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***Regulatory Implications of Turning Internet Platforms into  
Common Carriers***

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# Phoenix Center Policy Paper No. 60

## *Regulatory Implications of Turning Internet Platforms into Common Carriers*

Lawrence J. Spiwak, Esq.\*

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*Abstract:* The debate over how internet platforms moderate content has reached a fever pitch. To get around First Amendment concerns, some proponents of content moderation regulation argue that internet platforms should be regulated as “common carriers” – that is, internet platforms should be legally obligated to serve all comers without discrimination. As these proponents regularly point to communications law as an analytical template, it appears that the term “common carrier” has become a euphemism for full-blown public utility regulation complete with a dedicated regulator. However, proponents of common carrier regulation provide no details about how this regime would work. Viewing the question through a *regulatory* – as opposed to a First Amendment – lens, the purpose of this paper is to offer a few insights on how to fill that analytical gap, and to ask if we will be happy with the inevitable consequences (intended and unintended) if we proceed down that road. To provide context, this paper begins with a brief overview of the legal origins of the “internet platforms are common carriers” argument as a strategy to overcome First Amendment concerns. Next, this paper reviews the prominent academic literature arguing for internet platforms to be treated as common carriers, which draws upon direct analogies to the communications industry. However, if communications regulation is to provide the analytical template for internet platform regulation, then a more accurate understanding of communications law is required. Following this discussion, this paper reviews Justice Clarence Thomas’s concurrence in *Biden v. Knight Foundation*, along with the two cases – one from the Eleventh Circuit and one from the Fifth Circuit – which, at the time of this writing, are pending *certiorari* before the Supreme Court and where the question of whether internet platforms may be treated as common carriers is at the heart of the dispute. The penultimate section of this paper outlines some of the important – yet unaddressed – legal questions that will arise should the Supreme Court grant *certiorari* and rule that internet platforms are common carriers that could eventually be subject to some sort of public utility regulation. Concluding thoughts are at the end.

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\* President, Phoenix Center for Advanced Legal & Economic Public Policy Studies. The views expressed in this paper are the authors’ alone and do not represent the views of the Phoenix Center or its staff.

**TABLE OF CONTENTS:**

I. Introduction .....	2
II. Common Carriage as a Potential End-Run Around First Amendment Constraints.....	5
III. Are Internet Platforms Really Like Telephone Companies? A Review of the Prominent Academic Literature .....	8
A. Professor Adam Candeub .....	8
1. Summary of Candeub’s Regulatory Arguments.....	8
a. Net Neutrality .....	10
b. Cable Regulation .....	11
c. Broadcast Regulation .....	11
2. Discussion .....	11
B. Professor Eugene Volokh .....	24
1. Summary of Volokh’s Regulatory Arguments .....	24
2. Discussion .....	28
IV. Relevant Cases.....	28
A. Justice Thomas’s Concurrence in <i>Biden v. Knight First Amendment Institute at Columbia University</i> .....	29
B. <i>NetChoice LLC v. Attorney General of Florida</i> .....	30
C. <i>NetChoice, LLC v. Paxton</i> .....	34
D. Discussion.....	35
V. Regulatory Implications of Classifying Internet Platforms as Common Carriers.....	38
VI. Conclusion .....	42

**I. Introduction**

The debate over how internet platforms moderate content has reached a fever pitch. Congress is conducting oversight on so-called “Big Tech censorship,” and states such as Texas and Florida have enacted laws designed to prevent internet platforms from “silencing opposing voices.” But while such legislative efforts are popular with certain political constituencies, the constitutional and practical implications of regulating internet platforms’ content moderation practices are less than clear.

The basic problem plaguing these efforts is that the First Amendment prohibits the government from controlling the speech of private actors. To get around this constitutional constraint, some argue that internet platforms should be regulated as “common carriers” – that is, internet platforms should be legally obligated to

serve all comers without discrimination.<sup>1</sup> But while it is easy to propose an idea in the abstract, it is more difficult – yet crucial – to spell out how such a regulatory regime would work in practice. For example, is this vision of common carriage something akin to general public accommodation laws which are enforced by the courts or more like full-blown public utility regulation complete with a dedicated regulator? It is frustratingly hard to tell.

While some proponents of platform oversight appear (perhaps inadvertently) to equate common carrier regulation with public utility regulation, most others are vague, though it may nonetheless be possible to divine meaning in the latter case. Based upon the language used and analogies cited in both the academic literature and the caselaw, it appears that the latter group of proponents of common carrier regulation also envision some sort of public utility model. Several factors support such an interpretation of the argument.

For example, while the phrase “common carrier regulation” appears regularly in the debate, regulation, by definition, requires rules. As such, somebody must be responsible for writing and enforcing these rules in compliance with the Due Process Clause and the Administrative Procedure Act. If the common carrier argument is, in fact, a public utility argument, then some sort of independent regulator (complete with its own dedicated enabling statute) will be required.

Second, many advocates for common carriage regulation (as well as reviewing courts) routinely turn to the telecommunications industry (and its governing statute, the Communications Act of 1934) as a supporting analogy. They say internet platforms are “communications networks” and are therefore analogous to telephone companies and other electronic distribution networks, which are regulated as public utilities by the Federal Communications Commission (“FCC”).<sup>2</sup> Setting aside the fact that the assorted analogies to the telecommunications industry offered by proponents of internet platform regulation generally do not paint an accurate picture of communications law or do

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<sup>1</sup> A precise definition of “common carrier” is elusive in this context. For example, the Communications Act defines common carrier as “any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter...” 47 U.S.C. § 153(11).

<sup>2</sup> Some advocates have gone so far as to argue that the FCC already has the authority not only to regulate internet platforms as common carriers, but to impose content regulation as well. Such arguments do not withstand scrutiny, however. See Lawrence J. Spiwak, *In Response to Joel Thayer*, FEDSOC BLOG (Apr. 8, 2021) (available at: <https://fedsoc.org/commentary/fedsoc-blog/in-response-to-joel-thayer>).

not even involve common carrier regulation,<sup>3</sup> if FCC oversight of communications networks is the go-to analogy, then it must be understood that “common carriage” is a well-accepted term of art in the field which is synonymous with public utility regulation. Accordingly, by drawing heavily on the communications experience, then that analogy would also seem to imply that some sort of public utility regulation for internet platforms is the envisioned end-goal.<sup>4</sup>

Finally, as discussed in Section V below, over the past several years, calls to regulate internet platforms with a dedicated regulator have become prolific. Accounting for the political environment in which we currently find ourselves, it would not be unreasonable to infer that calls for common carrier regulation to regulate internet platforms’ speech are consistent with calls for a dedicated regulator to govern the economic behavior of internet platforms. (Of course, if the vision for platform regulation is more like the less intrusive public accommodation model, then proponents should say so to clear up the confusion caused by statements suggestive of public utility regulation. They have not.)

Which brings us back to an interesting yet unanswered question: if we assume *arguendo* that First Amendment concerns are overcome (a question which will likely be answered by the Supreme Court relatively soon) and calls for common carrier regulation of internet platforms are, in fact, calls for public utility regulation similar to FCC regulation of telephone companies, then what would such a

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<sup>3</sup> See *infra* Sections III-IV for discussion.

<sup>4</sup> As common carriage is simply *one form* of public utility regulation mandated by the Communications Act, it is possible to be regulated as a public utility without also being classified as a common carrier. For example, voice telephone service (fixed and mobile) is subject to common carrier regulation under Title II and Title III of the Communications Act, yet Voice over internet Protocol (VoIP) service exists in the regulatory netherworld of “voice” service, neither an information service under Title I nor a telecommunications service under Title II. Multichannel Video Programming provided by cable and satellite companies is not subject to common carrier regulation, but cable companies are subject to other regulatory requirements under Title VI of the Act. Broadcasting is similarly not subject to common carrier regulation but must comply with the licensing requirements of Title III. And, of this writing, Broadband Internet Access Services (fixed or wireless) is considered to be an information service under Title I of the Communications Act and therefore is not subject to common carrier regulation under Title II (although the Biden Administration has promised to reverse this policy as soon as it can get a Democratic majority at the FCC). See EXECUTIVE ORDER ON PROMOTING COMPETITION IN THE AMERICAN ECONOMY, THE WHITE HOUSE (July 09, 2021) (available at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy>). Yet regardless of the exact form of public utility regulation, to varying degrees, the FCC oversees the whole lot. The same is true in the energy sector. Under the Federal Power Act and Natural Gas Act, electric utilities and natural gas pipelines are not regulated as common carriers, yet oil pipelines are. Still, the Federal Energy Regulatory Commission has jurisdiction over all these services.

regulatory regime for internet platforms look like, and how would it work in practice? Proponents of the common carrier regulation provide no details. Viewing the question through a *regulatory*—as opposed to a First Amendment—lens, the purpose of this paper is to offer a few insights about how to fill that analytical gap, and to ask if we will be happy with the inevitable consequences (intended and unintended) if we proceed down that road.<sup>5</sup>

To provide context, this paper begins with a brief overview of the legal origins of the “internet platforms are common carriers” argument as a strategy to overcome First Amendment concerns. Next, this paper reviews the prominent academic literature arguing for internet platforms to be treated as common carriers, which draws upon direct analogies to the communications industry. Given the language used and analogies to the communications industry provided, it appears that these proponents are using the term “common carriage” as a euphemism for public utility regulation. However, if communications regulation is to provide the analytical template for internet platform regulation, then a more accurate understanding of communications law is required.

Following this discussion, this paper reviews Justice Clarence Thomas’s concurrence in *Biden v. Knight Foundation*, along with the two cases—one from the Eleventh Circuit and one from the Fifth Circuit—which, at the time of this writing, are pending *certiorari* before the Supreme Court. In these two cases, the question of whether internet platforms may be treated as common carriers is at the heart of the dispute. Like the surveyed literature, these opinions copiously use the term “common carrier regulation” and make analogies to communications law, again leading the reader to infer that common carrier regulation really means public utility regulation. The penultimate section of this paper outlines some of the important—yet unaddressed—legal questions that will arise should the Supreme Court grant *certiorari* and rule that internet platforms are common carriers that could eventually be subject to some sort of public utility regulation. Concluding thoughts are at the end.

## II. Common Carriage as a Potential End-Run Around First Amendment Constraints

Under the First Amendment to the U.S. Constitution, “Congress shall make no law ... abridging the freedom of speech.” Moreover, the Fourteenth Amendment

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<sup>5</sup> A discussion of whether or not designating internet platforms as common carriers will survive First Amendment scrutiny is beyond the scope of this paper. Any discussion about Section 230 of the Communications Decency Act will also be mercifully avoided.

makes the First Amendment's Free Speech Clause applicable to the states. As Justice Brett Kavanaugh wrote for the majority in *Manhattan Community Access Corp. v. Halleck*, the "text and original meaning of these Amendments, as well as this Court's longstanding precedents, establish that the Free Speech Clause prohibits only *governmental* abridgment of speech. The Free Speech Clause does not prohibit *private* abridgement of speech."<sup>6</sup>

Some argue that because internet platforms serve as the "modern town square,"<sup>7</sup> they take on a quasi-governmental role and are therefore subject to First Amendment *obligations* rather than enjoying First Amendment *protections*. Not so. According to the Supreme Court in *Halleck*, under the Court's state-action doctrine, a private entity may be considered a state actor "when it exercise[s] a function 'traditionally exclusively reserved to the State.'"<sup>8</sup> As the Court observed, it is

not enough that the federal, state or local government exercised the function in the past, or still does. And it is not enough that the function serves the public good or the public interest in some way. Rather, to qualify as a traditional, exclusive function within the meaning of our state-action precedents, the government must have traditionally *and* exclusively performed the function.<sup>9</sup>

And, noted the Court, "[p]roviding some kind of forum for speech is not an activity that only governmental entities have traditionally provided."<sup>10</sup>

Given such a strong statement by the Court, it is probably safe to conclude that internet platforms would not be held to provide a service that "only governmental entities have traditionally provided." Following the Court's reasoning, even though an internet platform – which is clearly a private entity – provides "a forum

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<sup>6</sup> *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2018) (emphasis in original).

<sup>7</sup> *C.f. Packingham v. North Carolina*, 582 U.S. 98, 107 (2017).

<sup>8</sup> *Halleck*, 139 S. Ct. at 1926. A private entity can also qualify as a state actor "when the government compels the private entity to take a particular action" or "when the government acts jointly with the private entity." *Id.* at 1928 (citations omitted). As discussed in more detail below, however, there is a big difference between overt collusion between the government and the private sector and the day-to-day necessity of dealing with the constant coercive political pressures of the Administrative State. *See infra* Section III.A.2.

<sup>9</sup> *Halleck*, 139 S. Ct. at 1928-29 (emphasis in original).

<sup>10</sup> *Id.* at 1930.

for speech,” it is “not transformed by that fact alone into a state actor” and may therefore “exercise editorial control over speech and speakers in the forum.”<sup>11</sup>

The logic supporting the Court’s holding in *Halleck* is compelling: the Court understood that government placing restrictions on the ability of private entities to control the content on their platforms would have a chilling effect on their First Amendment rights. As the Court pointed out, if all private property owners who open their property for speech are placed on the government side of the First Amendment equation, then they “would lose the ability to exercise what they deem to be appropriate editorial discretion within that open forum.”<sup>12</sup> In such a case, private property owners “would face the unappetizing choice of allowing all comers or closing the platform altogether.”<sup>13</sup> Accordingly, reasoned the Court,

to hold that private property owners providing a forum for speech are constrained by the First Amendment would be “to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country.” The Constitution does not disable private property owners and private lessees from exercising editorial discretion over speech and speakers on their property.<sup>14</sup>

In light of the Court’s precedent on what constitutes a state actor—and the repeated failure of arguments that internet platforms are state actors<sup>15</sup>—proponents of internet platform regulation have developed a new legal theory: internet platforms are communications networks and thus should be regulated as common carriers just like telephone companies, including being subject to a non-discrimination obligation to ensure that all voices are treated equally. As common carriage is a well-recognized term of art in the communications field, this theory appears to use the common carriage designation as a euphemism for public utility

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<sup>11</sup> *Id.* For a good summary of recent cases rejecting application of the state action doctrine to internet platforms, see Jess Miers, TWITTER (May 15, 2023, 5:23 pm) ([https://twitter.com/jess\\_miers/status/1658221488607223808](https://twitter.com/jess_miers/status/1658221488607223808)); Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH L. 191 (2021) (available at: <https://www.journaloffreespeechlaw.org/goldmanmiers.pdf>).

<sup>12</sup> *Halleck*, 139 S. Ct. at 1931.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* (citations omitted).

<sup>15</sup> See Miers, *supra* n. 11.



regulation of internet platforms. Rather than regulate internet platforms' *economic* conduct (e.g., prices), however, the government would regulate the platforms' *speech*. The problem, of course, is that because neither common carriage nor public utility regulation were ever intended to serve this function, how that regulatory regime would work in practice is unclear.<sup>16</sup> We turn to that question next.

### III. Are Internet Platforms Really Like Telephone Companies? A Review of the Prominent Academic Literature

#### A. Professor Adam Candeb

Perhaps one of the earliest (and most frequently cited) proponents of imposing common carrier regulation on internet platforms is Professor Adam Candeb of Michigan State University. While Professor Candeb has written extensively on the topic, his primary arguments are set forth in a paper entitled *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*.<sup>17</sup> As Candeb expressly calls for a new “regulatory deal” for network regulation which would “probably require an administrative agency”<sup>18</sup> and draws heavily from communications law and policy debates, he appears to sit squarely in the public utility camp for platform regulation.

#### 1. Summary of Candeb's Regulatory Arguments

Candeb begins with the basic premise that internet platforms—by virtue of their market power<sup>19</sup> and their provision of a “public good”<sup>20</sup>—should be treated as common carriers, complete with a non-discrimination obligation. While

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<sup>16</sup> C.f. Blake E. Reid, *Uncommon Carriage*, 76 STAN. L. REV. \_\_ (forthcoming 2024) (draft at 3) (available at: <https://ssrn.com/abstract=4181948>) (There is “no such thing as a broadly applicable law of ‘common carriage,’ nor any consistent body of First Amendment law consistently approving or disapproving of ‘common carriage’ laws for information platforms. The allegedly constituent parts of ‘common carriage’—and its close cousin, ‘quasi-common carriage’—often are pulled from disparate regimes in telecommunications law governing broadcast television and radio, cable TV, internet access, newspapers, and other technological siloes, divorced from the contemporary technological and social contexts that shaped the development of the regimes and their treatment by the courts.”).

<sup>17</sup> 22 YALE J.L. & TECH. 391 (2020) (available at: <https://yjolt.org/bargaining-free-speech-common-carriage-network-neutrality-and-section-230>).

<sup>18</sup> *Id.* at 431.

<sup>19</sup> *Id.* at 399.

<sup>20</sup> *Id.* at 400.

Candeub concedes that “[d]efining non-discrimination is not simple,”<sup>21</sup> under Candueb’s proposed paradigm, discrimination based on “any valid business or technical reason” would not be illegal.<sup>22</sup> Instead, “only the most egregious cases would constitute discrimination...”<sup>23</sup> But what constitutes “egregious” discrimination? Given the subjective nature of this standard, it is hard to tell from his paper.

For example, Candeub argues that “social media is all about, at some level, discrimination. The platforms curate media that will interest you – but somehow, it is never clear how tweets or particular Facebook posts get to the top of one’s feed.”<sup>24</sup> Thus, Candeub posits that there is “no reason why the social media companies cannot allow users to create their own experience, block what they wish, and express desires to see more of a particular type of posts.”<sup>25</sup> Yet there are many good reasons why internet platforms may choose to provide a curated experience, and since most do, such curation appears to be preferred by its customers and to support the business model. (And, one must wonder, if “social media is all about discrimination,” then wouldn’t a non-discrimination requirement turn social media into something else?)

Candeub also argues that a mandatory non-discrimination obligation would “protect[] communications from government interference”<sup>26</sup> (even though such a mandate is, by definition, government interference). In Candeub’s view,

One of common carriage’s anti-discrimination obligations’ great virtues is that it protects private entities from complying with government’s censorship demands. A private company with no legal obligation to treat users in a non-discriminatory fashion readily can accede government’s request to censor, block, or

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<sup>21</sup> *Id.* at 430.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 430-31.

<sup>25</sup> *Id.* at 431.

<sup>26</sup> *Id.* at 432.

otherwise treat users unfairly. But, if a private firm is prohibited by law to do so, then the government cannot even ask.<sup>27</sup>

To support his argument, Candeub points to three analogies in telecommunications law: net neutrality, cable regulation, and broadcast regulation.

a. *Net Neutrality*

Candeub's first analogy is to the FCC's controversial 2015 decision to classify Broadband Internet Access Services (BIAS) as an interstate common carrier telecommunications service under Title II of the Communications Act.<sup>28</sup> Citing to the D.C. Circuit's rejection of the FCC's 2010 *Open Internet Rules*<sup>29</sup> in *Verizon v. FCC*,<sup>30</sup> Candeub contends that the "legal status of network neutrality became enmeshed with common carriage because courts have identified the power to impose network neutrality rules with the power granted in section 201 of the Communication Act."<sup>31</sup> In Candeub's view, in exchange for "tolerat[ing] the market power of the broadband providers," the FCC in its 2015 *Open Internet Order* demanded that Internet Service Providers (ISPs) provide "a public good—serve all equally and refrain from discrimination."<sup>32</sup> Moreover, argues Candeub, a common carrier non-discrimination rule "serves important social goals. It prevents 'de-platforming' of politically or socially unpopular views, thus encouraging full-throated public discussion and creating a universal communications platform for discussion of political and social issues."<sup>33</sup>

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<sup>27</sup> *Id.* at 432-33.

<sup>28</sup> *In the Matter of Protecting and Promoting the Open Internet*, FCC 15-24, REPORT AND ORDER ON REMAND, DECLARATORY RULING, AND ORDER, 30 FCC Rcd. 5601 (rel. March 12, 2015), *aff'd United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *reh'g en banc denied* 855 F.3d 381 (2017).

<sup>29</sup> *In the Matter of Preserving the Open Internet, Broadband Industry Practices*, FCC 10-201, REPORT AND ORDER, 25 FCC Rcd. 17905 (rel. Dec. 23, 2010).

<sup>30</sup> 740 F.3d 623 (D.C. Cir. 2014).

<sup>31</sup> Candeub, *supra* n. 17 at 415 (citing 47 U.S.C. § 201).

<sup>32</sup> *Id.* at 416.

<sup>33</sup> *Id.* at 416-17.

b. *Cable Regulation*

Although cable companies (or, more accurately, the services they provide) are not regulated as common carriers under the Communications Act of 1934, Candeub nonetheless contends that the history of cable franchise regulation is a good example of a “common carriage deal” between industry and local governments.<sup>34</sup> That is, argues Candeub, in exchange for a total government-sanctioned monopoly in a franchise area, the cable company would agree to serve everybody in the franchise territory at a uniform price. According to Candeub, “[e]choes of this deal” can be found in the Cable Competition and Consumer Protection Act of 1992.<sup>35</sup>

c. *Broadcast Regulation*

As his final analogy, Candeub points to the public interest requirement in broadcast licensing. As Candeub notes, because the “federal government owns that [sic] airways and licenses their use to television and radio broadcasters,” the “government gives a unique benefit that only government can provide.”<sup>36</sup> That benefit, contends Candeub, is the ability of broadcasters to “command considerable rents” given the “scarcity of spectrum.”<sup>37</sup> Thus, Candeub argues that in “return for the granting of rents, the government asks that licensees use their monopoly power to expand access and encourage the flow of information, often political information.”<sup>38</sup>

2. *Discussion*

Professor Candeub has put forth an interesting yet controversial academic argument that has received some attention (including a citation by a sitting Supreme Court Justice). As scrutiny of his regulatory proposal shows, however, not only has Candeub misstated the law, but his analogies are uniformly inapposite.

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<sup>34</sup> *Id.* at 417.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 417-18.

Let's start with Candeub's primary analogy: net neutrality.<sup>39</sup>

As noted above, citing to the D.C. Circuit's ruling in *Verizon*, Candeub maintains that the "highly topical debate over so-called network neutrality is really a common carriage argument."<sup>40</sup> Candeub mischaracterizes *Verizon*. There, the D.C. Circuit was tasked with reviewing the FCC's first formal attempt to write net neutrality rules: the 2010 *Open Internet Order*. The 2010 *Order* conspicuously avoided going down the Title II common carrier road by trying to regulate Title I information services using the FCC's authority under Section 706 of the Telecommunications Act of 1996. After review, the court struck down the 2010 *Order*, finding that the Commission impermissibly treated Title I information services as common carrier telecommunications services pursuant to Section 153(51) of the Communications Act.<sup>41</sup> In particular, the D.C. Circuit found that the "no blocking" rule mandated by the FCC's 2010 *Order* essentially forced ISPs to provide edge providers with access at a regulated price of zero. The court therefore remanded the case with a clear roadmap on how the FCC could remedy its order without reverting to Title II.<sup>42</sup> Rather than heed the D.C. Circuit's advice, the FCC capitulated to political pressure from the Obama White House and classified BIAS as a Title II common carrier interstate telecommunications service in the 2015 *Open Internet Order*.<sup>43</sup> As the FCC decided in its 2015 *Order* to forbear from many of the Title II common carrier requirements such as tariffing and universal service contributions (thus producing what then-FCC Chairman Tom

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<sup>39</sup> For a detailed legal background about the net neutrality debate, see, e.g., Lawrence J. Spiwak, *What Are the Bounds of the FCC's Authority over Broadband Service Providers? – A Review of the Recent Case Law*, 18 J. INTERNET L. 1 (2015) (available at: <https://www.phoenix-center.org/papers/JournalofinternetLawBoundsofFCCAuthority.pdf>); Lawrence J. Spiwak, *USTelecom and its Aftermath*, 71 FED. COMM. L.J. 39 (2019) (available at: <http://www.fclj.org/wp-content/uploads/2018/12/71.1-%E2%80%93Lawrence-J.-Spiwak.pdf>).

<sup>40</sup> Candeub, *supra* n. 17 at 413.

<sup>41</sup> 47 U.S.C. § 153(51) ("A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services...").

<sup>42</sup> For a full brief of this case, see Spiwak, *What Are the Bounds of the FCC's Authority*, *supra* n. 39.

<sup>43</sup> *Supra* n. 29.

Wheeler described as “Title II-Lite”), it can be argued that the FCC’s reclassification strategy was more jurisdictional than philosophical.<sup>44</sup>

Candeub next claims that the FCC justified its *2015 Open Internet Order* “with the power granted in Section 201 of the Communications Act.”<sup>45</sup> According to Candeub, under this authority, the FCC “tolerat[ed] the market power of the broadband providers” in exchange for requiring that they “serve all equally and refrain from discrimination.”<sup>46</sup> Candeub misstates the Communications Act.

Candeub specifically points to Section 201(a), which provides in relevant part that: “It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request.” But what Candeub omits is any reference to Section 201(b), which provides in relevant part that: “All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful.”<sup>47</sup> Thus, the primary purpose of Section 201 is *not* to provide the FCC with a jurisdictional hook (other provisions of the Communications Act are designed for this purpose<sup>48</sup>), but to provide the legal structure for the price regulation of common carrier services.<sup>49</sup> And price regulation was precisely what the net neutrality fight was about: by mandating a no-blocking rule, the FCC forced ISPs to provide service at a regulated price of

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<sup>44</sup> In so doing, the FCC played fast and loose with the statutory requirements required for forbearance as required by Section 10 of the Communications Act (47 U.S.C. § 160). However, apparently believing that half a loaf was better than nothing at all, the industry did not object, and the D.C. Circuit upheld the legal gymnastics in the FCC’s *2015 Order*, vastly expanding the agency’s power going forward. See Spiwak, *USTelecom and Its Aftermath*, *supra* n. 39.

<sup>45</sup> Candeub, *supra* n. 17, at 415.

<sup>46</sup> *Id.* at 416.

<sup>47</sup> 47 U.S.C. § 201.

<sup>48</sup> See, e.g., 47 U.S.C. §§ 151, 152, and 153.

<sup>49</sup> For a primer on basic ratemaking under the “just and reasonable” standard, see, e.g., George S. Ford & Lawrence J. Spiwak, *Tariffing Internet Termination: Pricing Implications of Classifying Broadband as a Title II Telecommunications Service*, 67 FED. COMM. L.J. 1 (2015) (available at: <http://www.fclj.org/wp-content/uploads/2015/02/Tariffing-internet-Termination.pdf>).

zero without fulfilling the due process requirements of identifying a cost methodology, conducting a rate case, and requiring a tariff.<sup>50</sup>

While Section 201 encapsulates telephone companies' general common carrier obligation to provide service upon reasonable request, by its own terms, Section 201 has *nothing* to do with discrimination—i.e., having to provide service to all comers upon reasonable request, the ability of telephone companies to treat their customers differently. For that, we need to turn to the eponymous provision in the Communications Act which specifically deals with discrimination: Section 202. Under Section 202,

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.<sup>51</sup>

Yet, nowhere in Candeub's paper does he even mention Section 202. Perhaps this omission is due to the fact that once Section 202 and its implementing caselaw are properly understood, they do not help Candeub's discrimination argument.

Significantly, Section 202 does not bar all discrimination, but only *undue* or *unreasonable* discrimination. Under the express terms of Section 202(a), carriers are allowed to engage in *reasonable* discrimination<sup>52</sup>—a standard with which Candeub generally agrees. But if telecommunications law is to be the analytical template, then the inquiry is not what constitutes "egregious" discrimination, but what constitutes "unreasonable" discrimination? Fortunately, the term "unreasonable discrimination" is not an abstract concept; it is a common term of art found in many public utility statutes, and courts over the past nine decades have provided

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<sup>50</sup> See Ford & Spiwak, *Tariffing Internet Termination*, *id.* In fact, the FCC in its 2015 *Open Internet Order* ignored the rate regulation problem altogether. There, the FCC side-stepped the law by promulgating its "no paid prioritization" rule—not under Section 202(a), the provision in the Communications Act that is charged with regulating all issues of discrimination—but under the public interest catchall of Section 201(b) and Section 706. Spiwak, *USTelecom and Its Aftermath*, *supra* n. 39, at 49.

<sup>51</sup> 47 U.S.C. § 202.

<sup>52</sup> 47 U.S.C. § 202(a).

copious guidance about its parameters – regardless of whether the public utility is also regulated as a common carrier.<sup>53</sup>

Because Section 202 is designed to govern economic conduct (rather than speech), disputes under Section 202 generally involved complaints over differences in price and services offered by the providers to their assorted customers. According to well-established caselaw, any charge that a carrier has unreasonably discriminated must satisfy a three-step inquiry (in sequence): (1) whether the services offered are “like”; (2) if they are “like,” whether there is a price difference among the offered services; and (3) if there is a price difference, whether it is reasonable.<sup>54</sup> If the services are not “like” or “functionally equivalent,” then discrimination is not an issue, and the investigation ends. There is no valid discrimination claim for *different* prices or price-cost ratios for *different* goods.

A determination of whether services are “like” is based upon neither cost differences nor competitive necessity. Cost differentials are excluded from the likeness determination and introduced only to determine “whether the discrimination is unreasonable or unjust.” Likeness is based solely on functional equivalence.<sup>55</sup> If the services are determined to be “like” or “functionally equivalent,” then the carrier offering them has the burden of justifying any price disparity as reasonable, such as a difference in cost.<sup>56</sup> If a price difference is not justified, then the price difference is deemed unlawful. A price difference cannot be arbitrarily presumed unlawful, yet that is exactly what the FCC proceeded to do in its 2015 *Open Internet Order*.<sup>57</sup>

Moreover, given that allegations of non-discrimination generally arise around disputes over price, interpretation of the concept of “undue discrimination” under Section 202 also cannot be read in isolation from the tariffing requirements of

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<sup>53</sup> For example, under Section 206 of the Federal Power Act (16 U.S.C. § 824e), the Federal Energy Regulatory Commission has the authority to address any “rate, charge or classification” related to the transmission or sale of electricity that the agency determines is “unjust, unreasonable, unduly discriminatory or preferential.”

<sup>54</sup> See, e.g., *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990) and citations therein.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> See Spiwak, *USTelecom and Its Aftermath*, *supra* n. 39.



Section 203 of the Communications Act.<sup>58</sup> Under Section 203, a common carrier must file tariffed rates with the FCC for approval, upon which such tariffs are made available to the public. For this reason, one usual measure to determine reasonableness is an inquiry as to whether the different rates are offered to “similarly situated” customers.<sup>59</sup> That is, are the customers roughly the same size and exchange similar levels of traffic, or, for example, is one customer a wholesale customer while the other only buys at retail? In the standard course of regulating telecommunications rates, such distinctions permit different treatment.

Internet platforms, so far, are not subject to common carrier rate regulation and therefore do not have to file tariffs which govern their terms of service. They operate in a deregulatory environment. Moreover, they currently *voluntarily* charge a price of zero to the end consumer (i.e., their services are free). How then, if we adopt Candeub’s common carrier regulatory model, would we evaluate claims of “undue discrimination” by internet platforms following the language and implementing precedent of Section 202? That is, if we assume *arguendo* that internet platforms are common carriers and must provide service to all comers, then what level of content moderation among different customers would be unlawful? Although Candeub offers no answers, the D.C. Circuit’s ruling in *Orloff v. FCC* may offer some guidance.<sup>60</sup>

Under the Communications Act, mobile voice is classified as a common carrier service (while mobile data service is not). In the mid-1990s—with the express blessing of Congress—the FCC removed the tariffing requirement of Section 203 for mobile voice, reasoning that competition would ensure that rates remained “just and reasonable.”<sup>61</sup> The plaintiff in *Orloff*, however, argued that Verizon nonetheless engaged in undue discrimination under Section 202 because Verizon individually negotiated with customers and offered special deals. The D.C. Circuit disagreed.

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<sup>58</sup> 47 U.S.C. § 203.

<sup>59</sup> See, e.g., *In the Matter of Competition in the Interstate Interexchange Marketplace*, FCC 90-90, 5 FCC Rcd. 2627, NOTICE OF PROPOSED RULEMAKING (rel. April 13, 1990) at ¶¶ 131-139 (citing *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1007-13 (D.C. Cir. 1987)).

<sup>60</sup> *Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003), *cert. denied*, 542 U.S. 937 (2004).

<sup>61</sup> *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, FCC 94-31, SECOND REPORT AND ORDER, 9 FCC Rcd. 1411 (rel. March 7, 1994).

As the court observed, in a *deregulated* environment, “[r]ates are determined by the market, not the Commission, as are the level of profits.”<sup>62</sup> Thus, reasoned the court, Section 202 “prohibits only *unjust* and *unreasonable* discrimination in charges and service. [The plaintiff] is therefore not entitled to prevail merely by showing that she did not receive all the sales concessions Verizon gave to some other customers—that, in other words, Verizon engaged in discrimination.”<sup>63</sup>

*Orloff* thus provides a powerful reminder that a common carrier public utility regulation is not an environment in which firms can exist as “half pregnant”: either the government affirmatively regulates a firm’s rates, terms, and conditions of service, or the government surrenders that oversight function to the market. There is no middle ground. As *Orloff* holds, it is perfectly lawful for a firm providing a common carrier service to discriminate by individualized negotiations when the government opts for a deregulated market. Applying the lesson of *Orloff* to the “internet platforms are common carriers” debate, even if classified as common carriers, under current market conditions internet platforms’ content curation policies would likely not reach the level of “undue discrimination” that Section 202 proscribes. If the government wants to exert more control over how internet platforms curate content, then the full panoply of public utility regulation is probably required so that the regulator can decide, for example, whether Donald Trump is “similarly situated” to an Instagram influencer.

Finally, Candeub makes a mistake common among many academics: he fails to offer even basic cost/benefit analysis of his proposal.<sup>64</sup> It is axiomatic that while regulation has benefits, regulation also can be costly. It is also axiomatic that firms are not passive recipients of regulation. Thus, despite altruistic intentions, a common carrier regulatory regime may do more harm than good.

Such was the case with net neutrality. While the D.C. Circuit in *United States Telecom Association v. FCC* initially deferred to the FCC’s then-predictive judgment that the 2015 *Open Internet Rules* would not cause any economic harm,<sup>65</sup> when the FCC reversed those rules two years later in its *Restoring Internet Freedom Order*

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<sup>62</sup> *Orloff*, 352 F.3d at 420.

<sup>63</sup> *Id.* (emphasis in original).

<sup>64</sup> See, e.g., Lawrence J. Spiwak, *A Change in Direction for the Federal Trade Commission?*, 22 FEDERALIST SOC’Y REV. 304 (2021) (available at: <https://fedsoc.org/commentary/publications/a-change-in-direction-for-the-federal-trade-commission>) (critiquing now-FTC Chair Lina Khan’s argument for unfair methods of competition rulemaking).

<sup>65</sup> *U.S. Telecom Ass’n*, 825 F.3d at 707-08.

(RIFO), the Commission had the advantage of peer-reviewed econometric evidence which conclusively demonstrated that industry investment suffered as a result of reclassification.<sup>66</sup> Candeub may be unaware of the cost-benefit analysis described in the RIFO, as he incorrectly states that *Congress*—not the FCC’s 2018 *Restoring Internet Freedom Order*—was the governing authority that reversed the 2015 Order.<sup>67</sup>

Next, let’s turn to Candeub’s cable regulation analogy. As noted above, Candeub argues that the cable franchise system is essentially a “common carrier deal”—i.e., in exchange for a government-sanctioned monopoly, the cable company agreed to serve the entire franchise area at a uniform price. Moreover, argues Candeub, this deal was “echoe[d]” in the Cable Competition and Consumer Protection Act of 1992. Again, Candeub’s analogy is inapposite.

To begin, internet platforms do not have a government-sanctioned monopoly, so it is unclear what kind of “common carrier deal” can be made with regard to content moderation. (And, quite frankly, unless we want state-run social media, the notion of granting a particular internet platform a government-sanctioned monopoly in exchange for regulated content moderation is probably not a good idea in the first instance.)

Second, a mandatory buildout requirement in exchange for a government-sanctioned monopoly is not the equivalent of common carriage. To ensure due process, regulation requires specificity, and Congress has never subjected cable companies to common carrier regulation when they provide multichannel video services (although cable companies are subject to varying degrees of public utility regulation by the FCC). If anything, all this “bargain” between the local franchise authority and the cable companies represents is simply another form of public utility regulation.

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<sup>66</sup> *In the Matter of Restoring Internet Freedom*, FCC 17-166, DECLARATORY RULING, REPORT AND ORDER, AND ORDER, 33 FCC Rcd. 311 (rel. Jan. 4, 2018), at ¶¶ 95-98, *aff’d by, in part, vac’d by, in part, rem’d by Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (citing George S. Ford, *Net Neutrality, Reclassification and Investment: A Counterfactual Analysis*, PHOENIX CENTER POLICY PERSPECTIVE NO. 17-02 (2017) (subsequently published as *Regulation and Investment in the U.S. Telecommunications Industry*, APPLIED ECONOMICS (July 23, 2018)); see also George S. Ford, *Net Neutrality and Investment in the US: A Review of Evidence from the 2018 Restoring Internet Freedom Order*, 17 REV. NETWORK ECON. 175-205 (2019) (available at: <https://www.degruyter.com/downloadpdf/j/rne.2018.17.issue-3/rne-2018-0043/rne-2018-0043.xml>).

<sup>67</sup> Candeub, *supra* n. 17 at 416.

Moreover, Candeub's description of a "common carrier deal" was most definitely not echoed in the 1992 Cable Act. Section 621(a)(1) of the Cable Act specifically called for the end of exclusive franchises. And when local governments continued to drag their heels by forcing new entrants to live up to the same regulatory "bargain" of universal coverage the franchise authority made with the incumbent as a condition of approval, the FCC was forced to step in with their *2008 Cable Franchise Reform Order*. As the FCC found, mandatory buildout requirements are anticompetitive as they raise rivals' costs and deter new entry.<sup>68</sup>

Candeub's broadcast regulation analogy is also misplaced. As noted above, Candeub's central argument is that "in return for the granting of rents, the government asks that licensees use their monopoly power to expand access and encourage the flow of information."<sup>69</sup> But Candeub incorrectly conflates a property right with the ability to exercise market power by either raising price or restricting output in a particular market.

An exclusive spectrum license is a property right conferred by the government which is specifically designed to protect the license holder against harmful interference from other users in a particular band at a particular location. But unlike the old exclusive cable franchise model highlighted above, an exclusive spectrum license does not bestow a state-sanctioned monopoly over a given market.<sup>70</sup> Indeed, we don't live in a world where there is a single state-run television or radio station; broadcast markets are typically characterized by multiple broadcast licensees competing in the same geographic area for ears and eyeballs. And if we expand the definition of the relevant product market to include other currently available entertainment options—including one or more cable companies, two satellite companies, assorted streaming services, etc.—then

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<sup>68</sup> *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, FCC 06-180, REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING, 22 FCC Rcd. 5101 (rel. Mar. 5, 2007), *aff'd*, *Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

<sup>69</sup> Candeub, *supra* n. 17 at 418.

<sup>70</sup> If we accept Candeub's argument, then all of American's wireless companies also have monopolies via their exclusive licenses—the only difference is that they purchased their spectrum from the government at auction, while broadcasters received their spectrum for free in exchange for a social contract with the government. See T. Randolph Beard *et al.*, *An Economic Framework for Retransmission Consent*, PHOENIX CENTER POLICY PAPER NO. 47 (Dec. 2013) (available at: <https://www.phoenix-center.org/pcpp/PCPP47Final.pdf>). However, like broadcasting, wireless markets generally have multiple licensees. See, e.g., T. Randolph Beard *et al.*, *Wireless Competition Under Spectrum Exhaust*, 65 FED. COMM. L.J. 79 (2012).

the argument that broadcasters are feasting upon monopoly rents becomes preposterous. In fact, the continued erosion of the broadcasters' business model over the past several years led the FCC to loosen its media ownership rules and eliminate the broadcaster/newspaper cross-ownership ban.<sup>71</sup>

Finally, yet perhaps most germane, the Communications Act specifically bars treating broadcasters as common carriers. As Section 153(11) states, "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."<sup>72</sup> It is thus unclear how broadcast regulation is a "common carriage deal" when the Communications Act clearly belies that argument.

We also have Candeub's two (and somewhat interrelated) policy arguments: common carriage regulation is justified because internet platforms are "dominant" and because they provide a "public good."

As noted in the preceding discussion, dominance depends entirely on how one defines the relevant market.<sup>73</sup> Take Facebook as an example. If we define the relevant market narrowly as "a social media platform where people can interact with both friends and public figures based on a unique proprietary user interface," then sure: Facebook is dominant over itself (i.e., a relevant market of one firm). Yet Facebook competes for patronage with a host of other social media platforms, including Snapchat, Twitter (now X), TikTok, Mastodon, Substack, and Truth Social. The broadly defined social media market appears quite competitive, offering consumers a wide variety of choices free of charge.<sup>74</sup>

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<sup>71</sup> *In the Matter of 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Promoting Diversification of Ownership In the Broadcasting Services; Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets; Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services*, FCC 17-156, ORDER ON RECONSIDERATION AND NOTICE OF PROPOSED RULEMAKING, 32 FCC Rcd. 9802 (rel. Nov. 20, 2017).

<sup>72</sup> 47 U.S.C. § 153(11).

<sup>73</sup> *C.f.* Geoffrey A. Manne & J.D. Wright, *Google and The Limits of Antitrust: The Case Against Google*, 34 HARV. J.L. & PUB. POL'Y 171 (2011).

<sup>74</sup> A market equilibrium is an economic outcome, not a political choice. Depending on the size of the market, the intensity of price competition and the amount of sunk costs required for entry,

(Footnote Continued. . . .)

The question of market dominance also has legal implications. While market dominance may provide an argument for public utility regulation, does the fact that a firm is dominant *a fortiori* mean that this firm is also a common carrier? In a paper entitled *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, University of Pennsylvania Law School Professor Christopher Yoo addresses this question directly.<sup>75</sup> After reviewing the caselaw, Professor Yoo finds “that none of the standard judicial definitions of common carriage depend on the presence of market power.”<sup>76</sup> Yoo’s finding makes sense. For example, electric companies—which are the very epitome of “natural monopolies”—have never been regulated as common carriers but are nonetheless extensively regulated as public utilities.<sup>77</sup>

Which brings us to Candeub’s “social media is a public good” argument. A public good is an economic concept explaining a kind of product or service that theoretically may be underprovided without policy intervention. Candeub provides the standard economic definition of a public good as “(i) non-rivalrous, meaning that when a good is consumed, it doesn’t reduce the amount available for others and (ii) non-excludable, meaning that one cannot provide the good without others being able to enjoy it.”<sup>78</sup> In Candeub’s view, internet platforms fit this definition:

A universal communications platform is a public good. It is non-rivalrous, meaning my use does not affect or diminish your use. In fact, the more people who use the platform, the more valuable it becomes. And, it is non-excludable. It is difficult to hoard a universal communications forum for oneself. It allows government to explain itself to citizens—and citizens to express themselves to

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“few” firms may be the efficient outcome and therefore public utility regulation may be unwarranted. George S. Ford, Thomas M. Koutsky, & Lawrence J. Spiwak, *Competition After Unbundling: Entry, Industry Structure, and Convergence*, 59 FED. COMM. L.J. 331 (2007); see also George S. Ford, “Hipster” Antitrust Meets Two-Sided Markets, BLOOMBERG LAW (Apr. 17, 2018) (available at: <https://www.phoenix-center.org/oped/BloombergLawHipsterAntitrustMeetsTwo-SidedMarkets17April2018.pdf>).

<sup>75</sup> 1 J. FREE SPEECH L. 463 (2021).

<sup>76</sup> *Id.* at 467 (citations omitted).

<sup>77</sup> See *supra* n. 4. *C.f. Miami Herald Pub. v. Tornillo*, 418 U.S. 241 (1974) (striking down on First Amendment grounds a Florida law which required a newspaper to publish opposing views, even though the newspaper was the only print outlet in the market).

<sup>78</sup> Candeub, *supra* n. 17 at 399-400.

government and fellow citizens. It is therefore necessary for democracy and democratic institutions, which are themselves a public good. A universal communications platform lowers search costs for finding suitable goods and services and their associated transaction costs.... Above all, a universal communications platform allows for democratic self-government by promoting free speech.<sup>79</sup>

Candeub's application of the standard definition of a public good is incorrect and self-contradictory. A communications platform is not a public good. The fact that *information* is non-rivalrous in consumption does not imply that a service offering *access to information* is also a public good. Newspapers, books, and magazines are not public goods because exclusion is feasible through prices and subscriptions. Likewise, internet platforms are excludable, as are the internet accounts that make access possible. In fact, it is the platforms' ability to exclude that motivates Candeub's proposal, so he effectively rebuts his own public good argument. Any user of an internet platform must have an account, and there are all kinds of technical, policy, and even price restrictions on the use of their platforms. (If you think Facebook is a non-excludable service, try using it without logging in.) Since non-excludability is a necessary attribute of a public good, then the ability to discriminate – which Candeub seeks to regulate away – implies that internet platforms are not a public good. It may be possible through regulatory fiat to make platforms look more like public goods, but doing so is a regulatory creation, not an economic descriptor.

Candeub further contradicts himself by abandoning his definition entirely, conflating something that is "good for the public" with a "public good." That many Americans use internet platform services as their primary source of news and information makes them useful and important. Perhaps that is a separate reason for government oversight, but not because it makes platforms public goods.

For example, we have discovered that several internet platforms blocked posts about Hunter Biden's laptop shortly before the 2020 election (a decision which was hardly the industry's finest). But the central policy question is not whether some internet platforms censored content; instead, the relevant policy question is whether these internet platforms were able to suppress this information so totally that an inquisitive American could not avail herself of sufficient alternative news sources to make an informed decision. The answer, of course, is "no." If

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<sup>79</sup> *Id.* at 400-01.

anything—as the “Streisand Effect”<sup>80</sup> dictates—these internet platforms’ bad decision to curate content about the laptop simply amplified attention to the story by a plethora of other news outlets.<sup>81</sup> If it is true that Americans have such a profound confirmation bias that they are unwilling to question what they see on the internet, then that is hardly a compelling reason for massive government intervention into the market.

Finally, Candeub’s argument that common carrier regulation will somehow insulate internet platforms from government pressure merits some discussion. As noted above, Candeub posits that while unregulated firms are highly susceptible to government pressure to censor content, if a firm is subject to a mandatory common carrier non-discrimination obligation, then “the government cannot even ask.”<sup>82</sup> Such an argument reveals a naivety about how public utility regulation works in practice. Regulation does not widen the gap between the regulated and the regulator; *regulation brings them closer together*. Indeed, as it will be the government that adjudicates any charge of undue discrimination, if the government pressures a firm to censor content, then the firm may gladly acquiesce because it knows the government’s wishes will likely immunize it from penalty (and it may, in fact, view such acquiescence as a proverbial deposit in the regulatory favor bank that can be cashed in later).<sup>83</sup> More likely, however, is that even if the firm is skeptical about trusting the government in such a case, if an internet platform is regulated as a public utility, then the government retains numerous other regulatory pressure points to push the firm to agree (i.e., if you don’t help me in this case, I will stick it to you in another case where you want regulatory relief).<sup>84</sup> As it’s hard to fight City Hall, acceding to the constant coercive

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<sup>80</sup> See [https://en.wikipedia.org/wiki/Streisand\\_effect](https://en.wikipedia.org/wiki/Streisand_effect).

<sup>81</sup> Abby Ohlheiser, *Twitter’s Ban Almost Doubled Attention for Biden Story*, MIT TECH. REV. (Oct. 16, 2020) (available at: <https://www.technologyreview.com/2020/10/16/1010644/twitter-ban-hunter-biden-emails-backfires>).

<sup>82</sup> Candeub, *supra* n. 17 at 433.

<sup>83</sup> If there is demonstrated evidence of collusion between industry and the government, then under *Halleck*, the state-actor doctrine could be implicated. See *Halleck*, 139 S. Ct. at 1928 (“Under this Court’s cases, a private entity can qualify as a state actor in a few limited circumstances—including, for example, (i) when the private entity performs a traditional, exclusive public function; (ii) when the government compels the private entity to take a particular action; or (iii) when the government acts jointly with the private entity.”) (citations omitted).

<sup>84</sup> As Judge Frank Easterbrook observed nearly forty years ago:

(Footnote Continued. . . .)



pressure from the Administrative State is a far cry from outright “collusion” between the government and the private sector.<sup>85</sup>

### B. *Professor Eugene Volokh*

In a paper entitled *Treating Social Media Platforms Like Common Carriers?*,<sup>86</sup> Professor Eugene Volokh of UCLA School of Law posits that some form of government regulation over internet platform’s content moderation activities would likely survive First Amendment scrutiny. Whether Professor Volokh’s First Amendment arguments are correct is ultimately up to the courts to decide. Of interest here are the regulatory implications of Volokh’s arguments.

#### 1. *Summary of Volokh’s Regulatory Arguments*

Volokh’s basic argument is that because “[w]e don’t want large business corporations deciding what Americans can say in a particular medium of public communication,” when “‘dominant digital platforms’ have the power ‘to cut off speech,’ we should be as concerned about that power as we are about, say,

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Often an agency with the power to deny an application (say, a request to commence service) or to delay the grant of the application will grant approval only if the regulated firm agrees to conditions. The agency may use this power to obtain adherence to rules that it could not require by invoking statutory authority. The conditioning power is limited, of course, by private responses to the ultimatums – firms will not agree to conditions more onerous than the losses they would suffer from the agency’s pursuit of the options expressly granted by the statute. The firm will accept the conditions only when they make both it and the agency (representing the public or some other constituency) better off. Still, though, the agency’s options often are potent, and the grant of an application on condition may greatly increase the span of the agency’s control.

Frank Easterbrook, *The Supreme Court, 1983 Term – Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 39 (1984). In fact, the expectation that the regulator will want to negotiate to exert some pound of flesh in exchange for regulatory approval is now unfortunately commonplace. See T. Randolph Beard *et al.*, *Regulating, Joint Bargaining, and the Demise of Precedent*, 39 MANAGERIAL & DECISION ECON. 638 (2018).

<sup>85</sup> *C.f. Missouri v. Biden*, No. 3:22-Cv-01213, slip op. at 116-17 (W.D. La. July 4, 2023) (Memorandum Ruling on Request for Preliminary Injunction) (“The evidence thus far shows that the social-media companies cooperated [with the Biden Administration] *due to coercion, not because of a conspiracy.*”) (emphasis supplied). That said, as the Ninth Circuit recently recognized, there is also a fine line between coercion and elected officials’ First Amendment right to voice their opinions. See generally *Kennedy v. Warren*, 66 F.4th 1199, No. 22-35457, slip op. (9th Cir. May 4, 2023).

<sup>86</sup> 378 J. FREE SPEECH L. 377 (2021).

government power to exclude people from limited public forums.”<sup>87</sup> To remedy this problem, Volokh contends that a “common carrier-like model” for internet platforms’ “hosting function” – which Volokh defines as “the distribution of an author’s posts to users who affirmatively seek out those posts by visiting a page or subscribing to a feed”<sup>88</sup> – may be warranted.

But Volokh fails to provide any details about what his proposed common carrier regulatory regime would look like or how this regime would work in practice. For example, Volokh makes clear that he is not claiming that internet platforms “are ‘common carriers’ under existing law, or are precisely identical to existing common carriers.”<sup>89</sup> Instead, he simply wants to draw an “analogy” to “certain familiar common carriers, such as phone companies...”<sup>90</sup> Moreover, argues Volokh, even if telecommunications carriers “prove[] to be a helpful analogy, there’s little reason to think that all the details of common carrier law ought to be fully adopted for social media platforms, or that the threshold for regulation should be defined by traditional common carrier rules.”<sup>91</sup>

Yet while Volokh in his paper spends little time explaining how current common carrier telephone regulation might be used as a basis for internet platform regulation, Volokh spends a considerable amount of time focusing on a regulatory regime expressly targeted at firms which are *not* common carriers: the must-carry provisions for cable companies contained in the 1992 Cable Act.<sup>92</sup> Although the Supreme Court upheld a First Amendment challenge to the FCC’s must-carry rules,<sup>93</sup> the FCC’s must-carry regime – and its closely related cousin, the FCC’s retransmission consent regime<sup>94</sup> – are far from innocuous from a regulatory

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<sup>87</sup> *Id.* at 385 (citations omitted).

<sup>88</sup> *Id.* at 381.

<sup>89</sup> *Id.* at 382.

<sup>90</sup> *Id.* at 461-62.

<sup>91</sup> *Id.* at 382-83.

<sup>92</sup> *Id.* at 383, 438-39. *See* 47 U.S.C. § 534.

<sup>93</sup> *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1994).

<sup>94</sup> *See, e.g.*, 47 U.S.C. § 534. Despite the highly interrelated nature of the must-carry and retransmission consent regimes, Volokh makes no mention of the FCC’s retransmission consent regime in his paper.

perspective and have produced a plethora of contentious fights at the FCC over the years.<sup>95</sup>

That said, unlike Candeub, Volokh—to his credit—at least recognizes the economic pitfalls of regulation.

First, Volokh recognizes “the value of private property rights.” As Volokh notes, although “the government may sometimes require property owners to serve people they’d prefer not to serve—indeed, as it does for common carriers—this should be the rare exception and not the general rule.”<sup>96</sup>

Second, Volokh doubts that a broad non-discrimination rule would survive a cost/benefit test. According to Volokh, “[p]erhaps people are just so concerned by a few incidents over a few years that they have lost a sense of perspective about what might ultimately be a minor problem.”<sup>97</sup>

Third, Volokh appears to concede that there is a legitimate social value when internet platforms curate content. As Volokh observes:

One value of private property rights is that sometimes private property owners can enforce valuable norms that the government can’t; protect us from violence and other harms that stem from violation of those norms; or at least create diverse and competing norms, which might itself provide valuable choice to users. We probably profit greatly, for instance, from the fact that our friends can eject rude people from their parties, and that most businesses can eject rude speakers from their property. Such ejections might be rare, but perhaps their very availability makes them less necessary.<sup>98</sup>

Fourth, Volokh recognizes that “[g]overnment regulation can easily make problems worse.” As Volokh correctly notes, some

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<sup>95</sup> For a detailed explanation of both the must-carry and retransmission consent regimes, see Beard *et al.*, *An Economic Framework for Retransmission Consent*, *supra* n. 70.

<sup>96</sup> Volokh, *supra* n. 86, at 412.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

regulations may actually help entrench incumbents (for instance, by imposing costs that are too expensive for upstart rivals) and diminish future competition. Other regulations may create new governmental bureaucracies that could be indirectly used to suppress certain viewpoints, for instance if the common carrier rules are enforced by some Executive Branch agencies.<sup>99</sup>

Finally, and along the same lines, Volokh recognizes that if

access rules are not too costly to litigate, then they may unduly chill even legitimate removals of material—e.g., viewpoint-neutral removal of vulgarities, pornography, and the like, if a statute restricts only viewpoint-based removals—because platforms will worry that authors will wrongly assume that the removals were actually improper, and therefore file lawsuits that will be costly to defend.”<sup>100</sup>

Given these and other concerns he raises, Volokh concedes that perhaps “the best solution might well be to stay the course, and to expect market competition to resolve what problems there might be.”<sup>101</sup>

Yet even though Volokh provides many valid reasons for rejecting common carrier regulation for internet platforms, Volokh is nonetheless undeterred from calling for some sort of common carrier regime for to regulate content moderation by internet platforms. Despite his multiple caveats, Volokh continues to suggest that “that the phone company analogy is something that we should seriously consider” and, as such, legislation may be appropriate to regulate the “deeper levels of the communications infrastructure, for instance imposing common carrier obligations only on pure hosting companies, such as Amazon Web Services, or requiring platforms to make their services interoperable with rivals and thus diminishing monopoly-producing network effects.”<sup>102</sup> Volokh’s proposal looks a lot like the public utility regulation to which the communications industry is currently subjected.

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<sup>99</sup> *Id.* at 413.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 413-14.

## 2. Discussion

Volokh’s argument for common carrier regulation of internet platforms is perplexing. As one of the nation’s leading scholars of the First Amendment, the thrust of Volokh’s paper is to argue that the imposition of common carrier regulation on internet platforms would survive constitutional scrutiny—an argument which may soon be considered by the Supreme Court. But if one calls for regulation, then one also needs to provide the details of the proposed regulatory regime. This Volokh does not do. Like Candeub, Volokh rebuts his own proposal. While he suggests that “the phone company analogy is something that we should seriously consider,” he provides several valid reasons for not doing so and fails to rebut them. Moreover, if we adopt some form of the FCC’s must-carry regime for internet platforms as Volokh posits, then we will need both a dedicated statute and a dedicated regulator to write rules and enforce such a regime. If anything, by detailing many of the pitfalls of regulation, Volokh makes a convincing case *not* to impose such regulation. Given Volokh’s lack of specificity of his proposed regulatory regime and his admitted (and correct) caveats about the dangers of ill-formed regulation, Volokh’s paper offers little insight into the practical and policy implications of regulating internet platforms as common carriers—even if his First Amendment analysis of such regulation is correct.<sup>103</sup>

## IV. Relevant Cases

The preceding section provided a review of some of the literature calling for internet platforms to be treated as common carriers using telephone companies as a supporting analogy. This debate is no longer academic, however. Justice Clarence Thomas expressed support for the idea, and at the time of this writing two cases—one from the Eleventh Circuit and one from the Fifth Circuit—are pending a grant of *certiorari* before the Supreme Court where this question is directly at bar.

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<sup>103</sup> Given the Supreme Court’s recent ruling in *303 Creative LLC v. Elenis*, it is unclear what it will conclude with regard to efforts to treat internet platforms as common carriers. 600 U.S. \_\_, slip op. at 14 (decided June 30, 2023) (“No public accommodations law is immune from the demands of the Constitution. In particular, this Court has held, public accommodations statutes can sweep too broadly when deployed to compel speech.... When a state public accommodations law and the Constitution collide, there can be no question which must prevail.”).

A. *Justice Thomas's Concurrence in Biden v. Knight First Amendment Institute at Columbia University*

The central dispute in *Biden v. Knight First Amendment Institute* was whether President Donald Trump (then a government official) violated the First Amendment when he blocked certain users from interacting with his Twitter account.<sup>104</sup> The Court found that President Trump had only limited control of his account since Twitter had banned it from the platform, and that President Trump had ultimately lost the 2020 election and no longer held elected office. The Court therefore remanded the case to the Second Circuit with instructions to dismiss the case as moot.<sup>105</sup>

Although the Court issued its ruling *per curiam* without releasing an opinion, what makes the case interesting is that Justice Clarence Thomas decided to publish a lengthy concurrence to highlight the “principal legal difficulty that surrounds digital platforms – namely, that applying old doctrines to new digital platforms is rarely straightforward.”<sup>106</sup> According to Justice Thomas, as it is “unprecedented” that there is “concentrated control of so much speech in the hands of a few private parties,” perhaps the Court “will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned infrastructure such as digital platforms.”<sup>107</sup>

Recognizing that the Court’s earlier decision in *Halleck* imposed significant First Amendment constraints on any government attempt to impose content moderation constraints on private actors, Justice Thomas predicted that “part of the solution may be found in doctrines that limit the right of a private company to exclude.”<sup>108</sup> Citing *Candeub*, Justice Thomas endorsed the idea of common carrier regulation.<sup>109</sup>

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<sup>104</sup> 141 S. Ct. 1220 (2021).

<sup>105</sup> *Id.* at 1221.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 1222. It is interesting to note that subsequent to his concurrence in *Biden*, Justice Thomas joined the majority’s opinion in *303 Creative*, *supra* n. 103, which held that free speech concerns trump public accommodation laws forbidding discrimination.

<sup>109</sup> *Id.* at 1222-23.

Justice Thomas grounded his argument (as so many others have) on the telecommunications analogy. In Justice Thomas' view, although internet platforms are "digital instead of physical, they are at bottom communications networks, and they 'carry' information from one user to another."<sup>110</sup> According to Justice Thomas, a "traditional telephone company laid physical wires to create a network connecting people. Digital platforms lay information infrastructure that can be controlled in much the same way."<sup>111</sup>

Justice Thomas also echoed Candeub's argument that common carrier regulation is appropriate for internet platforms because of their "dominant market share."<sup>112</sup> In Justice Thomas' view, "[m]uch like with a communications utility, this concentration gives some digital platforms enormous control over speech."<sup>113</sup> Thus, reasoned Justice Thomas, if "the analogy between common carriers and digital platforms is correct, then an answer may arise for dissatisfied platform users who would appreciate not being blocked: laws that restrict the platform's right to exclude."<sup>114</sup> As such, Justice Thomas suggested that "similarities between some digital platforms and common carriers . . . may give legislators strong arguments for similarly regulating digital platforms."<sup>115</sup>

#### B. *NetChoice LLC v. Attorney General of Florida*

Florida passed a statute that imposed significant content moderation obligations on internet platforms. NetChoice challenged the law in federal court. The case revolved around whether internet platforms are private actors and, as such, engaged in constitutionally protected expressive activity when they moderate and curate content that they distribute on their respective platforms. The Eleventh Circuit found that they were private actors and thus held that the

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<sup>110</sup> *Id.* at 1224.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 1224-25.

<sup>115</sup> *Id.* at 1226.

Florida law that restricted the platforms' ability to engage in content moderation "unconstitutionally burden[ed] that prerogative."<sup>116</sup>

The Florida law specifically said that internet platforms are public utilities and that it was therefore appropriate to treat them "similarly to common carriers."<sup>117</sup> The Eleventh Circuit disagreed. While the court "confess[ed] some uncertainty" as to whether Florida meant to argue that "platforms are *already* common carriers, and so possess no (or only minimal First Amendment rights)" or that Florida "can, by dint of ordinary legislation, *make* them common carriers, thereby abrogating any First Amendment rights they may currently possess,"<sup>118</sup> the Eleventh Circuit—refreshingly drawing upon an accurate description of the communications industry and its governing laws—rejected both possible legislative interpretations.

As to the former interpretation of Florida's statute, the Eleventh Circuit offered three reasons why internet platforms are not common carriers.

First, the court pointed out that internet platforms have never acted like common carriers. In particular, the court noted that while common carriers do not "make individualized decisions . . . whether and on what terms to deal,"<sup>119</sup> internet platforms behave differently:

While it's true that social-media platforms generally hold themselves open to all members of the public, they require users, as preconditions of access, to accept their terms of service and abide by their community standards. In other words, Facebook is open to every individual if, but only if, she agrees not to transmit content that violates the company's rules. Social-media users, accordingly, are *not* freely able to transmit messages "of their own design and choosing" because platforms make—and have always made—

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<sup>116</sup> *NetChoice, LLC v. A.G. Fla.*, 34 F.4th 1196, 1203. As the Eleventh Circuit tersely noted, the fact that platforms are "private enterprises, not governmental (or even quasi-governmental) entities" would be "too obvious to mention if it weren't so often lost or obscured in political rhetoric." *Id.* at 1204.

<sup>117</sup> Florida Law SB-7072, Sections 1(5) and 1(6).

<sup>118</sup> *A.G. Fla.*, 34 F.4th at 1220 (emphasis in original).

<sup>119</sup> *Id.* (citations omitted).



“individualized” content- and viewpoint-based decisions about whether to publish particular messages or users.<sup>120</sup>

Second, the Eleventh Circuit found that neither the facts nor the caselaw supported treating internet platforms as common carriers. To begin, the court noted that internet platforms “aren’t ‘dumb pipes’”:

They’re not just servers and hard drives storing information or hosting blogs that anyone can access, *and they’re not internet service providers reflexively transmitting data from point A to point B*. Rather, when a user visits Facebook or Twitter, for instance, she sees a curated and edited compilation of content from the people and organizations that she follows.<sup>121</sup>

Thus, reasoned the court, the caselaw dictates that “social media platforms should be treated more like cable operators, which retain First Amendment rights to exercise editorial discretion, than traditional common carriers.”<sup>122</sup>

Finally, the Eleventh Circuit noted that in Section 223(e)(6) of the Telecommunications Act of 1996, Congress “explicitly differentiate[ed] ‘interactive computer services’—like social-media platforms—from ‘common carriers or telecommunications services.’”<sup>123</sup> According to the court, “Federal law’s recognition and protection of social-media platforms’ ability to discriminate

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<sup>120</sup> *Id.* (emphasis in original).

<sup>121</sup> *Id.* at 1204 (emphasis supplied); *see also Comcast Cable Corp. v. FCC*, 717 F.3d 982, 993-97 (Kavanaugh J., concurring) (D.C. Cir. 2013) (“Just as a newspaper exercises editorial discretion over which articles to run, a video programming distributor exercises editorial discretion over which video programming networks to carry and at what level of carriage.” Thus, “the FCC cannot tell Comcast how to exercise its editorial discretion about what networks to carry any more than the Government can tell Amazon or Politics and Prose or Barnes & Noble what books to sell; or tell the *Wall Street Journal* or *Politico* or the *Drudge Report* what columns to carry; or tell the MLB Network or ESPN or CBS what games to show; or tell *SCOTUSblog* or *How Appealing* or *The Volokh Conspiracy* what legal briefs to feature.”).

<sup>122</sup> *A.G. Fla.*, 34 F.4<sup>th</sup> at 1220 (citations omitted).

<sup>123</sup> *Id.* at 1220-21 (citing 47 U.S.C. § 223(e)(6)). As noted *supra*, the violation of a similar statutory prohibition was the exact reason why the D.C. Circuit in *Verizon* remanded the FCC’s 2010 *Open internet Rules*.

among messages—disseminating some but not others—is strong evidence that they are not common carriers with diminished First Amendment rights.”<sup>124</sup>

As to the second possible interpretation of Florida’s law—that the government can render platforms common carriers by statute—the Eleventh Circuit was equally skeptical. As the court observed, “[n]either law nor logic recognizes government authority to strip an entity of its First Amendment rights merely by labeling it a common carrier.”<sup>125</sup> Quite the contrary, reasoned the court,

if social-media platforms currently possess the First Amendment right to exercise editorial judgment, as we hold it is substantially likely they do, then any law infringing that right—even one bearing the terminology of “common carri[age]”—should be assessed under the same standards that apply to other laws burdening First Amendment-protected activity.<sup>126</sup>

The Eleventh Circuit went on to reject Florida’s argument that because internet platforms “are clothed with a ‘public trust’ and have ‘substantial market power’” they “are (or should be treated like) common carriers.”<sup>127</sup> The court gave two reasons for its rejection.

First, the court noted that Florida did not argue that market power and public importance alone are sufficient reasons to recharacterize a private company as a common carrier. Rather, Florida acknowledged that the “basic characteristic of common carriage is the requirement to hold oneself out to serve the public indiscriminately.”<sup>128</sup> But as the court pointed out, the problem with Florida’s argument was that “social-media platforms *don’t* serve the public indiscriminately but, rather, exercise editorial judgment to curate the content that they display and disseminate.”<sup>129</sup> Second, the Eleventh Circuit, citing the Supreme Court’s decision in *Miami Herald Publishing Co. v. Tornillo*, reasoned that a private company “engaged in speech within the meaning of the First Amendment [does not lose] its

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<sup>124</sup> *Id.* at 1221.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* (emphasis in original).

constitutional rights just because it succeeds in the marketplace and hits it big.”<sup>130</sup> Thus, concluded the court, “because social-media platforms exercise—and have historically exercised—inherently expressive editorial judgment, they aren’t common carriers, and a state law can’t force them to act as such unless it survives First Amendment scrutiny.”<sup>131</sup>

C. *NetChoice, LLC v. Paxton*

In direct contrast to *A.G. Florida*, the Fifth Circuit in *NetChoice v. Paxton* upheld the constitutionality of a Texas law that formally classified internet platforms as common carriers.<sup>132</sup> According to the Texas legislature, internet platforms “function as common carriers, are affected with a public interest, are central public forums for public debate, and have enjoyed governmental support in the United States.”<sup>133</sup> The Texas legislature further found that “social media platforms with the largest number of users are common carriers by virtue of their market dominance.”<sup>134</sup> Given these findings, the Texas legislature imposed an assortment of restrictions and prohibitions on internet platforms’ ability to curate content. The Fifth Circuit upheld the Texas law. As the Fifth Circuit repeated several times throughout its opinion, the Texas law “does not chill speech; if anything, it chills censorship.”<sup>135</sup>

The Fifth Circuit began its analysis by saying that internet platforms “are communications firms of tremendous importance that hold themselves out to serve the public without individualized bargaining.”<sup>136</sup> As such, reasoned the court, the Texas law “imposes a basic non-discrimination requirement that falls comfortably within the historical ambit of *permissible common carrier regulation*.”<sup>137</sup> To find otherwise, argued the court, “would represent the first time ... that federal

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<sup>130</sup> *Id.* at 1222 (citing *Tornillo*, *supra* n. 77, 418 U.S. 241).

<sup>131</sup> *Id.*

<sup>132</sup> *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022) (upholding Tex. Bus. & Com. Code § 120.002(b)).

<sup>133</sup> *Id.* at 445.

<sup>134</sup> *Id.*

<sup>135</sup> *See, e.g., id.* at 447, 450, 452.

<sup>136</sup> *Id.* at 469

<sup>137</sup> *Id.*

courts have prevented a State from requiring interstate . . . communications firms to serve customers without discrimination.”<sup>138</sup>

When the petitioners pointed out that platforms are not members of the communications industry because their mode of transmitting expression differs from what other industry members do, the court flatly called that distinction “wrong.”<sup>139</sup> Pointing to the Texas law – as opposed to the Communications Act of 1934 – the Fifth Circuit found that the “whole purpose of a social media platform . . . is to ‘enable[] users to communicate with other users.’”<sup>140</sup> Thus, reasoned the court, because internet platforms “are communications firms, hold themselves out to serve the public without individualized bargaining, and are affected with a public interest,” Texas permissibly determined that platforms are common carriers and, as such, can be “subject to nondiscrimination regulation.”<sup>141</sup> But if so, as discussed in a moment, then why did this Fifth Circuit draw upon the Communications Act (albeit incorrectly) to support its decision to uphold the Texas law?

#### D. Discussion

Like the literature surveyed in Section III, Justice Thomas, the Fifth Circuit, and the Eleventh Circuit all draw heavily from communications law to reach their respective conclusions. As such, although it is not explicitly stated, it is again reasonable to infer that they are viewing common carrier regulation through a public utility lens. Indeed, although the three opinions discussed above focused on the First Amendment implications of the “internet platforms are common carriers” question, the Eleventh Circuit confirmed what the debate is really about: *whether states may impose some form of public utility regulation on internet platforms*.<sup>142</sup> As such, it is troubling that none of the three opinions discuss the regulatory implications – across many different industries – of declaring internet platforms to be common carriers.

Second, if internet platforms are indeed communications firms as both Justice Thomas and the Fifth Circuit claimed, then the Communications Act and its

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<sup>138</sup> *Id.* (emphasis supplied).

<sup>139</sup> *Id.* at 474.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 473-74.

<sup>142</sup> *Id.*

decades of implementing caselaw cannot be swept under the rug. The Communications Act is Congress' most definitive statement about whether and how assorted communications firms should be regulated and must be included in any analysis. And with all due respect to both Justice Thomas and the Fifth Circuit, they both patently misunderstand Communications Law 101.

For example, Justice Thomas was wrong when he argued that although internet platforms are "digital instead of physical, they are at bottom communications networks, and they 'carry' information from one user to another."<sup>143</sup> According to Justice Thomas, a "traditional telephone company laid physical wires to create a network connecting people. Digital platforms lay information infrastructure that can be controlled in much the same way."<sup>144</sup> However, as the Eleventh Circuit correctly observed, internet platforms do not engage in providing interstate common carrier telecommunications services, and therefore are not currently subject to FCC subject matter jurisdiction under Title II. Moreover, the information infrastructure that carries their services to end-users is not their own, but that of communications firms regulated under FCC jurisdiction.

Along the same lines, although Texas passed a statute that specifically declares internet platforms to be common carriers, the Fifth Circuit's opinion does not discuss how the Commerce Clause may come into play. Internet platforms do not provide an "intrastate" service; their service is clearly *interstate* (if not international). Accordingly, if the Fifth Circuit is going to hold that internet platforms provide a communications service, then it cannot also conclude that states are allowed to require "interstate communications firms to serve customers without discrimination."<sup>145</sup> The Communications Act expressly prohibits such an extra-jurisdictional reach by states into interstate common carrier telecommunications services (which is under the FCC's exclusive purview). State jurisdiction is limited to *intrastate* telecommunications services.<sup>146</sup> But again, this reasoning assumes that these alleged communications networks are subject to the Communications Act.

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<sup>143</sup> *Knight Foundation*, 141 S. Ct. at 1224.

<sup>144</sup> *Id.*

<sup>145</sup> *Paxton*, 49 F.4<sup>th</sup> at 469 (emphasis supplied).

<sup>146</sup> *See* 47 U.S.C. § 152.

Furthermore, if telecommunications law is the analytical template for common carriage regulation of internet platforms, then there is an interesting legal paradox at play which the Fifth Circuit missed. Not only does the Communications Act prohibit states from regulating interstate telecommunications services, but Congress gave the FCC additional power to preempt states when local policy conflicts with federal policy. Under Section 253(d),

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.<sup>147</sup>

Thus, when the FCC classified BIAS as a common carrier telecommunications service in its *2015 Open Internet Order*, states were preempted from regulating any interstate BIAS service. When the FCC subsequently returned BIAS back to an information service in its *2018 RIFO*, however, California decided pass its own net neutrality law.<sup>148</sup> Although ISPs challenged the California law on the grounds of field, express, and conflict preemption, the Ninth Circuit ruled that by choosing to return BIAS back to a Title I information service, the FCC had surrendered its regulatory authority under Title II, and, as such, states were free to step in to fill the regulatory void.<sup>149</sup> Under this logic, it would appear that the Fifth Circuit has placed Texas into a box: On the one hand, if internet platforms already provide an interstate common carriage telecommunications service, then Texas has no authority to pass its own law because federal law preempts it. Conversely, as internet platforms clearly provide an information service under Title I of the Communications Act, then—as the Eleventh Circuit pointed out—states may not turn them into common carriers by statute (thus defeating the point of the legislative exercise).<sup>150</sup>

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<sup>147</sup> 47 U.S.C. § 253(d).

<sup>148</sup> Cf. Lawrence J. Spiwak, *The Preemption Predicament Over Broadband Internet Access Services*, 21 FEDERALIST SOC'Y REV. 32 (2020) (available at: <https://fedsoc.org/commentary/publications/the-preemption-predicament-over-broadband-internet-access-services>).

<sup>149</sup> *ACA Connects-America's Communs. Ass'n v. Bonta*, 24 F.4th 1233 (9th Cir. 2022).

<sup>150</sup> If anything, the decision to regulate internet platforms as an interstate common carrier telecommunications service under Title II or as an information service under Title I of the Communications Act rests exclusively with the FCC, not with the individual states. *Id.*

## V. Regulatory Implications of Classifying Internet Platforms as Common Carriers

As noted at the outset of this paper, by constantly drawing (albeit often incorrect) analogies to the communications industry, both the academic literature and the caselaw appear to be using the concept of common carriage as a euphemism for broader public utility regulation of internet platforms. The problem is that no one has articulated a clear vision of what this common carrier/public utility regulation would look like or how it would work in practice.

Let's thus assume *arguendo* that the Supreme Court upholds the Fifth Circuit's ruling in *Paxton* and rejects the Eleventh Circuit's ruling in *A.G. Florida* and rules that internet platforms are common carriers. Such an outcome is more likely to raise questions than provide answers.

The first and most obvious legal conundrum arises due to the common carrier exemption in the Federal Trade Commission Act. Under Section 5 of the Act, the FTC lacks any jurisdiction over "common carriers."<sup>151</sup> Thus, should the Supreme Court agree with the Fifth Circuit, then the federal government will immediately lose much of its oversight authority over internet platforms, particularly in the areas of consumer protection and privacy.<sup>152</sup>

To remedy this situation, Congress would basically have two options: On the one hand, it could eliminate the common carrier exemption. In this scenario, while Congress would effectively return FTC oversight of internet platforms back to the status quo, the practical effect would be to expose internet platforms – along with a host of other common carrier services such as railroads and voice telephony (mobile and fixed) – to redundant regulatory oversight (and with it, increased compliance costs). On the other hand, because internet platforms' service offerings (common carrier or not) do not fall under any part of the Communications Act, Congress would probably have to opt for a totally new

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<sup>151</sup> 15 U.S.C. § 45(a)(2).

<sup>152</sup> Interestingly, the Fifth Circuit in *Paxton* made no mention of the FTC Act's common carrier exemption. Whether somebody raises this important issue if the Supreme Court grants *certiorari* remains to be seen.

regulatory agency – complete with its own enabling statute – to regulate internet platforms. This is an idea that has gained steam over the last several years.<sup>153</sup>

Creating a new regulatory regime out of whole cloth is easier said than done. Such a regime must satisfy fundamental due process concerns to be constitutionally valid. This task requires us to ask important questions: What is the new regulator’s statutory mandate (i.e., Congressional policy goals)? Is the new regulator an independent agency like the FCC and FTC, or part of the executive branch like the Environmental Protection Agency? What is the new regulator’s subject matter jurisdiction? Is the new regulator limited to enforcement, or does it have rulemaking authority? Can the new regulator impose penalties and, if so, are there any statutory limits on these penalties? Do the new agency’s rules of practice and procedure comply with the Administrative Procedure Act? If there is a conflict with a state rule or regulation, does the new agency have the statutory power to preempt? If market conditions change, does the regulator have the authority to forbear from any of its statutory obligations?<sup>154</sup> The list is endless, yet so far there has been little discussion of these basic regulatory fundamentals in the assorted proposals for a digital regulator that have surfaced to date.<sup>155</sup>

Moreover, given that internet platforms provide an interstate service, the Commerce Clause is implicated. That is, if we regulate internet platforms as public

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<sup>153</sup> See, e.g., Report, George J. Stigler Center for the Study of the Economy and the State, The University of Chicago Booth School of Business, COMMITTEE FOR THE STUDY OF DIGITAL PLATFORMS, MARKET STRUCTURE AND ANTITRUST SUBCOMMITTEE (July 1, 2019) (available at: <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf>); Tom Wheeler, Phil Verveer, & Gene Kimmelman, *New Digital Realities; New Oversight Solutions in the U.S.: The Case for a Digital Platform Agency and a New Approach to Regulatory Oversight*, Shorenstein Center (Aug. 2020) (available at: [https://shorensteincenter.org/wp-content/uploads/2020/08/New-Digital-Realities\\_August-2020.pdf](https://shorensteincenter.org/wp-content/uploads/2020/08/New-Digital-Realities_August-2020.pdf)).

<sup>154</sup> See George S. Ford & Lawrence J. Spiwak, *Section 10 Forbearance: Asking The Right Questions To Get The Right Answers*, 23 *COMMLAW CONCEPTUS* 126 (2014) (available at <https://scholarship.law.edu/cgi/viewcontent.cgi?article=1551&context=commlaw>).

<sup>155</sup> See, e.g., George S. Ford, *Beware of Calls for a New Digital Regulator*, NOTICE & COMMENT – YALE JOURNAL ON REGULATION (Feb. 19, 2021) (available at: <https://www.yalejreg.com/nc/beware-of-calls-for-a-new-digital-regulator-by-dr-george-s-ford>); Lawrence J. Spiwak, *A Poor Case for a “Digital Platform Agency”*, PHOENIX CENTER POLICY PERSPECTIVE NO. 21-02 (Mar. 9, 2021) (available at: <http://www.phoenix-center.org/perspectives/Perspective21-02Final.pdf>); Neil Chilson, *Does Big Tech Need its Own Regulator*, George Mason University Global Antitrust Institute (2020) (available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3733726](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733726)); see also Lawrence J. Spiwak, *A Change in Direction for the Federal Trade Commission?*, *supra* n. 64.



utilities, then we must also decide how to allocate regulatory powers between the federal government and the individual states. Absent a cohesive federal framework, the internet could be subject to a Death by Fifty State Cuts.<sup>156</sup>

Finally, if we are going down the common carrier road to prevent viewpoint discrimination by internet platforms, will that regulatory regime apply to all online platforms—including, say, Amazon, which does not provide a social media service but is a large online retailer—to prevent traditional economic discrimination? The country just went through a major political fight when a bipartisan group of legislators tried to pass the American Innovation and Choice Online Act ostensibly to prevent a select number of firms from favoring their own goods and services (i.e., to impose a non-discrimination obligation). Due to the numerous legal<sup>157</sup> and economic<sup>158</sup> deficiencies of this poorly-crafted legislation, the bill died last Congress. Still, as non-discrimination is the political buzzword *du jour*, the potential for future legislative and regulatory mischief is endless.<sup>159</sup>

Which brings us to back to an important point about potential internet platform regulation that needs to be constantly re-emphasized: when government

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<sup>156</sup> See, e.g., T. Randolph Beard *et al.*, *Developing a National Wireless Regulatory Framework: A Law and Economics Approach*, 16 COMM'LAW CONSPECTUS 391 (2008); but cf. *National Pork Producers Council v. Ross, Secretary of the California Department of Food and Agriculture*, 143 S. Ct. 1142, No. 21-468 (decided May 11, 2023) (severely limiting the judicial doctrine of the dormant Commerce Clause).

<sup>157</sup> Lawrence J. Spiwak, *The Third Time is Not the Charm: Significant Problems Remain With Senator Klobuchar's Antitrust Reform Bill*, FEDSOC BLOG (June 7, 2022) (available at: <https://fedsoc.org/commentary/fedsoc-blog/the-third-time-is-not-the-charm-significant-problems-remain-with-senator-klobuchar-s-antitrust-reform-bill>); Lawrence J. Spiwak, *Why Does Congress Want to Break Amazon Prime?*, NOTICE & COMMENT – YALE JOURNAL ON REGULATION (Feb. 18, 2022) (available at: <https://www.yalejreg.com/nc/why-does-congress-want-to-break-amazon-prime-by-lawrence-j-spiwak>).

<sup>158</sup> George S. Ford, *The American Innovation and Choice Online Act is an "Economics-Free Zone"*, NOTICE & COMMENT – YALE JOURNAL ON REGULATION (June 10, 2022) (available at: <https://www.yalejreg.com/nc/american-innovation-and-choice-online-act-economics-free-zone>).

<sup>159</sup> For example, as this article was going to press, Senator Elizabeth Warren and Senator Lindsey Graham introduced the "Digital Consumer Protection Commission Act of 2023" to create a sector specific regulator for the tech industry that would oversee everything from economic behavior to content moderation. See [http://ct.symplicity.com/t/wrn/504b0983e2025a653fce52d369083957/2665571418/realurl=https://www.warren.senate.gov/imo/media/doc/Tech%20Bill\\_Full%20Text.pdf](http://ct.symplicity.com/t/wrn/504b0983e2025a653fce52d369083957/2665571418/realurl=https://www.warren.senate.gov/imo/media/doc/Tech%20Bill_Full%20Text.pdf). Although the Warren-Graham bill attempts to address the due process and regulatory structure issues highlighted in this paper, the bill's overly broad scope entails that its implementation would inevitably be plagued by the Law of Unintended Consequences.

decides to intervene in the market, we must always be wary of the “Law of Unintended Consequences.” Given our hyper-political times, politicians often rush to pass sweeping laws without understanding the consequences, often sweeping unrelated items into the legislation that will do society more harm than good.<sup>160</sup> As economist Dr. George Ford explained in the YALE JOURNAL OF REGULATION,

Firms are not passive recipients of regulation. When new rules or taxes are put in place, firms adjust their activities to accommodate the new setting, maximizing profits across a multitude of margins. Some of these altered behaviors can reflect the intent of the regulation, while others will not. Obamacare wanted employers to pay for employee’s healthcare, but many employers avoided the mandate by reducing hours below the threshold thirty hours per week. Affected workers faced lower incomes and had to search for second jobs. A 1990s effort to regulate cable television prices left prices largely untouched while cable companies curtailed quality and reduced industry investment.

This is the “Law of Unintended Consequences.”

Unintended consequences are universal. Inevitable. And, often painful. No regulatory intervention can fully escape them. The unforeseen (though often predictable) responses to a regulatory intervention may cause the regulation to do more harm than good.<sup>161</sup>

If social media companies are regulated as public utilities, then no one should be surprised when the inevitable “Law of Unintended Consequences” rears its ugly head and other digital platforms (ranging from streaming services to online retailers) are dragged into this new regulatory morass.

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<sup>160</sup> See, e.g., George S. Ford, *Is Social Media Legislation Too Broad? An Empirical Analysis*, PHOENIX CENTER POLICY PAPER NO. 59 (July 2023) (available at: <https://phoenix-center.org/pcpp/PCPP59Final.pdf>).

<sup>161</sup> George S. Ford, *Antitrust Reform and the Law of Unintended Consequences*, NOTICE & COMMENT – YALE JOURNAL ON REGULATION (January 7, 2022) (available at: <https://www.yalejreg.com/nc/antitrust-reform-and-the-law-of-unintended-consequences-by-george-s-ford-phd>).

## VI. Conclusion

When Congress passed the Telecommunications Act of 1996, one of its stated policy goals was to “reduce regulation in order to . . . encourage the rapid deployment of new telecommunications technologies.”<sup>162</sup> In fact, Section 230(b)(2) specifically states that it is the policy of the United States “to preserve the vibrant and competitive free market that presently exists for the internet and other interactive computer services, unfettered by Federal or State regulation.”<sup>163</sup> While the government took occasional steps in that direction over the ensuing twenty-five-plus years, history has borne out that the siren call of regulation was often too strong to ignore.<sup>164</sup> Such is the current push to impose public utility-type common carrier regulation on internet platforms.

For all its warts, the Telecommunications Act was designed to speed the transition from monopoly to competition.<sup>165</sup> But that is not what efforts to impose common carrier status on internet platforms is about. The effort to treat internet platforms as public utilities is, at bottom, an attempt to take a framework designed to govern the *economic behavior* of the Old Ma Bell monopoly and use it to govern questions of *speech* – the only constant being that the government would act as the final arbiter of a firm’s conduct. As such a regime has never been attempted before (probably because a regime designed to govern economic behavior was never intended to be used to regulate speech in the first instance), implementing this new regime would effectively force us to cross the “Regulatory Rubicon.”<sup>166</sup>

And if we cross this Regulatory Rubicon, what then? While First Amendment concerns are certainly important, there has been little meaningful discussion about how internet platform regulation would comport with the due process protections guaranteed by the Fifth Amendment, nor has anyone conducted a basic cost-benefit analysis to determine whether efforts to increase government intervention

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<sup>162</sup> Preamble, Telecommunications Act of 1996, Public Law 104-104.

<sup>163</sup> 47 U.S.C. § 230(b)(2).

<sup>164</sup> See, e.g., George S. Ford, “Regulatory Revival” and Employment in Telecommunications, PHOENIX CENTER POLICY PERSPECTIVE NO. 17-05 (June 12, 2017) (available at: <https://www.phoenix-center.org/perspectives/Perspective17-05Final.pdf>); BIDEN EXECUTIVE ORDER ON COMPETITION, *supra* n. 3.

<sup>165</sup> See, e.g., George S. Ford & Lawrence J. Spiwak, *Lessons Learned from the U.S. Unbundling Experience*, 68 FED. COMM. L.J. 95 (2016).

<sup>166</sup> See Reid, *supra* n. 16.

into the market would pay off. Adding to the morass, given the inherently interstate nature of the services internet platforms provide, the federal/state dynamic must be resolved.

Chief Justice John Roberts famously observed that the federal bureaucracy “wields vast power and touches almost every aspect of daily life.”<sup>167</sup> We must ask ourselves, therefore, do we really want a bunch of unelected bureaucrats to determine what speech is acceptable? Given our hyper-partisan times (and the increasing disrespect for precedent and the rule of law generally<sup>168</sup>), the answer should be a resounding “no.”<sup>169</sup> Otherwise, the definition of reasonable discrimination could shift with the political winds: Democrats in power would allow stringent curation of conservative content, and Republicans in power would allow stringent curation of liberal content.

Rather than regulate, perhaps there is a far cheaper and less intrusive solution for complaints about undue content moderation than massive government regulation: consumers can simply choose not to use social media platforms.

And who knows? If consumers find the content offensive, then they just might be happier for doing so.

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<sup>167</sup> *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (quotation marks omitted).

<sup>168</sup> See, e.g., *Beard et al., Regulating, Joint Bargaining, and the Demise of Precedent*, *supra* n. 84.

<sup>169</sup> Cf. Mike Lee, *SAVING NINE* (Center Street 2022).