Marquette University Law School
2022 Robert F. Boden Lecture
September 22, 2022

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

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Thank you very much for the kind introduction. I'm grateful to Marquette Law School for the invitation to deliver the annual Robert F. Boden Lecture and to everyone who has made it 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 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 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 his commitment to educating new lawyers—Marquette lawyers, as I know you say around here. Joe is also, as I'm sure you know, simply one of the most well-respected and admired deans across the American legal academy.

Legend has it (and this is supported by the *Marquette 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 mark, we hope to have time remaining in our hour to open the floor to questions and discussion. These issues are very current and very important.

My subject for today is the dominance of the internet platforms and proposals that would regulate the content and viewpoint of those platforms. Indeed, the currency of our topic today was emphasized just this past Friday, when a Fifth Circuit panel upheld a Texas state law that imposed common carrier requirements on the largest internet platforms, finding this consistent with the First Amendment.[1] This was

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[1] NetChoice, L.L.C. v. Paxton, 2022 WL 4285917 (5th Cir. Sept. 16, 2022).

the first statute of its kind, and the first decision upholding such regulation. Earlier this year, the Eleventh Circuit reached exactly the *opposite* conclusion involving a nearly identical Florida statute—holding that statute unconstitutional.[2]

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 them 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), of the ways we receive information, exchange it, even understand it. The main concern is that these platforms are biased, that they discriminate, that they foreclose speech. That is why, today, platform critics—including governments—are reaching for the traditional law of railroads and of telephone companies: the law of common carriage. That once-dominant law forbade discrimination. In addition to the Texas and Florida statutes—as I said one so far upheld and one struck down—one Supreme Court Justice has written in favor of platform-focused common carrier regulation, as have numerous federal and state lawmakers, some academics, and numerous commentators. Bills have been offered or are pending in Congress and in many states, including Wisconsin.[3]

I think the proposals for common carrier regulation of platforms are very right—and very wrong. I think 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 over the past few decades has largely been discarded in the United States, can be part of the solution. I think they 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

[2] NetChoice LLC v. Attorney General, 34 F.3d 1196 (11th Cir. 2022).

[3] *See* An Act To Create 100.75 of the Statutes; relating to: Censorship on Social Media Platforms and Providing a Penalty, 2021 Wis. Sen. Bill 525 (introduced Aug. 26, 2021, failed to pass pursuant to Wis. Sen. J. Res. 1, Mar. 15, 2022); *see also* Wis. Sen. Bills 582, 590 and Wis. Assembly Bills 530, 581, 582, 583, 591 (all subject to Sen. J. Res. 1).

are required to have an analogy to an old form of media, platforms are more like newspapers and broadcasters than telephone companies, though 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 it almost certainly violates the First Amendment and that the Fifth Circuit's decision to the contrary is quite wrong.

Instead, here's what we can do: we can and should at least try to address concerns about the currently dominant platforms by using law to make it easier to have *more platforms*. This is, truly, the essential argument that I will make: 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 the other services. But, in fact, myriad companies provide infrastructure and services that both enable user access and platform operation—companies that transmit data, such as the cable companies and other internet services providers that carry data, companies that host websites and platforms, and services such as website defense or payment processing that support both new and established platforms. In the past, these providers have denied services to some new platforms that sought to establish alternative services. Applying a *lighter-touch* (and differently placed) version of common carrier regulation to the internet's *support providers*, I will seek to convince you, can increase the possibility of alternative platforms. *This* is our best hope to enrich our speech choices and ecosystem without government censorship.

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

I'll do so in three main parts. 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.

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

I come to this very modern topic of internet platforms based on many years of writing about common carriage and asking how it applies both to the internet and perhaps to other modern industries.[4] As I hope I have already indicated, these are hard, hard questions, and reasonable people can differ. But I am certain about a few things—that this is a debate worth having, that common carrier rules can help us think about internet platforms, and that applying such rules to the internet platforms' support layers could increase the diversity of platforms.

Part 1: Dominant platforms and common carrier rules. I don't suppose it should take much of my time to say that we live in an era in which certain internet platforms hold enormous sway. Sway over speech, entertainment, and commerce. At least half of the ten most valuable companies in the world are internet platforms, and that number used to be higher before the beating tech stocks have taken.

[4] *See, e.g.*, James B. Speta, *Handicapping the Race for the Last Mile?: A Critique of Open Access Rules for Broadband Platforms*, 17 Yale J. on Reg. 39 (2000); James B. Speta, *A Common Carrier Approach To Internet Interconnection*, 54 Fed. Comm. L.J. 225 (2002); James B. Speta, *MCI, Southwest Airlines, and Now Uber: Lessons for Managing Competitive Entry into Taxi Markets*, 43 Transp. L.J. 101 (2017).

Google has two-thirds of all searches in the United States,[5] and more than 90 percent of all searches in every country in the European Union.[6] Google also provides the operating system on 75 percent of the world's cell phones[7] and the browser on two-thirds of all computers and phones.[8] Amazon has more than 40 percent of all U.S. online commerce.[9] Facebook, together with its subsidiaries Instagram and WhatsApp, dominate traditional social networking, and Twitter has become a key source of information, debate, and entertainment. In the U.S. in particular, Apple, too, is a key platform, through its app store and its phones.

If anything, these numbers play down the importance of these platforms in traditional media functions such as news. About one-third of all U.S. adults say that Facebook is a regular news source, and very nearly 50 percent of Americans "often" or "sometimes" get their news from social media.[10] The Supreme Court itself, in striking down a law that limited individuals' access to social media, identified social media as our "modern public square," and said that the law "bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listing in the modern public square, and otherwise exploring the vast realms of human thought and knowledge."[11]

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[5] https://www.statista.com/statistics/267161/market-share-of-search-engines-in-the-united-states/.

[6] https://gs.statcounter.com/search-engine-market-share/all/europe/2019.

[7] Jack Wallen, Why Is Android More Popular Globally?, TechRepublic, May 12, 2021 (https://www.techrepublic.com/article/why-is-android-more-popular-globally-while-ios-rules-the-us/).

[8] https://gs.statcounter.com/browser-market-share.

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

[10] Mason Walker & Katerina Eva Matza, News Consumption Across Social Media in 2021, Pew Research Center, Sept. 20, 2021 (https://www.pewresearch.org/journalism/2021/09/20/news-consumption-across-social-media-in-2021/)

[11] Packingham v. South Carolina, 137 S. Ct. 1730, 1737 (2017).

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 user is receiving the service for free—whether it's broadcast television, email, or exchanging 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.

The second piece of this first part will take a little longer: What are common carrier rules and why are we reaching for them now? In brief, as Dean Kearney and Professor Tom Merrill (who delivered the first Boden lecture in this building) wrote almost 25 years ago in the *Columbia Law Review*,[12] 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, at (3) 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

[12] Joseph D. Kearney and Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 Colum. L. Rev. 1323 (1998).

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

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 Thomas, in concurring with a denial of certiorari, 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. [P]art of the solution may be found in doctrines that limit the right of a private company to exclude[:] common carrier [and] public accommodation" law.[13]

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

- Both Facebook and Twitter removed President Trump from their platforms. 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 algorithms suppress conservative speech.[14]
- 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

[13] Biden v. Knight First Amendment Institute, 141 S. Ct. 1220, 1221, 1222, 1226 (2021) (Thomas, J., concurring in the denial of certiorari).

[14] *See* Melina Delkic, Trump's Banishment from Facebook and Twitter: A Timeline, N.Y. Times, May 13, 2022

platforms to take down more in the way of conspiracy theories, lies, hate speech, and threats of violence.[15]

- Another example: Changes to search algorithms have resulted in companies losing 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.[16]
- And one last example: Platforms sometimes prefer their own businesses over the businesses of third parties. The European Union fined Google nearly 3 billion dollars for giving the top display to its own shopping results[17]—and even more for prioritizing other of its properties. And part of the District of Columbia antitrust case against Amazon is the extent to which it uses the sales data on its platform to prefer its Amazon Basics brand and other affiliated sellers.[18]

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 choice 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.[19] One can imagine a social network that provides all posts made within a friend network, but only if the friend

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[15] *E.g.*, Robby Soave, Elizabeth Warren Absolutely Wants the Government to Punish Facebook for Spreading Disinformation, Reason, Feb. 3, 2020 (https://reason.com/2020/02/03/elizabeth-warren-free-speech-facebook-pen-america/).

[16] *E.g.*, Kinderstart.com LLC v. Google, Inc., 2006 WL 3246596 (N.D. Cal. July 13, 2006).

[17] Kelvin Chan, Google Loses Appeal of Huge EU Fine over Shopping Searches, AP News, Nov. 10, 2021 (https://apnews.com/article/business-european-union-european-commission-europe-euro-b7baf101cacca2f1a6d21faba5a7b91e).

[18] Shira Ovide, The Big Deal in Amazon's Antitrust Case, N.Y. Times, May 25, 2021 (https://www.nytimes.com/2021/05/25/technology/amazon-antitrust-lawsuit.html).

[19] *See* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 Harv. L. Rev. 1598 (2018); Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 Yale L.J. 2418 (2020).

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 virtually nonexistent.'"[20] 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.[21] 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 keep it by shaping our experiences on the platforms. The Texas law or any common carrier scheme for platforms necessarily constrains the content experience that the platforms seek to create for and in partnership with their users.

Sure, we could debate the platforms' motivations and techniques for discriminating: Google, for example, wants to you 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 choices 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 liberal, progressive, or Democrats.

But for our purposes today, we need not resolve the question of motivation; we just need to say, as I have done in this first part, 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, to the users they agree to host. If we like the choices that the platforms make, we call it that: choice or

[20] 2022 WL 4285917, at *15.

[21] *See, e.g.*, Tim Wu, The Attention Merchants: The Epic Scramble To Get Inside Our Heads (2016).

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

This brings me to *Part 2: Common Carrier Rules Aren't Appropriate for Platforms*. As I've already said, the current enactments or proposals for platforms focus on two basic translations of common carrier rules. First, the proposals require the biggest platforms to admit all prospective users. Second, 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.

Let me be more specific about the Texas statute, because it's a useful example.[22] The statute, widely known as HB20, applies to all "social medial 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, I do not think the analogy from telephone common carriers to platforms holds—or is 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 forbid both a platform's removing a user on the basis of viewpoint and a platform's muting or de-prioritizing 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, platforms may not select or deselect any user or expression on the basis of viewpoint. Platforms must post their use policies and

[22] *See generally* NetChoice LLC v. Paxton, 573 F. Supp. 3d 1092, 1099-1101 (W.D. Tex. 2021) (granting preliminary injunction against the law), *stay granted*, 2022 WL 1537249 (5th Cir., May 11, 2022), *stay vacated*, 142 S. Ct. 1715 (2022), *reversed*, 2022 WL 4285917 (5th Cir. Sept. 16, 2022).

provide an opportunity for content-decisions to be challenged. The statute creates both a private remedy and a remedy for the state attorney general to sue to reverse the platform's action, to receive an injunction against the platform, to recover attorney's fees, and (in the case of the AG to recover investigative costs).

The Florida statute, S.B. 7072, is quite similar, though with even more explicit protections for political candidates and what are called (inelegantly) "journalist entities," forbidding their deplatforming and the curation of their speech.[23] Also similar are a number of bills in Congress.[24] 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,[25] and that would supervise algorithms to limit "disparate outcomes based on race or other demographic factors."[26] The Democratic bills are consistent in part 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)[27] and Professor Adam Candeub of Michigan State.[28] I'll focus here mostly on Volokh's proposal, for I think Candeub's proposed regulatory "bargain" depends too much on the

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[23] *See generally*, NetChoice LLC, v. Attorney General, 34 F.4th 1196, 1205-07 (11th Cir. 2022).

[24] *See* S. 1384 – 21st Century FREE Speech Act; S. 2031 – PRO-SPEECH Act; H.R. 5921 – Filter Bubble Transparency Act;

[25] H.R. 6796 – Digital Services Oversight and Safety Act of 2022.

[26] H.R. 3611 – Algorithmic Justice and Online Platform Transparency Act.

[27] Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. Free Speech L. 377 (2021).

[28] Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 Yale. J.L. & Tech. 391 (2020).

platforms ultimately agreeing to the regulation the government desires. Volokh himself notes that his intervention is tentative, and 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.

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 Governor Ron DeSantis said, the Florida act was "to combat the 'biased silencing' of 'our freedom of speech as conservatives . . . by the "big tech" oligarchs in Silicon Valley.'"[29] 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."[30]

By contrast, no part of the historic Communications Act of 1934 or FCC regulations took a viewpoint approach to telephony, or 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).[31] Common carrier rules do have effects on the speech ecosystem, but have historically done so only indirectly, by promoting the availability of speech without suppressing any. As Volokh points out, content-neutral regulations can often have viewpoint-based effects and can still be constitutional. In any

[29] NetChoice, 34 F.4th at 1205.

[30] *See* NetChoice, 573 F. Supp. 3d at 1099.

[31] 47 U.S.C. § 223(b); *see* Sable Communs. v. FCC, 492 U.S. 115 (1989).

event, common carrier rules, as many have argued (most recently Professor Genevieve Lakier[32]), did ensure that speakers can 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, which led in part to their regulation.[33] 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.[34] 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 governments control over their selections.

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

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[32] Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 Harv. L. Rev. 2299 (2021).

[33] *See, e.g.*, Lakier at 2320.

[34] 47 U.S.C. § 230.

would become largely unusable for the reason that I have already said: given the galaxies of information on the internet, on social media, and even in most individuals' networks, the platforms must select. The Fifth Circuit simply did not understand what platforms do. It said that *Miami Herald v. Tornillo*,[35] 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."[36] 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" 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 statutes. This strikes at the core of the First Amendment, which forbids government the power to select content (or dictate to others the selection of their content). 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

[35] 418 U.S. 241 (1974).

[36] 2022 WL 4385917, at *15.

have told us so. We should be especially suspicious of legislation that has been explicitly offered as a way to promote certain viewpoints.[37]

I do not think that I need to endorse any of the more difficult intermediate moves that have been debated in free speech law and the digital age. I do not think that this concern requires a view that algorithms or the outputs of algorithms are, themselves, speech, as Professor Stuart Benjamin has argued.[38] The statutes empower the government to require changes to the platforms' algorithms, and that threatens direct government control over the speech ecosystem. And I do not think I need to say that the platforms engage in "editorial discretion," as that term has been used (and much debated) in media and communications cases. (Though I *will* of course agree that what I have said about platforms' need to discriminate bears a very strong resemblance to editorial discretion.)

This brings us to *Part 3*—the last big part or (if you prefer a substantive description) *The Infrastructure-Focused Alternative*. So, what might we do if you, like me and many others, share the dual concerns that, first, platforms have unusually significant (even troubling) sway over our speech and commerce, and, second, that 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, or with progressives that the platforms allow far too much fake science, conspiracy theory, racism, and the like. You might, as was the case in the late 1800s, simply be uncomfortable with the degree of power that these few platforms have over speech and commerce.

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

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

[38] *See* Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. Penn. L. Rev. 1445 (2013). *Compare* Tim Wu, *Machine Speech*, 161 U. Penn. L. Rev. 1495 (2013) (arguing to the contrary).

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 towards 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 platform was as open and unmoderated as advertised, but 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—indeed, 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 not impossible, for network effects can also make markets tippy—users will move very quickly to a new service that is perceived to be better, so long as that is the shared perception.[39] 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 telephone service, consumers and users can very easily be on more than one platform. Have you checked Lyft to see if the price was better 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.[40]

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.

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[39] *See* Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. Econ. Persp. 93, 108 (1994)

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

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

But we have seen, on several important occasions, that new or alternative platforms have been denied these supporting services and have lost their ability to reach users.[41] 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 effectively blocked Kiwi Farms—and it did so even after Cloudflare's CEO had publicly announced that it would not, saying that he did not want to be making such decisions based on the "ideology" of its customers.[42] Now, to be sure, in some cases, the terminations arose based on violent and hateful statements posted on these networks, but that was not all. In each case, the providers of infrastructure made a decision that effectively removed or significantly diminished a new platform's access.

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

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[41] *See, e.g.*, Zach Burdyck, Tech Giants Crack Down on Parler for Lack of Content Moderation, The Hill, Jan. 10, 2021 (https://www.nytimes.com/2021/05/25/technology/amazon-antitrust-lawsuit.html); Jose Van Dyck et al., Deplatforming and the Governance of the Platform Ecosystem, New Media and Society, Sept. 23, 2021 (https://doi.org/10.1177/14614448211045662); Kaitly Tiffany, Parler's Rise Was Also its Downfall, The Atlantic, Jan. 18, 2021 (https://www.theatlantic.com/technology/archive/2021/01/parler-ban-insurrection-trump-qanon/617718/).

[42] *See, e.g.*, Joseph Menn and Taylor Lorenz, Cloudflare Drops Kiwi Farms, Wash. Post, Sept. 3, 2022 (https://www.washingtonpost.com/technology/2022/09/03/cloudflare-drops-kiwifarms/).

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

I think that many or even most of the infrastructure services might welcome such regulation. As many of these episodes have revealed, some of these companies have become the targets for significant pressure campaigns. 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 can easily *download their own data from incumbent platforms*—for example, to take all of their pictures to a new service if they want. Indeed, in the original 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.[43]

[43] *See* FTC, Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns In the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search, Press Release, Jan. 3, 2013 (https://www.ftc.gov/news-events/news/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc-competition-concerns-markets-devices-smart).

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 kind—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. The fact that they overwhelmingly do not is one of the fundamental reasons for the success and diversity of the internet that we have today. In fact, I envision that, for most infrastructure segments, disputes will be rare, as hosting and payment systems, for example, have numerous providers.

Second, the access rule need not be a universal service requirement, interfering with fundamental planning decisions such as capacity. An infrastructure provider could deny service if it simply didn't have the room. But this too should be rare. More importantly, historical common carriage did not inherently deny railroads or telephone companies the ability to manage capacity on their networks—as long as they did so even-handedly. And common carrier companies could deny access to illegal or threatening uses. 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 between offered. Government would only look 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, like Texas. Or we can regulate the infrastructure and thereby indirectly promote competition

with the existing platforms. I think the second option 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 does violate the First Amendment. I hope 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.

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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: that it requires apps to protect user privacy and data, not to contain malware, and to protect children, among other things.[44] Many users and app developers want these policies. In the interest of full disclosure, I helped write an amicus brief for app developers who 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

[44] Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898 (N.D. Cal. 2021).

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 (of Gab and of 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 that imposed nondiscrimination requirements on broadband ISPs, the D.C. Circuit affirmed those rules against a First Amendment challenge.[45] But Judge (now Justice) Brett Kavanaugh (not a past Boden lecturer, but a past Hallows lecturer) dissented, writing that ISPs exercised editorial discretion and that, in the absence of market power, the net neutrality rules offended the First Amendment.[46] I think that he was wrong, both as a factual and as a legal matter. Much ink has been spilled on this particular debate, but let me echo two main points. ISPs have not made transport decisions on the basis of content, and, more importantly, the First Amendment should be satisfied by a rule that does not prohibit any speech and actually increases speech in the ecosystem. This is not inconsistent with my argument above, for a nondiscrimination rule applied to platforms necessarily suppresses the platforms' preferred speech experience. In all events, the access rule that I have in mind would require, as a threshold matter for its enforcement, some showing (whether by the private party or the government agency) that the denial of access left the alternative platforms with significantly diminished access to users—which 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

[45] USTA v. FCC, 825 F.3d 674 (D.C. Cir. 2016).

[46] *See* USTA v. FCC, 855 F.3d 381, 418 (Kavanaugh, J., dissenting from denial of rehearing en banc).

off the niche and the fringe. Second, at least as to several important elements of the mass media, journalistic ethics and elite ownership exerted significant content control, again, also tending to cut off the niche and the fringe. The internet has eliminated the power of this traditional intermediation, but platforms have been partially recreating it. The dominant platforms have now, to some extent, developed significant content moderation capabilities, and some of this explicitly removes false information, conspiracy theories, and the like. Perhaps re-fragmenting the platforms will result in more distribution of the niche and the fringe, convincing people to adopt 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.[47] For now, though, I think the following: that the internet is a fact and the "more speech" genie, including the niche and the fringe, cannot be put back into the bottle and that 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 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.[48] I still think, fundamentally, that view was correct: that ISPs will generally have the economic incentive to provide all services, that there are very good reasons to permit ISPs to offer differential service packages, and that markets are heading in the direction of competition. I did not, however, account for the possibility that ISPs (and, as relevant here, other infrastructure companies) might

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[47] Karen M. Douglas, Aleksandra Cichocka, and Robbie M. Sutton, *Motivations, Emotions and Beliefs in Conspiracy Theories*, in Routledge Handbook on Conspiracy Theories (2020).

[48] *See* Lawrence Lessig & Mark A. Lemley, *Open Access to Cable Modems*, 22 Whittier Law Review 3 (2000); Lawrence Lessig and Mark A. Lemley, The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era, 48 UCLA L. Rev. 925 (2000).

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.

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

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