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## Boden Lecture: The Past's Lessons for Today: Can Common-Carrier Principles Make for a Better Internet?

James B. Speta

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# BODEN LECTURE

MARQUETTE UNIVERSITY LAW SCHOOL  
SEPTEMBER 22, 2022

## THE PAST’S LESSONS FOR TODAY: CAN COMMON-CARRIER PRINCIPLES MAKE FOR A BETTER INTERNET?

JAMES B. SPETA\*

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Let me begin by saying that I’m grateful to Marquette Law School for the invitation to deliver the annual Robert F. Boden Lecture and to everyone who has made this experience possible. I’m honored to speak in this series, which has featured so many leading academics. And I feel connected to it, at least in the sense that I understand one of Dean Boden’s distinguishing characteristics to have been his commitment to practical education—to the insistence that a law school’s exploration of theory must serve the profession and prepare students for the practice. I come to legal academia as a practicing lawyer, and here is the most important way in which Dean Joseph Kearney’s invitation is so meaningful: I had the great privilege to learn lawyering with and alongside him, in the early to mid-1990s, and I’ve marveled at his and Marquette’s successes during his long deanship and at the commitment to educating new lawyers—Marquette lawyers, as I know you say around here. He is also, as I’m sure you know, simply one of the most well-respected and admired deans across the American legal academy.

Legend has it (and this is supported by the *Marquette Law Review*) that, a few years ago, a Boden lecturer—now the dean of Yale Law School no less—

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\* Elizabeth Froehling Horner Professor of Law, Northwestern University Pritzker School of Law. What follows is an essay version of the speech I delivered as the Boden Lecture at the Marquette University Law School. I am grateful for feedback on earlier drafts to Professors Erin Delaney, Peter DiCola, Paul Gowder, Emily Kadens, Joseph Kearney, Bruce Markell, and Deborah Tuerkheimer. I am also grateful for the comments on the lecture published in the *Marquette Lawyer* by Congressman Ro Khanna and Professors Ashutosh Bhagwat, Bruce E. Boyden, Eric Goldman, Kate Klonick, Sari Mazzurco, Tejas N. Narechania, Howard Shelanski, and Eugene Volokh.

was instructed to speak for precisely forty-three minutes.<sup>1</sup> Whether I meet that mark, we hope to have time remaining in our hour to open the floor to questions and discussion. These issues are very current and very important.

#### INTRODUCTION

My subject for today is the dominance of the internet platforms and, together with that, various proposals that would regulate the content and viewpoint of those platforms. Indeed, the currency of our topic today was emphasized just this past Friday (September 16, 2022), when a Fifth Circuit panel upheld a Texas state law which imposed common-carrier requirements on the largest internet platforms, finding this consistent with the First Amendment.<sup>2</sup> This was the first statute of its kind, and the first decision upholding such regulation. Earlier this year, the Eleventh Circuit reached exactly the *opposite* conclusion involving a nearly identical Florida statute—holding that statute unconstitutional.<sup>3</sup>

These statutes and the broader policy debate raise central questions about the speech ecosystem that we now have in this country and the ecosystem we would like to create. In this lecture, I will address both the dominance of the internet platforms and the calls to regulate those platforms as carriers. To begin to define our terms: this reference to the *platforms* means the dominance by Google and Facebook, by Amazon and Apple (and to a lesser extent by Twitter and Microsoft), over the ways we receive information, exchange it, even understand it. The main concern is that these platforms are biased, that they discriminate, that they foreclose speech. That is why, today, platform critics—including governments—are reaching for the traditional law of railroads and of telephone companies: the law of common carriage. That once-dominant law forbade discrimination. In addition to the Texas and Florida statutes—as I said one so far upheld and one struck down—a Supreme Court justice has written in favor of platform-focused common-carrier regulation, as have numerous federal and state lawmakers, some academics, and many commentators. Bills have been offered or are pending in Congress and in many states, including here in Wisconsin.<sup>4</sup>

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1. Heather K. Gerken, *The Real Problem with Citizens United: Campaign Finance, Dark Money, and Shadow Parties*, MARQ. L. REV. 903, 904 (2014).

2. *NetChoice, LLC v. Paxton*, 49 F.4th 439, 455, 473–74 (5th Cir. 2022).

3. *NetChoice, LLC v. Att’y Gen. of Fla.*, 34 F.4th 1196, 1231 (11th Cir. 2022). Both cases have *NetChoice, LLC* as the lead plaintiff, so I refer to them by circuit for clarity.

4. An Act To Create 100.75 of the Statutes; Relating to: Censorship on Social Media Platforms and Providing a Penalty, S.B. 525, 105th Leg., Reg. Sess. (Wis. 2021) (failing to pass pursuant to S.J. Res. 1, 105th Leg., Reg. Sess. (Wis. 2021)). Related bills that were also adversely disposed of by S.J.

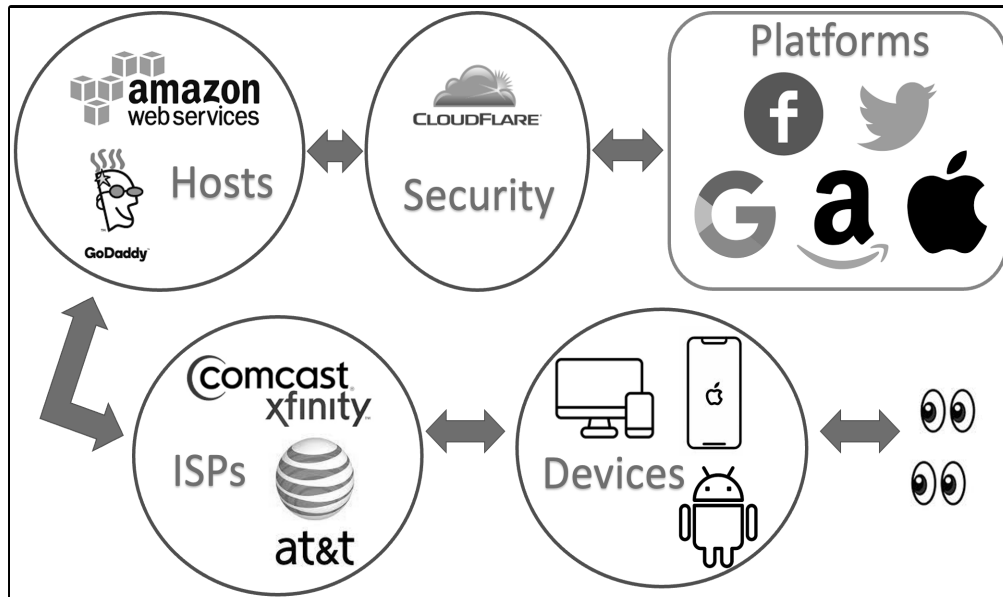
The proposals for common-carrier regulation of platforms seem to me very right—and very wrong. They are right to worry about the dominance of internet platforms. And they are right that common-carrier law—even though it smells musty and has largely been discarded in the United States over the past few decades—can be part of the solution. Yet, I think the proposals are very wrong to target common-carrier solutions at the platforms’ core operations themselves—to change the ways in which users are permitted access, content is moderated, and search results are provided. Such platform regulation does not fit the common-carrier model. Platforms are not merely conduits of user behavior, although they are partly that. Platforms *also* seek to create a particular kind of speech experience that holds the attention of their users. If we are required to have an analogy to an old form of media, platforms are more like newspapers and broadcasters than telephone companies, although I think the best single analogy is to bookstores. Newspapers, broadcasters, and bookstores curate the content they offer their customers, and common-carrier rules have *never* applied to them. Even more concerning, laws directly controlling platforms simply give the government unprecedented power over the content experiences these private companies seek to create. I think that this violates the First Amendment and that the Fifth Circuit’s decision to the contrary is quite wrong.

Here’s what we *can* do instead: we can and should at least try to address concerns about the currently dominant platforms by using law to make it easier to have *more platforms*. This is, truly, my essential argument: Common-carrier solutions should be targeted at the infrastructure that enables platforms to be built and to reach consumers. When we think about platforms, we usually think about the ways that users interact directly with Google or Twitter or other services. But, in fact, myriad companies provide infrastructure and services that enable user access or platform operation—companies that transmit data, such as the cable companies and other internet service providers carrying data; companies that host websites and platforms; and companies that provide services such as website defense or payment processing to support both new and established platforms. For ease of exposition, I have prepared a single Figure: a simplified graphic showing all the companies that stand between platform users—you and me—and the platforms themselves.

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Res. 1 include: S.B. 582, 105th Leg., Reg. Sess. (Wis. 2021); S.B. 590, 105th Leg., Reg. Sess. (Wis. 2021); Assemb. B. 530, 105th Leg., Reg. Sess. (Wis. 2021); and Assemb. B. 591, 105th Leg., Reg. Sess. (Wis. 2021).

**FIGURE 1**  
**The Intermediaries Between Platforms and Platform Users**



In the past, some of these providers have denied services to various new platforms that sought to establish alternative services.<sup>5</sup> Applying a *lighter-touch* (and differently placed) version of common-carrier regulation to the internet's *support providers*, I will seek to convince you, can increase the possibility of alternative platforms. *This* is our best hope to enrich our speech choices and ecosystem without government censorship.

At the end of the day, I contend that my proposal—considered comparatively—has the advantages of parsimony and modesty. Government should not intervene in the speech ecosystem any more than is absolutely required to meet an important governmental interest. I do think that the Fifth Circuit decision is, well, just wrong, and that, in fact, the Texas statute and similar proposals violate the First Amendment. But I need not convince you of that point of constitutional law. I need only persuade you that a more limited regulation—more limited in that it involves less direct government control over the creation of content experiences, of speech experiences—can address the problem.

I'll do so in three main moves. First, I'll provide a little background on platform dominance and the current proposals for common-carrier regulation.

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5. See *infra* notes 85–86, 94–95 and the accompanying text.

Second, I'll argue that common-carrier duties—particularly access requirements and nondiscrimination rules, which are the core of common carriage—both don't fit platforms and also give the government too much control over speech. And, third, I'll propose that common-carrier rules, especially access rules (which are really just a light form of nondiscrimination), when applied to internet service providers (ISPs, such as Comcast and AT&T), to hosts, to security support, and perhaps even to intermediaries like app stores, could increase the diversity and availability of platforms. We have in fact seen these sorts of companies deny access to alternative platforms, and those denials have been consequential.

Then, at the end, I will grapple with two problems. Can we write a rule that is administrable and meets the objections to common carriage for platforms? And will a fracturing of dominant platforms, even if it makes more speech more available, actually create more problems for democracy, good policymaking, and civil discourse?

I come to this very modern topic of internet platforms based on many years of writing about common carriage and asking how it applies both to the internet and perhaps to other modern industries.<sup>6</sup> As I hope I have already indicated, these are hard, hard questions, and reasonable people can differ. But I am certain about a few things—that this is a debate worth having, that common-carrier rules can help us think about internet platforms, and that applying such rules to the internet platforms' support layers could increase the diversity of platforms.

#### PART 1: DOMINANT PLATFORMS AND DISCRIMINATION

I don't suppose it should take much of my time to say that we live in an era in which certain internet platforms hold enormous sway. Sway over speech, entertainment, and commerce. At least half of the ten most valuable companies in the world are internet platforms,<sup>7</sup> and that number used to be higher before the beating tech stocks have recently taken in the market.<sup>8</sup> Google has almost

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6. See, e.g., James B. Speta, *Handicapping the Race for the Last Mile?: A Critique of Open Access Rules for Broadband Platforms*, 17 YALE J. ON REGUL. 39 (2000); James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM'NS. L.J. 225 (2002); James B. Speta, *Southwest Airlines, MCI, and Now Uber: Lessons for Managing Competitive Entry into Taxi Markets*, 43 TRANSP. L.J. 101 (2017).

7. Julia Faria, *Most Valuable Brands Worldwide 2023*, STATISTA (Mar. 14, 2023), <https://www.statista.com/statistics/264875/brand-value-of-the-25-most-valuable-brands/> [<https://perma.cc/75U5-TZRP>].

8. Rohan Goswami, *Tech's Reality Check: How the Industry Lost \$7.4 Trillion in One Year*, CNBC (Nov. 25, 2022), <https://www.cnbc.com/2022/11/25/techs-reality-check-how-the-industry-lost-7point4-trillion-in-one-year.html> [<https://perma.cc/J3TD-PP7U>].

two-thirds of all searches in the United States,<sup>9</sup> and more than ninety percent of all searches in every country in the European Union.<sup>10</sup> Google also provides the operating system on almost seventy-five percent of the world's cell phones<sup>11</sup> and the browser on just under two-thirds of all computers and phones.<sup>12</sup> Amazon has more than forty percent of all U.S. online commerce.<sup>13</sup> Facebook, together with its subsidiaries Instagram and WhatsApp, dominate traditional social networking, and Twitter has become a key source of information, debate, and entertainment. In the U.S. in particular, Apple, too, is a key platform, through its app store and its phones.

If anything, these numbers play down the importance of these platforms in traditional media functions such as news. About one-third of all U.S. adults say that Facebook is a regular news source, and very nearly fifty percent of Americans “often” or “sometimes” get their news from social media.<sup>14</sup> In 2017, the Supreme Court itself, in striking down a law that limited individuals’ access to social media, identified social media as our “modern public square,” and said that the law “bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.”<sup>15</sup>

I do not necessarily mean that these platforms have “market power” in a traditional antitrust sense (although the U.S. Justice Department and most of the states have filed lawsuits saying that at least the biggest platforms do).<sup>16</sup> I

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9. Tiago Bianchi, *Market Share of Search Engines in the United States 2008–2022*, STATISTA (Mar. 13, 2023), <https://www.statista.com/statistics/267161/market-share-of-search-engines-in-the-united-states/> [<https://perma.cc/63Z2-QPN9>].

10. *Search Engine Market Share Europe*, STATCOUNTER, <https://gs.statcounter.com/search-engine-market-share/all/europe/2019> [<https://perma.cc/7B7Q-R2WG>] (last visited May 3, 2023).

11. Jack Wallen, *Why Is Android More Popular Globally, While iOS Rules the US?*, TECHREPUBLIC (May 12, 2021), <https://www.techrepublic.com/article/why-is-android-more-popular-globally-while-ios-rules-the-us/> [<https://perma.cc/7VNL-BXB2>].

12. *Browser Market Share Worldwide*, STATCOUNTER, <https://gs.statcounter.com/browser-market-share> [<https://perma.cc/8XEX-WLLF>] (last visited May 3, 2023).

13. Melissa Repko, *Walmart Is Using Its Thousands of Stores to Battle Amazon for E-commerce Market Share*, CNBC (June 2, 2022), <https://www.cnbc.com/2022/06/02/walmart-bets-its-stores-will-give-it-an-edge-in-amazon-e-commerce-duel.html> [<https://perma.cc/QTF7-QPCS>].

14. Mason Walker & Katerina Eva Matsa, *News Consumption Across Social Media in 2021*, PEW RSCH. CTR. (Sept. 20, 2021), <https://www.pewresearch.org/journalism/2021/09/20/news-consumption-across-social-media-in-2021/> [<https://perma.cc/8FV4-7W5L>].

15. *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017).

16. Rebecca Klar, *How State Attorneys General Are Leading the Fight Against Big Tech*, HILL (Sept. 17, 2022), <https://thehill.com/policy/technology/3646920-how-state-attorneys-general-are-leading-the-fight-against-big-tech/> [<https://perma.cc/C4BP-P57T>] (“Nearly every state is suing Google

concede, for one example, that “search” is not a single economic market and, for another, that Google, Facebook, and Twitter are actually direct competitors in the advertising market. One of the most important truths of media and communications law is that when the user is receiving the service for free—whether it’s broadcast television, email, or cat videos—the user is not really the customer. The user—or rather the user’s attention along with data about the user—is the thing being sold (to advertisers).<sup>17</sup> But technical antitrust economics aside, I am aligned with those who say that the internet platforms are big enough and consequential enough to merit public policy attention.

The second piece of this first part will take a little longer: What are common-carrier rules, and why are we reaching for them now? In brief, as Dean Kearney and Professor Tom Merrill (who delivered the first Boden Lecture in this building) wrote almost 25 years ago in the *Columbia Law Review*, common-carrier rules dominated government treatment of transportation and public utility industries from the late 1800s through most of the 20th century.<sup>18</sup> Indeed, the first significant federal common-carrier statute, the Interstate Commerce Act, was adopted (in 1887) three years before the Sherman Antitrust Act, and together these statutes represented the Progressive and later New Deal concern with massive accumulations of private economic power.<sup>19</sup> And, for better or worse, what a triumph of an idea: By the middle of the 20th century, common-carrier rules covered railroads, buses, trucking, water carriers, airlines, telephone and telegraph companies, electric and natural gas transmissions, and many, many other industries.<sup>20</sup>

Full-blown common-carrier regulation had four pillars: (1) the government limited entry and exit of companies; (2) providers were required to serve all customers, subject to legality and other reasonable terms and conditions; (3) at just and reasonable prices; and (4) on a nondiscriminatory basis.<sup>21</sup> In general, regulatory schemes also promoted universal service, usually by mandating certain services and internal cross-subsidies to support those that might be money losers (which is why entry and exit had to be limited), although the degree of universal service rather varied, in principle and in practice.<sup>22</sup>

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and Meta, Facebook’s parent company, between three cases filed against the companies in the past two years.”).

17. TIM WU, *THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS* 5–6 (2016).

18. Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323 (1998).

19. *Id.* at 1332–34.

20. *Id.* at 1334.

21. *Id.* at 1363–64.

22. *Id.* at 1346.



But prevailing ideas change, and sometimes the law even follows along. Beginning in the late 1970s, common-carrier regulation of this full-blown type had been largely dismantled in the United States.<sup>23</sup> Railroads were deregulated, then airlines, then telecoms, and the march went on—in part due to technological change, an ideology of free-market economics, regulatory failure, and through other causes.<sup>24</sup>

So how or why are modern internet platforms and the old law of common carriage now colliding? They are colliding because of the conviction that platforms are engaged in discrimination—in bias of many sorts—and because the most important two pillars of common-carriage law require access by all customers and forbid discrimination. Justice Clarence Thomas, concurring in a summary disposition in 2021, wrote: “We will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms.”<sup>25</sup> He suggested that “part of the solution may be found in doctrines that limit the right of a private company to exclude”: common-carrier and public-accommodation law.<sup>26</sup> I agree that we need to attend to platform concentration, but the solution should not involve applying common-carrier rules to the platforms themselves, as we will see.

But first: What is meant by platform discrimination? It manifests in different ways, but examples offered have included:

Both Facebook and Twitter removed President Trump from their platforms.<sup>27</sup> This is only the highest-profile example for those on (if you will) the right, who also argue that platforms have removed other conservative voices and that the platforms’ algorithms suppress conservative speech.<sup>28</sup>

- Others (many but not all of whom might be called the left) condemn platforms for the choices that they make in hosting and distributing other kinds of content, wanting platforms to take down more in the

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23. *Id.* at 1383–84.

24. *Id.* at 1330, 1383–84.

25. *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring in the denial of certiorari).

26. *Id.* at 1222, 1226.

27. See Melina Delkic, *Trump’s Banishment from Facebook and Twitter: A Timeline*, N.Y. TIMES (May 13, 2022), <https://www.nytimes.com/2022/05/10/technology/trump-social-media-ban-timeline.html> [<https://perma.cc/8NFA-A8LY>].

28. See *infra* notes 61–62 and the accompanying text.

way of conspiracy theories, lies, hate speech, and threats of violence.<sup>29</sup>

- Another example: Changes to search algorithms have resulted in the loss by companies of valuable position. In several cases, companies have alleged that changes to Google's search engine or Amazon's display algorithm have overnight pushed them off the first results page and resulted in their bankruptcy.<sup>30</sup>
- And one last example: Platforms sometimes prefer their own businesses over the businesses of third parties. The European Union fined Google nearly three billion dollars for giving the top display to its own shopping results—and even more for prioritizing other of its properties.<sup>31</sup> And part of the District of Columbia antitrust case against Amazon is the extent to which it uses the sales data on its platform to prefer its Amazon Basics brand and other affiliated sellers.<sup>32</sup>

One can debate the merits of these and other individual cases, but one thing is inarguable: Platforms make choices; they curate their experience; they promote some content and they demote others. *They must*. Google cannot be indifferent among all of the possible results that it gives you; to be of any use, Google must make some choices among the trillions of possible results on the internet. Facebook must make choices about the postings to share with you. Professor Kate Klonick has written extensively about how exactly they do this, both algorithmically and through human intervention.<sup>33</sup> One can imagine a social network that provides all posts made within a friend network, but only if the friend network is not large. And users of all platforms want as part of their experience more than just the posts of their own friends. Facebook users want

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29. E.g., Robby Soave, *Elizabeth Warren Absolutely Wants the Government to Punish Facebook for Spreading Disinformation*, REASON (Feb. 3, 2020), <https://reason.com/2020/02/03/elizabeth-warren-free-speech-facebook-pen-america/> [<https://perma.cc/JK7V-4N5B>].

30. E.g., *Kinderstart.com LLC v. Google, Inc.*, 2006 WL 3246596, at \*3 (N.D. Cal. July 13, 2006).

31. Kelvin Chan, *Google Loses Appeal of Huge EU Fine over Shopping Searches*, AP NEWS (Nov. 10, 2021), <https://apnews.com/article/business-european-union-european-commission-europe-euro-b7baf101cacca2f1a6d21faba5a7b91e> [<https://perma.cc/6RNV-MCMW>].

32. Shira Ovide, *The Big Deal in Amazon's Antitrust Case*, N.Y. TIMES (June 22, 2021), <https://www.nytimes.com/2021/05/25/technology/amazon-antitrust-lawsuit.html> [<https://perma.cc/RJ9A-YG3F>]; First Amended Complaint at 3–5, *District of Columbia v. Amazon.com, Inc.*, No. 2021-CA-001775-B (D.C. Super. Ct., Civil Div. 2021).

33. Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018); Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418 (2020).

news from the platforms; Twitter, Instagram, and TikTok users *want* the platforms' suggestions and selections.

This truth makes clear that one of the Fifth Circuit's most fundamental errors was its assertion that the Texas statute wasn't censorship because "space constraints on digital platforms are practically nonexistent."<sup>34</sup> Even if correct in theory (as a matter of physics), that misunderstands how individuals use platforms and the product the platforms are trying to provide. The relevant constraint isn't digital space: it is user attention. *That* is what the platforms are competing to secure.<sup>35</sup> Users are valuable only if they stay on the services, provide data, and watch advertising.<sup>36</sup> And we all have limited time and attention. What platforms do is try to keep it by shaping our experiences on the platforms. The Texas law or any common-carrier scheme for platforms necessarily constrains the content experience that the platforms seek to create for, and in partnership with, their users.

Sure, we could debate the platforms' motivations and techniques for discriminating: Google, for example, wants you to believe that its algorithm does nothing more and nothing less than give you the results that you most want to receive.<sup>37</sup> Others argue that Google pursues profits by promoting its own services.<sup>38</sup> And still others argue that Google's choices reflect the personal preferences of its founders and still-controlling shareholders—just as Facebook's choices reflect Mark Zuckerberg's.<sup>39</sup> Or that the platforms' seemingly technical computer science-y or economics-y choices are irretrievably infected by the Silicon Valley bubble and the fact that almost all of their employees identify as liberal, progressive, or Democrats.<sup>40</sup>

But for our purposes today, we need not resolve the question of motivation. We just need to say that platforms—at least the kinds of platforms that we can imagine providing useful services—do choose both the kind of content they provide us and, when necessary, the users they agree to host. If we like the

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34. *NetChoice, LLC v. Paxton*, 49 F.4th 439, 462 (5th Cir. 2022) (quoting *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1226 (2021) (Thomas, J., concurring in the denial of certiorari)).

35. *See, e.g., WU*, *supra* note 17.

36. *Id.*

37. *How Google Search Works: Ranking Results*, GOOGLE, <https://www.google.com/search/howsearchworks/how-search-works/ranking-results/> [<https://perma.cc/RG6T-XYYY>] (last visited May 4, 2023).

38. EUR. COMM'N, ANTITRUST: COMMISSION FINES GOOGLE €2.42 BILLION FOR ABUSING DOMINANCE AS SEARCH ENGINE BY GIVING ILLEGAL ADVANTAGE TO OWN COMPARISON SHOPPING SERVICE – FACTSHEET (2017), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_17\\_1784](https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784) [<https://perma.cc/SR5W-QUXC>].

39. Anupam Chander & Vivek Krishnamurthy, *The Myth of Platform Neutrality*, 2 GEO. L. TECH. REV. 400, 400–01 (2018).

40. *Id.*

choices that the platforms make, we call it choice or curation. If we don't like the choices platforms make, we call it discrimination.

## PART 2: THE INAPTNESS OF COMMON-CARRIER RULES FOR PLATFORMS

This brings me to my second major point: common-carrier rules simply do not fit platforms. Recall, as I've already said, that the current enactments or proposals for platforms focus on two basic translations of common-carrier rules. The proposals require the biggest platforms to admit all prospective users, and the proposals impose some form of nondiscrimination requirement on the ways in which the platforms handle the speech and other content generated by the users. As a procedural corollary of these two requirements, platforms are required to state their access policies and their selection algorithms and to provide users or government authorities some opportunity to challenge platform actions.<sup>41</sup>

Let me be more specific about the Texas statute, because it's a useful example.<sup>42</sup> The statute, widely known as HB20, applies to all "social media platform[s]" that are "open to the public," allow inter-user communication or sharing, and have more than fifty million active domestic users in any month.<sup>43</sup> These threshold requirements are said to justify the analogy to common-carrier law—and there is some family resemblance to communications common carriers.<sup>44</sup> The traditional common-carrier telephone company did provide service to all comers, did provide a service that principally connected users to one another, and occupied a significant position in the market. I will discuss in a few minutes why, all the same, the analogy from telephone common carriers to platforms does not hold—or is not even particularly relevant. But it is not frivolous.

As to substantive requirements, the Texas law prohibits "censor[ing]" a user based on the user's "viewpoint."<sup>45</sup> "Censor," as used in the statute, would forbid both a platform's removing a user on the basis of viewpoint and a platform's muting or deprioritizing the distribution of any expression on the

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41. *NetChoice, LLC v. Paxton*, 49 F.4th 439, 446 (5th Cir. 2022); *NetChoice, LLC v. Att'y Gen. of Fla.*, 34 F.4th 1196, 1206–07 (11th Cir. 2022).

42. Tex. H.B. 20, 87th Leg., 2d C.S. (2021) (enacted). The portions of HB20 relevant to this discussion are codified at TEX. BUS. & COM. CODE §§ 120.001–151 and TEX. CIV. PRAC. & REM. CODE §§ 143A.001–08. *See also* *NetChoice, LLC v. Paxton*, 573 F. Supp. 3d 1092, 1099–1101 (W.D. Tex. 2021), *stay of preliminary injunction granted*, 2022 WL 1537249 (5th Cir. 2022), *stay of preliminary injunction vacated*, 142 S. Ct. 1715 (2022), *preliminary injunction vacated*, 49 F.4th 439 (5th Cir. 2022).

43. *NetChoice, LLC v. Paxton*, 49 F.4th 439, 445 & n.2 (5th Cir. 2022).

44. *Id.* at 445.

45. Tex. H.B. 20, 87th Leg., 2d C.S. (2021) (enacted).

basis of viewpoint.<sup>46</sup> The law also provides that users have both the right to express and the right to receive expression.<sup>47</sup> In short, under the law, platforms may not select or deselect any user or expression on the basis of viewpoint. Platforms must post their use policies and provide an opportunity for content decisions to be challenged. The statute creates both a private remedy and a remedy for the state attorney general (AG) to sue to reverse the platform's action and to receive an injunction against the platform.<sup>48</sup> There are also provisions to seek attorney's fees, and (in the case of the AG) to recover investigative costs.<sup>49</sup>

Texas is not the extent of it. The Florida statute, S.B. 7072, is quite similar, though with even more explicit protections for political candidates and what are called (inelegantly) "journalistic enterprise[s]," forbidding their deplatforming and the curation of their speech.<sup>50</sup> Also similar are a number of bills in Congress.<sup>51</sup> While none has progressed significantly, a large number of representatives and senators have expressed that common carriage or some other form of nondiscrimination regulation should be forthcoming.<sup>52</sup>

Let me be clear that, while the Texas and Florida statutes and most of the pending bills come from Republicans, some Democrats are also unhappy with the content choices of internet platforms. Democrat-sponsored bills include those that would establish Federal Trade Commission supervision of platform moderation practices<sup>53</sup> and that would supervise algorithms to limit "disparate outcomes on the basis of an individual's . . . race" or other demographic features.<sup>54</sup> The Democratic bills are consistent with the view on the left that current platform content moderation insufficiently roots out hate speech, conspiracy theories, fake news, and the like.<sup>55</sup>

The most well-developed academic proposals for common-carrier-like rules for platforms have come from Professor Eugene Volokh of UCLA

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46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *NetChoice, LLC, v. Att'y Gen. of Fla.*, 34 F.4th 1196, 1205-07 (11th Cir. 2022).

51. 21st Century FREE Speech Act, S. 1384, 117th Cong. (2021); PRO-SPEECH Act, S. 2031 117th Cong. (2021); Filter Bubble Transparency Act, H.R. 5921, 117th Cong. (2021).

52. Steve Lohr, *To Rein in Big Tech, Europe Looked Beyond Lawsuits. Will the U.S. Follow?*, N.Y. TIMES (Dec. 10, 2022), <https://www.nytimes.com/2022/12/10/business/big-tech-antitrust-rules.html?searchResultPosition=7> [<https://perma.cc/VB87-DWWB>].

53. Digital Services Oversight and Safety Act of 2022, H.R. 6796, 117th Cong. (2022).

54. Algorithmic Justice and Online Platform Transparency Act, H.R. 3611, 117th Cong. (2021).

55. *See, e.g., Soave, supra* note 29.

(another past Boden lecturer)<sup>56</sup> and Professor Adam Candeub of Michigan State.<sup>57</sup> I'll take up briefly the former's proposal. Volokh himself notes that his intervention is tentative and that it is not based on an argument that social media platforms are, *in fact*, common carriers or sufficiently like common carriers that one should presume the same form of regulation.<sup>58</sup> Volokh mainly proposes that government might mandate that social media platforms host all comers—and that such hosting would be consistent with the First Amendment.<sup>59</sup> As to nondiscrimination, Volokh does say that government could mandate open subscription, open directories, and maybe even algorithms that do not discriminate on the basis of viewpoint—and that such rules would be constitutional.<sup>60</sup>

It is true that, ultimately, we cannot and should not resolve the debate over platform regulation based simply on how much they look like common carriers. Yet I want to emphasize just how different platform regulation would be from telephone (and other) common-carrier regulation. The platform regulations adopted and proposed so far explicitly target a change to the viewpoint “balance” of the expression on the platform. Google and Amazon would be required to change the order of search results. Social media regulation is intended to alter the (perceived) political and cultural (im)balances on platforms. As the Eleventh Circuit recounted by quoting Governor Ron DeSantis, the Florida Act was “to combat the ‘biased silencing’ of ‘our freedom of speech as conservatives . . . by the “big tech” oligarchs in Silicon Valley.’ ”<sup>61</sup> Governor Greg Abbott similarly tweeted, in defending his state's law, “[s]ilencing conservative views is un-American, it's un-Texan and it's about to be illegal in Texas.”<sup>62</sup>

By contrast, no part of the historic Communications Act of 1934 or Federal Communications Commission (FCC) regulations took a viewpoint approach to telephony. In fact, no part of the 1934 Act even addressed the content of the speech being carried on the telephone system (except for a statutory provision

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

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

58. Volokh, *supra* note 56, at 412–14.

59. *Id.* at 415–16.

60. *Id.* at 440–45, 450 n.285.

61. NetChoice, LLC v. Att'y Gen. of Fla., 34 F.4th 1196, 1205 (11th Cir. 2022).

62. NetChoice, LLC v. Paxton, 573 F. Supp. 3d 1092, 1099 (W.D. Tex. 2021); Greg Abbott (@GregAbbott\_TX), TWITTER, (Mar. 5, 2021, 8:35 PM), [https://twitter.com/gregabbott\\_tx/status/1368027384776101890?lang=ga](https://twitter.com/gregabbott_tx/status/1368027384776101890?lang=ga) [<https://perma.cc/SWS4-LHLH>].

that forbade the carriage of indecent or obscene speech for commercial purposes, and the Supreme Court struck that down as to indecent speech).<sup>63</sup> Common-carrier rules do have effects on the speech ecosystem, but they have historically done so only indirectly—by promoting the availability of speech without suppressing any. As Volokh points out, content-neutral regulations can often have viewpoint-based effects and can still be constitutional.<sup>64</sup> In any event, common-carrier rules, as many have argued (most recently Professor Genevieve Lakier), did ensure that speakers could access one another without interference from the telephone company.<sup>65</sup> This required a neutral stance as to content and also created a neutral stance as to viewpoint.<sup>66</sup>

Telephone companies—particularly the Bell System—were premised on a transport function, carrying the content from one user to another.<sup>67</sup> If unregulated, telephone companies *could* have used their market position to favor certain viewpoints, and there is some evidence that *telegraph* companies did so, a fact contributing to their regulation.<sup>68</sup> But the fundamental of telephone service is one-to-one communication, and, to this day, that is one of the definitional requirements of a common-carrier service.<sup>69</sup> In this way, “telcos” really were like railroads carrying packages (some of which might be books or newspapers). Similarly, common-carrier rules, under traditional law, *ended at the end of the infrastructure of the communications systems—the wires and the spectrum*.<sup>70</sup> The companies that *created* speech experiences—newspapers, broadcasters, cable programmers, and others—have always had First

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63. 47 U.S.C. § 223(b) (2023); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 117 (1989).

64. Volokh, *supra* note 56, at 446–48.

65. Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2316–17 (2021).

66. *Id.*

67. That telephony is based on an idea of transporting content between individuals is embedded in the Communications Act’s current definition of telecommunications as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(50) (2023). Similarly, the cases interpreting the scope of common carriage for telephone companies emphasize user transmission. *Nat’l Ass’n of Regul. Util. Comm’rs v. FCC*, 533 F.2d 601, 608–09 (D.C. Cir. 1976) (“A second prerequisite to common carrier status [is] . . . that the system be such that customers ‘transmit intelligence of their own design and choosing.’”) (quoting *Frontier Broad. Co.*, 24 F.C.C. 251, 254 (1958)). As to the Bell System, its essential function was just this—providing what was sometimes called “plain old telephone services”: common-carrier services connecting individual telephone calls. In fact, under an antitrust consent decree entered in 1956, the Bell System was limited to providing common-carrier services until 1980. *E.g.*, PETER W. HUBER, MICHAEL K. KELLOGG & JOHN THORNE, *FEDERAL TELECOMMUNICATIONS LAW* § 4.4.2 (2d ed. 1999).

68. *See, e.g.*, Lakier, *supra* note 65, at 2320–22.

69. 47 U.S.C. § 153(11) (2023).

70. *See generally* 47 U.S.C. § 201 (2023).

Amendment protection.<sup>71</sup> The Fifth Circuit’s analogies just don’t work, highlighted by the example I mentioned earlier of bookstores. Government did not regulate them—and the First Amendment definitely protected the selections that bookstores made; they were creating a speech experience for their visitors.<sup>72</sup> The bookstore analogy also shows that the Fifth Circuit’s reliance on the well-known Section 230 of the 1996 Telecommunications Act is problematic.<sup>73</sup> According to the Fifth Circuit, Section 230’s declaration that platforms are not publishers, and their immunity from the liability of publishers, meant that they can’t also claim to be speakers.<sup>74</sup> But bookstores had nearly the same status: they were not liable in tort or otherwise for material in the books they carried—unless they had actual knowledge of it—and yet they had First Amendment rights to be immune from government control over their selections.<sup>75</sup>

A legal requirement of viewpoint neutrality—or probably even one of content neutrality—can’t translate to platforms. The services would become largely unusable for the reason that I have already said: given the galaxies of information on the internet, on social media, and even in most individuals’ networks, the platforms must select. The Fifth Circuit simply did not understand what platforms do. It said that *Miami Herald v. Tornillo*,<sup>76</sup> the Supreme Court’s 1974 decision, was distinguishable because “when the State appropriated space in the newspaper or newsletter for a third party’s use, it necessarily curtailed the owner’s ability to speak in its own forum.”<sup>77</sup> But, contrary to the Fifth Circuit, government-imposed common-carrier laws, including the Texas law, necessarily curtail the speech experience that the platforms are attempting to create.

This leads to my most significant concern: the statutory solutions being proposed do not have any viewpoint-neutral or content-neutral hook on which to base a nondiscrimination requirement. Telephone calls, although they carry speech, are simply electronic transmissions executed by sending and receiving equipment. The traditional common-carrier nondiscrimination rule thus asks *only* whether each customer has access to the same equipment and is able to

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71. *FCC v. League of Women Voters*, 468 U.S. 364, 375–76 (1984); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931).

72. *E.g.*, *Smith v. California*, 361 U.S. 147, 150 (1959).

73. 47 U.S.C. § 230 (2023).

74. *NetChoice, LLC v. Paxton*, 49 F.4th 439, 466–67 (5th Cir. 2022).

75. *Smith*, 361 U.S. at 153–55.

76. 418 U.S. 241 (1974).

77. *NetChoice, LLC*, 49 F.4th at 462.



make the same electronic transmissions.<sup>78</sup> Nothing—nothing—in the regulatory structure requires or permits the government to look inside the transmission to see what is being said.

By contrast, the proposals that go under the banner of “common-carrier rules for platforms” decidedly do give government this power. By statutory text, they require viewpoint neutrality, and they require the platforms to give the government access to algorithms and data so that the government can determine whether there has in fact been viewpoint discrimination. A common-carrier case can be decided without consideration of the content or the viewpoint of the excluded speech; not so under these new statutes. This strikes at the core of the First Amendment, which forbids government the power to select content (or dictate to others the selection of their content).<sup>79</sup> If anything, government power over the choice of *viewpoint* has been thought even more problematic. And these statutes are in fact targeted at viewpoint—their sponsors have told us so. Should we not be especially suspicious of legislation that has been explicitly offered as a way to promote certain viewpoints?<sup>80</sup>

It is not necessary for me to endorse any of the more difficult intermediate moves that have been debated in free speech law and the digital age. Nor do I believe that this concern requires a view that algorithms or the outputs of algorithms are, themselves, speech, as Professor Stuart Benjamin has argued.<sup>81</sup> The statutes empower the government to require changes to the platforms’ algorithms, and that threatens direct government control over the speech ecosystem. I also do not need to say that the platforms engage in “editorial discretion,” as that term has been used (and much debated) in media and communications cases.<sup>82</sup> (Yet I will of course agree that what I have said about platforms’ need to discriminate bears a very strong resemblance to editorial discretion.)

This brings us to the last big part.

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78. 47 U.S.C. § 202(a) (2023); *MCI Telecommuns. Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990).

79. U.S. CONST. amend. I.

80. *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524, 543 (1993) (finding statute that prohibited animal killings was unconstitutional in large part because it was motivated by animus against one specific religion’s practices).

81. *See generally* Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PENN. L. REV. 1445 (2013). *Contra* Tim Wu, *Machine Speech*, 161 U. PENN. L. REV. 1495 (2013) (arguing to the contrary).

82. *See, e.g.,* Fred B. Campbell Jr., *The First Amendment and the Internet: The Press Clause Protects the Internet Transmission of Mass Media Content from Common Carrier Regulation*, 94 NEB. L. REV. 559, 561–62 (2016).

## PART 3: A BETTER APPROACH: FOCUSING ON INFRASTRUCTURE

So, what might we do if you, like me and many others, share the dual concerns that, on the one hand, platforms have unusually significant (even troubling) sway over our speech and commerce, and that, on the other, empowering government to control viewpoint dissemination on platforms is problematic? You don't have to agree with Texas and Florida that platforms are discriminating against conservatives. You need not embrace the views of progressives that the platforms allow far too much fake science, conspiracy theory, racism, and the like. You might, as was the case in the late 1800s, simply be uncomfortable with the degree of power that these few platforms have over speech and commerce.

My answer comes from the Supreme Court's consistent invocation that the solution to problematic speech is more speech.<sup>83</sup> The solution to problematic platforms is more platforms. There's nothing particularly new about that, as internet entrepreneurs have regularly tried to create new platforms and services by distinguishing themselves from existing players. Few succeed, at least for any significant period. But some do. It has taken little more than a year for TikTok to go from a startup to one of the most visited sites on the internet.<sup>84</sup>

Indeed, as you may know, several platforms have started or offered new practices specifically to respond to perceived viewpoint inadequacies on the current platforms. For example, a product called "Gab" launched in 2016, was promoted explicitly as a "free speech" alternative to Twitter, and was principally targeted towards conservatives.<sup>85</sup> Parler was launched in 2018 and similarly marketed itself as a "free speech" alternative to Twitter and Facebook.<sup>86</sup> Some reporting has suggested that neither platform was as open

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83. *E.g.*, *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("[T]he remedy to be applied is more speech, not enforced silence.").

84. L. Ceci, *TikTok: Number of Global Users 2020-2025*, STATISTA (Sep. 5, 2022), <https://www.statista.com/statistics/1327116/number-of-global-tiktok-users/> [<https://perma.cc/UCM5-X7TT>].

85. José Van Dijck, Tim De Winkel & Mirko Tobias Schäfer, *Deplatformization and the Governance of the Platform Ecosystem*, SAGE J. (Sept. 23, 2021), <https://doi.org/10.1177/14614448211045662> [<https://perma.cc/LZ9C-MT66>].

86. *See, e.g.*, Zack Budryk, *Tech Giants Crack Down on Parler for Lack of Content Moderation*, HILL (Jan. 10, 2021), <https://thehill.com/policy/technology/533519-tech-giants-crack-down-on-parler-for-lack-of-content-moderation/> [<https://perma.cc/K79H-Q9WL>]; Kaitlyn Tiffany, *Parler's Rise Was Also Its Downfall*, ATLANTIC (Jan. 18, 2021), <https://www.theatlantic.com/technology/archive/2021/01/parler-ban-insurrection-trump-qanon/617718/> [<https://perma.cc/FNL7-55PR>].

and unmoderated as advertised,<sup>87</sup> but we must agree that they are alternative platforms, free to set their own access and moderation policies. And of course Truth Social is now the principal platform for former President Donald Trump—in fact, it is owned by Trump—and it formed after he was removed from Twitter and Facebook.<sup>88</sup>

Starting a new platform is not easy. Economically, it requires scale, and the “network effects” that the largest platforms currently enjoy are difficult to replicate. But it is not impossible, for network effects can also make markets tippy. That is users will move very quickly to a new service that is perceived to be better, so long as that is the shared perception.<sup>89</sup> For those of you not of the TikTok generation, recall how quickly Yahoo search replaced Altavista, Google search replaced Yahoo, or VHS conquered Betamax once everyone started to care about videotape. Even more importantly, unlike the case with telephone service, consumers and users can very easily be on more than one platform. Have you ever checked if Lyft could give you a better price than Uber? Or if Expedia can find you a cheaper flight than Orbitz? It’s just a few quick taps, because your smartphone can have both apps. Indeed, the key to real-time competition between Uber and Lyft—apart from their drivers, cars, and riders—is that each company’s app has access to the smartphone, directly or through an open browser.<sup>90</sup>

What do new platforms need to compete with the old, other than subscribers? *They need the infrastructure on which platforms depend.* These are all of the services we discussed earlier.

Usually, these pieces come together relatively seamlessly, for in fact selling hosting or transport or cyberdefense services is in the economic interest of companies. Each usually wants to work with new startups, for new companies increase revenues, especially if they take off as only a new internet company can.

Even so, on several important occasions, we have seen new or alternative platforms being denied these supporting services and consequently losing their

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87. Rachel Lerman, *The Conservative Alternative to Twitter Wants to Be a Place for Free Speech for All. It Turns Out, Rules Still Apply*, WASH. POST (July 15, 2020), <https://www.washingtonpost.com/technology/2020/07/15/parler-conservative-twitter-alternative/> [<https://perma.cc/UE9S-QPQN>].

88. Nell Clark, *Trump’s Social Media Site Hits the App Store a Year After He was Banned from Twitter*, NPR (Feb. 22, 2022), <https://www.npr.org/2022/02/22/1082243094/trumps-social-media-app-launches-year-after-twitter-ban> [<https://perma.cc/5DH2-V3WP>].

89. See Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. ECON. PERSPS. 93, 108 (1994).

90. Smartphones now have open browsers, meaning that at least many services can be accessed through the browser if not through an app.

ability to reach users.<sup>91</sup> Both Gab and Parler had this happen, when their hosts and payment services terminated their relationships, stating that they did not wish to be associated with the sites.<sup>92</sup> Both Apple and Google removed Parler from their app stores.<sup>93</sup> Cloudflare, the largest cyber-defense company, terminated 8chan, which had long been an alternative platform.<sup>94</sup> And just this month, Cloudflare effectively blocked Kiwi Farms—and it did so even after Cloudflare’s CEO had publicly announced that it would not, saying that he did not want to be making such decisions based on the ideology of its customers.<sup>95</sup> Now, to be sure, in some cases, the terminations arose based on violent and hateful statements posted on these networks. But the fact remains that, in each case, the providers of infrastructure made a decision that effectively removed or significantly diminished a new platform’s access.

It is to these supporting services that a common-carrier rule could be targeted, to ensure that alternative platforms have the kind of access needed to create more effective competition to the existing platforms—and to address whatever might be wrong with their practices. That rule need do nothing more than say that the ISPs, the hosts, the app stores, and the cyberdefense companies must grant access and services to new platforms and services on the same terms on which they grant access and services to others. I would add to this that denial of service would be presumptively disallowed whenever that denial would cause the platform (or other) to lose access to a substantial number of prospective users. We aren’t talking about any of the most heavy-handed parts of common-carrier regulation—rate regulation or filing of rate schedules (tariffs) or universal service policies. My proposal is common-carrier inspired, not common carriage.

I think that many or even most of the infrastructure services might welcome such regulation. As many of these episodes have revealed, some of these companies have become the targets for significant pressure campaigns.<sup>96</sup> Legal access requirements would provide a quick and easy answer for what is

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91. Budryk, *supra* note 86; Van Dijck, De Winkel & Schäfer, *supra* note 85; Tiffany, *supra* note 86.

92. Van Dijck, De Winkel & Schäfer, *supra* note 85.

93. Tiffany, *supra* note 86.

94. Joseph Menn & Taylor Lorenz, *Under Pressure, Security Firm Cloudflare Drops Kiwi Farms Website*, WASH. POST (Sept. 3, 2022), <https://www.washingtonpost.com/technology/2022/09/03/cloudflare-drops-kiwifarms/> [<https://perma.cc/U6QJ-F7HJ>].

95. *Id.*; Matthew Prince & Alissa Starzak, *Cloudflare’s Abuse Policies & Approach*, CLOUDFLARE: CLOUDFLARE BLOG (Aug. 31, 2022), <https://blog.cloudflare.com/cloudflares-abuse-policies-and-approach/> [<https://perma.cc/K2W6-SYGK>].

96. *See supra* notes 94–95.

overwhelmingly the business decision they already make (and want to make) as to ninety-nine percent of all customers.

Finally, although I am generally disinclined toward platform regulation, I do think there is one move that might be made there, one that would support the idea that the solution is more platform competition. Specifically, government could take steps to ensure that customers can more easily switch to new platforms. Common-carrier regulation and related utility regulation often used interconnection requirements to facilitate entry.<sup>97</sup> Interconnection overcomes network effects, because a customer can switch its own provider but still have access to everyone remaining on the original network. A full-blown interconnection requirement on platforms, however, would suffer the same problems as an access requirement, because it would effectively result in the same intrusion to each platform's curation. But, well short of an interconnection requirement, government could still make switching easier, by ensuring that users can easily *download their own data from incumbent platforms*—for example, to take all of their pictures to a new service if they want. Indeed, in the original Federal Trade Commission (FTC) antitrust investigation of Google in 2010, in which the FTC decided against an enforcement action, one meaningful concession that it did secure from Google was easier exit for advertisers, by allowing advertisers to more easily capture their campaign data from Google.<sup>98</sup>

Let me return to the main motion, if you will. For three reasons, I think my proposal to focus access and nondiscrimination requirements—common carriage of this light-touch sort—on the infrastructure or support companies could work and does not suffer the principal difficulties of directly regulating the platforms' own access and content decisions. This should increase the ability of new platforms—coming from whatever perspective—to start service.

First, there is here, unlike with the platforms, a non-content-based, non-viewpoint-based hook. That is because we are, as in the case of our old friend, the telephone (and its regulation), simply talking about electronic access. Sure, transport companies, web hosts, payment systems, and cyberdefenders could today choose with whom they do business based on the content in which their customers deal. But they overwhelmingly do not. This fact—that they overwhelmingly do not select or refuse business based on their customers'

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97. Kearney & Merrill, *supra* note 18, at 1350–53.

98. See Press Release, Fed. Trade Comm'n, Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns in the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search (Jan. 3, 2013), <https://www.ftc.gov/news-events/news/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc-competition-concerns-markets-devices-smart> [<https://perma.cc/9AZS-8B5V>].

content—is one of the fundamental reasons for the success and diversity of the internet that we have today. In fact, I envision that, for most infrastructure segments, disputes will be rare, as hosting and payment systems, for example, have numerous providers.

Second, the access rule need not be a universal service requirement, interfering with fundamental planning decisions such as capacity. An infrastructure provider could deny service if it simply didn't have the room. But this, too, should be rare. Historical common carriage did not inherently deny railroads or telephone companies the ability to manage capacity on their networks—so long as they did so evenhandedly.<sup>99</sup> And common-carrier companies could deny access to illegal or threatening uses.<sup>100</sup> In any event, the contrast is that an access and nondiscrimination rule for a *platform* would significantly interfere with its core business decision—how to shape the content experience for its users.

Third, for similar reasons, a common-carrier rule only for *infrastructure services* would not give the government tools to directly change the content and viewpoints being offered. Government would look only to the fact of access to electronics and services, not inside the content and viewpoints being offered.

The bottom line is that this is a matter of comparative regulatory analysis. If we are concerned about the dominance of platforms and reaching for common-carrier analogies, we can (apart from doing nothing) try to regulate the platforms directly, as Texas is doing. Or we can regulate the infrastructure and thereby indirectly promote competition with the existing platforms. I think the option of regulating the infrastructure is comparatively better, for it doesn't use government power to change the speech experiences directly. In First Amendment law, the Court often asks whether a regulation is the “least restrictive means” of pursuing the government's goal.<sup>101</sup> As I said at the outset, I don't need to convince you that common-carrier regulation of platforms violates the First Amendment. I hope that I have convinced you that the alternative of focusing on the infrastructure is a better solution, because it gives the government less direct power over our most important speech experiences.

#### PART 4: SOME OBJECTIONS

Now that I have set out the proposal, let me address a few objections, identify my most significant uncertainty, and conclude with an attempt to reconcile what I am saying today with my own initial objection to nondiscrimination rules for ISPs.

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99. 47 U.S.C. § 202 (2023).

100. 47 U.S.C. § 223(a) (2023).

101. *E.g.*, *United States v. Alvarez*, 567 U.S. 709, 729 (2012).

The first objection to this proposal would be factual: to my claim that most infrastructure companies are, in fact, not “curating” their customer list. The most pointed objection might come from Apple, which has been quite clear that it has a theory of those apps that should be permitted on its App Store. In the *Epic Games v. Apple* antitrust litigation, in which Epic sued over Apple’s removing the game Fortnite from the App Store, Apple has emphasized that it selects apps carefully.<sup>102</sup> It requires apps to protect user privacy and data, not to contain malware, and to protect children, among other things.<sup>103</sup> Many users and app developers want these policies. In the interest of full disclosure, in another capacity, I helped write an amicus brief for app developers that endorsed Apple’s policies.<sup>104</sup>

The answer, I think, is twofold. On the one hand, common carriage did not actually forbid a company from setting terms and conditions on its users and their use of the network. On the other hand, I do think that we should consider whether, in our environment of only two mobile operating systems (and therefore only two app stores), government should require access for alternative app stores. The handset and operating system manufacturers could issue warnings, and government could require app store policy disclosures. And mobile operating system providers—Apple and Google—could still set prices for alternative app stores. Korea has imposed such a rule, and this gives us an opportunity to see how it unfolds.<sup>105</sup> More pointedly, Apple or other service providers might say that the few instances of deplatforming (as with Gab and Kiwi Farms) came only when the speech on those platforms was violent and threatening. Here, again, an access requirement that retained a company’s ability to remove illegal threats would not offend common-carrier principles.

The second objection would be legal, and it would return us to the First Amendment. When the FCC briefly adopted net neutrality requirements, imposing nondiscrimination requirements on broadband ISPs, the D.C. Circuit affirmed those rules against a First Amendment challenge.<sup>106</sup> But there was a dissent by now-Justice Brett Kavanaugh (not a past Boden lecturer, but a past Hallows lecturer here). He wrote that ISPs exercised editorial discretion and that, in the absence of market power, the net neutrality rules offended the First

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102. *E.g.*, *Epic Games, Inc. v. Apple, Inc.*, 559 F. Supp. 3d 898, 949 n.219, 1002–04 (N.D. Cal. 2021).

103. *Id.* at 949 & n.219.

104. Brief of Act | The App Association, as Amici Curiae Supporting Respondents, *Epic Games v. Apple, Inc.*, No. 21-16506 (9th Cir. Mar. 31, 2022).

105. Malcolm Owen, *South Korea Finalizes Rules Forcing App Store to Take Third-Party Payments*, APPLEINSIDER (Mar. 8, 2022), <https://appleinsider.com/articles/22/03/08/south-korea-finalizes-rules-forcing-app-store-to-take-third-party-payments> [<https://perma.cc/WS8W-9FHF>].

106. *USTA v. FCC*, 825 F.3d 674, 739 (D.C. Cir. 2016).

Amendment.<sup>107</sup> I think that he was wrong, both as a factual and as a legal matter. Much ink has been spilled on this particular debate, but let me echo two main points. ISPs have not made transport decisions on the basis of content, and, more importantly, the First Amendment should be satisfied by a rule that does not prohibit any speech and actually increases speech in the ecosystem.<sup>108</sup> This is not inconsistent with my argument above, for a nondiscrimination rule applied to platforms necessarily suppresses the platforms' preferred speech experience. In all events, the access rule that I have in mind would require, as a threshold matter for its enforcement, some showing (whether by the private party or the government agency) that the denial of access left the alternative platforms with significantly diminished access to users. That ought to be enough even for those who agree with Justice Kavanaugh.

While I don't think much of either of these first two objections, I do think there is a more significant objection still to be made—and that is to the splintering of the dominant platforms at all. Traditional mass media was highly intermediated—with newspapers and networks choosing almost all of the information that received significant distribution. That intermediation had two effects: First, it created some strong incentives to appeal to the largest audience, which meant leaving off the niche and the fringe. Second, at least as to several important elements of the mass media, journalistic ethics and elite ownership exerted significant content control, again, also tending to cut off the niche and the fringe. The internet has eliminated the power of this traditional intermediation, but platforms have been partially recreating it. The dominant platforms have now, to some extent, developed significant content moderation capabilities, and some of this explicitly removes false information, conspiracy theories, and the like.<sup>109</sup> Perhaps re-fragmenting the platforms will result in more distribution of the niche and the fringe—convincing people to adopt or embrace it, to the detriment of civil society, democracy, and social cohesion.

I will concede that this gives me pause, for we know that those exposed to fake news and conspiracy theories often adopt those views.<sup>110</sup> For now, though, I think the following: that the internet is a fact; that the “more speech” genie, including the niche and the fringe, cannot be put back into the bottle; and that this is generally a great part of the internet age. In general, we must trust people

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107. *USTA v. FCC*, 855 F.3d 381, 426–27 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

108. See *Whitney v. California*, 274 U.S. 357, 377 (1927); James B. Speta, *Handicapping the Race for the Last Mile?: A Critique of Open Access Rules for Broadband Platforms*, 17 *YALE J. ON REGUL.* 39, 82–88, 90–91.

109. Klonick, *supra* note 33, at 1630–35.

110. Karen M. Douglas, Aleksandra Cichočka & Robbie M. Sutton, *Motivations, Emotions and Belief in Conspiracy Theories*, *ROUTLEDGE HANDBOOK OF CONSPIRACY THEORIES* 181 (2020).



with information (and enhance through education and other means their ability to discern good information from bad) and expect that competition or at least the threat of competition will make the platforms better.

Finally, let me note a potential inconsistency with my own prior writings. As I said at the outset, I have been working on questions of common carriage and internet policy for more than two decades. I have written that nondiscrimination rules for broadband ISPs were not necessary;<sup>111</sup> indeed, I first made my name in this field (if any I have) by offering that view just as Professors Larry Lessig and Mark Lemley were writing the opposite.<sup>112</sup> I still think, fundamentally, that view was correct: that ISPs will generally have the economic incentive to provide all services, that there are very good reasons to permit ISPs to offer differential service packages, and that markets are heading in the direction of competition.<sup>113</sup> I did not, however, account for the possibility that ISPs (and, as relevant here, other infrastructure companies) might be targeted with ideological pressure campaigns, from the right and the left, that could significantly alter their economic calculations. Nevertheless, the rule that I propose here is not significantly different from my earlier intervention. Net neutrality's premise is that nondiscrimination itself is the legal test, and any discrimination is therefore legally suspect.<sup>114</sup> In what I propose, the type of access denial and discrimination covered is more limited and, when coupled with a required showing that the denial is paired with substantial loss of access to potential users, the rule requires more than a showing of discrimination.

#### CONCLUSION

Let's wrap up. Communications networks are built to enable communications. While the internet and the myriad services offered have made the infrastructure much more complicated, we can still profitably distinguish between the ultimate creators of content and content ecosystems and the companies that enable those creators. The platforms are in the first group, and common-carrier-inspired access and nondiscrimination rules would significantly interfere with their operation and hand the government too much control over speech. By contrast, a light-touch access and nondiscrimination requirement forbidding content-based denials of service, when such denials

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111. Speta, *supra* note 108, at 90–91.

112. Mark A. Lemley & Lawrence Lessig, *Open Access to Cable Modems*, 22 WHITTIER L. REV. 3, 8 (2000); 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, 928, 931 (2001).

113. *See generally* Speta, *supra* note 108.

114. Bruce M. Owen, *Antecedents to Net Neutrality*, 30 REGUL. 14, 14 (2007).

substantially reduce a platform's access to potential users, provides the superior option of competition and more speech.

Let me conclude by renewing my thanks to Marquette Law School, and to all of you for coming today. I look forward to your questions.