BARGAINING FOR FREE SPEECH: COMMON CARRIAGE, NETWORK NEUTRALITY, AND SECTION 230

Adam Candeub*

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Democracy and the global flow of ideas depend upon a free internet. Network neutrality advocates worry that dominant broadband services providers, such as Verizon or Comcast, will use their market power to block, degrade, or otherwise discriminate against content originating from unaffiliated or disfavored firms. Others fear platforms such as search engines and social media will control online behavior and censor speech. Advocates of both network neutrality and platform regulation postulate an internet firm—either broadband service provider or search/social media platform—with the market power to discriminate among businesses and users. Yet, despite these similarities, broadband service providers and dominant search engines/social platforms face different regulatory regimes: the Federal Communications Commission's (FCC) network neutrality regulation as opposed to section 230 of the Communications Decency Act. These differing regulatory regimes create an indefensible double standard for online platforms, with broadband facing potential network neutrality regulation but search/social media enjoying section 230's liability protections.

Both network neutrality and section 230 reflect a historically typical "regulatory bargain" first found in common carriage, the body of law that has regulated transportation and communications networks for centuries. Government offers carrots, such as liability relief, and imposes sticks, such as antidiscrimination duties. In return, a dominant network firm furnishes public goods that flow from a universal communications platform. Viewing regulation through this prism, this Article forwards a unified internet liability regime consistent with consumer protection and free speech.

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INTRODUCTION

Democracy and the innovation economy depend on the free flow of ideas. Justice Holmes's classic analysis of the First Amendment identifies a vibrant marketplace of ideas as a central pillar of a self-governing society.[1] Similarly, "free speech guarantees should have a great deal to do with a knowledge economy, and a world in which wealth and power increasingly depend on information technology, intellectual property, and control over information flows."[2] As the internet is now the primary global platform to exchange ideas, both democracy and innovation depend upon internet freedom.

Many fear dominant internet platforms' interference with the free flow of ideas online—and these concerns motivate today's most important legal and policy debates about the internet. First, so-called network neutrality advocates worry that dominant broadband services providers, such as Verizon or Comcast, may use their market power to block, degrade, or otherwise discriminate against content originating from unaffiliated firms.[3] For instance, Comcast

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[1] Abrams v. U.S. 250 U.S. 616, 630 (1919) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.").

[2] Jack M. Balkin, *The Future of Free Expression in A Digital Age*, 36 PEPP. L. REV. 427, 427 (2009); *see also* Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CAL. L. REV. 335, 338 (2017) ("free speech doctrine harmonizes with the democratic self-governance and personal autonomy theories that most legal scholars embrace"); Hillary Greene, *Muzzling Antitrust: Information Products, Innovation and Free Speech*, 95 B.U. L. REV. 35, 36 (2015) ("courts must account for free speech—a value exogenous to antitrust—as well as competition and innovation, two goals often considered in tandem within an antitrust framework"); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992) ("Autonomy is the foundation of all basic liberties, including liberty of expression. . . . Our ability to deliberate, to reach conclusions about our good, and to act on those conclusions is the foundation of our status as free and rational persons. No conviction forced upon us can really be ours at all."); Jack M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 385 ("[W]e should always keep in mind why the principle of free speech is important to us—because it protects dissent, egalitarian participation in public and private forms of social power, individual conscience, and individual autonomy."); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) ("[T]he constitutional guarantee of free speech ultimately serves . . . . development of the individual's powers and abilities—an individual "realizes" his or her full potential.").

[3] Susan P. Crawford, *The Internet and the Project of Communications Law*, 55 UCLA L. REV. 359, 395 (2007) ("By 'discrimination,' I mean allowing network-access providers to treat some traffic or some users differently."); Tim Wu, *Why Have a Telecommunications Law? Anti-Discrimination Norms in Communications*, 5 J. ON TELECOMM. & HIGH TECH. L. 15, 16 (2006).

allegedly degraded or threatened to degrade Netflix's content because both firms compete in the home video entertain business.[4]

A second set of concerns focuses on search engines' and social media's controlling online behavior and censoring speech, i.e., "platform regulation." Legal academics have long recognized how anticompetitive motives could bias search engine results,[5] and businesses have long complained that Google biases its search results.[6] Consistent with these claims, the EU Commission recently fined Google $2.7 billion,[7] and the Department of Justice has recently opened a high-profile investigation of the dominant internet firms.[8] Finally, social media is seen as playing an oversized and often unaccountable role in shaping public discourse.[9]

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[4] Rob Frieden, *The Internet of Platforms and Two-Sided Markets: Implications for Competition and Consumers*, 63 VILL. L. REV. 269, 270 n.5 (2018) ("Comcast, a major broadband access provider in the United States, and Netflix, the predominant supplier of video content, resolved an interconnection and compensation dispute by agreeing to interconnect directly at Comcast's primary national switching facilities upon payment of a surcharge.
'Comcast arguably uses its market power derived from its market share of cable to squeeze money out of content providers such as Netflix,'" (quoting Adam Candeub, *Networks, Neutrality & Discrimination*, 69 ADMIN. L. REV. 125, 165 (2017)) (internal quotation marks omitted)).

[5] Howard A. Shelanski, *Information, Innovation, and Competition Policy for the Internet*, 161 U. PA. L. REV. 1663, 1705 (2013); Frank Pasquale, *Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries*, 104 NW. U.L. REV. 105, 106 (2010); Frank Pasquale, *Internet Nondiscrimination Principles: Commercial Ethics for Carriers and Search Engines*, 2008 U. CHI. LEG. FORUM 263, 265 (2008); James Grimmelmann, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 3 (2007).

[6] *See* Adi Robertson, *The Long, Tortured Quest To Make Google Unbiased*, THE VERGE (Dec 6, 2018), https://www.theverge.com/2018/12/6/18125879/search-neutrality-google-bias-seo-rigged-sundar-pichai-congress-eu,
("Websites have been fighting Google over search rankings almost since the company was founded—in 2002, a site called Search King sued Google over a suddenly demoted PageRank score.").

[7] Daniel Boffey, *Google Appeals Against EU's €2.4bn Fine over Search Engine Results*, THE GUARDIAN (Sep. 11, 2017 14:03 EDT), https://www.theguardian.com/technology/2017/sep/11/google-appeals-eu-fine-search-engine-results-shopping-service.

[8] Brent Kendall, *Updated Justice Department to Open Broad, New Antitrust Review of Big Tech Companies*, WALL ST. J. (Jul. 23, 2019), https://www.wsj.com/articles/justice-department-to-open-broad-new-antitrust-review-of-big-tech-companies-11563914235.

[9] The political right points to social media's de-platforming of conservatives. Sue Halpern, *The Search for Anti-Conservative Bias on Google*, NEW YORKER, (Dec. 19, 2018), https://www.newyorker.com/tech/annals-of-technology/the-search-for-anti-conservative-bias-on-google. The left points to scandals such as Cambridge Analytica and Russia's involvement in the 2016 presidential elections. For an overview of the scandal, see The Guardian's news stories, *available at* https://www.theguardian.com/news/series/cambridge-analytica-files.

Both network neutrality and platform regulation seek to counter a powerful internet firm, whether a Comcast or Google—a broadband provider or social network/search engine—which has the market power to discriminate among users and businesses that rely on their network. Even though these economic and policy concerns are quite similar, broadband service providers and dominant search social networks face different regulatory regimes. The Federal Communications Commission's (FCC) network neutrality regulation, promulgated under Title II common carriage jurisdiction of the 1934 Communications Act,[10] governs, at least potentially, broadband service providers. Under this jurisdiction, the FCC may impose the whole range of common carriage duties, including rate regulation, mandatory interconnection as well as anti-discrimination obligations.[11] The FCC has regulated the internet pursuant to this power on and off for a decade—with the network neutrality debate continuing as one of the most controversial regulatory matters in recent memory.[12]

In contrast, search and social media platforms such as Google, Facebook, and Twitter only face section 230 of the Communications Decency Act. Rather than impose common carriage obligations, section 230 exempts internet platforms from liability arising from third-party speech.[13] Under its protections, if a newspaper publishes a libelous letter to the editor, the newspaper faces legal liability. But, if you post the same letter to the newspaper's online forum, the newspaper faces no liability under section 230.[14] Section 230 remains controversial with some who see it as a giveaway to the

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[10] 47 U.S.C. § 201(a)-(b) *et seq*.

[11] Natl. Ass'n of Reg. Util. Com'rs v. F.C.C., 525 F.2d 630, 640 (D.C. Cir. 1976) ("This character, coupled with the lack of control exercised by shippers or travellers over the safety of their carriage, was seen to justify imposing upon the carrier the status of an insurer. The late nineteenth century saw the advent of common carriers being subjected to price and service regulations as well."); Tim Wu, *supra* note 3, at 16-17, 32-35.

[12] Promoting and Protecting the Open Internet Order, 30 FCC Rcd. 5601, 5614 (2015); Adam Candeub, *supra* note 4, at 126-27 ("The FCC's Open Internet Order, one of the most controversial regulations in recent memory, has exerted federal power, for the first time in history, over potentially the entire Internet network. The FCC received over 3.5 million comments from interested individuals and organizations, reflecting a groundswell of popular interest that crashed the agency's computers.").

[13] Communications Decency Act of 1996, 47 U.S.C. § 230 (2018).

[14] Adam Candeub, *Renegotiated NAFTA Will Entrench Big Tech Censorship*, REAL CLEAR POLITICS (Nov. 23, 2018), https://www.realclearpolitics.com/articles/2018/11/23/renegotiated_nafta_will_entrench_big_tech_censorship_138731.html ("In practice, this means if the New York Times publishes a defamatory article online, the victim can sue the Times and the author, but if the @NYTimes tweets the same defamatory claim, Twitter has no legal responsibility.").

giant search/ social media firms while others see it as protecting free speech—and with numerous bills pending in Congress to reform.[15]

Despite different historical origins, network neutrality and section 230 platform liability—and so-called "common carriage," the body of law that has regulated transportation and communications networks for centuries, all reflect a historically typical "regulatory bargain." In exchange for liability relief from tort or antitrust law and for other government-granted privileges, a dominant network firm provides public goods it can uniquely offer: a universal communications platform enabling free speech and promoting democratic institutions. Common carriage's historical concern was carrier liability, which was designed to protect consumers and expand access. In the early modern period, common carriage required a higher level of liability for bailors, innkeepers, and ferries to protect consumers who often had no choice as to carriage service or innkeeper in those early industrial times.

Nineteenth century courts limited these liabilities but still imposed upon common carriers higher liability standards and other special obligations—and required carriers to refrain from discriminating against individuals or the content of their messages, i.e., provide a universal communications platform. In return, common carriers received special legal benefits such as protected monopolies, rights of condemnation for rights of way, or immunity from certain types of suits.[16]

Similarly, section 230, part of the 1996 Communications Decency Act, encouraged the early internet platforms, such as AOL or CompuServe, to regulate pornography and other matters traditionally subject to media or communications regulation, but at

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[15] *See* Elizabeth Nolan Brown, *Section 230 Is the Internet's First Amendment. Now Both Republicans and Democrats Want To Take It Away*, REASON (Jul. 19, 2019), https://reason.com/2019/07/29/section-230-is-the-internets-first-amendment-now-both-republicans-and-democrats-want-to-take-it-away;
Cristiano Lima, *How a Widening Political Rift over Online Liability Is Splitting Washington*, POLITICO (Jul. 9, 2019), https://www.politico.com/story/2019/07/09/online-industry-immunity-section-230-1552241.

[16] Cellco Partn. v. F.C.C., 700 F.3d 534, 545 (D.C. Cir. 2012) ("For centuries, common carriage principles have structured the transportation and communications industries. Borrowing from English common law traditions that imposed certain duties on individuals engaged in 'common callings,' such as innkeepers, ferrymen, and carriage drivers, American common law has long applied the concept of common carriage to transportation and communications enterprises."); BARBARA A. CHERRY, THE CRISIS IN TELECOMMUNICATIONS CARRIER LIABILITY: HISTORICAL REGULATORY FLAWS AND RECOMMENDED REFORM (1999).

the same time fostered the free flow of ideas. It did so by creating the two different liability standards found in section 230(c)(1) and section 230(c)(2).[17] Notably, section 230 asked very little in return for this liability relief. [18]

But, unending network neutrality and section 230 debates—and continued concerns about network discrimination as search and social networks are no longer nascent industries but dominant global communications hubs—argue for a new, unified internet liability regime. And, any new deals should respond to firms' most blatant and destructive use of market power, discrimination.

This Article presents a novel interpretation of network regulation as a "regulatory deal." First, this interpretation offers a new interpretation of common carriage and network regulation—not as a sort of junior, ex ante antitrust regulation—but as an exchange of liability relief and other government goods for public goods that dominant network firms can uniquely offer such as a universal communications platform for free speech. Second, the Article shows how this "deal" is found not only in common carriage but also in network neutrality, other network regulations, and section 230. Third, the Article shows how some court rulings have twisted the terms of section 230, expanding its immunity to an absurd degree—further calling for a renegotiation of the section 230 regulatory deal to protect free speech. Fourth, the article describes what a unified internet liability regime should look like—and how it would not involve much regulation at all but simply impose a mild anti-discrimination requirement while encouraging platforms to enable users to block objectionable content and decide for themselves how to protect their own individual online experiences.

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[17] David Lukmire, *Can the Courts Tame the Communications Decency Act?: The Reverberations of Zeran v. America Online*, 66 N.Y.U. ANN. SURV. AM. L. 371, 373 (2010) ("To better understand section 230, it is worth exploring the origins of the CDA as a whole. Television ratings, the V-chip, and especially online pornography were high on the agenda for Congress in the mid-1990sand were generating significant public interest. The CDA was a product of a particular historical and political moment: explosive growth occurred in the telecommunications industry, including the growth of cable television, cellular phone technology, and the Internet.").

[18] JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 20-33 (2017).

I. REGULATING NETWORK LIABILITY AND PUBLIC GOODS: COMMON CARRIAGE, NETWORK NEUTRALITY, AND SECTION 230

Few areas of economic and legal regulation have received more attention than communications networks—whether the old AT&T telephone monopoly, the period of competitive long-distance during the 1980s and 1990s or the network neutrality and social media censorship debates.[19] This section argues for a new understanding of network regulation: it is a deal where the government allows dominant firms to maintain market power, or even monopoly, in order to obtain and preserve public goods of universal communications platform, free speech, and democratic institutions.[20] In other words, the dominant firm is not regulated only to curb its market power. Rather, its dominance is tolerated to provide additional public goods not otherwise obtainable.

Depending on the historical and industrial context, the deal often imposes or relieves liabilities, grants government powers, such as the right of condemnation, or requires terms and conditions, such as non-discrimination or universal service. The basic element,

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[19] CHRISTOPHER H. STERLING, PHYLLIS W. BERNT & MARTIN B.H. WEISS., SHAPING AMERICAN TELECOMMUNICATIONS: A HISTORY OF TECHNOLOGY, POLICY, AND ECONOMICS (2006); Daniel F. Spulber & Christopher S. Yoo, *Toward A Unified Theory of Access to Local Telephone Networks*, 61 FED. COMM. L.J. 43, 116 (2008); Howard A. Shelanski, *Adjusting Regulation to Competition: Toward a New Model for U.S. Telecommunications Policy*, 24 YALE J. ON REG. 55, 101-05 (2007).

[20] Viewing network regulation as a deal has long been suggested by courts and the scholarly literature. *See, e.g.,* Natl. Ass'n of Reg. Util. Com'rs v. F.C.C., 525 F.2d 630 (D.C. Cir. 1976) ("NARUC I"), 525 F.2d at 641-42 ("The common carrier concept appears to have developed as a sort of quid pro quo whereby a carrier was made to bear a special burden of care, in exchange for the privilege of soliciting the public's business."); *see also* Rob Frieden, *Schizophrenia Among Carriers: How Common and Private Carriers Trade Places*, 3 MICH. TELECOMM. & TECH. L. REV. 19 (1997) ("Historically, the rights and responsibilities vested in common carriers tempered their market power in exchange for reduced liability or insulation from commercial and personal damages caused by the content carried."). It also is central to the efficient cost pricing rule theory. *See generally* J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U. L. REV. 851 (1996); J. Gregory Sidak & Daniel F. Spulber, *Deregulation and Managed Competition in Network Industries*, 15 YALE J. ON REG. 117, 125 (1998) ("Continuing service requirements imposed on the incumbent LECs, particularly the obligation to provide unbundled network access, should be priced in a fashion that maintains the incumbent LECs' incentives to provide service. To do so requires compensating the incumbent LECs for all of their continuing and future regulatory obligations to serve, including their universal service obligation."); J. GREGORY SIDAK & DANIEL F. SPULBER, DEREGULATORY TAKINGS AND THE REGULATORY CONTRACT: THE COMPETITIVE TRANSFORMATION OF NETWORK INDUSTRIES IN THE UNITED STATES (1997).

however, remains the same: the government tolerates a firm with market power in exchange for the provision of a public goods.

In contrast, most legal and policy work has assumed that the sole and only goal of regulating networks is to regulate a natural monopoly or combat market power.[21] In other words, regulators have feared that the dominant firm would extract excess profits, impose deadweight loss on the economy, or use its market power to pursue various strategies, such as vertical foreclosure, to drive out competition, or otherwise harm consumers.[22] For instance, the 1983 breakup of AT&T was predicated on such a foreclosure scheme, as was the Microsoft antitrust litigation—and much subsequent telecommunications legal controversy.[23]

But, communications regulation, particularly common carriage, has always encompassed more than antitrust because communications networks offer essential public goods. Economists define 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-

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[21] Alfred E. Kahn, *Telecommunications: The Transition from Regulation to Antitrust*, 5 J. ON TELECOMM. & HIGH TECH. L. 159, 182-84 (2006) (arguing that many forms of regulation of telecommunication companies are "in essential conflict with and obstructive of the developing dynamic competition among technologically different platforms"); Christopher S. Yoo, *Would Mandating Broadband Network Neutrality Help or Hurt Competition? A Comment on the End-to-End Debate*, 3 J. ON TELECOMM. & HIGH TECH. L. 23, 65 (2004) (objecting to net neutrality advocates' preference for homogeneous, "dumb" pipes, and concluding that differentiation may provide for economic benefits by allowing networks to better satisfy heterogeneous customer preferences); Barbara A. Cherry, *Misusing Network Neutrality to Eliminate Common Carriage Threatens Free Speech and the Postal System*, 33 N. KY. L REV 483, 502 (2006) ("[T]o advocate primary reliance on antitrust principles ignores important historical facts. Common carriage regulation, both under the common law and statutorily, evolved prior to antitrust regulation. Thus, antitrust law subsequently evolved to augment—that is, to address issues and situations not already encompassed by—common carriage . . . . Advocates of a regime based solely on antitrust fail to explain how the issues pertaining to the provider-to-customer relationship, that have been governed by the ex ante rules of industry-specific common carriage regulation, will be adequately addressed by antitrust ex post remedies.").

[22] Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 HARV. J.L. & TECH. 85 (2003);

[23] Steven C. Salop, *Invigorating Vertical Merger Enforcement,* 127 YALE L.J. 1962, 1994 (2018) ("Three classic examples of a vertically integrated firm engaging in foreclosure conduct are: vertically integrated AT&T using its control over the local exchange network to raise barriers to entry into long distance, conduct that resulted in the disintegration of AT&T"); United States v. AT&T Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom*., Maryland v. United States, 460 U.S. 1001 (1983); United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001); Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

excludable, meaning that one cannot provide the good without others being able to enjoy it.[24] Typical examples would include police protection, environmental protection, and flood protection. To illustrate, my enjoyment of police protection does not impinge upon yours, nor can I prevent you from receiving the benefits of living in a society with police protection.

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 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. This was true in the 18th century when the U.S. Constitution required the federal government to create the post office, one of the few departments that the Constitution specifies[25] as well as when Congress, in one of its first acts, mandated reduced rates for newspapers so that citizens could learn about and participate in politics and national issues.[26]

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[24] James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 41-42 (2003) (arguing that the distinguishing features of information as property are non-rivalrousness and non-excludability); Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 STAN. L. REV. 455, 457-58 (2010) (arguing that although information is non-rivalrous and non-excludable, "the inability of an owner to take physical possession of what he owns does not make it impossible for one person to have rights of exclusive use and disposition of the property in question. It only means that a legal system has to become more mature before it can handle the greater administrative burdens").

[25] United States Constitution, Article I, Section 8, Clause 7 empowers Congress "[t]o establish Post Offices and Post Roads."

[26] C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 S. CT. REV. 57, 98 (1994) ("Historically, newspapers were the largest beneficiaries of postal subsidies. In 1792, Congress's first major legislation on postal service charged rates for newspapers that, depending on the size of the paper and the distance sent, were from one-sixth to one-fiftieth the rate set for letters. These beneficial rates continued throughout our history. In 1912, the government reported that first-class mail produced a $70 million profit, while second-class postage entailed a $70 million loss, with letter mail paying a rate eighty times that charged newspapers."). Congress historically had provided lower postal rates to newspapers and magazines in order to encourage "the dissemination of current intelligence." David M. Rabbant, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 528 (1981).

Above all, a universal communications platform allows for democratic self-government by promoting free speech. George Washington emphasized the value of "political intelligence and information," and James Madison argued that in democratic society the "easy and prompt circulation of public proceedings is peculiarly essential."[27]

In a similar vein, public goods theory justifies government grants of monopoly-like property rights to patent and copyright holders.[28] Copyright and patent law, respectively, give their owners legal rights and privileges over inventions and creative words in order to encourage their creation and innovation. As part of the deal, patent holders disclose their inventions. Similarly, common carriage requires networks surrender their legal right to exclude users so as to promote the dissemination of information and knowledge in society necessary for self-governance and creation of resilient political institutions. In return, carriers gain certain legal immunities and continue to enjoy their market power.

Common carriage, network neutrality, and section 230 emerged in varied historical and industrial contexts. These legal regimes create different types of deals, but certain elements remain the same. As the following shows, *liability* is often the prime factor in the deal. Government will often grant a higher or lower standard of liability in order to further various types of public goods.

A. Common Carriage

Common carriage emerged in the 17th and 18th century as the law governing bailors, innkeepers, couriers, docks, and other

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[27] RICHARD B. KIELBOWICZ, NEWS IN THE MAIL: THE PRESS, POST OFFICE, AND PUBLIC INFORMATION, 1700-1860S at 34 (Greenwood, 1989).

[28] Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 431-32 (1984) ("The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest . . . . [T]he ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."); David W. Barnes, *A New Economics of Trademarks*, 5 NW. J. TECH. & INTELL. PROP. 22, 22-23 (2006); David J. Brennan, *Fair Price and Public Goods: A Theory of Value Applied to Retransmission*, 22 INT'L REV. L. & ECON. 347, 351-355 (2002); Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Anatomy of A Congressional Power*, 43 IDEA 1,1 (2002) ("Madison . . . argued that patents and copyrights were monopolies that should be tolerated because of the public good they could produce."); John Cirace, *When Does Complete Copying of Copyrighted Works for Purposes Other than for Profit or Sale Constitute Fair Use? An Economic Analysis of the Sony Betamax and Williams & Wilkins Cases*, 28 ST. LOUIS U. L.J. 647 (1984).

communications network and transportation industries.[29] In the 19th and 20th century, common carriage became the dominant framework for regulating a wide variety of industries including railroad, telegraphs, and telephones.[30]

Common carriage's original concern was carrier liability, at first requiring a higher level of liability, typically strict liability, for bailors, porters, innkeepers, and ferries to protect consumers who often had no choice as to carriage service, ferry, or innkeeper in earlier times.[31]

In return for greater liability, common carriers often received special legal benefits such as protected monopolies[32] or, at least, regulation of market entrance,[33] rights of condemnation for rights of way,[34] and

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[29] James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM. L.J. 225, 255 (2002) ("[A]s the common law emerged into the sixteenth and seventeenth centuries, however, cases based on the law of common callings focused on a narrow set of trades and professions: carriers of all kinds, and occupations (such as warehousing) associated with transportation—most notably innkeepers").

[30] Cellco P'ship v. F.C.C., 700 F.3d 534, 545 (D.C. Cir. 2012) ("For centuries, common carriage principles have structured the transportation and communications industries. Borrowing from English common law traditions that imposed certain duties on individuals engaged in 'common callings, such as innkeepers, ferrymen, and carriage drivers, American common law has long applied the concept of common carriage to transportation and communications enterprises ."); Speta, *supra* note 29, at 251-52 ("The English common law imposed special duties on certain professions to serve all who sought service, on just and reasonable terms, and without discrimination. Beginning in the 1800s, English and American statutes applied these rules—what are now called common carrier rules—to the dominant mode of transportation, the newly emerging railroads.").

[31] JOSEPH K. ANGELL, A TREATISE ON THE LAW OF CARRIERS OF GOODS AND PASSENGERS BY LAND AND WATER §§ 149-219 (1849).

[32] Susan Dente Ross, *First Amendment Trump?: The Uncertain Constitutionalization of Structural Regulation Separating Telephone and Video*, 50 FED. COMM. L.J. 281, 308 (1998) ("Conventional wisdom holds that telephone companies held themselves out as common carriers in a quid pro quo for protected monopoly status.")

[33] Martin Shapiro, *The Warren Court and the Interstate Commerce Commission*, 18 STAN. L. REV. 110, 144 (1965) ("This decision was designed to allow some of the larger contract carriers to expand their operations closer to common carrier proportions and thus to compete with existing common carriers that had been excessively protected by the ICC's reluctance to grant new common carrier certificates.")

[34] Julia K. Tanner, *Mobile Internet Access: Technology, Competition, and Jurisdiction*, 23 B.U.J. SCI. & TECH. L. 123, 125 (2017) ("Common carrier regulation restricts those regulated, but also may result in benefits or loss offsets, such as access to public markets, public rights of way, construction or operation subsidies, control of facilities, services or routes also needed by other service providers, and limited liability for the content of traffic transported for customers.")

immunity from certain types of suits.[35] Importantly, responding to changed circumstanced, courts limited the strict liability rule to encourage the public good of free exchange of ideas as discussed below.

1. Common Carriage's Liability Deal

Common carriage emerged from the law of "public callings" which in turn originally developed from the medieval guild system.[36] In its very beginnings in the 16th and 17th centuries, common carriage included all sorts of tradesmen who were characterized as having a "public calling."[37] Common law required these industries to perform upon reasonable request without discrimination, to charge just and reasonable prices, and to exercise their calling with adequate care, skill and honesty—and function under a de facto strict liability.[38]

Market power broadly justified this liability deal. In an early industrial economy, in which transportation was expensive and

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[35] *In re* Vehicle Carrier Services Antitrust Litigation, 846 F.3d 71, 81 (2017) ("The Shipping Act, which regulates ocean common carriers, provides immunity from private antitrust suits based on conduct prohibited by the Shipping Act."); PETER WILLIAM HUBER ET AL., FEDERAL TELECOMMUNICATIONS LAW § 14.6.7, at 1308 (2d ed. 1999) ("Telegraph and telephone common carriers have traditionally enjoyed broad immunity from defamation suits."); Stephen J. Foland, *Common Carriage and Liability in the Rail Transportation of Toxic Inhalation Hazard Materials*, 8 AVE MARIA L. REV. 197, 198 (2009)("[C]ourts have held that, in light of their obligation as common carriers to move any and all freight handed to them for shipment, rail carriers should be immune from liability").

[36] MARTIN G. GLAESER, PUBLIC UTILITIES IN AMERICAN CAPITALISM 199-201 (1957); Speta, *supra* note 29, at 259; Edward A. Adler, *Business Jurisprudence*, 28 HARV. L. REV. 135 (1914).

[37] Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 217, 230-31 (1904); Samuelson v. Pub. Utilities Commn. of State, 227 P.2d 256, 260 (Cal. 1951) ("In his work on Carriers, Mr. Moore, at page 20 (volume 1), defines a common carrier as one who holds himself out as such to the world; that he undertakes generally and for all persons indifferently to carry goods and deliver them for hire; and that his public profession of his employment be such that, if he refuse, without some just ground, to carry goods for any one, in the course of his employment and for a reasonable and customary price, he will be liable to an action." (internal quotation marks omitted)).

[38] Wyman, *supra* note 37*,* at 243; Barbara Cherry, *Maintaining Critical Rules to Enable Sustainable Communications Infrastructures,* 24 GA. ST. U. L. REV. 947, 962-67 (2008). The case to establish absolute liability for bailors was the English case *Coggs v. Bernard*, 2 Ld. Raym. 909 (1703). Nineteenth-century American Supreme Court cases applied this liability standard to bailors and railroads. BARBARA A. CHERRY, THE CRISIS IN TELECOMMUNICATIONS CARRIER LIABILITY 14-15 (1999).

difficult, competition in various essential industries was limited. A common law doctrine developed to protect consumers as perhaps a sort of early antitrust regulation to address natural monopoly[39]—although this interpretation is not totally accepted.[40] Rather, some legal scholars see common carriage as a requirement to offer service to all on a nondiscriminatory basis to some fundamental, essential service in society.[41]

By the nineteenth century, at least in the United States, courts applied common carriage largely to those involved in infrastructure-type industries, such as dock owners, toll bridge and roads, telegraph operators, and most importantly for the development of legal doctrine, railroads.[42] Even though common carriage did, indeed, center on a few industries by the 19th century, it never developed clear rules for the extent of its application. Rather, it remained a sprawling collection of principles with inconsistent application.

And, not surprisingly, legal academics have spilled much ink trying to discover the essential nature of common carriage.[43] The two leading commentators of the early 20th century, Bruce Wyman and Charles Burdick, took opposing points of view. Wyman thought that the industries so affected have anticompetitive monopoly power.[44] In contrast, Burdick saw the distinction as broader to include all firms that that hold themselves out as being open to the public.[45]

The Supreme Court's decision in *Munn v. Illinois*[46] reflects this confusion. Courts had to identify what constitutes industries affected with the public interest—of which common carriers were a species—because these industries were exempt from the Supreme Court's *Lochner*-era limits of federal regulation of business.[47] Due

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[39] Wyman, *supra* note 37*,* at 222.
[40] Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 COLUM. L. REV. 514, 518-25 (1911).
[41] *Id.*
[42] Angela J. Campbell, *Publish or Carriage: Approaches to Analyzing the First Amendment Rights of Telephone Companies*, 70 N.C. L. REV. 1071, 1120 (1992) ("In the United States, the concept of common carriage was initially associated with the railroads."); *see also* Cherry, *supra* note 38, at 14-16.
[43] Christopher S. Yoo, *Common Carriage's Domain*, 35 YALE J. ON REG. 991, 994-95 (2018) ("Over the years, scholars and courts have repeated[ly] attempted to devise a coherent framework for determining when common carriage should apply, without much success.").
[44] Wyman, *supra* note 37, at 222.
[45] Burdick, *supra* note 40, at, 518-25.
[46] Munn v. Illinois, 94 U.S. 113 (1876).
[47] Adam Candeub, *Network Interconnections and Takings*, 54 SYRACUSE L. REV. 369, 382 (2004) ("Given the constitutional barriers in regulating business before

to the historical fact that regulation of these industries extended back centuries, the Supreme Court ruled that regardless of substantive due process, the federal government could regulate common carriers and industries affected with the public interest.[48]

In Munn, the majority opinion ruled that grain elevators could be regulated as common carriers because they were affected with the public interest.[49] This reasoning brought forth a famous derisive response from Justice Field in dissent: why are grain warehouses so affected and consequently susceptible to regulation, but not firms that sell "calico gown[s]" or "city mansion[s]."[50]

Modern efforts at justifying the parameters of common carriage have not gone much further than Wyman and Burdick.[51] Most modern efforts at trying to unravel this mystery have identified underlying basic transportation or communications industries that perform an important public service as constituting common carriage.[52] It is a fair riposte to these ideas that they are descriptive at too general a level and fail to provide a convincing rule of decision. How involved in transportation or communications must an industry be before it becomes a common carrier. Why private car services but not Uber? Why wireline phones but not wireless? Teasing out common carriage law's definitional criteria may be, in the end, desultory.

Looking at the matter from a fresh perspective, it seems important to see the entire regime of common carriage. And what emerges is a

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the Supreme Court changed its mind about such matters in the 1930s, the limits of common carriage were of vital importance for an obvious reason: a common carrier could be regulated in ways in which a non-common carrier could not . . . . A tremendous amount of ink therefore was spilled in an attempt to demarcate the boundary between common carriers and non-common carriers during the late nineteenth century and early twentieth century."); Cherry, *supra* note 38, at 54.

[48] *Munn*, 94 U.S. at 134-35.

[49] *Id*. at 135-36.

[50] *Id*. at 152 (Field, J., dissenting).

[51] Yoo, *supra* note at 43, at 994-95. ("Over the years, scholars and courts have repeated attempted to devise a coherent framework for determining when common carriage should apply, without much success.").

[52] Thomas B. Nachbar, *The Public Network,* 17 COMM LAW CONSPECTUS 67, 109 (2008) ("It is hard to find a specific characteristic that leads to nondiscriminatory access and rate regulation. . . . Nonetheless, all of the regulated industries relate in some way to transportation and communication networks, and society has demonstrated a singularly strong interest in their regulation."); Susan P. Crawford, *Transporting Communications*, 89 B.U. L. REV. 871, 881 (2009) ("[T]his social understanding of communications regulation was widely-held; it amounted to the acceptance of the idea that government oversight of common carrier services was appropriate and necessary to ensure that these services were reasonable and non-discriminatory, whether or not carriers were market powerful.").

bargain that gives special liability breaks in return for the carrier refraining from using some market power to further some public good. On one hand, the carrier gives away the right to discriminate on the basis of sender or content and in return receives immunity for liability for the content therein. On the other hand, the carrier agrees to moderate monopoly power against competitors or perhaps provides access to competitors in return for immunity from antitrust suit. Similarly, the increased standard of care reflects the market power of dominant communication and transportation firms enjoy vis à vis individual customers—and can be seen as a return for the privileges common carriers enjoy such as right of access etc.

In this regard, common carriage is a deal. The regulated industry has things the government wants—a universal communications platform that provides valuable public goods, notably free speech to further democratic deliberation and reduce transaction costs on a society-wide basis. But, in return, the regulated industry receives preferential treatment from the government. This could be in the form of protection from application of antitrust laws,[53] special access to rights of way and even condemnation,[54] or the relaxation of liability as for carrier's immunity of liability for the content of the messages these carry.[55]

Common carriage reflects a deal that both parties receive something which they could not obtain in an ordinary business transaction. The deal changed over different economic situations, industries and

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[53] Allen Evans Jackson, *In Support of Exempting Non-Vessel Operating Common Carriers from Tariff Filing*, 1 GEO. MASON. L. REV. 289, 302 n.64 (1993) ("The antitrust immunity that ocean common carriers receive allows them to discriminate, albeit not unfairly or unjustly, against different shippers."); Southern Motor Carriers Rate Conf., Inc. v. U.S., 471 U.S. 48, 65 (1985) ("[W]e hold that the petitioners' collective ratemaking activity is immune from Sherman Act liability").

[54] *See* Chris Baronzzi, *Oil and Gas Pipeline Companies Can Condemn Private Property in Ohio*, OIL & GAS LAW REPORT (Oct. 19, 2012), http://www.oilandgaslawreport.com/2012/10/19/oil-and-gas-pipeline-companies-can-condemn-private-property-in-ohio/ (stating that the Natural Gas Act and state legislation allows natural gas companies to condemn private property for "public use").

[55] PETER WILLIAM HUBER ET AL., FEDERAL TELECOMMUNICATIONS LAW § 14.6.7, at 1308 (2d ed. 1999) ("[C]ommon carriers are generally immune from liability when their networks are used to enable or facilitate the violation of copyrights"); Ryan Gerdes, *Scaling Back S 230 Immunity: Why the Communications Decency Act Should Take A Page from the Digital Millennium Copyright Act's Service Provider Immunity Playbook*, 60 DRAKE L. REV. 653, 656 (2012) ("Common carriers, including telephone companies, have very little control over the content of the information communicated over their networks and thus are normally afforded immunity from liability for the defamatory statements transmitted by users.").

times. Under the deal, government demands that the firm refrain from using its market power or imposes some liability to counter market power (the "sticks") and in return the firm receives some relief from liability or other legal privilege (the "carrots"), and the exchange advances some public good that only a dominant network firm can provide, such as a universal communications platform that furthers free speech. Sometimes increased liability was part of the deal—as with the old common carrier strict liability; sometimes decreased liability was part of the carrot, a gift in return for refraining from exercising market power.[56]

Last, viewing common carriage as a regulatory deal is consistent with the history of telecommunications regulation. During the period before state regulation of telephone, roughly the last two decades of the 19th century, cities and localities "bargained" with AT&T, which controlled telephones due to its patents. In exchange for rights of ways, the cities' and localities' "demands included free municipal government service, imposition of taxes, regulation of rate levels, requirements to purchase defunct of existing competitive telephone facilities [to continue service to customers of these firms] and creation of new classes of service such as residential and business services."[57] In other words, AT&T received the benefit of public rights of way and, in return, it provided benefits that only a universal communications platform can—such as a free way for government to communicate with its citizens.

2. The Common Carriage Sticks

The sticks have changed dramatically over time. As mentioned above, common carriage emerged from the guild system in Europe. The guilds received tremendous power, deciding who could enter their trade and thus controlling supply, i.e. a type of monopoly control. In return, however, there was a very big stick: typically, strict liability and a requirement to serve all without discrimination.[58]

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[56] Economists have long viewed regulation of common carriers as a deal. Most notably, the efficient cost pricing rule, the argument that government owed regulated utilities a guaranteed monopolistic rate of return upon deregulation, conceptualizes common carriage as a deal between governments and industry. *See supra* note 20.

[57] Cherry, *supra* note 48, at 24.

[58] *See* 13 C.J.S. CARRIERS § 391 ("Common carriers are held to a very strict accountability for the loss of or injury to goods received by them for carriage, being liable for almost all losses and injuries."); David G. Owen, *The Evolution of Products Liability Law*, 26 REV. LITIG. 955, 957-58 (2007)

Medieval and early modern common carriage is about as relevant to today's law as is a performance of Wagner's *Die Meistersingers*. Throughout the 19th century, particularly in reaction to the railroads, this medieval deal changed, adapting to modern times but retaining its form: a stick of regulations meant to counter the exercise of market power and a carrot of some special grant of government privilege to ensure the flow of public goods.

Elimination of Strict Liability, but Maintenance of Higher Liability Standards. Shippers were held to a special standard of care that was higher than standard tort liability. Well into the 19th century, carriers in the United States in many states had strict liability for the freight they accepted. [59] The strict liability moderated, perhaps as transportation became cheaper and more competitive in later centuries. American courts, like their English counterparts, modified the common law to permit common carriers to limit by contract their strict liability for safe delivery of goods. Nevertheless, they did not permit common carriers to exempt themselves from liability when judges believed that "such exemption is not just and reasonable in the eye of the law."[60]

A similar story could be told for telegraphs. Under traditional common carriage law, a telegraph company had unlimited liability for injuries resulting from a misdelivered message.[61] Courts in the 19th century modified that rule, allowing telegraph companies to contract out of complete liability but requiring them to offer insured, so-called "repeated" messages for a higher charge.[62]

("In early medieval English law, the law governing a seller's responsibility for defects in its products was crude at best. Indeed, private law, under which an aggrieved buyer might sue the seller for damages caused by defective goods, was largely unknown in early England."); Adam Candeub, *Network Interconnection and Takings*, 54 SYRACUSE L. REV. 369, 381 (2004) ("The law has used the term 'common carrier' since the Middle Ages. Originally an outgrowth of the guild system, common carriage included all sorts of tradesmen.").

[59] Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127, 1149 (1990) ("Several state courts in the first half of the nineteenth century refused to recognize that a common carrier had a common-law right to limit his liability even by express agreement. As late as the 1840s, the states of Connecticut, Georgia, Massachusetts, New Hampshire, New York, and Ohio unequivocally rejected the idea.").

[60] Griswold v. New York & N. E. R. Co., 4 A. 261, 264 (Conn. 1885).

[61] Adam Candeub, *infra* note 127, at 812 ("Telegraph companies and their users face the risk of error in transcription or copying. Under traditional common law, common carriers were liable for damages resulting from these errors.").

[62] *Id.* at 813. In addition, common carriers remained liable for messages liable for defamation on their face. Western Union Tel. Co. v. Lesesne, 198 F.2d 154 (4th Cir. 1952).

Non-discrimination. Common carriers could not discriminate in service or terms or service, but had to charge, as a general rule, everyone the same rate and receive business from all. Common carriage has been described as a calling that holds itself out to all members of the public.[63] Railroads, for example, cannot discriminate between competitors and members of the public in receiving and transporting goods.[64] However, this anti-discrimination rule again was more of a broad standard than a rule. Railroads were permitted to price discriminate in favor of large shippers. This extent of this discrimination was a major locus of legal and regulatory concern during the late 19th and early 20th centuries when farmers were often at the mercy of railroads.[65]

Mandatory Interconnection. Mandatory interconnection with competitors was often required. Just as with anti-discrimination, interconnection requirements differed from industry to industry. Common carriage required railroads to accept freight from another carrier; physical connections were also sometimes required under common law. Telegraphs, similarly, had to receive and forward and, indeed, telephone companies were required to transmit messages they received from them in a rather strange fashion.[66] However, under common law neither railroads, telegraphs, nor telephones were required to physically interconnect; rather, interconnection was a common requirement of statutory regimes.

Rate Regulation. The Supreme Court in Munn v. Illinois[67] made clear that common carriers were subject to special government regulation, particularly rate regulation. Of course, rate regulation is the atomic bomb of government regulation—and directly counters a

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[63] Samuelson v. Pub. Utilities Comm'n. of State, 227 P.2d 256, 260 (Cal. 1951) ("Mr. Moore, at page 20 (volume 1), defines a common carrier as one who holds himself out as such to the world; that he undertakes generally and for all persons indifferently to carry goods and deliver them for hire; and that his public profession of his employment be such that, if he refuse, without some just ground, to carry goods for any one, in the course of his employment and for a reasonable and customary price, he will be liable to an action." (internal quotation marks omitted)); Peter K. Pitsch & Arthur W. Bresnahan, *Common Carrier Regulation of Telecommunications Contracts and the Private Carrier Alternative*, 48 FED. COMM. L.J. 447, 452 (1996) ("[T]he essential element of common carriage [is] that the carrier holds itself out as providing the services to the public.").

[64] *See, e.g.*, McCoy v. Cincinnati Railway., & C.R.R. Co., 13 F. 3, 7, 9-10 (C.C.S.D. Ohio 1882) (holding that a railroad could not form an exclusive delivery relationship with one stockyard at the expense of other).

[65] GABRIEL KOLKO, RAILROADS AND REGULATIONS, 1877-1916 at 22-25 (1965).

[66] Candeub, *supra* note 47, at 387.

[67] *Munn*, 94 U.S. at 126.

monopolist's ability to charge supra-competitive rates.[68] And, the specter of this extreme government intervention still remains a legal, if not practical, potential for much of the communications industry.

Service Requirements. Just as railroads had to receive business from all, communications common carriers, like telephones, often had requirements to serve whole communities—not simply "cream skim" the most profitable areas in a community to serve. This requirement, which became nationalized at federal level in the FCC's Universal Service program,[69] started locally with individual communities negotiating with companies over easements and service areas.[70]

3. The Common Carriage Carrots

The Kingsbury Agreement reflects the common carriage deal—with both carrots and sticks. In the early part of the 20th century, AT&T dominated in the highly profitable major urban areas and used its vast capital to invest in the nation's only long-distance network.[71] It was fighting what appeared to be a winning war against the hundreds of independent telephone companies. These companies served less populated areas which offered telephone companies little profit—although there were some exceptions, notably the United States Telephone Company.[72] AT&T dominated large urban areas, though not all of them. Thus, because there was no mandatory physical interconnection, many businesses had two telephones—one to call

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[68] Greg Goelzhauser, *Price Squeeze in a Deregulated Electric Power Industry,* 32 FLA. ST. U.L. REV. 225, 229 (2004) ("[S]tate and federal regulators have required regulated utilities to offer consumers rates 'that were just, reasonable, and non-discriminatory.' In accord with the traditional economic understanding of natural monopoly, electric utility firms' rates were regulated to ensure those firms would not take advantage of their market dominance by reducing output or raising prices to supracompetitive levels."); Robin A. Prager, *Firm Behavior in Franchise Monopoly Markets,* 21 RAND J. ECON. 211, 211 (1990) ("The traditional solution to the natural monopoly problem is to impose some form of rate regulation.").

[69] Charles M. Davidson & Michael J. Santorelli, *Federalism in Transition: Recalibrating the Federal-State Regulatory Balance for the All-IP Era*, 29 BERKELEY TECH. L.J. 1131, 1144 (2014) ("The 1934 Act articulated a model of dual federalism for regulating basic telephone service. More specifically, it enshrined an assumption that both the states and the federal government, via the newly created FCC, had a role to play in monitoring the telephone monopoly and realizing the shared goals of universal service and affordable prices.").

[70] MILTON MUELLER, UNIVERSAL SERVICE: COMPETITION, INTERCONNECTION, AND MONOPOLY IN THE MAKING OF THE AMERICAN TELEPHONE SYSTEM 60-73 (1997).

[71] *Id.* at 44-50; Candeub, *supra* note 47, at 387-88.

[72] U.S. Tel. Co. v. C. Union Tel. Co., 171 F. 130, 131 (C.C.N.D. Ohio 1909), *aff'd*, 202 F. 66 (6th Cir. 1913).

people on AT&T and the other to call people who were customers of a large independent company in the area. Because of its bigger network and dominance in long distance lines, AT&T could offer a much bigger and thus more valuable network.[73] The small independents could only offer customers numbers of those users on their network. And, since common law did not require it, AT&T refused to interconnection with the small guys—which was clearly an expression of its market power. Thus, the United States telephone industry was locked in a struggle between the AT&T Goliath and a large number of independent Davids.

The Kingsbury Agreement, a negotiated settlement to the Attorney General's antitrust suit against AT&T, was quite literally a deal: common carriage sticks, carrots, and a public good. In return for settling the suit, AT&T promised to interconnect and carry the messages of the small telephone systems.[74] This agreement unified over one thousand telephone networks into one network, a tremendous public good. For the first time, any customer of any phone company could reach any customer of any phone company. AT&T refrained from using its market power, the Government refrained from using its antitrust power, and the public gained a good: one interconnected, national phone network.[75]

Immunity from Antitrust Laws. Common carriers often received immunity from the antitrust laws—both federal and state.[76] This immunity could be found in statutes or were actually negotiated litigation settlements as with the 1913 Kingsbury Agreement, which settled the first antitrust settlement suit against AT&T discussed above.[77] Or, they can emerge in judge-made law. For instance, the

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[73] Richard Gabel, *The Early Competitive Era in Telephone Communication, 1893-1920*, 34 LAW & CONTEMP. PROBS. 340, 350 (1969) ("Refusal to connect with independent telephone systems for long distance telephone service afforded Bell a stronger means of curbing the independent movement. Since Bell was the pioneer in this field, its refusal to connect confined independent companies within the limits of the particular territories they served.").

[74] HARRY B. MACMEAL, THE STORY OF INDEPENDENT TELEPHONY 204-07 (1934) (reprinting the commitment and specifying the "connection charge of ten cents for each message which originates on its lines and is carried in whole or in part, over the lines of the Bell system").

[75] ROBERT W. CRANDALL & LEONARD WAVERMAN, WHO PAYS FOR UNIVERSAL SERVICE?: WHEN TELEPHONE SUBSIDIES BECOME TRANSPARENT 5-9 (2000); MUELLER, *supra* note 70, at 4-10.

[76] Household Goods Forwarders Tariff Bureau v. I.C.C., 968 F.2d 81, 82 (D.C. Cir. 1992) ("[T]he Reed-Bulwinkle Act, Pub.L. No. 80-662, 62 Stat. 472 (1948) (current version at 49 U.S.C. § 10706), which gave the ICC the authority to grant antitrust immunity to common carriers' collective ratemaking").

[77] Gabel, *supra* note 73, at 352-353.

Supreme Court in the Trinko case[78] announced a principle that antitrust remedies are not available to those challenging common carriers for failing to take anticompetitive measures that are already comprehensively regulated under Title II of the Communications Act.[79] Where the government regulated in common carriage, there are no antitrust remedies.

Liability Standards. Perhaps most important for this discussion, common carriers, while sometimes held to high liability standards for services rendered, also had protection from liability in other areas. For instance, common carriers such as telephone and electricity companies enjoyed (and enjoy to this day) immunity for liability from any service outages as well as erroneous listings in their phone books.[80] They also enjoyed immunity in large part from defamatory statements they carried for users.[81]

This immunity was expressed by no less than Justice Brandeis in terms of a deal. Common carriage services are provided as part of arrangement. Prices, rates, levels of service, as well as liability for erroneous listings and service failures are inseparable. Greater liability in these areas would increase the cost of furnishing telephone service—thereby result in higher rates—and thereby threaten the bargained for good: one universal communication network. As Justice Brandeis stated in a similar context upholding a telegraph company's limitation of liability, "the limitation of liability was an inherent part of the rate."[82]

Legal Monopoly. Some common carriers were actual legal monopolies. At times, government granted a legal monopoly, prohibiting any party from entering. Perhaps more common, were

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[78] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004).

[79] Howard A. Shelanski, *The Case for Rebalancing Antitrust and Regulation*, 109 MICH. L. REV. 683, 686-87 (2011) ("*Trinko* expanded the scope and rationale for implied immunity from antitrust enforcement in a market governed by a regulatory statute that, far from being silent with regard to antitrust, contains a savings clause that expressly preserves the simultaneous operation of antitrust and regulation.").

[80] Rendi L. Mann-Stadt, *Limitation of Liability for Interruption of Service for Regulated Telephone Companies: An Outmoded Protection?* 1993 U. ILL. L. REV. 629 ("Historically, local telephone companies have enjoyed a broad limitation of liability for service outages. This protection evolved along with the strict oversight and regulation that characterized the predivestiture telecommunications industry. In exchange for the required universal service obligation, state utility commissions limited recovery of damages against the utility, partially as a method of keeping telephone rates reasonable").

[81] *See* HUBER ET AL., *supra* note 35.

[82] Western Union Telegraph Co. v. Esteve Brothers & Co., 256 U.S. 566, 571 (1921).

de facto government-protected monopolies through regulatory entry barriers such as certificates of need.[83]

Eminent Domain. Some common carriers, such as railroads or utilities, were given the right of eminent domain.[84] And, similarly, common carriers were often given preferential treatment in the granting of easements and public rights of way.[85]

B. Network Neutrality's Regulatory Deal

The common carriage debate is not merely an historical artifact. The highly topical debate over so-called network neutrality is really a common carriage argument. The fear motivating calls for network

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[83] Greg Goelzhauser, supra *note* 68, at 228 ("Because of the belief that electric power could be provided most efficiently in any given area by a single vertically integrated firm, the electric utility was viewed as a natural monopoly and was regulated as such by state agencies. Under this regulatory regime, the electric utility was granted an exclusive service territory in exchange for having its prices set by state regulators."); Note, *National Transportation Policy and the Regulation of Motor Carriers*, 71 YALE L.J. 307, 310 (1961) ("The common carrier entry requirement, "public convenience and necessity," had through its long use in railroad regulation acquired a reasonably definite meaning; a common carrier had to show a positive need for his service, or in other words, the inadequacy of existing common carrier services.").

[84] Cox v. State of Ohio, 3:16CV1826, 2016 WL 4507779, at *9 (N.D. Ohio Aug. 29, 2016) ("[T]he Supreme Court has previously found eminent domain constitutional when exercised by common carriers."); Natalie Jensen, *Eminent Domain and Oil Pipelines: A Slippery Path for Federal Regulation*, 29 FORDHAM ENVTL. L. REV. 320, 325 (2017) ("[P]rivate actors were given the right of eminent domain for large infrastructure transportation projects"); Nicholas Laurent & Christopher Oddo, *Pipe(line) Dreams Post-Denbury Green*, 48 ST. MARY'S L.J. 699, 701 (2017) ("For many years in Texas, purported common carrier pipeline companies would quickly and easily obtain summary judgments affirming their power to condemn private property for the permanent installation of their pipelines.").

[85] Harry L. Reed, *The New Carbon Dioxide Pipelines: Revival of the Common Carrier at Common Law*, 12 OKLA. CITY U. L. REV. 103, 111 (1987) ("There are many applicable statutes for obtaining rights of way from the federal government . . . . Some of these statutes expressly require that the grantee of the right of way be operated as a common carrier or at least observe certain common carrier obligations."); Robert R. Nordhaus & Emily Pitlick, *Carbon Dioxide Pipeline Regulation*, 30 ENERGY L.J. 85, 93 (2009) ("If a right-of-way is granted under the MLA, the pipeline is regulated by FERC as a common carrier, which imposes an obligation on the pipeline to "accept, convey, transport, or purchase without discrimination all oil or gas delivered to the pipeline without regard to whether such oil and gas was produced on Federal or non-Federal lands." (citations omitted)); Michelle M. Sheidenberger, *Torts; Pipeline Corporations—Strict Liability*, 27 PAC. L.J. 1020, 1024 (1996) ("[T]he pipeline is a public utility, it is authorized to secure its right-of-way by eminent domain through any private property through which it will pass.").

neutrality is that dominant broadband service providers, such as Comcast or AT&T, would slow or block connections with, or otherwise discriminate against, non-affiliated content, thereby leveraging their dominance in the last mile to greater control over all internet content.[86] This concern mirrored the concern about AT&T in the mid-19th century during the brief period of competitive telegraphy or in the early 20th century during the period of competitive telephony. Given that most areas only were covered by one telegraph company, many feared that AT&T would control traffic of messages that had to be handed off to other carriers. Early regulation allowed senders to specify carriage routes.[87] And, as discussed above, a similar concern motivated the Kingsbury Agreement. "Network neutrality supporters were initially quite hesitant to equate network neutrality with common carriage. Over time, however, proponents became more amenable to drawing a connection between the two concepts."[88]

1. Network Neutrality and Common Carriage

Network neutrality and common carriage revolve around the same issues.[89] They share the same fears: whether telegraphs, or telephones, or dominant broadband services will use their market power to discriminate against competitors or certain users and undermine the public good of one unified communications network, allowing the freest flow of ideas and information, Indeed, network neutrality, when defined, sounds a lot like common carriage's antidiscrimination requirement.[90]

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[86] Barbara van Schewick, *Towards an Economic Framework for Network Neutrality Regulation,* 5 J. ON TELECOMM. & HIGH TECH. L. 329, 390 (2007) ("In the absence of network neutrality regulation, there is a real threat that network providers will discriminate against independent producers of applications, content or portals or exclude them from their network.").

[87] Tomas Nonnenmacher, *Law, Emerging Technology, and Market Structure: The Development of the Telegraph Industry*, *1838-1868*, 57 J. ECON. HISTORY 488 (1997); Richard B. du Boff, *The Telegraph in Nineteenth-Century America: Technology and Monopoly*, 26 COMP. STUDS. IN SOC'Y & HISTORY 571 (1984).

[88] Yoo, *supra* note 43, at 992 (citations omitted).

[89] *Id*. at 1006.

[90] *Id.* ("The duty to serve identified by the courts as one of the defining aspects of common carriage is the equivalent of the no blocking obligation that was the heart of the 2005 Policy Statement and the 2010 and 2015 Open Internet Orders. The no unreasonable discrimination rule of the 2010 Open Internet Order and its various renamed incarnations in the 2015 Open Internet Order . . . are the equivalent of the obligation to provide indiscriminate service that the courts have identified as one of the signature characteristics of common carriage.").

Not surprisingly, the legal conceptual similarity led courts to view the power to impose common carriage regulation as identical to the power to impose network neutrality. 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.[91] This section states 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 therefor; and, in accordance with the orders of the Commission."[92] In series of rulings, the D.C. Circuit made clear that common carriage-like regulation could only be imposed pursuant section 201.

The FCC's first effort at network neutrality regulatory was exhortatory. The Republican FCC Chairman Michael Powell classified broadband access as outside common carriage jurisdiction as set forth in section 201 of the Communications Act.[93] At the same time, in February 2004, Powell declared, in a rather pompous echo of FDR, the four "Internet freedoms," i.e., principles he hoped the broadband service providers would follow. These freedoms were (1) access content of their choice, (2) use applications of their choice, (3) attach personal devices of their choice, and (4) obtain meaningful information about their service plans.[94] These were not legal requirements—just general principles that the FCC hoped and perhaps expected broadband providers to follow—backed up with as much threat a deregulatory Republican FCC commissioner could credibly convey.

More regulatory FCCs, however, shifted course and tried to impose network neutrality. These efforts relied on sections of the Communications Act that were not part of the Commission's common carriage authority granted in section 201. Specifically, the 2010 Open Internet Order relied on Title I of the Communications Act and its "ancillary jurisdiction." In this Order, the FCC mandated the following requirements, very much out of the common carriage deal book. First, broadband service providers had to "disclose the

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[91] Verizon v. FCC, 740 F.3d 623, 656-57 (D.C. Cir. 2014).
[92] 47 U.S.C.A. § 201 (2018).
[93] Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, 17 FCC Rcd. 4798, 4821-23 ¶¶ 37-38 (2002), *aff'd sub nom.* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 987-91, 1000 (2005).
[94] Michael K. Powell, Chairman, Fed. Commc'ns Comm'n, Remarks at the Silicon Flatirons Symposium on "The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age" (Feb. 8, 2004), http://apps.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf [http://perma.cc/A3BC-H9QM].

network management practices, performance characteristics, and terms and conditions of their broadband services." Second the FCC forbade them from "block [ing] lawful content, applications, services, or non-harmful devices, subject to reasonable network management." Finally, the FCC prohibited all "unreasonably discrimination against transmitting lawful network traffic."[95] To guide what "unreasonable" meant, the FCC identified four considerations: transparency, end-user control, use-agnosticism, which meant not favoring any particular application or purpose, and compliance.[96]

The D.C. Circuit's 2014 decision in Verizon v. FCC[97] struck down the 2010 Open Internet Order because these common carrier-type restrictions could only be mandated pursuant to section 201's common carriage jurisdiction.

The FCC then changed jurisdictional course again in the 2015 Open Internet Order, placing broadband providers under section 201 common carrier jurisdiction, and the D.C. Circuit upheld that order on judicial review.[98] Congress reversed that FCC order.[99]

The network neutrality debate reflects the common carriage deal in its purest form. The FCC tolerates the market power of the broadband providers. In exchange, it demands a public good—serve all equally and refrain from discrimination.

Nondiscrimination in the network neutrality context functions both on an economic and political level. It reduces the ability of the broadband service providers to refuse interconnection or provide substandard connection to non-affiliated content providers. This reduces broadband providers' ability to foreclose on competitors or engage on other types of anticompetitive behavior.

In addition, non-discrimination serves important social goals. It prevents "de-platforming" of politically or socially unpopular

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[95] Preserving the Open Internet, Report and Order, 25 FCC Rcd. 17905, 17907-11 (2010).
[96] *Id.* at 17907-14.
[97] Verizon v. FCC, 740 F.3d 623, 656-57 (D.C. Cir. 2014).
[98] Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, 5724-25 ¶¶ 283-87, 5757-90 ¶¶ 355-408 (2015), *aff'd sub nom*. U.S. Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016).
[99] Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order, WC Docket 17-108 (adopted Dec. 14, 2017), http://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0104/FCC-17-166A1.pdf.

views, thus encouraging full-throated public discussion and creating a universal communications platform for discussion of political and social issues.

2. The Common Carriage/Network Neutrality-Type Deal in Cable Television and Broadcast

The common carriage deal is found in a variety of other communications regulations that are not common carriers, i.e., communications services that do not receive and transmit messages from the public. Cable television is an excellent example. Originally not regulated at all, early cable companies typically bargained with communities on the terms and conditions of service.[100] This type of deal flourished until overtaken by FCC regulation and state regulation.[101] The bargain was simple: the cable company would agree to serve the entire community, not simply those residences and areas that were most profitable to serve, and often would negotiate rates with localities that reflected progressive pricing structures. In return, the cable companies had special use of easements and rights-of-ways and were typically offered a legally protected monopoly in the furnishing of cable service. Echoes of this deal are found in the 1992 Cable Act, a federal law regulating localities' relationship with cable companies. It requires a mild level of rate setting (mostly obsolete at this point) along with requirements for universal coverage and carriage of local broadcasters, subject to certain exceptions.[102]

A similar arrangement can be seen in the public interest requirement in broadcast licensing. The federal government owns that airways and licenses their use to television and radio broadcasters. Thus, the government gives a unique benefit that only government can provide. Given the scarcity of spectrum, its owners can command considerable rents. In return for the granting of rents, the government asks that licensees use their monopoly power to expand

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[100] Robert F. Copple, *Cable Television and the Allocation of Regulatory Power: A Study of Government Demarcation and Roles*, 44 FED. COMM. L.J. 1, 16 (1991) ("Throughout this same initial period of cable television development up until 1961, the primary source of cable regulation was at the local level where municipalities granted budding cable entrepreneurs franchise rights to wire cities and to provide television service to their communities.").

[101] *Id.*

[102] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460.

access and encourage the flow of information, often political information.[103]

For two to three generations, television and radio broadcasters have been regulated with a view to preserve a diversity of voices and a robust monopoly place of ideas. The FCC has always regulated with the explicit goal to maximize diversity of viewpoint, particular local perspectives and legitimate minority views.[104] Broadcasters are subject to "no censorship"[105] and equal opportunity rules for legitimate political candidates.[106] The FCC enforces special "public interest" criteria in merger policy, including the promotion of the "widest possible diversity of information sources and services to the public."[107]

C. Section 230's Regulatory Deal

Section 230 can be seen as a common carriage-type deal—but without the government demanding much in return from internet platforms. In fact, nothing is required at all. Section 230 is all carrot and no stick. Section 230(a)(1) relieves internet platforms of liability for statements made by third parties and other user generated content. Second, it creates a "good Samaritan" exemption in section 230(c)(a)(2) which immunizes the platforms' own efforts 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."[108] In granting these special liability reliefs, Congress intended to promote two public goods: (i) encourage wide dissemination and diversity of ideas on the internet[109] and (ii) protect internet platforms that choose to create

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[103] Farmers Educ. and Co-op. Union of Am., N. Dakota Div. v. WDAY, Inc., 360 U.S. 525, 534 (1959) ("While denying all candidates use of stations would protect broadcasters from liability, it would also effectively withdraw political discussion from the air. Instead the thrust of § 315 is to facilitate political debate over radio and television.").

[104] Adam Candeub, *Media Ownership Regulation, the First Amendment, and Democracy's Future*, 41 U. CAL. DAVIS L. REV. 1547 (2008).

[105] Letter from Norman Goldstein, Chief of Complaints and Political Programming Branch, Federal Comms. Comm'n (Oct. 4, 1996), https://transition.fcc.gov/Bureaus/Mass_Media/Orders/1996/da961646.txt; *see* 47 U.S.C. § 315(a) (2018).

[106] 47 C.F.R. § 73.1941 (1996).

[107] 47 U.S.C. § 521(4) (2018).

[108] 47 U.S.C. § 230(b)(c)(2)(A) (2018).

[109] 47 U.S.C. § 230(a)(3) (2018) ("The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique

family-friendly environments. In short, Facebook cannot be sued for a defamatory posting by a Facebook user—or bear any liability proceeding from third party content.

1. Genesis of Section 230

Commentators and courts have concluded that Section 230 responded to two cases:[110] *Stratton Oakmont, Inc. v. Prodigy Services Co.*,[111] and *Cubby v. CompuServe*.[112] At the very least, Cubby acknowledged that it was responding to *Stratton*, and congressional records explicitly cite *Stratton* as a case Section 230 meant to remedy.[113] *Cubby* and *Stratton* reflect two different approaches to applying common law rules about distributor liability to the internet. Under common law, a distributor, such as a bookstore, newsstand, or library, had no affirmative duty to ensure that all the material it sold was permissible under defamation or other law. Rather, upon notice that material was libelous or, under some courts' rulings, upon awareness of likelihood that its materials were libelous, distributors had a duty to pull the material from their shelves.[114]

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opportunities for cultural development, and myriad avenues for intellectual activity").

[110] *See* Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1101 (9th Cir. 2009) ("[S]ister circuits have recognized, Congress enacted the Amendment in part to respond to a New York state court decision [Stratton]." (citing Fair Hous. Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157, 1163 (9th Cir. 2008))); Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997); FTC v. Accusearch Inc., 570 F.3d 1187, 1195 (10th Cir. 2009).

[111] Stratton Oakmont v. Prodigy, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

[112] Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991).

[113] 141 CONG. REC. S8310-03 (daily ed. June 14, 1995) (statement of Sen. Coats, "I want to be sure that the intent of the amendment is not to hold a company who tries to prevent obscene or indecent material under this section from being held liable as a publisher for defamatory statements for which they would not otherwise have been liable . . . . Am I further correct that the subsection (f)(4) defense is intended to protect companies from being put in such a catch-22 position? If they try to comply with this section by preventing or removing objectionable material, we don't intend that a court could hold that this is assertion of editorial content control, such that the company must be treated under the high standard of a publisher for the purposes of offenses such as libel."); 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox, referring to Stratton decision as "backward"); 141 CONG. REC. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte, criticizing Stratton decision).

[114] The Restatement (Second) of Torts reads: "(1) Except as stated in subsection (2), one who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character. (2) One who broadcasts defamatory matter by means of radio or television is subject to the same liability as an original publisher." RESTATEMENT (SECOND) OF TORTS § 581 (AM. LAW INST. 1977).

In *Cubby*, plaintiffs brought a defamation claim against CompuServe for an allegedly libelous statement appearing on one of its online fora.[115] CompuServe did not edit or control the content posted on their various forums but contracted with a separate, independent entity to do so. Thus, CompuServe exercised no real control over the contents of the fora.

The court analogized CompuServe to "an electronic, for profit library" and gave it distributor liability.[116] The court held that the "inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, book store, or newsstand would impose an undue burden on the free flow of information."[117] The court came to this conclusion because CompuServe maintained no editorial control over the publications it provided and, therefore, "it would be no more feasible for CompuServe to examine every publication it carried for potentially defamatory statements than it would be for any other distributor to do so."[118] The Court concluded that "an ISP, as a distributor, would generally not be liable for defamation if it did not know or did not have reason to know of the existence of defamatory statements."[119]

On the other hand, the court in *Stratton* reached the opposite conclusion.[120] It determined that Prodigy had publisher liability and therefore could be liable for defamatory content posted on its Internet site by a third party.[121] Just as with AOL in Cubby, Prodigy hosted bulletin boards on a variety of topics and contracted with individuals to lead the fora and monitor them. But unlike AOL, Prodigy's promotional materials marketed the company as an online community that seeks a "value system that reflects the culture of the millions of American families."[122] In support of its family-friendly objective, Prodigy developed and implemented policies, guidelines, and a software-screening program and allowed its bulletin board leaders to delete offending messages.[123]

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[115] Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991).
[116] *Id.* at 140.
[117] *Id.*
[118] *Id.*
[119] Cara J. Ottenweller, Note, *Cyberbullying: The Interactive Playground Cries for A Clarification of the Communications Decency Act*, 41 VAL. U. L. REV. 1285, 1300 (2007).
[120] Stratton Oakmont, 1995 WL 323710, at *1.
[121] *Id.* at *5.
[122] David P. Miranda, *Defamation in Cyberspace: Stratton Oakmont, Inc. v. Prodigy Services Co.*, 5 ALB. L.J. SCI. & TECH. 229, 239 n.29 (1996).
[123] *Id.* at 234.

Here, in distinction to Cubby, the court ruled that Prodigy was a publisher and outside the protection of section 230. Looking at Prodigy's policies and content guidelines, the court found that Prodigy advertised and promoted its product as being edited. Because it accepted the benefits of editorial control, Prodigy could not claim the distributor immunity from liability.[124]

Thus, the early internet platforms faced a choice: exert no control over postings and have no liability for statements made therein or edit and control these postings and accept massive liability. Section 230 responded to this Hobsen's choice. Section 230(c)(1) states that "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 provision grants a type of distributor liability to online platforms. Just as bookstores have no duty to inspect the books they sell for possible libel, internet platforms have no duty to ensure user generated content is lawful.

Conversely, Congress wanted to protect internet providers who in fact monitor their platforms to promote family-friendly environments and, therefore, passed section 230(c)(2) which states "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."[125] Thus, as an exception to the rule that platforms qua author, publisher, or content moderator stand outside section 230's liability protection, platforms may assume, without liability, a publisher or editorial function if done for these specific "family friendly" purposes.

2. Section 230's Sticks and Carrots

Section 230 is a clear deal: internet platforms receive immunity for third party content. This liability relief encourages the posting of third-party, user-generated content—and thus furthers the free flow of ideas. And, Congress wanted to give them complete immunity for creating family friendly online environments.

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[124] Vanessa S. Browne-Barbour, *Losing Their License to Libel: Revisiting Section 230 Immunity*, 30 BERKELEY TECH. L.J. 1505, 1519-23 (2015).
[125] 47 U.S.C.A. § 230 (2018).

Section 230's deal is analogous to the 19th century courts' common carriage liability adjustments to encourage telegraph transmission. Under the old, common carriage strict liability rule, telegraph companies were liable for all damages resulting from an undelivered or misdelivered telegraph.[126] In order to limit these potentially enormous damages, i.e., a mistaken telegram that says buy 50,000 pork bellies rather than 5,000 pork bellies could be an enormous liability, the court lowered the liability standard, limiting normal mis-delivery liability to the cost of the telegraph.[127] It is also similar to the 20th century elimination of liability for service outage because this liability protection was viewed as part of a deal that included reduced telephone rates and allowed universal service.[128] And, it is also analogous to relaxation of liability for wire services and conduits discussed *infra.*

The problem with the section 230 deal, however, is that, in the interim, the internet grew up. Facebook and Google replaced Compuserve and AOL. The internet transformed from the dial-up curiosity of bulletin boards, stock quotes and file sharing into the dominant engine of global communications. Like the telegraph and telephone companies, Facebook and Google enjoyed special immunity against publisher liability. But, unlike telegraph and telephone companies, Facebook and Google to this day have no obligations to refrain from discrimination, carry all lawful messages, or provide any public good—even though they function as the dominant communications of their time, just like telegraphs and telephones once did. In short, the modern internet behemoths continue to enjoy a "liability freebie" granted to their pioneering predecessors.

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[126] *In re* Vehicle Carrier Services Antitrust Litigation, 846 F.3d 71 (3d Cir. 2017) (ruling that the Shipping Act immunizes certain ocean shippers from private antitrust suits based on the Shipping Act.)

[127] Adam Candeub, *The Common Carrier Privacy Model*, 51 U. CAL. DAVIS L. REV. 805, 813 (2018) ("The Supreme Court ruled that while a telegraph company could contract out of liability for an erroneously telegraphed message, it could not so contract if the sender paid extra for a 'repeated message.'. . . In this manner, courts gave telegraph and telephone companies more flexibility in liability compared to more traditional common carriers (i.e., shippers and railroads) which could not contract out of liability for mis-delivery."); *see also* Primrose v. W. Union Tel. Co., 154 U.S. 1, 14, 15-16 (1894) ("Telegraph companies resemble railroad companies and other common carriers, in that they are instruments of commerce . . . . [T]he telegraph company has not undertaken to wholly exempt itself from liability for negligence; but only to require the sender of the message to have it repeated, and to pay half as much again as the usual price, in order to hold the company liable for mistakes or delays in transmitting or delivering or for not delivering a message, whether happening by negligence of its servants or otherwise.").

[128] *See supra* note 80.

3. Zeran *and Its Progeny: Empowering Internet Censorship*

But what makes the current section 230 deal even more one-sided is that courts went further in interpreting section 230, giving internet platforms greater protection that the old common law distributor immunity. Recall that under common law, distributors had no duty to inspect materials they sell for unlawful content, but distributors had liability upon knowledge or constructive knowledge. In contrast, the highly influential *Zeran* case interpreted Section 230(c)(1) as an absolute immunity for liability for third party content—largely out of concern of the effect of knowledge liability on online platforms.

Further, as discussed below, building upon, indeed misquoting *Zeran*, some courts have expanded upon this extravagant immunity to include liability arising not only from third party speech, but from the contractual relationship between end-users and platforms. This extension of legal privileges allows platforms to function as censors, blocking or deplatforming with complete legal immunity.

a. *Zeran*'s Expansion of Immunity

The *Zeran* court reasoned that "If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement—from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context."[129]

Notice this position's extremeness. In *Zeran*, the plaintiff was allegedly falsely accused in an AOL posting of selling T-shirts mocking the Kansas City bombing. Mr. Zeran contacted AOL begging them to take the libelous slander down as he was receiving death threats. AOL refused. The court could have held AOL to distributor liability's constructive knowledge standards, holding it harmless for third party posts unless it received notice of the unlawful or harmful content.

[129] Zeran v. Am. Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997).

Not only does the *Zeran* rule fail to provide the aggrieved Mr. Zeran a remedy, but the text of section 230(c)(1) does not mandate this result. Section 230(c)(1) speaks only of publisher and speaker liability. To arrive at its result, the *Zeran* court reasoned that distributors are a subspecies of speaker/publisher and, therefore, when Congress stated that no interactive computer service would be treated as a "speaker or publisher," it meant distributor as well. Perhaps.

But, "publisher" has both specific and generic meanings. While the word, in its generic sense, can refer to both publishers and distributors as the *Zeran* court ruled, the word "publisher" in its specific sense refers to those who *first* make an expression rather than distribute it, i.e., publishers rather than re-publishers. And, Congress could have used the term "publisher" in a specific sense.

To illustrate another word with specific and generic meanings, consider the word "congressperson." It has a generic meaning that includes both "senator" and "representative." But typically "congressperson" only refers to a member of the house of representatives. Congress could have used "publisher" in a similarly specific manner. Indeed, if Congress were going to deprive a remedy from clearly aggrieved persons such as Mr. Zeran, one would expect that Congress would address the matter explicitly and without ambiguity.

Beyond textual analysis, *Zeran's* policy justification for expanding section 230(c)(1) liability no longer holds. The *Zeran* court feared that if given any liability for the statements on their platforms, firms such as AOL would be crushed with the expense and trouble of monitoring.[130] However, with AI, that concern no longer appears to be a problem. The platforms are excellent in tracking "bad

[130] *Zeran*, 129 F.3d at 333 ("If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement—from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context.").

speech"[131] as they are at detecting copyright infringement.[132] Contrary to the *Zeran* opinion's pearl clutching, these platforms routinely and relatively cheaply remove unlawful content—thanks to technologies that did not exist in the 1990s.

While the expansive immunity of *Zeran* has received positive reaction in some courts, such as the Ninth Circuit and California state courts, perhaps because it makes less work for judges[133] and protects the behemoth internet platforms, the case has received much criticism. Both courts[134] and commentators find the standard is too easy on intermediaries,[135] goes beyond Congressional intent[136] and statutory text,[137] fails to protect against harassment and

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[131] Stephen Shankland, *Facebook: New AI Tech Spots Hate Speech*, CNET (May 1, 2019), https://www.cnet.com/news/facebook-says-its-new-ai-tech-spots-hate-speech-faster/.

[132] Chris Griffith, *YouTube Protects Copyright with Artificial Intelligence*, AUSTRALIAN BUS. REV. (Nov. 28, 2016), https://www.theaustralian.com.au/business/technology/youtube-protects-copyright-with-artificial-intelligence/news-story/3ec6616cf5325bdda820659c7fc491df.

[133] Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does*), 1993 SUP. CT. ECON. REV. 1.

[134] City of Chicago v. StubHub!, Inc., 624 F.3d 363, 366 (7th Cir.2010) ("[S]ubsection (c)(1) does not create an 'immunity' of any kind"); Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100 (9th Cir.2009) ("Looking at the text [of subsection (c)(1)], it appears clear that neither this subsection nor any other declares a general immunity from liability deriving from third-party content.") Chicago Lawyers' Comm. for Civ. Rights Under L., Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008); Gucci Am., Inc. v. Hall & Associates, 135 F. Supp. 2d 409, 415 (S.D.N.Y. 2001).

[135] Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH. 569, 584 (2001) (suggesting that "serious online defamation presents more than just an academic question and its incidence will likely accelerate as cyberspace communications become even more widespread").

[136] Jonathan A. Friedman & Francis M. Buono, *Limiting Tort Liability for Online Third-Party Content Under Section 230 of the Communications Ac*t, 52 FED. COMM. L.J. 647, 660-61 (2000).

[137] Patricia Spiccia, Note, *The Best Things in Life Are Not Free: Why Immunity Under Section 230 of the Communications Decency Act Should Be Earned and Not Freely Given*, 48 VAL. U. L. REV. 369, 410-13 (2013); *Roommates.com*, 521 F.3d at 1164 n. 15 (9th Cir. 2008) ("The Internet is no longer a fragile new means of communications that could easily be smothered in the cradle by overzealous enforcement of laws and regulations applicable to brick-and-mortar businesses. Rather, it has become a dominant—perhaps the preeminent—means through which commerce is conducted. And its vast reach into the lives of millions is exactly why we must be careful not to exceed the scope of immunity provided by Congress and . . . comply with laws of general applicability."); *see also* Ryan J.P. Dyer, *The Communication Decency Act Gone Wild: A Case for Renewing the Presumption Against Preemption*, 37 SEATTLE U. L. REV. 837, 855 (2014) ("A plain language reading of section 230 and its legislative history implies that

pornography,[138] or ignores the modern internet experience, which is designed and controlled by dominant platforms like Facebook and Google.[139]

b. Beyond *Zeran*

Section 230(c)(1) prohibits only one type of action: those where a plaintiff seeks to "treat [an internet platform] as the publisher of independently posted content."[140] Section 230(c)(1) "does not create 'a general immunity from liability deriving from third-party content.'"[141] Rather, it is section 230(c)(2) that provides immunity for internet platforms—and that immunity only extends to good faith efforts 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." In other words, section 230 creates a liability regime consistent with the schemata below.

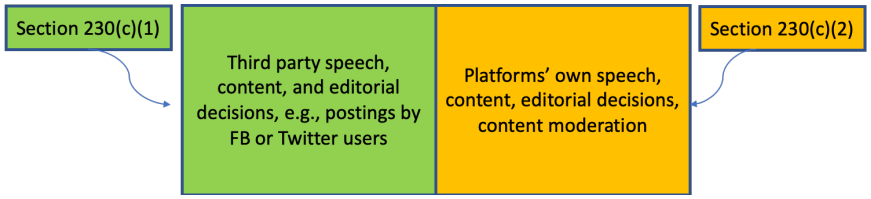

Fig. 1: Section 230's Liability Regime for Speech on Internet Platforms

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Congress only intended to preempt State laws that imposed publisher liability."); Joey Ou, Note, *The Overexpansion of the Communications Decency Act Safe Harbor*, 35 HASTINGS COMM. & ENT. L.J. 455, 458 (2013); David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147, 167-72 (1997) (stating that when "Congress said 'publisher,' it meant 'publisher,' and not 'distributor'").

[138] Ann Bartow, *Internet Defamation as Profit Center: The Monetization of Online Harassment*, 32 HARV. J. L. & GENDER 383, 409-10 (2009); Mary Anne Franks, *The Lawless Internet? Myths and Misconceptions About CDA Section 230,* HUFFINGTON POST BLOG (Dec. 18, 2013), https://www.huffpost.com/entry/section-230-the-lawless-internet_b_4455090, (arguing that section 230 is often mischaracterized "as granting website owners complete immunity regarding any content posted by users.").

[139] Olivier Sylvain, *Intermediary Design Duties*, 50 CONN. L. REV. 203, 258 (2018) ("[T]he most popular intermediaries today engineer almost every aspect of users' online experience. Courts may in this regard no longer presume that the underlying injury originates with a third-party user's objectionable volitional act.").

[140] Levitt v. Yelp! Inc., 2011 U.S. Dist. LEXIS 99372, *23 (N.D. Cal. Mar. 22, 2011).

[141] Airbnb, Inc. v. City & Cty. of San Francisco, 217 F. Supp. 3d 1066, 1074 (N.D. Cal. 2016) (quoting *Barnes*, 570 F.3d at 1100).

Courts have overwhelmingly rejected extending the protections of Section 230(c)(1) to causes of action that seek to impose liability on a platform's "publisher or speaker" activity—keeping the protection for liability based on third parties' statements or content.[142] But there are a handful of California cases that blur the distinction.[143] Interestingly, these cases often involve pro se representation of plaintiffs, such as *Riggs* and *Lancaster*—and quite obviously result from courts responding to inadequate briefing, yet some are among the most cited cases in section 230 litigation, at least by defense counsel. And, as discussed below, place the platforms quite literally above the law.

What is shocking is that these cases turn on a misinterpretation, even a misquotation, of *Zeran*, which states: "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred." And that language is quoted extensively.[144]

What many courts forget is the *immediately preceding* language. To quote *Zeran* fully, section 230

> creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from

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[142] *See* Barnes, 570 F.3d at 1107 (ruling that a promissory estoppel claim against a website seeking the "removal of material from publication" was not precluded by Section 230(c)(1), because it sought to hold the website liable as a promisor, not a publisher or speaker); Doe v. Internet Brands, Inc., 824 F.3d 846, 851 (9th Cir. 2016) ("Jane Doe's negligent failure to warn claim does not seek to hold Internet Brands liable as the 'publisher or speaker of any information provided by another information content provider.'"); *Airbnb, Inc.*, 217 F. Supp. 3d at 1072-73 ("[T]he Ordinance . . . in no way treats plaintiffs as the publishers or speakers of the rental listings provided by hosts[,] . . . and holds plaintiffs liable only for their own conduct."); Homeaway.com, Inc. v. City of Santa Monica, 2018 U.S. Dist. LEXIS 40198, at *17 (C.D. Cal. Mar. 9, 2018); Darnaa, LLC v. Google, Inc. No. 15-cv-03221-RMW, 2016 U.S. Dist. LEXIS 152126, at *23-24 (N.D. Cal. Nov. 2, 2016).

[143] *See, e.g.*, Sikhs for Justice, Inc. v. Facebook, Inc. ("SFJ"), 144 F.Supp.3d 1088, 1094 (N.D. Cal. 2015), *aff'd sub nom.* Sikhs for Justice, Inc. v. Facebook, Inc., 697 Fed. Appx. 526 (9th Cir. 2017) (expanding section 230 to platform's own editorial decisions); Federal Agency of News LLC v. Facebook, Inc. 395 F. Supp. 3d 1295 (N.D. Cal. 2019); Lancaster v. Alphabet Inc., No. 15-CV-05299-HSG, 2016 WL 3648608, at *3 (N.D. Cal., July 8, 2016); Riggs v. MySpace, Inc*,* 444 Fed. Appx. 986, 987 (9th Cir. Jul. 25, 2011).

[144] According to a Westlaw search, 98 cases quote the language directly from *Zeran.* That count probably underestimates the influence of the language because the quotation appears in other cases that are themselves quoted.

> entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.[145]

The "traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content" are examples, i.e., the *Zeran* court uses the word "[s]pecifically," of the type of third-party content decisions that section 230 protects. It does not protect a platform form its *own* editorial decisions or judgments.

This distinction is lost on a growing number of California cases that misquote the controlling language in *Zeran* and interpret section 230 as immunizing platform's *own editorial decisions.* For instance, in *Levitt v. Yelp!,* the plaintiff alleged that Yelp! "manipulate[d] . . . review pages—by removing certain reviews and publishing others or changing their order of appearance."[146] The court ruled that section 230(c)(1) immunized Yelp!'s conduct. And, it supported its conclusion by quoting the "traditional editorial functions" language of *Zeran*.[147]

But, notice the confusion of the *Levitt* court. Here, Yelp! allegedly made changes and consciously re-arranged reviews. It was making *its own* editorial decisions. Plaintiffs were not trying to hold Yelp! liable for the liability of third parties—which is what the plain language and clear intention of section 230(c)(1) requires.

Expanding *Zeran* in this way has been rightfully criticized, because "interpreting the CDA this way results in the general immunity in (c)(1) swallowing the more specific immunity in (c)(2). Subsection (c)(2) immunizes only an interactive computer service's 'actions taken in good faith.' If the publisher's motives are irrelevant and always immunized by (c)(1), then (c)(2) is unnecessary."[148] So too, the California Supreme Court's decision in *Barrett v. Rosenthal* holds that, consistent with the CDA's text, 230(c)(2), not 230(c)(1) applies to causes of action where the plaintiff objects to restriction of access, as opposed to publication.[149]

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[145] Barrett v. Rosenthal, 146 P.3d 510, 516 (Cal. 2006) (quoting *Zeran*, 129 F.3d at 330) (emphasis added).
[146] Levitt v. Yelp! Inc., No. C-10-1321 EMC, 2011 WL 5079526, at *6 (N.D. Cal. Oct. 26, 2011), *aff'd*, 765 F.3d 1123 (9th Cir. 2014).
[147] *Id.*
[148] E-ventures Worldwide, LLC v. Google, Inc., No. 2:14-cv-646-FtM-PAM-CM, 2017 U.S. Dist. LEXIS 88650, at *9. (M.D. Fla. Feb. 8, 2017).
[149] *Barrett*, 146 P.3d at 519-20.

But, cases like *Levitt* have not been fully abandoned, and the implications of these cases' interpretation of section 230 are breathtaking. These cases take section 230(c)(1), a provision written to relieve platform liability for third party speech and use it to eliminate liability for the platforms' own speech and behavior. In doing so, these cases place the platform above the law. Facebook, Twitter, and the like use these decisions to claim that section 230 gives them immunity for any decision they make concerning their platforms. Thus, the platforms claim the section 230(c)(1) right to disavow promises and contracts,[150] avoid consumer fraud suits,[151] and even throw off minority groups from their networks.[152]

II. COMMON CARRIAGE, DISCRIMINATION, AND A UNIFIED REGULATORY DEAL TO PROTECT FREE SPEECH

A unified internet liability regime should counter perceived abuses stemming from internet firms' market power anywhere on the internet. As shown above, it is clear that discrimination is the motivating concern behind critiques of both broadband service providers and the giant social media/search firms. The network neutrality advocates fear Comcast, for instance, will provide superior connection to affiliated content providers, while critics of Google argue that it unfairly biases its search results. These fears are reasonable. Internet firms, whether broadband service providers or social media/search, that unreasonably discriminate undermine a universal communications platform. They undermine a public good. A regulatory deal must provide sticks and carrots calibrated to forward this public good, and these elements are outlined below.

A. Sticks: Discrimination and Curation

Sticks might involve some sort of generalized non-discrimination requirement of the sort already seen in network neutrality. The network neutrality order passed by the FCC already has such a

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[150] Darnaa, LLC v. Google, Inc., No. 15-cv-03221-RMW, 2016 U.S. Dist. LEXIS 152126, at *23-24 (N.D. Cal. Nov. 2, 2016).

[151] Green v. Am. Online (AOL), 318 F.3d 465, 472 (3d Cir. 2003).

[152] *See, e.g.*, Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, No. 19-1284, 2020 WL 6037214, at *4 (U.S. Oct. 13, 2020) (order denying certiorari), (citing Sikhs for Justice, Inc. v. Facebook, Inc., 697 F. App'x. 526 (9th Cir. 2017), aff 'g 144 F.Supp.3d 1088, 1094 (N.D. Cal. 2015) ("With no limits on an Internet company's discretion to take down material, § 230 now apparently protects companies who racially discriminate in removing content.")).

standard which could apply not simply to broadband internet access but also to search and social media:

> Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.[153]

Again, this would be generalized antidiscrimination requirement—and concededly, these sorts of standards present real challenges. In the broadband context, it has been pointed out that networks are inherently discriminatory. Certain types of traffic are always prioritized due to specific geographic requirements. A local service provider in a community in a university will specially provision connections to the university servers. Businesses will pay for better connections. Different types of services (email vs. streaming video) receive different types of priorities. Defining non-discrimination is not simple.[154]

Yet, discrimination on reasonable technical grounds is perfectly acceptable. Moreover, one could make the requirement even less stringent. Require non-discrimination absent any valid business or technical reason. The requirement could be enforced in an administrative context as the FCC already has exerted jurisdiction over the internet to impose network neutrality rules, and it could impose them on search engines and social media. Or such a requirement could be enforced in court. The point would be that only the most egregious cases would constitute discrimination, given the difficulty of defining the term.

And, this difficulty would concededly only be exacerbated in social media. Social media is all about, at some level, discrimination. The platforms curate media that will interest you—but somehow, it is

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[153] Protecting and Promoting the Open Internet, 30 F.C.C. Rcd. 5601, 5609 ¶ 21 (2015). The D.C. Circuit upheld this rule in *U.S. Telecom Assn. v. Fed. Commun. Commn.*, 825 F.3d 674 (D.C. Cir. 2016), but it was reversed with the new Trump administration by the FCC. *See In re* Restoring Internet Freedom, 33 F.C.C. Rcd. 311 (2018).

[154] *See* Adam Candeub & Daniel McCartney, *Law and the Open Internet*, 64 FED. COMM. L.J. 493, 496 (2012).

never clear how tweets or particular Facebook posts get to the top of one's feed. On the other hand, reasonable tests could be worked out—and they have been explored.[155] The question of search results is, of course, far more complex—and much has been written about how fairness in search results could be maintained. It would probably require an administrative agency, either the FCC or FTC, to examine search algorithms under some types of secrecy order. This is somewhat unprecedented, but certainly not unheard of in court or administrative proceedings which often involve examination of trade secrets and other proprietary information. The agencies have the jurisdiction to impose this regulation.[156]

Further, there is a question of simple de-platforming, which can be analyzed under a non-discrimination framework. The question of whether one is discriminatorily terminated from a network is not a deep technical issue. Rather, it is akin to the discrimination question in civil rights and employment law that courts routinely answer.

The social media platforms might argue that they are all about curation. What they "sell" is an experience that discriminates for and against certain posts, authors, and views. But like the search engines, they can be analyzed under a reasonable justification standard.

Most important, there is no reason that the powers of curation cannot be put in the hands of users. Certainly, Facebook and Twitter could allow individuals to determine what sorts of posts they wish to see or not. Yet, the entire curation experience is passive. 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. A stick could certainly involve a legal or regulatory requirement that certain types of highly sensitive and important curation decisions—one might think political views and sexual content, for example, could be left in the hands of users.

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[155] *See generally* Frank Pasquale, *Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries*, 104 NW. U.L. REV. 105 (2010); Frank Pasquale, *Internet Nondiscrimination Principles: Commercial Ethics for Carriers and Search Engines*, 2008 U. CHI. LEG. FORUM 263 (2008); James Grimmelmann, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1 (2007).

[156] *See* Adam Candeub, *The Common Carrier Privacy Model*, 51 U.C. DAVIS L. Rev. 805, 826 (2018) ("[T]o impose a regime of common carriage privacy, the FCC would have to expand 2015 Open Internet Order's definition of common carrier from major broadband internet access providers ('BIASs'), such as Comcast, to so-called 'edge providers,' such as Google and Facebook. The FCC could do this, and, indeed, already has walked a good deal down that road.").

B. Condign Carrots for Free Expression's Weakest Link

Section 230(c)(1) essentially provides the legal immunity that telegraph, telephones, and other conduits enjoy for carrying their users content. Telephones, telegraphs, and other conduits usually existed under a non-discrimination requirement and thus enjoyed liability immunity for the content of the messages they carried. A similar immunity should be enjoyed by non-discriminatory search engines and social media platforms.

To the degree that we wish to encourage curated platforms, liability should be granted so that the platforms do not gain publisher liability as in *Stratton Oakmont*.[157] Thus, the section 230(c)(2) immunity is appropriate. However, to the degree that we want to maintain a universal communications platform, this liability must be read narrowly. Otherwise, platforms will use curation decisions to censor.

Finally, the importance of non-discrimination principle applied to the entire internet cannot be understated because it protects communications from government interference. The internet is governed by a decentralized system of domain name registration and platform control that extends from the Internet Corporation for Assigning Names and Numbers (ICANN) and Mark Zuckerberg to individual's Wordpress accounts. In a prescient article, Seth Kreimer foresaw how "[r]ather than attacking speakers or listeners directly, governments [will] enlist private actors within the chain as proxy censors to control the flow of information" on the internet.[158]

Contrary to the claim that the internet platforms can be trusted to police themselves, [159] Facebook and Google face continuous accusations of politicization and unfair censorship—as well as pressure from governments. They are constantly responding in strange and often inconsistent ways to this pressure. Thus, they have become the free expression's weakest link.

One of common carriage's anti-discrimination obligations' great virtues is that it protects private entities from complying with

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[157] 1995 WL 323710, at *1.

[158] Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 14 (2006).

[159] *See, e.g.*, Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018).

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 otherwise treat users unfairly. But, if a private firm is prohibited by law to do so, then the government cannot even ask. Thus, a unified liability regime is necessary to protects users and the free flow of ideas from the weakest link.

CONCLUSION

From Wyman and Burdick to current times, courts and legal scholars have puzzled over the contours of common carriage. Most have tried to identify a common carrier's unique economic function. Offering a new perspective, this Article shows the common carriage—and most network regulation—is a regulatory deal. The deal includes carrots, such as liability relief and other government-granted privileges, and sticks, such as anti-discrimination requirements. In return, a dominant network firm furnishes public goods it can uniquely offer such as a. universal communications platform to enable free speech that can build democratic institutions.

Looking at internet regulation through this prism, the radical difference between the regulation of broadband service providers and social media/search calls for reform. A new deal is necessary, starting with, at least, a proper judicial understanding of section 230 and then statutory or regulatory reform, which is within the power of the FCC or FTC. These reforms would include an anti-discrimination requirement or requirements that dominant platforms share blocking technologies with users so that individuals, not corporate platforms, set the boundaries of on-line speech.