



WHY SOCIAL MEDIA PLATFORMS ARE NOT COMMON CARRIERS

*Ashutosh Bhagwat**

In a recent opinion respecting denial of certiorari, Justice Clarence Thomas expressed concerns about the degree of control that a handful of social media platforms exercised over political discourse, and suggested common carrier regulation as a potential solution to this perceived problem. The States of Florida and Texas promptly adopted legislation restricting social media companies' ability to control content and users on their platforms, explicitly citing the common carrier concept in support. In this paper, I argue that even under Justice Thomas's (probably incorrect) definition of common carriage, and certainly under the traditional definition, platforms simply are not common carriers. They do not possess any of the characteristics that Justice Thomas himself cited as typical of common carriers; and, more fundamentally, they lack the necessary characteristic—indifference to the content they carry—that is typical of communications common carriers. Indeed, and ironically, it is precisely because platforms are *not* indifferent to content, and act on their preferences (in particular by deplatforming President Trump), that Thomas proposed, and Florida and Texas adopted, platform regulations. These regulations, however, clearly violate the First Amendment, and appear to be headed for rapid judicial invalidation. Social media platforms, in short, are not common carriers, and cannot be forced to become ones by legislative fiat so long as the First Amendment remains in force. This essay concludes by arguing that common carrier regulation of social media platforms is not only unconstitutional, but also a terrible idea as a matter of public policy.

* Distinguished Professor and Boochever and Bird Endowed Chair for the Study and Teaching of Freedom and Equality, UC Davis School of Law (contact: aabhagwat@ucdavis.edu). Thanks to participants in the symposium on Non-Governmental Restrictions on Free Speech for extremely helpful feedback. Thanks also to my fellow symposium organizers, Vince Blasi, Thomas Healy, and Jim Weinstein for helping put together a truly great event. Finally, thanks to Jose Ayala-Artiga for excellent research assistance.

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INTRODUCTION

Social media is in the doghouse, and common carriage is in the air. Following the insurrection at the U.S. Capitol on January 6, 2021 and President Trump’s online statements supportive of the violence, the President was famously banned from the major social media platforms, including Twitter and Facebook.¹ Almost simultaneously, certain platforms such as Parler were barred from the Apple and Google App stores (and removed from Amazon Web Services) for allegedly violating those stores’ Terms of Service by permitting calls for violence on their platforms.² These events reignited long-standing complaints from political conservatives that “Big Tech” had a liberal bias and unduly censored conservative speech on their platforms—a claim which, while lacking any empirical support, appears to be widely shared among conservatives.³

Given the importance of social media platforms in modern public discourse, and in politics, it was inevitable that some sort of proposed regulatory response to this (purported) problem would emerge, and indeed quite soon after Trump’s deplatforming, one did. Facebook and Twitter are private companies that, almost all concede, are not bound by the First Amendment and so face no *constitutional* constraints against suppressing disfavored but constitutionally protected viewpoints (in particular, praise for political violence) on their platforms. Conservative critics

¹ Melina Delkic, *Trump’s Banishment from Facebook and Twitter: A Timeline*, N.Y. TIMES (May 10, 2022).

² Brian Fung, *Parler Has Now Been Booted by Amazon, Apple and Google*, CNN (Jan. 11, 2021), <https://perma.cc/9GC7-RCKH>.

³ Alison Durkee, *Are Social Media Companies Biased Against Conservatives? There’s No Solid Evidence, Report Concludes*, FORBES (Feb. 1, 2021), <https://perma.cc/65DH-WQVJ>.

therefore needed a theory to justify regulatory interference with the control that these companies exert over their own private property. To create such a theory, these critics embraced the concept of common carriage: the idea that, because social media platforms are common carriers like telephone companies and railroads, there are no constitutional or legal barriers around mandating equal access to their services and property.

The most prominent exposition of this theory was put forth by Justice Clarence Thomas in a lengthy judicial opinion that was more of an essay (the essay/opinion was Justice Thomas's concurrence in the grant of certiorari and remand with directions to dismiss in *Biden v. Knight First Amendment Institute at Columbia University*⁴). Citing a 2020 law review article by Professor Adam Candeub (one of my fellow panelists at this symposium), Justice Thomas argued that social media platforms share many characteristics with traditional, common-law common carriers or places of public accommodation—though he emphasized the former. As a result, he argued, social media platforms could, consistent with the First Amendment, lawfully be stripped of their power to exclude content (*i.e.*, speech) of which they did not approve.⁵ Justice Thomas concluded by suggesting that Congress should consider regulating platforms as common carriers or places of public accommodation.⁶

Congress has not yet taken up Justice Thomas's invitation,⁷ but the States of Florida and Texas have. In May of 2021, the Florida legislature passed and Governor DeSantis signed S.B. 7072, a bill which extensively regulated social media platforms for the express purpose (as stated by Governor DeSantis in signing the bill) of combatting “Big Tech's” alleged censorship of conservative views.⁸ In its text,

⁴ *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021) (Thomas, J., concurring). This 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.

⁵ *Id.* at 1222–25 (citing Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J.L. & TECH. 391, 398–403 (2020)).

⁶ *Id.* at 1226.

⁷ This is odd because, aside from legislation regarding management of the judicial branch, judges and Justices do not normally consider such blatant intrusion into the political process to be an appropriate judicial role, especially in a published judicial opinion.

⁸ *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1205 (11th Cir. 2022).

S.B. 7072 analogizes social media platforms to “public utilities,” and explicitly states that platforms “should be ‘treated similarly to common carriers.’”⁹ Building on this analysis, the Act then proceeds to impose a number of restrictions on social media platforms’ content moderation, including prohibiting the deplatforming of candidates for political office, prohibiting actions that would reduce the prominence of posts by—or about—such candidates, and prohibiting the censorship of posts by “journalistic enterprises.” In addition, the Act requires (without defining) “consistency” in the application of content-moderation policies, and permits users to completely opt out of any content moderation (so that their feeds would be “sequential or chronological”).¹⁰

Aside from the obviously self-serving nature of the first two of these provisions (something Florida politicians have a history of¹¹), these provisions as a whole strike at the heart of social media platforms’ power to exercise control over the content that their users are presented with. The last, “opt-out” provision in particular would eliminate any and all such control over users who invoke the provision. Such intrusions would seem to run straight into fundamental First Amendment concerns, on the assumption (which I have defended elsewhere) that platforms enjoy First Amendment “editorial rights.”¹² These First Amendment issues are alleviated, however, if legislatures can legitimately treat platforms as common carriers—which is to say transparent conduits such as telephone companies—with no First Amendment rights to control the content that they host, as Justice Thomas insists. The common carrier status of platforms is thus central to the constitutionality of the Florida law. As of this writing, S.B. 7072 has been preliminarily enjoined by a federal district court, and the holding was mainly affirmed by the Eleventh Circuit.¹³

Nor is Florida alone. As noted earlier, Texas soon joined Florida in taking Justice Thomas’s legislative advice. In September of 2021, in a special session called by

⁹ *Id.* (quoting S.B. 7072, § 1(5), (6)).

¹⁰ *Id.* at *3–*4. The Act also imposes a number of disclosure obligations on platforms, which are not the topic of this paper.

¹¹ *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 257–58 (1974) (striking down a Florida law granting politicians a “right of reply” when criticized by newspapers).

¹² Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. FREE SPEECH L. 97 (2021).

¹³ *NetChoice v. Att’y Gen.*, *affirming in part, vacating in part* *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082 (N.D. Fla. 2021).

Governor Greg Abbott, the Texas legislature adopted HB 20 which, like Florida's S.B. 7072, regulates social media content-moderation practices. Like Governor DeSantis in Florida, Texas Governor Abbott cited the need to prevent the "[s]ilencing of conservative views" as the impetus for the legislation.¹⁴ And also like the Florida legislation, the first section of HB 20 explicitly finds that "social media platforms function as common carriers," citing this conclusion as a justification for the legislation.¹⁵

Despite these similarities, HB 20 is in fact substantially broader, and even more intrusive on platform autonomy, than the Florida legislation. Rather than merely protecting politicians, the Texas law forbids *all* censorship by social media platforms based on "the viewpoint of the user or another person," "the viewpoint represented in the user's expression," or "a user's geographic location" within Texas.¹⁶ As such, the Texas law in effect eliminates the core editorial power of platform operators, which surely consists of preferentially publishing their favored viewpoints. And so again, the validity of this statute is entirely dependent on the legislative finding that social media platforms constitute common carriers who lack editorial rights to exclude, as Justice Thomas proposed. As of this writing, the core provision of HB 20 quoted above was at first preliminarily enjoined by a federal district court.¹⁷ The Fifth Circuit then stayed the lower court's injunction without explanation,¹⁸ but the Supreme Court in turn, by a 5-4 vote, vacated the Fifth Circuit's stay and so brought the injunction back into force.¹⁹

The purpose of this essay is, in short, to demonstrate why Justice Thomas and the legislatures and Governors of Florida and Texas are clearly wrong in categorizing social media platforms as common carriers; and why every court to consider the issue so far, with the exception of one panel of the Fifth Circuit,²⁰ was clearly

¹⁴ *NetChoice, LLC v. Paxton*, 1:21-CV-840-RP, 2021 WL 5755120, at *1 (W.D. Tex. Dec. 1, 2021).

¹⁵ *Id.* at *8 n.3 (quoting Tex. H.B. No. 20, 87th Leg., 2nd Sess. § 1(4) (2021)).

¹⁶ *Id.* at *1 (quoting Tex. Civ. Prac. & Rem. Code § 143A.002(a)(1)–(3)). Like the Florida law, the HB 20 also contains a number of disclosure requirements, which will not be considered here.

¹⁷ *Id.* at *15.

¹⁸ *NetChoice, LLC v. Paxton*, No. 21-51178, 2022 WL 1537249 (5th Cir. May 11, 2022).

¹⁹ *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715 (2022).

²⁰ There are reasons to wonder about the sophistication of this panel. Media reports of the oral

correct to reject the common carrier argument and so enjoin efforts to strip platforms of First Amendment editorial rights. Part I will explore the concept and definitions of common carriage. Part II will explain why social media platforms do not qualify as common carriers and why this fact dooms the Florida and Texas legislation. Finally, Part III will explain why classifying social media platforms as common carriers is not only legally indefensible, but is also a truly terrible idea as a matter of policy.

I. COMMON CARRIERS AND PLACES OF PUBLIC ACCOMMODATION

Let us begin with the foundational question of what, historically and legally, is common carriage—which is to say, what characteristics of particular services have led to them being classified as common carriers (or, as we shall see, places of public accommodation) subject to extensive legal restrictions. Instead of reinventing the wheel, I will in this part rely heavily on Professor Christopher Yoo’s article (published in an earlier issue of this journal) on this topic.²¹

As Justice Thomas correctly points out in his concurring opinion in the *Knight* case discussed above, common carriage is an old concept, traceable to the English common law. At its heart, common carriage imposed obligations to serve customers on a nondiscriminatory basis (and imposed liability for negligence) on certain forms of transportation as well as related professions such as innkeepers and warehousemen.²² Citing work by Bruce Wyman from the early 20th century, Professor James Speta argues that this body of law emerged from much earlier (medieval) law requiring *all* tradesmen who engaged in a “common calling” to serve the public

arguments before the Fifth Circuit suggest that members of the panel failed to grasp such basic concepts as the distinction between internet-service providers (who, it should be noted, are explicitly exempted from the coverage of HB 20) and social-media platforms. The highlight was apparently when Judge Edith Jones, a member of the Fifth Circuit panel, explained to the plaintiffs’ attorney that their clients—*i.e.*, platforms such as Twitter—“are not websites.” Ben Brody, *A Judge Was Sure Twitter Isn’t a Website. Now Tech Law Could Get Messy*, PROTOCOL (May 10, 2022), <https://perma.cc/3NEE-YBHU>.

²¹ Christopher Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463 (2021).

²² *Biden v. Knight First Amend.* Inst. at Columbia Univ., 141 S. Ct. 1220, 1222–23 (2021) (Thomas, J., concurring) (citing Candeub, *supra* note 5, at 398–403); James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM. L.J. 225, 255 (2002).

without discrimination.²³ Regardless, however, long before the American Revolution, the common law had evolved to focus on certain specific professions associated with transportation.

That stability was challenged, unsurprisingly, by the technological revolution of the 19th and 20th centuries. The first challenge was railroads, who were in the transportation business but of course had no precise, common-law analogue. Congress resolved that issue by designating railroads as common carriers in the Interstate Commerce Act of 1887.²⁴ Meanwhile, the telephone was invented (in 1876), and the question emerged whether this new industry should also have common carrier status. Courts originally split on this issue, but Congress resolved it by classifying telephone companies as common carriers in 1910, a designation it confirmed in the Federal Communications Act of 1934 (the foundational statute establishing the framework for federal regulation of the telecommunications and broadcasting industries).²⁵ Furthermore, these statutory designations go beyond the common law of common carriage by also imposing rate regulation and tariff filing requirements on regulated firms (the relevant provisions of the Interstate Commerce and Communications Acts are essentially identical).

The above discussion describes *how* common carrier regulation evolved, but it tells us little about what it was, precisely, that led judges and regulators to designate certain industries, but not others, as common carriers. Furthermore, in the telecommunications field, the statutory definition of common carrier—“[A]ny person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio”²⁶—is notably unhelpful (except by clarifying that radio broadcasters are not common carriers). In *Knight*, Justice Thomas identifies a number of considerations that scholars and courts have associated with common carrier status: market or monopoly power, whether one holds oneself out as serving the public, whether the business is “affected with the public interest,” whether the service is in the “transportation or communications industries,” and whether the business has

²³ Speta, *supra* note 22, at 253–54 (citing Bruce Wyman, *The Law of Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156 (1904)).

²⁴ Angela J. Campbell, *Publish or Carriage: Approaches to Analyzing the First Amendment Rights of Telephone Companies*, 70 N.C. L. REV. 1071, 1120 (1992).

²⁵ *Id.* at 1121–22.

²⁶ 47 U.S.C. § 153(h).

received “special government favors.”²⁷ Thomas also argues that modern social media platforms share all of these characteristics.²⁸

In an analysis which I will only briefly summarize here, Christopher Yoo demonstrates that most of these considerations have little historical basis. Monopoly power, for example, was not historically either sufficient (see *Standard Oil*) or necessary (see inns in large cities) for common carrier status.²⁹ As for being “affected with the public interest,” the Supreme Court has recognized since 1934 that this phrase does not identify any particular category of businesses.³⁰ (Indeed, in the very case that introduced this principle into U.S. constitutional law in 1876, the dissent made this very point cogently.³¹) Similarly, a bland statement that “transportation and communications” businesses have tended to be common carriers evades the questions of *why* that is so, and why it is that some, but not all, such services are treated as common carriers—which is, of course, the very issue with respect to digital platforms.³² Finally, regarding “special government favors,” while it is true that common carrier status has often historically been accompanied by franchises, sometimes granting legal monopolies or limitations on liability (on which more below³³), it is simply not true that a franchise or license inevitably results in common carrier status even in communications industries—the obvious counterexamples being cable-television operators³⁴ and television broadcasters.³⁵

That leaves “holding out as serving the entire public.” Christopher Yoo convincingly argues that, as a historical matter, this is probably the most widely accepted definition of a common carrier.³⁶ This approach to common carriage is also consistent with the D.C. Circuit’s leading decisions on the topic, which are widely followed. In the first, *NARUC I*, the court stated that “to be a common carrier one

²⁷ *Knight*, 141 S. Ct. at 1222–23 (Thomas, J., concurring).

²⁸ *Id.* at 1224–25.

²⁹ Yoo, *supra* note 21, at 466–68.

³⁰ *Id.* at 468 (citing *Nebbia v. New York*, 291 U.S. 502, 536 (1934)).

³¹ *Id.* at 469 & n.29 (citing *Munn v. Illinois*, 94 U.S. 113, 140–41 (1876) (Field, J., dissenting)).

³² *Id.* at 469–72.

³³ See Part II *infra*.

³⁴ *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

³⁵ *Columbia Broad. System, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94 (1973).

³⁶ Yoo, *supra* note 21, at 473–75.

must hold oneself out indiscriminately to the clientele,”³⁷ or alternatively that “the carrier ‘undertakes to carry all people indifferently.’”³⁸ In a later case with the same name (but different subject matter), *NARUC II*, the court reiterated this definition while clarifying that it was crucial to common carriage that the carrier transmit information of the customer’s own choosing, not that of the carrier’s.³⁹

The D.C. Circuit’s analysis in the *NARUC* cases, moreover, was adopted from the approach to common carriage taken by the Federal Communications Commission (“FCC”), the federal agency created by the 1934 Communications Act to regulate the communications industry. In an important 1966 Order, the FCC had this to say about common carriage under the 1934 Act:

[T]he fundamental concept of a communications common carrier is that such a carrier makes a public offering to provide, for hire, facilities by wire or radio whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing between points on the system of that carrier and between such points and points on the system of other carriers connecting to it; and that a carrier provides the means or ways of communication for the transmission of such intelligence as the customer may choose to have transmitted so that the choice of the specific intelligence to be transmitted is the sole responsibility or prerogative of the customer and not the carrier.⁴⁰

This definition, it should be noted, fully adopts the “holding out” approach, while adding the clarification (as *NARUC II* does) that to be a common carrier, the carrier must have no role in selecting either the content of the communication at issue, or its source or destination.

It should be noted, however, that to identify the “holding out” approach as the dominant historical and regulatory definition of common carriage is to open up a host of very difficult questions. For one thing, this definition appears to leave firms with an easy option to avoid common carriage designation by simply announcing

³⁷ National Ass’n of Regul. Util. Comm’rs v. FCC (*NARUC I*), 525 F.2d 630, 641 (D.C. Cir. 1976).

³⁸ *Id.* (quoting *Semon v. Royal Indemnity Co.*, 279 F.2d 737, 739 (5th Cir. 1960)).

³⁹ National Ass’n of Regul. Util. Comm’rs v. FCC (*NARUC II*), 533 F.2d 601, 609 (D.C. Cir. 1976).

⁴⁰ 5 FCC 2d 197, 202 (1966).

that they do not serve the general public—but surely Congress did not intend telephone companies to avoid regulation through such a simple ploy.⁴¹ In addition, it should be obvious that a simple willingness to serve the general public does not convert a firm into a common *carrier* because if that were so, Walmart would be a common carrier. Something more is clearly required, which we will for now call “carriage” (which, as Yoo points out, is why Congress itself recognizes that when a carrier offers other functions bundled with carriage, those services are *not* regulated as common carriers⁴²).

Finally, a brief word on places of public accommodation. This much-used phrase is, if anything, even more vague and amorphous than common carriage. At the end of his *Knight* opinion, Justice Thomas briefly (and without much analysis) suggests that digital platforms might also be regulated by legislatures as “places of public accommodation, on which nondiscrimination requirements can be imposed.⁴³ In particular, Thomas suggests that social media platforms are similar to traditional places of public accommodation, which serve “lodging, food, entertainment, or other services to the public . . . in general.”⁴⁴ But again, Thomas moves too fast. As Christopher Yoo points out, historically “places of public accommodation” was a poorly defined concept that included common carriers and innkeepers (and perhaps smiths), but it is far from clear what else, if anything (though the caselaw that suggests it did *not* include places of entertainment, contrary to Justice Thomas).⁴⁵ Furthermore, after the Civil War, the common law regarding places of public accommodation was largely displaced by statutes which presumed a right to exclude on the part of businesses other than common carriers and innkeepers, absent a statutory prohibition.⁴⁶ One prominent example of such a statute is Title II of the Civil Rights Act of 1964, which prohibits race discrimination in such places,

⁴¹ See Yoo, *supra* note 21, at 475.

⁴² *Id.*

⁴³ *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1225–26 (2021) (Thomas, J., concurring).

⁴⁴ *Id.* (quoting BLACK’S LAW DICTIONARY 20 (11th ed. 2019)).

⁴⁵ Yoo, *supra* note 21, at 476 & n.82.

⁴⁶ *Id.* at 477–79.

and adopts a statutory definition of places of public accommodation (which includes places of entertainment, but not other businesses such as retail stores).⁴⁷

All of which is to say that the concept of places of public accommodation adds little to Justice Thomas's historical argument regarding legislative authority to strip platforms of First Amendment editorial rights because they are common carriers (assuming, that is, that Thomas concedes that Facebook and Twitter are not innkeepers). And in any event, even the broadest possible historical definition of a place of public accommodation, as any business that held itself out as serving the public without exercise of discretion, basically replicates the leading definition of a common carrier.⁴⁸ In short, then, the addition of the category of "places of public accommodation" adds essentially nothing to the basic question of whether social media platforms can legitimately be classified as common carriers, and so be stripped of their First Amendment right to exclude content to which they object. It is to that question that we now turn.

II. PLATFORMS AS COMMON CARRIERS

A. *Are Platforms Common Carriers?*

The discussion of the development and definition of common carrier status presented in the previous Part goes a long way toward explaining why social media platforms such as Facebook and Twitter do not conceivably fit within that category, even if Justice Thomas's definition is correct. Indeed, the question is not even a close one.

Starting with the obvious, there is no question that Facebook, with its almost 2 billion active daily users,⁴⁹ possesses some degree of market power, as Justice Thomas argues in his *Knight* concurrence.⁵⁰ But its market share, and profits, have been stagnating or declining in recent years because of the rise, as Meta (the owner

⁴⁷ 42 U.S.C. § 2000a.

⁴⁸ Yoo, *supra* note 21, at 480.

⁴⁹ Shannon Bond, *Facebook Shrugs Off Fears It's Losing Users*, NPR (Apr. 28, 2022), <https://perma.cc/QR52-2ZSH>.

⁵⁰ *Biden v. Knight*, First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring).

of Facebook and Instagram) CEO Mark Zuckerberg acknowledges, of rival platforms such as TikTok.⁵¹ As such, Facebook hardly constitutes the sort of unavoidable essential facility such as a local landline telephone company (before the rise of cellular telephony) or monopoly railroad facilities⁵² that have traditionally been classified as common carriers under the monopoly theory of common carriage⁵³ (which in any event, as discussed above, is a weak one). And Twitter, with its 229 million active daily users worldwide,⁵⁴ is even less credibly described as a monopoly of that nature—as demonstrated by the fact that, when deplatformed by Twitter, President Trump created his own, competing platform, Truth Social. Yet it was undoubtedly *Twitter's* deplatforming of Donald Trump that triggered Justice Thomas's judicial and Florida and Texas's legislative attacks on social media, given that Twitter was Trump's primary medium of communication to his followers as well as being the subject matter of the *Knight* litigation.⁵⁵ Indeed, the very existence of four (or five if one counts Facebook and Instagram separately despite their common ownership) dominant social media platforms (Facebook, Twitter, Instagram, YouTube, and TikTok) belies the notion that any one of them is a monopoly essential facility. And finally, the fact that Trump continues to post on his new social media platform, Truth Social,⁵⁶ also demonstrates beyond doubt that Twitter, or for that matter Facebook, are not the sorts of non-bypassable networks or services that have historically triggered common carrier treatment.

⁵¹ Bond, *supra* note 49.

⁵² See *United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383 (1912).

⁵³ Justice Thomas seeks to avoid this conclusion by arguing that toll bridges and trains were also bypassable since “a person always could . . . instead swim the Charles River or hike the Oregon Trail.” *Knight*, 141 S. Ct. at 1225 (Thomas, J., concurring). Presumably the point of this exaggerated analogy is that Facebook (or Twitter?) is so unlike any other communications options that it is effectively impossible not to rely upon it. But Justice Thomas entirely fails to explain why that is so given the existence of many other platforms, large and small, and the fact that there are no physical or insurmountable financial barriers to creating new ones (as President Trump's Truth Social platform demonstrates).

⁵⁴ *Twitter Daily User Growth Rises as Musk Readies To Take Control*, AL JAZEERA (April 28, 2022), <https://perma.cc/XC3J-SKYW>.

⁵⁵ *Knight*, 141 S. Ct. at 1221 (Thomas, J., concurring).

⁵⁶ Brent D. Griffiths, *Trump Rattles Off a Dozen Livid Social media Posts in 2 Hours as Ex-Aide Gives Explosive Testimony to January 6 Panel: 'A Total Phony!!!'*, YAHOO! NEWS (June 28, 2022), <https://perma.cc/YHD3-G5GD>.

Aside from market power, the factors Justice Thomas identifies as relevant to common carrier status are whether the business “holds itself out as open to the public,” is “of public interest,” is in the transportation or communications sectors, or has received “special government favors.”⁵⁷ But Justice Thomas himself concedes that “of public interest” is a meaningless standard⁵⁸ (and as noted above, the Court as a whole so held in 1934). And as for the fact that social media platforms are in the communications sector, no one seriously believes that all communications companies are common carriers. After all, all media companies—including newspapers such as the *New York Times* and cable channels such as Fox News—are involved in “communications” but, everyone appears to agree, cannot be subjected to common carriage regulation. And as also noted above, the Supreme Court has specifically rejected common carrier status for television broadcasters and cable-television operators,⁵⁹ both undoubtedly in the “communications” business. In other words, being in the transportation or communications sectors is neither necessary (see inns), nor sufficient (see cable and broadcasting) to be classified as a common carrier.

That leaves “government favors” and “holding out.” Let us begin with the latter because, as discussed above, it is the most plausible candidate for the traditional definition of common carriers. But again, obviously not all businesses that serve the public indiscriminately are common carriers—see Walmart. Even within “communications” companies, being open to the public generally (as the Fox News website is) obviously cannot suffice. This is the insight underlying the D.C. Circuit’s analysis in *NARUC II* and the FCC’s previous analysis. According to both of them, the key to common carrier status is that customers of the communications service at issue “communicate or transmit intelligence of their *own* design” and to their own destination of choice.⁶⁰ Without that indifference to content on the part of the communications service, common carriage is a nonstarter.

But now consider the absurdity of the argument that social media platforms are common carriers. Justice Thomas and the States of Florida and Texas object to social media platforms because they “discriminate against”—*i.e.*, refuse to carry—

⁵⁷ *Knight*, 141 S. Ct. at 1222–23 (Thomas, J., concurring); *supra* Part I.

⁵⁸ *Id.* at 1223 (Thomas, J., concurring).

⁵⁹ See *supra* notes 34 & 35 and accompanying text.

⁶⁰ Report and Order, *supra* note 40.

certain conservative content, and refuse to serve certain conservative customers (in particular, President Trump). Furthermore, conservative voices object that social media firms choose to emphasize certain content, while deemphasizing other, disfavored content. In other words, the conservative argument is that social media platforms are or should be common carriers because they do precisely what a common carrier does not, which is having the service itself decide what content to carry and where to send it. In short, the Thomas/Florida/Texas argument is that social media platforms are common carriers because they are not common carriers. To quote Justice Robert Jackson from a very different context, himself quoting Mark Twain, “The more you explain it, the more I don’t understand it.”⁶¹

Finally, we come to “special government favors” as the basis for common carrier status.⁶² It is certainly true that traditional common carriers such as railroads and telephone companies were often granted special franchises or licenses, often with monopoly status, or special governmental powers such as eminent domain⁶³—but obviously none of that has any relevance to social media platforms. So in what sense do such platforms receive special “favors”? Justice Thomas does not himself much elaborate on this argument in his *Knight* concurrence, but the article he cites by Professor Adam Candeub does. Professor Candeub argues that historically, what appears to define common carriage “is a bargain that gives special liability breaks in return for the carrier refraining from using some market power to further some public good.”⁶⁴ And with respect to social media platforms, Candeub argues that the common carrier “bargain” can be found in Section 230 of the Communications Decency Act, which limits platform liability for third party content.⁶⁵ So, it is to Section 230 that we should turn now.

Section 230, adopted in 1996, has been described as “the twenty-six words that created the internet.”⁶⁶ It has two crucial provisions. The first, Section 230(c)(1), states that “[n]o provider or user of an interactive computer service shall be treated

⁶¹ *Securities & Exchange Comm’n v. Chenery Corp.*, 332 U.S. 194, 214 (1947) (Jackson, J., dissenting).

⁶² *Knight*, 141 S. Ct. at 1223 (Thomas, J., concurring).

⁶³ Candeub, *supra* note 5, at 402–03.

⁶⁴ *Id.* at 405–06.

⁶⁵ *Id.* at 418–22.

⁶⁶ JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* (2019).

as a publisher or speaker of any information provided by another information content provider.”⁶⁷ This provision, which long predates social media platforms but clearly applies to them, effectively means that such platforms cannot be held liable for third-party content that is illegal or harms others. The exact scope of this immunity is, however, disputed. As Candeub points out, while the language of Subsection (c)(1) only prohibits publisher or speaker liability—which can be strict liability, or at a minimum impose a duty of care—courts have interpreted this provision to also bar distributor liability, which only extends to *knowing* distribution of unprotected or harmful materials (*i.e.*, with knowledge of their nature).⁶⁸ Justice Thomas has argued, in another opinion respecting denial of certiorari, that this interpretation is at least open to doubt and should be considered by the Court⁶⁹ (and he is somewhat convincing in this regard⁷⁰); but as of this writing, the Court has yet to take up this important question of statutory interpretation.⁷¹

The second provision, Section 230(c)(2), is a more explicit grant of immunity. It states that no platform or user shall be held liable for “any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.”⁷² Pointing to the phrase “otherwise objectionable,” a number of courts have interpreted Subsection (c)(2) to grant platforms essentially absolute immunity for their content-moderation decisions, so long as they are undertaken in good faith.⁷³ This interpretation is, however, also disputed. Adam Candeub and Eugene Volokh have argued that the *eiusdem generis* interpretive canon—that general words following specific words should be read to encompass only things similar to the specific enumerated items—argues for a narrower definition of the phrase

⁶⁷ 47 U.S.C. § 230(c)(1).

⁶⁸ Candeub, *supra* note 5, at 423–24.

⁶⁹ *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S. Ct. 13, 15–16 (2020) (statement of Thomas, J., respecting denial of certiorari).

⁷⁰ See Candeub, *supra* note 5, at 424–25.

⁷¹ *Doe v. Facebook*, 142 S. Ct. 1087 (2022) (statement of Thomas, J., respecting denial of certiorari) (again calling for the Court to take up the meaning of § 230(c)(1)).

⁷² 47 U.S.C. § 230(c)(2)(A).

⁷³ Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. § 230(c)(2)*, 1 J. FREE SPEECH L. 175, 177 (2021).

“otherwise objectionable.” Specifically, they argue that this language only refers to things objectionable for reasons similar to things that are “obscene,” “lewd,” etc.,⁷⁴ and so does not protect content moderation based on “political content,” even if “offensive or dangerous.”⁷⁵ Leaving aside the question of whether speech praising political violence (the claimed reason for Trump’s deplatforming) is sufficiently similar to speech that is “excessively violent,” this reading would at a minimum deny platforms immunity from blocking hate speech (unless, that is, it is directed at individuals and so arguably constitutes harassment).

The proper interpretations of the two provisions of Section 230 are topics beyond the scope of this paper. The question at hand is whether Candeub’s argument that Section 230 should be treated as a “bargain” granting platforms immunity in exchange for potential regulation as a common carrier is plausible. I will argue that while this is the best argument available for platform common carriage, ultimately it does not convince. First of all, if we adopt the narrower interpretations of Section 230(c)(1) and (2) advanced by Thomas, Candeub and Volokh, the argument for common carrier status clearly fails. Under these readings, platforms would remain liable for the transmission of information they know, or have reason to know, are subject to liability; and their immunity for content moderation would be exceedingly modest, limited primarily to sexually explicit or violent materials. Common carrier status, however, would require platforms to carry any and all legal materials. Under this reading, therefore, platforms would risk liability either if they transmit materials they had reason to know were unprotected, *or* if they mistakenly block non-sexual or violent materials because of a mistaken judgment that they were potentially harmful. Given the scale at which social media platforms operate, and the consequent inevitability of errors in both directions, such a legal regime would be effectively impossible to comply with. At a minimum, imposing it would surely raise very serious First Amendment concerns, and in practice may completely doom social media as a technology.

Suppose, however, that the dominant, current judicial interpretations of Section 230, which grant platforms almost complete immunity for third-party content and for good-faith content moderation, hold. Would it then be reasonable to impose common carriage as a quid pro quo? While the question is closer (since in this

⁷⁴ *Id.* at 178–79.

⁷⁵ *Id.* at 184.

world platforms could actually operate), there remains a fundamental and irreconcilable contradiction. The problem is this—common carriage is a legal regime whereby platforms would be required to carry any and all legal content. Its very purpose is to eliminate content moderation. But under its broad, currently dominant interpretation, the very purpose of Section 230(c)(2) was to *encourage* content moderation in order to prevent the internet and platforms from degenerating into sewage (on which more in the next Part of this essay). In particular, the broader reading permits, and indeed encourages, platforms to block content that they, in good faith, believe is hateful or highly offensive. But this kind of hate, as the Supreme Court has repeatedly (and recently unanimously) held, is a viewpoint protected by the First Amendment.⁷⁶ Thus, the very purpose of common carriage regulation as proposed by Justice Thomas (and enacted by Florida and Texas)—to prevent platforms from discriminating based on viewpoints—is the conduct that Congress, on the broader reading of Section 230(c)(2), intended to encourage and protect. In other words, this particular “bargain,” Section 230 immunity in exchange for common carriage status, is not just implausible, but incoherent.

In short, there is simply no plausible argument that social media platforms are or should be considered analogous to historical common carriers. They bear essentially no similarities to such carriers (other than engaging in “communications”), and certainly do not function as carriers of user-selected content, indifferent to content themselves, that characterize traditional common carriers such as telephone companies. Indeed, that lack of transparency is the very objection to platforms that conservative critics advance. The question we turn to now is what this conclusion implies for the Florida and Texas legislation described in Part I.

B. Implications

Very simply, the lack of any plausible historical analogy between modern social media platforms and traditional common carriers dooms both the Florida and Texas social media legislation. The reasoning is straightforward. Social media platforms are privately owned expressive mediums that, for reasons I have explained elsewhere, presumptively enjoy First Amendment editorial rights⁷⁷ (which were

⁷⁶ *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (plurality opinion); *id.* at 1766 (Kennedy, J., concurring in part and concurring in the judgment); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 391–92 (1992).

⁷⁷ See Bhagwat, *supra* note 12.

legislatively bolstered by Section 230(c)(2)). The question then becomes whether the States of Florida and Texas overcome those rights by legislatively classifying such platforms as “common carriers” or “places of public accommodation.” The clear answer that the Supreme Court has given is that they may not, unless there is some logical/historical basis for doing so—which the previous subsection demonstrates there is not.

The two key cases establishing this point are *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*⁷⁸ and *Boy Scouts of America v. Dale*.⁷⁹ In *Hurley*, a group of gay, lesbian and bisexual individuals of Irish descent formed an organization named GLIB, which sought to participate in Boston’s annual St. Patrick’s Day parade in a way that would express their pride in their openly gay, lesbian and bisexual identities as well as in their Irish heritage. After the organizers of the parade (a private group) denied their application, GLIB filed a lawsuit claiming that the denial violated a state law forbidding discrimination on account of sexual orientation by places of public accommodation.⁸⁰ Massachusetts state courts concluded that the parade constituted a place of public accommodation, that GLIB’s exclusion violated the antidiscrimination statute, and that application of the statute did not violate the parade organizers’ rights of expressive association because the parade lacked “any specific expressive purpose.”⁸¹ The United States Supreme Court, however, unanimously reversed, finding that application of the law violated the parade organizers’ First Amendment rights. The Court reasoned that because the St. Patrick’s Day parade, like most parades, was expressive in nature, inclusion of GLIB effectively forced the parade organizers to express a message with which it disagreed, thereby violating their right against compelled speech.⁸²

Two important points about the *Hurley* decision are worthy of highlighting. The first is the nature of the parade organizers’ “speech.” The parade organizers conceded, as they had to, that the actual participants in the St. Patrick’s Day parade were third parties rather than the organizers themselves. The Court, however, concluded that this was irrelevant because the selection of what third-party messages

⁷⁸ *Hurley v. Irish-Am. Gay, Lesbian Bisexual Group of Boston*, 515 U.S. 557 (1995).

⁷⁹ *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

⁸⁰ *Hurley*, 515 U.S. at 561.

⁸¹ *Id.* at 562–64.

⁸² *Id.* at 573–74.

to include within the parade was itself First-Amendment-protected expressive activity. In doing so, it analogized the organizers' decisions to the First Amendment right of cable-television operators to choose what channels to carry,⁸³ the First Amendment right of newspaper editors to choose what outside opinions to publish,⁸⁴ and the right of newspaper editors to select what paid, noncommercial advertisements to publish.⁸⁵ *Hurley* was decided in the infancy of the internet, well before social media, but the analogy to social media platforms is obvious.

The second, even more important point is the role of public accommodations law in the Court's decision. In *Hurley* the Court was, of course, bound by the state courts' conclusion that under Massachusetts state law a parade constituted a place of public accommodation; but importantly, this fact had no impact on the Court's analysis. The Court held that even though it may be permissible to apply antidiscrimination statutes to forbid places of public accommodation from excluding individuals based on their status—in this case, sexual orientation—that was not relevant because the parade organizers stated, without contradiction, that they had no objection to homosexuals participating in the parade as individuals. Here, however, the application of the law effectively forced the parade not to include particular individuals, but to include a particular message (of tolerance). Put differently, the application of the law in *Hurley* did not force the parade organizers to include people it disliked (perhaps a permissible application—though *Dale* raises doubt on this point, as we shall see), but rather a viewpoint that it disagreed with. This, *Hurley* held, was something the state could not do through the application of its public-accommodation statute.⁸⁶ But of course, what Florida and Texas are trying to do through SB 7072 and HB 20 is to force social media platforms to carry viewpoints that the platforms disfavor by the expedient of declaring them common carriers—precisely what the *Hurley* Court unanimously (including, it should be noted, Justice Thomas) forbade.

Boy Scouts v. Dale, while not as on-point as *Hurley*, also supports the conclusion that applying the label “common carrier” or “place of public accommodation”

⁸³ *Id.* at 570 (citing *Turner Broad. System, Inc. v. FCC (Turner I)*, 512 U.S. 622, 636 (1994)).

⁸⁴ *Id.* (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974)).

⁸⁵ *Id.* (citing *New York Times v. Sullivan*, 376 U.S. 254, 265–66 (1964)).

⁸⁶ *Id.* at 572–75.

does not eliminate First Amendment rights. James Dale was an assistant scoutmaster (and former Eagle Scout) who, while in college, came out as gay and took a leadership position in his school's Gay/Lesbian Alliance. When the leadership of Dale's scout troop discovered this, they revoked his adult scout membership and scoutmaster position.⁸⁷ Dale then sued the Boy Scouts in New Jersey state court, invoking the state's public-accommodations law. Ultimately, the New Jersey Supreme Court ruled in Dale's favor. It held that the Boy Scouts were a place of public accommodation under state law, and that therefore the Scouts had violated the state's ban on discrimination on the basis of sexual orientation by their actions. Finally, the state Supreme Court rejected the Scouts' claim that application of the law violated their First Amendment right of expressive association, concluding that the Boy Scouts did not actually have a shared goal to express or teach the view that homosexuality was immoral.⁸⁸

The United States Supreme Court then granted certiorari and reversed the New Jersey court's decision on First Amendment grounds by a 5–4 vote (with Chief Justice Rehnquist writing the majority opinion). The majority concluded that it should defer to the Boy Scouts both in their assertion that they held a view hostile to homosexuality,⁸⁹ and in their assertion that inclusion of Dale in their organization in a leadership position would interfere with their association's ability to express that view.⁹⁰ Finally, on the question of whether application of a state public-accommodations statute under these circumstances violates the First Amendment, the majority emphasized that New Jersey's extension of the concept of places of public accommodations from traditional places such as "inns and trains" to the Boy Scouts was a new and unusual step.⁹¹ It then distinguished previous expressive-association cases, in which First Amendment challenges to antidiscrimination legislation had been rejected, on the grounds that here, unlike in those cases, application of the law would seriously burden the Scouts' First Amendment rights, apparently

⁸⁷ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644–45 (2000).

⁸⁸ *Id.* at 646–47.

⁸⁹ *Id.* at 651–53.

⁹⁰ *Id.* at 653.

⁹¹ *Id.* at 656–57.

even if Dale said nothing about his sexual orientation during scouting events.⁹² Finally, citing *Hurley*, the Court concluded that New Jersey’s interest in combatting discrimination “do[es] not justify such a severe intrusion on the Boy Scouts’ rights to freedom of expressive association.”⁹³

Like *Hurley*, the *Dale* decision thus clearly stands for the proposition that legislatures, and courts, cannot strip entities of First Amendment protections, including the right to exclude, simply by designating them as places of public accommodation. Furthermore, *Dale* supports the proposition that such a move is particularly suspect when a state extends the “places of public accommodation” designation well beyond historical parameters. *Dale* was, admittedly, a close case invoking a four-Justice dissent; but the reason for that cuts against, not in favor of, the Florida and Texas social media legislation. *Dale* was close because, unlike in *Hurley*, the New Jersey legislation did not explicitly require the Scouts to express or incorporate a message or viewpoint of which they disapproved; it only forbade them from ejecting Dale based on his status as a homosexual. Crucially, as Justice Stevens’s dissent points out, there was absolutely no evidence in the record that “Dale had ever advocated a view on homosexuality to his troop before his membership was revoked.”⁹⁴ And all nine Justices in *Dale* appear to agree that Dale had no right to do so—in other words, that the Boy Scouts had an absolute First Amendment right to prohibit its leadership from advocating, in their role as Boy Scout leaders, any discussion of homosexuality or sexuality more broadly.⁹⁵ But, of course, that is precisely what Florida and Texas are seeking to do—to force social media platforms to host viewpoints of which they disapprove. *Hurley* and *Dale* together foreclose that option.

The primary Supreme Court precedents generally advanced in opposition to

⁹² *Id.* at 658.

⁹³ *Id.* at 659.

⁹⁴ *Id.* at 689 (Stevens, J., dissenting).

⁹⁵ *Id.* at 688 (Stevens, J., dissenting).

this conclusion are *PruneYard Shopping Ctr. v. Robins*,⁹⁶ *Turner Broadcasting System v. FCC*,⁹⁷ and *Rumsfeld v. FAIR*,⁹⁸ all of which upheld laws requiring owners of private property to open that property up to speakers.⁹⁹ For reasons that I will briefly explain, however, each of these cases is readily distinguishable; and indeed, one of them (*Turner*) supports the argument made here regarding platform common carrier status.

PruneYard arose when a shopping center owner in California sought to prevent high school students from distributing political pamphlets and soliciting signatures in the shopping center. The California Supreme Court held in favor of the students on the grounds that the free speech provision of the California state constitution protected the exercise of free speech and petition rights even on private property if it was open to the public and the activities did not interfere with its regular use.¹⁰⁰ The shopping center owners then argued that this holding violated *their* First Amendment right against compelled speech. The United States Supreme Court, however, easily rejected this argument because it concluded that the California constitution did not force the shopping center owners to express any views, much less views of the government's choosing, and did not interfere with any editorial function that was being exercised at the time by the owners.

PruneYard obviously cannot stand for the proposition that the government can always force property owners to host speech of which they disapprove, because then *Hurley* (as well as compelled speech cases such as *Wooley v. Maynard*¹⁰¹ and *Pacific Gas & Elec. Co. v. Pub. Util. Comm'n*¹⁰²) would be clearly wrong—but they remain

⁹⁶ *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

⁹⁷ *Turner* was actually two decisions: *Turner I*, 512 U.S. 622 (1994), and *Turner Broad. System, Inc. v. FCC (Turner II)*, 520 U.S. 180 (1997).

⁹⁸ *Rumsfeld v. Forum for Acad. & Institutional Rts., Inc.*, 547 U.S. 47 (2006).

⁹⁹ See, e.g., Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 415–19 (2021) (relying on all three cases); *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1215 (11th Cir. 2022) (noting that the State of Florida cited *PruneYard* and *Rumsfeld* in support of the constitutionality of S.B. 7072).

¹⁰⁰ *PruneYard*, 447 U.S. at 77–78.

¹⁰¹ *Wooley v. Maynard*, 430 U.S. 705 (1977). In *Wooley*, the Court struck down a New Hampshire law that prohibited car owners from covering up the state motto “Live Free or Die” on their automobile license plates.

¹⁰² *Pacific Gas & Elec. Co. v. Pub. Util. Comm'n (PG&E)*, 475 U.S. 1 (1986). In *PG&E*, the Court

good law. The obvious point distinguishing *PruneYard* from these cases is that the property at issue in *Pruneyard*—a shopping center open to the public—was not meaningfully expressive in nature, unlike the parade in *Hurley*, license plate in *Wooley*, or even the billing envelope in *Pacific Gas & Electric* (which the plaintiff utility had previously used to distribute its own newsletter). That is why the Court so readily rejected the idea that shopping-center owners performed editorial functions, stating that such “concerns *obviously* are not present here.”¹⁰³ But, to also state the obvious, social media platforms are intrinsically expressive, and platform operators regularly exercise editorial functions (which is precisely the “problem” that Florida and Texas are seeking to “solve”). As such, *PruneYard* does not alter the conclusion that under *Hurley*, requiring amalgamators of third-party content to host disfavored viewpoints violates the First Amendment.

Leaving aside the *Turner* case, to which I will return, *Rumsfeld* is off point for much the same reason as *PruneYard*. In that case, the Court unanimously rejected a First Amendment challenge to a federal law that denied federal funding to any institution of higher learning that restricted military recruiters’ access to their students (the law was passed in response to the actions of many law schools in denying access to military recruiters because of the military’s now-repealed policy of discriminating against LGBTQ individuals).¹⁰⁴ The Court noted that the federal statute did not force law schools to express any message, or prevent them from expressing their opposition to the military’s policies.¹⁰⁵ More significantly, when distinguishing “compelled hosting of speech” cases such as *Hurley* and *PG&E*, the Court noted that “schools are not speaking when they host interviews and recruiting receptions. Unlike a parade organizer’s choice of parade contingents, a law school’s decision to allow recruiters on campus is not inherently expressive.”¹⁰⁶ And this is surely correct (as to the narrow activity of hosting recruiters—obviously colleges and universities in general are highly expressive). The purpose of hosting recruiters is to get students jobs, not to send a “message” or prefer favored messages. Law schools

invalidated a regulatory requirement that a local utility include in its billing envelopes to customers materials prepared by critics of the utility.

¹⁰³ *PruneYard*, 447 U.S. at 88 (emphasis added).

¹⁰⁴ *Rumsfeld v. Forum for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 51 (2006).

¹⁰⁵ *Id.* at 61–62.

¹⁰⁶ *Id.* at 64.

routinely host law firms that litigate on behalf of both liberal and conservative political causes, firms associated with corporate clients, and do-gooder nonprofits. And even law schools that excluded military recruiters did not do so because of the military's "viewpoints," but rather because of their *actions* in discriminating against LGBTQ students. So, again, the nonexpressive nature of the regulated activity crucially distinguishes *Rumsfeld* from cases such as *Hurley*, and of course from social media platforms.

Finally, consider *Turner*. In those cases, the Court upheld a federal statute and implementing regulations (jointly called "must-carry") that required cable-television operators to carry the signals of local television-broadcast stations free of charge. Cable television is, of course, an expressive medium, and so *Turner* is not as easily distinguished as *PruneYard* and *Rumsfeld*. But as it turns out, *Turner*'s reasoning supports rather than cuts against platform First Amendment rights. Most importantly, the Court clearly held in *Turner I* that cable operators possess First Amendment rights to control what content they carry, despite the fact that cable operators (like social media platforms) carry almost exclusively third-party content.¹⁰⁷ Secondly, in ultimately upholding must-carry rules, the Court emphasized that the rules were content-neutral and did not seek to favor particular content or viewpoints¹⁰⁸—*i.e.*, must-carry did not seek to interfere with cable operators' preferences regarding the content they carried, but rather sought to prevent operators from engaging in anticompetitive conduct by disfavoring a potential competitor technology.¹⁰⁹ In that sense, the *Turner* decisions reflect the same basic reasoning of *Associated Press v. United States* upholding the application of anticompetition law to media entities.¹¹⁰

Of course, the impact of must-carry *might* be that cable operators had to host disfavored content, but that would be an incidental effect at most (and, frankly, an unlikely one given the anodyne content of most local television broadcast channels). In contrast to must-carry, however, the very *purpose* and direct, non-incidental effect of the Florida and Texas platform legislation is precisely to require social media platforms to host viewpoints of which they disapproved, which is a very

¹⁰⁷ *Turner I*, 512 U.S. 622, 636–37 (1994).

¹⁰⁸ *Turner II*, 520 U.S. 180, 186 (1997) (quoting *Turner I*, 512 U.S. at 643).

¹⁰⁹ *Id.* (quoting *Turner I*, 512 U.S. at 649).

¹¹⁰ *Associated Press v. United States*, 326 U.S. 1 (1945).

different (and unconstitutional) kettle of fish. It is the difference between a law prohibiting certain conduct (say, camping) which incidentally interferes with a protest message, and a law which is specifically directed at the message.¹¹¹

One final point on the distinction between direct speech regulation and incidental effects. Congress is currently considering legislation prohibiting certain forms of anticompetitive conduct—in particular, “self-preferencing” by dominant platforms of their own products or services over competitors. In an important *Washington Post* op-ed, Professors Jane Bambauer and Anupam Chander point out that the impact of the law might be to interfere with Apple and Google’s ability to exclude from their app stores services and apps that distribute disinformation and hate speech (as those stores did with the Parler app following the January 6 insurrection at the Capitol).¹¹² The concerns that Bambauer and Chander raise are both realistic and concerning. But, under the analysis set forth here, this impact would not raise any *First Amendment* (as opposed to policy) issues, so long as the legislation has neither the purpose nor direct (as opposed to incidental) effect of favoring apps carrying particular content.

In conclusion, then, it should be clear that under well-established Supreme Court precedent, states (or Congress) cannot strip expressive entities or platforms of First Amendment rights simply by designating them as “common carriers” or “places of public accommodation.” Such entities and platforms remain subject to generally applicable laws not targeted at expression, such as antitrust laws (subject, perhaps, to the relatively deferential scrutiny applicable to laws with incidental effects on speech). But what Florida and Texas have done, which is to attempt direct interference with the core of platforms’ First Amendment editorial rights, is clearly unconstitutional.

III. WHY SOCIAL MEDIA PLATFORMS SHOULD NOT BE COMMON CARRIERS

To understand why Justice Thomas’s proposal to treat platforms as common

¹¹¹ Cf. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984) (upholding a National Park Service regulation prohibiting overnight sleeping in certain parks in Washington, D.C., as applied to a group which wished to create tent cities in those parks, and sleep in the tents, to protest homelessness).

¹¹² Jane Bambauer & Anupam Chander, *Bills Meant to Check Big Tech’s Power Could Lead to More Disinformation*, WASH. POST (June 6, 2022).

carriers, and Florida's and Texas's steps in that direction, are not only unconstitutional but also terrible public policy, it is useful to envision what the world would look like if these proposals *did* become implemented. Would that world be a better one than the admittedly imperfect status quo? Proponents of regulation appear to believe so (or so one must assume); but they are clearly wrong.

Let us begin first with Justice Thomas's far-reaching proposal to fully regulate social media platforms as common carriers or places of public accommodation, on par with railroads, landline telephony, and telegraphs. At the core of such regulation is a requirement of non-discrimination—an obligation to serve all customers without distinction and on identical terms, so long as the provider has capacity to do so¹¹³ (presumably Justice Thomas is not in support of extending modern, statutory regulations of common carriers such as rate regulation and tariff-filing requirements to platforms). As applied to social media, what this would mean is that platforms would be required to carry any and all (legal?) content posted by any person who is or seeks to be a platform user (capacity constraints not being an issue in the online world). What would this look like?

First, let us consider the potential caveat limiting platform hosting obligations to *legal* content. While the issue is rarely directly addressed, proponents of platform regulation appear to implicitly assume that even under common carrier regulation, platforms could and would refuse to host blatantly illegal content such as child pornography or violent threats. But it is not clear what the basis of this assumption is. After all, when terrorists use telephone calls to plan an attack, or insurrectionists travel by airplane or railroad to attack the Capitol, no one holds the telephone company, airline, or railroad responsible for the resulting violence, even if they had reason to know that illegal activities were afoot. The reason is that imposing such policing obligations on common carriers seems deeply problematic given their broader obligation to serve. Why then should platforms be different? If platforms are regulated as common carriers, they will presumably dismantle the elaborate content-moderation machinery that they have created.¹¹⁴ After all, content moderation is a fraught, expensive, and controversial process, so if platforms' ability to engage in such moderation is severely restricted, they will surely not bother with

¹¹³ *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1222 (2021) (Thomas, J., concurring).

¹¹⁴ See Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1625–30 (2018).

the expense. But once the content-moderation machinery is dismantled, how and why would platforms suppress illegal content? Left to their own devices, one strongly suspects that they would not.

A possible response to this argument is that platforms should simply be subject to a legal obligation to block illegal content, while carrying all legal content. But this is also highly problematic. The difficulty arises because, as Eric Goldman and Jess Miers have pointed out, the line between protected and unprotected content is often very blurry.¹¹⁵ When a communication crosses the line from hyperbole to a “true threat,” for example, is often unclear.¹¹⁶ And even when the legal line is clear, it is often quite difficult to determine if content is illegal—for example, whether it is unprotected child pornography portraying a minor in a sexual situation,¹¹⁷ or protected “virtual child pornography” depicting a young-looking adult.¹¹⁸ But under a regulatory approach combining common carriage with an obligation to block illegal content, platforms would be liable *either* if they fail to block illegal content or if they mistakenly blocked legal content thinking it is illegal. Such a legal regime is both profoundly unfair and entirely unsustainable.

Leaving aside the problem of illegal content, however, even with respect to unquestionably legal and constitutionally protected content, common carriage would have highly problematic consequences. As Goldman and Miers also point out, the world is full of content that is “lawful-but-awful,” and the internet may be particularly likely to be used to spread such content (perhaps because of the pseudo-anonymity of being online).¹¹⁹ Such content includes non-obscene pornography, hate speech, bullying that does not rise to the level of harassment or threats, and of course lies galore about just about anything, including dangerous lies such as medical misinformation. Such content is definitionally legal (because it is constitutionally protected, in most cases), and so a common-carriage requirement would entirely eliminate social media platforms’ power to block, or even de-amplify such content—de-amplify because common carriers are required to provide service to

¹¹⁵ 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, 204–07 (2021).

¹¹⁶ See, e.g., *Elonis v. United States*, 575 U.S. 723 (2015).

¹¹⁷ *New York v. Ferber*, 458 U.S. 747 (1982).

¹¹⁸ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

¹¹⁹ Goldman & Miers, *supra* note 115, at 208–09.

all users on equal terms, on a first-come, first-served basis. In the world of social media, this means serving *all* legal content because, for the major platforms, capacity constraints are a non-issue. If, however, platforms were forced to host and display such content on equal terms with all other content, it seems highly likely that all but the worst users will flee the platforms, leading to platforms' demise. Whether or not social media is on balance socially beneficial, the precedent of the government effectively destroying a new form of communicative media through regulation seems to set a truly terrible precedent, putting aside constitutionality.

Perhaps because they recognized these problems, the Florida and Texas legislation, while giving a nod to the notion that social media platforms operate as "common carriers," in fact both stopped well short of true common carriage requirements. Nonetheless, both laws would, if implemented, have highly problematic consequences. The problem with Florida's law is, frankly, that it is bizarre. The special protections it provides to speech by or about politicians suggests that in the view of the Florida legislature, elected officials are more important contributors to public discourse than the citizens who vote them into office. How such an approach can be reconciled with the basic premises of popular sovereignty that underlie our system of government is beyond understanding. If James Madison was correct in asserting that "[p]ublic opinion sets bounds to every government, and is the real sovereign in every free one,"¹²⁰ then Florida's law—which favors elected officials over ordinary citizens in the process of setting public opinion by only protecting politicians from deplatforming, and only protecting politicians' posts about public policy (as opposed to about the politicians themselves)—has it upside-down.

Finally, let us consider Texas's requirement of viewpoint neutrality in content moderation. On its face, this seems a narrower and more reasonable restriction than full common carriage, since it would presumably still permit platforms to block some forms of lawful-but-awful content, such as nudity or personal abuse, on a viewpoint-neutral basis. But viewpoint neutrality nonetheless prohibits a great deal of desirable content moderation. For example, speech praising and supporting ISIS, and encouraging emulation of terrorist violence, is clearly a viewpoint that the Texas law would protect. It is ironic in this regard that Twitter, which in its early years avoided content moderation, changed its approach precisely because Twitter

¹²⁰ James Madison, *Public Opinion*, NAT'L GAZETTE (Dec. 19, 1791), <https://perma.cc/T92L-ZXM6>.

had become an important source of ISIS propaganda and recruitment.¹²¹ In the name of protecting conservatives, the Texas statute would *force* Twitter (and Facebook and YouTube and all other platforms) back to that time.

For similar reasons, platform efforts to block hate speech directed at racial or sexual minorities or at women would be illegal under the Texas statute. The Supreme Court has clearly held that hate-speech bans are viewpoint-based.¹²² As a result, a hate-speech ban on social media would directly violate the primary provisions of HB 20. To give just one example of the consequences of this, under HB 20, Facebook would be required to reverse its decision from October of 2020 to ban Holocaust denial.¹²³ Indeed, because HB 20 prohibits censorship based on the viewpoint of the user, it would also appear to prohibit platforms from banning white supremacist groups such as the Ku Klux Klan (KKK) from their platform.

In short, there are very good reasons, both ethical and business-related, why almost all successful social media platforms moderate content, often extensively. Eliminating that ability, as Justice Thomas's common carrier proposal would do, would have utterly unacceptable social consequences. Furthermore, even Texas's more modest requirement of viewpoint-neutral content moderation would also end up enabling a great deal of speech, such as terrorist propaganda and white supremacist speech, that all reasonable people agree causes great harm. Which is to say that these proposals are not just unconstitutional, they are a terrible idea.

CONCLUSION

In his separate opinion in *Biden v. Knight Institute*, Justice Thomas expressed concerns about the degree of control that a handful of social media platforms exercise over political discourse, and suggested common carrier regulation as a potential solution to this perceived problem. There is no question that the concerns Justice Thomas expressed are widely shared and have a reasoned basis (though Justice Thomas exaggerates the amount of control that any one platform has or can exercise over discourse, given the plurality of platforms and low entry barriers). In this

¹²¹ Julia Greenberg, *Why Facebook and Twitter Can't Just Wipe Out ISIS Online*, WIRED (Nov. 21, 2015), <https://perma.cc/T263-YKUW>.

¹²² *Matal v. Tam*, 137 S. Ct. 1744, 1766–67 (2017) (Kennedy, J., concurring in part and concurring in the judgment); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391–92 (1992).

¹²³ Monika Bickert, VP of Content Policy, *Removing Holocaust Denial Content*, FACEBOOK (Oct. 12, 2020), <https://perma.cc/X5QK-T3SC>.

paper, I have argued that his proposed solution, however, is both unconstitutional and a bad idea, and that the same is true of the two statutes that Florida and Texas adopted in response to Thomas's proposal. Those laws, and any others like them, appear headed for rapid judicial invalidation, and that is a very good thing. Social media platforms, in short, are not common carriers, and cannot be forced to become ones by legislative fiat so long as the First Amendment remains in force.

Of course, this leaves open the question of what the proper social response *is* to the problem of private platform power. Heavy-handed government regulation is clearly not the answer, but that does not mean that the government has no role to play here. Continued, careful enforcement of antitrust laws, including perhaps reversing some previous platform consolidations (such as Facebook's purchase of Instagram) should certainly be on the table. Furthermore, like all other important institutions, social media firms should and can continue to be subject to public oversight and criticism. Hopefully, that will be enough.