posts—if only temporarily and subject to user consent—based solely on their content.

Platforms' current methods for labeling information might also be insufficient, from a practical perspective, even if those methods would comply with public accommodations originalism. One of the primary concerns associated with the availability of violent or sensitive content is the instantaneous consumption of the content. When a user is scrolling through a feed, the presence of pornography or violent imagery is immediately discernable in a way that a post with a link to an article containing vaccine misinformation is not. In other words, users typically have to stop scrolling or affirmatively click on a link to be exposed to misinformation. Meanwhile, users can accidentally stumble across sensitive or violent content, which can be damaging for that user. Thus, merely displaying a message below posts containing violent imagery or sensitive content—as is the standard practice for flagging misinformation—is insufficient to prevent the harms associated with violent and sensitive content. That said, public accommodations

258. *See* Binder, *supra* note 228 ("Twitter also has policies surrounding manipulated or synthetic media, i.e. edited video or deepfakes intended to spread disinformation.").

259. *E.g., Sensitive Media Policy*, TWITTER (Jan. 2023), https://help.twitter.com/en/rules-and-policies/media-policy [https://perma.cc/AQ6T-GSSR] (providing the content guidelines for Twitter).

originalism provides platforms with more flexibility in flagging content than merely adding an addendum below a post. Platforms could insert disclaimers above posts or even create an algorithm that generates an entirely separate post above the post containing violent or sensitive content warning the user about the nature of the content that follows.

These examples merely point out how platforms can use their own speech rights to mitigate the harms associated with violent or sensitive content. Part IV.B below addresses the normative question of whether the law should regulate platforms as public accommodations and what potential value, if any, such regulations would have.

B. *Public Accommodations Regulation Will Not Overwhelm Platforms with Lawful, But Awful Speech if They Adjust Their Content Moderation Strategies Appropriately*

Notwithstanding the ability of platforms to retain a significant amount of control over their algorithms and engage in their own speech, critics of a public accommodations framework for online platforms continue to doubt the efficacy of this regulatory model. They typically claim that the inability of platforms to remove most content will destroy the usefulness of online platforms because the platforms would become "cesspools of pornography, hate speech, [and] white supremacist propaganda."[260] Commentators have dubbed this sort of content "lawful-but-awful" speech.[261] In one article, Eric Goldman and Jess Miers discuss a variety of cases where, in their opinion, platforms should be encouraged to remove content to prevent its availability online.[262] In *Enhanced Athlete v. Google*,[263] the plaintiff posted a video to YouTube advocating the use of Selective Androgen Receptor Modulators (similar to anabolic steroids).[264] These steroids have a variety of negative health consequences and, according to the U.S. Food and Drug Administration, "have the potential to increase the risk of heart attack and stroke, and the long-term effects on the body are unknown."[265] Goldman and Miers

260. MacCarthy, *supra* note 12 (discussing concerns relating to content removal); s*ee* Feeney *supra* note 167 (discussing reactions from hosting companies to white supremacy and the Capitol riots).

261. *See* Goldman & Miers, *supra* note 11, at 196 (discussing services that "permit all lawful material, no matter how awful").

262. *Id.* at 201–04.

263. Enhanced Athlete v. Google, 479 F. Supp. 3d 824 (N.D. Cal. 2020).

264. *Id.* at 827.

265. Press Release, U.S. Food & Drug Admin., FDA In Brief: FDA Warns Against Using SARMs in Body-Building Products (Oct. 31, 2017), https://www.fda.gov/news-events/fda-brief/fda-brief-fda-warns-against-using-sarms-body-building-products [https://perma.cc/4GX7-2H3C].

also cite the case of *Wilson v. Twitter*,[266] in which "Wilson tweeted insults about 'gayness/Homos/Fagots[sic]/Dykes/Low Down Bi-Bisexuals [sic]/Queer Dogs/Trans Mutants.'"[267]

Goldman and Miers then argue that "[i]mplicitly or explicitly, advocates of must-carry rules are working to ensure the proliferation and wider availability of content like the content at issue in *Enhanced Athlete* . . . and *Wilson*."[268] While not technically incorrect, Goldman and Miers's characterization of must-carry advocates is narrow and too simple to contend with all of the nuances associated with must-carry rules. Under a public accommodations framework, online platforms would still have a great deal of power to curb lawful-but-awful speech and moderate content more broadly if they adjust their content moderation strategies to better align with the requirements of public accommodations originalism.

This Article has already discussed the actions that platforms currently employ to moderate content—such as algorithmic decision-making and the platform's ability to engage in its own speech—that will not be prohibited under public accommodations originalism. Platform speech, although it mitigates the harms associated with a duty to host, primarily gives users the opportunity to skip over content that they would prefer not to engage with. It does not give users the ability to remove objectionable content from their feeds altogether. Likewise, the algorithmic decisions of most online platforms (with the exception of Reddit) do not give users a meaningful voice in choosing the type of content that they will see; the platform makes that decision for them with little to no user input. While public accommodations originalism would not allow a platform to remove posts from user feeds as they currently do, nothing under this regulatory framework would prevent the platform from giving users the option to excise certain kinds of content from their feeds. Platforms could overhaul their approach to content moderation in order to give users more power in controlling the type of content available to them online.

Public accommodations originalism would not prevent platforms from altering their content moderation strategies to put more power in the hands of users to curate the content that they want to see. Some platforms, like Reddit, are already implementing the types of content moderation strategies

266. Wilson v. Twitter, No. 20-cv-00054, 2020 WL 3410349 (S.D. W. Va. May 1, 2020), *adopted by* Wilson v. Twitter, No. 3:20-0054, 2020 WL 3256820 (S.D. W. Va. June 16, 2020).

267. Goldman & Miers, *supra* note 11, at 203 (quoting *Wilson*, 2020 WL 3410349, at *2).

268. *Id.*

that every platform should consider adopting under a public accommodations framework in order to give users more power in curating the content on their feeds. In addition to its upvote/downvote system, Reddit also allows users to choose whether certain categories of information will be visible on their feeds. Historically, Reddit only allowed users to remove content that was not safe for work (NSFW)—such as pornography—from their feeds.[269] But recently, the platform began expanding user curation of content to other categories of information as well. In 2021, Reddit released the following update regarding the expansion of its content curation system:

> Maybe you're cool with sexual content, but don't want the gore. Maybe you're ok seeing depictions of graphic medical surgeries or violence, but are recovering from addiction and don't want to see drugs or alcohol in your feed. As we evolve our classification system, we'll advance the tools that let redditors control their experience on the platform as well.[270]

Reddit is not the only platform to allow users to remove certain content from their feeds based on its characteristics or content, however. LinkedIn recently announced that it was launching a no-politics option, which would allow users to remove all political posts from their feeds on the popular networking platform.[271] LinkedIn's announcement defined political content as content containing information regarding "political parties and candidates, election outcomes, and ballot initiatives," but the platform also announced that it would expand the functionality of the no-politics button over time based on user feedback.[272]

Even though these content curation systems discriminate against posts based on their content, they do not run afoul of public accommodations originalism for two important reasons. First, they are viewpoint neutral. In LinkedIn's case, users are able to excise *all* political posts from their feeds rather than block only posts from certain political parties. But even if users

269. *See* u/ChiTownSando, *How to Turn Off NSFW Subreddit Search Filter and Allow NSFW Search Results to Appear in Feed*, REDDIT: R/HELP (June 23, 2019), https://www.reddit.com/r/help/comments/c4g9tk/how_to_turn_off_nsfw_subreddit_-search_filter_and/ [https://perma.cc/EV9A-V4GF] (discussing how to edit a feed to display content once removed by Reddit).

270. u/KeyserSosa, *Removing Sexually Explicit Content From r/all*, REDDIT: R/CHANGELOG (Feb. 11, 2021), https://www.reddit.-com/r/changelog/comments/lhnvok/removing_sexually_explicit_content_from_rall/ [https://perma.cc/HXN8-XCZD].

271. *Choose if You Want to See Less Political Content in Your LinkedIn Feed*, LINKEDIN (Oct. 28, 2021), https://www.linkedin.com/help/linkedin/answer/134715 [https://perma.cc/S68T-FB6V].

272. *Id.*

could remove posts from their feed based on their viewpoint—for example, a user decides they only want to see political posts by Democrats or in support of Democratic policies—it is unlikely they would contravene public accommodations originalism. This is because public accommodations originalism only prevents platforms (i.e., the public accommodation) from censoring content or users based on viewpoint. Merely empowering users to make their own decisions about what content they want to see does not violate a platform's duty to host.

If platforms continue the trend that Reddit and LinkedIn have started—and develop robust curation categories—then they will not be overwhelmed with lawful-but-awful content. Users unopposed to objectionable, violent, or sensitive content will be permitted to view that content. But users who are opposed to such content can filter out all or some as they see fit. Of course, as Goldman and Miers argued, "lawful-but-awful" speech will still be proliferated online (at least for those who want to see it).[273] However, it will not be as widely available as it would be under the duty to host, and it will certainly not make these platforms "cesspools" for pornography, misinformation, and hate speech. While such a system might be distasteful to those who would prefer to see all lawful-but-awful content removed from the internet, these concerns must be balanced against the First Amendment and the equally valid objections of those who are concerned with the growing and unchecked powers of social media monopolies. Public accommodations originalism might strike the appropriate balance in weighing these concerns. Thus, whether or not policymakers embrace a public accommodations framework, online platforms should begin decentralizing their content moderation strategies and give users more control in how they curate the content on their feeds.

By controlling algorithmic decisions, engaging in their own speech, and overhauling content moderation policies to give users the power to see only what they want, platforms can viably prevent the spread of misinformation and lawful-but-awful speech without censoring it. There will likely be a significant adjustment period if online platforms are subjected to public accommodations restrictions. Most prominent social media companies have centralized content moderation strategies in which they hold complete power over the speech communicated on their platforms. Imposing a public accommodations framework on social media companies would require them either to adapt to their new reality or risk their platform becoming a

273. Goldman & Miers, *supra* note 11, at 203.

breeding ground for pornography, hate speech, and misinformation. Most if not all companies will choose the former. By altering their content moderation strategies to become less centralized, online platforms will be able to comply with public accommodations restrictions without destroying the effective and necessary communications networks they have cultivated over the past twenty-five years. Even more importantly, users, not companies, will have power over their online speech for the first time.

VI. CONCLUSION

The rise of online platforms has resulted in the blurring of the line between the law of public and private callings. While the companies that operate online platforms are *private* corporations, they are increasingly able to influence *public* discourse in ways the Founders never could have anticipated. That said, the Founders did not have to anticipate how the Constitution would address the problems of the information age. The Constitution has always allowed private entities to be regulated similarly to public entities through public accommodations law if they met certain conditions.

A private entity subjected itself to public accommodations regulations by holding itself out to the public as willing to serve all comers. Likewise, the government could impose public accommodations regulations on an industry through franchise obligations if it operated in conditions of natural monopoly. Although they do not make it clear through their terms of service, social media giants such as Facebook, Twitter, and Reddit induce the public to believe that they are holding themselves out as willing to serve all comers and have thus classified themselves as public accommodations. Even if these companies change their policies to avoid public accommodations status under the holding out theory, the government could impose public accommodations status on them because they operate in conditions of natural monopoly. Social media companies do not technically compete with one another in a way that is relevant to a natural monopoly analysis. Additionally, the presence of network effects makes it, if not impossible, at least inefficient for competition to exist in each of the dominant social media companies' markets.

That said, public accommodations regulations will not solve the many problems associated with the moderation of online speech. Online platforms are still capable of speaking themselves and may be able to discriminate against users in some instances. Furthermore, public accommodations regulations will likely result in people having to tolerate speech online that

is intensely undesirable (although social media companies could mitigate this in some ways).

Either way, "the Federal Constitution does not prohibit everything that is intensely undesirable."[274] It thus becomes a matter of policy whether the benefits that come with public accommodations status for online platforms outweigh the potential burdens. That, however, is a question better left for another time. For now, it is sufficient to say that the original public meaning of the Constitution does not prevent the government from regulating online platforms as public accommodations and imposing on them a duty to serve.

274. Bennis v. Michigan, 516 U.S. 442, 453–54 (1996) (Thomas, J., concurring).