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Common Carriage and Section 230

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ABSTRACT: 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 with other firms. Others fear platforms such as search engines and social media will control online behavior and censor speech. Both network neutrality and platform regulation concern involve an internet firm—either broadband service provider or search/social media—with the market power to discriminate among businesses and users. Yet, despite these economic similarities, broadband service providers and dominant search engines/social networks 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 break.

Despite different histories, the FCC network neutrality regulation and section 230 platform regulation reflect a historically typical regulatory “bargain.” As part of a deal that includes carrots, such as liability relief and other government-granted privileges, and sticks, such as antidiscrimination duties, a dominant network firm furnishes a public good it can uniquely offer: a universal communications platform to enable free speech. With such an understanding of network regulation, this Article forwards a unified internet liability regime, consistent with consumer protection and free speech.

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I. 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, use their market power to block, degrade, or otherwise discriminate against content originating from unaffiliated firms.³ For instance, Comcast allegedly

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 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"); Jack M. Balkin, *The Future of Free Expression in A Digital Age*, 36 PEPP. L. REV. 427 (2009); see also Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225 (1992); J. M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 378-79; Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

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*

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 for search bias,⁷ and the Department of Justice has recently opened a high profile investigation of the

Communications, 5 J. ON TELECOMM. & HIGH TECH. L. 15 (2006); Kevin Werbach, *Breaking the Ice: Rethinking Telecommunications Law for the Digital Age*, 4 J. ON TELECOMM. & HIGH TECH. L. 59, 95 (2005).

⁴ Rob Frieden, *The Internet of Platforms and Two-Sided Markets: Implications for Competition and Consumers*, 63 VILL. L. REV. 269, 320 (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," citing Adam Candeb, *Networks, Neutrality & Discrimination*, 69 ADMIN. L. REV. 125, 165 (2017)).

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, available at

<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 <https://www.theguardian.com/technology/2017/sep/11/google-appeals-eu-fine-search-engine-results-shopping-service>.

dominant internet firms.⁸ Finally, social media is seen as controlling and shaping public discourse.⁹

Both network neutrality/ platform regulation see a powerful internet firm, whether a Comcast or Google—a broadband provider or social network/search engine—with the market power to discriminate among users and businesses that rely on their network. Even though these economic worries 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 Act¹⁰ governs broadband service providers. Under this jurisdiction, the FCC may impose the whole range of burdensome common carriage duties, including rate regulation, disclosure, mandatory interconnection as well as anti-discrimination obligations.¹¹ In its network neutrality order, the FCC has, in fact, regulated the internet pursuant to this power on and off for a decade—with the network neutrality debate being one of the most controversial regulatory matters in recent memory.¹²

⁸ Brent Kendall, Updated Justice Department to Open Broad, New Antitrust Review of Big Tech Companies, *Wall Street Journal* (July 23, 2019).

⁹ The political right points to social media’s de-platforming of conservatives. Sue Halpern, *The Search for Anti-Conservative Bias on Google*, *THE NEW YORKER*, (Dec. 19, 2018). 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* newstories, *available at* <https://www.theguardian.com/news/series/cambridge-analytica-files>.

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 2, at 16-17, 32-35.

¹² Federal Communications Commission, *Promoting and Protecting the Open Internet Order*, 30 FCC Rcd. 5601, 5614 (2015); Adam Candeub, *supra* note **Error! Bookmark not defined.**, 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.”).

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 Thus, 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 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, both common carriage and section 230 platform liability reflect a historically typical regulatory “bargain.” In exchange for liability relief and other government-granted privileges, a dominant network firm gives a public good it can uniquely offer: a universal communications platform enabling free speech. Common carriage's original, primary concern was carrier liability. 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.

¹³ Communications Decency Act of 1996, 47 U.S.C. § 230.

¹⁴ Adam Candeub, *RealClear Politics, Renegotiated NAFTA Will Entrench Big Tech Censorship*, Nov. 23, 2018 (“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.”), available at

https://www.realclearpolitics.com/articles/2018/11/23/renegotiated_nafta_will_entrench_big_tech_censorship_138731.html

¹⁵ See Elizabeth Nolan Brown, *Section 230 Is the Internet's First Amendment. Now Both Republicans and Democrats Want To Take It Away*: From Josh Hawley to Kamala Harris, online free speech is under attack.

REASON, July 19, 2019, available at <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: At stake is a 26-word provision in the 1996 Communications Decency Act that protects online platforms from liability for content their users post, <https://www.politico.com/story/2019/07/09/online-industry-immunity-section-230-1552241>

Nineteenth century courts limited these liabilities but still gave 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 but at 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 But, importantly, section 230 asked very little in return for this liability relief, probably because Congress was encouraging the nascent internet industries which then lacked market power.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

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).

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-1990s and 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).

communications hubs—argue for a new, unified internet liability regime. Any new deals should respond to firms' most blatant and destructive use of market power, discrimination.

This Article sets forth this new regulatory approach in the following way. First, it 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 a public good that dominant network firms can uniquely offer: a universal communications platform for free speech. Second, the Article examines how section 230 also constitutes such a deal but one made at a time when the internet was not a universal communications network and that consequently fails to protect free speech against unreasonable discrimination. 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 sets forth 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 giving users the blocking technologies to protect their individual online experiences.

II. Regulating Networks: Common Carriage, Section 230, and Public Goods/ Free Speech Bargain

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 Indeed, it is difficult to name any other area that has received more sophisticated economic and policy analyses—

¹⁹CHRISTOPHER 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. COMMUN. 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).

probably because communications and its technological transformation have so greatly impacted our society.²⁰ This section argues that network regulation reflects a deal where the government allows dominant firms to maintain market power, or even monopoly, in order to obtain and preserve the public good of universal communications platform and promote free speech.²¹

In contrast, most legal policy work has assumed that the sole and only goal of regulating networks is limiting market power.²² In other

²⁰ Robert W. Crandall, “Halfway Home: U.S. Telecommunications (De)Regulation in the 1970s and 1980s,” in *REGULATION, ECONOMIC THEORY AND HISTORY* (Jack High ed. 1991).

²¹ Viewing network regulation as a deal long has 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).

²² Alfred E. Kahn, *Telecommunications: The Transition from Regulation to Antitrust*, 5 *J. 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.

words, regulators have feared that the dominant firm would extract excess profits, impose deadweight loss on the economy by producing less but using a monopolist's power to set price at marginal revenue, or use its market power to pursue various strategies, such as vertical foreclosure, to drive out competition, or otherwise harm consumers.²³ Thus, communications regulation has prescribed rate regulation to counter monopoly prices and imposes interconnection and anti-discrimination requirements to prevent dominant firms from shutting out other networks or hurting consumers. 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.²⁴

But, communications regulation, particularly common carriage, has always encompassed more than antitrust because communications networks offer a unique public good. 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-excludable, meaning that one cannot provide the good without others

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.”).

²³ 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);

²⁴ 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).

being able to enjoy it.²⁵ Typical examples would include police protection, environmental protection, and flood protection. For example, 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 usage of it does not affect or diminish your usage. 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, which in and of itself is a public good. A universal communications platform lowers the cost of business, both the search costs of 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 specifies²⁶ and when Congress, in one of its first acts, mandated reduced rates for newspaper carriage so that citizens could learn about and participate in federal governance and national issues.²⁷

²⁵ 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) (characterizing modern intellectual property scholars as rejecting traditional law associated with physical property because information is non-rivalrous and non-excludable)/

²⁶ United States Constitution, Article I, Section 8, Clause 7 empowers Congress “To establish Post Offices and Post Roads.”

²⁷ 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

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.”²⁸

In a similar vein, public goods theory justifies government grants of monopoly-like property rights to patent and copyright holders.²⁹ 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 surrender of a legal right of exclusion of network users to further the dissemination of information and knowledge in society. In return, carriers gain certain legal immunities and continue to enjoy their market power.

Communications network regulation is a deal: market power, or even monopoly, is tolerated in exchange for furthering public goods that only a dominant firm can offer. These public goods include, above all, a universal communication platform that promotes free speech. Viewing network regulation this way gives a new understanding of common carriage, the ancient regulation of bailors,

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).

²⁸ RICHARD B. KIELBOWICZ, *NEWS IN THE MAIL: THE PRESS, POST OFFICE, AND PUBLIC INFORMATION, 1700-1860S* at 34 (Greenwood, 1989).

²⁹ David W. Barnes, *A New Economics of Trademarks*, 5 NW. J. TECH. & INTELL. PROP. 22, 22–23 (2006); Michael Abramowicz, *A Theory of Copyright’s Derivative Right and Related Doctrines*, 90 MINN. L. REV. 317 (2005); Peter Eckersley, *Virtual Markets for Virtual Goods: The Mirror Image of Digital Copyright?*, 18 HARV. J.L. & TECH. 85, 117-18, 139-41 (2004); 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); Dan L. Burk, *Muddy Rules for Cyberspace*, 21 CARDOZO L. REV. 121 (1999); 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).

innkeepers, couriers, docks, and other communications network and transportation industries, as well as modern regulation internet regulation under section 230. To these regimes, we now turn.

III. Common Carriage and Section 230: Two Network Regulatory Deals

The historical origins of common carriage/ network neutrality regulatory regimes and section 230 are different. Common carriage emerged in the 17th and 18th century as the law governing bailors, innkeepers, couriers, docks, and other communications network and transportation industries.³⁰ In the 19th and 20th century, common carriage became the dominant framework for regulating a wide variety of industries including railroad, telegraphs, and telephones.³¹ In contrast, section 230 of the Communications Decency Act reflects Congress's reaction to two cases from the 1990s: *Cubby*³² and *Stratton Oakmont*,³³ and their application of common law publisher/distributor liability to early internet platforms.³⁴

³⁰ James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMMUN. L.J. 225, 255 (2002) (“as 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”).

³¹ *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.”); James B. Speta, *supra* note 30, 54 Fed. Comm. L.J. 225, 251-52 (2002) (“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.”).

³² *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991)

³³ *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y.Sup.Ct. May 24, 1995).

³⁴ Jeff Kosseff, *The Gradual Erosion of the Law That Shaped the Internet: Section 230's Evolution over Two Decades*, 18 COLUM. SCI. & TECH. L. REV. 1, 4 (2016) (“To understand the origins of Section 230, it is necessary to review two Internet

Common carriage's original concern was carrier liability, at first requiring a higher level of 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.³⁵ But, in return, common carriers often received special legal benefits such as protected monopolies³⁶ or, at least, regulation of entrance,³⁷ rights of condemnation for rights of way,³⁸ and immunity from certain types of suits.³⁹

Importantly, responding to changed circumstances, courts limited strict liability rule to encourage the public good of free exchange of

liability cases decided in the years before Section 230's enactment. These cases--*Cubby, Inc. v. CompuServe, Inc.* and *Stratton Oakmont, Inc. v. Prodigy Services Co.*--prompted Congress to set the boundaries for Internet service provider liability.”).

³⁵ JOSEPH K. ANGELL, *A TREATISE ON THE LAW OF CARRIERS OF GOODS AND PASSENGERS BY LAND AND WATER* §§ 149-219 (1849).

³⁶ Susan Dente Ross, *First Amendment Trump?: The Uncertain Constitutionalization of Structural Regulation Separating Telephone and Video*, 50 *FED. COMMUN. 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.”)

³⁷ 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.”)

³⁸ 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.”)

³⁹ *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 Cherry

ideas. To cite one example, under the old strict liability rule, telegraph companies were liable for all damages resulting from an undelivered or misdelivered telegraph.⁴⁰ 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.⁴¹

Section 230 adjusts carrier liability in a similar way though in a very different context. Section 230 was part of the Communications Decency Act of 1996, a congressional reaction to the rampant spread of pornography on the web.⁴² It primarily focused on protecting minors from pornography, an effort the Supreme Court deemed for the most part to violate the First Amendment.⁴³ But, section 230 was more subtle, and it survived. Following typical common carriage

⁴⁰ *In re Vehicle Carrier Services Antitrust Litigation*, 846 F.3d 71 (3d Cir. 2017), as amended, (Jan. 25, 2017) (The Shipping Act immunizes certain ocean shippers from private antitrust suits based on the Shipping Act.)

⁴¹ 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,” citing *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.”).

⁴² 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, 371 (2010) (“Congress passed the Communications Decency Act of 1996 (CDA) amid concern over minors’ access to Internet pornography, *citing* 141 Cong. Rec. 3203 (1995) (statement of Sen. Exon)”).

⁴³ *Reno v. American Civil Liberties Union*, 521 U.S. 844, 117 S. Ct. 2329 (1997), (the Supreme Court ruled unconstitutional those parts of the Communications Decency Act that limited online pornography and the transmission of indecent or patently offensive material to minors).

strategy, it created liability exemptions in order to further certain public goals. As discussed below, section 230(c)(1) encouraged widespread deployment of broadband services and 230(c)(2) meant to encourage internet platforms to censor and moderate obscene and sexual oriented materials. Congress was not shy about its intentions, stating that its purpose was to “to promote the continued development of the Internet and other interactive computer services and other interactive media [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services.”⁴⁴ Section 230 is a common carriage-type regulation, adjusting liability to further certain public goals, namely widespread broadband penetration—just like common carriage liability for telegraph regulation was decreased, if not *de facto* eliminated, to encourage widespread telegraph penetration.⁴⁵

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, but they have never been asked to “pay back” and provide any public good in return for this benefit. This section describes the “common carriage deal,” how it has spread to other forms and types of communications regulations--and the origin of the section 230 liability.

A. Common Carriage’s Liability Deal

⁴⁴ 47 U.S.C.A. § 230.

⁴⁵ Candeub, *supra* note 41, at 392-5.

Common carriage emerged from the law of “public callings” which in turn originally developed from the medieval guild system.⁴⁶ 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.”⁴⁷ 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.⁴⁸

The justification for this liability deal was likely based on the market power these firms enjoy. In an early industrial economy, in which transportation and expensive and difficult, competition in various essential industries was limited. A doctrine of common law emerged to protect consumers as a sort of early antitrust regulation⁴⁹—although this interpretation is not totally accepted.⁵⁰ 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—which is, arguably, a similar argument.⁵¹ And, the historical development of common carriage reinforces the notion that

⁴⁶ MARTIN G. GLAESER, *PUBLIC UTILITIES IN AMERICAN CAPITALISM* (1957); Speta, *supra* note 30, at 259; Edward A. Adler, *Business Jurisprudence*, 28 HARV. L. REV. 135 (1915).

⁴⁷ Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156, 169-70 (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, vol. 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.’”).

⁴⁸ Wyman, *supra* note 47, at 168-9; Barbara Cherry, *Maintaining Critical Rules to Enable Sustainable Communications Infrastructures*, 24 GEORGIA ST. L. REV. 934, 942 (2008). The case to establish absolute liability for bailors was the English case, *Coggs v. Bernard* (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).

⁴⁹ Wyman, *supra* note 47, at 161.

⁵⁰ Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 COLUM. L. REV. 514, 518-25 (1911).

⁵¹ *Id.*

it applies primarily to firms that serve as essential hubs to commerce and society.

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 important for the development of legal doctrine, railroads.⁵² 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 unclear application.

And, not surprisingly, legal academics have spilled much ink trying to discover the essential nature of common carriage.⁵³ The two leading commentators of the time, Bruce Wyman and Charles Burdick, took opposing points of view. Wyman thought that the industries so affected have anticompetitive monopoly power.⁵⁴ In contrast, Burdick saw the distinction as broader to include all firms that hold themselves out as being open to the public.⁵⁵

The Supreme Court's decision in *Munn v. Illinois*⁵⁶ reflects this confusion. Courts had to define 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.⁵⁷ Due to the historical fact that

⁵² 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 48, at 14-16.

⁵³ Christopher S. Yoo, *Common Carriage's Domain*, 35 YALE J. ON REG. 991, 994-95 (2018) ("Over the years, scholars and courts have repeatedly attempted to devise a coherent framework for determining when common carriage should apply, without much success."),

⁵⁴ Wyman, *supra* note 49, at 161.

⁵⁵ Burdick, *supra* note 50, at 518-25.

⁵⁶ *Munn v. Illinois*, 94 U.S. 113, 126 (1876).

⁵⁷ Adam Candeub, *Network Interconnections and Takings*, 54 Syracuse L. Rev. 369, 382 (2004) ("Given the constitutional barriers in regulating business before 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

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.⁵⁸

In *Munn*, the majority opinion ruled that grain elevators could be regulated as common carriers because they were affected with the public interest.⁵⁹ 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].”⁶⁰

Modern efforts at justifying the parameters of common carriage have not gone much further than *Wyman* and *Burdick*.⁶¹ 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.⁶² 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

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.”); BARBARA A. CHERRY, *THE CRISIS IN TELECOMMUNICATIONS CARRIER LIABILITY* 54 (1999).

⁵⁸ *Munn*, 94 U.S. at 96-98.

⁵⁹ *Munn v. Illinois*, 94 U.S. 113, 135-36 (1876).

⁶⁰ *Munn*, 94 U.S. at 152 (Field, J., dissenting).

⁶¹ Yoo, *supra* note at 53, at 994–95. Over the years, scholars and courts have repeatedly attempted to devise a coherent framework for determining when common carriage should apply, without much success.

⁶² Thomas B. Nachbar, *The Public Network*, 17 *COMMLAW 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) (“this 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.”).

common carriage law's definitional criteria may be, in the end, desultory.

Looking at the matter from a fresh perspective, it seems important to look at the entire regime of common carriage, not simply interconnection and non-discrimination—or even rate regulation and liability. And what emerges is a bargain that gives special legal liability 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, 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 something the government wants—a universal communications platform that provides a valuable public good, notably free speech to further democratic deliberation. 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,⁶³ special access to rights of way and even condemnation,⁶⁴ or the relaxation of

⁶³ Allen Evans Jackson, *In Support of Exempting Non-Vessel Operating Common Carriers from Tariff Filing*, 1 GEO. MASON. L. REV. 289, 329 (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) (“we hold that the petitioners’ collective ratemaking activity is immune from Sherman Act liability”).

⁶⁴ 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”).

liability as for carrier's immunity of liability for the content of the messages these carry.⁶⁵

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 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 moderating—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.⁶⁶ To the specifics of these deals we now turn.

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

⁶⁵§ 14.7 Free Speech, Fed. Telecom. L. 5626047 (“common 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.”).

⁶⁶ 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 note 21.*

telephone facilities [to continue service to customers of these firms] and creation of new classes of service such as residential and business services.”⁶⁷ 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 and methods of ensuring maximum participation on the network.

B. 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.⁶⁸

Of course, while strict liability remained in some areas, such as carrier duties to freight, medieval and early modern common carriage is about as relevant to law as a performance of Wagner’s *Die Meistersingers*. Throughout the 19th century, particularly in reaction to the railroads, this medieval deal changed, adopting 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. What we find, probably due to increased competition and alternatives, is a decrease in the size of liability but a move towards other ways to limit market power and further 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

⁶⁷ CHERRY, *supra* note 48, at 24.

⁶⁸ 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.”).

freight they accepted.⁶⁹ 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.”¹⁹¹ The reasoning behind this rule was generally that shippers had significant market power vis à vis consumers. And, this was undoubtedly true in times during which transportation was expensive and alternatives few.⁷⁰

A similar story could be told for the transmission of telegraphs. Under traditional common carriage law, a telegraph company was liable for all the injuries resulting from a misdelivered message.⁷¹ 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.⁷²

Non-discrimination. Common carriers could not discriminate in service or terms or service, but had to charge, as a general rule,

⁶⁹ 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.”).

⁷⁰ This is not to say that common carriers are monopolists in the modern antitrust sense. Rather, they have an ability to exercise some market power. While “antitrust analysis should treat market power and monopoly power as qualitatively identical—both terms refer to anticompetitive economic power,” monopoly generally refers to market power exercised or acquired in certain anticompetitive, particularly disfavored ways. Thomas G. Krattenmaker, Robert H. Lande, and Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 252 (1987).

⁷¹ Adam Candeub, *supra* note 41, 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.”).

⁷² *Id.* 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).

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.⁷³ Railroads, for example, cannot discriminate between competitors and members of the public in receiving and transporting goods.⁷⁴ However, this anti-discrimination rule again was more of a broad standard than a rule. Railroads were permitted to price discriminate for 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.⁷⁵

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.⁷⁶ However, under common law neither railroads, telegraphs, or telephones were required to physically interconnect; but that was a common requirement of statutory regimes.

⁷³ *Samuelson v. Pub. Utilities Commn. of State*, 227 P.2d 256, 260 (Cal. 1951) (“(Mr. Moore, at page 20, vol. 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.’”); Peter K. Pitsch & Arthur W. Bresnahan, *Common Carrier Regulation of Telecommunications Contracts and the Private Carrier Alternative*, 48 FED. COMMUN. L.J. 447, 452 (1996) (“the essential element of common carriage--that the carrier holds itself out as providing the services to the public.”).

⁷⁴ 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 exclusive delivery relationship with one stockyard at the expense of other).

⁷⁵ LEDWIG GORDON, *THE CONCEPT OF THE COMMON CARRIER IN ANGLO-AMERICAN LAW* 43-45 (1971).

⁷⁶ Candeub, *supra* note 57, at 382.

Rate Regulation. The Supreme Court in *Munn v. Illinois*⁷⁷ 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 monopolist’s ability to charge supra-competitive rates.⁷⁸ And, the spectre 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,⁷⁹ started locally with individual communities negotiating with companies over easements and service areas.⁸⁰

C. 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

⁷⁷ 94 U.S. 113, 126 (1876).

⁷⁸ Greg Goelzhauser, *Price Squeeze in A Deregulated Electric Power Industry*, 32 FLA. ST. U.L. REV. 225, 229 (2004) (state 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 supra-competitive 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.”).

⁷⁹ 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.⁶⁸ 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.”).

⁸⁰ MILTON MUELLER, *UNIVERSAL SERVICE: COMPETITION, INTERCONNECTION, AND MONOPOLY IN THE MAKING OF THE AMERICAN TELEPHONE SYSTEM* (1996).

vast capital to invest in the nation's only long distance network.⁸¹ 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.⁸² 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 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.⁸³ 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.⁸⁴ This 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 to use

⁸¹ *Id.* at 44-50; Candeub, *supra* note 57, at 433.

⁸² *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).

⁸³ Richard Gabel, *The Early Competitive Era in Telephone Communication, 1893-1920*, 34 *LAW & CONTEMP. PROBS.* 340, 343 (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.”).

⁸⁴ 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”)

its market power, the Government refrained from using its antitrust power, and the public gained a good: one interconnected, national phone network.⁸⁵

While the carrot and sticks are not always as clearly defined as with the Kingsbury Agreement: settling the antitrust case, common carriers typically received carrots and sticks negotiated over time and that differed from industry to industry. But, in general, the benefits to the carriers came in the following forms.

Immunity from Antitrust Laws. Common carriers often received immunity from the antitrust laws—both federal and state.⁸⁶ 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.⁸⁷ Or, they can emerge in judge-made law. For instance, the Supreme Court in the Trinko case⁸⁸ 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.⁸⁹ 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

⁸⁵ ROBERT W. CRANDALL & LEONARD WAVERMAN, WHO PAYS FOR UNIVERSAL SERVICE?: WHEN TELEPHONE SUBSIDIES BECOME TRANSPARENT 5-9 (2000); MUELLER, *supra* note 80, at 4-10.

⁸⁶ Household Goods Forwarders Tariff Bureau v. I.C.C., 968 F.2d 81, 82 (D.C. Cir. 1992) (“the 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”).

⁸⁷ Gabel, *supra* note 83, at 343.

⁸⁸ Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004);

⁸⁹ Howard A. Shelanski, *The Case for Rebalancing Antitrust and Regulation*, 109 MICH. L. REV. 683, 686–87 (2011) (“Trinko expanded the *687 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”).

for services rendered, also had protection from liability in other areas. Even as the 19th century saw the limiting of the liability standards, courts and legislatures were at the same time limiting common carrier liability in significant ways.⁹⁰ 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.⁹¹

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.”⁹²

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 de facto government-protected monopolies through regulatory entry barriers such as certificates of need.⁹³

⁹⁰ See *Anderson v. N.Y. Tel. Co.*, 320 N.E.2d 647, 649 (N.Y. 1974); Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137, 141 (2008).

⁹¹ Rendi L. Mann-Stadt, *Limitation of Liability for Interruption of Service for Regulated Telephone Companies: An Outmoded Protection?* 1993 U. ILL. L. REV. 629 (1993) (“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 pre-divestiture 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”).

⁹² *Western Union Telegraph Co. v. Esteve Brothers & Co.*, 256 U.S. 566, 571, 41 S.Ct. 584, 586, 65 L.Ed. 1094, 1097 (1921).

⁹³ Greg Goelzhauser, *supra note 78*, 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.¹⁵ Under this regulatory regime, the electric

Eminent Domain. Some common carriers, such as railroads or utilities, were given the right of eminent domain.⁹⁴ And, similarly, common carriers were often given preferential treatment in the granting of easement and public rights of way.⁹⁵

III. 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 legislative give and no take. 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(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.”⁹⁶ In granting

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.”);

⁹⁴ Cox v. State of Ohio, 3:16CV1826, 2016 WL 4507779, at *9 (N.D. Ohio Aug. 29, 2016) (“the 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) private 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.”).

⁹⁵ Recent Developments In Pipeline Condemnation Law, 2004 No. 4 RMMLF-INST Paper No. 12 (“Common carriers may enter on and condemn the land, rights-of-way, easements, and property of any person or corporation necessary for the construction, maintenance, or operation of the common carrier pipeline.”).

⁹⁶ 47 U.S.C.A. § 230(b)(3).

these special liability relief, Congress intended to promote two public goods: (i) encourage the widest dissemination and diversity of ideas on the internet⁹⁷ and. (ii) protect internet platforms that chose to create 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.

A. Genesis of Section 230 and Its Current Interpretation

Commentators and courts have concluded that Section 230 responded to two cases:⁹⁸ *Stratton Oakmont, Inc. v. Prodigy Services Co.*,⁹⁹ and *Cubby v. CompuServe*.¹⁰⁰ 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.¹⁰¹ *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

⁹⁷ “The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity. 47 U.S.C. § 230(a)(3).

⁹⁸ *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101 (9th Cir. 2009) (“sister 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); see also *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1195 (10th Cir. 2009).

⁹⁹ *Stratton Oakmont v. Prodigy*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995)

¹⁰⁰ *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991)

¹⁰¹ 141 Cong. Rec. 16025 (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 Representative Cox, referring to *Stratton* decision as “backward”); 141 Cong. Rec. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte, criticizing *Stratton* decision).

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 awareness of likelihood that its materials were libelous, distributors had a duty to pull the material from their shelves.¹⁰²

In *Cubby*, plaintiffs brought a defamation claim against CompuServe for an allegedly libelous statement appearing on one of its online fora.¹⁰⁷ 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.¹¹⁵ 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.”¹⁰³ The court came to this conclusion because CompuServe maintained no more 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.”¹⁰⁴ 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.”¹⁰⁵

¹⁰² Restatement (Second) Of Torts § 581 (1977)

(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.

¹⁰³ *Cubby*, 776 F. Supp. at 138-9.

¹⁰⁴ *Cubby*, 776 F. Supp. at 139.

¹⁰⁵ Cara J. Ottenweller, *Cyberbullying: The Interactive Playground Cries for A Clarification of the Communications Decency Act*, 41 VAL. U. L. REV. 1285, 1300 (2007).

On the other hand, the court in *Stratton Oakmont v. Prodigy* reached the opposite conclusion.¹⁰⁶ It determined that Prodigy had publisher liability and therefore could be liable for defamatory content posted on its Internet site by a third party.¹⁰⁷ 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."¹⁰⁸ 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.¹⁰⁹

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.¹¹⁰

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 these concerns. 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.

¹⁰⁶ *Stratton Oakmont v. Prodigy*, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995).

¹⁰⁷ *Id.*

¹⁰⁸ David P. Miranda, *Defamation in Cyberspace: Stratton Oakmont, Inc. v. Prodigy Services Co.*, 5 ALB. L.J. SCI. & TECH. 229, 247 (1996).

¹⁰⁹ *Id.*

¹¹⁰ Vanessa S. Browne-Barbour, *Losing Their License to Libel: Revisiting Section 230 Immunity*, 30 BERKELEY TECH. L.J. 1505, 1519–23 (2015).

But courts went further in interpreting section 230, giving internet platforms greater protection than 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.

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.”¹¹¹

Notice this position’s extremeness. In *Zeran*, the plaintiff was 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.

Not only does failing to provide distributor liability fail to give the clearly aggrieved Mr. Zeran a remedy, but the text of section 230(c)(1) does not mandate this extreme result. Section 230(c)(1) speaks only of publisher and speaker liability. To get its result, the *Zeran* court reasoned that distributors are a subspecies of speaker/publisher and, therefore, when Congress stated that no

¹¹¹ *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997).

interactive computer service would be treated as a “speaker or publisher,” it meant distributor as well. Perhaps. In a sense, both distributors and speaker/publisher make statements—but Congress could have been referred to liability status, not functional similarity. Indeed, if they were going to deprive a remedy from clearly aggrieved persons such as Mr. Zeran, one would expect that Congress would address the matter specifically.

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.¹¹² However, with AI, that concern no longer appears to be a problem. The platforms are excellent in tracking “bad speech”¹¹³ as they are at detecting copyright infringement.¹¹⁴ 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 judges¹¹⁵ and protects the behemoth internet platforms, the case has received much

¹¹² *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.”).

¹¹³ Stephen Shankland, Facebook: New AI tech spots hate speech faster <https://www.cnet.com/news/facebook-says-its-new-ai-tech-spots-hate-speech-faster/> (May 1, 2019).

¹¹⁴ Chris Griffith, YouTube protects copyright with artificial intelligence, *The Australian Business Review* (Nov. 28, 2016).

¹¹⁵ Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, *SUPREME COURT ECONOMIC REVIEW* 1993 3:, 1-41.

criticism. Both courts¹¹⁶ and commentators find the standard is too easy on intermediaries,¹¹⁷ that it goes beyond Congressional intent¹¹⁸ and statutory text,¹¹⁹ fails to protect against harassment and pornography,¹²⁰ or that it ignores the modern internet experience which is designed and controlled by the dominant platforms such as Facebook and Google.¹²¹

Last, Congress wanted to protect internet providers who in fact monitor their platforms for good reasons 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

¹¹⁶ *City of Chicago v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir.2010) (“subsection (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), as amended (May 2, 2008); *Gucci Am., Inc. v. Hall & Associates*, 135 F. Supp. 2d 409, 415 (S.D.N.Y. 2001).

¹¹⁷ 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”)

¹¹⁸ Jonathan A. Friedman & Francis M. Buono, *Limiting Tort Liability for Online Third-Party Content Under Section 230 of the Communications Act*, 52 FED. COMM. L.J. 647, 660-61 (2000) (citing Ian Ballon, *Zeran v. AOL: Why the Fourth Circuit Is Wrong*, J. Internet L., Mar. 1998, at 6

¹¹⁹ 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).

¹²⁰ 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), http://www.huffingtonpost.com/mary-anne-franks/section-230-the-lawless-internet_b_4455090.html.

¹²¹ Olivier Sylvain, *Intermediary Design Duties*, 50 CONN. L. REV. 203, 258 (2018) (“the 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”).

objectionable, whether or not such material is constitutionally protected.”¹²² Thus, as an exception to the rule that platforms qua author or publisher stands outside section 230 and has liability, platforms may assume, without liability, a publisher or editorial function if does for these specific “family friendly” purposes.

Section 230 is a clear deal: internet platforms receive immunity for third party content. The immunity is distributor liability or complete immunity for third party content—depending on whether you like the *Zeran* decision. 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, porn-free environments. Just like the 19th century courts’ common carriage liability adjustments to encourage telegraph transmission—or 20th century elimination of liability for service outage to reduce telephone rates and allow universal service, section 230 diminishes liability to further two public goods: the free flow of information and more family-friendly places on the internet.

B. Section 230(a)(1)’s Unwarranted Expansion: California Dreaming

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.”¹²³ Section 230(c)(1) “does not create ‘a general immunity from liability deriving from third-party content.’”¹²⁴ Rather, it is section 230(c)(2) that provides immunity for internet platforms—and that immunity only extends for 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.” *Zeran*, of course, went further eliminating all liability.

¹²² 47 U.S.C.A. § 230

¹²³ *Levitt v. Yelp! Inc.* (N.D. Cal. Mar. 22, 2011) 2011 U.S. Dist. LEXIS 99372, *23

¹²⁴ *Airbnb, Inc. v. City & Cnty. of San Francisco* (N.D. Cal. 2016) 217 F. Supp. 3d 1066, 1074 (quoting *Barnes*, 570 F.3d at p. 1100).

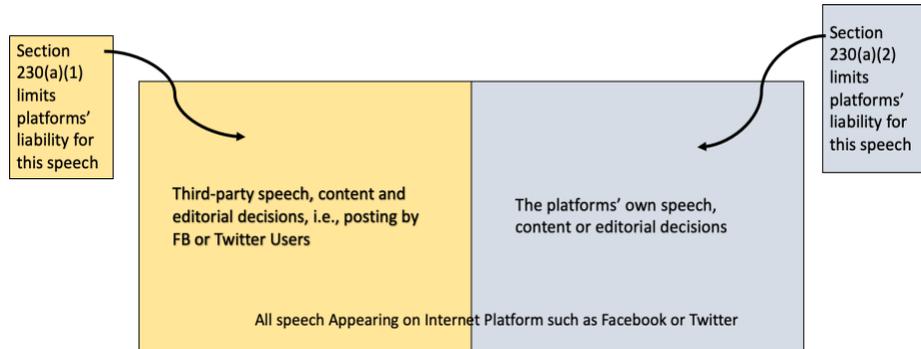


Fig. 1: Section 230's Liability Regime for Speech on Internet Platforms

Courts have overwhelmingly rejected extending the protections of Section 230(c)(1) to causes of action that seek to impose liability on platform's "publisher or speaker" activity—keeping the protection for liability based on third parties' statements or content.¹²⁵ But, there are a handful of California cases that blur the distinction.¹²⁶ 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

¹²⁵ *Barnes*, 570 F.3d at 1107 (promissory estoppel claim against 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.* (9th Cir. 2016) 824 F.3d 846, 851 ("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 ("the 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* (C.D. Cal. Mar. 9, 2018) 2018 U.S. Dist. LEXIS 40198, at *17; *Darnaa, LLC v. Google, Inc.* (N.D. Cal. Nov. 2, 2016) 2016 U.S. Dist. LEXIS 152126, at *23–*24.

¹²⁶ *See, e.g.*, *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.* (N.D. Cal. 2015) 144 F.Supp.3d 1088, 1094, *aff'd sub nom. Sikhs for Justice, Inc. v. Facebook, Inc.* (9th Cir. 2017) 697 Fed.Appx. 526; *Federal Agency of News LLC v. Facebook, Inc.* (N.D. Cal., July 20, 2019, No. 18-CV-07041-LHK) 2019 WL 3254208, at *7; *Lancaster v. Alphabet Inc.* (N.D. Cal., July 8, 2016, No. 15-CV-05299-HSG) 2016 WL 3648608, at *3; *Riggs v. MySpace, Inc.* (9th Cir. Jul. 25, 2011), 444 Fed. Appx. 986, 987.

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 a section from *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.¹²⁷

But what many court forget is the *immediately preceding* language. To quote *Zeran* fully “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 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.” *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 43 [51 Cal.Rptr.3d 55, 61, 146 P.3d 510, 516], quoting (*Zeran*, at p. 330.) (emphasis added). *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)

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 from its *own* editorial decisions or judgments.

But, this distinction is lost on a growing number of California cases that ignore the controlling language in *Zeran* and interpret section 230 as immunizing platform’s *own editorial decisions*. For instance, in *Sikhs for Justice “SFJ”, Inc. v. Facebook, Inc.*,¹²⁸ the court held

¹²⁷ According to a Westlaw search, 108 cases quote the language—and that is and underestimate because the language appears so often in other cases that quote are themselves quoted.

¹²⁸ 144 F. Supp. 3d 1088, 1094. Frustratingly, the district court ruled without being briefed on section 230 issues—and the Ninth Circuit affirmed in a *pro se* appeal.

that 230(c)(1) prohibited a claim under the Civil Rights Act for blocking access to the Sikh advocacy group's webpage based on racial, religious and national origin discrimination.¹²⁹ It states publish or to withdraw from publication third-party content Notice how SFJ get it wrong. The plaintiffs accused Facebook of making discriminatory editorial decisions. These decisions were not protected by section 230(c)(1) because they were made by Facebook, itself, not a third-party poster. Facebook only has immunity for its editorial judgments if made pursuant to the purposes of section 230(c)(2). And regrettably a growing number of California cases relying on the same misquotation from *Zeran* and *SFJ* get it wrong.¹³⁰

SFJ 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.”¹³¹ So too, the California Supreme Court's decision in *Barrett* 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.¹³²

But, cases like *SFJ* 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, et al. 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,¹³³ avoid consumer fraud suits, and

¹²⁹ *Id.* at pp. 1094-1096.

¹³⁰ See case cite in note 128.

¹³¹ *e-ventures Worldwide, LLC v. Google, Inc.* (M.D. Fla. Feb. 8, 2017) 2017 U.S. Dist. LEXIS 88650, at *9.

¹³² 40 Cal. 4th at p. 49.

¹³³ Darnaa briefing

even throw off women and other minority groups from their networks.¹³⁴

IV. The Extent of Common Carriage Deal: Network Neutrality and Its Continuing Vitality into the 21st Century

The common carriage debate is not merely an historical artifact. After all, the debate over so-called network neutrality is really a common carriage argument. The fear motivating calls for network 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.¹³⁵ 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.¹³⁶ 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.”¹³⁷

¹³⁴ Transcript to be furnished.

¹³⁵ Barbara van Schewick, *Towards an Economic Framework for Network Neutrality Regulation*, 5 J. ON TELECOMM. & HIGH TECH. L. 329, 383 (2007).390 (“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.”)

¹³⁶ Nonnenmacher, T. (1997). *Law, Emerging Technology, and Market Structure: The Development of the Telegraph Industry, 1838–1868*. *The Journal of Economic History*, 57(2), 488-490. doi:10.1017/S0022050700018581; Du Boff, R. (1984) *The Telegraph in Nineteenth-Century America: Technology and Monopoly*. *Comparative Studies in Society and History*, 26(4), 571-586. doi:10.1017/S0010417500011178i

¹³⁷ Yoo, *supra* note 53, at 992 (citations omitted).

A. Network Neutrality

Network neutrality and common carriage revolve around the same issues.¹³⁸ 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.¹³⁹

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.¹⁴⁰ 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."¹⁴¹ 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

¹³⁸ *Id.* at 1006.

¹³⁹ 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 (including also the ban on throttling and paid prioritization and the general conduct standard against unreasonable interference or disadvantage) are the equivalent of the obligation to provide indiscriminate service that the courts have identified as one of the signature characteristics of common carriage."

¹⁴⁰ *Verizon v. FCC*, 740 F.3d 623, 656-57 (D.C. Cir. 2014).

¹⁴¹ 47 U.S.C.A. § 201.

as set forth in section 201 of the Communications Act.¹⁴² 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.¹⁴³ These were not legal requirements—just general principles that the FCC hope 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 by 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.” Under this Order, the FCC mandated the following. First, broadband service providers had to “disclose the 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 “unreasonable discrimination against transmitting lawful network traffic.”¹⁴⁴ To guide what “unreasonable” meant, the FCC identified four considerations: transparency, end-user control, use-agnosticism,

¹⁴² 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).

¹⁴³ 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”: Preserving Internet Freedom: Guiding Principles for the Industry 5 (Feb. 8, 2004), http://apps.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf [<http://perma.cc/A3BC-H9QM>].

¹⁴⁴ Preserving the Open Internet, Report and Order, 25 FCC Rcd. 17905, 17907-11 (2010).

which meant not favoring any particular application or purpose, and compliance.¹⁴⁵

The D.C. Circuit's 2014 decision in *Verizon v. FCC*¹⁴⁶ struck down the 2010 Open Internet Order because these common carrier-type restrictions could only be mandate 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.¹⁴⁷ Congress reversed that FCC order.¹⁴⁸

Thus, the common carrier status of broadband providers has become central in determining whether the FCC can regulate it. The need to define common carriage for the network neutrality debate is similarly to impetus of the *Munn* court. Common carriers traditionally can be regulated under section 201 of the Communications Act, and this section allows the FCC to impose the network neutrality regulations. Analogously, in the early 20th century, the definition of common carrier set the parameters of federal power to regulate certain interstate industries given the *Lochner* era restrictions.

B. The Common Carriage-Type Deal in Other Non-Common Carrier Contexts

The common carriage deal is a pattern that 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.

¹⁴⁵ *Id.* at 17907-14.

¹⁴⁶ *Verizon v. FCC*, 740 F.3d 623, 656-57 (D.C. Cir. 2014).

¹⁴⁷ 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).

¹⁴⁸ 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.

Originally not regulated at all, early cable companies typically bargained with communities on the terms and conditions of service.¹⁴⁹ This type of deal flourished until overtaken by FCC regulation and state regulation.¹⁵⁰ 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.¹⁵¹

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, a scarcity enforced by the government, its owners can command considerable rents. In return for the granting of rents, the government asks that licensees use some of their monopoly power to expand access and encourage the flow of information, often political information.¹⁵²

¹⁴⁹ Robert F. Copple, *Cable Television and the Allocation of Regulatory Power: A Study of Government Demarcation and Roles*, 44 FED. COMM. L.J. 1, 172 (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.”).

¹⁵⁰ *Id.*

¹⁵¹ Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. 609 note. see also 47 U.S. Code § 521(1)-(5).

¹⁵² *Farmers Educ. and Co-op. Union of Am., N. Dakota Div. v. WDAY, Inc.*, 360 U.S. 525, 534 (1959) (“While denying all candidates us of stations would protect broadcasters from liability, it would also effectively withdraw political discussion from the air. Instead the thrust of section 315 is to facilitate political debate over radio and television.”).

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.¹⁵³ Broadcasters are subject to “no censorship”¹⁵⁴ and equal opportunity rules for legitimate political candidates.¹⁵⁵ 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,”¹⁵⁶ which Congress mandated to promote a “diversity of views provided through multiple technology media.”¹⁵⁷

C. Wire Service, Conduit Liability, and the Appropriate Level of Liability

So far the article has established the notion of reduced liability for platforms in exchange for universal, or at least wider, communications. A question remains: what is the ideal level of liability. Courts have struggled over this question during the last century in establishing in other carrier-like contexts. The primary bone of contention was whether certain types of re-publishers, like newspapers republishing libelous wire services stories, should have strict liability, as older common law requires, or whether some sort of scienter, i.e., the newspaper knew or should have known, about the libel.

This issue led some courts to create special liabilities for newspapers carrying wire service liability in *Layne v. Tribune Co.* and¹⁵⁸ so-called “radio libel” for comments uttered during live radio events.¹⁵⁹

¹⁵³ Adam Candeub, *Media Ownership Regulation, the First Amendment, and Democracy's Future*, 41 U. CAL. DAVIS L. REV. 1547 (2008).

¹⁵⁴ https://transition.fcc.gov/Bureaus/Mass_Media/Orders/1996/da961646.txt.

¹⁵⁵ <https://www.fcc.gov/media/policy/statutes-and-rules-candidate-appearances-advertising>.

¹⁵⁶ <https://www.law.cornell.edu/uscode/text/47/521>.

¹⁵⁷ <https://law.justia.com/codes/us/2014/title-47/chapter-5/subchapter-v-a/part-i/sec.-521>.

¹⁵⁸ 108 Fla. 177, 183 (1933).

¹⁵⁹ 8 A.2d at 310–11.

But, contrary to some claims,¹⁶⁰ these developments did not anticipate section 230 because while they eliminated liability for negligence republication, they all maintained some liability for republishers. Thus, under *Layne*, wire service liability, and other related torts, liability remained for content for which the republishing firm had knowe or constructive knowledge.

This is inconsistent with the *Zeran* interpretation of section 230 which eliminates *all* liability. At the most, it could be said that they are consistent with section 230 so long as it retains some sort of distributor liability for internet platforms.¹⁶¹ In other words, these cases anticipate a world without the *Zeran* decision.

Further, these special liabilities reflect the public goods bargain in a way that section 230 often ignores. The wire service liability only existed to further the flow of information in a responsible way. As a court characterized the *Layne* ruling, “in granting the defendant’s motion to dismiss, the Florida Supreme Court recognized that local newspapers must frequently gather information from a number of outside sources in order to provide readers with coverage of world and national events.” And, the *Layne* court recognized that “the public benefit obtained from this practice and accordingly articulated the following rule that a newspaper is only liable when republishing a reputable wire source.”¹⁶²

Thus, the question remains what level of liability best suits the modern internet. Part of the justification for *Zeran* (as well as the wire service rule) was that it was simply impossible for an internet bulletin board—or local newspaper—to review the contents of all

¹⁶⁰ Brent Skorup & Jennifer Huddleston, *The Erosion of Publisher Liability in American Law, Section 230, and the Future of Online Curation*, Mercatus Working Paper (July, 2019).

¹⁶¹ *Layne v. Trib. Co.*, 146 So. 234, 238 (Fla. 1933) (“The mere reiteration in a daily newspaper, of an actually false, but apparently authentic news dispatch, received by a newspaper publisher from a generally recognized reliable source of daily news, such as some reputable news service agency engaged in collecting and reporting the news, cannot through publication alone be deemed per se to amount to an actionable libel by indorsement, in the absence of some showing from the nature of the article published, or otherwise, that the publisher must have acted in a negligent, reckless, or careless manner”).

¹⁶² *Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d 348, 370 (S.D.N.Y. 1998)

user-generated content. As discussed above, the *Zeran* court was quite explicit that it was limiting liability due to the difficulties of monitoring content.

But, technology has, yet again, shifted the balance. The social media platforms not only have the power, through AI and other technologies, to monitor what is posted, but they quite obviously use that power. They monitor their pages religiously. This has tremendous significance from a liability perspective because the justification for reduced liability was reduced control—or at least, as a practical economic matter, there is reduced control for the internet platforms. But, that has changed. Whether we should return the strict liability of common law—or adapt to a scientur-based approach in light of these new screening technologies is a matter for the courts. What is clear, however, is that the factual predicates on which *Zeran* stood have now crumbled.

V. **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. 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**

A deal's stick would 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 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.¹⁶³

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 specific geographic requirements, say 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.¹⁶⁴

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

¹⁶³ In the Matter of Protecting and Promoting the Open Internet, 30 F.C.C. Rcd. 5601 (F.C.C. 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 the Matter of Restoring Internet Freedom*, 33 F.C.C. Rcd. 311 (F.C.C. 2018).

¹⁶⁴ Adam Candeub & Daniel McCartney, *Law and the Open Internet*, 64 FED. COMMUN. L.J. 493, 496 (2012).

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 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.¹⁶⁵ 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.¹⁶⁶

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 right 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, 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

¹⁶⁵ 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 Grimmelman, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 3 (2007).
¹⁶⁶ Candeub, *supra* note 41, at 832 (2018).

entirely 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, sexual content, could be left in the hands of users.

B. Condon Carrots for the First Amendment's Weakest Link

Section 230(c)(1) essentially provides the legal immunity that telegraph, telephones, and other conduits enjoy. Telephones, telegraphs, and other conduits usually existed under a non-discrimination requirement and thus enjoyed liability immunity for the content of their 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*. 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. The majority of courts that read section 230(c)(2) pursuant to established canons of interpretation are correct. Section 230(c)(2), passed as part of the Communications Decency Act of 1996, aimed at controlling pornography and obscenity on the internet. It was not passed to allow platforms to discriminate on the basis of politics, religion, views on sexuality, or any other purpose.

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 internet¹⁶⁷

Contrary to claim that the internet platforms can be trusted to police themselves,¹⁶⁸ 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 become the First Amendment’s weakest link.

One of common carriage’s anti-discrimination obligations great virtues is that it protects private entities from complying with government’s censorship demands. A private company with no legal obligation to treat users in a non-discriminatory fashion, on the other hand, 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 protect 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 a public good it can uniquely offer: a universal communications platform to enable free speech.

Looking at internet regulation through this prism, the radical difference between the regulation that broadband service providers and social media/search face calls for reform. The Article shows that

¹⁶⁷ Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11 (2006).

¹⁶⁸ Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018).

such a bifurcation is indefensible given the market power of both sets of actors. 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 a mild 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.