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# Releasing the Caged Bird: A Case for Twitter as a Common Carrier

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*Social media platforms have become influential in shaping public discourse. These digital platforms have established new modes of communication that enable individuals from different ethnic, political, and racial backgrounds to come together and discuss contentious issues in online public forums. Yet, as these platforms continue to grow, their unfettered control over online speech increases. Legal scholars and Supreme Court Justices have examined these platforms' control over speech, putting forth various legal theories to combat censorial practices, but have not agreed upon a solution.*

*To provide a legal framework for legal scholars and courts to consider, this Note will look deeper into the issue of censorship on social media, adopting a focused lens. Specifically, it will explore the feasibility of imposing common carrier responsibilities on one of the leading social media platforms, Twitter. It will assess the functionalities of the platform and how these mechanisms contribute to the indiscriminate regulation of user speech. Additionally, it will historically examine the common carrier doctrine, scrutinizing alternative common carrier theories that arose from the doctrine while advocating, adopting, and applying Eugene Volokh's compelled hosting doctrine to Twitter. This Note concludes by assessing privatized regulation through an analysis of Elon Musk's acquisition of Twitter.*

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## INTRODUCTION

Social media companies have become powerful institutions that influence public discourse. Through the creation and use of online platforms, private companies have established a digital panopticon that directly controls access to information. These unchecked institutions also monitor and control individual expression, ideas, and speech. America’s founding fathers warned against similar forms of speech control by the government, but have not directly addressed this type of control by private entities.<sup>1</sup> Justice Stevens in *Citizens United v. Federal Election Commission*, however, cautioned against privatized corporate domination over speech, noting that the legal structure of corporations allows them to accumulate and deploy financial resources on a scale that few people can match, leading to the marginalization of certain political opinions and the manipulation of public discourse.<sup>2</sup> Such control, as seen today, is often concealed under the guise of the First Amendment and protected by Section 230 of the Communications Decency Act.<sup>3</sup>

Unfortunately, Justice Stevens’s concerns have been confirmed in the digital landscape. Social media companies like Twitter<sup>4</sup> have used their financial resources to develop algorithms that silence select members of the public and elected

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1. U.S. CONST. amend. I.

2. Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 469 (2021) (explaining Justice Stevens’ dissent in *Citizens United v. FEC*); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 369 (2010).

3. 47 U.S.C. § 230 (1996).

4. Twitter has officially been renamed to “X,” as of July 23, 2023. See Ashley Capoot, *Elon Musk Rebrands Twitter to ‘X,’ Replaces Iconic Bird Logo*, CNBC (July 24, 2023, 8:42 AM), <https://www.cnbc.com/2023/07/24/elon-musk-rebrands-twitter-to-x-replaces-iconic-bird-logo.html>.

officials.<sup>5</sup> Individuals from both sides of the political spectrum have questioned and combatted such censorial practices by documenting and revealing unjustifiable inconsistencies in hopes of pressuring social media companies to implement fair and transparent policies.<sup>6</sup> Others have called on their elected officials to draft common sense regulations to prevent companies from arbitrarily prohibiting a user's expression on their platforms.<sup>7</sup> Despite these laudable efforts, there still remains no agreed-upon solution or strategy for combatting privatized censorship.

This Note will explore potential solutions for social media regulation. Specifically, it will examine the feasibility of attaching common carrier responsibilities on the social media giant, Twitter. Part I will analyze the functionalities of Twitter, including its *hosting*, *conversation management*, and *user moderation functions*,<sup>8</sup> and discuss how these functions have contributed to the company's rise and potential downfall. Part II will examine the evolution of the common carrier doctrine. Notable common carrier theories will be examined, but the Volokhian doctrine of compelled hosting will be advocated and applied to Twitter. Lastly, Part III will examine private regulation through an analysis of Elon Musk's acquisition of Twitter. It will explore the benefits and drawbacks of privatized social media regulation and its implications for the common carrier doctrine.

## I. TWITTER AS A DIGITAL PUBLIC SQUARE

Twitter, the prominent social networking platform, has established a digital emporium that connects individuals from all over the world.<sup>9</sup> Through the click of a button, users are able to share, communicate, and express their ideas while staying informed about the latest developments in current events and popular trends. This digitally interconnected space has largely shaped public debate by offering new forms of conversation and publication. The feasibility, success, and popularity of

5. See *Elected Officials Suspended or Banned From Social Media Platforms*, BALLOTPEDIA, [https://ballotpedia.org/Elected\\_officials\\_suspended\\_or\\_banned\\_from\\_social\\_media\\_platforms](https://ballotpedia.org/Elected_officials_suspended_or_banned_from_social_media_platforms) [<https://perma.cc/53E6-HHQ5>] (last visited Sept. 11, 2023) (documenting notable elected officials who were suspended and temporarily banned from the platform); see also Tori Otten, *Elon Musk's Twitter Is Suspending Liberal Accounts for "Spam"*, NEW REPUBLIC (Dec. 1, 2022, 9:42 AM), <https://newrepublic.com/post/169234/elon-musk-twitter-suspending-liberal-accounts-spam> [<https://perma.cc/LXC2-XMF7>].

6. See Matt Taibbi (@mtaibbi), TWITTER (Dec. 2, 2022, 3:34 PM), <https://twitter.com/mtaibbi/status/1598822959866683394?lang=en> [<https://perma.cc/P3PB-Z4NH>] (documenting and displaying censorial practices of Twitter); Bari Weiss (@bariweiss), TWITTER (Dec. 8, 2022, 4:15 PM), <https://twitter.com/bariweiss/status/1601007575633305600?lang=en> [<https://perma.cc/HT7M-5NCH>] (explaining Twitter's blacklisting of conservative and liberal pundits through hidden obscurity tools); see also *TikTok is Silencing the Left, Content Creators Warn of Rampant Censorship*, YAHOO (Jan. 20, 2022, 9:53 AM), <https://www.yahoo.com/now/ryan-grim-tiktok-silencing-left-145300974.html> [<https://perma.cc/E5MY-7FQG>] (arguing that Tik Tok is censoring progressive content creators).

7. See Rebecca Kern, *Social Media Sweeps the States*, POLITICO (July 1, 2022, 4:30 AM), <https://www.politico.com/news/2022/07/01/social-media-sweeps-the-states-00043229> [<https://perma.cc/X653-9TVV>].

8. Volokh, *supra* note 2, at 408. Volokh coins these terms when discussing a platform's many functions. These terms will be utilized when examining Twitter's functions and common carrier traits.

9. See Tom Fish, *These Countries Have the Most People on Twitter*, NEWSWEEK (Sept. 22, 2021, 7:00 PM), <https://www.newsweek.com/countries-most-people-twitter-social-media-us-japan-uk-1631479> [<https://perma.cc/8HSB-9XUL>] (showcasing the sheer number of diverse users on Twitter).

the platform, like many other businesses, are due to its multiple technological functions. These functions are the backbone of the platform and will be elucidated in the coming section before diving into concerns of speech.

### A. Functions of the Platform

*Hosting Function.*<sup>10</sup> Twitter's most notable function is its user hosting responsibilities. Through tweets that are posted on user pages, the platform enables users to express their ideas and display creative content.<sup>11</sup> As a host, Twitter moderates, recommends, and transmits these tweets to other users who intentionally visit or follow the page.<sup>12</sup> This feature grants the platform extensive control over publicly accessible information. In addition, the hosting function serves as a global recommendation function.<sup>13</sup> On a user's timeline or news feed, the platform globally suggests (recommends) and displays popular tweets to users on the platform. Users who view recommended tweets are given a digital snapshot of the public's sentiment in real time—via user's replies and comments of the recommended tweet—enabling them to generate and to form their own opinions about a specific issue.<sup>14</sup>

Interestingly, however, the recommendation function is managed by an algorithm.<sup>15</sup> The algorithm documents a user's likes, replies, followed topics, followers, and recommends a tweet based on those "signals."<sup>16</sup> The algorithm also scans and analyzes characteristics and patterns of a given tweet to see if it follows community guidelines.<sup>17</sup> If the algorithm concludes that a piece of content breaches a set of community norms, it will either moderate or remove the content.<sup>18</sup>

10. See discussion in *supra* note 8.

11. See *About Your Twitter Timeline*, TWITTER, <https://help.twitter.com/en/using-twitter/twitter-timeline> [<https://perma.cc/9FBC-AYLU>] (last visited Dec. 29, 2022); see also *Find Your Way Around Twitter*, TWITTER, <https://help.twitter.com/en/resources/twitter-guide/twitter-101/find-your-way-around-twitter-by-taking-a-tour-twitter-help> [<https://perma.cc/TEW3-ZKA7>] (last visited July 3, 2021).

12. See *New User FAQ*, TWITTER, <https://help.twitter.com/en/resources/new-user-faq> [<https://perma.cc/Z68F-848T>] (last visited Dec. 29, 2022); *About Your Twitter Timeline*, TWITTER, <https://help.twitter.com/en/using-twitter/twitter-timeline> [<https://perma.cc/9FBC-AYLU>] (last visited Dec. 29, 2022).

13. See *How Recommendations Help You Discover More on Twitter*, TWITTER (Sept. 20, 2022), [https://blog.twitter.com/en\\_us/topics/product/2022/how-recommendations-help-discover-more-twitter#:~:text=If%20you've%20ever%20seen,actions%20you%20take%20on%20Twitter](https://blog.twitter.com/en_us/topics/product/2022/how-recommendations-help-discover-more-twitter#:~:text=If%20you've%20ever%20seen,actions%20you%20take%20on%20Twitter) [<https://perma.cc/8GNC-T9LF>].

14. *Twitter Trending Topics: How They Work and How to Use Them*, SPROUT SOCIAL (Mar. 15, 2021) <https://sproutsocial.com/insights/twitter-trending-topics/> [<https://perma.cc/AY5V-WB9W>].

15. *About Twitter's Account Suggestions*, TWITTER, <https://help.twitter.com/en/using-twitter/account-suggestions#:~:text=How%20does%20Twitter%20find%20accounts,who%20already%20have%20Twitter%20accounts> [<https://perma.cc/P7N8-YYQD>] (last visited Sept. 12, 2023). See generally Robert Gorwa, Reuben Binns & Christian Katzenback, *Algorithmic Content Moderation: Technical and Political Challenges in the Automation of Platform Governance*, BIG DATA & SOC'Y, Jan.–June 2020, at 1.

16. *How Recommendations Help You Discover More on Twitter*, *supra* note 13.

17. *Twitter Trending Topics: How They Work and How to Use Them*, *supra* note 14.

18. *Id.* The difference between full removal and moderation of content is that moderation only requires limiting access to certain content by way of content warnings and other seminal mechanisms.

Moreover, as mentioned previously, Twitter's hosting function is contingent upon its community guidelines. These guidelines are intended to foster an environment of civility and safety for public discourse.<sup>19</sup> The guidelines prohibit illegal activities such as the promotion of terrorism, the exploitation of children, and the use of illegal drugs.<sup>20</sup> Content and speech that promotes violence or harm against a particular demographic is also expressly prohibited.<sup>21</sup> By adhering to these policies, Twitter is theoretically able to perform its hosting functions and moderate content uniformly.

*Conversation management.*<sup>22</sup> A second function of the platform is its conversation management function. This function allows the platform to moderate posts by blocking comments posted on other user's pages.<sup>23</sup> By filtering spam and other unwanted prohibited content, Twitter can create a safe and healthy space for its users. One thing to note is that the function is also controlled by a man-made algorithm.<sup>24</sup> This algorithm can identify and flag specific content for review by human moderators.<sup>25</sup> Once reviewed, the moderators then decide whether to remove such content from the platform or apply a warning that provides context for users.<sup>26</sup> Through this process, the platform can effectively identify automated accounts while addressing prohibited content.

Another conversation management tool is its automatic removal tool. This tool allows the platform to remove prohibited content from the site automatically, without the need for human review.<sup>27</sup> The tool is also powered by a man-made machine learning algorithm. Similar to the hosting function's algorithm, this

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*See Understanding Your Media Settings on Twitter*, TWITTER, <https://help.twitter.com/en/rules-and-policies/media-settings#:~:text=Tap%20Settings%20and%20privacy.&text=Tap%20Privacy%20and%20safety.&text=Ta%20Your%20Tweets.&text=Toggle%20the%20button%20next%20to,material%20that%20may%20be%20sensitive> [<https://perma.cc/2P47-EZB9>] (last visited Sept. 12, 2023).

19. *See The Twitter Rules*, TWITTER, <https://help.twitter.com/en/rules-and-policies/twitter-rules> [<https://perma.cc/A3JH-TJM2>] (last visited Sept. 12, 2023) (explaining the rules and purposes of the platform).

20. *Id.*

21. *Id.*

22. *See* Volokh, *supra* note 2.

23. *See About Your Twitter Timeline*, *supra* note 11.

24. *Twitter Artificial Intelligence*, RUBY MEDIA GROUP (Dec. 26, 2022), <https://rubymediagroup.com/twitter-artificial-intelligence> [<https://perma.cc/2QM6-YXNB>] (utilizing Twitter's internal documents to showcase how the platform's man-made algorithm was designed and influenced by political and government actors).

25. *See id.*

26. *See* DALIA SAFFAR, BASHAIAER AQAHTANI, AMJAD ALFAHHAD, LAMA ALAMRI, SHAHAD ALANSARI, NADA ALQAHTANI & DABIAH A. ALBOANEEN, *Machine and Deep Learning Algorithms for Twitter Spam Detection*, in PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON ADVANCED INTELLIGENT SYSTEMS AND INFORMATICS 2019, 483 (Aboul Ella Hassanien, Khaled Shaalan & Mohamed Fahmy Tolba eds., 2020) (providing an in-depth examination of Twitter's machine learning algorithms).

27. *See* Katie Paul & Sheila Dang, *Exclusive: Twitter Leans on Automation to Moderate Content as Harmful Speech Surges*, REUTERS (Dec. 5, 2022, 1:41 PM), <https://www.reuters.com/technology/twitter-exec-says-moving-fast-moderation-harmful-content-surges-2022-12-03/> [<https://perma.cc/8V36-AA34>] (noting that Twitter is using AI to moderate content on the platform).

algorithm can identify and flag certain content by retrieving and analyzing characteristics associated with prohibited content.<sup>28</sup>

*User Moderation.* The last key function is its user moderation function. This function allows users to take action against accounts that engage in harassment or abusive behavior.<sup>29</sup> To take action, users can click on the “More” button (represented by three dots) located next to the tweet.<sup>30</sup> Once clicked, a menu with options to block, report, or mute the specific tweet will appear.<sup>31</sup> If a user ultimately decides to report or flag the post, it will be reviewed by Twitter’s moderation team, who will then decide whether it violates the platform’s policies.<sup>32</sup> This moderation function provides users with an easy-to-access tool that helps shield themselves and others from malicious conduct.

The *hosting, conversation management, and user moderation* functions make up the backbone of Twitter. Without them, the platform would likely fall, or at the very least, struggle to compete with existing social media behemoths like Facebook and TikTok.<sup>33</sup> In any case, these functions, despite vaulting the platform to success, have guided it to uncharted First Amendment territory. This territory, some argue, will lead to its demise.

### B. Twitter’s Influence on Political Discourse

After the banning and suspension of controversial figures such as Donald Trump and Jordan Peterson, some legal scholars have expressed concerns about the censorial practices of Twitter.<sup>34</sup> They argue that the banning of influential political figures has the potential to negatively impact and influence political discourse. One such scholar, Erwin Chemerinsky, argues that the platform’s conduct sets a

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28. See Jacob Kastrenakes, *Twitter Says it Now Removes Half of All Abusive Tweets Before Users Report Them*, THE VERGE, (Oct. 24, 2019, 5:02 AM), <https://www.theverge.com/2019/10/24/20929290/twitter-abusive-tweets-automated-removal-earnings-q3-2019> [<https://perma.cc/9Y8Z-M4VQ>].

29. See *Report a Tweet, List, or Direct Message*, TWITTER, <https://help.twitter.com/en/safety-and-security/report-a-tweet> [<https://perma.cc/7UK5-ZLNB>] (last visited Sept. 12, 2023) (describing the procedures for reporting a tweet, list, or direct message).

30. *Id.*

31. *Id.*

32. See *Report Abusive Behavior*, TWITTER, <https://help.twitter.com/en/safety-and-security/report-abusive-behavior> [<https://perma.cc/8AE6-XQLG>] (last visited Sept. 12, 2023).

33. See Oscar Beijbom, *Same Same But Different: Content Moderation at Facebook, Twitter, TikTok, and Reddit*, NYCKEL (Oct. 9, 2022) <https://www.nyckel.com/blog/content-moderation-comparison-facebook-twitter-reddit-tiktok/> [<https://perma.cc/DS8J-KNE7>] (showcasing prominent social media platforms’ moderation practices; an essential practice that helps the platforms combat misinformation and protect their business models).

34. The former president was banned for inciting violence following the storming of the United States Capitol on January 6. The platform specifically stated that the former president violated its civic integrity policy and violence policy. See Brian Fung, *Twitter Bans President Trump Permanently*, CNN (Jan. 9, 2021, 9:19 AM), <https://www.cnn.com/2021/01/08/tech/trump-twitter-ban/index.html> [<https://perma.cc/GEH5-VD3G>]. As to Jordan Peterson, he was suspended for making hateful comments towards Elliot Page. Such comments, according to the platform, amounted to “hateful conduct” that was against the platform’s rules. See Eliot Lefroy, *Twitter Suspends Jordan Peterson for Tweet About Elliot Page’s Trans ‘sin,’* N.Y. POST (June 30, 2022, 2:39 PM), <https://nypost.com/2022/06/30/twitter-suspends-jordan-peterson-for-elliott-page-sin-tweet/> [<https://perma.cc/FT5R-AZ6N>].

dangerous precedent for free speech.<sup>35</sup> Chemerinsky specifically notes that Twitter's decision to permanently ban Trump, a former president who actively used the platform to communicate and share his views with his followers, could chill others' ability to freely express their own opinions.<sup>36</sup> This is because individuals who adhere to and hold views similar to the former President may be discouraged from publicly expressing such views out of fear that they too could be banned in a similar manner.<sup>37</sup> Chemerinsky is also concerned with allowing Twitter to determine what types of speech an individual can receive. He states that these determinations give the company too much power over speech and can influence public discourse in a manner that may not be representative of the wide variety of perspectives held by the platform's users.<sup>38</sup>

In addition to banning prominent political figures, Twitter's moderation practices at the time appeared to restrict certain opinions and articles for hate speech and disinformation. The censorship of the COVID-19 lab leak theory, which was supported by many prominent conservatives, is one notable example.<sup>39</sup> The *New York Post* published an article that speculated on the origins of COVID-19, suggesting that it started in a Chinese laboratory.<sup>40</sup> After the story was published and shared on Twitter, it was promptly pulled down and deemed to be hate speech and conspiratorial disinformation.<sup>41</sup> Numerous users who promoted and disseminated the story were banned from the platform.<sup>42</sup> As previously noted, the banned users had a conservative bend, which prompted many to conclude that the article was suppressed for political reasons rather than "hate speech" and

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35. See Nicholas Iovino, *Twitter's Trump Ban Sets Dangerous Precedent for Free Speech, Legal Scholar Warns*, COURTHOUSE NEWS SERV. (Jan. 14, 2021), <https://www.courthousenews.com/twitters-trump-ban-sets-dangerous-precedent-for-free-speech-legal-scholar-warns/> [<https://perma.cc/M5YB-8ZG9>] (explaining Chemerinsky's apprehensions about Trump's ban and censorship).

36. *Id.*

37. *Id.*

38. *Id.*

39. See Jon Cohen, *Republican Senate Staff Tout Lab-leak Theory of the Pandemic's Origin*, SCIENCEINSIDER (Oct. 27, 2022, 7:50 PM), <https://www.science.org/content/article/republican-senate-staff-tout-lab-leak-theory-pandemics-origin> [<https://perma.cc/ZD58-SUWU>].

40. See *Facebook's COVID Coverup*, N.Y. POST (Jan. 5, 2021, 7:25 PM), <https://nypost.com/2021/01/05/facebooks-covid-coverup/> [<https://perma.cc/97U4-LQ5B>] (detailing how Facebook suppressed New York Post article regarding the potential origins of COVID-19); see also Katherine Eban, Vanity Fair & Jeff Kao, *COVID-19 Origins: Investigating a "Complex and Grave Situation" Inside a Wuhan Lab*, PROPUBLICA (Oct. 28, 2022, 12:45 PM), <https://www.propublica.org/article/senate-report-covid-19-origin-wuhan-lab> [<https://perma.cc/8WNW-IVEN>] (outlining the potential origins of COVID-19).

41. See Matt Taibbi (@mtaibbi), *Twitter Files: The Great Covid-19 Lie Machine. The Virality Project, and the Censorship of True Stories*, TWITTER (Mar. 17, 2023, 7:00 AM), <https://twitter.com/mtaibbi/status/1636729166631432195> [<https://web.archive.org/web/20230323093423/https://twitter.com/mtaibbi/status/1636729166631432195?lang=en>] (documenting how an academic-backed organization persuaded Twitter to censor COVID-19 inquiries, such as the lab leak theory and describing the inquiries as disinformation).

42. See Johnathan Chait, *How Twitter Cultivated the Media's Lab-Leak Fiasco*, N.Y. MAG. (May 26, 2021), <https://nymag.com/intelligencer/2021/05/lab-leak-media-liberals-covid-china-biden-fauci-investigation.html> [<https://perma.cc/R9HM-X3DS>] (chronicling the process by which an academic-backed organization convinced Twitter to classify COVID-19 inquiries, including the COVID lab leak theory, as misinformation).



“misinformation.”<sup>43</sup> These concerns were somewhat vindicated when scientists and government agencies recognized the plausibility of the lab leak theory.<sup>44</sup>

Legal scholar Eugene Volokh commented on Twitter’s suppressive efforts, arguing that the company’s moderation policies were overly broad, contradictory, and discriminatory towards conservatives.<sup>45</sup> He explains that Twitter’s metric of “hate speech” extends to a considerable range of opinions that are hotly debated in the public sphere.<sup>46</sup> Making subjective determinations of “hate speech” and blocking stories under that metric discourages public discourse and encourages group think.<sup>47</sup>

Activists on the progressive and liberal spectrum have also encountered similar treatment. In 2018, dozens of Occupy Wall Street activists were suspended on Twitter without explanation.<sup>48</sup> Many of these activists believed that Twitter was banning users because of the movement’s anti-corporation message.<sup>49</sup> Specifically, they claimed that Twitter’s crackdown on fake bots and accounts was a cover for censoring activists associated with the movement.<sup>50</sup> As a result, the movement

43. See Dhruv Khullar, *Lab Leaks and COVID-19 Politics*, NEW YORKER (Mar. 3, 2023), <https://www.newyorker.com/news/daily-comment/lab-leaks-and-covid-19-politics> [<https://perma.cc/LU6F-LHW8>] (demonstrating that prominent conservative politicians and commentators believe that the lab leak theory was suppressed for political reasons).

44. See Joel Achenbach & Dan Diamond, *Senate GOP Report Argues Lab-Leak Theory is Most Likely Origin of Covid*, WASH. POST (Oct. 27, 2022, 5:48 PM), <https://www.washingtonpost.com/science/2022/10/27/covid-lab-leak-theory-origin/> [<https://perma.cc/6YWP-NNQX>]; James Comer, *Fauci’s Emails Raise Questions of Lab Leak Cover Up*, COMER, <https://comer.house.gov/2022/1/comer-fauci-s-emails-raise-questions-of-lab-leak-cover-up> [<https://perma.cc/RXS2-V3KJ>] (last visited Sept. 12, 2023); Nicholas Wade, *Emails Reveal Scientists Suspected COVID Leaked from Wuhan Lab – Then Quickly Censored Themselves*, MANHATTAN INST. (Jan. 24, 2022), <https://www.manhattan-institute.org/emails-reveal-suspected-covid-leaked-from-a-wuhan-lab-then-censored-themselves> [<https://perma.cc/G5RX-9BKJ>] (noting that scientists may have acknowledged the plausibility of COVID leaking from a lab); Julian Barnes, *Lab Leak Most Likely Caused Pandemic, Energy Dept. Says*, N.Y. TIMES (Feb. 26, 2023), <https://www.nytimes.com/2023/02/26/us/politics/china-lab-leak-coronavirus-pandemic.html> [<https://perma.cc/W838-HN9K>]; Ana Faguy, *U.S. Government Divided On Covid Lab Leak Theory—Here’s Where Each Agency Stands*, FORBES (Feb. 27, 2023, 3:43 PM) <https://www.forbes.com/sites/anafaguy/2023/02/27/us-government-divided-on-covid-lab-leak-theory-heres-where-each-agency-stands/?sh=266707b21a5> [<https://perma.cc/9LX5-TLHA>].

45. Volokh, *supra* note 2, at 396.

46. *Id.*

47. *Id.* at 397. “Groupthink,” as defined by Irving Janis in “Victims of Groupthink: A Psychological Study of Foreign-Policy Decisions and Fiascoes,” refers to a situation where the pursuit of agreement within a cohesive group surpasses the motivation to evaluate alternative solutions realistically. In the debate over COVID-19’s origins, this phenomenon may have manifested as a collective push for consensus within the scientific community, possibly leading to the downplaying of the lab leak theory and other alternative origin theories. This overemphasis on consensus could have inadvertently stifled a comprehensive discussion and assessment of all potential explanations for the virus’s origin. See IRVING JANIS, *VICTIMS OF GROUP THINK: A PSYCHOLOGICAL STUDY OF FOREIGN-POLICY DECISIONS AND FIASCOES*, 237 (Houghton Mifflin Company ed., 1972).

48. See Sanjana Varghese, *Twitter has Purged Left-Wing Accounts with No Explanation*, WIRED UK (Oct. 10, 2018, 7:00 AM), <https://www.wired.co.uk/article/twitter-political-account-ban-us-mid-term-elections> [<https://perma.cc/3F4D-KQIT>] (describing and hypothesizing how Twitter was silencing one of the most popular anti-corporation movements in America as well as documenting the opinions of activists as to why they were banned).

49. *Id.*

50. *Id.*

struggled to organize and maintain their following.<sup>51</sup> Moreover, hashtags related with the Occupy Wall Street movement reportedly vanished from Twitter's search results and "trending list" in 2011.<sup>52</sup> Many movement leaders speculated that Twitter intentionally banned access to their posts.<sup>53</sup>

The filtration and restriction of political viewpoints on Twitter have allowed the platform to dominate political dialogue and popular opinion. Some critics claim that Twitter's popularity in the political sphere gives the platform the ability to influence political discourse and events through its filtration and restriction mechanisms.<sup>54</sup>

Regardless, its private status and Section 230 protections provide it with a great deal of discretion to prohibit ideas without explanation or reason.<sup>55</sup> Many American citizens are alarmed by this type of unchecked power.

## II. TWITTER AS A COMMON CARRIER

### A. *The Common Carrier Doctrine*

The common carrier doctrine is a common law principle rooted in the First Amendment.<sup>56</sup> The purpose of the doctrine is to impose nondiscriminatory duties and regulations on special industries or businesses—common carriers—whose services largely affect the public interest.<sup>57</sup> Both federal and state courts have not explicitly outlined what constitutes a common carrier but have historically applied the doctrine to industries and businesses that (1) hold themselves out to the public, (2) obtain a significant market share of a particular industry, (3) receive countervailing benefits from the government or (4) are part of the communications or transportation industry.<sup>58</sup>

For example, in *Messenger v. Pennsylvania Railroad Company*, Pennsylvania Railroad Company discriminately charged merchants a higher rate for its transportation services.<sup>59</sup> The company had previously contracted with rival merchants and agreed to carry goods at a cheaper market rate.<sup>60</sup> This exclusionary

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51. *Id.*

52. Jonathan Albright, *Did Twitter Censor Occupy Wall Street?*, THE CONVERSATION (Oct. 11, 2011, 10:03 PM), <https://theconversation.com/did-twitter-censor-occupy-wall-street-3822> [<https://perma.cc/E29L-TDTY>].

53. *Id.*

54. See Chuck Grassley, *Twitter and 2020 Election Interference*, GRASSLEY (Dec. 7, 2022), <https://www.grassley.senate.gov/news/remarks/twitter-and-2020-election-interference> [<https://perma.cc/ZCN4-375V>]; see also Chris Pandolfo, *Elon Musk Says Twitter 'has Interfered in Elections'*, FOX BUS. (Nov. 30, 2022, 1:41 PM), <https://www.foxbusiness.com/technology/elon-musk-says-twitter-has-interfered-elections> [<https://perma.cc/2PEQ-6ASD>].

55. See *infra* Section II.A.

56. See Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463 (2021).

57. Robert B. Horwitz, *The First Amendment Meets Some New Technologies: Broadcasting, Common Carriers, and Free Speech in the 1990s*, 20 THEORY & SOC'Y 21, 28 (1991).

58. See *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1222–23 (2021) (Thomas, J., concurring); Mark A. Hall, *Common Carriers Under the Communications Act*, 48 U. CHI. L. REV. 409 (1981).

59. *Messenger v. Pa. R.R. Co.*, 36 N.J.L. 407, 408 (1873).

60. *Id.* at 408–09.

agreement gave select parties a monopoly over the trading business thereby granting them unrestricted control of the trading market.<sup>61</sup> The New Jersey Supreme Court refused to enforce the contract, stating that a common carrier cannot discriminate between individuals for whom it will render service.<sup>62</sup> It noted that the Pennsylvania Railroad Company had been granted important prerogatives from the government, like the right to build and use a railway.<sup>63</sup> Such prerogatives serve a public function and impose a vital duty on railroad companies.<sup>64</sup> This duty requires railroad companies and industries to perform nondiscriminatory services.<sup>65</sup>

Similar to the court in *Messenger*, state courts and legislators recognized the importance of regulating transportation and communication services.<sup>66</sup> Elected officials knew that these industries could privatize their public function and profit from government granted incentives—at the expense of citizens’ First Amendment rights. To combat this, many states incorporated and codified the common carrier doctrine.<sup>67</sup> States neither wanted railroad companies to grant monopolies through the use of hidden exclusive agreements nor did they want communication companies to indiscriminately charge parties higher rates.<sup>68</sup> Congress soon followed and implemented the Federal Communications Act of 1934.<sup>69</sup> This expansive regulatory scheme subjected broadcast media to public regulation and clarified elements of a common carrier’s duty. Specifically, the Act regulated both wireless and wired communications, and prohibited broadcast networks from discriminating in rates or against a “particular person, class of person or locality.”<sup>70</sup> Similar to railroad companies, broadcasting networks were treated and were subjected to government regulation as common carriers. Each company had a duty to provide services in equal measure to citizens thereby, fulfilling its public utility purpose.<sup>71</sup> The Act enabled the free flow of information and fostered the development of the radio spectrum.<sup>72</sup>

Although the Federal Communications Act of 1934 was repealed, elements of the common carrier doctrine have been federally codified in 47 U.S.C. § 201(b) which states:

All charges, practices, classifications, and regulations for and in connection with such communication service [common

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61. *Id.* at 409.

62. *Id.*

63. *Id.* at 413.

64. *Id.*

65. *See* *New England Express Co. v. Me. Cent. R.R. Co.*, 57 Me. 188, 196 (1869) (rejecting an exclusive contract between the railroad company and clients because common carriers are precluded from granting monopolies and given special preferences).

66. Eli M. Noam, *Beyond Liberalization II: The Impending Doom of Common Carriage*, 18 TELECOMMS. POL’Y 435, 435–36 (1994).

67. *Id.* at 437.

68. *Id.* at 436–37.

69. *See* 47 U.S.C. §§ 151–614(2018).

70. *Communications Act of 1934*, BUREAU OF JUST. ASSISTANCE, <https://tinyurl.com/428p3t2u> [<https://perma.cc/DM5M-PD45> (last visited Sept. 12, 2023)].

71. *See* Brian Caterina, *Communications Act of 1934*, FIRST AMEND. ENCYC., <https://www.mtsu.edu/first-amendment/article/1044/communications-act-of-1934> [<https://perma.cc/7GXF-H5C5>] (last visited Sept. 12, 2023).

72. *Id.*

carriers engaged in interstate or foreign communication by wire or radio], shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful . . . .<sup>73</sup>

Moreover, Congress has expressly included a provision prohibiting common carriers from unjustly and unreasonably discriminating against citizens when providing services.<sup>74</sup> Although this statutory provision resembles the original Federal Communications Act of 1934, it is much more limited in scope. Likewise, companies that identify as common carriers and assume such duties will, generally, be protected from antitrust laws, benefit from the relaxation of liabilities, and obtain special access to rights-of-way.<sup>75</sup>

Common carrier duties were also considered in the context of newspapers in *Miami Herald Publishing Company v. Tornillo*, where the Supreme Court struck down a Florida statute requiring newspapers to give political candidates the right to have their responses to criticisms published.<sup>76</sup> The Court acknowledged that the public's First Amendment right to be informed was in jeopardy because select owners obtained a monopoly on the marketplace of ideas.<sup>77</sup> Despite the monopolization concerns, the Court ruled in favor of the *Miami Herald* and stated that compelling newspapers to publish content is against the First Amendment, as newspapers have a right to editorial control pursuant to the First Amendment.<sup>78</sup>

The Court's notable First Amendment considerations in *Miami Herald* and § 230 have protected social media companies like Twitter from common carrier responsibilities. The shielding provisions of § 230 provide 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."<sup>79</sup> In other words, internet intermediaries that host or republish content are shielded from a variety of laws that may otherwise be used to hold a company liable.<sup>80</sup> These protected intermediaries not only include traditional Internet Service Providers (ISPs), but also a variety of "interactive computer service providers," which include any online service that publishes third-party information.<sup>81</sup>

Twitter is designated as an "interactive computer service provider" under § 230, which exempts it from liability for content placed on its platform.<sup>82</sup> The § 230 exemption is comparable to the protections the newspaper company had in *Miami Herald* because Twitter is granted considerable control over its *hosting* and

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73. 47 U.S.C.A. § 201 (West).

74. *Id.*

75. Noam, *supra* note 66, at 436.

76. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

77. *Id.* at 251.

78. *Id.* at 258.

79. 47 U.S.C. § 230.

80. Bryan Pietcsh, Isobel Asher Hamilton & Katie Canales, *The Facebook Whistleblower Told Congress it Should Amend Section 230, the Internet Law Hated by Both Biden and Trump. Here's How the Law Works*, BUS. INSIDER (Oct. 6, 2021, 11:39 PM), <https://www.businessinsider.com/what-is-section-230-internet-law-communications-decency-act-explained-2020-5> [<https://perma.cc/M7XG-FG6Q>].

81. *Id.*

82. *Id.*

*conversation management functions*.<sup>83</sup> Some law professors and Supreme Court Justices, however, questioned Twitter's classification and degree of online speech management.<sup>84</sup> Some of those scholars and justices have advocated for the use of the common carrier theory, which would force Twitter to guarantee equal access to its platform for all users and to refrain from viewpoint discrimination.<sup>85</sup> Others have presented alternative theories for governing the platform's moderating practices.<sup>86</sup>

### B. Theories of the Common Carrier Doctrine

After the Supreme Court's ruling in *Biden v. Knight First Amendment Institute at Columbia University*, where Justice Thomas in his concurrence stated, "[D]igital platforms that hold themselves out to the public resemble traditional common carriers,"<sup>87</sup> legal scholarship theorizing the common carrier doctrine as applied to social media platforms was popularized. Conservative-leaning scholars make up the bulk of such scholarships and have gained noticeable traction in the legal realm. The theories established by these notable scholars will be identified and briefly examined.

*Monopoly Power.* Richard Epstein, a distinguished professor at the New York University Law School, developed a monopolization theory rooted in English common law.<sup>88</sup> He states that "any party that holds either a legal or a natural monopoly falls under a duty to provide services to all comers on fair, reasonable, and nondiscriminatory terms."<sup>89</sup> He notes that businesses in seventeenth-century England (harbors, inns, and stables) were largely subjected to these duties.<sup>90</sup> This was because many businesses were the single sellers of the market and maintained exclusive control over important public services. Due to their monopoly power, these entities were able to control interstate commerce, transportation, and market pricing.<sup>91</sup> Because of the lack of competition, and unfair business practices, England extended common carrier liabilities to these businesses.<sup>92</sup>

Epstein further states that the United States has mirrored the English approach and adopted the common carrier doctrine.<sup>93</sup> The purpose of this

83. See Volokh, *supra* note 2, at 408–09.

84. See generally Volokh, *supra* note 2; James B. Septa, *The Past's Lessons for Today: Can Common Carrier Principles Make for a Better Internet*, MARQ. U. L. SCH., (Sept. 22, 2022) <https://law.marquette.edu/assets/programs-degrees/pdf/2022-boden-lecture.pdf> [<https://perma.cc/3GL6-WUM3>] (criticizing Twitter's social media management system and how the platform controls users' speech). See *infra* notes 81, 94, and 104.

85. See *infra* Section II.B.

86. See *infra* Section II.B.

87. *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring).

88. See RICHARD A. EPSTEIN, SHOULD PLATFORMS BE TREATED AS COMMON CARRIER? IT DEPENDS (2022), <https://platforms.aei.org/wp-content/uploads/2022/07/Should-Platforms-Be-Treated-as-Common-Carriers.pdf> [<https://perma.cc/A9D7-Q72J>] (explaining his common-carrier-monopoly theory and extending the application of such theory to social media companies).

89. *Id.* at 4.

90. *Id.* at 3.

91. *Id.*

92. *Id.*

93. *Id.*

incorporation was to prevent natural monopolies and to promote public welfare.<sup>94</sup> By doing so, the doctrine today serves as a unique but distinguished form of antitrust law: rather than breaking up monopolies, which can be unfeasible and costly, the rule imposes common carrier duties on monopolistic entities.<sup>95</sup> This less drastic alternative could potentially apply to prominent internet platforms like Twitter.

When applying the doctrine, Epstein labels Twitter as a complicated and impure monopoly.<sup>96</sup> The platform lacks traditional monopolistic traits because it faces competition from other social media sites like Facebook and Instagram.<sup>97</sup> Additionally, unlike harbors, warehouses, and railroads, social media companies do not raise issues of rates since their content is provided free of charge.<sup>98</sup> Despite these factors, Epstein contends that the monopoly argument gains strength when those “policing the entry into [their] network[s]” reveal their political preferences.<sup>99</sup> The perceived political bias in enforcing, moderating, and removing certain users, who associate with particular political groups and opinions could, in theory, constitute discriminatory conduct conducive of a monopoly. Epstein, however, seems to jump the gun, as he does not clearly define what constitutes a social media monopoly. It is not sufficient to merely provide justifications and reasons for classifying a social media platform as a monopoly without first establishing a clear and comprehensive definition of what a monopoly entails.

*FCC expansion.* Adam Candeub, a law professor at Michigan State University Law School, provides an alternative theory that ultimately grants expansive authority to the Federal Communications Commission (FCC). Before positing the theory, he justifies it by referring to the statutory and legislative history of FCC expansion.<sup>100</sup> Because the FCC has traditionally been granted power by Congress to impose traditional common carriage and privacy obligations on private entities under § 201, he argues that the agency could simply expand its authority to “major edge operators.”<sup>101</sup>

For example, prior to the Telecommunications Act of 1996, communication services in § 201 were interpreted to include both enhanced services and basic services.<sup>102</sup> Enhanced services consisted of non-regulatable services such as

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94. *Id.* at 4.

95. *Id.* at 3–4.

96. See Tunku Varadarajan, Opinion, *The ‘Common Carrier’ Solution to Social-Media Censorship*, WALL ST. J. (Jan. 15, 2021, 12:39 PM), <https://www.wsj.com/articles/the-common-carrier-solution-to-social-media-censorship-11610732343> [<https://perma.cc/YN8J-AYDB>].

97. Matthew Feeney, *Are Social Media Companies Common Carriers?*, CATO INST. (May 24, 2021, 3:39 PM), <https://www.cato.org/blog/are-social-media-companies-common-carriers> [<https://perma.cc/FJF5-FEDG>].

98. See *Signing Up with Twitter*, TWITTER, <https://help.twitter.com/en/using-twitter/create-twitter-account> [<https://perma.cc/PBB7-AZSS>] (last visited Sept. 12, 2023) (showcasing that signing up for Twitter is free); Paul Gil, *What Is Twitter & How Does It Work?*, LIFEWIRE (Aug. 29, 2021), <https://www.lifewire.com/what-exactly-is-twitter-2483331> [<https://perma.cc/GAJ9-K53C>] (demonstrating that Twitter’s services are free).

99. Varadarajan, *supra* note 96.

100. See Adam Candeub, *The Common Carrier Privacy Model*, 51 U.C. DAVIS L. REV. 805, 824–36 (2018).

101. *Id.* at 826.

102. *Id.* at 827.

voicemail, email, and other internet-based communication functions while “basic services” referred to regulated functions like telephone communications.<sup>103</sup> The FCC utilized this previous distinction and applied it to broadband internet access services (BIASs).<sup>104</sup> The 2015 Open Internet Order expanded the FCC’s regulatory authority and treated BIASs as basic services, thereby subjecting companies like Verizon and AT&T to common carrier responsibilities.<sup>105</sup> Candeub notes that such bold actions justify Title II expansion on social media platforms.<sup>106</sup>

Further, he puts forth several tests, specifically highlighting the public offerings tests discussed in *National Association of Regulatory Utility Commissioners v. FCC*—which also outlines a basis for FCC expansion.<sup>107</sup> In that case, the Supreme Court adopted a unique interpretation of a common carrier that analyzes whether “an entity makes a public offering on the same terms to all.”<sup>108</sup> It noted that common carriers who participate in public offerings are subject to Title II liabilities and duties.<sup>109</sup> Twitter may fit the public offering characterization despite not being a world edge browser. After all, the platform publicly offers its communication services under uniform terms. Users who sign up and create an account exchange their personal information for platform access. Interestingly enough, such services are similar to cable providers who charge rates to users who utilize their services.<sup>110</sup>

*Gatekeeper Power.* Lastly, John Bergmayer, a legal director and scholar for The Public Knowledge,<sup>111</sup> posits a gatekeeper power theory. He states that social networks, like Internet Service Providers (ISP), “are gatekeepers, in that they control access to their user base.”<sup>112</sup> Through content moderation, social media platforms can use their unchecked authority to control and gatekeep users’ speech.<sup>113</sup> The gatekeeping function, he argues, could justify common carrier liabilities for social media companies.<sup>114</sup> However, Bergmayer remains unconvinced that this theory fully applies to social media platforms. He notes that ISPs, unlike social networking sites, can shut off users’ access to the internet entirely.<sup>115</sup> Additionally, users of ISP

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103. *Id.*

104. *Id.* at 824, 826–27.

105. *Id.* at 807 (noting that because Verizon and AT&T Comcast qualify as broadband internet access services, they are regulated as common carriers and prohibited from discriminating in favor of their own content).

106. *Id.* at 827. Title II refers to a part of the Federal Communications Act of 1934 giving the FCC regulatory authority over common carriers. Title II and common carrier are used interchangeably by Candeub.

107. *Id.* at 833–35 (explaining the Supreme Court’s adoption of the public offerings test and applying it to dominant “edge providers” like Google and Facebook).

108. *Id.* at 833–34.

109. *Id.* at 834.

110. *Id.* at 844–45.

111. The public knowledge is a non-profit organization dedicated to promoting freedom of expression, and open internet. The organization operates as a non-political entity that advocates for policies that promote open and honest dialogue on the internet which serve the public interest. *See About Us*, PUBLIC KNOWLEDGE, <https://publicknowledge.org/about-us/> (last visited Oct. 21, 2023).

112. John Bergmayer, *What Makes a Common Carrier, and What Doesn’t*, PUB. KNOWLEDGE (Jan. 14, 2021), <https://publicknowledge.org/what-makes-a-common-carrier-and-what-doesnt/> [<https://perma.cc/463V-QJEA>] (positing numerous traits that make a common carrier).

113. *Id.*

114. *Id.*

115. *Id.*

services typically use one server at a time, whereas users on social networks can use multiple platforms simultaneously.<sup>116</sup> The stark differences in function and control make it difficult to directly compare ISPs and social media networks.<sup>117</sup>

The theories proposed by Epstein, Candeub, and Bergmayer, while thought-provoking, do not adequately address (1) whether social media platforms sufficiently constitute common carriers and (2) how the government can implement reasonable regulations platforms without harming a platform's private aspects.

Epstein attempts to address both issues when advocating for his monopolization approach but downplays the competitive landscape of the social media industry. This is a mistake. A thorough examination of the tech world is needed to determine whether platforms are obtaining monopolies through anticompetitive conduct.<sup>118</sup>

For example, Twitter faces competition from platforms like Facebook, YouTube, Reddit, TikTok, and Instagram in the digital advertising market. The platform sells promoted products from digital advertisers and licenses data to build a steady revenue stream.<sup>119</sup> To attract more digital advertisers, Twitter competes for users and makes its platform a healthy place for public discussion and ad promotion.<sup>120</sup> The platform, however, has not been successful. This is evidenced by its negative balance sheets and significant long-term debt.<sup>121</sup> Such performance indicates a struggling company that needs assistance, not a “near monopoly” that rejects it.

Candeub's approach, on the other hand, focuses on justifying FCC's regulatory expansion without addressing the crux of the issue—imposing common carrier liabilities on social media companies like Twitter. It will not matter if the

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116. Compare Samantha Hunter, *ISP (Internet Service Provider): How It Works*, FORBES (Sept. 11, 2023 7:54 PM), <https://www.forbes.com/home-improvement/internet/what-is-an-isp/> [<https://perma.cc/V87U-3YS8>] (stating that ISPs are gateway companies that provide internet access to users in a myriad of ways), with Margaret Rouse, *What Is a Social Networking Site (SNS)?*, TECHNOPEdia (May 30, 2022), <https://www.techopedia.com/definition/4956/social-networking-site-sns> [<https://perma.cc/7ZLD-QAH6>] (explaining how social media networks contain networks that allow users to create a public profile and build connections with other users on the same or similar platforms).

117. See *id.*

118. See generally *Antitrust Laws and You*, U.S. DEP'T OF JUST., (Mar. 21, 2022), <https://www.justice.gov/atr/antitrust-laws-and-you> [<https://web.archive.org/web/20220405110039/https://www.justice.gov/atr/antitrust-laws-and-you>].

119. See Nathan Reiff, *How Twitter Makes Money*, INVESTOPEDIA (Oct. 30, 2022), <https://www.investopedia.com/ask/answers/120114/how-does-twitter-twtr-make-money.asp#:~:text=Twitter%20divides%20its%20revenue%20into,Facebook%20parent%20Meta%20Platforms%20Inc> [<https://perma.cc/XD4V-2FAT>].

120. See Matthew Feeney, *Are Social Media Companies Common Carriers?*, CATO INST. (May 24, 2021, 3:39 PM), <https://www.cato.org/blog/are-social-media-companies-common-carriers> [<https://perma.cc/NHQ3-S2T5>].

121. As noted by the controversial billionaire Elon Musk, Twitter as a business was stagnating and had not booked an annual profit since the start of 2019. Mark Maurer, a journalist for the *Wall Street Journal* has documented and evidenced this in his article. See Mark Maurer, *How Elon Musk's Twitter Faces Mountain of Debt, Falling Revenue and Surging Costs*, WALL ST. J. (Nov. 21, 2022, 9:48 AM), <https://www.wsj.com/articles/how-elon-musks-twitter-faces-mountain-of-debt-falling-revenue-and-surging-costs-11669042132> [<https://perma.cc/3J6A-HXGY>].



FCC expands common carrier liabilities if legislators are incapable of classifying them.

Candeub explores the idea of implementing § 201 common carrier privacy duties, which would require social media companies to offer a private service for their users.<sup>122</sup> Under this proposal, social media companies would be contractually obligated to maintain the privacy of user-generated messages, thereby holding companies liable for misdelivery or breaches of confidentiality.<sup>123</sup> However, such an approach primarily focuses on privacy concerns and lacks a targeted approach to addressing censorship and content neutrality.

Bergmayer, in contrast, acknowledges only one relevant function that Twitter engages in but remains unconvinced that such a function justifies Title II implementation.<sup>124</sup> Acknowledging a platform's gatekeeping power is only one small piece to the common carrier puzzle. There are many responsibilities, functions, and powers social media companies possess. It is important to acknowledge most of these traits to build an effective case for treating tech giants as common carriers. These theories, consequentially, provide only a superficial understanding of how social media platforms function and fail to adequately explain how platforms meet the requirements of common carriers.

To truly understand the potential for regulating social media platforms, it is necessary to take a microscopic approach and carefully examine a platform's capabilities, services, and purposes. Only then can one compare these platforms to existing public utilities and determine the most appropriate regulatory approach. One legal scholar has adopted such an approach when applying his common carrier theory to social media platforms. His approach will be examined and advocated for in the following section.

### C. Volokh's Compelled Hosting Doctrine

Eugene Volokh, a renowned First Amendment scholar, outlines a convincing legal pathway for implementing common carrier duties on social media platforms. This legal pathway is largely premised on the *hosting functions* of a platform.<sup>125</sup> Platforms such as Twitter host speech and expression by enabling users to post content, which, much like UPS and phone line carriers, gets delivered to followers, subscribers, and members of the public. By considering social media platforms in a similar light to traditional carriers, Volokh's approach leverages a platform's *hosting functions* to advocate for the implementation of common carrier duties.

Volokh recognizes that these hosting functions become detrimental for users when platforms discriminately delete a post or remove an account.<sup>126</sup> Authors, politicians, and political activists become deprived of their First Amendment right and struggle to maintain active communications with their base. This can be taken

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122. See Candeub, *supra* note 100, at 836.

123. *Id.*

124. See Bergmayer, *supra* note 112.

125. See Volokh, *supra* note 2, at 409 (noting that a social media platform's hosting functions may be the strongest avenue for imposing common carrier liabilities).

126. *Id.*

to the extreme when platforms operate as barriers to access by predetermining who can and cannot use their platforms.

To prevent such control, Volokh proposes a common carrier rule that compels social media companies to host a user's speech.<sup>127</sup> This rule would constitutionally mandate the hosting of user speech—as long as the platform is open to the public. Specifically, the rule would prohibit platforms from engaging in both viewpoint and content-based discrimination, ensuring that user-generated content and political viewpoints are treated fairly and equally.<sup>128</sup> Volokh thinks that such a rule would pass constitutional muster, relying on three seminal First Amendment cases: (1) *Pruneyard Shopping Center v. Robins*, (2) *Turner Broadcasting System v. FCC*, and (3) *Rumsfeld v. FAIR*.<sup>129</sup>

### 1. Compelled Hosting Precedent

In *Pruneyard Shopping Center v. Robins*, high school students gathered in the courtyard of a privately owned shopping center to distribute pamphlets and solicit signatures.<sup>130</sup> The shopping mall instructed the students to leave because the conduct violated its expressive activity policy.<sup>131</sup> The California Supreme Court ruled in favor of the students, holding that California law protects the right to reasonably exercised speech and petitioning—especially in private centers like shopping malls.<sup>132</sup> The mall objected, contending that a “private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others.”<sup>133</sup>

The U.S. Supreme Court disagreed and upheld the California law.<sup>134</sup> It noted that the state law did not compel speech, nor did it exact any penalty on the mall's speech.<sup>135</sup> The mall was free to denounce and disavow any connection with the students, and the Court noted that states may impose reasonable restrictions on privately owned property as long as they do not violate the Constitution.<sup>136</sup>

However, the Court carefully cabined its holding, clarifying that states may grant their citizens greater individualized rights, but those rights do not give citizens free rein to disseminate their ideas whenever they so choose.<sup>137</sup> Businesses are free to implement time, place, and manner restrictions to somewhat tame these individual rights and curb their hosting responsibilities.<sup>138</sup>

Similarly, in *Turner Broadcasting System v. FCC*, communication providers challenged a federal statute that compelled cable television systems to host a

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127. *Id.* at 414–15.

128. *Id.*

129. *Id.* at 415.

130. *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 456–57 (5th Cir. 2022) (summarizing *PruneYard Shopping Ctr v. Robins*, 447 U.S. 74 (1980)).

131. *Id.* at 456.

132. *Id.*

133. *Id.*

134. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 2044 (1980).

135. *Id.*

136. *Id.*

137. *See id.* at 2041.

138. *Id.* at 2042.

percentage of local broadcasting<sup>139</sup> programs on their channels.<sup>140</sup> The communication providers asserted that these regulations were a violation of their First Amendment rights to free speech and editorial discretion.<sup>141</sup>

The Supreme Court disagreed and upheld the statute.<sup>142</sup> Justice Kennedy, writing for the majority, explained that content-neutral federal regulations are permissible if they satisfy intermediate scrutiny.<sup>143</sup> He explained that the provisions of the federal law were unrelated to the content of the cable operators' programming.<sup>144</sup> Had the law "required the utterance of a particular message favored by the government" or stifled speech in favor of a particular message,<sup>145</sup> it would be subject to the harshest scrutiny.<sup>146</sup> Furthermore, Kennedy noted that the law serves an important government interest, which is to promote and protect over-the-air broadcast media.<sup>147</sup>

Lastly, in *Rumsfeld v. FAIR*, law schools were facing loss of federal funds due to a federal law that compelled schools to host and provide equal access to military recruiters.<sup>148</sup> The law schools challenged the law, alleging that it violated their First Amendment rights to expressive association.<sup>149</sup> Specifically, they argued that forcing universities to partake and assist in military recruitment implicitly associates them with the military establishment.<sup>150</sup> They also noted that such assistance compelled speech. Schools were forced to notify students—through bulletin board posts and emails—on behalf of the military.<sup>151</sup>

Nevertheless, the U.S. Supreme Court upheld the federal law. It stated that the law regulated conduct absent from speech.<sup>152</sup> The Court recognized that the law compelled certain elements of the schools' speech—like requiring universities to notify students of military recruitment through emails and bulletin posts.<sup>153</sup> But it recognized that these elements of speech were "incidental" and did not amount to First Amendment violations.<sup>154</sup>

*Pruneyard*, *Turner*, and *Rumsfeld* establish a narrow but attainable entry point for common carrier expansion. Federal and state laws gain access to this point if a proposed law only regulates the transmission and hosting of user expression

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139. See Helen J. Knowles, *Turner Broadcasting System, Inc. v. Federal Communications Commission (1994, 1997)*, FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/118/turner-broadcasting-system-inc-v-federal-communications-commission> [<https://perma.cc/WD94-6MS4>] (last visited Sept. 12, 2023) (summarizing *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622 (1994)).

140. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 2449 (1994).

141. *Id.*

142. *Id.* at 2470–71.

143. *Id.* at 2469.

144. *Id.* at 2449.

145. *Id.* at 2458.

146. *Id.* at 2459.

147. *Id.* at 2469.

148. *Rumsfeld v. F. Acad. & Inst. Rts, Inc.*, 547 U.S. 47, 51 (2006).

149. *Id.* at 68.

150. See *id.* at 68–69.

151. *Id.* at 61–62.

152. *Id.* at 70.

153. *Id.* at 48.

154. *Id.* at 70.

without harming a platform's expressive substance.<sup>155</sup> To implement such a law, one must identify and analyze the similarities between the entities evident in *Pruneyard*, *Turner*, and *Rumsfeld*, examine the corresponding transmissive functions as they relate to social media platforms, and apply the Court's rationale.

## 2. *Applicability to Twitter*

To begin this analysis, we must first revisit Twitter's hosting function previously discussed in Part I. As mentioned, Twitter is a digital public forum. The platform enables users to broadcast and exchange ideas through tweets (i.e., posts). Members of the public are afforded access to these ideas via their home timeline and have the option of commenting on specific tweets.<sup>156</sup> As a host, Twitter moderates, recommends, and delivers such information to other members of the public.<sup>157</sup> This allows users, government entities, and businesses from all over the world to view, respond, or challenge given tweets. Moreover, Twitter controls who can and cannot access the platform. Individuals who break community guidelines by posting hateful and demonstrably false content are barred, while individuals who follow the community guidelines will be granted full access. Essentially, the platform's hosting functions serve a vital purpose in fostering public debate by providing a digital "safe space."

When analogizing the parties' hosting abilities in *Pruneyard*, *Rumsfeld*, and *Turner* to Twitter's hosting functions, one can make room for the compelled hosting doctrine's applicability. First, Twitter, like the privately owned shopping mall in *Pruneyard* and the private universities in *Rumsfeld*—who had opened their property to the public and shared their real estate with other speakers—shares and hosts its virtual real estate with other members of the public. Individuals from different parts of the world can access the platform and its services with no cost and little effort. Members are free to exchange ideas, purchase goods and services, and participate in public dialogue. This makes the platform an open but "modern public square."<sup>158</sup>

Moreover, similar to the property owners in *Pruneyard*, Twitter has "intentionally transformed [its platform] into a public market, a public gathering[,] . . . a community."<sup>159</sup> Previously Twitter was a medium and SMS platform that enabled parties to share updates with close family, friends, and acquaintances.<sup>160</sup> Although open to the public, public discourse was typically cabined to a handful of people due to its limited functions.<sup>161</sup> After the

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155. See Knowles, *supra* note 139.

156. See *supra* Part I.

157. See *supra* Part. I.

158. See Volokh, *supra* note 2, at 419 (stating that if social media companies hold themselves out and operate as "public squares," they should be regulated).

159. See Volokh, *supra* note 2, at 419 (quoting the court's holding in *N.J. Coalition v. J.M.B. Realty Corp.*, 650 A.2d 757 (N.J. 1994)); see also *N.J. Coalition v. J.M.B. Realty Corp.*, 650 A.2d 757, 776.

160. See Chuck Murphy, *Tweet Twist: The Evolution of Twitter*, BOS. DIGIT. (Nov. 25, 2019), <https://www.bostondigital.com/insights/tweet-twist-evolution-twitter> [https://perma.cc/2387-DHV2] (outlining the genesis of Twitter).

161. See Amanda MacArthur, *The Real History of Twitter in Brief*, LIFEWIRE (Nov. 25, 2020), <https://www.lifewire.com/history-of-twitter-3288854> [https://web.archive.org/web/20230428210521/https://www.lifewire.com/history-of-twitter-3288854].

implementation of certain functions—like hashtags, retweets, and replies—the company transformed itself into a digital agora.<sup>162</sup> Similar to the privately owned shopping mall in *Pruneyard*, businesses on the platform advertise their services, and users gather and express their ideas knowing that they have the option to buy certain commodities from specific entities.

Further, like the cable company in *Turner*, Twitter operates as a conduit and gatekeeper of information. As previously mentioned, Twitter can host and deliver certain information to parties. It does this via the recommendation and search functions. This operates in the same as way cable operators, in that the platform uses its networks and algorithms to control who may or may not access certain information. These similarities demonstrate Twitter’s common carrier traits and establish a constitutionally valid route for imposing common carrier duties on the platform.

Lastly, like the law schools in *Rumsfeld*, who were required to host military recruiters,<sup>163</sup> compelling Twitter to host third party user speech would be constitutionally permissible. This is because compelling a private company to host individuals and their speech on private property is somewhat distinct from compelling it to post speech. Hosting speech compels a platform to display user-generated content and expressions while maintaining viewpoint and content-based neutrality. Mandating the hosting of hotly debated and controversial content that would normally be rejected or removed for violating the platform’s terms of service would also be included and permissible under the compelled hosting doctrine. Twitter has attempted to perform its hosting duties without government regulation but has been accused of removing and shadow banning specific users by obscuring their tweets and replies from other users for ideological purposes.<sup>164</sup> Conversely, requiring the platform to publish or to distribute specific content would necessitate that Twitter, itself, republish or disseminate content created by other users or organizations. Requiring the platform to personally publish, distribute, and disseminate third-party speech, however, would be unconstitutional because the government would be effectively telling the platform “what [it] must say.”<sup>165</sup>

Compelling Twitter to host individuals’ speech may provide a reasonable solution. As seen in *Pruneyard*, *Rumsfeld*, and *Turner*, government regulations can mandate visitor access to a company’s platform for the purpose of speaking, so long as the platform is (1) open to public, (2) not compelled to speak or restricted from speaking, and (3) the message of the visitor is likely not to be attributed to the company.<sup>166</sup> Due to Twitter’s previously mentioned public nature, compelled hosting on the platform is plausible, but only if lawmakers draft a content-neutral

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162. See *id.*; see also Jessica Demilt, *The Origins of Twitter*, PENNINGTON CREATIVE <https://penningtoncreative.com/the-origins-of-twitter/> [https://perma.cc/SCN8-HVQB] (last visited Sept. 12, 2023).

163. See generally, *Rumsfeld v. F. Acad. & Inst. Rts, Inc.*, 547 U.S. 47, 47 (2006).

164. See Matthew Humphries, *Twitter to Tell Users When Their Accounts Have Been ‘Shadow Banned,’* PCMAG (Dec. 9, 2022), <https://www.pcmag.com/news/twitter-to-start-telling-users-when-their-account-has-been-shadowbanned> [https://perma.cc/V8CC-X84F].

165. See *Rumsfeld*, U.S. 547 at 61.

166. See *NetChoice, L.L.C. v. Moody*, 546 F. Supp. 3d 1082, 1093 (N.D. Fla. 2021). The district court struck down a Florida social-media-access statute but noted that the government can compel hosting on platforms as long as it comports with a company’s First Amendment rights.

law that is narrowly tailored to Twitter's hosting functions. This will enable the platform to "share [its] online 'virtual estate' with others on the same terms that they offer other users."<sup>167</sup> Simply stated, the hosting mandates would require the platform to host all visitors and their expressions in equal measure. Such a law would curb Twitter's deplatforming powers and gatekeeping abilities.

### 3. Criticisms of the Volokhian Approach

Although subjecting Twitter and other platforms to common carrier liabilities seems like a viable solution to curbing censorship, courts and scholars believe that such regulations violate a platform's First Amendment rights. Specifically, they state compelling platforms to host third parties' speech would be a different shade of compelled speech.<sup>168</sup> This is because, like the newspapers in *Miami Herald*, platforms "[are] more than passive receptacle[s] or conduit[s] for news, comment, and advertising."<sup>169</sup> Internet platforms curate, host, and publish material for users "in accordance with the editorial control and judgment" of their editors.<sup>170</sup> Thus, when a platform chooses to host certain users and moderate content, it does so at the company's discretion. Establishing a law that forces platforms to host speech would be contrary to the company's right to editorial control and tantamount to forcing the platform to speak.<sup>171</sup>

However, internet platforms are not like the newspaper company in *Miami Herald* because, as noted in *Netchoice, LLC v. Paxton*, platforms use algorithms "to screen out certain obscene and spam related content."<sup>172</sup> In other words, human editors neither exercise full editorial control or judgment, nor do they exercise substantial, substantive discretionary review when analyzing platform content.<sup>173</sup> Although platforms generally have not released their algorithmic models to confirm their supposed editorial conduct, they have given the public a hint to their limited editorial functions through direct user messaging and their terms of service agreements. For example, companies like Facebook have stated, "We try to explicitly view ourselves as not editors. . . . We don't want to have editorial judgment over the content that's in your feed."<sup>174</sup> In addition, Twitter has claimed, through its terms of service, that it may not monitor, endorse, or take responsibility

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167. See Volokh, *supra* note 2, at 419.

168. See, e.g., *Boy Scouts of America v. Dale*, 530 U.S. 640, 640 (2000) (holding that a private organization's freedom of association was violated when a state law required the organization to accept a homosexual scoutmaster, which was a sexual orientation that the organization did not request or desire); see also *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (holding that compelling citizens to host and display the state's message on their car is unconstitutional because the state would be effectively requiring individuals to use their private property as a mobile billboard for its ideological message).

169. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

170. *See NetChoice LLC v. Paxton*, 49 F.4th 439, 459 (5th Cir. 2022).

171. *See id.*

172. *See id.*

173. *See id.* at 460.

174. *See id.* (explaining how prominent Facebook staff figures claim that they do not want to have editorial judgment over Facebook's users' posted content); Ravi Somaiya, *How Facebook is Changing the Way its Users Consume Journalism*, N.Y. TIMES (Oct. 26, 2014), <https://www.nytimes.com/2014/10/27/business/media/how-facebook-is-changing-the-way-its-users-consume-journalism.html> [<https://perma.cc/45YB-G6YK>].

for user-created postings on the platform.<sup>175</sup> Admittedly, these platforms want to operate “as conduits of other parties’ speech,” not newspapers that exercise full editorial control over its user’s content.<sup>176</sup>

Another concern for implementing a common carrier hosting duty on internet platforms is that it would impede upon a platform’s right of expressive association. Social media companies, like the law schools in *Rumsfeld*, have stated that the mandatory hosting of speech might be confused for a forced affiliation or endorsement of it.<sup>177</sup> The claim is that forcing a platform to host white supremacists, Nazis, or terrorists would likely cause users to misconstrue the difference between speech a platform actively sponsors and speech a platform legally permits.<sup>178</sup> After all, property owners have a First Amendment right to associate and dissociate with messages being stated on their platforms—especially when such messages can cause economic and social harm to the business.<sup>179</sup>

Infringing on a platform’s right of expressive association is a valid criticism that implicates both state and federal law. Nevertheless, just as the Court stated in *Pruneyard* and *Rumsfeld*, property owners can “expressly disavow any connection with the message.”<sup>180</sup> An internet platform, like the law schools in *Rumsfeld*, has control “over any impressions it gives [its user].”<sup>181</sup> Twitter, for example, has algorithmic and editorial tools that fact check, moderate, and recommend tweets.<sup>182</sup> For instance, the Birdwatch<sup>183</sup> function fact checks information by visibly flagging and providing context when source-checking a post.<sup>184</sup> Users who have viewed the post will notice the additional context and tread cautiously when reading it. Twitter can implement a similar function that explicitly states that it hosts particular

175. TWITTER, *Terms of Service*, § 3, <https://twitter.com/en/tos> [<https://perma.cc/C4LY-BK7K>] (last visited Sept. 12, 2023) [hereinafter *Twitter Terms*]; see also FACEBOOK, *Terms of Service*, § 4.3, <https://www.facebook.com/terms.php> [<https://perma.cc/MYR6-WDZ6>] (last visited Sept. 12, 2023) [hereinafter *Facebook Terms*] (“[W]e are not responsible for [user’s] actions or conduct . . . or any content [user’s] share. . . .”); YOUTUBE, *Terms of Service*, <https://www.youtube.com/static?template=terms> [<https://perma.cc/F9NT-YT7G>] (last visited Sept. 12, 2023) (“Content is the responsibility of the person or entity that provides it to the Service.”).

176. See, e.g., Notice of Motion and Motion to Dismiss at 10 n.5, *Fields v. Twitter, Inc.*, No. 3:16-cv-00213 (N.D. Cal. Apr. 6, 2016) (stating how Twitter claims to be a service provider but truly acts as a “conduit for huge quantities of third-party speech”); Brief for Appellees at 1, *Klayman v. Zuckerberg*, No. 13-7017 (D.C. Cir. Oct. 25, 2013).

177. See *NetChoice, LLC*, 49 F.4th at 460.

178. See Volokh, *supra* note 2, at 430.

179. See generally Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515 (2001).

180. *PruneYard Shopping Ctr. v. Robins* 447 U.S. 74, 87 (1979); *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 69 (U.S., 2006)

181. See Volokh, *supra* note 2, at 431 (citing Bd. of Ed. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 251 (1990) (plurality opinion)).

182. See *id.* at 408–09.

183. Birdwatch function has now been renamed as community notes. See Bethany Biron, *Elon Musk said Twitter’s Birdwatch Feature Will be renamed ‘Community Notes’ and Is Aimed at ‘Improving Information Accuracy’ amid growing Content Moderation Concerns*, INSIDER (Nov. 5, 2022), <https://www.businessinsider.com/musk-renames-birdwatch-community-notes-touts-improving-accuracy-2022-11>.

184. Keith Coleman, *Introducing Birdwatch, a Community Based Approach to Misinformation*, TWITTER (Jan. 25, 2021), [https://blog.twitter.com/en\\_us/topics/product/2021/introducing-birdwatch-a-community-based-approach-to-misinformation](https://blog.twitter.com/en_us/topics/product/2021/introducing-birdwatch-a-community-based-approach-to-misinformation) [<https://perma.cc/5KN7-6SQR>].

speakers “as a matter of legal command, not of voluntary decision.”<sup>185</sup> Inevitably, the onus would be on the users to reasonably determine whether the platform associates with the third party’s speech after the platform’s legal disclosures.

### III. THE MUSK ACQUISITION

The recent acquisition of Twitter by the controversial tech billionaire Elon Musk calls into question the implementation of the common carrier doctrine. The forty-four billion dollar deal has sent American citizens and legal scholars from both sides of the political spectrum into a frenzy.<sup>186</sup> Many conservatives, who generally support the acquisition, believe that the billionaire will restore free speech on the platform, with some advocating for an online Wild West.<sup>187</sup> Many liberals, on the other hand, have dreaded the acquisition, stating that the tech mogul will unleash hate, racism, and bigotry through the guise of free speech.<sup>188</sup> Despite these differing opinions, both political sides understand that the acquisition is important and could lay the groundwork for social media regulation—or deregulation.

#### *A. Private v. Public Regulation*

The acquisition of Twitter has certain implications on social media common carrier liability. As previously mentioned, implementing common carrier liabilities on social media companies would largely be enumerated by a state or federal law and enforced by the government. However, as noted by Musk himself, he intends to implement guidelines and functions that would largely promote free speech.<sup>189</sup> Musk has championed unbanning and re-hosting prominent figures like the former President Donald Trump and Dr. Jordan Peterson and has implemented amnesty guidelines for previously banned accounts.<sup>190</sup> These policies, despite their private elements, are largely at his discretion, making it an authoritative but top-down approach to combatting censorship. Applying these policies would promote free speech and stop Twitter’s overreach.

When examining this top-down approach, one could not help but notice its inconsistency with public regulation. Allowing a billionaire to selectively unban

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185. See Volokh, *supra* note 2, at 428.

186. See Stuart A. Thompson & David McCabe, *On Twitter, Conservatives Celebrate, and Progressives Cringe, About Musk’s Ownership of Twitter*, N.Y. TIMES (Apr. 26, 2022), <https://www.nytimes.com/2022/04/26/technology/twitter-far-right-conservatives-liberals.html> [<https://perma.cc/UKW4-HFRF>].

187. *Id.*

188. *Id.*; Will Oremus, *Why Elon Musk Is So Polarizing*, WASH. POST (Apr. 30, 2022, 8:00 AM), <https://www.washingtonpost.com/technology/2022/04/30/elon-musk-twitter-polarizing-conservatives-liberals/> [<https://perma.cc/8JBT-SS56>].

189. Jeffrey Rosen, *Elon Musk Is Right that Twitter Should Follow the First Amendment*, ATLANTIC (May 2, 2022), <https://www.theatlantic.com/ideas/archive/2022/05/elon-musk-twitter-free-speech-first-amendment/629721/> [<https://perma.cc/3UDJ-5SJ4>].

190. See Mia Jankowicz, *Conservatives and Anti-vaxxers Are Frantically Lobbying Elon Musk to Lift Twitter Bans on Their Idols After He Took Over*, BUS. INSIDER (Oct. 28, 2022, 9:31 AM), <https://www.businessinsider.com/conservatives-plead-elon-musk-unban-right-wingers-twitter-2022-10> [<https://perma.cc/K5T4-26RT>]; see also Megan McCluskey, *Human Rights Advocates Are Fighting Elon Musk’s ‘Amnesty’ Plan for Suspended Twitter Users*, TIME (Nov. 29, 2022, 1:31 PM), <https://time.com/6237204/elon-musk-twitter-amnesty-advocates/> [<https://perma.cc/2986-DA2Z>] (stating Elon’s amnesty guidelines for banned users).



individuals at his discretion is not the same as attaching common carrier liabilities on Twitter and mandating the platform to host third party's speech. This is because the billionaire acts as the regulator and arbiter of speech instead of the government. In this scheme, there is no other authority to keep him in check, which grants him free reign to implement guidelines that he sees fit. Moreover, instead of an algorithm moderating content, Musk—and possibly other members of his team—would exercise their editorial judgment when moderating content. This more subjective approach would be a less blanketed version of a common carrier rule but would be subjected to First Amendment safeguards, as evidenced in *Miami Herald*. Other tech moguls and wealthy individuals could adopt Musk's top-down approach idea by buying social media platforms and implementing similar “pro-free-speech policies.” This phenomenon would create a privatized billionaire tech marketplace that theoretically would not require government regulation.

Even if common carrier liabilities were implemented on the platform, the Muskian approach would likely not satisfy his own First Amendment and freedom of speech goals. Musk himself has stated that certain controversial figures like Alex Jones will not be hosted on the platform.<sup>191</sup> Not hosting Alex Jones would still be a form of censorship that denies specific parties from engaging in the public forum, thereby violating the banned user's First Amendment right to speech. This would not only frustrate Elon's freedom-of-speech approach, but it would clearly violate the platform's common carrier responsibilities.

### B. Concerns

Allowing a billionaire to regulate and implement what he thinks is “pro-freedom-of-speech policies” on a platform that consists of 350 million active users is concerning.<sup>192</sup> Additionally, trying to obtain and maintain a “digital town square” is admirable but seemingly unfeasible. Every town square has thugs, trolls, and propagandists who threaten the public good.<sup>193</sup> Unironically, bad faith actors have already taken over the platform and have expressed a significant amount of racist hate speech.<sup>194</sup> Libertarians and conservatives have recognized such conduct as an unintended consequence of Musk's free speech approach, but people on the other side of the political spectrum view the conduct as dangerous rhetoric that fuels division.<sup>195</sup>

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191. Brian Fung, *Twitter Won't Restore Alex Jones' Account, Elon Musk Says*, CNN (Nov. 21, 2022, 3:51 PM), <https://www.cnn.com/2022/11/21/tech/alex-jones-twitter-ban/index.html> [<https://perma.cc/5CN4-6HQD>].

192. See Stacy Jo Dixon, Number of Twitter Users Worldwide 2019 to 2024, Statista (Dec. 14, 2022), <https://www.statista.com/statistics/303681/twitter-users-worldwide/> [<https://perma.cc/LR3M-HNPZ>].

193. John Thornill, *Elon Musk's Free Speech Absolutism May Endanger Fragile Democracies*, FIN. TIMES (Nov. 25, 2022), <https://www.ft.com/content/994f0ef1-5a82-46d2-af6a-7e7eb074fcd8> [<https://perma.cc/57YH-GA3K>].

194. See Drew Harwell, Taylor Lorenz & Cat Zakrzewski, *Racist Tweets Quickly Surface After Musk Closes Twitter Deal*, WASH. POST (Oct. 28, 2022, 6:36 PM), <https://www.washingtonpost.com/technology/2022/10/28/musk-twitter-racist-posts/> [<https://perma.cc/P9CK-XT9R>] (displaying the emergence of hate speech after Musk's acquisition of Twitter).

195. See Nik Popli, *As Elon Musk Buys Twitter, the Right Is Celebrating*, TIME (Oct. 28, 2022), <https://time.com/6226238/twitter-elon-musk-right-wing-influencers-politicians-celebrate/> [<https://perma.cc/7TQE-M2H7>].

In addition, Musk's policies have brought forth privatization and economic concerns. After the acquisition of Twitter, the Tesla CEO implemented an eight-dollar subscription for verified accounts.<sup>196</sup> Accounts that wished to imitate other celebrities were required to pay a fee and disclose on their user profiles that they were parody accounts.<sup>197</sup> The goal of the policy was to decrease bots and increase trust within the platform. However, the policy backfired in two ways. First, many users and prominent figures were outraged because Musk was privatizing a form of speech.<sup>198</sup> They believed that parody, just like satire and other forms of expression, should be neither frustrated by a pay wall nor threatened by censorship.<sup>199</sup> These concerns were valid and showed that Elon was going against the very thing he advocated for. Consequently, however, individuals who made appropriately labeled parody accounts and paid the eight-dollar premium were censored, making the policy at odds with its original purpose.<sup>200</sup>

Second, Musk's ostensibly pro-free-speech policies affected companies operating on the platform. After the eight-dollar-per-month Twitter verification implementation and the flooding of blue-tick accounts, many companies lost billions of dollars.<sup>201</sup> Impersonators who paid the premium exploited the system and hurt private industries, resulting in massive losses. Take, for example, the Lockheed Martin incident.<sup>202</sup> An impersonator on the platform created a fake Lockheed Martin handle and tweeted, "We will begin the halting all weapons sales to Saudi Arabia, Israel, and the United States until further investigation into their

196. Geoffrey A. Fowler, *We Got Twitter 'Verified' in Minutes Posing as a Comedian and a Senator*, WASH. POST (Nov. 11, 2022, 3:31 PM), <https://www.washingtonpost.com/technology/2022/11/11/twitter-blue-checkmark/> [<https://perma.cc/F4AF-U4S5>] (noting Twitter's policy of selling blue check marks to the public).

197. *See Parody, Commentary, and Fan Account Policy*, TWITTER, <https://help.twitter.com/en/rules-and-policies/parody-account-policy> [<https://web.archive.org/web/20230419002802/https://help.twitter.com/en/rules-and-policies/parody-account-policy>] (last visited Apr. 19, 2023) (showcasing the rules for parody and impersonation accounts).

198. Alexandria Ocasio-Cortez (@AOC), TWITTER (Nov. 1, 2022, 8:25 PM), <https://twitter.com/AOC/status/1587647032457449473> [<https://web.archive.org/web/20230419031515/https://twitter.com/AOC/status/1587647032457449473>]; Mirna Alsharif, *Alexandria Ocasio-Cortez, Mark Ruffalo Among Those Criticizing Elon Musk's \$8-a-Month Twitter Subscription Plan*, NBC NEWS (Nov. 6, 2022, 11:12 AM), <https://www.nbcnews.com/news/us-news/alexandria-ocasio-cortez-mark-ruffalo-criticizing-elon-musk-8-month-tw-rna55882> [<https://perma.cc/G5DP-A8KH>].

199. Chris Williams, *When Free Speech Cost \$8: Musk's Twitter Censorship Is Going About as You'd Expect It To*, ABOVE THE L. (Nov. 7, 2022, 5:17 PM), <https://abovethelaw.com/2022/11/when-free-speech-cost-8-musk-twitter-censorship-is-going-about-as-you-d-expect-it-to/> [<https://perma.cc/3HDD-MSWD>].

200. *See* Connor Bennett, *Ethan Klein Banned on Twitter After Mocking Elon Musk Over Verification Fiasco*, DEXERTO (Nov. 7, 2022, 2:06 PM), <https://www.dexerto.com/entertainment/ethan-klein-banned-on-twitter-after-mocking-elon-musk-over-verification-fiasco-1977994/> [<https://perma.cc/RC5B-D4HJ>] (showing that the popular YouTuber Ethan Klein was banned after parodying Elon Musk despite labelling his account as a parody).

201. *See* Ronny Reyes, *Elon Musk Was Handed Seven-Page Document From Twitter's Trust and Safety Team that Recommended AGAINST His \$8-a-Month Blue Check Mark System - Before the Site was Flooded with Fake Accounts*, DAILY MAIL (Nov. 15, 2022, 10:15 PM), <https://www.dailymail.co.uk/news/article-11430355/Musk-warned-Twitter-trust-safety-team-against-8-month-blue-check-mark-system.html> [<https://perma.cc/T4FF-SGA9>] (documenting how Elon's implementation of the blue check mark system hurt private businesses despite being warned by Twitter's Safety and Trust Team).

202. *Id.*

record of human rights abuses.”<sup>203</sup> The tweet caused the company’s share price to fall by five percent.<sup>204</sup> Furthermore, medical manufacturing corporation Eli Lilly was impersonated and has allegedly lost billions of dollars due to an impersonator’s fake tweets.<sup>205</sup> Ever since these incidents occurred, Twitter has paused the blue checkmark policy.<sup>206</sup>

Clearly, implementing policies that recognize an individual’s First Amendment rights is challenging on a private platform. Letting controversial billionaires like Musk figure out these challenges may not be the best solution for social media platforms in general. Billionaires, like all humans, have certain political leanings and biases that may affect the implementation of certain policies. Therefore, it may be best for legislators to work with legal scholars and their colleagues to draft a bill that compels the hosting of third parties’ speech on social media platforms.

### C. Decentralizing the Platform

A meteoric solution to Twitter’s censorship problem that does not involve government or billionaire-sponsored regulation is decentralization. Currently, when a user logs into Twitter, they have access only to the world of Twitter.<sup>207</sup> Individuals in this world are permitted to post and directly message other users on the network but cannot directly transmit such information to different platforms like Instagram or Facebook.<sup>208</sup> This is because Twitter does not disclose, share, or disseminate its algorithms to other social media companies.<sup>209</sup> A closed system gives the platform absolute control over who can and cannot post on the network. Opening the platform (i.e., decentralization) would combat this type of control by giving members a greater voice over their content. For example, in an open federated system, users would have the ability to create and customize interconnected communities within the platform’s network.<sup>210</sup> An open federated system would allow people to choose the type of subculture or culture they want to cultivate. Because the network is merely made up of several separate entities—often users—that are linked together, a centralized authority would be unable to govern these users. The decentralized system, if implemented, would inevitably eliminate

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203. *Id.*

204. *Id.*

205. *See, e.g., id.*

206. *See* Lora Kolodny & Sofia Pitt, *Twitter Pauses Paid Verifications After Users Abuse Service to Impersonate Brands and People*, CNBC (Nov. 11, 2022, 9:23 AM), <https://www.cnbc.com/2022/11/11/twitter-blue-subscription-disappears-from-app.html> [<https://perma.cc/PYY6-QCX5>].

207. *See* Caitlin Bassett, *Could Decentralization Fix Twitter’s Censorship Problems?*, MIND MATTERS (Mar. 30, 2022), <https://mindmatters.ai/2022/03/could-decentralization-fix-twitters-censorship-problems/> [<https://perma.cc/FJT2-CAFK>].

208. *Id.*

209. *Id.*

210. *See* ROBERT RIEMANN, *TECH DISPATCH: FEDERATED SOCIAL MEDIA PLATFORMS* (Massimo Attoresi ed., 2022), [https://edps.europa.eu/system/files/2022-07/22-07-26\\_techdispatch-1-2022-federated-social-media-platforms\\_en.pdf](https://edps.europa.eu/system/files/2022-07/22-07-26_techdispatch-1-2022-federated-social-media-platforms_en.pdf) [<https://perma.cc/3CXJ-TNFR>]; *see, e.g.*, Amanda Silberling, *A Beginner’s Guide to Mastodon, the Open Source Twitter Alternative*, TECH CRUNCH (Nov. 8, 2022, 5:24 AM), <https://techcrunch.com/2022/11/08/what-is-mastodon/> [<https://perma.cc/K3XL-XYEL>] (showcasing how the popular social media site, Mastodon, operates under an open federated system).

Twitter's monopoly on public discourse and give members of the public more control over their own data.

The federal system, however, may alter the fundamental nature of Twitter. The platform's intended purpose was to establish a global-but-unitary town square where communities from all over the world could engage in public dialogue. Creating a network in which users can create and control their own personalized "clubs" could essentially defeat that purpose and possibly shun public discourse. Likewise, Musk and his Twitter team may consider implementing some aspects of the federated system in order to build a more inclusive and free public space.

#### CONCLUSION

The regulatory framework for Twitter and social media platforms remains muddy. There is no consensus on how or what Congress can do to combat these platforms' censorship powers. As Twitter continues to grow, it becomes harder to strike a balance between different competing equities. After all, these companies, in the eyes of many lawmakers and judges, are viewed as people<sup>211</sup> capable of asserting a natural person's constitutional rights—despite receiving extensive protections for their corporate character. This paradox has and likely always will be the bane of publicly regulating social media giants.

That said, this Note outlines a potential avenue for social media regulation. By analyzing Twitter's important but commonly held functions and examining the commonalities of those functions with other common carriers, lawmakers are afforded a good regulatory starting point when inquiring on how to implement common carrier responsibilities on a platform. Moreover, examining different legal theories and extensively applying Volokh's compelled hosting doctrine illuminates potential pathways and legal approaches for public regulation of social media platforms without harming their private aspects.

Privatized regulation or opening the platform may be the more efficient form of regulation since it ignores the inherently bureaucratic nature of both the federal and state governments. However, privatized approaches are largely subject to the whims of company heads, and opening a platform may be too drastic for emerging, ever-changing social media platforms.

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211. See generally, *Citizens United v. FEC*, 558 U.S. 310 (2010); Ashley Parker, *Romney Stands by Corporations Remarks*, N.Y. TIMES, Aug. 25, 2011, at A17; CNN, *Romney: Corporations Are People Too*, YOUTUBE (Aug. 12, 2011), <https://www.youtube.com/watch?v=FxUsRedO4UY> [<https://perma.cc/5FXB-9RXS>]. See, e.g., *First Nat'l Bank Bos. v. Bellotti*, 435 U.S. 765, 794–95 (1978) (agreeing with corporate lawyers who stated that a corporation deserves legal rights similar to a natural person because it is a mere collection of men and an association of individuals).

