Imperative Protection or Veiled Persecution?
Balancing §230 Immunity and the First Amendment in the Censorship of Social Media

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Abstract

In the new age of fast-paced digital news, the primary platform for political discourse has evolved from the static town square to an ever-expanding, broadly accessible, and immediately available forum of global proportions. As traditional publishers scramble to adapt to this shift, social networking platforms like Twitter and Meta ("Facebook") have become harbors of unverified, even dangerous, information. This position has prompted the creation of "fact-checkers," which attempt to identify and block information deemed subjectively inappropriate from disseminating into the public. Other industry leaders, like Google, have adopted a similar policy of censoring information and choosing market winners, through the biased filtering of search engine results available to their users. These "safeguards" have been criticized as empowering private organizations to curtail unwanted—not merely inaccurate—speech, begging the question of private versus public rights as it relates to the obligation of the law to interfere and protect freedoms of expression and speech. Analyzing this dichotomy calls on the Court to reconsider decades of precedent as it relates to private monopolies and its rudimentary definition of common carriage. In so doing, we conclude that a sufficient public rights infringement exists such that the government has an obligation to affirmatively impose restrictions on the censorship rights of monopolistic digital platforms for the purpose of preserving the collective freedom of thought and open channels of debate necessary to a thriving democracy.

Introduction

In the age of social media, there is increased demand for the regulation of speech due to the sheer volume and speed at which information can be consumed and spread. Where the "town square" of old was limited in its capacity and self-regulated to favor experts, the ease by which thoughts now travel online has evolved a new forum for the uninhibited dissemination of individual ideas and agendas. In some respects, the private companies which host these platforms have a duty to regulate this information where it has the potential to create harm, and the government has an interest in protecting this duty, especially where the agendas being shared are counter to the ideals of democracy or the perpetuation of government itself. But this interest must be balanced against the constitutional protections guaranteed to citizens of the United States by the First Amendment. This line between protection and persecution has not been clearly articulated by the courts. Despite numerous cases regarding the use of social media censoring to target groups with differing viewpoints (US Congress House Committee on Energy 2018; US Congress Senate Committees on Judiciary and on Commerce, Science and Transportation 2018; *Langdon* v. *Google* 2007), the right of private tech companies to censor their users has been upheld (*NAACP* v. *Claiborne Hardware* 1982; *Organization for a Better Austin* v. *Keefe* 1971).

While, in some ways, this hands-off posture is consistent with the underlying constitutional principles of limited government and individual responsibility, the courts have failed to adequately identify and address the new frontier of public discourse that is social media. While the function of these companies is certainly distinct from that of traditional print media, it drives a striking resemblance to the old town square,[1] which was a forum for discussion and a listening ear by which common citizens could petition their government for change. The modern adaptation of this forum has dominated the marketplace of ideas, but with greater visibility, unmatched speed, and unknown potential. Given the rapid growth of digital platforms, the unanticipated expansion of its user base, and the oligopoly that has been formed by the giants at the forefront of this new frontier (FairSearch 2012),[2] the Federal Government has a distinct obligation to intervene in the suppression of free speech as a necessary correction to the failing of the free market. This obligation trumps the longstanding government interest in granting maximum liberty to private companies because the scope and consequences of maintaining such concentrated power over the speech of private citizens and public actors is unprecedented and dangerous. By allowing these platforms to privately regulate the speech of billions of users, we surrender control of the national narrative (Shearer and Grieco 2019),[3] excluding political minorities and threatening the balance of free and unencumbered discourse that is imperative to a thriving democracy.

As Justice Thomas acquiesced in the recent case of *Biden* v. *Knight First Amendment Institute at Columbia University* (2021), "[The Court] will soon have no choice but to address how our legal doctrines apply to a highly concentrated, privately owned information infrastructure such as digital platforms." This article seeks to do just that. By re-evaluating the criteria for liability insulation and expanding the Court's rudimentary understanding of social media companies and their role in the market, we will conclude that such platforms ought to be barred from arbitrarily censoring their users whilst enjoying the protections of neutral forums. Whether by closing the loopholes from liability employed under Section 230 of the Communications Decency Act or by enforcing the heightened restrictions of common carriage, courts will thereby restore the free marketplace of ideas that is fundamental to the First Amendment and imperative to the perpetuation of our democracy.

Literature Review and Political Theory

The First Amendment and Protected Speech

The First Amendment to the United States Constitution reads, "Congress shall make no law…abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." This right to speech and, as extended, expression, is intrinsic to the American way of being as far back as its founding. The power of a people to air their grievances in the public forum, and the acute attention of the government to the needs of its citizens, are foundations necessary to any thriving democracy, which find their footing in the protections of the First Amendment.

Traditionally, these protections include individual and collective speech "in the pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends" (*Roberts* v. *U.S. Jaycees* 1984). This definition is intentionally overbroad, as the Bill of Rights was intended to constrain the federal government from acting, leaving all unallocated rights to the states and by extension, its people. Consequently, speech is generally protected when challenged, except when it falls into one of few narrow, judicially created categories of unprotected speech.

Looking first at those protected rights, the involvement of protected speech in a suit does not necessarily invoke a First Amendment violation. Traditionally, the Court has considered a number of factors when determining the threshold of a First Amendment speech violation, including whether the law was directed at speech or conduct and, if the latter, whether that conduct was inherently expressive (Killion 2019). Courts may also consider whether a law invokes a valid "time, place, or manner" restriction (*Hill* v. *Colorado* 2000), or wholly prohibits speech on the basis of its content (*Reed* v. *Town of Gilbert* 2015). Different categories of speech invoke differing levels of judicial scrutiny, primarily ranging from strict to intermediate. The primary category of protected speech invoked with regard to digital platforms is that which is political or ideological.

Given its historic context, it comes as no surprise that the Supreme Court has long regarded the safeguard of unencumbered political discourse to be the bedrock of First Amendment protections. Whether by prohibiting forced nationalism (*West Virginia* v. *Barnette* 1943) or supporting symbolic protest (*Tinker* v. *Des Moines* 1969; *Texas* v. *Johnson* 1989), the Court has generally upheld political speech except in rare cases, where under strict scrutiny the government has demonstrated that the implicated law was "narrowly tailored to achieve a compelling government interest" (Killion 2019).

Moreover, the importance of the right to free discourse in a democratic society is so paramount that courts and legislators have, for decades, expanded the protection of individual expression for this purpose beyond the scope of the First Amendment (Lakier 2021). These legal mechanisms include the right to access "uncensored channels of communication" (*Marsh* v. *Alabama* 1946), to partake in "free political discussion to the end that government may be responsive to the will of the people" (*Stromberg* v. *California* 1931), or to approach speech rights from the negative, by asserting an equally protected right to refrain from speaking at all (*Wooley* v. *Maynard* 1977). The Supreme Court has long stated that it is central to our democratic processes that we secure "the widest possible dissemination of information from diverse and antagonistic sources" (Benkler 1999, 354, 358) in an effort to round our view of the world and innovate as a society (*Turner Broadcasting* v. *FCC* 1997; *Turner Broadcasting v. FCC* 1994; *Buckley* v. *Valeo* 1976; *Red Lion* v. *FCC* 1969; *Citizen Publishing* v. *US* 1969; *New York Times* v. *Sullivan* 1964).

Restrictions on the Freedom of Speech

Despite the integral nature of free discourse in American society, the Court has, over time, articulated a narrow set of categories over which the First Amendment does not affirmatively offer protection. While content-based restrictions on speech are presumptively prohibited (*Reed* v. *Gilbert* 2015), speech which falls into these few, tailored categories may be restricted on the basis of their content, so long as such restrictions are imposed equally across the board (*R.A.V.* v. *St. Paul* 1992). These categories of unprotected speech generally include obscenity (*Miller* v. *California* 1973), defamation (*Gertz* v. *Robert Welch* 1974; *New York Times* v. *Sullivan* 1964), fraud (*US* v. *Alvarez* 2012; *Illinois ex rel. Madigan* v. *Telemarketing Associations* 2003), incitement (*Brandenburg* v. *Ohio* 1969), fighting words (*Chaplinsky* v. *New Hampshire* 1942),[4] true threats (*Watts* v. *United States* 1969), speech integral to criminal conduct (*Giboney* v. *Empire Storage and Ice Co*. 1949), and child pornography (*New York* v. *Ferber* 1982). When dealing with unprotected speech, the threshold for restriction by the government is significantly lowered, though the First Amendment may still provide grounds to challenge such restrictions, even on speech that is not expressly protected.

Application of Free Speech Rights and Restrictions in an Increasingly Digital World

When evaluating these unprotected categories of speech in the context of an expansive and evolving digital world, many of the traditional definitions applied by the court become muddied. Where “obscenity,” “pornography,” and “criminal conduct” might retain their meaning in an online environment, more ambiguous terms like “fraud” and “incitement” require additional consideration.

<u>Defamation and Fraud.</u> The first area of unprotected speech often contemplated with regard to online censorship is that of fraudulent or defamatory statements. Perhaps the most hotly

contested and easily identifiable activity engaged in by digital platforms, the emergence of "fact checkers," who censor and remove false or misleading speech, constitute a grave threat to the free flow of democratic discourse in the marketplace of ideas. The Supreme Court has continuously rejected the notion that false speech is exempted under First Amendment protections, out of principle that so doing would hinder innovation and productive discourse, which is necessary to a thriving democracy. As articulated in the plurality opinion of *States v. Alvarez* (2012), "some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation."

This sentiment, favoring maximum speech in the interest of innovation, is further reflected in the Brandeis concurrence to *Whitney v. California* (1927), which reads,

> Those who won our independence…believed that freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly, discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

This 'concurring dissent,' offered by Justice Brandeis, reaffirms the importance of preserving the unencumbered right to public discourse under the First Amendment. In direct opposition to the limits placed by the Sanford court via *Gitlow* (1925) and imposed thereby onto *Whitney* (1927), his concurrence presents the original intent of the First Amendment by the same criteria often cited of the Second. Much like the "well-regulated militia" is interpreted as a means for the people to defend themselves against a tyrannical government, Justice Brandeis vindicates the utility of free speech as an equally crucial tool in curbing tyranny by the majority. As argued above, the importance of public discourse in exciting political truth and creating an arena for advocacy and change is paramount. Without the freedom to speak against oppression, the majority will always prevail.

Even more so than categorically false information, this aspirational argument likewise concerns the majority of political speech exercised on social media platforms, particularly when such speech is censored or restricted for being contrary to the status quo. However, a narrow exception drawn by the Court in *Alvarez* allows for regulation of such speech when the knowingly false statements form the basis for other "legally cognizable harm" (*States* v. *Alvarez* 2012).[5] Generally, such harm has been limited to defamation of character or criminal fraud. Still, the Court has extended the exception to cases where such censorship will correct public or consumer deception (*Madigan* v. *Telemarketing Associations* 2003).[6] Clarification of this extension will be critical in understanding the limits to which the government can halt the spread of controversial false narratives regarding election integrity and public health—both of which have inspired passionate debate in recent years.

As it stands, regulation of most false or misleading speech is not exempted from First Amendment protections except in cases where, applying strict scrutiny, the government meets the burden of such restrictions being narrowly tailored to achieve a specific and compelling public interest. But in a world plagued by voter insecurity and pandemic-level health crises, the analysis of what constitutes public deception will be integral to understand what narratives can safely be promoted and what necessitates regulation by the government. Keeping in mind the context of the Bill of Rights and the longstanding interest in maintaining the First Amendment to preserve combative discourse, it would be prudent of the Court to construe such facts narrowly, leaving the optimal freedom in the hands of the citizens, and imposing censorship only where a grave and cognizable harm exists.

<u>True Threats and Incitements</u>. Looking next to "incitement," the most obvious articulation of the court can be found in the 1969 case of *Brandenburg v. Ohio*. Contemplating the validity of a criminal syndication law that prohibited public speech advocating illegal activity as invoked by the violent calls a Ku Klux Klan leader, the court held that speech advocating the use of force or lawbreaking was protected speech (*Brandenburg* v. *Ohio* 1969, 447). Narrowly, they carved a line where "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." (*Brandenburg* v. *Ohio* 1969, 447-8).[7] But, as Justice Holmes articulated in his now-canonical dissent in *Gitlow v. New York* (1925), "Every idea is an incitement…The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result." More pointedly, drawing the line between mere ideas and intentional incitement is unprecedentedly difficult when dealing with anonymous platforms and rapid, expansive information sharing, which often produces unintended results.

Proponents of online censorship argue that the pedestal for provocative speech is itself a tool that incites and, thus, can be restricted. This premise is based not in law but in an outdated and stifling fear of the unknown. Speech itself does not inflict harm, and mere contrary words do not invite danger. The line drawn between ideas and incitements is meant to address action where speech is involved, not silence speakers for contrary or antagonistic points of view or punish fruitless coercion (*NAACP* v. *Claiborne Hardware* 1982; *Organization for a Better Austin* v. *Keefe* 1971). It is the bombing of a school, not the empty threat (*Elonis* v. *United States* 2015) for which the government seeks to intervene. It is the violence against minority citizens, not the racist point of view (*Virginia* v. *Black* 2003) for which the government finds footing to legislate. It is the keeping of the peace, the protection from clear and present danger, and the right of the government to maintain order for which it finds cause to intervene in the free speech of private citizens.

Thus, where online forums create avenues for the rapid dissemination of ideas and instantly connect individuals across the globe without the need for intentional solicitation, the court must be wary of imposing intent where none affirmatively exists. As articulated in *Elonis* (2013, 723), the critical element of criminality in such a case is the intent of the threat itself and not merely its posting. Thus, assuming criminality from the actual or imagined but wholly unintended consequences of empty words is a perversion of this well-intended restriction—one which has the potential to freeze speech and stifle potential.

The Necessity of Unencumbered Discourse

The court has repeatedly upheld the necessity of political speech to curb majority rule and protect against tyranny (*Tinker* v. *Des Moines* 1969; *Watchtower* v. *Stratton* 2002; *Texas* v. *Johnson* 1989) and has noted a primary purpose for its perpetuation to be the fostering of an "uninhibited marketplace of ideas" (*Virginia* v. *Hicks* 2003), which can test truth and challenge minds by the "competition of the market" (Abrams v. US 1919, Holmes dissent). Alas, "[The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public" (*Associated Press* v. *US* 1945) and its basis, "…the hypothesis that speech can rebut speech, propaganda will answer propaganda, [and the] free debate of ideas will result in the wisest government policies" (*Dennis* v. *United States* 1951).

Where historically, unprotected speech was viewed as antagonistic to the institution of democracy, prompting decades of communist-era precedent on the necessity of government self-preservation (*Gitlow* v. *New York* 1925; *Whitney* v. *California* 1927; *Dennis* v. *US* 1951), the digital age of First Amendment scholarship requires a heightened focus on the fruits of democracy rather than the institutions which enforce it. As one scholar observed, “A system of free speech depends not only on the mere absence of state censorship, but also on [the fostering of] an infrastructure of free expression” (Balkin 2004). This infrastructure includes open channels of communication, free exchange of ideas, and encouragement of innovation by voices who desire change (Balkin 2004). The posture of the court in approaching these unforeseen challenges to free speech in a digital era shares this belief that the purpose of First Amendment protections are foremost to aggrandize the Lockean culture of collaborative participation and citizen-legislating, which has distinguished this country since its founding Balkin 2004, 438). Consequently, the atmosphere of hyper-regulating the content of the market and thereby discouraging an infrastructure of free discourse runs contrary to the position of the Court and the underlying constitutional principles that are fundamental to the American way of life.

Government Regulation of Private Companies' Suppression of Speech

For generations, the government itself has posed the biggest threat to the individual's freedom of speech (*Abrams* v. *US* 1919; *Texas* v. *Johnson* 1989; *Debs* v. *United States* 1919; *Chaplinsky* v. *New Hampshire* 1942; *United States* v. *O'Brien* 1968). But in an increasingly digital world, it is no longer the sole, or even primary, menace to the free flow of ideas in the marketplace (Benkler 1999, 364). Instead, individuals, and by extension, private companies, have assumed the role of silencing one another. Be it to bar opposing points of view or injure market competitors, when these private actors engage in silencing by relying on state-enforced rights and legislation enacted to empower this posture of censorship “for the greater good,” the threat to First Amendment liberties becomes grave (Benkler 1999, 365). Where the government has an obligation to refrain from First Amendment infringements, these private actors are not so held. Thus, by empowering individuals and private companies to censor and silence, the government knowingly enables and encourages a substantively wrong bypass of the First Amendment protections afforded to its citizens (Benkler 1999). Moreover, by allowing such censorship to rise to the degree of restricting democratic discourse wholly unchecked, Congress has nurtured such violations to disastrous proportions (Auxier 2020).

The unforeseeable monopoly on media, news, and narrative that digital platforms have assumed as a result of this legislative fostering, paired with the uniqueness of the new frontier, have prompted a plethora of unanswered questions regarding the ability of the people to seek redress against private companies for their role in censoring the marketplace of ideas. As posited by a 1999 article in the NYU Law Review, “allowing a few private companies to exercise too much control over our information environment has the potential to reduce the robustness and diversity of exchange in our marketplace of ideas” (Benkler 1999, 359).

This concern that private power over information access could threaten the infrastructure of the First Amendment is not new (Benkler 1999, 366). In fact, the Opinion of the Court in *Associated Press v. United States* (1945) provided an example of such judicial concern as far back as 1945. Therein, Justice Black contended, “Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.” Here, we see that the “freedom of the press” can be unconstitutionally threatened by not only government restrictions, but by any intervention which hinders the entry of diverse voices into the marketplace (Benkler 1999, 366). While in 1945, the Court's primary concerns were not with the censorship of social media, the same aspirational principles of *Associated Press* can be extrapolated into an analysis of the threat posed by restricted information access from a small group of powerful private organizations.

From this analysis, it is clear that the unprecedented position assumed by Meta, Twitter, and Google as gatekeepers of the information environment uniquely empowers the government to enforce restrictions on these otherwise private actors. Such an exemption is limited and necessary to further the specific and public interest of restoring the free flow of communication, which is central to our democracy. As Justice Black continued in *Associated Press,* "Freedom to publish means freedom for all and not for some... [and] Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests" (*Associated Press* v. *US* 1945, 20). From this discussion, it is clear that where First Amendment freedoms of the public are being threatened by a private few, in a way as disastrous to our collaborative government as that of censoring the channels of communication, the government has an obligation and a right to intervene in the interest of restoring such liberties.

In these cases, despite being private actors with their own First Amendment protections, Twitter, Meta, Google, and similar networking giants, are not entitled to constitutional immunity where such actors have banded to restrict and restrain economic competition or the free flow of information in the marketplace of ideas (FairSearch 2011; U.S. Senate Committee on Intelligence 2018). Rather, the Court has an obligation to evaluate the manifest inequality developing in the marketplace, and the striking abuse of social media giants in hindering private speech for political gain. Whether by closing the legal loophole that allows for censorship in the absence of neutrality, or by enacting affirmative restrictions on digital platforms as common carriers, the Court has a duty to correct the failings of the free market as it pertains to the free flow of information and the uninhibited discourse that is paramount to a thriving democracy.

Legal Standing and Applicable Law

In an era where social platforms dominate news media (Walker and Matsa 2021), the question of whether Google manipulates search results to benefit political preferences and silence its competitors is not a trivial matter. Neither is the censorship of individual voices nor the boosting of political ads on social media platforms like Facebook and Twitter, which have assumed the role of the modern town square in facilitating the bulk of democratic discourse. The internet is our generation's greatest, most significant economic enabler and the undisputed home of the modern marketplace of ideas. Consequently, laws protecting media giants from liability whilst maintaining their power over the gateways of information and the accessibility of our digital economy are gravely outdated.

The first of these barriers, faced by private citizens seeking to sue for discriminatory censorship, is the state action requirement of the First Amendment. This restriction bars private citizens from seeking redress against constitutional violations arising from other private parties (*Lloyd Corp.* v. *Tanner* 1972). The second barrier continually hid behind in the quest to avoid liability, is Section 230 of the Communications Decency Act (or CDA) (1996), which provides near-absolute immunity for "interactive computer service providers"[8] over the content that they host. Between these two barred avenues, federal law does not currently provide a recourse for users aggrieved social networking companies' subjective and discriminatory censorship (Brannon 2019).

The State Action Requirement

The First Amendment to the United States Constitution explicitly prohibits Congress from making any law interfering with the freedom of speech or expression. By including the phrase "*Congress* shall make no law…" however, such restrictions are limited in application to the government itself and, as incorporated, its states,[9] but not to private citizens (*Herbert* v. *Lando* 1979). While the Court has, on occasion, extended protection to citizens seeking redress for harm caused by the discrimination of private companies (*Marsh* v. *Alabama* 1946), it has firmly articulated that such recourse is discretionary, and not rooted in the Constitution itself (*Hudgens* v. *NLRB* 1976). The most well-known case of such action by the court is in the 1946 case of *Marsh v. Alabama*, where the court held that a company town does not have the same rights as a private homeowner in restricting First Amendment religious expression (*Marsh* v. *Alabama* 1946). Despite the precedential similarities, which could arguably encapsulate modern digital platforms, the court has continued to limit the holding in *Marsh* to its specific set of facts, refusing to extend the decision in future cases (Brannon 2019,6).

A second, more approachable avenue entertained by courts for First Amendment suits against private parties is through the characterization of such parties as state actors. A private company may be recognized as a state actor when such party has a "sufficiently close relationship" (*Public Utilities Commission* v. *Pollak* 1952) to the government itself, such that the latter's actions are reflective of the state itself. In order for a private entity to qualify as a public actor, it must (1) perform a traditional, exclusive public function, (2) be compelled by the government to act in a particular way, or (3) act jointly with the government (*Manhattan Community Access* v. *Halleck* 2019). Outside of these limited circumstances, the Court has also recognized state action where an entity was established by the government in order to carry out a government objective (“Procedural Matters” 2021).

For nearly a decade, plaintiffs have sought to extend these criteria to social media companies, arguing they ought to be treated as state actors when they engage in the censorship or restriction of First Amendment speech, and for decades, courts have rejected these claims (“Procedural Matters” 2021). Lower courts have repeatedly held that the fact that social media companies hold out their private property as a forum for “expression of diverse points of view” (*Prager* v. *Google* 2020) is not sufficient to satisfy the test of the “exclusive public function” (*Cyber Promotions* v. *America Online* 1996). Courts have further rejected efforts to characterize the “dissemination of news and fostering of debate” (*Quigley* v. *Yelp* 2018). as traditional state functions (Brannon 2019, 7), noting that “merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints” (*Manhattan Community Access* v. *Halleck* 2019).

Consequently, trial courts have entered a clear and uniform position against the recognition of digital platforms as state actors. While compelling arguments have been under specific sets of facts, the overarching posture of the court at this time is unfavorable. Accepting that social media companies cannot be safely categorized as state actors, the next avenue for exploration is that of common carriage.

Digital Platforms as Common Carriers

The term “common carrier” refers to a sect of private actors who, on account of their influence over and position in the market, are subject to special regulations, including a general requirement to serve all consumers, indiscriminately (*Biden* v. *Knight* 2021). Where the formal criteria for qualification as a common carrier have long been contested (Yoo 2021), Justice

Thomas's opinion in *Knight* (2021) provides some necessary guidance on the types of considerations that have historically categorized common carriers, and which, if met, could lead social networking forums to be similarly held. These considerations include (1) whether the company holds monopoly power, (2) the degree to which the industry is "affected with the public interest," (3) whether the company operates in the transportation or communications industry, (4) whether it receives benefits from the government, and (5) whether the actor holds itself out as providing a general public service (Yoo 2021, 465).

<u>Market Power.</u> Looking first to market power, a common carrier's most frequently recognized characteristic is its monopoly on its industry. Rejected by the majority in *USTA* v. *FCC* (2016), but accepted in the D.C. Circuit dissents regarding the 2010 and 2015 Open Internet Orders (*Verizon* v. *FCC* 2014), the question of whether an industry monopoly is required for characterization as a common carrier has not been securely established (Yoo 2021, 466). While in theory, monopolization over an industry would seem to follow naturally from a company meeting the requirements of common carriage, we see historically that is not always the case. Railroads, for instance, have long been regarded as common carriers despite serving competitive routes (Yoo 2021, 458). The same is true for cabs, inns, and trucks (Yoo 2021).

Opponents of characterizing digital platforms as traditional monopolies deny this history, contending that there can be no close substitutes for the service and must be entry barriers for competitors in order for a company to reach the level of monopolization required for this classification. Due to the emergence of competing companies, such opponents claim that these industry leaders are just that—highly successful in their craft but being ably challenged by the free market in a way that the court is not called to correct (Jamison 2013). In *Knight* (2021), Justice Thomas accepts this assumption in part but challenges the requirement that a company needs be the exclusive provider of a good or service in order to qualify. Instead, he contends that a monopoly exists whenever no reasonable alternative can survive in the market. As it pertains to Meta, Google, and Twitter, this is no doubt the case.

Looking at Google, for example, the lack of real and meaningful competition in the market largely comes down to numbers. A 2018 study on search ad revenues showed that Google brought in more than thirty times the revenue of its closest competitor and nearly sixty times that of its second runner-up (Desjardins 2018). Processing 3.5 billion searches per day, the operation level enjoyed by Google is fiscally impossible to surmount. Competing search engines would need to pay to market to millions of consumers with enough consistency to permanently alter their behavior. Despite numerous attempts by Yahoo, Yelp, Microsoft, and other billion-dollar competitors, no other alternative has come close to toppling this media giant, and it is likely that, barring government intervention, none ever will. For this reason, Google and its similarly situated industry frontrunners no doubt meet the criteria for market power required under historic common carriage.

<u>Industries Affected with a Public Interest</u>. A second consideration of Justice Thomas in *Knight* (2021) was the characterization of the social media industry as "affected with the public interest." This longstanding test for common carriers originated in the case of *Munn* v. *Illinois,* which spoke to the government's police powers in holding that states may regulate the use of private property "when such regulation becomes necessary for the public good" (1876, 126). Resurrecting a persisting principle of common law, Justice Waite, speaking for the Court, herein noted that "when private property is 'affected with a public interest, it ceases to be *juris privati* only'" (*Munn v. Illinois* 1876). Continuing, he clarifies that the test for public interest should be satisfied when the property is used (1) in a manner that makes it of public

consequence, and (2) affects the community at large (*Munn v. Illinois* 1876). Although discarded as overbroad by later courts (*Nebia* v. *New York* 1934) and noted as "hardly helpful" (*Biden* v. *Knight* 2021) in Justice Thomas's own analysis, the presence of this feature as an earmark of historic common carriers warrants its brief consideration.

Undoubtedly, modern digital platforms like Google, Meta, and Twitter meet the aforementioned criteria for affecting the public interest. A 2021 Pew Research survey found that 86% of American citizens use digital platforms to view their news (Shearer and Grieco 2019). A similar study, conducted the same year, found that over 48% of Americans locate such news using social media sites like Facebook and Twitter (Walker and Matsa 2021). And yet another study indicated that nearly half of such social media news seekers are below the age of 30 (Mitchell et al. 2020). These several statistics, in conjunction with the plummeting decline of print newsrooms over the last decade (Walker and Matsa 2021), indicate a trend toward the digital monopolization of news media that suggests such sites significantly impact the Public at large.

Moving beyond the scope of the newsroom, these channels have likewise become the primary driver of a new digital economy. A 2016 study found that nearly 80% of Americans had made purchases online, with 15% alleging that such purchases were made from links originating on social media sites (Smith, Aaron, and Anderson 2016). The emergence of product marketplaces on Facebook and Instagram, the expansive growth of data-tailored digital quick-link marketing, and the onset of the COVID-19 pandemic leads one to assume that these statistics have only grown over the last five years. In fact, a September 2021 analysis of the global impact of the COVID-19 crisis on online consumer purchasing behavior found that the onset of the pandemic triggered a massive pilgrimage away from traditional commerce and toward business digitalization (Gu et al. 2021, 2271). By the second wave of the pandemic in January 2021, online transactions in some industries had surged as much as 73%, with consumer behavior trending towards an increased comfortability with online storefronts that is likely to continue well into a post-pandemic world (Gu et al. 2021, 2273-76). Given that Google controls 90.8% of search activity in United States, directly or through its subsidiaries, it can be extrapolated that such a platform holds significant and unbridled power to choose winners and losers in the marketplace, simply by filtering feeds and boosting content to achieve its desired end (Desjardins 2018). Such concentrated power, which so directly impacts the national economy and the livelihoods of individual consumers and companies, no doubt satisfies the threshold for affecting the public interest.

<u>Industry: Transportation or Communications</u>. The third piece of guidance for common carriage considered in *Knight* (2021, 1223) was the historical precedent for regulating transportation and communication networks. Employing a straightforward analysis, social media companies are communications firms in the most generalized sense. However, the unique, hybrid nature of their craft tends to distinguish them from traditionally regulated telecommunications firms. The creation of the "online forum" has led many courts to analogize digital platforms to traditional publishers, while their underlying function had led others still to compare their role to that of the utility industry.

Drawing on this latter comparison, social media companies are comparable to companies that carry electricity from one place to another, for, as Justice Thomas argues, these companies serve an identical function to the public, despite the distinction that their assets are digital, and not physical (*Biden* v. *Knight* 2021). Rather than laying wires, he argues, these providers create the digital infrastructure which connects individuals across the world. And unlike traditional, decentralized technology, these platforms are controlled, monetized, and censored by a small group of individuals with a self-interested agenda (*Biden* v. *Knight* 2021). In any case, it is clear that social media companies are multifaceted and ever-changing, leaving no analogy without its flaws. Broadly categorizing, these platforms certainly meet the traditional criteria for communications firms, but their exact fitting in the midst of an ever-evolving industry is a balancing test not yet conquered by the courts (*National Cable* v. *Brand X* 2005).

<u>Countervailing Government Benefits</u>. The fourth aspect of common carriage noted by Justice Thomas is the existence of a "quid pro quo" for government favors or protections. Historically, in return for the greater liability assumed, common carriers would often receive special legal benefits, such as protected monopolies, barriers to market competitors, or limits to potential suit (Candeub 2020, 402). In his opinion, Justice Thomas references the congressional protection from defamation liability afforded to the telegraph industry of old as an example of such countervailing government benefits (American Law Institute 1976). This context, of historic industries afforded legislative insulation from private suit is eerily akin to the persistence of § 230 of the Communications Decency Act (1996). As aforementioned, this legislation specifically bars private individuals from suing digital platforms on account of the content that they host or, conversely, refuse to host. This shield, deliberately offered to social media companies to encourage innovation and growth, provides a prime example of countervailing government benefits, such as have been enjoyed by historic common carriers.

In addition to this obvious insulation, secondary support for the evident quid pro quo between government legislators and these social media giants is the obvious barrier that exists for new competitors attempting to enter the market. In 2020 alone, Google brought in $182.5 billion in total revenue (*Biden* v. *Knight* 2021), while Twitter and Meta enjoyed $3.7 billion

("Twitter Revenue" 2021) and $85.96 billion ("Meta Platforms" 2021), respectively. These numbers ought to incentivize new players into the marketplace, but the lack of such viable competitors, Justice Thomas argues, highlights the existence of significant barriers to entry (*Biden* v. *Knight* 2021). As noted by our discussion of the monopolistic structure of the current market, the viable competitors to these digital frontrunners do not come close to challenging their dominion, and despite efforts to topple this oligopoly through free market means, no likely competitor will ever approach the financial bandwidth to compete with the status quo. Each of these examples give credence to the notion that the oligopoly of digital platforms at the forefront of social networking receive countervailing benefits that are historically sufficient to characterize them as common carriers.

<u>Holding Out to the Public</u>. The final characteristic noted by Thomas in *Knight* turns on whether a company holds itself out as serving the entire public (*Biden* v. *Knight* 2021). This element has been widely considered the most important factor of common carriage, though lower courts have not held it, alone, to be dispositive (*Prager University* v. *Google* 2020). Its definition rests on the notion that a company assumes an obligation to accept applicants indiscriminately. Given that Facebook holds itself to be a "platform for all ideas," and each of the social forums provide their service to the entire public, free of charge, this important condition can be easily extrapolated, thus satisfying the fifth and final requirement for common carriage under the law (Senate Committees on the Judiciary and on Commerce, Science and Transportation 2018).

Section 230 of the Communications Decency Act of 1996

Moving from the constitutional barriers on suit to those entrenched in congressional legislation, the next avenue for liability insulation abused by social networking platforms is the loophole afforded through Section 230 of the CDA (1996).

47 U.S.C. § 230(a) reads, in pertinent part, “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider…” This law is a fundamentally good protection of free speech, and perhaps paramount to the perpetuation of the free marketplace of ideas. It grants digital forums privilege against lawsuits originating from the content that they host, which is not directly required by First Amendment doctrine, but is enormously impactful on the marketplace of expression as it exists today (Balkin 2004). By insulating these companies from liability, we have encouraged innovation, broadened digital horizons, and engaged valuable tools to connect persons and ideas across an increasingly globalized world. Indeed, the second circuit noted the objective of CDA § 230 was “[T]o preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation” (*FTC* v. *LeadClick* 2016). Equally important, this insulation from liability protects from a phenomenon called “collateral censorship,” where the threat of suit against a platform prompts heightened restrictions on the right to speak, out of a need to safeguard from potential liability (Balkin 2004, 435).

<u>The Section 230 Liability Loophole</u>. On its face, CDA § 230 limits the liability of hosts and imposes responsibility on the person speaking, which is not only intuitive but aspirational in that it reinforces the posture of self-responsibility that is a lynchpin of American society. However, in an age of social media dependency, where three primary technology companies have imposed an unstoppable oligopoly over the marketplace of ideas, this well-intended section has been misused to further divisive and discriminatory ends. Subsection (c), “Protection for ‘Good Samaritan’ Blocking and Screening of Offensive Material,” provides that:

> (1) No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider…
>
> (2) No provider or user of an interactive computer service shall be held liable on account of
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1) (CDA 1996).

This subsection effectively creates a loophole from liability for technology companies to abuse without recourse. Employing the protections of CDA § 230, these private platforms are recharacterized from traditional publishers to mere "interactive services," free from the liability of the content that they publish, whilst enjoying the unhinged ability to regulate and censor the information accessed by their users, without restriction. Unlike traditional publishers, who are enabled to discriminate on their platforms on the basis of the liability that they assume over the content published, Facebook, Google, and Twitter are hereby enabled to "have their cake and eat it too"—a practice that encourages discrimination and infringes on the First Amendment rights of American citizens.

<u>Has § 230 Succeeded in Its Intended Goals</u>? During the congressional deliberation over § 230 of the Communications Decency Act, Delegate Cox argued that given the vast scale and nature of the internet, (1) the government could not be as effective at censoring content as private

companies; and (2) courts had been inconsistent in applying or withholding publisher liability to platforms—both begging a need for uniformity under the law ("Personal Explanation" 1995). While these considerations were well-intentioned, the reality of the application has been far from uniform and consistent, leading to greater confusion on the part of users and abuses on the part of controllers.

Looking first to the feasibility of government oversight, it is obvious that delegating out the responsibility for criminal surveillance, given the expanse of the internet, is the easiest option for an overextended government and, perhaps, advantageous for the freedom-loving citizen. However, if deliberately empowering private companies to assume a watchdog function previously assumed by government, there ought to be an equal imposition of restrictions on the sorts of speech which those agents may censor. In other words, if the government intends to delegate policing powers to private companies, then they should be recognized as state actors, performing state surveillance and bound by the same first amendment restrictions on the prohibition of speech to which the federal government and its agents are tied. Alternately, such delegation manifests as mere laziness on the part of the legislature, providing unchecked power to regulate without restriction in areas where the government itself cannot act. The presence of such important restrictions on the government's ability to curb speech are paramount to the principles of democracy and the perseverance of free thought (*West Virginia* v. *Barnette* 1943; *Virginia* v. *Black* 2003; *Brandenburg* v. *Ohio* 1969; *Watchtower* v. *Stratton* 2002; *R.A.V.* v. *St. Paul* 1992; *Tinker* v. *Des Moines* 1969; *Texas* v. *Johnson* 1989). By attempting to outsource the regulation of criminal conduct (a state action) without limiting the ability to restrict speech censorable by otherwise private parties, the government reaps the minute benefits of an eased workload at the expense of the freedom of thought and expression of an entire generation.

Moving then to the uniform imposition of liability, it is clear that the adoption of CDA § 230 has not halted the unequal application of the law. Instead, it has muddied the waters. Consider the case of *Fair Housing v. Roommates.Com* 2008), where local fair housing councils sued the operator of an online roommate matching website for violating Fair Housing Laws by requiring its users to complete questionnaires containing protected characteristics. Here, the Ninth Circuit held that Defendant did not qualify for CDA § 230 immunity because it transcended its status as a platform and became an "information content provider" when it developed a tool which forced users to divulge protected personal indicators which could be used to discriminate (2008, 1166). Speaking specifically to the purpose of CDA § 230, the court reasoned "Congress sought to immunize the *removal* of user-generated content, not the *creation* of content" (2008, 1174).

Contrastingly, in the case of *Gonzalez v. Google* (2017), the plaintiff was unsuccessful in holding its subsidiary, YouTube, liable for knowingly opening its platform to ISIS and permitting their channels to post propaganda, recruit followers, and organize criminal attacks. At the crux of the plaintiff's argument was the idea that Google had affirmatively supplied the terrorist organization with powerful tools and weapons of terrorism by making such tools generally available and subsequently failing to monitor their use for illegal behavior properly. This reasoning mimicked that which failed in *Fields I* (2016a), where the plaintiffs similarly sought to distinguish their case by claiming its basis "was not in the contents of tweets or the failure to remove tweets, but [was] instead based on "Twitter's 'provision of Twitter accounts to ISIS in the first place'" (*Fields* v. *Twitter* 2016b). As in *Fields I*, this argument was rejected on the basis that screening and selectively prohibiting users from entering the channels of social media was quintessential content-based censorship. Thus, the California District Court was unwilling to critique the publishing decisions of Google by imposing liability where none was due (*Gonzalez* v. *Google* 2017; *Force* v. *Facebook* 2019).

The juxtaposition of these opinions is stark. In the case of *Fair Housing*, the Court explained that CDA § 230 immunity could be withheld when a traditionally protected interactive service provider rose to the role of an information content provider, which they defined as someone who is "'responsible, in whole or in part, for the creation or development of' the offending content" (*Fair Housing* v. *Roommates.Com* 2008). Therein, the Ninth Circuit found Roomates.com had breached this barrier by developing a widget that could be used for illegal and discriminatory ends (*Fair Housing* v. *Roommates.Com* 2008, 1162). On the contrary, in a case analogous to *Gonzalez,* the Second Circuit found in *Force v. Facebook* that despite developing and marketing the algorithm which aided Hamas in illegal and terroristic conduct, Google was not similarly barred from CDA § 230 immunity (*Force* v. *Facebook* 2019). In sum, the U.S. District Court in California refused to find Google (*Gonzalez* v. *Google* 2017, 1166) or Twitter (*Fields* v. *Twitter* 2016a) liable for the creation of widgets that connected dangerous individuals and magnified their influence on a global scale.

While the latter cases might be advantageous for the purposes of maintaining the diverse discourse from antagonistic sources posited by the First Amendment, the inconsistency of the lower courts in determining at what threshold the creation of a tool used in conducting harm is considered sufficient to raise liability from developer to content creator poses real dangers for future abuse under the law. Consequently, CDA § 230 has been ineffective at aiding government oversight or achieving uniformity in the law. Instead, it has facilitated a system of oft-employed loopholes which bar private citizens from redress and fundamentally injure the marketplace of democratic discourse.

Surely, this could not have been the intent of Congress, nor should it be upheld in the court. It is clear from the legislative history of CDA § 230 that Congress had a specific interest in censoring access to false or obscene information, in the interest of "the greater good" ("Personal Explanation" 1995). In the Congressional deliberation, Delegate Cox recognized the censorship potential of this section, and noted that his encouragement thereof was largely in the interest of protecting his children from the dangers of an unrestricted cyberspace ("Personal Explanation" 1995, 8471). This sentiment was reiterated by Delegate Wyden, who sought to balance his fears that bureaucratic overreach would ruin cyber innovation alongside his desire to protect his family from crude, crass, and lude content. In his eyes, private censorship struck the balance of the two by encouraging watchdogs and removing the need for consistent government oversight to achieve a "family friendly" internet for all.

These considerations were, no doubt, noble, and the function of Congress as a moral watchdog was certainly not novel. However, the contemplated function of social media companies as gatekeepers has transcended what was contemplated in this discussion. Where several delegates expressed interest in prohibiting lewd or otherwise inappropriate content—with such terminology even expressly added to the final text of the law—the actual implications of this loophole have been far less concerned with moral turpitude and more with the perpetuation of self-interested narratives and one-sided political ideals.

Rather than acting as a shield against the hypothesized horrors of pornography ("Personal Explanation" 1995, 8471), these social media giants have become the gatekeepers of truth, barring opinions that they deem "inappropriate" or "dangerous" and effectively closing off the democratic marketplace of ideas. This overt action on the part of these "hosts," designed to surpass mere screening for illegality and, instead, affirmatively advance a specific viewpoint, constitutes an overreach of disastrous proportions, one which finds its footing in a new realm of reality that these legislators could not have anticipated. The hasty expansion of the internet and the extent it now spans were simply incognizable twenty years ago. Thus, much like how the cellular phone could not have been posited by our founding fathers, the legislators who well-meaningly designed this loophole could not have foreseen its consequences in a world where social media platforms have overthrown and replaced the town square and click-bait news has all but supplanted research journalism (Walker and Matsa 2021). Some might contend that this new era of instant news coverage and fast-paced media imposes a heightened responsibility to regulate. That contention is beyond the scope of this analysis, but whether restrictions on these platforms ought to enable more or less oversight, the same guiding principle remains. That is, where social media companies have the discretion to discriminate, they ought to be liable. And conversely, if not liable, such censorship must not be discriminatory.

Legal and Policy Analysis

Despite decades of attempts by plaintiffs to hold digital platforms accountable, the general consensus of the court as it pertains to censorship has been unfavorable to the aggrieved. However, this posture was born from a long history of inaccurate analogies by the court, based largely in an outdated understanding of the scope and power of digital platforms in the world today. As articulated in *Zhang v. Baidu.com* (2014), which evaluated the ability of a Chinese internet company to prevent pro-democracy websites from appearing in the results of a popular search engine, the court has long held the most apt comparison to digital media companies to be to the print newspaper (*Zhang v. Baidu.com* 2014, 437). Under this antiquated comparison, there is no doubt that the First Amendment immunizes such behavior, as the censorship of search results or restriction of content is akin to the sort of editorial discretion which is paramount to a free press. In *Baidu* and beyond, the court has argued that the right of a private company to decide what and when it speaks is protected under the First Amendment (*Wooley* v. *Maynard* 1977), but such a comparison to the historic right of traditional print publishers is no longer apt.

Foremost, digital search platforms have been marketed such that the user understands the content shown to belong to other actors (Lakier 2021, 2317). Unlike a traditional media source, which employs journalists to speak on behalf of the company, digital networking platforms have continuously held themselves out as mere forums for facilitating individual content. In fact, this exact distinction is where they claim to find the basis for their CDA § 230 immunity. While the editorial discretion of the press in determining what ideologies and aesthetics fill their pages is paramount to their reputation and survival in the market, the same comparison cannot be drawn to mere host services, whose viewpoints are not broadly associated with the content that they present (Lakier 2021). This distinction is important, as it suggests that prohibitions against the censorship of search results would not undermine the ability of digital platforms to "control the content of their message" (*Jian Zhang* v. *Baidu.com* 2014), as had traditionally been the fear in cases regarding the free press.

On that same footing, CDA § 230 has, in practice, resulted in a complete absolution of liability for social networking platforms. The basis of this extension of immunity had always been based on the distinction from publishers regarding the lack of ownership over the content these forums host. Hence, the necessity of free press protections, as it relates to publisher liability, is not relevant in the case of forum censorship. Consequently, the longstanding comparison between traditional print media and digital networking platforms is not sufficiently accurate to contemplate the straightforward application of free press laws as they have been applied to date.

Instead, a fundamental rethinking of the application of the law must be posited as it relates to this new and unprecedented frontier. On one hand, were the protections of the free press to be applied on account of a recognition of the importance of editorial discretion, then such platforms should be appropriately characterized as editors and publishers, assuming the same liability of the press, which necessitates constitutional protections. If, however, the goal is to maintain this absolution of forum liability, then the court must recognize that the lack of accountability for the points of view hosted necessarily implies an inability to edit on a non-neutral basis. Refusing such neutrality in censorship alternately implies a desire to espouse a particular point of view via the content hosted, which ought then to invoke the publisher liability imposed on the traditional press.

While a clean line has not yet been drawn to this end, the discussion of what precise definition ought to characterize social media giants has been stewing in the minds of the Court.

Where substantial analysis has led to a rejection of these platforms as state actors, Justice Thomas's comparison to common carriage has set the foundation for a recharacterization of social networking companies away from that of a newspaper and towards that of a train or cable provider. This recharacterization would constitute a crucial step toward the imposition of restrictions on the right of these companies to suppress the free speech of private citizens in the absence of a neutrality requirement for CDA § 230 liability. More importantly, a firm definition would rightfully distinguish social media companies from the oft-analogized traditional press, ridding the court of its longstanding inconsistencies in applying the definition of "publisher" in its attempts to draw the line between creators of content and publishers of ideas.

Options for Legal Remedy

Should Section 230 Apply to Non-Neutral Platforms?

Section 230 of the Communications Decency Act (1996) clearly prohibits companies from being treated as the "publisher or speaker" of ideas that they merely distribute. Social media companies regularly invoke this express insulation from liability when aggrieved private citizens seek to bring First Amendment complaints on the basis of unconstitutional restrictions or arbitrary censorship. In these instances, such companies prefer to be held out as carriers of information, emphasizing their role as a forum rather than a publisher of content—a legal distinction that teeters on the notion that the censorship of information channels is not akin to traditional editing undertaken by print media. The Court has yet to address this questionable distinction, but attempts have been made to recharacterize digital platforms as state actors or common carriers for the purpose of imposing affirmative restrictions on the suppression of speech. While these attempts have largely been futile in the lower courts, the jurisprudence surrounding CDA § 230 seems to suggest a posture that assumes the neutrality of the host where facts are questionable. But in practice, such neutrality has not been clearly established, and the lack of a formal requirement leaves a gaping loophole for abuse.

While the court has yet to explicitly articulate a neutrality requirement for CDA § 230 insulation, the need for objectivity in the tools provided by such forums has been referenced in numerous cases on point (*Jones* v. *Dirty World* 2014; *Elliott* v. *Donegan* 2020; *Herrick* v. *Grindr* 2018; *Goddard* v. *Google* 2009). For instance, while the court in *Fair Housing Council* (2008) did not overtly discuss the neutrality requirement for forums as a whole, it expressly referenced the necessity of widgets that are non-discriminatory and neutral to all users. Herein, the court entered an important distinction: that an interactive computer service provider may lose its CDA

§ 230 immunity if it crosses the threshold of providing content." (*Fair Housing* v. *Roommates.Com* 2008, 1162-63). In line with past precedent, the court suggested non-neutral tools, which curate or categorize in a discriminatory way, as an indicator elevating hosts to this threshold of "content provider" (*Fair Housing* v. *Roommates.Com* 2008; *Goddard* v. *Google* 2009, 1997-98). In years since, this consideration has developed in some circuits into a three-part test to determine whether immunity is owed where content has been published. Accordingly, CDA § 230 protects "(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat . . . as a publisher or speaker (3) of information provided by another information content provider" (Barnes v. Yahoo! 2009).

Although the intersection of online media and the First Amendment is an ever-evolving field, this distinction by the court has provided substantial guidance over the last several decades, indicating a posture that favors liberty as opposed to overbroad restriction. In the case of *Ashcroft* v. *ACLU* (2004) the court analyzed the Child On-Line Protection Act (COPA), which was aimed, similar to the CDA, at restricting minors from ingesting lewd online content. In this case, the court held that COPA violated the First Amendment because it was overbroad, resulting in content-based restrictions on speech where less restrictive options were available (*Ashcroft* v. *ACLU* 2004, 670). That said, courts have generally held that the mere ability of a site to control its content does not automatically raise it to the threshold of "content provider" (*Klayman* v. *Zuckerberg* 2014, 1358). As articulated in the case of *Klayman v Zuckerberg* (2014, 1357), "a website does not create or develop content when it merely provides a neutral means by which third parties can post information of their own independent choosing online." But this statement, while seemingly narrowing the scope of cases where liability can be imposed, also reinforces the premise that the court assumes neutrality when defining forums over content creators: the optimal phrase therein being "neutral means."

Although it is evident from congressional deliberation that CDA § 230 was not intended to be neutral ("Personal Explanation" 1995, 8470; *Fair Housing* v. *Roommates.Com*, 2008), the evolution of digital networking platforms over the last twenty years has rendered the discussion of the implications of such legislation suspect. Its unprecedented growth, and the scope of information over which these companies now gatekeep, require a reevaluation of the law as it applies. While the court has begun to contemplate the importance of a neutrality requirement, the legislative history likely bars the clear imposition of such a requirement without significant judicial activism. Thus, the most appropriate remedy to modernize this piece of antiquated legislation, while keeping with the aspirational posture of the court is to legislatively amend CDA § 230 to include an unambiguous neutrality requirement for insulation as a digital forum. In the absence of such legislation, however, another avenue for redress exists. That is the characterization of such companies as common carriers.

Digital Platforms as Common Carriers: What Restrictions Apply?

Based on the above analysis of the historical components of common carriage, it is possible, and perhaps likely, that the Court could recharacterize digital networking platforms under this definition. Such action would necessarily impose a slew of previously inapplicable laws restricting the right to exclude, which would finally provide an avenue of recourse for the thousands of users being arbitrarily censored for exercising their freedom of speech. Additionally, the government would be limited in its ability to mandate the removal of certain types of content, ending the current circumvention of the First Amendment protections as it relates to constitutionally protected speech.

Under this recharacterization, new regulations could be enacted by Congress, akin to Section 202 of the Communications Act of 1934, regulating telecommunications companies under federal law from "making any unjust or unreasonable discrimination" in the services provided or rates charged (CDA 1996). Similar to the Civil Rights Acts authorizing suit for denial based on protected characteristics, subsection (a) further prohibits discrimination or prejudice by common carriers based on locality, class, or other unreasonable prejudice (CDA 1996). As articulated in a recent *Harvard Law Review* article,

> [The Communications Act of 1934], which has been interpreted to prevent common carriers from discriminating against consumers because of the content of their speech, their identity, or any other irrelevant characteristic, clearly protects a number of interests that the First Amendment also protects. By prohibiting telephone companies like AT&T from denying service to customers because they dislike what the customers say or who they are, common carrier laws act, just as the First Amendment does, as a shield under which "many types of life, character, opinion and belief can develop unmolested and unobstructed" by external repression. By preventing common carriers from engaging in discriminatory pricing, the laws safeguard "the free communication of views" that the First Amendment also safeguards. And by ensuring that the rates companies charge are not unreasonably high, the laws help ensure that the public has access to a wide "dissemination of information from diverse and antagonistic sources," just as the First Amendment does (Lakier 2021, 2316-17).

Thus, by imposing common carrier restrictions like those which bind the existing channels of communications, the Court effectively restrains private companies from discriminating against opposing viewpoints on their platforms, thereby bolstering the free and uninhibited flow of democratic discourse.

Conclusion

In an ever-evolving digital world characterized by shifting players and innovative technology, fixing static definitions and classifications is not an easy task. For an institution as rooted in history and bound to stability as the Court, approaching such a shifting landscape can be difficult, even daunting. But as technological innovation continues to rapidly expand beyond the scope of what could have been predicted at the adoption of the CDA, it has an obligation to step in and evaluate those goals which Congress sought to protect and to consider whether the continued absolution of platform liability is the best avenue to achieve such ends. As it relates to CDA § 230, its legislative history, and the underlying principles of the First Amendment, this is simply not the case.

Section 230 of the Communications Decency Act was enacted "to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum" (*Force* v. *Facebook* 2019). A fundamentally important protection to bolster the marketplace of ideas and encourage innovation, this well-intended legislation has been carried to disastrous ends. As articulated in congressional deliberation, the initial purpose of this legislation was to protect children from sexually explicit content by enabling private networking companies to act as watchdogs, censoring lewd or illegal behavior as an added safeguard for their users (*FTC* v. *LeadClick* 2016). Through the unprecedented growth of social media and the monopolistic rise of Meta, Twitter, and Google, however, these ends have been abused and discarded. Rather than aiding the government in halting illegal activity that threatens American citizens, suit after suit has refused to impose liability in cases where such companies enabled terrorism or criminal activity, even where the tools developed by the network directly contributed to the spread of propaganda or the organization of terrorist events (*Force* v. *Facebook* 2019; *Gonzalez* v. *Google* 2017; *Fields* v. *Twitter* 2016a). Moreover, the secondary objective of enabling censorship to protect children from lewd content has been discarded in favor of a full-on assault of unprotected and protected speech. Social media companies have assumed the role of gatekeeper—targeting, marketing, and limiting information channels to further specific and often politically motivated agendas. Whereas twenty years ago, when print media still maintained its hold on the national narrative, such censorship by private actors might not have posed a threat, the modern environment of total digital discourse makes this unprecedented monopoly over the channels of information a menace to the future of unencumbered discourse that is paramount in a free, democratic society.

The premise of CDA § 230 as a bar from liability for truly neutral forums is commendable and advantageous for a society prizing limited government, optimal citizen involvement, and free market innovation. No doubt the legislators who drafted this Act understood the need to protect private companies from undue liability in an effort to expand user access and maximize content sharing in the interest of an innovative and collaborative global cyberspace. But the challenges of balancing a privatized media monopoly with the interests of the free market, in the context of a discourse-driven democracy cannot be understated. As the oligopoly of media frontrunners continues to grow uninhibited, the Court is bound to be forced to confront the implications of allowing our national discourse to be censored by a small, elite group of technical giants. In confronting that issue, it has two plausible courses of action, which maintain the integral benefits CDA § 230 while forcing accountability on those who control our channels of discourse. The first option is to amend CDA § 230 to include a neutrality requirement in order to meet the criteria for absolution of liability. The alternative is to impose common carrier restrictions on the primary controllers of the media market, thus circumventing the state action requirement and forcing adherence to First Amendment protections. Either path forward would crucially halt the ability of private organizations to limit the exercise of free speech on their public platforms, thus restoring the free marketplace of ideas and protecting against further First Amendment assault.

It is the obligation of the Court to stand against the overreach of private parties where their conduct fundamentally suppresses the right to speech. Without the oversight of the government or the imposition of liability by the Court, these companies will continue to regulate, silence, and censor the channels of information—chipping away at areas of speech that offend, incite, or serve counter-interests until all speech is regulated speech, and no speech is free. Such power could not have been contemplated by the creators of CDA § 230 and certainly run counter to the values of the First Amendment and democracy as a whole. Consequently, the federal government is obligated to close the existing loopholes from liability or impose on social networking platforms the stringent regulations of common carriers to preserve the free marketplace of ideas and uphold the foundational principles of its Constitution.

References

Abrams v. *United States*. 1919. 250 U.S. 616, 630.

American Law Institute. 1976. *Restatement of the Law*, Second, Torts 2d. St., § 581. St. Paul: American Law Institute Publishers.

Ashcroft v. *American Civil Liberties Union*. 2004. 542 U.S. 656.

Associated Press v. *United States*. 1945. 326 U.S. 1, 20.

Auxier, Brooke. 2020. "How Americans see U.S. Tech Companies as Government Scrutiny Increases." *Pew Research*, Oct. 27. https://www.pewresearch.org/fact-tank/2020/10/27/how-americans-see-u-s-tech-companies-as-government-scrutiny-increases/.

Balkin, Jack M. 2004. "Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society." *New York Law Review* 79 (April): 1-58.

Barnes v. Yahoo!, Inc. 2009. 570 F.3d 1096, 1101 (9th Cir.).

Benkler, Yochai. 1999. "Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain." *New York University Law Review* 74 (May): 354-446

Biden v. *Knight First Amendment Institute at Columbia University*. 2021. 141 S. Ct. 1220.

Brandenburg v. *Ohio*. 1969. 395 U.S. 444, 447-48.

Brannon, Valerie C. 2019. "Free Speech and the Regulation of Social Media Content." *Congressional Research Service*, March 27. https://www.everycrsreport.com/files/20190327_R45650_9f272501744325782e5a706e2aa7678130 7abb64.pdf

Buckley v. *Valeo*. 1976. 424 U.S. 1, 49.

Candeub, Adam. 2020. “Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230.” *Yale Journal of Law and Technology* 22: 391-433.

Chaplinsky v. *New Hampshire*. 1942. 315 U.S. 568, 574

Citizen Publishing Co. v. *United States*. 1969. 394 U.S. 131, 139-40.

Communications Decency Act. 1996. Pub. L. No. 104-104 (Tit. V), 110 Stat. 133, Feb. 8, codified at 47 U.S.C. §§223, 230.

Cyber Promotions v. *America Online*. 1996. 948 F. Supp. 436, 441 (E.D. Penn.).

Debs v. *United States*. 1919. 249 U.S. 211.

Dennis v. *United States.* 1951. 341 U.S. 494, 503.

Desjardins, Jeff. 2018. “How Google Retains More Than 90% of Market Share.” *Business Insider*, April 23. https://www.businessinsider.com/how-google-retains-more-than-90-of-market-share-2018-4.

Elliott v. *Donegan*. 2020. 469 F. Supp. 3d 40, 60 (E.D.N.Y.).

Elonis v. *United States*. 2015. 575 U.S. 723.

Fair Housing Council of San Fernando Valley v. *Roommates.Com, LLC*. 2008. 521 F.3d 1157, 1174 (CA9).

FairSearch. 2011. “Can Search Discrimination by a Monopolist Violate U.S. Antitrust Laws?” July 12. http://www.fairsearch.org/wp-content/uploads/2011/07/Can-Search-Discrimination-by-a-Monopolist-Violate-U.S.-Antitrust-Laws1.pdf.

Federal Trade Commission v. *LeadClick Media LLC*. 2016. 838 F.3d 158 (2d Cir.)

Fields v. *Twitter*. 2016a. 217 F. Supp. 3d 1116, 1121 (N.D. Cal.)

Fields v. *Twitter.* 2016b. 200 F. Supp. 3d 964 (N.D. Cal.).

Force v. *Facebook.* 2019. 934 F.3d 53 (2d Cir.)

Gertz v. *Robert Welch*. 1974. 418 U.S. 323.

Giboney v. *Empire Storage and Ice Co*. 1949. 336 U.S. 490, 498.

Gitlow v. *People of State of New York*. 1925. 268 U.S. 652.

Goddard v. *Google, Inc*. 2009. 640 F. Supp. 2d 1193 (N.D. Cal.).

Gonzalez v. *Google, Inc*. 2017. 282 F. Supp. 3d 1150, 1164 (N.D. Cal. 2017).

Gu, Shengyu, Beata Ślusarczyk, Sevda Hajizada, Irina Kovalyova, and Amina Sakhbieva. 2021. "Impact of the COVID-19 Pandemic on Online Consumer Purchasing Behavior." *Journal of Theoretical and Applied Electronic Commerce Research* 16 (September): 2263-81.

Herbert v. *Lando*. 1979. 441 U.S. 153.

Herrick v. *Grindr*. 2018. LLC, 306 F. Supp. 3d 579 (S.D.N.Y.).

Hill v. *Colorado*. 2000. 530 U.S. 703.

Hudgens v. *NLRB*. 1976. 424 U.S. 507, 513.

Illinois ex rel. Madigan v. *Telemarketing Associations*. 2003. 538 U.S. 600, 612.

Jamison, Mark A. 2013. "Should Google Be Regulated as a Public Utility?" *Journal of Law, Economics and Policy* 9 (Winter): 223-50.

Jian Zhang v. *Baidu.com Inc.* 2014. 10 F. Supp. 3d 433 (S.D.N.Y.).

Jones v. *Dirty World Entertainment Recordings LLC*. 2014. 755 F.3d 398, 413 (6th Cir.).

Killion, Victoria L. 2019. "The First Amendment: Categories of Speech." *Congressional Research Service*, 7-5700, 16 January. https://sgp.fas.org/crs/misc/IF11072.pdf.

Klayman v. *Zuckerberg*. 2014. 753 F.3d 1354, 1357 (D.C. Cir.)

Lakier, Genevieve. 2021. "The Non-First Amendment Law of Freedom of Speech." *Harvard Law Review* 134 (May): 2300-81.

Langdon v. *Google Inc*. 2007. 474 F. Supp. 2d 622, 627 (D. Del. 2007).

Lloyd Corp. v. *Tanner*. 1972. 407 U.S. 551, 567.

Madigan v. *Telemarketing Associations*. 2003. 538 U.S. 600, 612.

Manhattan Community Access Corp. v. *Halleck*. 2019. 139 S. Ct. 1921.

Marsh v. *Alabama*. 1946. 326 U.S. 501, 507.

"Meta Platforms Revenue 2009-2021." 2021. *MacroTrends*. https://www.macrotrends.net/stocks/charts/FB /meta-plat forms/revenue.

Miller v. *California*. 1973. 413 U.S. 15, 24.

Mitchell, Amy, Mark Jurowitz, J. Baxter Oliphant, and Elisa Shearer. 2020. "Demographics of Americans Who Get Most of Their Political News from Social Media." *Pew Research Center*, July 30. https://www.pewresearch.org/journalism/2020/07/30/demographics-of-americans-who-get-most-of-their-political-news-from-social-media/.

Munn v. *Illinois*. 1876. 2 94 U.S. 113, 126.

NAACP v. *Claiborne Hardware Co*. 1982. 458 U.S. 886.

National Cable and Telecommunications Association v. *Brand X Internet Services.* 2005. 545 U.S. 967, 989-97.

Nebia v. *New York*. 1934. 291 U.S. 502, 536.

New York v. *Ferber*. 1982. 458 U.S. 747, 764.

New York Times Co. v. *Sullivan*. 1964. 376 U.S. 254, 266.

Organization for a Better Austin v. *Keefe*. 1971. 405 U.S. 415.

"Personal Explanation." 1995. *Congressional Record* 141 (129), 4 August. https://www.congress.gov/congressional-record/1995/8/4/house-section/article/h8460-1.

Prager University v. *Google LLC*. 2020. 951 F.3d 991 (9th Cir.).

“Procedural Matters and Freedom of Speech: State Action.” 2021. *Constitution Annotated*. https://constitution.congress.gov/browse/essay/amdt1_2_2_4/#essay-3.

Public Utilities Commission of the District of Columbia v. *Pollak*. 1952. 343 U.S. 451, 462.

Quigley v. *Yelp, Inc.* 2018. No. 17-CV-03771-RS, 2018 WL 7204066 (N.D. Cal. Jan. 22).

R.A.V. v. *St. Paul*. 1992. 505 U.S. 377, 382-86.

Red Lion Broadcasting Co. v. *FCC*. 1969. 395 U.S. 367, 390.

Reed v. *Town of Gilbert*. 2015. 135 S. Ct. 2218 (2015).

Roberts v. *U.S. Jaycees*. 1984. 468 U.S. 609, 622.

Shearer, Elisa, and Elizabeth Grieco. 2019. “Americans Are Wary of the Role Social Media Sites Play in Delivering the News.” *Pew Research*, Oct. 2, 2019. https://www.pewresearch.org/journalism/2019/10/02/americans-are-wary-of-the-role-social-media-sites-play-in-delivering-the-news/.

Smith, Aaron, and Monica Anderson. 2016. “Online Shopping and E-Commerce.” *Pew Research*, December 19. https://www.pewresearch.org/internet/2016/12/19/online-shopping-and-e-commerce/.

Snyder v. *Phelps* 2011. 562 U.S. 443, 458.

“State Action Doctrine.” 2021. *Constitution Annotated*. https://constitution.congress.gov/browse/essay/amdt14-2/ALDE_00000810/

States v. *Alvarez.* 2012. 567 U.S. 709, 718-19.

Stromberg v. *California*. 1931. 283 U.S. 359, 369.

Texas v. *Johnson*. 1989. 491 U.S. 397.

Tinker v. *Des Moines Independent Community School District*. 1969. 393 U.S. 503.

Turner Broadcasting System Inc. v. *FCC*. 1997. 520 U.S. 180, 189.

Turner Broadcasting System Inc. v. FCC. 1994. 512 U.S. 622, 663-64.

"Twitter Revenue 2011-2021." 2021. *MacroTrends*. https://www.macrotrends.net/stocks/charts/TWTR/twitter/revenue.

United States v. *Alvarez*. 2012. 567 U.S. 709, 718-19.

United States v. *O'Brien*. 1968. 391 U.S. 367.

U.S. Congress. House Committee on Energy & Commerce. 2018. *Twitter: Transparency and Accountability*, 115th Congress, Sept. 5.

U.S. Congress. Senate Committee on Intelligence. 2018. *Foreign Influence Operations' Use of Social Media Platforms*, 115th Congress, Sept. 5.

U.S. Congress. Senate Committee on the Judiciary and Senate Committee on Commerce, Science and Transportation. 2018. *Facebook, Social Media Privacy, and the Use and Abuse of Data*, 115th Congress, April 10.

U.S. Telecom Association v. *FCC*. 2016. 825 F. 3d 674, 708 (D.C. Cir.).

Verizon v. *FCC*. 2014. 740 F. 3d 623, 663-66 (D.C. Cir. 2014).

Virginia v. *Black*. 2003. 538 U.S. 343.

Virginia v. *Hicks*. 2003. 539 U.S. 113, 119.

Walker, Mason, and Katerina Eva Matsa. 2021. "News Use Across Social Media in 2021." *Pew Research*, Sept. 20. https://www.pewresearch.org/journalism/2021/09/20/news-consumption-across-social-media-in-2021/

Watchtower Bible and Tract Society of New York, Inc. v. *Village of Stratton*. 2002. 536 U.S. 150.

Watts v. *United States*. 1969. 394 U.S. 705, 708.

West Virginia State Board of Education v. *Barnette*. 1943. 319 U.S. 624.

Whitney v. *California*. 1927. 274 U.S. 357.

Wooley v. *Maynard*. 1977. 430 U.S. 705, 714.

Yoo, Christopher S. 2021. "The First Amendment, Common Carriers, and Public Accommodations." *Journal of Free Speech Law* 2021-2022 (1): 463-508.

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[1] *See, e.g.,* statement of Jack Dorsey (CEO of Twitter)"[W]e believe that the people use Twitter as they would a public square and they often have the same expectations that they would have of any public space. For our part, we see our platform as hosting and serving conversations." and statement of Mark Zuckerberg, (CEO of Facebook) "[W]e consider ourselves to be a platform for all ideas." (US Congress. Senate Committee on Intelligence 2018).

[2] Note that "Google controls over 90% of search in several European markets and nearly 70% in the United States."

[3] "…the top five results on the first page of results attract 88% of the clicks…Google acknowledged that prominent placement on its search is 'critical' to web sites because 'if you are not found, the rest cannot follow'" (FairSearch 2011).

[4] The Court has since held that words cannot be censored simply because it is upsetting (*Snyder v. Phelps* 2011) and has not upheld a government action on the basis of this doctrine since *Chaplinsky*.

[5] In *Alvarez*, the court evaluated the constitutional validity of the Stolen Valor Act, which criminalized false claims about receipt of a military honor. Affirming the decision of the Ninth Circuit to hold the Act invalid, the Court found that falsity alone does not take speech outside of the First Amendment. Instead, such legislation requires proof of a direct causal link between the restriction imposed and the injury prevented, by identifying a "legally cognizable harm" that is sure to result from the perpetuation of the falsehood.

[6] *Madigan* holds that States may maintain fraud actions when fundraisers make false or misleading representations designed to deceive donors about the use of their intended donations. In a unanimous opinion, the Court here articulated a distinction between a mere failure to disclose, and the use of intentionally misleading statements designed to defraud the listener. The latter constitutes fraud, and thus, is not protected under the First Amendment.

[7] The decision found that the criminal syndication act was overly broad because it criminalized the advocacy and teaching of threatening and violent doctrines, without contemplating whether such speech would actually incite "imminent lawless action".

[8] 47 U.S.C. § 230(f)(2) defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." This definition has been extended to Facebook (*Klayman v. Zuckerberg* 2014) and Twitter (*Fields v. Twitter* 2016).

[9] Through interpretation of the Fourteenth Amendment, First Amendment prohibitions have been extended to the states (*"State Action Doctrine"* 2021)