DO PLATFORMS HAVE EDITORIAL RIGHTS?

Ashutosh Bhagwat[*]

Many regulatory proposals have been advanced, and in some cases legislatively enacted, to restrict how social media platform owners control what content they host, refuse to host, display, and prioritize. These proposals include, among other things, imposing common carrier status on platforms (an approach endorsed by Justice Thomas in a recent separate opinion), requiring viewpoint-neutral content moderation policies, and restricting or conditioning platforms' Section 230 immunities. These proposals seek to restrict how social media platforms control the content that they host, refuse to host, display, and prioritize.

These proposals are in deep tension with the idea that platforms themselves have First Amendment rights to control what content is available or visible on their platforms—what I call editorial rights. In this article, I define and distinguish various kinds of First Amendment editorial rights. I then examine how, and to what extent, the courts have extended editorial rights to new communications technologies. I next turn to the specific question of internet platform editorial rights, concluding that social media platforms should indeed enjoy substantial editorial rights, though probably fewer than prototypical holders of editorial rights such as print newspapers. I conclude by considering whether current regulatory proposals are consistent with these editorial rights.

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[*] Distinguished Professor and Boochever and Bird Endowed Chair for the Study and Teaching of Freedom and Equality, UC Davis School of Law (:aabhagwat@ucdavis.edu). Thanks to participants in this symposium, and to participants at the UC Davis School of Law "Schmooze," for extremely helpful feedback. Thanks also my co-executive editors Eugene Volokh and Jane Bambauer for inviting me to join in launching this new venture. Finally, thanks to Christine Hanon for exemplary research assistance.

Introduction

In a recent concurring opinion in *Biden v. Knight First Amendment Institute at Columbia University*,[1] Justice Clarence Thomas discussed the relationship between the First Amendment and technology companies. He argued that the First Amendment might permit legislative restrictions on the power of technology companies to exclude users (a clear reaction to the Great Deplatforming that occurred after the Jan. 6, 2021 attack on the Capitol) because technology companies might legitimately be classified as common carriers or as places of public accommodation. In other words, a Supreme Court Justice in a published opinion encouraged legislatures to regulate technology companies—including and especially social media platforms—in ways that would restrict their control over the content available on their platforms.

At the same time, Congress is actively considering amending or even repealing Section 230 of the Communications Decency Act,[2] as a means to force social media platforms to alter how they moderate content (Republicans claim the platforms discriminate against conservative content, and Democrats claim they are insufficiently

[1] 141 S. Ct. 1220 (2021) (Thomas, J., concurring). The opinion concurred in the grant of certiorari and remand with directions to dismiss. The litigation arose as a successful challenge to President Trump's actions blocking critics from commenting on his Twitter feed, which he and the White House described as an "official" account. The case became moot when President Biden succeeded Trump.

[2] 47 U.S.C. § 230.

vigilant in blocking hate speech, fake news, and calls for violence).

Both of these developments run contrary to the idea that platforms themselves have First Amendment rights to control what content is available or visible on their platforms—what I call editorial rights. Justice Thomas explicitly attacks this idea, and Section 230 reformers do so implicitly. This article will explore the legitimacy of these attacks.

I begin by identifying and clarifying the nature of First Amendment editorial rights and their relationship to other regulatory issues such as publisher liability. I then consider how editorial rights have played out with respect to new technologies. In light of this history, I next turn to the specific question of internet platform editorial rights, concluding that social media platforms should indeed enjoy substantial editorial rights (though probably fewer than prototypical holders of editorial rights such as print newspapers). I conclude by considering some implications of this conclusion for nascent regulatory proposals.

I. Editorial Rights

Historically, the core protection provided by the Speech and Press Clauses of the First Amendment was the right to express one's own choice of ideas, and to distribute them as widely as one chooses, free of governmental interference. In addition, since the 1943 flag salute case,[3] there has also been a related right against compelled speech. The exact nature and contours of the latter right, however, are still quite indeterminate, and I for one have expressed doubts that such a right even belongs in the expressive and political provisions of the First Amendment (as opposed to the Religion Clauses).[4] But for now, the right remains in place and indeed has expanded in scope in recent years.[5]

Finally, however, the Court has also recognized that owners of expressive platforms that communicate their own speech *or* the speech of others have a right to choose what to include and what not to include on their platforms. These editorial rights are somewhat related to both the speech and compelled speech rights, but I

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[3] W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[4] Ashutosh Bhagwat, *The Conscience of the Baker: Religion and Compelled Speech*, 28 Wm. & Mary Bill Rts. J. 287 (2019).

[5] *See, e.g.*, Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018) [hereinafter *NIFLA*]; Am. Beverage Ass'n v. City & Cnty. of San Francisco, 916 F.3d 749 (9th Cir. 2019) (en banc).

would argue they are distinct, especially with respect to third-party content. Editorial rights are not a form of pure speech. When a platform carries third-party content, interference with editorial freedom does not involve suppression of the regulated entity's own speech. Social media owners are different from traditional media such as newspapers in this regard; though they control the speech available on their platforms, they do not generate it, nor do they choose what should be displayed for most content (though as we shall see, many platforms do exercise control over what content attains prominence).

Editorial rights are also not pure rights against compelled speech, for two separate reasons. First, one aspect of editorial rights—the right to carry third-party speech that the government disapproves of—has nothing to do with compelled speech. Second, even when the claimed editorial right is to refuse to carry government-favored speech, pure compelled speech doctrine is a poor fit because editorial rights apply even when it is highly unlikely that the speech at issue would be attributed to the regulated entity/platform owner. Admittedly, the Supreme Court has occasionally recognized rights against compelled speech when misattribution was unlikely;[6] but those cases inevitably involve harms to dignitary and conscience interests, which arguably derive from the Religion Clauses—not the Free Speech Clause.[7] In any event, whatever their source those rights are surely not available to the sorts of publicly-traded corporations that typically claim editorial rights.[8] A *free-speech*-based editorial right—rooted in instrumental concerns—to reject speech is therefore distinguishable from the personal, dignitary right to refuse to associate with speech inconsistent with personal values (whatever the source of the latter right).

For all of these reasons, editorial rights are best understood as a third, distinct right of free expression protected by either the Free Speech or Free Press Clauses of the First Amendment. Just as with compelled speech, however, the nature and reach of such rights remain murky. Editorial rights are of course well established

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[6] Bhagwat, *supra* note 4, at 308–09.

[7] *Id.* at 310.

[8] The Court's decision granting statutory conscience rights to a corporation in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), involved a private, family-owned corporation, not a publicly-traded one lacking a small group of identifiable owners. Admittedly, the largest social media firm, Facebook, is under the control of one individual (Mark Zuckerberg), but it is nonetheless a publicly-traded firm with myriad owners, unlike Hobby Lobby.

with respect to traditional print newspapers.[9] But who else enjoys such rights is unclear. Some telecommunications entities—notably those historically treated as common carriers (e.g., telephone and telegraph companies)—by definition do not possess meaningful editorial rights, since the primary obligation of common carriers is to accept all customers and content on a nondiscriminatory fashion.[10] At the other extreme, websites that are highly selective about the content they carry, such as nytimes.com and Huffpost.com, must possess strong editorial rights by way of analogy to print newspapers; it would, after all, be mad to treat the print and online versions of the New York Times differently in this regard, just as it would be mad to treat the New York Times and HuffPost differently. But beyond that, much uncertainty remains.

While issues regarding editorial rights have always arisen, as the newspaper cases demonstrate, debates over the nature and reach of such rights are now coming to a head because of the rise in importance of social media platforms. There can be no serious doubt that in recent years social media platforms have become, as the Supreme Court recently said, "the most important places . . . for the exchange of views."[11] But while this development has had the obvious advantage of democratizing public discourse, it has also generated huge amounts of controversy over such issues as foreign intervention in elections,[12] the spread of falsehoods and conspiracy theories including false claims of election fraud,[13] and ultimately the Great Deplatforming of President Trump following the January 6, 2021 attack on the Capitol.[14]

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[9] *See, e.g.*, Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[10] 47 U.S.C. § 202; *see also* U.S. Telecom Ass'n v. FCC, 295 F.3d 1326, 1328–29 (D.C. Cir. 2002) (applying the FCC's two-prong test for identifying a common carrier, as determined in the *NARUC* cases (NARUC v. FCC, 525 F.2d 630, 640–41 (D.C. Cir. 1976); NARUC v. FCC, 533 F.2d 601, 608–09 (D.C. Cir. 1976))).

[11] Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).

[12] *See* NATIONAL INTELLIGENCE COUNCIL, ICA 2020-000078D, FOREIGN THREATS TO THE 2020 US FEDERAL ELECTIONS (March 10, 2021); Mike Isaac & Daisuke Wakabayashi, *Russian Influence Reached 126 Million Through Facebook Alone*, N.Y. TIMES (Oct. 30, 2017).

[13] *See* Sheera Frenkel, *How Misinformation "Superspreaders" Seed False Election Theories*, N.Y. TIMES (Nov. 23, 2020); Kaleigh Rogers, *Americans Were Primed to Believe the Current Onslaught of Disinformation*, FIVETHIRTYEIGHT (Nov. 12, 2020, 2:41 PM), https://perma.cc/TS4Q-SN6W.

[14] *See The Lawfare Podcast: Jonathan Zittrain on the Great Deplatforming*, LAWFARE INST. (Jan. 14, 2021, 5:01 AM), https://perma.cc/76QT-ENGM.

In response to such controversy, there have inevitably been calls for reform, which have recently risen to a crescendo. Notable examples of such calls include Justice Thomas's proposal to impose common carrier obligations on such platforms, as well as numerous calls from Congress and others for Section 230 reform—including requiring viewpoint-neutral social media content moderation policies, as proposed by Senator Josh Hawley[15] and Dean Erwin Chemerinsky with his Berkeley School of Law colleague.[16] In at least one instance, this has resulted in legislation, in the form of a Florida statute prohibiting platforms from banning politicians.[17] In light of these developments, the question of whether Internet platforms possess editorial rights, and if so to what extent, becomes crucial to determining the permissibility of such regulations.

A. The Forms of Editorial Rights

Before turning to the main question of social media editorial rights, it is necessary to consider and dissect the nature of such rights, because editorial rights are not a monolith but rather come in different forms. To begin with, a distinction must be drawn between positive and negative editorial rights—*i.e.*, between a right to include on one's platform expression that the government disfavors and a right to exclude information that the government would mandate. This distinction has obvious parallels to the distinction between the basic free speech right and the right against compelled speech; but, as noted above, the parallel is not exact.

Nonetheless, it may well be that positive editorial rights should receive stronger constitutional protections than negative editorial rights, just as the right to speak is more robust than the right not to speak.[18] In both cases, the reason for the difference

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[15] *Senator Hawley Introduces Legislation to Amend Section 230 Immunity for Big Tech Companies*, JOSH HAWLEY, U.S. SENATOR FOR MISSOURI (June 19, 2019), https://perma.cc/HFM2-93VA; *see also* Jane Coaston, *A Republican Senator Wants the Government to Police Twitter for Political Bias*, VOX (June 26, 2019, 3:30 PM), https://www.vox.com/2019/6/26/18691528/section-230-josh-hawley-conservatism-twitter-facebook.

[16] Prasad Krishnamurthy & Erwin Chemerinsky, *How Congress Can Prevent Big Tech from Becoming the Speech Police*, THE HILL (Feb. 18, 2021, 8:00 AM), https://perma.cc/G8EJ-3XCM.

[17] S.B. 7072, 2021 Leg. (Fla. 2021) (taking effect July 1, 2021).

[18] Admittedly, the Court has at times insisted upon "[t]he constitutional equivalence of compelled speech and compelled silence." Riley v. National Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 797 (1988). Given the ubiquity of disclosure obligations in the commercial and campaign finance contexts, however, these assertions cannot be taken entirely seriously.

is that the expressive injury, and potential distortion of public discourse, caused by state restrictions on what content platforms are permitted to include are obvious and severe; but the distortion caused by forced inclusion of content is clearly less so, as long as the platform owner is permitted to prominently disassociate itself from the required content and indicate that the content is government mandated.

Second, editorial rights encompass not only the right to carry or exclude content, but also *how* to present it and what content to emphasize. With respect to the traditional media, this editorial right encompasses the decision to highlight some content on a newspaper front page or magazine cover, while burying other content inside the paper or magazine. With broadcast and cable television channels, this editorial power is most obviously exercised when programming is allocated "primetime" slots, while other programming is relegated to 2 a.m. With cable television operators, the decision on which channels to grant preferred (*i.e.*, low) channel numbers is similarly an editorial one. With Facebook, the decision on what content to highlight in users' feeds, and what content to deemphasize, is similarly an editorial one.

Another, related distinction that might be drawn is between a right/obligation to store content on a platform in a way visible only to active searchers and a right/obligation to display content to users. With respect to pre-digital platforms such as print newspapers, this distinction of course had no meaning since all content was physically included. With respect to cable television operators, again the distinction was not meaningful because there are no "hidden" channels.

But with respect to a social media platform, especially the dominant Facebook, the distinction is potentially important. Facebook's decisions regarding what content it chooses to display in its users' "feeds," and what content it hides, constitute some of the key editorial, business decisions that the platform makes (along with, of course, what content to block and what content to label). On the flip side, to have content available on Facebook but not prominently displayed on individual feeds makes it *far* less likely that the content will be seen, since to search for hidden content one must learn through some other communications media that it exists (at which point requiring its availability on Facebook may be pointless). One can assume that Facebook and other platforms would care more about controlling what content they display than what content they merely host, suggesting that the right to/not to display should be more robust than the right not to host; though to be sure, even the latter obligation might be objectionable either if the platform faces

capacity constraints or does not wish to be associated with particularly vile content. It should also be noted that this distinction, and the assumption that the right to, or not to, display is more robust, lies at the center of Eugene Volokh's contribution to this Symposium.[19]

Finally, it is important to recognize that even when editorial rights exist, *how* the government interferes with those rights may well be constitutionally relevant. Regarding disfavored content, for example, presumably a prohibition on carrying the content constitutes a greater First Amendment burden than, say, a requirement that the content be accompanied by a warning label, something that platforms today do voluntarily, but in this instance would be attributed to the government. Similarly, if the government is to mandate carriage of particular content, for reasons already noted the harm of such a mandate would be mitigated (though not eliminated) so long as the platform can clearly state that the content is state mandated and disown it. Indeed, absent the ability to do so the violation of editorial rights merges with a compelled speech violation of the most egregious form, especially if the compelled content goes beyond demonstrably true facts.

In short, editorial rights can take a range of different forms, and can be interfered with in a variety of ways. When the rights of traditional vehicles such as print newspapers were disputed, these distinctions had little significance because the strong presumption was that *any* state interference with editorial rights violates the First Amendment. As we shall see, however, as the Supreme Court has extended editorial rights to new, electronic media, fine distinctions have taken center stage. And so it is likely to be with social media and other Internet platforms.

B. Editorial Rights and Platform Liability

Finally, it should be obvious that there is a close relationship between editorial rights and vehicle/platform liability for the speech of third parties, and this fact too has important implications for platform rights and responsibilities. To begin with, it should be obvious that a complete lack of editorial rights precludes liability. It is completely incoherent to impose common carrier requirements, which require firms to carry the speech of others on a nondiscriminatory basis, on a communications vehicle and then impose liability on the carrier for that speech. Such liability punishes them for communications beyond their control and incentivizes them to

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

engage in conduct (blocking illegal content) that is in fact itself illegal. When criminals use cell phones to plan or carry out a crime, no one sues or prosecutes the phone company.

On the other hand, it is precisely because newspapers can decline advertisements, and printers can refuse to print materials, that we have generally held them civilly and sometimes criminally liable for content they disseminate. It should be remembered that John Peter Zenger, the most famous seditious libel defendant in colonial American history, was a printer and publisher, not primarily an author.[20] In other words, we have long presumed that strong editorial rights imply strong legal responsibilities to reject illegal content.

Even here, though, there are ambiguities because of the arguably perverse incentives created by liability. Benjamin Franklin (in his capacity as a printer, not a Founding Father) once wrote an editorial defending himself against criticism for an advertisement that he printed, by arguing that printers are and should be willing to print almost any legal content.[21] Franklin was to some extent analogizing printers to common carriers, on the theory that because printers as a group controlled a rare resource critical to communications—the printing press—they should encourage a diversity of voices. Excessive liability would disincentivize such choices and encourage printers and other distributors of third-party content to publish only "safe" speech—a concern that, of course, has led the modern Supreme Court to place limits on publisher liability.[22]

The question of editorial rights and liability has been particularly fraught with respect to social media and other Internet platforms such as search engines. While the first part of Section 230 famously gives Internet platforms immunity for third-party content they carry, as if they were common carriers, the second part of Section 230 protects from liability the good faith content moderation (*i.e.*, editorial) decisions of platforms. As such, Section 230 grants online platforms the benefits of common carrier status (immunity) without the burdens (obligations to serve), and

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[20] *See* Arthur E. Sutherland, *A Brief Narrative of the Case and Trial of John Peter Zenger*, 77 HARV. L. REV. 787, 787–88 (1964).

[21] *See* Benjamin Franklin, *Apology for Printers*, PENNSYLVANIA GAZETTE (June 10, 1731), https://perma.cc/83V7-X8NP.

[22] *See infra* notes 108–109 & accompanying text (discussing the Court's *New York Times v. Sullivan* decision).

it also grants such platforms the benefits of traditional media (editorial rights) without the accompanying burden (liability for illegal content). This fact is undoubtedly the source of much modern criticism of the legal regime within which Internet platforms operate today.

II. Editorial Rights and Technology

As the previous discussion indicates, the problem of editorial rights is not a purely modern or "technology" issue, as editorial disputes have arisen even in the context of the most traditional communications vehicle, print newspapers. But as communications has become dominated by electronic communications, and especially electronic vehicles that primarily carry the speech of others, the question of when, and to what extent, owners of such vehicles should enjoy editorial rights has become more important and more disputed.

When the issue came up with regards to the first important electronic mass media—broadcast radio and television—the Court gave a mixed answer but largely rejected strong editorial rights. Most famously, in the *Red Lion* case the Court upheld the Federal Communication Commission's (FCC's) Fairness Doctrine, which imposed significant restrictions on broadcasters' editorial rights including by imposing a "right of reply."[23] The Court later struck down similar statutory restrictions on newspapers,[24] thus making clear that broadcasters' First Amendment editorial rights were substantially weaker than traditional media. In particular, the Court in *Red Lion* sustained the FCC's "personal attack" rule requiring broadcasters to grant individuals and groups subject to attacks upon their "honesty, character, integrity or like personal qualities" notice, and an opportunity to respond using the broadcaster's facilities.[25] This holding is, of course, a strong rejection of broadcasters' *negative* editorial rights to reject government-favored content. The question of *positive* editorial rights (*i.e.*, the right to distribute disfavored third-party content) does not arise much in the broadcaster context because broadcasters are not truly platforms for others' speech, and so editorial and direct free speech rights merge. It should be noted in this context that the Court has sustained restrictions

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[23] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 398 (1969). The FCC later repealed the Fairness Doctrine in *In Re Complaint of Syracuse Peace Council Against Television Station WTVH*, 2 FCC Rcd. 5043 (1987).

[24] Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257–58 (1974).

[25] *Red Lion*, 395 U.S. at 373–74.

on broadcasters' ability to distribute some speech—in particular, an "indecent" comedy monologue[26]—even though a bookstore surely could not be punished for distributing similar content.[27] To be sure, it seems safe to assume that the Court would hold *some* interferences with broadcasters' control over content, such as viewpoint-based carriage requirements, to be unconstitutional; broadcasters do possess *some* negative editorial rights, unlike common carriers. But they are clearly very limited.

When the Court was subsequently faced with questions regarding editorial rights of more recent technologies, however, it has been far more receptive to constitutional claims. Most importantly, the Supreme Court *has* held that cable television operators, meaning the entities that own and operate the physical infrastructure of wires that bring cable television programming into the household, possess constitutionally protected "editorial discretion over which stations or programs to include in its repertoire."[28] This is notable because, as with social media platforms but not with broadcasters, the choice of content carried by cable operators—that is to say, the particular combination of cable television channels offered to customers and the programming that those channels offer—is truly third-party content. The channel lineup of a cable operator is not something that cable viewers would consider to be some sort of ideological choice by the operator, nor would viewers attribute the content of those channels—*i.e.*, the programming—to the cable operator. After all, the typical cable television provider carries, simultaneously, CNN, Fox News, and MSNBC. It also carries the major broadcast networks, cable channels such as HBO, and often on-demand pornography. No rational viewer could or would think that a cable television provider such as Comcast is consciously endorsing, or associating itself with, such a wide array of content and political slants.

Importantly, however, while the Court has granted significant editorial rights to cable operators, those rights are not absolute and are probably weaker than those

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[26] FCC v. Pacifica Found., 438 U.S. 726, 750–51 (1978) (ruling for the FCC on its decision to condemn the broadcasting of a satirical monologue titled "Filthy Words").

[27] Butler v. Michigan, 352 U.S. 380, 383–84 (1957).

[28] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 636–37 (1994) [hereinafter *Turner I*] (quoting City of Los Angeles v. Preferred Commc'ns, Inc., 476 U.S. 488, 494 (1986)); *see also* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996) (in which all Justices appeared to agree that cable television operators possess editorial rights, even though the Court splintered as to the actual restrictions challenged in the case).

of traditional print media. This is evident from the ultimate outcome in the *Turner Broadcasting* decision. *Turner* involved a challenge to the FCC's "must carry" rules, which required cable operators to carry the signals of local broadcast television stations, free of charge and on low channel numbers.[29] The first time a challenge to these rules reached the Court, it held in the language quoted above that the rules implicated the First Amendment editorial rights of cable operators, and so triggered heightened scrutiny. It also held, however, that the rules were content neutral, and therefore subject to intermediate rather than strict scrutiny.[30] Ultimately, in the second *Turner* decision the Court upheld the must-carry rules.[31] Relying significantly on the fact that cable operators (at the time) typically were monopolists with bottleneck control over wireline television programming into the home, the Court concluded that must-carry rules survived intermediate scrutiny because they advanced important congressional interests in preserving free, over-the-air broadcast television.

The *Turner* litigation (and other cable television cases) thus establish that, while cable operators have significant editorial rights to control their channel lineup, Congress may interfere with those rights if it has sufficiently important policy objectives. However, three limitations of this holding should be recognized. First, the *Turner I* Court explicitly stated that cable operators had greater First Amendment rights than broadcasters.[32] Second, the *Turner* cases only involved interference with cable operator's negative editorial rights to refuse carriage of government-favored channels. It is doubtful that the case would have come out the same way if the government had attempted to forbid operators from carrying particular channels (albeit, in the pre-digital era of limited channel capacity, must-carry in effect did require operators to drop channels—but it was those of the operators', not the government's choosing).

Finally, and most importantly, the must-carry rules were upheld because they were deemed to be content neutral. If the rules were classified as content-based, as a 4-Justice dissent in *Turner I* argued, there is little doubt that they would have

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[29] *Turner I*, 512 U.S. at 630–32.

[30] *Id.* at 660–61.

[31] Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 185 (1997) [hereinafter *Turner II*].

[32] *Turner I*, 512 U.S. at 638–40.

failed strict scrutiny.[33] Nonetheless, it is doubtful that the Court would tolerate even comparable content-neutral interference with print newspapers' editorial rights, such as, say, requiring newspapers to randomly publish letters to the editor or columns submitted by the public (though admittedly the issue has never been litigated[34]). Thus, while *Turner* clearly extends editorial rights to electronic media platforms, it also suggests that the physical and economic nature of that media is relevant to determining the scope of those rights.

After the rise of the Internet, the question of editorial rights and new technology reappeared. With respect to non-platform, content-providing websites not primarily dedicated to third-party content, the issue has rarely arisen because the government has rarely tried to interfere with their content—and when it has, as with indecent or sexually oriented content, the relevant laws have invariably been struck down (though, to be fair, non-platform cases tend to implicate primary speech rights rather than editorial control).[35] With respect to platforms, as noted below, the existence of Section 230 has largely obviated disputes by substituting (for now) statutory for constitutional protections.

As a result, editorial issues have arisen most clearly regarding Internet Service Providers (ISPs), as a consequence of the net neutrality rules adopted by the Federal Communications Commission (FCC) in March of 2015.[36] Net neutrality rules, in broad terms, forbid broadband ISPs from discriminating among websites in providing access to end users. The legal basis for the FCC's Order was its decision to reclassify ISPs as common carriers, by labeling them "telecommunications services" providers under the Federal Communications Act. When the FCC's Order

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[33] *Cf.* United States v. Playboy Ent. Grp., 529 U.S. 803, 826–27 (2000) (striking down a statute placing restrictions on cable carriage of channels primarily dedicated to sexually explicit programming).

[34] Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256–57 (1974). The Court struck down a right-of-reply statute that applied to newspapers, but because the right of reply in that case was triggered by attacks on political candidates, it was in effect content based, *id.* at 256–57. Dictum in the opinion, however, does express strong hostility to any statutory right of access to newspapers.

[35] *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 877–78 (1997); Ashcroft v. ACLU, 542 U.S. 656, 672 (2004).

[36] Protecting & Promoting the Open Internet, 30 FCC Rcd. 5601, 5607–09 (2015). The net neutrality rules were repealed by the FCC during the Trump Administration. Cecilia Kang, *F.C.C. Repeals Net Neutrality Rules*, N.Y. TIMES (Dec. 14, 2017).

was challenged in the D.C. Circuit, a panel upheld the Order by a 2-1 vote.[37] The majority opinion dealt primarily with regulatory and administrative law issues, but at the end of the majority opinion the court considered, and rejected, an argument that net neutrality rules violated ISPs' First Amendment editorial rights (Judge Williams's dissent did not address this issue).[38] Briefly, the majority reasoned that common carriers have always been subject to nondiscrimination requirements because such carriers, like ISPs, carry "*others'* speech, not a carrier's communication of its own message."[39] The majority also rejected an analogy to cable television operators, to whom (as was just noted) the Supreme Court has granted editorial rights, on the grounds that ISPs do not have capacity constraints and so do not have to exclude some content if required to include other content.[40]

When the ISPs challenging the net neutrality order sought en banc review, a majority of the D.C. Circuit rejected the petition.[41] Then-Judge Kavanaugh, however, issued a lengthy dissent from denial of en banc review. In it, he explicitly argued that, like cable providers, ISPs enjoy strong editorial discretion, protected by the First Amendment, over the content they carry over their networks.[42] The fact that ISPs did not communicate their own content was irrelevant, he argued, because neither do cable operators. Indeed, he argued that ISP editorial rights were less subject to regulation than cable operators because ISPs, unlike cable operators, do not possess market power.

Now that Justice Kavanaugh is on the Supreme Court, it is possible that his views will control a majority and lead to strong protection for ISPs (and the permanent demise of net neutrality). It should be noted in this regard, however, that Kavanaugh's views are in deep tension with Justice Thomas's views in *Biden v. Knight First Amendment Institute at Columbia University*, discussed in the Introduction, that legislatures may classify platforms as common carriers—because if platforms can be so regulated, then a fortiori so can ISPs, which exercise far less control over content than platforms and have far less need to do so.

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[37] U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 689 (D.C. Cir. 2016).

[38] *Id.* at 740–44.

[39] *Id.* at 740.

[40] *Id.* at 743.

[41] U.S. Telecom Ass'n v. FCC, 855 F.3d 381 (D.C. Cir. 2017).

[42] *Id.* at 431–35 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial for rehearing en banc).

The converse of this point is that if then-Judge Kavanaugh was correct about ISP editorial rights, then social media platforms necessarily possess very strong editorial rights because they exercise far more control over content than ISPs and also do not possess the sort of physical monopoly that cable television providers do (though concededly, Facebook's share of the social media market is very large). Even if Kavanaugh is wrong about ISPs, however (as I think he is[43]), the question of social media platform rights remains very much an open one. In practice, the issue has not arisen because Section 230 provides strong statutory protections for platform editorial rights, mooting the constitutional issue. But as Congress contemplates Section 230 reform, the constitutional issue will of course arise. It is to that question, then, that we now turn.

III. WHY INTERNET PLATFORMS SHOULD HAVE *SOME* EDITORIAL RIGHTS

A. Why Rights?

In this subpart, I will argue that the same factors that in the past have led the Supreme Court to extend editorial rights to new communications technologies argue in favor of editorial rights for social media platforms. Indeed, I will argue that the case for platform editorial rights is *stronger* than that for other technologies such as cable television providers, and certainly than for ISPs.

Most fundamentally, the reason to grant social media platforms editorial rights is that they, unlike common carriers such as telephone companies (and unlike ISPs), are intentionally designed to provide a specific experience to users. While it is true that most of the content available on social media platforms is generated by third parties rather than the platforms themselves, social media is not a transparent conduit for speech such as a telephone system or ISPs. To the contrary, platforms famously moderate content extensively, making constant, value-based choices about what third-party content to permit on their platforms.[44] It should be noted in

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[43] Kavanaugh's analysis in the net neutrality litigation, and in particular his analogy to *Turner* and cable operators, is unconvincing because as a historical matter ISPs, with rare exceptions, simply have not exercised control over the content they transport, nor have they had any reason to do so. As a result, they look far more like telephone carriers than they do platforms—much less content providers.

[44] Eric Goldman made this point succinctly in a brief essay. *See* Eric Goldman, *Of Course the First Amendment Protects Google and Facebook (and It's Not a Close Question)*, KNIGHT FIRST AMENDMENT INST. AT COLUMBIA UNIV. (Feb. 26, 2018), https://perma.cc/UU8L-R72T. For a thor-

this respect that social media platforms in many ways control content on their platforms *far* more than cable television operators. To give just one obvious example, the on-demand pornography (or for that matter the *Game of Thrones* HBO series) available on cable is not permitted on either Facebook[45] or YouTube.[46]

In addition to content moderation, platforms also typically employ algorithms that determine what content to show users, what content to emphasize, and what content to deemphasize. Such algorithmic controls, while not universally employed, are a major element of the design of, at the least, Facebook, the largest social media platform. Furthermore, Facebook and other platform owners are constantly tweaking and making deliberate choices about how their algorithms should operate, both for business reasons and for ideological ones (sometimes in response to public pressure). Facebook, for example, has deliberately adjusted its algorithms to deemphasize political content in favor of content linked to personalized groups, in response to claims that its previous algorithms contributed to political polarization.[47] In short, platforms are editors, and their editorial decisions are central to their functionality, their relationship to society, and their very existence.[48]

Finally, social media platforms lack the sort of market power enjoyed by traditional common carriers, as well as by cable television operators during the pre-streaming era, when the *Turner* litigation occurred. Platforms may benefit from network effects, but they are not natural monopolies. Alternative social media platforms like Facebook, Twitter, Snap, and Instagram can and do coexist; and this diversity includes ideologically oriented platforms such as 4Chan, 8Chan, and Parler. This diversity, and lack of physical monopolies, cuts strongly against imposing

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ough description of the process, *see* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018).

[45] *Adult Nudity and Sexual Activity*, FACEBOOK: COMMUNITY STANDARDS, https://perma.cc/VQY7-R2NZ.

[46] *Nudity & Sexual Content Policies*, YOUTUBE: POLICIES, https://perma.cc/BK9K-UUPE.

[47] Aastha Gupta, *Reducing Political Content in News Feed*, FACEBOOK NEWSROOM (Feb. 10, 2021, 5:00 AM), https://perma.cc/5UWT-2FXJ.

[48] Insofar as there are smaller platforms that do not moderate content and do not utilize algorithms, their claim to editorial rights would undoubtedly be much weaker, since their operations, unlike those of the major social media platforms, would resemble traditional common carriers. Needless to say, however, such platforms, if they exist, are not major players in this field.

common-carrier-like restrictions or nondiscrimination requirements on social media platforms (*i.e.*, stripping them of editorial rights). The reason is that if a user is unsatisfied with a platform's content moderation—which is to say editorial—decisions, the user remains free to seek an alternative platform more to their liking, as illustrated by the migration to Parler following the Great Deplatforming of President Trump.[49]

In addition to these factual arguments, basic free speech principles support granting social media platforms editorial rights. The reason we grant editorial rights to other media such as newspapers and websites that provide their own content is because we think public discourse is enhanced when publishers are able to present coherent, consistent products with consistent messages. Fox News is not CNN, and the Wall Street Journal editorial pages are not the same as those of the New York Times. Furthermore, we believe that this diversity of perspectives advances public debate despite some risk of ideological sorting (conservatives watching Fox News and reading the Wall Street Journal, liberals doing the same with CNN and the New York Times). Permitting the creation of such coherent and consistent messaging[50] is the very purpose of First Amendment editorial rights. Part of the reason why we consider such coherence desirable is that while debate across perspectives is of course a valuable part of public discourse, so is discussion within ideological groups to develop and enhance their particular message(s).[51]

Indeed, it would seem fundamental to the very concept of democratic citizenship that we must permit individuals to choose what information and perspectives to focus on. Or conversely, it is entirely inconsistent with our system of popular

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[49] *See* Yelena Dzhanova, *Top Conservative Figures Are Tweeting to Advertise Their Parler Accounts After Trump was Permanently Banned from Twitter*, BUSINESS INSIDER (Jan. 9, 2021, 7:17 AM) (though the accounts had to be accessed via the Parler website since hosting services like Google Play had begun to remove the app).

[50] In a paper analyzing compelled speech, Eugene Volokh described an analogous concept he labeled called "coherent speech products." Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 361–63 (2018). The concept is not quite the same as what I describe because Volokh appears to be primarily envisioning first-party speech, rather than platforms for third-party content. Nonetheless, the argument I make here for platform editorial rights surely carry over, fully, to products such as newspapers, which publish their own content.

[51] For a fuller development of this argument, tying it to the implied First Amendment right of association, *see* ASHUTOSH BHAGWAT, OUR DEMOCRATIC FIRST AMENDMENT 56–57 (2020).

sovereignty and democratic self-governance to permit the State to choose what information is "appropriate for" or "beneficial to" citizens, and then force it upon them. We do not, after all, require liberals to watch Fox News, or conservatives to watch CNN, and could never do so consistent with the First Amendment. Yet imposing viewpoint neutrality, nondiscrimination, or common carrier requirements on social media platforms does precisely the same thing. It denies platforms the ability to create ideologically coherent packages of content, and so denies platform users the ability to select among such packages. Such regulation is no different than legally *requiring* Fox News to provide airtime to Rachel Maddow or requiring CNN to provide time to Laura Ingraham—laws which presumably all would agree would violate the First Amendment editorial rights of those news channels, and for good reason. To deny social media platforms, unquestionably the new dominant media for political and social discourse, the same freedom makes little sense.

In short, assuming that the purpose of the First Amendment is to enhance public discourse, we as a society have long believed that publishers contribute best to that discourse when they are able to provide coherent messages, not a cacophony of voices randomly strung together. It should be noted in this regard that highly partisan media platforms (*i.e.*, newspapers) were the norm for most of American history; it was not until the Twentieth Century that the concept of a "nonpartisan" press became dominant.[52] To give a famous historical example, during the 1790s Benjamin Franklin's grandson, Benjamin Franklin Bache, published a newspaper named *The Aurora*, which was tied to the developing Democratic Republican Party led by Thomas Jefferson and James Madison. During John Adams's presidency, *The Aurora* published an article describing President Adams as "blind, bald, crippled, toothless," and "querulous."[53] Bache was, for this affront, criminally prosecuted by the Adams Administration under the Sedition Act of 1798 (Bache died while awaiting trial). That such media partisanship sharpened disagreements (what today we call political polarization) in the extremely divisive politics of the 1790s seems clear; but it seems equally clear that by presenting the People with clear political and ideological choices it also strengthened the young American Republic, leading ultimately to consolidation of power by the Jeffersonians following the crucial election of 1800. The same may well be true of platform publishers today, just

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[52] *See* Mitchell Stephens, *Goodbye Nonpartisan Journalism. And Good Riddance*, POLITICO MAGAZINE (June 26, 2017), https://perma.cc/T4Z5-SHXU.

[53] GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH DURING WARTIME 35 (2004).

as it was for more traditional ones.

If anything, the fact that modern social media platforms rely on third-party content, rather than their own, strengthens rather than weakens the argument in favor of editorial autonomy. The starting, but widely shared, assumption here is that democratic self-governance and republican government rely on public discourse;[54] and further, that both are enhanced when that discourse is truly *public*, meaning open to the public at large. While historically a partisan press permitted those few who had access to the press—*i.e.*, political and social leaders—to create and shape groupings of citizens with shared values and perceived interests, social media permits citizens themselves to engage in discourse, both with leaders and among themselves, and so to participate in that creative, shaping process. Thus, the Internet has democratized not just speech but also association and assembly.[55] Admittedly, granting platforms editorial rights leaves citizen groups at the mercy of the platform owners' decisions to permit or deplatform such groups, including ideologically driven decisions;[56] but to deny platforms such rights would leave such groups at the mercy of government regulation that would inevitably also favor some groups over others, surely a worse outcome. And in any event platforms, unlike the government, do not monopolize power and so if a group is denied access to one platform (say Facebook), it can always migrate to another (say Parler). A group disfavored by the government would have no such exit option.

Finally, the argument that because the major social media platforms today claim *not* to engage in ideologically based moderation, they have no need for editorial rights, is wrong for three different reasons. First, it is irrelevant. Even if platforms such as Facebook have not engaged in ideologically-based moderation, they still use their algorithms to control users' experiences on their platform, making them more engaging (and arguably more addictive, which is the source of much criticism of Facebook and Twitter). It is worth remembering in this context that the First Amendment protects entertainment as well as political and ideological speech,

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[54] *See* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 684 (1990).

[55] *Cf.* John D. Inazu, *Virtual Assembly*, 98 CORNELL L. REV. 1093, 1141–42 (2013).

[56] Such deplatforming decisions are not uncommon. *See, e.g.*, Joshua Partlow, *Facebook's Decision to Shut Down Militia Pages Prompts Backlash Among Some Targets*, WASH. POST (Aug. 21, 2020).

at least in part because of our inability to distinguish between the two.[57]

Second, it is untrue. Social media platforms' terms of service and other moderation rules are replete with ideological choices. The decisions by Facebook and Twitter to ban hate speech, glorification of violence, electoral falsehoods, and even nudity are in fact ideological choices. To consider just nudity, the enormous struggles Facebook faced early in its existence over defining nudity and determining how to apply its prohibition to breastfeeding women[58] or the famous Napalm Girl photograph,[59] illustrates the charged ideological questions that can arise in enforcing even seemingly simple rules. Moreover, social media firms' willingness to engage in arguably ideological content moderation is evolving. Twitter started life as an "anything goes" platform,[60] and has rapidly moved in recent years to exercise extensive control over content.[61] Just the events of January 2021, when multiple platforms decided to deplatform the *President of the United States*, show how quickly these practices are evolving.

Finally, there is a logical error in conditioning constitutional rights on their exercise. By that logic, only current gun owners would have Second Amendment rights—but that obviously cannot be the law. Similarly, a printer's Ben Franklin-like commitment to generally publish all perspectives[62] cannot mean that the printer has waived their right to reject content that is particularly objectionable in their (evolving) view. For the same reason, even if social media platforms today do

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[57] *See* Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 790 (2011); United States v. Stevens, 559 U.S. 460, 479–80 (2010); Winters v. New York, 333 U.S. 507, 510 (1948).

[58] *Radiolab: Post No Evil*, WNYC STUDIOS (Aug. 17, 2018), https://perma.cc/B8SQ-27VM.

[59] Aarti Shahani, *With 'Napalm Girl,' Facebook Humans (Not Algorithms) Struggle to be Editor*, NPR (Sept. 10, 2016, 11:12 PM), https://perma.cc/HE6Q-N7WB.

[60] *See* Farhad Manjoo, *Twitter, It's Time to End Your Anything-Goes Paradise*, N.Y. TIMES (Nov. 22, 2017); *see also* Lindy West, *This American Life: Ask Not for Whom the Bell Trolls; It Trolls for Thee*, CHI. PUB. RADIO (Jan. 23, 2015), https://perma.cc/5VUC-8KJW. Lindy West's segment on the harms of trolls led to Twitter's then-CEO admitting the platforms failures to address harassment, Caitlin Dewey, *Twitter CEO Dick Costolo Finally Admits the Obvious: Site has Failed Users on Abuse*, WASH. POST (Feb. 5, 2015).

[61] *The Twitter Rules*, TWITTER: RULES AND POLICIES, https://perma.cc/GNC7-7Q3R (last visited June 25, 2021).

[62] *See* Franklin, *supra* note 21.

not engage in ideological censorship,[63] that is no reason to believe that they have waived that right, given the extensive *other* moderation that they undoubtedly do engage in.

B. Which Rights?

For all of the reasons stated above, it seems unexceptional that social media platforms are entitled to First Amendment editorial rights. But as the discussion to this point, especially of the Court's approach to broadcasters and cable television operators, indicates, to say that entities have editorial rights does not mean that they enjoy all editorial rights or that those rights are equally strong (*i.e.*, equally exempt from government regulation). This subpart considers which editorial rights platforms should enjoy, and which should be more (or less) robust than others. Put differently, I will consider here what aspects of platform editorial rights should be considered near inviolable, meaning subject to regulatory control only to advance extremely important state objectives, and what forms of rights might be subject to greater regulation. The distinction drawn here has obvious parallels to the standard free-speech dichotomy between content-based restrictions (triggering "strict" scrutiny) and content-neutral regulations (triggering "intermediate" scrutiny); but for reasons that will be explained, the analogy is imperfect.

At first cut, seemingly the strongest editorial right a platform must possess is the positive right to include any legal content it desires on its platform. For the state to interfere with this right not only directly interferes with the platform's editorial control, but it also directly infringes on the free-speech rights of the individual who posted the content. Since such regulations necessarily specify what content is forbidden, such regulatory intervention is presumptively unconstitutional (*i.e.*, subject to strict scrutiny) under standard First Amendment doctrine, if challenged by the speaker. Even if the speaker does not assert their right to speak, however, a platform should similarly be able to assert its editorial rights to invalidate any such regulation. As we shall see, however, this simple fact dooms many regulatory proposals (primarily from the political left) directed at social media platforms.

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[63] Whether or not they do so turns entirely on the definition of "ideological." If by that one means that platforms favor "liberal" over "conservative" content, there appears to be no evidence that they do. But if a ban on hate speech can be considered ideological, then the major platforms clearly engage in such behavior.

On the other hand, regulatory interference with negative editorial rights, by requiring inclusion of specified content, certainly remains constitutionally troubling but might be defensible in specific circumstances. The problem with such inclusion requirements, to begin with, are two-fold. First, and foremost, such inclusion undermines a platform's ability to create a *coherent* user experience; and concomitantly, it interferes with the ability of groups of users to develop shared beliefs and values, by interposing the state's own preferred beliefs into the conversation. As such, forcing content onto platforms interferes with both editorial and associational values. Second, requiring inclusion of content has the potential to distort public discourse, by overemphasizing the preferred positions of the state at the expense of the views of the *public* as expressed in posts by users, a clear violation of the democratic principles that underlie the First Amendment. As Madison put it, in a "Republican Government . . . the censorial power is in the people over the Government, and not in the Government over the people."[64]

For all of these reasons, there should generally exist a presumption against state-imposed inclusion of content onto platforms. But it need not be absolute, because inclusion of content clearly has less impact on either editorial integrity or public discourse than suppression of content. Requiring content carriage does not actually suppress any messages, and so long as platform owners can label required content as such, specifying that it is state-imposed rather than platform- or user-generated, the risk of confusion is also reduced. Furthermore, unlike with, say, a newspaper, inclusion of government-mandated content on a platform constitutes less of an interference with First Amendment interests because platforms are already dedicated to hosting content generated and selected by third parties, with only modest control (which is also why interference with negative editorial rights is analytically distinct from compelled speech).

Nonetheless, it seems clear that regulations that require platforms to carry content expressing the government's own ideological preferences are out of bounds. Such rules would create the greatest distortions of public discourse and seem to have no strong justification since the government remains free to circulate its preferred message using its own means. For this reason, a law that, for example, would require a social media company to display messages discouraging smoking/drug

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[64] New York Times v. Sullivan, 376 U.S. 254, 275 (1964) (quoting 4 ANNALS OF CONGRESS 934 (1794)).

use/premarital sex would be clearly unconstitutional.

On the other hand, requirements of non-ideological, factual content, even though it is chosen by the government, seem less problematic. Thus regulations that require platforms to prominently disclose their own content moderation practices, for example, are surely not terribly troubling.[65] And one could imagine a myriad of other factual content not directly related to the platform's own policies, such as displaying polling hours and locations near in time to an election or displaying the locations of shelters during a natural disaster. Surely these advance strong state interests while imposing little or no harm to editorial rights or public discourse, so long as the quantity of mandated content remains modest (modest because if content requirements become ubiquitous, they would threaten to crowd out platform- and user-favored content[66]). Somewhat oddly, in the context of non-platform compelled speech the modern Supreme Court has invalidated such factual disclosure requirements unrelated to the speaker's product of services;[67] but again, given that platforms are in the business of displaying third-party content with few restrictions, requiring some additional, unobjectionable content seems a minor burden on their editorial rights.

As a sidelight, it should be noted that content compulsions, including disclosure requirements, are almost *always* content based, since it is generally meaningless to require publication of content without specifying what content is to be published (the exception would be things such as common carrier regulation, or a requirement that newspapers publish letters to the editor on a random basis). As such, the fact that a content compulsion is "content based" cannot in itself make such a requirement constitutionally suspect or subject to strict scrutiny, at least in the context of commercial interactions, since this would sound the death knell for

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[65] It is noteworthy in this respect that in the non-platform context of compelled commercial speech, the Court has upheld compelled disclosure of "purely factual and uncontroversial information about the terms under which . . . services will be available." *NIFLA*, 138 S. Ct. at 2372 (quoting Zauderer v. Off. of Disciplinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985)). If so, then a similar disclosure requirement when services are actually being provided is surely permissible as well.

[66] *Cf.* Am. Beverage Ass'n v. City & Cnty. of San Francisco, 916 F.3d 749, 757 (9th Cir. 2019) (en banc) (citing *NIFLA* to invalidate a warning requirement on advertisements of sugar-sweetened beverages because the size of the warning drowned out the advertisers' speech).

[67] *See NIFLA*, 138 S. Ct. at 2372.

all commercial disclosure requirements (and the Supreme Court's suggestion otherwise in the *NIFLA* case[68] must be incorrect). This is one important way in which negative editorial rights differ from positive rights to publish disfavored content, because content-based prohibitions on content *are* presumptively invalid, for the reasons laid out above.

To this point, we have considered interferences with platform editorial control that either prohibit, or require, specified content. As discussed earlier,[69] however, the state has a larger regulatory repertoire than that. Consider a hypothetical legal requirement that platforms label specific content as false, or a requirement that platforms post warning labels or links to trusted sources of factual information (as many already do) when specific topics such as COVID-19 vaccines are the subject matter of a post. Notice that such requirements implicate both positive and negative editorial rights. They implicate positive rights because a platform's decision to display specific user content triggers legal consequences.[70] They implicate negative rights because the legal remedy is to force platforms to post content of the government's choosing.

Nonetheless, it seems plain that labeling requirements are less intrusive on editorial discretion than flat bans because platforms remain free to post any material they wish, to control the prominence of those materials, and to disassociate themselves from any government-mandated label by captioning the label as such. On the other hand, there is an obvious concern that regulatory authorities will select what content to target for labeling for ideological reasons, which would violate the cardinal rule against ideologically-based infringements of negative editorial rights. As a consequence, at a minimum courts should approach labeling or linking requirements with a high degree of skepticism, and uphold them only if the government has a strong regulatory interest, the information labeled is uncontroversially factual and false, and the information the platform is required to link to (if any) is uncontroversially factual and true.

Moving beyond government efforts to mandate what content is, or is not, available on platforms, one can also imagine any number of other ways in which laws

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[68] *See id.* at 2371 (suggesting that because the notice requirement in that case was "a content-based regulation of speech," it was presumptively invalid).

[69] *See* discussion *supra* in Part I.A.

[70] *See supra* note 34, discussing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

might interfere with platform editorial discretion. At the most extreme, some have proposed regulation that treats platforms as common carriers, or alternatively as state actors. The purpose and result of such regulation would be to eliminate *all* platform editorial rights by requiring them to host and display all legal, First-Amendment-protected content on a nondiscriminatory basis.

Another obvious, and today salient, form of regulation is laws which require platforms to host not specific content, but rather users which the platform would rather not. Such interference could take two distinct forms. First, if platforms were subjected to common-carrier-like regulations as Justice Thomas has urged, then platforms would be required to accept *all* users, capacity permitting (as with the major platforms it generally does). As Christopher Yoo's contribution to this symposium points out, that does not necessarily mean that platforms are deprived of all control over content on their platforms;[71] but there can be no doubt that in practice control over speaker identity is correlated with control over content and so implicates editorial rights, even if (a big if) such legislation does not deny platforms editorial control altogether.

Second, however, one can also imagine laws which forbid platforms from deplatforming a specific class of users—as in fact Florida has done with respect to politicians,[72] in obvious response to the deplatforming of President Trump in January of 2021. Such legislation has the direct and obvious effect of denying platforms one powerful remedy—temporary or permanent deplatforming—against users who regularly violate content policies, which in itself interferes with editorial freedom. Leaving aside remedial authority, however, a requirement of including specific users has obvious parallels to the must-carry rules that the Supreme Court permitted the FCC to impose on cable television operators. In some respects, such a requirement is less burdensome on platforms than cable operators because including one set of users does not displace others, unlike with cable television in an era of limited channel capacity. Nonetheless, just as the *Turner* Court held that must-carry rules implicate editorial rights, so surely do laws such as the Florida legislation. Whether, like must-carry, such laws can nonetheless be justified we will consider in the next Part.

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[71] Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463 (2021).

[72] S.B. 7072, 2021 Leg. (Fla. 2021).

Another way in which regulation can interfere with editorial discretion without outright imposing or banning content is to exert authority over prominence—which is to say, over which content will be easily visible to users, for example by featuring prominently in Facebook newsfeeds. The analog equivalent would be to permit newspapers to print whatever they wish, but to assert control over what sorts of stories appear on the front page. Control over prominence can take a number of forms.

First, and most likely, would be legal requirements that platforms determine prominence randomly or on a viewpoint-neutral basis. This is essentially the result that Ohio's Attorney General is seeking with respect to Google searches in the litigation he has launched against Google.[73] Alternatively, regulations might require certain kinds of content—perhaps concerning the statements or activities of politicians—to be given prominence over others. Both sorts of legal strictures interfere directly with editorial rights, since surely determining prominence is at the heart of what many platforms do; but it is equally obvious that a nondiscrimination requirement is less problematic than state manipulation of feeds to push its own content. The latter sort of regulation, by explicitly distorting public discourse, runs up against fundamental First Amendment values, and would surely be invalidated by any court to hear a challenge. The former, however, raises more complex issues that I will turn to soon.

Finally, let us consider the distinction that lies at the center of Eugene Volokh's contribution to this symposium:[74] the distinction between an obligation to carry content on a platform that is accessible via search (what he calls compelled hosting), as opposed to an obligation to actually display content (which was analyzed above as interference with negative editorial rights). Volokh argues that under current Supreme Court precedent, an obligation to host third-party content would not violate the First Amendment, even if an obligation to display content would. While I do not fully agree with Volokh's argument for reasons too complicated to fully lay out here,[75] I do agree that so long as a platform does not face a capacity constraint,

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[73] Daisuke Wakabayashi & Cecilia Kang, *Ohio's Attorney General Wants Google to be Declared a Public Utility*, N.Y. TIMES (June 8, 2021).

[74] Volokh, supra note 19.

[75] I disagree with Volokh mainly because neither of the two key cases Volokh relies upon—*Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980), and *Rumsfeld v. FAIR*, 547 U.S. 47 (2006)—

the intrusion on editorial rights is clearly far less severe in this situation than with compelled display. As such, a compelled hosting requirement might survive First Amendment scrutiny if the government could demonstrate a sufficiently strong regulatory justification.

Several caveats are necessary here, however. First, the capacity point is important. If a platform did have capacity constraints (which mega-platforms such as Facebook, Twitter, and YouTube do not, but smaller platforms might), then compelled hosting would require the platform to jettison other content that it preferred, a serious intrusion on editorial control. Second, if a platform was owned by an individual, a group of like-minded individuals, or perhaps a closely held corporation such as Hobby Lobby, the owner(s) might well have a conscience-based right to not be associated with content contrary to the owner's values, such as requiring a conservative religious platform to host pornography. And lastly, given the existence of multiple alternative platforms it is far from clear what the government interest would be in forcing a mega-platform to host content. After all, to search for content one must generally know of its existence, and if one knows it exists, there is no reason to believe a theoretical searcher would not also know on which other platforms to seek the content. As such, what is gained by foisting a hosting duty on Facebook or Twitter is far from clear.

What becomes evident out of the above discussion is that while platforms undoubtedly enjoy a range of editorial rights, not all such rights are equal. Some are well-nigh absolute, but others can and should be subject to restrictions if necessary to achieve strong enough social goals. With that in mind, we can now turn to specific regulatory proposals advanced in recent years and evaluate them under the First Amendment.

IV. Implications and Qualifications

If I am correct that the First Amendment grants important, albeit limited editorial rights to social media platforms, this has important implications for currently circulating reform proposals. Many such proposals are entirely inconsistent with editorial rights, while others will have to be modified to ensure that burdens on such rights are minimized. Yet others pose no First Amendment concerns at all.

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involved intrusion on editorial control over a communications platform, and while *Turner Broadcasting* did, I (as discussed earlier), unlike Volokh, read the Court there as recognizing editorial rights, albeit ones subject to limitation.

The most radical regulatory proposals regarding social media platforms are undoubtedly those that would treat platforms as common carriers (Senator Bill Hagerty introduced legislation in April of 2021 that would do just that[76]), places of public accommodation, or sometimes as "utilities." This approach has of course been endorsed by Justice Thomas,[77] as well as others.[78] Such an approach would subject platforms to strict nondiscrimination requirements with respect to users and, presumably, content, which means that platforms would be required to post all (legal) content on a first-come, first-served basis so long as the platform has capacity. In a similar vein, a number of recent legislative proposals (all introduced by Republicans) would, without explicitly labeling platforms as common carriers, forbid platforms from removing or restricting any lawful content and so achieve much the same ultimate outcome.[79]

Leaving aside what a terrible idea this is (who exactly wants to create social media platforms flooded with hate speech, non-obscene pornography, or other content that Eric Goldman and Jess Miers call "lawful, but awful"?[80]), under the analysis presented here all these proposals are quite clearly unconstitutional. To believe that legislatures have the power to simply designate platforms as common carriers (as Justice Thomas apparently does) or to otherwise eliminate their ability to remove lawful content is necessarily to embrace the position that platforms have *no* First Amendment editorial rights, since the essence of editorial rights is to choose

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[76] 21st Century FREE Speech Act, S. 1384, 117th Cong. (2021).

[77] *See supra* note 1 and accompanying text.

[78] *See, e.g.*, Tunku Varadarajan, *The 'Common Carrier' Solution to Social-Media Censorship*, WALL ST. J. (Jan. 15, 2021) (describing views of Richard Epstein, as presented in a Zoom interview); *see also* K. Sabeel Rahman, *Regulating Informational Infrastructure: Internet Platforms as the New Public Utilities*, 2 GEO. L. TECH. REV. 234, 235–36 (2018); Dipayan Ghosh, *Don't Break Up Facebook—Treat It Like a Utility*, HARV. BUS. REV. (May 30, 2019), https://perma.cc/A8PE-4FSV; Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J. L. & TECH. 391 (2020). In his contribution to this Symposium, Candeub seeks to achieve much the same result via a narrow interpretation of Section 230. Adam Candeub, *Reading Section 230 as Written*, 1 J. FREE SPEECH L. 139 (2021).

[79] *See, e.g.*, PRO-SPEECH Act, S. 2031, 117th Cong. (2021); Protect Speech Act, H.R. 3827, 117th Cong. (2021); Protecting Constitutional Rights from Online Platform Censorship Act, H.R. 83, 117th Cong. (2021); CASE-IT Act, H.R. 285, 117th Cong. (2021).

[80] 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, 194 (2021).

content. But it is of course the essential thesis of this paper, set forth in the previous Part, that platforms do indeed have significant First Amendment editorial rights. If that is so then legislatively-imposed common carrier, public accommodation, or utility status for platforms is out of the question, as is a prohibition on removal of lawful content, since obviously legislatures cannot by fiat eliminate First Amendment rights.

A close relative of common carrier regulation is legislation restricting platform power to deplatform—*i.e.*, to permanently ban individuals from posting on their platforms. As noted earlier, Florida has recently adopted legislation which imposes fines on social media platforms that deplatform politicians,[81] and other states including Texas are considering similar legislation.[82] As noted in the previous Subpart, legislation restricting deplatforming (or alternatively, requiring access for users) has obvious parallels to the "must-carry" rules that the Supreme Court upheld for cable television operators in the *Turner* litigation, despite the Court's conclusion that cable operators possessed editorial rights. Thus, restrictions on deplatforming are not as obviously unconstitutional as imposing common carrier status on platforms.

Even under this view, however, the Florida legislation and its kin raise severe constitutional concerns because they do not neutrally regulate deplatforming decisions, but rather single out a favored set of users—politicians—and then flatly prohibit their deplatforming no matter how egregiously a user violates platforms' moderation policies. The legislation seems clearly to violate the First Amendment for two separate reasons.[83] First, the legislation severely restricts platform editorial control over a very important group of users—politicians—because under the legislation politicians can be secure in the knowledge that the worst that can happen to them for violating platform policies is to have individual posts removed. As such, it obviously incentivizes serial violations on the hopes that some will get through the platform's enforcement mechanisms, which in turn strips platforms of *effective* editorial rights with respect to this class of speakers.

But second and even more fundamentally, one of the key reasons why the

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[81] S.B. 7072, 2021 Leg. (Fla. 2021).

[82] Cat Zakrzewski, *The Technology 202: Tech Groups Criticize Florida's Social Media Law as Unconstitutional, Setting the Stage for Legal Action*, WASH. POST (May 25, 2021, 6:39 AM).

[83] It is also probably preempted by Section 230; but that is a topic beyond the scope of this paper.

FCC's must-carry rules were upheld in *Turner* was that the Court concluded that the rules were not based on the content carried by the favored speakers—broadcasters—but rather by the desire to preserve the economic viability of a particular communications technology—free broadcast television.[84] No such neutral justification can possibly be advanced, however, to explain a blatant preference for politicians over the general public in the Florida legislation.[85] In context it is perfectly obvious that the only purpose, and the only consequence, of the law will be to protect specific users: politicians who wish to use social media to spread specific messages in violation of platform policies, including primarily falsehoods and hate speech, as well as justification, and glorification of violence. This is of course the antithesis of the neutrality commanded by the First Amendment as interpreted in *Turner* and so is unconstitutional.[86]

It is, however, possible to envision more neutral and nuanced regulations of deplatforming decisions, which might survive First Amendment scrutiny despite the fact that they would undoubtedly burden platform editorial rights. At a minimum, legislation requiring platforms to follow specific and consistent procedures in making deplatforming decisions, and perhaps granting an internal appeals process—in short, the sorts of requirements that Facebook's Oversight Board recently imposed in the context of reviewing President Trump's deplatforming[87]—probably should survive First Amendment scrutiny. Such procedural requirements impose a fairly limited burden on platform editorial control: while they do require platforms to follow consistent rules, and might slow down platform decisionmaking, they leave the ultimate, substantive power to decide what to do with platforms. And on the flip side, the state interest in protecting *all* users from inconsistent or discriminatory treatment by platforms seems obvious, given the enormous importance of

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[84] *Turner I*, 512 U.S. at 646.

[85] The Florida legislature appears to have a particular predilection for self-serving and blatantly unconstitutional legislation of this sort; the right-of-reply statute struck down in *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974), also only benefited politicians.

[86] On June 30, 2021 a federal district court enjoined enforcement of Florida's deplatforming legislation precisely on the ground that the statute discriminated on the basis of content and viewpoint, and so violated the First Amendment. NetChoice, LLC v. Moody, 2021 WL 2690876 at *9-*11 (N.D. Fla. June 30, 2021).

[87] OVERSIGHT BOARD, Case Decision 2021-001-FB-FBR (2021), https://perma.cc/DW8M-KNTS?type=image.

platforms in modern public discourse.

A more difficult issue would arise if legislation sought to impose legal restrictions on what sorts of substantive violations platforms can invoke to justify deplatforming. Such substantive regulation cuts closer to the First Amendment quick because it implicates platform authority to determine what sorts of content are more and less objectionable, surely a core editorial right. Put differently, for the state to determine what sorts of content does, or does not, justify deplatforming seems precisely the sort of substantive decision reserved to First Amendment editors because of both the importance of such control for platforms and the serious potential for ideological bias in such legislation (*e.g.*, Republican legislatures prohibiting deplatforming for hate speech and Democratic legislatures requiring it).

Other close cousins of common carrier regulation are a recent proposal advanced by UC Berkeley Law Professor Prasad Krishnamurthy and Dean Erwin Chemerinsky to prohibit viewpoint discrimination by social media platforms,[88] and separate proposals by Senators Josh Hawley of Missouri and Marco Rubio of Florida that would condition Section 230 immunity for social media platforms on their making politically neutral and/or viewpoint neutral content moderation decisions.[89] These proposals would also appear to attack the core of the editorial right, which surely is to make ideologically based choices about the content that one carries free of governmental coercion, just as the core of the right to speak is to be free of governmental coercion based on the ideological views one expresses.[90]

Hawley and Rubio do not address First Amendment concerns, but Krishnamurthy and Chemerinsky do. They argue that the Supreme Court's *Red Lion* decision discussed earlier, upholding the FCC's "Fairness Doctrine" and restricting broadcasters' editorial rights, supports their nondiscrimination rule. *Red Lion*, however, has never been extended beyond the broadcast media, and when faced with the question the Supreme Court has repeatedly and forcefully argued that the

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[88] Krishnamurthy & Chemerinsky, *supra* note 16.

[89] *See* JOSH HAWLEY, U.S. SENATOR FOR MISSOURI, *supra* note 15; RUBIO INTRODUCES SEC 230 LEGISLATION TO CRACK DOWN ON BIG TECH ALGORITHMS AND PROTECT FREE SPEECH, MARCO RUBIO, U.S. SENATOR FOR FLORIDA (June 24, 2021), https://perma.cc/43R6-HRWV.

[90] *See* Iancu v. Brunetti, 139 S. Ct. 2294, 2299 (2019); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829–30 (1995).

Internet deserves full First Amendment protection[91] rather than the attenuated protections granted to broadcasters.[92] The reason for this is that the key justification for the *Red Lion* decision was spectrum scarcity resulting in a paucity of broadcast licenses. But as the Supreme Court pointed out early in the Internet era in rejecting the *Red Lion* analogy, there are almost no physical limits to how much content can be carried across the Internet.[93]

Krishnamurthy and Chemerinsky also suggest that platform market power may justify treating them analogously to broadcasters. However, market power was not the basis for *Red Lion*; it was the purportedly "public" nature of broadcast frequencies—an argument with no relevance to the privately-owned Internet. Furthermore, in *Miami Herald v. Tornillo* the Court explicitly rejected the argument, in the context of print newspapers, that economic market power, or even monopoly, justified denial of editorial freedom.[94] And even though some platforms such as Facebook probably do enjoy some level of market power, given the existence of numerous alternative platforms their market power cannot compare to that of newspapers with local monopolies, which were commonplace when *Tornillo* was decided.[95]

Krishnamurthy and Chemerinsky seek to distinguish *Tornillo* on the grounds that "social media platforms do not and should not receive the same protections afforded to the press" (*i.e.*, editorial rights) because Section 230 shields them from publisher liability. This, however, seems a bit of a non sequitur, assuming as it does that an easily modified or repealed statutory immunity can somehow strip the beneficiary of constitutional protections. Furthermore, it misses the point that the Supreme Court's decision in *New York Times v. Sullivan*[96] in practice shields even newspapers from most publisher liability; yet obviously this decision did not have the consequence of stripping newspapers of editorial rights. For all of these reasons,

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[91] *See* Reno v. ACLU, 521 U.S. 844, 885 (1997); Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

[92] *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 389 (1969); FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

[93] *See Reno*, 521 U.S. at 870.

[94] Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 254–57 (1974).

[95] *Id.* at 249 n.13 (noting that one-newspaper towns were at the time the norm).

[96] 376 U.S. 254 (1964).

Krishnamurthy and Chemerinsky's attempted extension of the *Red Lion* doctrine to social media does not withstand scrutiny.

Just as editorial rights are a formidable barrier to the mainly conservative proposals to require viewpoint neutrality on social media platforms, such rights similarly almost certainly doom some liberal proposals such as requiring platforms to block more falsehoods and hate speech.[97] The reason is, quite simply, that both hate speech[98] and falsehoods[99] are fully protected under the First Amendment. And the First Amendment's prohibition on content-based suppression of protected speech applies equally to government requirements that private actors suppress such speech.[100] As such, users posting prohibited content would surely be able to successfully attack such laws; and in their absence, platforms claiming editorial rights should be able to do the same.

However, while a flat-out prohibition on falsehoods or hate speech cannot survive constitutional scrutiny, some narrower restrictions might. Thus, a narrow prohibition on falsehoods regarding, for example COVID-19 or voting rules, might survive intermediate or strict scrutiny,[101] if written carefully. It is important not to lose track of the fact that the First Amendment does permit regulation even of protected speech, thereby restricting both speech and editorial rights, so long as the regulation serves urgent social goals and is written narrowly. Furthermore, when speech is *unprotected* there is no question that legislation can ban such speech, overriding both speech and editorial rights. Thus, there is no First Amendment barrier to laws requiring platforms to remove false commercial speech[102] or hate speech that crosses the line into incitement of violence under the extant *Brandenburg* standard.[103]

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[97] *See, e.g.*, Davey Alba, *Facebook Must Better Police Online Hate, State Attorneys General Say*, N.Y. TIMES (Aug. 5, 2020).

[98] Matal v. Tam, 137 S. Ct. 1744, 1764 (2017) (plurality opinion).

[99] United States v. Alvarez, 567 U.S. 709, 727–28 (2012).

[100] United States v. Playboy Ent. Grp., 529 U.S. 803, 826–27 (2000).

[101] In the *Alvarez* decision, which held that intentional falsehoods are protected speech, the Court splintered on the applicable standard of review for laws regulating falsehoods. 567 U.S. at 730–39 (Breyer, J., concurring in the judgment).

[102] *See, e.g.*, Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770–71 (1976).

[103] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

For similar reasons, the existence of editorial rights also does not in itself pose any obstacles to imposing greater *liability* on platforms for carrying unprotected speech, such as incitement meeting the *Brandenburg* standard, child pornography, and at least some speech that facilitates criminal activity.[104] To the contrary, as noted above, normally editorial rights are linked with liability rather than immunity; it is only imposition of common carrier or nondiscrimination requirements that is inconsistent with liability. As such, recognizing platform editorial rights cuts in favor of, not against, platform liability. As of this writing Section 230 gives *statutory* immunity to platforms even for illegal content, but that is not constitutionally mandated. Indeed, in the 2018 FOSTA-SESTA legislation Congress carved out one area—platforms that knowingly permit their services to be used to facilitate sex trafficking—from Section 230 immunity.[105] Whatever the wisdom of this legislation, which is disputed,[106] there is little doubt that the First Amendment poses no barriers to it, or to other legislative proposals to expand Section 230 carve-outs.[107]

It should be noted, however, that the First Amendment is not entirely silent even on the question of liability for unprotected content—though the potential barrier is not (directly) editorial rights. Rather, the logic of *New York Times v. Sullivan* suggests that some limits on unlimited publisher liability are constitutionally required. *Sullivan* and its progeny famously held that the First Amendment required limits on the circumstances under which state law could impose liability for libel on newspapers, because of the chilling effects created by broad publisher liability. In particular, the *Sullivan* line of cases requires proof that newspapers acted with

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[104] *See* Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1104 (2005).

[105] For a discussion of the legislation's terms and background, *see* Charles Matula, *Any Safe Harbor in a Storm: SESTA-FOSTA and the Future of § 230 of the Communications Decency Act*, 18 DUKE L. & TECH. REV. 353 (2020).

[106] David McCabe & Kate Conger, *Stamping Out Online Sex Trafficking May Have Pushed it Underground*, N.Y. TIMES (Dec. 17, 2019).

[107] Examples of a such recent legislative proposals include legislation advanced by the Trump Department of Justice in September of 2020, *see The Justice Department Unveils Proposed Section 230 Legislation*, U.S. DEP'T OF JUST. (Sept. 23, 2020), https://perma.cc/X5NY-VAPS; and the "Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms Act" or "SAFE TECH Act" introduced by Senator Mark Warner in February of 2021. *See* SAFE TECH Act, S. 299, 117th Cong. (2021). For a thoughtful academic defense of such carve outs for truly bad actors, *see* Danielle Keats Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, U. CHI. LEGAL F. 45, 70–73 (2020).

"actual malice"—*i.e.*, with knowledge or reckless disregard of the falsity of the statement—before public officials or figures can recover for libel based on falsehoods printed in a newspaper. Moreover, the falsehood that provided the basis for the libel action in *Sullivan*—a paid political advertisement—was third-party content and not the Times's own reporting.[108]

Just as it was unreasonable in 1964 to expect the New York Times to spot every factual inaccuracy in third-party advertising or even in its own reporting, it is surely even more unreasonable to expect social media platforms today to identify and suppress every instance of third-party posts containing false or illegal speech, given the sheer volume of postings on social media platforms.[109] The problem is compounded by the fact that the line between legal and illegal content is hardly clear, as Eric Goldman and Jess Miers point out in their contribution to this volume.[110] Obvious examples of line-drawing difficulties include the vague lines between unprotected "obscenity" and fully protected non-obscene pornography,[111] and between unprotected incitement and protected "abstract advocacy" of violence.[112] The consequence of imposing absolute liability on platforms for illegal content would therefore almost certainly be platforms engaging in massively overbroad moderation of speech—*i.e.*, a major chilling effect on users' speech.

And given the importance of social media platforms for social and political discourse in the modern era—at least as important as newspapers in the pre-Internet era—such chilling effects raise serious First Amendment concerns. Thus, it may well be that the First Amendment requires any reductions in Section 230 immunity to be tempered with some sort of scienter requirement for platforms, such as the

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[108] *Sullivan*, 376 U.S. at 279–80; *see also* Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967). A later case extends the "actual malice" rule to liability for intentional infliction of emotional distress. Hustler Magazine v. Falwell, 485 U.S. 46, 56–57 (1988).

[109] Facebook's website claims that it has over 3 billion users world, and that over 100 billion messages are posted daily on its platform. FACEBOOK: COMPANY INFO, https://perma.cc/36XB-6BQ2 (last visited July 2, 2021). In the United States, Pew Research reports that 69% of all adults use Facebook. John Gramlich, *10 Facts about Americans and Facebook*, PEW RESEARCH CENTER (June 1, 2021), https://perma.cc/MFD7-2QMN.

[110] Goldman & Miers, *supra* note 80.

[111] *Compare* Miller v. California, 413 U.S. 15, 36–37 (1973), *with* United States v. Playboy Ent. Grp., 529 U.S. 803, 826–27 (2000).

[112] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

Sullivan "actual malice" standard. Importantly, this understanding—that the First Amendment protects unwitting distribution of illegal materials by platforms but not knowing distribution—is consistent with Justice Thomas's suggestion in a recent opinion that the existing text of Section 230 is best read to not immunize knowing distribution of illegal materials (contrary to what most courts of appeals have held).[113]

Justice Thomas argues, as does Jack Balkin in this volume, that the better reading of Section 230, and a better legal fit for platform liability might be neither absolute immunity as courts have read Section 230, nor absolute liability as publishers historically faced, but rather common law distributor liability.[114] Under such a regime, liability could be imposed only if a platform was aware that it was hosting illegal or unprotected content, but still refused to remove it—which in practice for platforms would mean a notice-and-take-down regime such as the one that already applies to content violating intellectual property laws. Such a regime would also displace the current rule that liability for libel may be imposed merely on a showing of negligence, with respect to claims brought by private figures regarding speech on matters of public concern.[115] A chorus of appellate judges (in, not coincidentally, terrorism cases) have recently expressed agreement with Justice Thomas in this regard,[116] and a group of Republican members of the House of Representatives have introduced legislation that would enact Justice Thomas's reading into statutory text.[117] All of this is clearly consistent with the First Amendment, and such a regime (or something much like it) may well be the minimum protection the First Amendment requires for platforms based on the reasoning in *New York Times v. Sullivan*.

Straying from constitutional law to policy for a moment, it should be noted that in the area of print publications, the Supreme Court has *not* interpreted the First

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[113] Malwarebytes, Inc. v. Enigma Software Group USA, LLC, 141 S. Ct. 13 (2020) (Thomas, J., respecting the denial of certiorari).

[114] Jack Balkin, *How to Regulate (and not Regulate) Social Media*, 1 J. FREE SPEECH L. 71 (2021).

[115] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

[116] *See, e.g.*, Gonzalez v. Google LLC, 2021 WL 2546675, at *32 (9th Cir. June 22, 2021) (Berzon, J., concurring) (arguing that Section 230 immunity should not extend to platform "activities that promote or recommend content or connect content users to each other"); *id.* at *38–*40 (Gould, J., concurring in part and dissenting in part). *See also* Force v. Facebook, 934 F.3d 53, 81–84 (2d Cir. 2019) (Katzmann, C.J., concurring in part and dissenting in part).

[117] Stop Shielding Culpable Platforms Act, H.R. 2000, 117th Cong. (2021).

Amendment to limit publisher liability for speech not on matters of public concern (though admittedly it has been less than clear on this point).[118] For newspapers, this is not a major problem because most content in such publications is presumed to be of public concern. Unlike with *news* media, however, with *social* media there can be no such assumption; to the contrary, much content on social media is purely private and often personal (I for one tend to use Facebook to report on nice hikes). The logic of the Court's decisions would strongly suggest that there are no constitutional bars to imposing liability without proof of *mens rea* on platforms for hosting, for example, libelous private falsehoods.

Though I agree with this constitutional conclusion, I nonetheless believe that such liability would be a very bad idea. Creating a legal regime favoring political speech over personal speech on platforms, which a variable liability regime would surely do, would incentivize platforms to favor political over personal speech in their algorithms, and ultimately to sharply restrict personal posts, in order to minimize risk of liability. But many modern criticisms of social media assert that social media feeds are too politicized and tend to contribute to political polarization (though concededly serious doubts have been raised about the accuracy of these complaints[119]). Hiking photos and cat videos do not polarize (except, I suppose, ailurophobes), but political content, especially in this day and age, often does. To create a legal regime that favors the latter over the former therefore seems, even if constitutional, utterly perverse.

Finally, I will close by considering some Section 230 reform proposals pending or recently proposed in Congress, and their constitutionality under the analysis set forth above. Most obviously, Congress of course has the power to completely repeal Section 230, as endorsed by both President Trump[120] and President Biden[121] during the 2020 presidential election, and by Representative Louie Gohmert of Texas in recently proposed legislation.[122] After all, what Congress can pass it can repeal. As

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[118] *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761–63 (1985).

[119] *See* Jane R. Bambauer, Saura Masconale & Simone M. Sepe, *Cheap Friendship*, 54 U.C. DAVIS L. REV. 2341 (2021).

[120] *See* Bobby Allyn, *As Trump Targets Twitter's Legal Shield, Experts Have a Warning*, NPR (May 30, 2020, 11:36 AM), https://perma.cc/S3B3-Q9UB; *Presidential Veto Message to the House of Representatives for H.R. 6395*, WHITE HOUSE (Dec. 23, 2020), https://perma.cc/8LLS-UG2E.

[121] Editorial Board, *Joe Biden*, N.Y. TIMES (Jan. 17, 2020).

[122] The proposed legislation is called the "Abandoning Online Censorship" or "AOC" Act.

the analysis set forth above argues, however, the logic of *New York Times v. Sullivan* argues that regarding third-party content on matters of public concern, the First Amendment would require proof of knowledge (or perhaps recklessness) before liability could be imposed on platforms (and with respect to matters not of public concern, policy and common sense strongly argue for the same). But statutory immunity is obviously not constitutionally mandated.

Other proposed legislation are even more likely to be constitutional. Consider, for example, the bipartisan legislation titled the "Platform Accountability and Consumer Transparency Act" or "PACT Act" (introduced by Senator Brian Schatz on March 17, 2021).[123] This legislation imposes transparency and process obligations on platform content moderation by requiring platforms to publish their moderation policies, inform users of moderation decisions, and provide users with an appeals process to challenge such decisions (the Act also requires platforms to publish a transparency report every six months, providing statistics about its moderation decisions). Notably, the PACT Act in no way interferes with platforms' substantive editorial discretion, but only adds fairly modest time and resource burdens on platforms in implementing their own chosen policies (importantly, the legislation exempts small individual and business providers, to ensure that the burdens it imposes are manageable). Given the important governmental interests the legislation advances in protecting users, and the minor and incidental burdens it imposes on editorial rights, it seems likely that the legislation, if passed, would and should survive any First Amendment challenge.

Similarly unproblematic is the "Limiting Section 230 Immunity to Good Samaritans Act," introduced by a group of Republican House members in January of 2021.[124] This law would require platforms to maintain written terms of service and adhere to them in good faith on pain of financial liability. The law also defines bad faith actions by platforms as including the use of algorithms that selectively enforce written terms of service. As I read the legislation, it does not impose any limits on what substantive provisions are contained within a platform's terms of service, but merely requires publication and neutral adherence to such terms. So, if a platform *says* in its written terms that will not permit content that describes the result of the

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AOC Act, H.R. 874, 117th Cong. (2021).

[123] PACT Act, S. 797, 117th Cong. (2021).

[124] Limiting Section 230 Immunity to Good Samaritans Act, H.R. 277, 117th Cong. (2021).

2020 presidential election as a fraud, that is fine so long as the platform neutrally enforces those terms. If this reading is correct then this legislation (unlike, say, requirements of viewpoint neutrality) imposes *no* burdens on platform editorial rights other than the trivial one of laying out its editorial policies in advance and in writing.[125] Finally, requiring platforms to follow these written terms in good faith is analogous to enforcing neutral contract law against a platform, something that the Court has long held does not pose First Amendment concerns.[126]

On the other hand, efforts to condition Section 230 immunity on specific, substantive changes to platform moderation practices (other than restrictions on illegal content) are far more problematic—as emblematized by Senator Hawley's and Senator Rubio's proposals to condition Section 230 on viewpoint neutral moderation.[127] While presented as Section 230 reform, the Hawley and Rubio proposals in fact seek to impose an obligation on platforms—viewpoint neutrality—as a condition for a legal benefit with no relation to the condition; and which condition itself Congress has no power to impose directly. Moreover, the "benefit" Congress is granting here—Section 230 immunity—is, to some extent, constitutionally mandated for reasons already discussed.[128] As such, it is quite different from the financial subsidies that are the typical hook in unconstitutional conditions cases. Thus what Hawley and Rubio propose is analogous to Congress granting to the New York Times by statute immunity against libel liability somewhat greater than that constitutionally dictated by *New York Times v. Sullivan*, on the condition that the Times include a mix of political perspectives, including conservative ones, in its editorial pages.

Finally, this is not a situation, such as in *Rust v. Sullivan*,[129] where Congress is

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[125] I read the word "selective" in the statute as requiring algorithms to be applied on equal terms to all users. If, on the other hand, the term is interpreted to restrict what algorithms the platform may use, or how algorithms might be trained, then the provision undoubtedly imposes severe and probably unconstitutional burdens on platform editorial rights.

[126] Cohen v. Cowles Media Co., 501 U.S. 663, 669–70 (1991).

[127] *See* JOSH HAWLEY, U.S. SENATOR FOR MISSOURI, *supra* note 15; MARCO RUBIO, U.S. SENATOR FOR FLORIDA, *supra* note 89.

[128] "To some extent" because Section 230 clearly goes beyond constitutional requirements, at a minimum by not imposing liability even if scienter exists. *See* Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33 (2019).

[129] 500 U.S. 173 (1991).

dictating how federal funds will be spent. It is rather leveraging a grant of immunity to interfere with constitutional rights, much as if a legislature conditioned a grant of qualified immunity to police officers on the condition that they do not publicly disclose official misconduct that they observed on the job. If the unconstitutional conditions doctrine has any meaning at all,[130] therefore, such purported "conditions" cannot survive constitutional review.

A slightly more difficult question is posed by the Protecting Americans from Dangerous Algorithms Act introduced into Congress by Representative Tom Malinowski in March of 2021.[131] The Act, in effect, seeks to reverse the holding in the Second Circuit decision in *Force v. Facebook*[132] by amending Section 230 to permit civil actions under specific civil rights or anti-terrorism statutes to be brought against platforms, when the content that is the basis for the action was amplified or promoted by a platform's algorithms. Senator Rubio's recently proposed legislation contains a similar provision.[133]

Given the analysis of editorial rights presented in Part III of this paper, there is no doubt that this sort of legislation burdens editorial rights since the use of algorithms to decide what content to promote is clearly, under that analysis, a core exercise of platform editorial rights (the analogy, recall, was to a newspaper's decision regarding what stories to present on the front page). At first cut, however, the intrusion seems a relatively minor one, since it only covers content that could be the basis for civil liability under specific statutes, and therefore is itself unprotected.[134] In practice, however, the burden on platforms would be enormous. After all, the driving force behind Section 230 immunity is the realization that platforms cannot

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[130] And it does. *See* Agency for Int'l Dev. v. All. for Open Society Int'l, Inc., 570 U.S. 205, 220–21 (2013).

[131] Protecting Americans from Dangerous Algorithms Act, H.R. 2154, 117th Cong. (2021).

[132] 934 F.3d 53, 66–68 (2d Cir. 2019).

[133] MARCO RUBIO, U.S. SENATOR FOR FLORIDA, *supra* note 89.

[134] In this regard, Senator Rubio's proposal has similarities to proposals to read or amend Section 230 to eliminate immunizing of knowing distribution of illegal content. *See* sources cited *supra* notes 113–117. Difficult questions arise, however, about the extent to which algorithmic amplification can be defined as "knowing" conduct by a platform, given that mainstream platforms obviously do not write their algorithms to intentionally amplify unprotected content. But that is a question for another day.

effectively police the legality of third-party content. Given this reality, to deny immunity to algorithmically amplified content would in practice force platforms to entirely abandon algorithmic promotion or amplification, such as Facebook's use of algorithms to choose what content to display prominently in users' Newsfeeds, because of the risk that illegal content would be amplified (indeed, the *Force* litigation was based on the theory that algorithmically generated Facebook Newsfeeds contributed to several terrorist attacks by Hamas).

The legislation recognizes this reality by creating a safe harbor if platforms sort content "chronologically or reverse chronologically; by average user rating or number of user reviews; alphabetically; randomly; and by views, downloads, or a similar usage metric," rather than using proprietary algorithms. The legislation thus, in practice if not in name, entirely strips platforms of a key editorial right—the decision on what content to emphasize or deemphasize. And while the government interest driving the legislation is undoubtedly substantial, the Supreme Court has repeatedly held that laws may not prohibit protected First Amendment activity in the name of proscribing unprotected content.[135] Therefore, this legislation likely violates the First Amendment.

In conclusion, as the above discussion demonstrates, recognizing robust editorial rights for social media platforms does not spell the end of all regulation of content moderation practices. Reasonable, content-neutral efforts to protect consumers remain permissible, as do efforts to hold platforms responsible for the *knowing* hosting or distribution of illegal content. But the very purpose of First Amendment editorial rights is to keep the core decisions about what legal content to host, and what legal content to emphasize, in the hands of rights holders, in this case platforms. As such, legislative efforts to interfere with those fundamental decisions are necessarily unconstitutional unless they are necessary to protect extremely strong governmental interests, which is rarely the case.

Conclusion

In this paper, I argued that under both extant doctrine and first principles, social media firms should be entitled to significant First Amendment "editorial

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[135] *See, e.g.*, Ashcroft v. Free Speech Coal., 535 U.S. 234, 255 (2002) ("The Government may not suppress lawful speech as the means to suppress unlawful speech."). In her contribution to this volume, Daphne Keller examines and criticizes regulation of amplification in more detail. Daphne Keller, *Amplification and Its Discontents: Why Regulating the Reach of Online Content Is Hard,* 1 J. Free Speech L. 227 (2021).

rights" to control the content that is carried and highlighted on their platforms, despite the fact that that content is almost exclusively generated by third parties rather than the platforms themselves. I also explored the implications of finding such editorial rights for a slew of current regulatory proposals directed at social media. In brief, many of the more aggressive proposals—such as imposing common carrier status, requiring viewpoint neutrality in content moderation, or requiring greater moderation of falsehoods and hate speech—almost certainly violate the First Amendment. However, more modest proposals such as imposing liability on platforms for carrying content falling outside First Amendment protections, if coupled with a strong scienter requirement, is probably permissible.

My analysis here has been focused on social media firms, not other platforms such as Google's search engine. Search is arguably different from social media because it is a less curated service, but Google undoubtedly does employ algorithms to determine what search results to prioritize, meaning that it is undoubtedly exercising some degree of editorial discretion. As a consequence, some commentators (including Eugene Volokh) have argued that the First Amendment fully protects search results.[136] Whether services such as search should be treated as platforms possessing editorial rights is, however, an issue beyond the scope of this paper.

Regulation of web-hosting services such as Amazon Web Services (AWS) poses yet different questions. At first glance services like AWS are far less expressive or selective than social media platforms, and so nondiscrimination requirements seem less troubling. In other words, AWS and other web-hosting services may not enjoy any significant editorial rights because they are meaningfully distinct from both social media platforms and search in their relationship to, and control over, the content they host. Indeed, imposing nondiscrimination requirements on such services may actually strengthen the argument for granting social media platforms editorial rights because it would ensure that competing platforms, such as Parler, cannot be subjected to the sort of deplatforming that occurred in January of 2021,[137] and so will remain viable alternatives to the dominant platforms such as Facebook and Twitter. For now, however, such questions must also be left for another day.

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[136] Eugene Volokh & Donald M. Falk, *Google: First Amendment Protections for Search Engine Search Results*, 8 J.L. ECON. & POL'Y 883 (2012).

[137] *Apple, Google and Amazon Kick Parler off Their Platforms*, N.Y. TIMES (Jan. 9, 2021).