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Jim Speta and Ro Khanna Ask:

REGULATING INTERNET PLATFORM DISCRIMINATION

Is There a Lawful and Effective Way?

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

BY JAMES B. SPETA

Let me begin by saying that I'm grateful to Marquette Law School for the invitation to deliver the Robert F. Boden Lecture and to everyone who has made this experience possible. I'm honored to speak in this series, which has featured so many leading academics. And I feel connected to it, at least in the sense that I understand one of Dean Boden's distinguishing characteristics to have been his commitment to practical education—to the insistence that a law school's exploration of theory must serve the profession and prepare students for the practice.

I come to legal academia as a practicing lawyer, and here is the most important way in which Dean Joseph Kearney's invitation is so meaningful: I had the great privilege to learn lawyering with and alongside him, in the early to mid-1990s, and I've marveled at his and Marquette's successes during his long deanship and at the commitment to educating new lawyers—Marquette lawyers, as I know you say around here. He is also, as I'm sure you know, simply one of the most well-respected and admired deans across the American legal academy.

Legend has it (and this has some support from the *Marquette Lawyer* magazine) that, a few years ago, a Boden lecturer—now the dean of Yale Law School no less—was instructed to speak for precisely 43 minutes. Whether I meet that precise mark, we hope to have time remaining in our hour to open the floor to questions and discussion. The matters at hand are very current and very important.

Jim Speta is the Elizabeth Froehling Horner Professor at Northwestern University Pritzker School of Law. In September 2022, he delivered Marquette Law School's annual Robert F. Boden Lecture. The following is a lightly edited version of that lecture, interspersed with brief responses from various legal academics. The feature concludes with a question-and-answer session between Speta and Congressman Ro Khanna (of California), who himself has written extensively with respect to internet law and policy.



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INTRODUCTION

My subject for today is the dominance of the internet platforms and, together with that, various proposals that would regulate the content and viewpoint of those platforms. Indeed, the currency of our topic was emphasized just this past Friday (September 16, 2022), when a Fifth Circuit panel upheld a Texas state law which imposed common-carrier requirements on the largest internet platforms. The court found this consistent with the First Amendment. This had been the first statute of its kind, and this was the first decision upholding such regulation. Earlier this year, the Eleventh Circuit reached exactly the opposite conclusion involving a nearly identical Florida statute—holding that statute unconstitutional. (Both cases have NetChoice, LLC, as the lead plaintiff, so I shall refer to them by circuits rather than by names.)

These statutes and the broader policy debate raise central questions about the speech ecosystem that we now have in this country and the ecosystem we would like to create. In this lecture, I will address both the dominance of the internet platforms and the calls to regulate those platforms as common carriers.

To begin to define our terms: this reference to the *platforms* means the dominance by Google and Facebook, by Amazon and Apple (and to a lesser extent by Twitter and Microsoft), over the ways we receive information, exchange it, even understand it. The main concern is that these platforms are biased, that they discriminate, that they foreclose speech.

That is why, today, platform critics—including governments—are reaching for the traditional law of railroads and of telephone companies: the law of common carriage. That once-dominant law forbade discrimination. In addition to the Texas and Florida statutes—again, one so far upheld and one struck down—a Supreme Court justice has written in favor of platform-focused common-carrier regulation, as have numerous federal and state lawmakers, some academics, and many commentators. Bills have been offered or are pending in Congress and in many states, including here in Wisconsin.

The proposals for common-carrier regulation of platforms seem to me very right—and very wrong. They are right to worry about the dominance of internet platforms. And they are right that common-carrier law—even though it smells musty and has largely been discarded in the United States over the past few decades—can be part of the solution.

Yet I think the proposals are very wrong to target common-carrier solutions at the platforms' core operations themselves—to change the ways in which users are permitted access, content is moderated, and search results are provided. Such platform regulation does not fit the common-carrier model. Platforms are not merely conduits of user behavior, although they are partly that.

Platforms *also* seek to create a particular kind of speech experience that holds the attention of their users. If we are required to have an analogy to an old form of media, platforms are more like newspapers and broadcasters than telephone companies, although I think the best single analogy is to bookstores. Newspapers, broadcasters, and bookstores curate the content they offer their customers, and common-carrier rules have *never* applied to them. Even more concerning, laws directly controlling platforms simply give the government unprecedented power over the content experiences these private companies seek to create. I think that this violates the First Amendment and that the Fifth Circuit's decision to the contrary is quite wrong.

Here's what we *can* do instead: we can and should at least try to address concerns about the currently dominant platforms by using law to make it easier to have *more platforms*. This, truly, is my essential argument: Common-carrier solutions should be targeted at the infrastructure that enables platforms to be built and to reach consumers.

When we think about platforms, we usually think about the ways that users interact directly with Google or Twitter or other services. But, in fact, myriad companies provide infrastructure and services that enable user access or platform operation—companies that transmit data, such as the cable companies and other internet service providers carrying data; companies that host websites and platforms; and companies that provide services such as website defense or payment processing to support both new and established platforms. For ease of exposition, I have prepared a single Figure (see page 13): a simplified graphic showing all the companies that stand between platform users—you and me—and the platforms themselves. In the past, some of these providers have denied services to various new platforms that sought to establish alternative services.

Applying a *lighter-touch* (and differently placed) version of common-carrier regulation to the

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SPEECH PLATFORMS—THE MANY-TO-MANY BROADCAST MODEL

by Kate Klonick

I'm honored to be asked to comment on Professor James Speta's exceptional Boden Lecture, but my task is made more difficult by the fact that I agree with almost all of his conclusions. We apparently share a similar streak of moderation and pragmatism, which does not bode well for a rigorous reply, but I will do my best.

The law and history of common carriage are complicated, and various internet controversies over the last 20 years have seen it thrown into the fray as a panacea or Hail Mary pass. In my experience in interdisciplinary conversations about online speech platforms, the idea of treating platforms as common carriers is usually raised in the eleventh hour of discussion—usually by someone tentatively asking, "Have you thought about treating platforms as *railroads*?"

It sounds initially absurd, but there's good reason that this concept has strong intuitive appeal: it involves nondiscrimination in the provision of essential services—and at a superficial level "essential services" certainly *feels* like our relationship with the shiny glass boxes and speech platforms on which we spend 55 percent of our waking hours. And it's hard to disagree that those platforms' decisions—of what content we can and can't see and whom we should and shouldn't hear from—have echoes in nondiscrimination.

But, of course, as Professor Speta so accurately points out, the legal and technological history and rationales of the common-carrier concept do much to limit its practical use as a solution to the problems presented by speech platforms.

Besides his point about the differences in rationale (the limited physical spectrum of radio and television, or the economies of scale of infrastructure), there was one part of Professor Speta's lecture that particularly spoke to me: the difference in the editorial function of broadcast and telecom companies from online speech platforms. As Speta so astutely points out, television and radio broadcast companies create and disseminate commercial content created by a private *few* to the public *many*. By contrast, telecommunications firms do

not themselves create any content or even engage with it; they merely facilitate one-to-one (or few-to-few) communications between members of the public. In contrast with both broadcast and telecom examples, user-generated online speech platforms instead disseminate content created by the *many* to the *many*.



The important distinguishing feature here is the *first* side of the many to many—that is, the *many speakers* to many listeners. Never in history have so many speakers been given so many open points of access not only to speak but, more importantly, to so widely broadcast. It is truly what makes online platforms unique—and what any historical analogy necessarily fails to capture.

The essential function of speech platforms is the one way in which Professor Speta's very resonant comparison of online speech platforms to bookstores fails, because of course *physical* bookstores, as we have known them for most of history, are also subject to the limited physical spectrum of space; cuts must be made about what will be promoted or sold at all. This pressure fundamentally forces a bookstore to be a gatekeeping content provider—a few-to-many platform. And although online speech platforms certainly also promote, or curate, select content for certain products and functions (like newsfeeds or timelines), the majority of speech remains available and accessible by index or search, even if not amplified or delivered by algorithm.

In so many ways, the questions invoked by these new technologies are age old, but in other ways so dramatically different from anything we have encountered as a society before. I am so grateful for the intellectual conversation that Professor Speta's remarks have advanced, and to be a part of a community that continues to think curiously, creatively, and systemically about the nature of the problem and how to solve it.

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TECHNOLOGY, ANALOGIES, AND LEGAL REASONING

by Ashutosh Bhagwat

Thank you to Professor Speta for this fascinating lecture and to Dean Kearney for the opportunity to provide a brief commentary. I should begin by acknowledging that I agree with Professor Speta's main argument in almost every respect. Perhaps that is unsurprising, since I too learned and practiced telecommunications lawyering with Dean Kearney (and Professor Speta) a long time ago, in a galaxy far, far away. I completely agree that the common-carrier label is a profoundly bad fit for social media and search platforms; indeed, I argue the same in a recently published article in *The Journal of Free Speech Law*. I also agree that where common carriage, or more accurately a nondiscrimination requirement, makes more sense is with respect to internet infrastructure.

There is, however, an aspect of Professor Speta's argument that raises very difficult questions for me. He argues that "the best single analogy" between platforms and a traditional medium is bookstores. Like bookstores, platforms distribute content generated by third parties rather than by themselves, and, like bookstores, platforms necessarily curate that content, choosing what content to carry, what not to carry, and what to emphasize. All of this is clearly correct, as is Professor Speta's ultimate conclusion that just as bookstores enjoy First Amendment rights regarding their curation decisions, so too should platforms. And therefore the Fifth Circuit's contrary conclusion—that because platforms are not "speakers" in their curator or content moderator roles, they do not have First Amendment rights—is clearly incorrect.

Bookstores probably *are* the best traditional-media analogue to modern platforms. And as lawyers, we are inevitably drawn to analogies. This analogy, however, is deeply imperfect for several reasons (and I doubt Professor Speta would disagree). First, bookstores do not possess network effects, as social media platforms do. There is no benefit to shopping at the same bookstore as your friends—to the contrary, if you want to get a reputation as a savvy gift-giver or an iconoclastic thinker, the motivation is precisely the opposite. But with social media, the entire value derives from using the same platform as your friends. Second, while bookstores sell third-party content, it is (unlike social media) not user-generated content. Finally, the sheer volume of content that all platforms process is incomparably greater than any bookstore on Earth.

According to recent statistics, Facebook has almost two *billion* daily active users. Powell's Book Store is a minnow in comparison.

These differences matter for two reasons. First, the scale and network effects associated with at least social media platforms make Professor Speta's (and my) dream of real competition among such platforms elusive (search platforms are a different story). Certainly, small platforms for politically obsessed fringe groups may survive, but for those of us for whom social media is, well, more *social*, we want to be where "normal" people hang out online, rather than on Gab or Parler. Second, the combination of user-generated content and sheer volume means that the kinds of personal curation decisions characteristic of bookstores are impossible on platforms. As a result, when one discusses regulating content moderation—and the converse issue, the extent to which content moderation enjoys First Amendment protection—one must face the fact that with platforms we are talking about algorithms and artificial intelligence, not your friendly neighborhood bookstore owner. The questions about the extent to which algorithms and AI should be regulated or constitutionally protected are very different from whether bookstores enjoy First Amendment rights.

So does this mean the analogy to bookstores is useless? No, analogies provide useful guidance. But it does mean that as we apply the law to wholly new technologies, with no perfect pre-internet analogues, we as lawyers need to be wary of relying too much on analogies and turn instead to first principles. Do I believe platforms should have First Amendment protection against overweening regulation? Absolutely, but not mainly because they are the same as bookstores. It is rather because protecting platform independence from self-serving political actors advances the underlying, democracy-enhancing purposes of the First Amendment. But that is a longer discussion.

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internet's *support providers*, I will seek to convince you, can increase the possibility of alternative platforms. *This* is our best hope to enrich our speech choices and ecosystem without government censorship. At the end of the day, I contend that my proposal—considered comparatively—has the advantages of parsimony and modesty. Government should not intervene in the speech ecosystem any more than is absolutely required to meet an important governmental interest.

I do think that the Fifth Circuit decision is, well, just wrong and that, in fact, the Texas statute and similar proposals violate the First Amendment. Yet I need not convince you of that point of constitutional law. I need only persuade you that a more limited regulation—more limited in that it involves less direct government control over the creation of content experiences, of speech experiences—can address the problem.

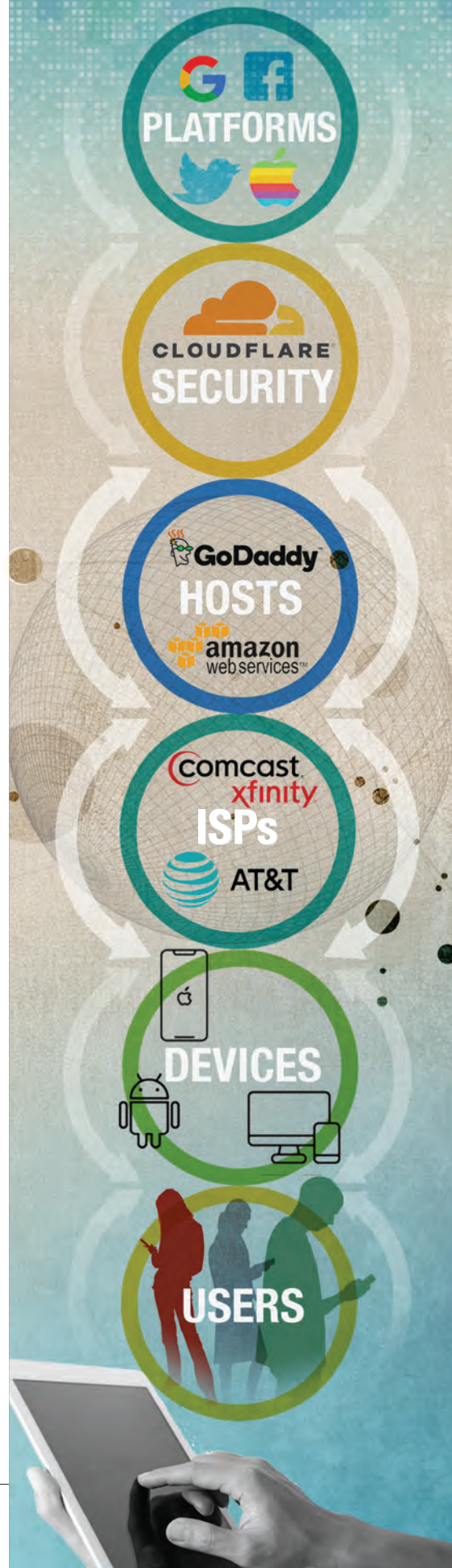
Let me do so in three main moves. *First*, I'll provide a little background on platform dominance and the current proposals for common-carrier regulation. *Second*, I'll argue that common-carrier duties—particularly access requirements and nondiscrimination rules, which are the core of common carriage—both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

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

I come to this very modern topic of internet platforms based on many years of writing about common carriage and asking how it applies both to the internet and perhaps to other modern industries. As I hope I have already indicated, these are hard, hard questions, and reasonable people can differ.

But I am certain about a few things—that this is a debate worth having, that common-carrier rules

FIGURE



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can help us think about internet platforms, and that applying such rules to the internet platforms' support layers could increase the diversity of platforms.

DOMINANT PLATFORMS AND DISCRIMINATION

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

Dimensions of Platform Power

Google has almost two-thirds of all searches in the United States and more than 90 percent of all searches in every country in the European Union. Google also provides the operating system on some 75 percent of the world's cell phones and the browser on just under two-thirds of all computers and phones. Amazon has more than 40 percent of all U.S. online commerce. Facebook, together with its subsidiaries Instagram and WhatsApp, dominates traditional social networking, and Twitter has become a key source of information, debate, and

entertainment. In the United States in particular, Apple, too, is a key platform, through its App Store and its phones.

If anything, these numbers play down the importance of these platforms in traditional media functions such as news. About one-third of all U.S. adults say that Facebook is a regular news source, and very nearly 50 percent of Americans "often" or "sometimes" get their news from social media. In 2017, the Supreme Court itself, in striking down a law that limited individuals' access to social media, identified social media as our "modern public square." It elaborated that such a law as the one challenged there "bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge."

I do not necessarily mean that these platforms have "market power" in a traditional antitrust sense (although the U.S. Justice Department and most of the states have filed lawsuits saying that at least the biggest platforms do). I concede, for one example, that "search" is not a single economic market and, for another, that Google, Facebook, and Twitter are actually direct competitors in the advertising market. One of the most important truths of media and communications law is that when the

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INTERNET INTERMEDIARY “MUST CARRY” RULES

by **Sari Mazzurco**

Professor Jim Speta’s Boden Lecture identifies a problem of tremendous complexity with great tact and acuity: how can law help create an online speech ecosystem that enables more speech while minimizing government control over the “content experiences” that entities such as Facebook and Google produce? He proposes that common-carriage regulation has a part to play but should not be directed at the likes of Facebook and Google. Rather, he says, it should be aimed at the myriad intermediaries that operate in the background to connect these entities to the eyeballs of real, live human internet users. These internet intermediaries include internet service providers (ISPs), hosts, and security providers, which transact with social media companies and have some power to enable or restrict these companies’ entry to the internet.

Indeed, Professor Speta identifies these intermediaries’ power over entry as the foundational problem. He asserts that if this power is restricted—through requirements to “grant access and services to new platforms and services on the same terms” they provide to others—new social media companies will crop up to fill gaps left by incumbents. Parler, Gab, and potentially more liberal-leaning social media companies would join ranks with the incumbents to provide internet users a social media smorgasbord—more access to speech and opportunities to speak through greater selection among alternatives.

Although Professor Speta regards his proposed requirements as common carriage of a “light-touch sort,” they call to my mind a different form of regulation—the “must carry” rules of the Federal Communications Commission (FCC). Historically, “must carry” rules allowed local television stations to require a cable operator serving the same market to carry their signals. FCC “must carry” rules shed light on the political magnitude of Professor Speta’s compelling proposal and might help defend it against First Amendment objection.

The FCC promulgated “must carry” rules to solve a bottleneck problem as cable companies came to intermediate viewers’ access to television programming; this is much like the problem Professor Speta calls out on today’s internet. Carrying smaller and less popular broadcast networks was not profitable for cable companies, but it was the difference between life and death for those smaller networks. The FCC deemed saving these smaller networks valuable because it would serve the public interest in media diversity and access to information—the two values Professor Speta asserts his “common-carriage inspired” proposal would serve.

It made sense for the FCC to pursue these values because of its particular construction of the public as

“listeners” in a democracy. The gist of it: as “listeners,” people need access to a wide range of diverse viewpoints so that they can be effective participants in democratic government. A biased or sparse media ecosystem is thus a significant political problem. Regulation that prioritizes the survival of small broadcast networks over a cable company’s bottom line serves that end. When applied to internet intermediaries, social media companies, and internet users, a cable–broadcaster–listener role-framing may provide a robust defense against a First Amendment objection to Professor Speta’s proposal. In fact, it turns such an objection on its head. Much as the Supreme Court held in *Turner Broadcasting System, Inc. v. FCC (Turner III)* in 1997, restricting internet intermediaries’ freedom to refuse to deal with new social media companies might instead serve important First Amendment values.

Common-carriage regulation, by contrast, minimizes the democratic importance of public access to multiple social media companies. It construes social media companies as “passengers” (or, potentially, “subscribers”) of internet intermediaries’ services (the “common carriers”) with an interest in participating in the internet market. To be sure, it guards against the risk that internet intermediaries might act unfairly by excluding social media companies from the market, but internet users’ role and interests are conspicuously absent. The harm of an insufficiently populated media ecosystem is economic, personal, and individual to the particular excluded social media company. Democratic harm is foreign to this relationship construction. Moreover, “nondiscrimination” requirements are especially vulnerable to First Amendment attack. *303 Creative LLC v. Elenis* has presented the Supreme Court with the question whether Colorado’s Antidiscrimination Act “compels speech” in violation of the First Amendment.

Professor Speta makes a forceful case that regulation of internet intermediaries is a crucial step toward a diverse, participatory online speech ecosystem. But appealing to common-carriage regulation may not be the best fit to achieve that end. FCC “must carry” rules, and the FCC’s construction of the triadic cable–broadcaster–listener relationship, add helpful context on the political basis and implications of Professor Speta’s proposal and might better shield it from the deregulatory First Amendment.

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DOES THE FIRST AMENDMENT PROHIBIT ALL PLATFORM REGULATION?

by Eugene Volokh

Professor Speta and I agree on much. We agree, for instance, that search engines can't be treated as common carriers: If you Google "theory of gravity," you presumably want the top results to represent mainstream viewpoints about gravity, rather than rival viewpoints.* Likewise, when social media platforms recommend sites to you, they should be free to recommend what they think is worth viewing, based on their guesses about your preferences and their own judgment.

But when it comes to *hosting*—for instance, letting Donald Trump have a Twitter account, and letting his followers re-Tweet his posts to their followers—a viewpoint-neutrality rule is more plausible. I'm not sure it's wise, but it should be seriously considered. And I don't think it's unconstitutional.

The First Amendment does forbid the government from discriminating based on viewpoint, and usually based on content as well, as Speta notes. But I don't think that this stops the government from forbidding viewpoint discrimination by certain private parties. (The Fourteenth Amendment bars the government from discriminating based on race and sex, and that's seen as consistent with statutes that apply similar rules to many private parties.)

Nor are such neutrality mandates invalidated because the drafters are motivated by a concern that platforms are suppressing particular viewpoints. Most antidiscrimination laws, in fact, are triggered by a concern about some particular group being harmed; yet they can protect all groups against discrimination. Likewise, the viewpoint-neutrality requirements would protect all viewpoints, Left, Right, or other.

What about platforms' interest in creating their "preferred speech experience," as Speta terms it? Platforms do have a right to decide what material to specially promote to their users. They should also probably remain free to edit third-party comments

posted on someone's page or attached to someone's Tweets, both to stop spam and to block insults that tend to degrade the quality of user conversations—though that "conversation management" function is a complicated matter.

But it doesn't follow that platforms have a First Amendment right to block users, based on viewpoint, from speaking to willing listeners. In *Rumsfeld v. FAIR* (2006), for instance, universities sought to create a "preferred speech experience" by excluding military recruiters from recruiting on campus, because the military discriminated against gays and lesbians. Universities had ideological reasons for doing this, and many of their constituents (faculty, students, donors) were upset by military recruiters' presence on campus. What's more, universities are quintessential speakers, routinely speaking on their own property. Doesn't matter, said the Supreme Court: Congress had the power to mandate that universities include military recruiters on the same footing as other recruiters.

Likewise, a few states, including California, mandate that large shopping malls allow leafleters and signature gatherers on the premises. The shopping malls may want to create a "preferred speech experience" that consists solely of the mall's and its tenants' advertising, and not have customers put off by political messages that might offend them, anger them, or just distract them from buying. But in *PruneYard Shopping Center v. Robins* (1980), the Supreme Court held that a state could nonetheless compel shopping malls to allow such outside speakers.

The Court has told us, in 2017, that social media is "the modern public square." The First Amendment *mandates* that all viewpoints be allowed in the old, traditional public square. It likewise doesn't *bar* all government attempts to make sure that all viewpoints are allowed in the modern one.



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* I have argued this in a white paper commissioned by Google, Eugene Volokh & Donald M. Falk, *First Amendment Protection for Search Engine Search Results*, 8 J.L. Econ. & Pol'y 883 (2012), but I would also endorse this view as an academic.

user is receiving the service for free—whether it's broadcast television, email, or cat videos—the user is not really the customer. The user—or rather the user's attention along with data about the user—is the thing being sold (to advertisers). But technical antitrust economics aside, I am aligned with those who say that the internet platforms are big enough and consequential enough to merit public policy attention.

Common-Carrier Law

The second piece of the current debate will take a little longer to set out: What are common-carrier rules, and why are we reaching for them now? In brief, as Dean Kearney and Professor Tom Merrill (who delivered the first Boden Lecture in this building) wrote almost 25 years ago in “The Great Transformation of Regulated Industries Law” in the *Columbia Law Review*, common-carrier rules dominated government treatment of transportation and public utility industries from the late 1800s through most of the 20th century.

Indeed, the first significant federal common-carrier statute, the Interstate Commerce Act, was adopted (in 1887) three years before the Sherman Antitrust Act, and together these statutes represented the Progressive and later New Deal concern with massive accumulations of private economic power. And, for better or worse, what a triumph of an idea: By the middle of the 20th century, common-carrier rules covered railroads, buses, trucking, water carriers, airlines, telephone and telegraph companies, electric and natural gas transmissions, and many, many other industries.

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

But prevailing ideas change, and sometimes the law even follows along. Beginning in the late 1970s, common-carrier regulation of this full-blown type has been largely dismantled in the United States. Railroads were deregulated, then airlines, then telecoms, and the march went on—in part due to

So how or why are modern internet platforms and the old law of common carriage now colliding? They are colliding because of the conviction that platforms are engaged in discrimination—in bias of many sorts—and because the most important two pillars of common-carriage law require access by all customers and forbid discrimination.

technological change, in part due to an ideology of free-market economics, in part due to regulatory failure, and through other causes.

The Move to Bring Common Carriage to Platforms

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

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

- Both Facebook and Twitter removed President Donald Trump from their platforms. This is only the highest-profile example for those on (if you will) the right, who also argue that platforms have removed other conservative voices and that the platforms' algorithms suppress conservative speech.
- Others (many but not all of whom might be called the left) condemn platforms for the choices that they make in hosting and distributing other kinds of content, wanting platforms to take down more in the way of conspiracy theories, lies, hate speech, and threats of violence.
- Changes to search algorithms have resulted in the loss by companies of valuable position. In several cases, companies have alleged that changes to Google's search engine or Amazon's display algorithm have overnight pushed them off the first results page and resulted in their bankruptcy.
- And one more: Platforms sometimes prefer their own businesses over the businesses of third parties. The European Union fined Google

The relevant constraint isn't digital space: it is user attention. That is what the platforms are competing to secure.

nearly \$3 billion for giving the top display to its own shopping results—and even more for prioritizing other properties of its own. And part of the District of Columbia's antitrust case against Amazon is the extent to which it uses the sales data on its platform to prefer its Amazon Basics brand and other affiliated sellers.

One can debate the merits of these and other individual cases, but one thing is inarguable: Platforms make choices; they curate their experience; they promote some content and they demote others. *They must.* Google cannot be indifferent among all of the possible results that it gives you; to be of any use, Google must make some choices among the trillions of possible results on the internet. Facebook must make choices about the postings to share with you. Professor Kate Klonick has written extensively about how exactly they do this, both algorithmically and through human intervention.

One can imagine a social network that provides all posts made within a friend network, but only if the friend network is not large. And users of all platforms want as part of their experience more than just the posts of their own friends. Facebook users *want* news from the platforms; Twitter, Instagram, and TikTok users want the platforms' suggestions and selections. This truth makes clear that one of the Fifth Circuit's most fundamental errors was its assertion that the Texas statute wasn't censorship because "space constraints on digital platforms are practically nonexistent." Even if correct in theory (as a matter of physics), that misunderstands how individuals use platforms and the product the platforms are trying to provide.

The relevant constraint isn't digital space: it is user attention. *That* is what the platforms are competing to secure. Users are valuable only if they stay on the services, provide data, watch advertising. And we all have limited time and attention. What platforms do is try to capture that time and keep that attention by shaping our experiences on the platforms. The Texas law or any common-carrier scheme for platforms necessarily constrains the content experience that the platforms seek to create for, and in partnership with, their users.

We could debate the platforms' motivations and techniques for discriminating: Google, for example, wants you to believe that its algorithm does nothing more and nothing less than give you the results that you most want to receive. Others

argue that Google pursues profits by promoting its own services. And still others argue that Google's choices reflect the personal preferences of its founders and still-controlling shareholders—just as Facebook's reflect Mark Zuckerberg's. Or that the platforms' seemingly technical computer science-y or economics-y choices are irretrievably infected by the Silicon Valley bubble and the fact that almost all of their employees identify as liberals, progressives, or Democrats.

For our purposes today, however, we need not resolve the question of motivation. We just need to say that platforms—at least the kinds of platforms that we can imagine providing useful services—do choose both the kind of content they provide us and, when necessary, the users they agree to host. If we like the choices that the platforms make, we call it choice or curation. If we don't like the choices platforms make, we call it discrimination.

THE INAPTNESS OF COMMON-CARRIER RULES FOR PLATFORMS

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

Current Legislation and Proposals

Let me be more specific about the Texas statute, because it's a useful example. The statute, widely known as HB20, applies to all "social media platform[s]" that are "open to the public," allow inter-user communication or sharing, and have more than 50 million active domestic users in any month.

These threshold requirements are said to justify the analogy to common-carrier law—and there is some family resemblance to communications



common carriers. The traditional common-carrier telephone company did provide service to all comers, did provide a service that principally connected users to one another, and occupied a significant position in the market. I will discuss in a few minutes why, all the same, the analogy from telephone common carriers to platforms does not hold—or is not even particularly relevant. But it is not frivolous.

As to substantive requirements, the Texas law prohibits “censor[ing]” a user based on the user’s “viewpoint.” *Censor*, as used in the statute, would involve both a platform’s removing a user on the basis of viewpoint and a platform’s muting or deprioritizing the distribution of any expression on the basis of viewpoint. The law also provides that users have both the right to express and the right to receive expression.

In short, under the law, platforms may not select or deselect any user or expression on the basis of viewpoint. Platforms must post their use policies and provide an opportunity for content decisions to be challenged.

The statute creates both a private remedy and a remedy for the state attorney general (AG) to sue to reverse the platform’s action and to receive an injunction against the platform. There are also provisions to seek attorney’s fees and (in the case of the AG) to recover investigative costs.

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

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

The most well-developed academic proposals for common-carrier-like rules for platforms have come from Professor Eugene Volokh of UCLA (another past Boden lecturer) and Professor Adam

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

The Analogy Fails

It is true that, ultimately, we cannot and should not resolve the debate over platform regulation based simply on how much they look like common carriers. Yet I want to emphasize just how different platform regulation would be from telephone (and other common-carrier) regulation.

The platform regulations adopted and proposed so far explicitly target a change to the viewpoint “balance” of the expression on the platform. Google and Amazon would be required to change the order of search results. Social media regulation is intended to alter the (perceived) political and cultural (im)balances on platforms. As the Eleventh Circuit recounted by quoting Governor Ron DeSantis, the Florida act was “to combat the ‘biased silencing’ of ‘our freedom of speech as conservatives . . . by the ‘big tech’ oligarchs in Silicon Valley.’” Governor Greg Abbott similarly tweeted, in defending his state’s law, “Silencing conservative views is un-American, it’s un-Texan and it’s about to be illegal in Texas.”

By contrast, no part of the historic Communications Act of 1934 or Federal Communications Commission regulations took a viewpoint approach to telephony. In fact, no part of the 1934 Act even addressed the content of the speech being carried on the telephone system (except for a statutory provision that forbade the carriage of indecent or obscene speech for commercial purposes, and the Supreme Court struck that down as to indecent speech).

Common-carrier rules do have effects on the speech ecosystem, but historically they have done so only indirectly—by promoting the availability of speech without suppressing any. As Volokh

A legal requirement of viewpoint neutrality—or probably even one of content neutrality—can’t translate to platforms. The services would become largely unusable . . . [G]iven the galaxies of information on the internet, on social media, and even in most individuals’ networks, the platforms must select.

points out, content-neutral regulations can often have viewpoint-based effects and can still be constitutional. In any event, common-carrier rules, as many have argued (most recently Professor Genevieve Lakier), did ensure that speakers could access one another without interference from the telephone company. This required a neutral stance as to content and also created a neutral stance as to viewpoint.

Telephone companies—particularly the Bell System—were premised on a transport function, carrying the content from one user to another. If unregulated, telephone companies *could* have used their market position to favor certain viewpoints, and there is some evidence that *telegraph* companies did so, a fact contributing to their regulation. But the fundamental of telephone service is one-to-one communication, and, to this day, that is one of the definitional requirements of a common-carrier service. In this way, telcos really were like railroads carrying packages (some of which might be books or newspapers).

Similarly, common-carrier rules, under traditional law, *ended at the end of the infrastructure of the communications systems—the wires and the spectrum*. The companies that *created* speech experiences—newspapers, broadcasters, cable programmers, and others—have always had First Amendment protection.

The Fifth Circuit’s analogies just don’t work, highlighted by the example I mentioned earlier of bookstores. Government did not regulate them—and the First Amendment definitely protected the selections that bookstores made; they were creating a speech experience for their visitors.

The bookstore analogy also shows that the Fifth Circuit’s reliance on the well-known section 230 of the 1996 Telecommunications Act is problematic. According to the Fifth Circuit, section 230’s declaration that platforms are not publishers, and their immunity from the liability of publishers, meant that they can’t also claim to be speakers. But bookstores had nearly the same status: they were not liable in tort or otherwise for material in the books they carried—unless they had actual knowledge of it—and yet they had First Amendment rights to be immune from government control over their selections.

A legal requirement of viewpoint neutrality—or probably even one of content neutrality—can’t translate to platforms. The services would

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TOWARD MORE DIRECT PLATFORM INTEROPERABILITY

by Howard Shelanski

Professor Jim Speta's thoughtful Boden Lecture identifies the regulatory consequences of a critical difference between digital platform technologies and traditional common carriers. Digital platforms sell not just conduit; they also—perhaps primarily—sell an “experience” that can vary considerably for any user according to the content that other users share on the platform. So rules requiring nondiscriminatory access, though little affecting a transportation or telephone service, may directly interfere with a digital platform's decisions about what content will create the most attractive user experience.

That common-carriage rules would limit the choices of digital platforms is, of course, the very objective of such proposals. One central concern with digital platforms, in Speta's formulation, is that they “are biased, that they discriminate, that they foreclose speech.” Such a concern about access and content diversity is similar to the rationale for historical broadcast regulation (e.g., Title III of the Communications Act of 1934) but is distinct from the rationale for traditional common carriage (e.g., Title II). Whereas the former was concerned with preserving viewpoint diversity and access to information, the latter's worry was that monopoly carriers might discriminate to extract consumer surplus or to harm competing carriers. Speta's main objection to imposing common carriage on digital platforms involves the First Amendment—a concern that does not arise in regulating a platform's choices about price and output. He therefore finds that common carriage would intrude into the very nature of digital platforms' businesses.

Speta proposes that, instead of applying common carriage to digital platforms themselves, policy makers place nondiscrimination requirements on services and infrastructure that platforms depend on. He suggests nondiscrimination obligations for the services—like hosting, conduit, payment systems, app stores, and other physical and service infrastructure—that an innovator needs for a new platform. Competitive entry could then provide the access and diversity allegedly not provided by dominant incumbents.

I share Speta's inclination toward light-touch interconnection and access rules, as Bill Rogerson and I explained in “Antitrust Enforcement, Regulation, and Digital Platforms,” in the *University of Pennsylvania Law Review* (2020). Yet there are important trade-offs in limiting such rules to underlying third-party infrastructure. While Speta would avoid direct interference with the platforms' businesses and thus the associated constitutional questions, history and economics

suggest that more is needed to create meaningful platform competition.

Speta's proposal bets on entry by new platforms—i.e., on enabling more speech. For anyone against government interference in private speech and in favor of reliance on markets, this is attractive. But the nature of digital platforms suggests that the market's prospects for generating a robust set of competing platforms are very uncertain even with nondiscrimination requirements for providers of underlying infrastructure and services. The network effects and switching costs that can lead to a period of platform dominance can be durable, even if they are not always so. And the arising new platforms might be small and—like Parler or Truth Social—play to niche audiences without ever reaching the bulk of users of the incumbent platforms. Even with entry by more such platforms, there might not be a meaningful change in access to the incumbent's user base or, correspondingly, in the viewpoints and information that those users experience.

So, what more can policy makers do to expand content diversity through competition? I agree with Speta that competition is a better path than content-related mandates (the history of which is not promising). One possibility is to regulate digital platforms directly in a way not affecting a platform's content discretion but limiting its ability to block rivals' access to the protocols and information that can erode switching costs and allow sharing of network effects. Examples might include data portability requirements to make it easier for consumers to switch networks, or non-discriminatory access to application programming interfaces (APIs) so new entrants can receive useful information about the incumbent's user base (as Rogerson and I discuss).

The basic point is that there may be regulation—applying directly to incumbent platforms and supplementing the nondiscrimination rules Speta proposes for underlying infrastructure—that improves the prospects for meaningful platform competition. Further development of these ideas can be among the next steps in building on the valuable contribution that Speta's Boden Lecture makes to the digital platform policy debate.

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THE STACK IN THE MACHINE

by Tejas N. Narechania

I am grateful for the opportunity to write a response—brief as it is—to a Robert F. Boden Lecture and, especially, to reply to one as rich and textured as James Speta's contribution. This lecture, on treating internet platforms as common carriers, invites a wide range of questions: What analogy (if any) fits internet platforms best? Does the Supreme Court's maxim—that the answer to problematic speech is more speech—ring as true in the 2020s as in the 1920s? What roles should competition and regulation play in speech-intensive markets?

Here, I focus on questions arising out of the lecture's invocation of the debates regarding the Telecommunications Act of 1996. In many ways, the lecture revisits these prior policy exchanges, which asked how to best induce competition in markets that had been dominated by monopolists and oligopolists for nearly a century. Some favored greater investment in the basic (and expensive) network facilities—the wires and antennae, say—that formed the base of the telecommunications industry's technical “stack,” and so advocated for more direct subsidies in such infrastructure. Others looked higher in the stack, striving to design a competitive market of retail service providers by designating network facilities owners as wholesalers. And still others thought that competition was an imperfect substitute for regulation, advocating instead for rules directly prescribing the good conduct that many hoped competition would induce.

Speta's lecture considers the modern debates over today's dominant and consequential internet platforms from a similar perspective. It eschews calls for direct regulation (as with Texas's statutory scheme) and instead focuses on designing a competitive platform market by regulating suppliers—e.g., the hosting and cybersecurity service providers—to that market. Put in terms of those prior debates, it advocates for regulating the wholesale operations of certain infrastructural providers, thereby ensuring a more competitive market for the platforms that sit atop (i.e., are higher in the stack than) such providers.

I do not disagree that competition among platforms might help address problematic platform speech by creating a race to the top: Platforms might compete for user attention by developing policies to promote and induce speech that users want, while discouraging speech they don't. And while reasonable readers might disagree over whether competition will come quickly enough (a critical error in the plan of the 1996 Act), or

even whether speech-related concerns are best addressed by a market-centric solution, it seems worthwhile to at least try to improve platform competition.

Let me offer a complementary proposal, then, to the lecture's call for regulating, as common carriers, providers of hosting and cybersecurity services.

Such infrastructural providers may indeed require more substantial regulation. But we might also look to the stack *within* platforms for an even more targeted approach to inducing competition. A single platform serves (at least) two functions: one, a transport function (the transportation of, e.g., tweets or toots); and two, a display function (namely, the curated and edited display of those tweets and toots). We might treat each platform as both a wholesale and a retail provider of social media services: we might require that the transport services of various platforms interconnect with each other, while letting each platform make its own decisions about how to display and moderate the social media content that flows across the entire ecosystem.

In this respect, I do not share the lecture's concern that an interconnection requirement would intrude on any editorial voice. By separating the transport function from the display function, each platform retains the discretion to display content to its users however it sees fit. Meanwhile, interconnection in transport—one cornerstone of the 1996 Act—makes each platform even more content-rich, amplifying network effects across providers and making it easier for users to switch from one platform to another.

Particulars aside, James Speta's thoughtful Boden Lecture reminds us to look ahead to the possibilities of the future while drawing on the lessons of the past. Here, there is plenty of both: the laws, technologies, and markets that compose the platform ecosystem will churn substantially in coming years, and there is more than a century of precedent to help guide—without dictating—our approach to the challenges and opportunities ahead.

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become largely unusable for the reason that I have already said: given the galaxies of information on the internet, on social media, and even in most individuals' networks, the platforms must select.

The Fifth Circuit simply did not understand what platforms do. It said that *Miami Herald v. Tornillo*, the Supreme Court's 1974 decision, was distinguishable because "when the State appropriated space in the newspaper or newsletter for a third party's use, it necessarily curtailed the owner's ability to speak in its own forum." But, contrary to the Fifth Circuit, government-imposed common-carrier laws, including the Texas law, necessarily curtail the speech experience that the platforms are attempting to create.

This leads to my most significant concern: the statutory solutions being proposed do not have any viewpoint-neutral or content-neutral hook on which to base a nondiscrimination requirement. Telephone calls, although they carry speech, are simply electronic transmissions executed by sending and receiving equipment. The traditional common-carrier nondiscrimination rule thus asks *only* whether each customer has access to the same equipment and is able to make the same electronic transmissions. Nothing—nothing—in the regulatory structure requires or permits the government to look inside the transmission to see what is being said.

By contrast, the proposals that go under the banner of "common-carrier rules for platforms"

This leads to my most significant concern: the statutory solutions being proposed do not have any viewpoint-neutral or content-neutral hook on which to base a nondiscrimination requirement.

decidedly do give government this power. By statutory text, they require viewpoint neutrality, and they require the platforms to give the government access to algorithms and data so that the government can determine whether there has in fact been viewpoint discrimination.

A common-carrier case can be decided without consideration of the content or the *viewpoint* of the excluded speech; not so under these new statutes. They strike at the core of the First Amendment, which forbids government the power to select content (or to dictate to others the selection of their content).

If anything, government power over the choice of viewpoint has been thought even more problematic. And these statutes are in fact targeted at viewpoint—their sponsors have told us so. Should we not be especially suspicious of legislation that has been explicitly offered as a way to promote certain viewpoints?

It is not necessary for me to endorse any of the more difficult intermediate moves that have been debated in free speech law and the digital age. Nor do I believe that this concern requires a view that algorithms or the outputs of algorithms are, themselves, speech, as Professor Stuart Benjamin has argued. The statutes empower the government to require changes to the platforms' algorithms, and that threatens direct government control over the speech ecosystem.



My answer comes from the Supreme Court's consistent invocation that the solution to problematic speech is more speech. The solution to problematic platforms is more platforms.

I also do not need to say that the platforms engage in “editorial discretion,” as that term has been used (and much debated) in media and communications cases. (Yet I will of course agree that what I have said about platforms’ need to discriminate bears a very strong resemblance to editorial discretion.)

A BETTER APPROACH: FOCUSING ON INFRASTRUCTURE

So, what might we do if you, like me and many others, share the dual concerns that, on the one hand, platforms have unusually significant (even troubling) sway over our speech and commerce and that, on the other, empowering government to control viewpoint dissemination on platforms is problematic?

You don’t have to agree with Texas and Florida that platforms are discriminating against conservatives. You need not embrace the views of progressives that the platforms allow far too much fake science, conspiracy theory, racism, and the like. You might, as was the case in the late 1800s, simply be uncomfortable with the degree of power that these few platforms have over speech and commerce. So what might you *do*?

More Platforms

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

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

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

Starting a new platform is not easy. Economically, it requires scale, and the “network effects” that the largest platforms currently enjoy are difficult to replicate. But it is not impossible, for network effects can also make markets tippy. That is, users will move very quickly to a new service that is perceived to be better, so long as that is the shared perception. For those of you not of the TikTok generation, recall how quickly Yahoo search replaced Altavista, Google search replaced Yahoo, or VHS conquered Betamax once everyone started to care about videotape.

Even more importantly, unlike the case with telephone service, consumers and users can very easily be on more than one platform. Have you ever checked if Lyft could give you a better price than Uber? Or if Expedia can find you a cheaper flight than Orbitz? It’s just a few quick taps, because your smartphone can have both apps. Indeed, the key to real-time competition between Uber and Lyft—apart from their drivers, cars, and riders—is that each company’s app has access to the smartphone, directly or through an open browser.

What do new platforms need to compete with the old, other than subscribers? *They need the infrastructure on which platforms depend.* These are all of the services we discussed earlier. Usually, these pieces come together relatively seamlessly, for in fact selling hosting or transport or cyberdefense services is in the economic interest of companies. Each usually wants to work with new startups, for new companies increase revenues, especially if they take off as only a new internet company can.

Even so, on several important occasions, we have seen new or alternative platforms being denied these supporting services and consequently losing their ability to reach users. Both Gab and Parler had this happen, when their hosts and payment services terminated their relationships, stating that they did not wish to be associated with the sites. Both Apple and Google removed Parler from their app stores. Cloudflare, the largest cyber-defense company, terminated 8chan, which had long been an alternative platform. And just this month, Cloudflare

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COMMON CARRIAGE AND CAPITALISM'S INVISIBLE HAND

by Eric Goldman

I'm honored to comment on Professor James Speta's Boden Lecture, "Can Common-Carrier Principles Make for a Better Internet?" Like many other academic works about the telecommunications industry, the lecture analyzes the telecom "stack," which models how various "layers"—from the physical infrastructural layer to the layer of content transmitted over the network—combine to enable electronic communications.

The lecture focuses on the Florida and Texas laws passed in 2021 that constrain content-moderation decisions by online publishers of third-party content. Professor Speta argues—correctly, in my opinion—that these publishers, located at the top of the telecom stack, should not be subject to common-carriage principles, even when they are "dominant platforms." Professor Speta notes that "platforms" necessarily prioritize some content over other content and classifying them as "common carriers" would negate this core function. That makes the Florida and Texas laws censorial, blatantly unconstitutional, and terrible policy.

The lecture then takes up circumstances where expanded common-carriage principles nevertheless might help to address platform dominance. Professor Speta argues for the imposition of access and nondiscriminatory obligations (common-carriage-lite, we may call it) among some vendors occupying layers between the online content publishers and the physical telecom layer. He describes the entities of interest as "infrastructure that enables platforms to be built and to reach consumers." His hope is that regulating these vendors will enhance the overall competition in the telecom stack layers above them, which could increase the number of platforms and spur more vigorous competition among them. I had two main problems with this argument.

First, Professor Speta doesn't precisely define exactly which entities should be targeted for these obligations. Professor Speta refers to several categories of telecom stack vendors (he calls them "the internet's support providers") that might be sufficiently infrastructural, including app stores, web hosts, anti-DDOS services, and payment systems. However, these vendors are quite disparate in nature, so I can't tell why these niches all warrant equal regulatory treatment.

Indeed, each niche has its own unique attributes that cut against these burdens. For example, like bookstores, app stores curate third-party informational resources that consumers can buy. Professor Speta says bookstores shouldn't and couldn't be treated as common carriers, but app stores may qualify for common-carrier-lite status. Why this dichotomy?



Second, the same infrastructural dynamics might apply to many other industries, not just some players in the middle of the telecom stack. Businesses routinely become critical vendors to other businesses or their customers. When should these businesses across our economy also be subject to common-carrier-lite principles?

Here's my answer: rarely. For good reasons, we don't require businesses to accept customers and treat them equally except when absolutely necessary. Capitalism's "invisible hand" assumes that parties freely enter into contracts. This self-interested autonomy enables the efficient allocation of goods and services to those who value them the most. Common-carrier obligations (even a lite version) override this economic freedom, thus conflicting with one of capitalism's basic tenets. Common-carrier obligations also override associational liberty—a point the Supreme Court is likely to address in the pending *303 Creative LLC v. Elenis* case.

While common carriage is a venerable part of telephony regulation, it's an extraordinary regulatory intervention for most sectors of our economy. Accordingly, advocacy for expanded common-carrier-like obligations should prove that exceptional treatment is needed and reconcile the many associated policy tradeoffs. That task was beyond the scope of Professor Speta's lecture, but it will be a necessary step before I can embrace the argument.

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CONFRONTING THE WAVICLES OF MASS MEDIA

by Bruce E. Boyden

When the internet burst into public consciousness in the mid-1990s, there were euphoric hopes that the age of participatory democracy was upon us, that the voices of individuals would be finally freed from the gatekeeping of mass media conglomerates. But it turns out that most people simply do not want to read every single random thought posted to the internet; they want access to as much content as possible, but they want it filtered and organized. And only large enterprises—Big Tech—can offer both of those things at once. Meet the new boss, same as the old boss.

So it is unsurprising that many people have concluded that we have, in fact, been fooled again. Legislators have picked up on this disenchantment and have begun passing laws aimed at curbing the powers of social media platforms to decide what content can stay up and what should be removed. Jim Speta, in his wonderful Boden Lecture, has addressed one such legislative solution: common-carrier regulation of platforms. For the reasons Professor Speta states, common-carrier obligations are a poor fit for the *content* on platforms, but such duties have considerably more promise in regulating the markets that *serve* platforms, as a way to reduce the dominance of the existing oligopoly.

Professor Speta's affirmative proposal has a lot to recommend it, but I think the benefits would unfortunately be attenuated. The widespread anger at how platforms manage the content on their services isn't simply due to a lack of alternatives. It has more to do with a clash of long-standing social and legal norms that has bedeviled internet law and policy since the beginning.

Old media were divided into two types: transmission and content. Services tended to fall into one or the other, and societal expectations formed around which category a service happened to be in. Transmission services sold individuals the ability to get their message from Point A to Point B, and as a matter of practice they engaged in little to no monitoring or control of the content of those messages. Content services, by contrast—radio and television networks, newspapers, book publishers, and the like—assembled a large crew of paid contributors to produce entertainment, art, or news, which they then distributed to viewers in a one-way communication. Viewers could pick and choose what service they would watch or read, but otherwise had no input in its substance.

Legal rules accreted around these expectations. Over time, transmission services became subject to extensive regulation governing their operations, including common-carrier rules, but were largely free from liability for the content of messages sent through their facilities. Content services,

meanwhile, were largely free from government regulation of their operations, but were subject to liability for what they chose to publish.

The internet screwed all of that up. The problem is that modern media—the social networks, search engines, video-sharing sites, and online shopping markets—combine elements of *both* transmission and content. They are the wavicles of mass media. Like transmission services, they offer individual users the ability to communicate with each other, largely unfettered. Like content services, they assemble and organize a stream of information to provide to their users, and they are constantly selecting whose messages to promote and which users to drop. But unlike any of the old media, the producers of modern media are also the users—the path is circular.

Not only is the public perception of platforms jumbled, so is their legal regulation. Platforms edit and organize the content that flows in from users, and so they claim freedom from government regulation under the First Amendment. But thanks to the Communications Decency Act, 47 U.S.C. § 230, platforms are also shielded from liability arising from that content. Although there is nothing inherently contradictory about this result, the tension with old media norms helps to explain the otherwise puzzling reaction of the Fifth Circuit to Texas's social media law in *NetChoice, LLC v. Paxton*, the 2022 decision noted by Professor Speta. The *NetChoice* majority evidently viewed Twitter, Facebook, and the rest as basically just fancy party-line phone calls. Viewed from that perspective, selectively deleting messages and booting users constituted “censorship” of communications and not editing of contributions.

It's easy to deride the uncritical sloganeering of the Fifth Circuit, but harder to state what norms should govern an enterprise that assembles content gathered from users, repackages it, and provides it back to those users as a service. Professor Speta's proposal to encourage more competition for this odd wavicle of communications technology is worth adopting, but the weirdness of such content—which, like Schrödinger's cat, is both user speech and platform speech at the same time—will continue no matter how many platforms there are.

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effectively blocked Kiwi Farms—and it did so even after Cloudflare’s CEO had publicly announced that it would not, saying that he did not want to be making such decisions based on the “ideology” of the company’s customers.

Now, to be sure, in some cases, the terminations arose based on violent and hateful statements posted on these networks. But the fact remains that, in each case, the providers of infrastructure made a decision that effectively removed or significantly diminished a new platform’s access.

A Common-Carrier Approach to Infrastructure Would Help New Platforms

It is to these supporting services that a common-carrier rule could be targeted, to ensure that alternative platforms have the kind of access needed to create more effective competition with the existing platforms—and with whatever might be wrong with their practices. That rule need do nothing more than say that the ISPs, the hosts, the app stores, and the cyberdefense companies must grant access and services to new platforms and services on the same terms on which they grant access and services to other platforms and services.

I would add to this that denial of service would be presumptively disallowed whenever that denial would cause the platform to lose access to a substantial number of prospective users. We aren’t talking about any of the most heavy-handed parts of common-carrier regulation—rate regulation or filing of rate schedules (tariffs) or universal service policies. My proposal is common-carrier inspired, not common carriage.

I think that many or even most of the infrastructure services might welcome such regulation. As many of these episodes have revealed, some of these companies have become the targets for significant pressure campaigns. Legal access requirements would provide a quick and easy answer for what is overwhelmingly the business decision they already make (and want to make) as to 99 percent of all customers.

Finally, although I am generally disinclined toward platform regulation, I do think there is one move that might be made there, one that would support the idea that the solution is more platform competition. Specifically, government could take steps to ensure that customers can more easily switch to new platforms.

Common-carrier regulation and related utility

regulation often used interconnection requirements to facilitate entry. Interconnection overcomes network effects, because a customer can switch its own provider but still have access to everyone remaining on the original network. A full-blown interconnection requirement on platforms, however, would suffer the same problems as an access requirement, because it would effectively result in the same intrusion to each platform’s curation.

But, well short of an interconnection requirement, government could still make switching easier, by ensuring that users are able easily to *download their own data from incumbent platforms*—for example, to take all of their pictures to a new service. Indeed, in the original Federal Trade Commission (FTC) antitrust investigation of Google in 2010, in which the FTC decided against an enforcement action, one meaningful concession that it did secure from Google was easier exit for advertisers, by allowing advertisers to more easily capture their campaign data from Google.

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

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

This fact—that they overwhelmingly do not select or refuse business based on their customers’ content—is one of the fundamental reasons for the success and diversity of the internet that we have today. In fact, I envision that, for most infrastructure segments, disputes will be rare, as hosting and payment systems, for example, have numerous providers.

Second, the access rule need not be a universal service requirement, interfering with fundamental planning decisions such as capacity. An infrastructure provider could deny service

It is to these supporting services that a common carrier rule could be targeted, to ensure that alternative platforms have the kind of access needed to create more effective competition with the existing platforms

I do think that we should consider whether, in our environment of only two mobile operating systems (and therefore only two app stores), government should require access for alternative app stores.

if it simply didn't have the room. But this, too, should be rare. Historical common carriage did not inherently deny railroads or telephone companies the ability to manage capacity on their networks—so long as they did so evenhandedly. And common-carrier companies could deny access to illegal or threatening uses.

In any event, the contrast is that an access and nondiscrimination rule for a *platform* would significantly interfere with its core business decision—how to shape the content experience for its users.

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

The bottom line is that this is a matter of comparative regulatory analysis. If we are concerned about the dominance of platforms and reaching for common-carrier analogies, we can (apart from doing nothing) try to regulate the platforms directly, as Texas is doing. Or we can regulate the infrastructure and thereby indirectly promote competition with the existing platforms.

I think the option of regulating the infrastructure is comparatively better, for it doesn't use government power to change the speech experiences directly. In First Amendment law, the Court often asks whether a regulation is the "least restrictive means" of pursuing the government's goal.

As I said at the outset, I don't need to convince you that common-carrier regulation of platforms violates the First Amendment. I hope that I have convinced you that the alternative of focusing on the infrastructure is a better solution, because it gives the government less direct power over our most important speech experiences.

SOME OBJECTIONS

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

The *first objection* to this proposal would be factual: to my claim that most infrastructure companies are, in fact, not "curating" their customer list. The most pointed objection might come from

Apple, which has been quite clear that it has a theory of those apps that should be permitted on its App Store. In the *Epic Games v. Apple* antitrust litigation, in which Epic sued over Apple's removing the game Fortnite from the App Store, Apple has emphasized that it selects apps carefully. It requires apps to protect user privacy and data, not to contain malware, and to protect children, among other things. Many users and app developers want these policies. (In the interest of full disclosure, in another capacity, I helped write an amicus brief for app developers that endorsed Apple's policies.)

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

The *second objection* would be legal, and it would return us to the First Amendment. When the FCC briefly adopted net neutrality requirements, imposing nondiscrimination requirements on broadband ISPs, the D.C. Circuit affirmed those rules against a First Amendment challenge. But there was a dissent by now-Justice Brett Kavanaugh (not a past Boden lecturer, but a past Hallows lecturer here). He wrote that ISPs exercised editorial discretion and that, in the absence of market power, the net neutrality rules offended the First Amendment. I think that he was wrong, both as a factual and as a legal matter. Much ink has been spilled on this particular debate.

Let me echo two main points. ISPs have not made transport decisions on the basis of content. And, more importantly, the First Amendment should be satisfied by a rule that does not prohibit

any speech and actually increases speech in the ecosystem. This is not inconsistent with my argument earlier, for a nondiscrimination rule applied to platforms necessarily suppresses the platforms' preferred speech experience.

In all events, the access rule that I have in mind would require, as a threshold matter for its enforcement, some showing (whether by the private party or the government agency) that the denial of access left the alternative platforms with significantly diminished access to users. That ought to be enough even for those who agree with Justice Kavanaugh.

While I don't think much of either of these first two objections, I do think there is a *more significant objection* still to be made—and that is to the splintering of the dominant platforms at all.

Traditional mass media was highly intermediated—with newspapers and networks choosing almost all of the information that received significant distribution. That intermediation had two effects: First, it created some strong incentives to appeal to the largest audience, which meant leaving off the niche and the fringe. Second, at least as to several important elements of the mass media, journalistic ethics and elite ownership exerted significant content control, again tending to cut off the niche and the fringe.

The internet has eliminated the power of this traditional intermediation, but platforms have been partially recreating it. The dominant platforms have now, to some extent, developed significant content moderation capabilities, and some of this explicitly removes false information, conspiracy theories, and the like.

Perhaps re-fragmenting the platforms will result in more distribution of the niche and the fringe—convincing people to adopt or embrace it, to the detriment of civil society, democracy, and social cohesion.

I will concede that this gives me pause, for we know that those exposed to fake news and conspiracy theories often adopt those views. For now, though, I think the following: that the internet is a fact; that the “more speech” genie, including the niche and the fringe, cannot be put back into the bottle; and that this is generally a great part of the internet age. In general, we must trust people with information (and enhance through education and other means their ability to discern good information from bad) and expect that competition or at least the threat of competition will make the platforms better.

Finally, let me note a potential inconsistency with my own prior writings. As I said at the outset, I have been working on questions of common carriage and internet policy for more than two decades. I have written that nondiscrimination rules for broadband ISPs were not necessary; indeed, I first made my name in this field (if any I have) by offering that view just as Professors Larry Lessig and Mark Lemley were writing the opposite.

I still think, fundamentally, that this view was correct: that ISPs will generally have the economic incentive to provide all services, that there are very good reasons to permit ISPs to offer differential service packages, and that markets are heading in the direction of competition. I did not, however, account for the possibility that ISPs (and, as relevant here, other infrastructure companies) might be targeted with ideological pressure campaigns, from the right and the left, that could significantly alter their economic calculations.

Nevertheless, the rule that I propose here is not significantly different from my earlier intervention. Net neutrality's premise is that nondiscrimination itself is the legal test, and any discrimination is therefore legally suspect. In what I propose, the type of access denial and discrimination covered is more limited and, when coupled with a required showing that the denial is paired with substantial loss of access to potential users, the rule requires more than a showing of discrimination.

CONCLUSION

Communications networks are built to enable communications. While the internet and the myriad services offered have made the infrastructure much more complicated, we can still profitably distinguish between the ultimate creators of content and content ecosystems and the companies that enable those creators. The platforms are in the first group, and common-carrier-inspired access and nondiscrimination rules would significantly interfere with their operation and hand the government too much control over speech.

By contrast, in the case of the second group of companies, a light-touch access and nondiscrimination requirement forbidding content-based denials of service, when such denials substantially reduce a platform's access to potential users, would provide the superior option of competition and more speech.

I am grateful for this opportunity to engage with you on this. ■

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

Seeking Dignity and Connectedness in the Digital World

Congressman Ro Khanna offers a vision of people being meaningfully heard online.

The *Marquette Lawyer* arranged a conversation between Professor Jim Speta and Congressman Ro Khanna of California. This is an edited transcript of their exchange, which, like the foregoing Boden Lecture and responses, takes up important topics in internet policy making.

Q Congressman Khanna, thank you for the opportunity to talk about internet policy, and thank you for generously engaging with the Boden Lecture. I want to start with your recent book, *Dignity and the Digital Age: Making Tech Work for All of Us* (2022). The book has a really comprehensive agenda for digital equity. For those less familiar with it, can you say a little bit about what you mean by *dignity* and how it is particularly under threat in the digital age?

A There are two aspects to what I meant by dignity. The first is dignity in the sense of having *agency*—that we respect people by empowering them to fulfill their potential. One disempowering aspect of the digital age is the lack of productive work and economic opportunities for many people in many places. So the first half of the book talks about how we create opportunities for

individuals to be productive, to generate wealth, and to contribute in an age where software and digital technologies are having a greater and greater impact on the economy.

Then the second half of the book explores what dignity means in terms of *citizenship*. There seems to be a sense that only a very select few are getting to design the architecture of the digital public spaces. There often is a disconnect between the ability to participate in the digital public square and how that affects policy. It used to be that people would go to their town hall or go to their school board meeting and they would not just be speaking and participating but were actually influencing policy under elected officials.

My sense of a lot of what's going on online is that, while people may be tweeting and retweeting and expressing their views, it's not connected enough to government actions. It's not the traditional public square in the way we think of it—which is not just a conversation but actually having an impact on government action. And then let's think about what the many online spaces are where people can have an impact on government policy. How can people affirm their citizenship? And what do the variety of discursive spaces look like?

That was something I felt was very attractive about your Boden Lecture, and we're both saying that one of the answers is to have more discursive spaces online for different types of purposes in terms of empowering citizens.

Q You are worried then that the internet platforms—Google, Facebook, Twitter, and



Congressman Ro Khanna

others—have become places where there is discussion but the discussion isn't serving the greater political purposes or engagement?

A Yes, at least sometimes. At some moments, being online has positive effects. It was an appropriate place for expression of legitimate anger and organization and mobilization. You look at the Arab Spring, many years ago, and that was probably a time social media was working. But I think, a lot of times, one of the reasons people are so angry on social media is they almost feel that their expressions don't matter. So it leads almost to a frustration. Contrast that, for example, with Taiwan, not that Taiwan is ideal, but where they have a digital forum, where people are ranking policy choices and the government is actually listening to it and it's more constructive.

One of the challenges for us in a digital age is how we build institutions online that are not just more deliberative but that are more impactful of policy. I think that that is missing today.

Q You are engaged significantly with online spaces, and certainly we had a recent president who was quite engaged with online digital spaces. Do you think it's the case that individuals in government are just not involved enough with these digital spaces currently?

A No, I think the issue is more formal than that. I am online, and I'll often go to Twitter or Facebook to get a sense of what at least some activists are thinking. But I don't think that the conversations are as granular or full as the conversation I may have had this weekend at a town hall in my district.

I get much more of a sense of what's going on in my community and what people are thinking in a town hall like that than I may right now on social media. Now that may be partly who's participating in social media—is it really a representative of a community? But it's also the way these conversations are taking place.



"I think right now we only have a limited imagination of what social media should look like. . . . I'd love to see more intentional efforts at offering the types of communication online that can contribute to policy making."

— Ro Khanna

One of the things I like about your lecture was the point that while there may be a place for Twitter or Facebook, the question is whether we can have other spaces as well that approximate town halls or have other modes of communication.

I think right now we only have a limited imagination of what social media should look like. It's probably because it's early. I'd love to see more intentional efforts at offering the types of communication online that can contribute to policy making. I don't want everything to be boring. There's a time for anger and protest. And that's why some of the social media is fine, but I don't think it's fully developed in all the types of discursive spaces that we see in the non-online world influencing government policy.

Q One of the big criticisms of the platforms forming the new public square—in fact, it's the criticism that prompted the lecture—is the idea that the biggest platforms are systematically discriminating against conservative voices on the platforms. That concern is what prompted the Texas legislation and the Florida legislation and also bills that have been pending in Congress. What do you think of the criticism that the platforms' content-moderation policies are politically biased and otherwise unfair?

A Actually, I think it's hard to argue that conservative voices are being unfairly squelched. If you look at Facebook, for example, or if you look at the 10 most popular political sites, I think eight or nine of them are conservative or Republican-leaning sites. I think it's an appropriate criticism that certain forums may be censoring based on viewpoints and that they should be more careful to have wide-open, robust debates. That's not because they're obligated to follow the First Amendment. They're obviously not government actors. It just may be better for them to look at the First Amendment principles as a practical matter.

I think, though, that content moderation has affected the people on the left as well. I guess I want to see data that suggest that it's been more prevalent on the right as opposed to anyone else. And if the data were there, I'd be open to it, but it seems to me that a lot of times people make that criticism without providing the evidence of it.

Q In your book, you write about content-moderation policies, and you seem drawn to

the idea of oversight boards, such as the Facebook Oversight Board, to engage community and experts together to help make these decisions. Would you like to see those sorts of engagements made more broadly throughout the platform space?

A I would, and I especially want more transparency on why the decisions are being made. I propose a right of appeal if someone gets censored or, certainly, if someone gets deplatformed. There should be clear guidelines. I think a lot of the problem right now is a lack of transparency and a lack of a process that these platforms have.

I also agree with you that having many of these sites, as much as possible, is a good thing. Now I think one of the challenges is that the more discursive sites you have, the more spaces you have, platforms you have, you create the risk of the fragmentation of public discourse—where all the conservatives go to one platform, say Truth Social, and all the liberals go to a different platform. I think that's problematic because then we're not talking to each other at all. I think there's a tension between having a plurality of platforms, which decreases the risk of voices being suppressed, and having forums for exchange with people who don't share our views. And I think that that is something we have to try to figure out. How do we do both?

Q Do you think there's a role for government either in being the appellate body on content-moderation decisions or perhaps in building new spaces that maintain a form of universal connectivity?

A I certainly think, on the latter, there's a role for government to incentivize, encourage, support efforts that are encouraging conversation with the people who disagree with each other online.

I've been very drawn to work that James Fishkin at Stanford has done with deliberative polling and bringing people from different backgrounds into living-room conversations. Could you do those living-room conversations online with people in different geographies? I think government could try to encourage and facilitate it, the way government does in a town hall.

But I also think that the platforms have to see themselves as stewards of democracy, in the way that newspapers and broadcast television did. If newspapers were simply profit-maximizing, they would never publish my op-ed. Many people write

op-eds that would go more viral. And probably no one would ever put me on television if profit were all that broadcast networks cared about.

So there's a developed sense of ethics or culture where these traditional media institutions in the private sphere also see themselves as having a responsibility to democracy. I think that that needs to emerge with social media.

By contrast, I'm wary of government directly getting involved in adjudicating whether my tweet violated standards or whether I should be suspended from Twitter or not. I think that's getting too close to the government being an arbiter of truth, which it should not be.

Q You represent the area of Silicon Valley. These internet platforms have largely come from a background of engineering and entrepreneurship, not from journalism schools and communication studies. How does that sense of journalistic ethics or democratic engagement evolve? And how do we as individuals make a claim on it? You discuss democratic participation in your book. How do we as individuals get more broadly engaged so that the platforms have the kind of ethics we want them to have?

A One of the reasons I advocate for the democratization of who gets to participate in building the architecture is that it's important for more people to have a stake in how the architecture is designed. Right now, I think it's a very small group in Silicon Valley—engineers—making those decisions. The more we can get people from rural communities and the Midwest, from Black and brown communities, from all different perspectives, at the table, when these things are being designed, the architecture itself will be concerned about hate speech or censorship of conservative voices. So, I think one aspect of it is, how do you get more people involved in the architecture?

The second thing is that that these platforms started out by just hiring engineers and finance folks, which is understandable, and then they got lawyers for compliance. But they need to think about more people in the liberal arts, more people who are thinking about democratic issues, to be working there.

Now, what is their incentive to hire in those ways? I think as there's more public scrutiny on their role in democracy, they may see that it is in their interests to have that concern. But, you know, it's a big and difficult question to ask how culture emerges.

Q How did you personally come to focus on this work?

A For one, I represent the district of Silicon Valley. Something that I was very struck by is that my district has \$10 trillion in market value. The world is their oyster for a lot of people graduating out of Cupertino High or Homestead in Cupertino, or where Steve Jobs went to high school in Sunnyvale. But then opportunities aren't there for so many other Americans, particularly with jobs going offshore and globalization. That's really something that I have been interested in since going to Congress. You can't advocate for spreading digital opportunity without addressing also the problems of the digital architecture and citizenship, and that's why I started thinking about those issues.

Q Your book includes a great story of a trip to rural Kentucky with other representatives, to meet people and to see digital training in operation. Alex Hughes was one of the people you met there.

A You know, what was striking to me about Alex Hughes, a worker whose business closed when the local coal company shut down, was that he was about making things and building things. He continued to do so with the digital training that he received. Alex is not someone who is going to go become a software engineer or a coder for Google. But he wanted to build things, and now he is building ovens and refrigerators and doing it with the modern digital technology.

I've been a huge champion of bringing our production back to the United States. I call it a new economic patriotism. I really believe it was a colossal mistake for America to offshore so much of our production and manufacturing. One of the things that could allow us to bring production back is digital technology: Our robotics can make manufactured processes more efficient, and we can have machines communicating with each other through sensors or digital technology to be more productive.

Alex Hughes is, for me, a symbol of someone rooted in a community and yet making things, embracing the idea that making things with digital technology training doesn't require a college degree. A theme also throughout the book is the importance of rootedness in community—of the ability to stay where you grew up and still have economic opportunity. That's why I thought it so important to tell Alex's story. ■



Congressman Ro Khanna of California

"I think there's a tension between having a plurality of platforms, which decreases the risk of voices being suppressed, and having forums for exchange with people who don't share our views."