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Failed Analogies: Justice Thomas's Concurrence in *Biden v. Knight First Amendment Institute*

Sarah S. Seo*

Twenty-six years ago, twenty-six words created the internet. Section 230 of the Communications Decency Act is a short, yet powerful, provision that notably protects social media platforms, among other interactive computer services, from liability for content created by third-party users. At the time of its enactment, Section 230 aimed to encourage the robust growth of the then-nascent internet while protecting it from government regulation. More recently, however, it has been wielded by Big Tech companies like Twitter and Facebook to prevent any liability for real-world harms that stem from virtual interactions conducted over their platforms.

Although the Supreme Court has never taken on a Section 230 case itself, Justice Thomas individually stands out as one of the most prominent anti-Section 230 advocates today. When the Supreme Court declined to hear a Section 230 case in 2020, Justice Thomas issued a statement respecting the Court's denial that planted the seeds for his disapproval of the statute. When the Court issued a brief opinion in 2021 instructing a lower court to dismiss a Section 230 case as moot due to the change in the presidential administration, Justice Thomas issued a second statement concurring in the opinion, continuing his charge against Big Tech companies that profit from Section 230 immunity. Most recently, when the Court

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declined to hear a Section 230 case in 2022, Justice Thomas issued his third statement imploring either Congress to step in or potential litigants to bring up an "appropriate case" so the Supreme Court could interpret Section 230 itself.

Justice Thomas's concurring opinion in Biden v. Knight First Amendment Institute*—his second pass at Section 230—provides Justice Thomas's most substantive call for reform. His opinion proposes recommendations for how the legislature should treat digital platforms and social media companies, analogizing them to common carriers and places of public accommodation. This Note rejects both analogies. To reach this conclusion, this Note examines the histories of both proposed common law frameworks and the creation of Section 230 itself. Finally, this Note suggests limiting this powerful immunity by excluding digital platforms that exhibit deliberate indifference to unlawful or harmful content, or subsequent conduct arising from such content.*

INTRODUCTION

Tweets on Twitter led to an assault on the Capitol building of the United States.[1] Posts on Facebook allegedly sparked multiple Hamas terrorist attacks in Israel.[2] But neither Twitter nor Facebook directly penned the content that incited violence. Instead, Twitter and Facebook users—third-party content providers—penned the posts independently. Accordingly, Twitter and Facebook wield powerful shields of immunity under a small yet mighty statute in the Communications Decency Act ("CDA"), Section 230, and escape liability entirely.[3]

How did we come to live in a world where a quick Facebook post or tweet can lead to such devastating results, yet leave the host platforms scot-free from liability? Part I of this Note starts to answer this question by diving into the historical and legislative background of Section 230. The dawn of the Cyber Age saw many novel types of internet service providers ("ISPs"), making it difficult for courts to map these new methods of communication and information dispersal onto preexisting liability schemes.[4] In particular, two New York cases—*Cubby, Inc. v. CompuServe, Inc.*[5] and *Stratton Oakmont, Inc. v. Prodigy Services Co.*[6]—produced outcomes so contradictory with one another that Congress intervened and attempted to resolve the tension. Thus, Section 230 was born.

Since its enactment, however, lower courts have consistently muddied the waters by broadly interpreting the provision in ways

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1 *See* Graeme Massie, *A Timeline to Insurrection: The Trump Tweets That Security Experts Say Led to the Capitol Riots*, INDEPENDENT (Jan. 18, 2021, 8:09 PM), https://www.independent.co.uk/news/world/americas/us-election-2020/trump-tweets-attacks-capitol-violence-b1786246.html [https://perma.cc/5NBZ-DPK4] (stating that Trump's rhetoric in his Tweets "eventually led to insurrection and bloodshed at the Capitol.").

2 *See* Force v. Facebook, Inc., 934 F.3d 53, 59 (2d Cir. 2019) (arising out of claims alleging that Hamas used Facebook to post content that encouraged terrorist attacks in Israel).

3 47 U.S.C. § 230(c) (2012).

4 *Compare* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 141 (S.D.N.Y. 1991) (finding that the internet-based company functioned like a distributor), *with* Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *4 (N.Y. Sup. Ct. May 24, 1995) (finding that the internet-based company functioned like a publisher).

5 776 F. Supp. 135 (S.D.N.Y. 1991).

6 *Stratton Oakmont*, 1995 WL 323710.

that expand its reach.[7] Although the Supreme Court has yet to substantively address how to properly apply Section 230, Justice Thomas has independently expressed his views on lower courts' statutory interpretations.[8] Part II of this Note explains that in these statements, Justice Thomas expressed his dissatisfaction with what is, in his opinion, a "too-common practice of reading extra immunity into statutes where it does not belong."[9] In his most substantive statement on this topic in *Biden v. Knight First Amendment Institute*,[10] Justice Thomas reiterated his disapproval of lower courts' interpretations of Section 230 and instead suggested alternative frameworks to address social media platforms.[11] Specifically, he urged legislators to utilize two common law doctrines historically applied to narrow the private right to exclude: the common carrier doctrine and the public accommodations doctrine.

Part III of this Note rejects both of Justice Thomas's proposals to treat digital platforms as common carriers or places of public accommodation. First, inherent in the common carrier doctrine is the idea that the entity indiscriminately holds itself out to the general public. Social media platforms only allow those with preexisting phone numbers or email accounts to register.[12] These platforms do not avail themselves to the general public. Moreover, these platforms openly use algorithms to individualize content to each user.[13] This editorial discretion precludes platforms' designations as common carriers.[14] Second, textual arguments forbid defining a place of public accommodation as anything other than specifically

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7 *See infra* Part I.C.

8 *See generally* Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13 (2020) (Thomas, J., statement respecting denial of certiorari); Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021) (Thomas, J., concurring); Doe v. Facebook, Inc., 142 S. Ct. 1087 (2022) (Thomas, J., statement respecting denial of certiorari).

9 *Malwarebytes*, 141 S. Ct. at 15 (Thomas, J., statement respecting denial of certiorari).

10 141 S. Ct. 1220 (Thomas, J., concurring).

11 *See infra* Part II.B.

12 *See infra* note 197.

13 *See infra* notes 203–06 and accompanying text.

14 *See infra* Part III.A; Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463, 496 (2021) ("[E]ntities that opt to exercise editorial discretion over some services are [not] common carriers . . . with respect to those services.").

enumerated physical spaces. This does not include non-physical spaces, such as a website.[15] Even if a court did extrapolate the "public accommodations" definition to include non-physical spaces, Congress's intent behind Section 230's enactment does not support an imposition of public accommodation duties.

Reviewing the history used to support Justice Thomas's concurrence in *Biden v. Knight*, this Note argues that Justice Thomas's proposed analogies must fail. Drawing these analogies and thereby limiting digital platforms' right to exclude would hamstring the ability to fight disinformation at a crucial time when its proliferation is harming society. This Note concludes by offering a suggestion for reform that would remove immunity for interactive service providers or users who deliberately ignore unlawful content or the threat of harmful conduct arising from such content. Social media platforms must bear responsibility for the dangerous ways users abuse seemingly-beneficial algorithms to connect like-minded people.[16] At the end of the day, it must be social media platforms' responsibility to monitor the proliferation of objectively false information with the capacity to spur dangerous reactions beyond just the screen.[17]

I. THE EVOLUTION OF SECTION 230

A fundamental principle of the First Amendment is ensuring all people have access to places where they can speak, listen, and engage with others.[18] In the past, streets and parks served as quintessential forums within which individuals exercised their First Amendment rights.[19] The internet's advent, however, created

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15 *See infra* note 232.

16 *See generally* Force v. Facebook, Inc., 934 F.3d 53 (2d Cir. 2019) (providing Section 230(c) immunity to Facebook for its alleged assistance to Hamas terrorist attacks, where Facebook's "matchmaking" algorithms connected members of the Hamas group).

17 *See, e.g.*, Greg Miller et al., *A Mob Insurrection Stoked by False Claims of Election Fraud and Promises of Violent Restoration*, WASH. POST (Jan. 9, 2021, 8:49 PM), https://www.washingtonpost.com/national-security/trump-capitol-mob-attack-origins/2021/01/09/0cb2cf5e-51d4-11eb-83e3-322644d82356_story.html [https://perma.cc/6Q2A-CKHD].

18 *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).

19 *See id.*

difficulties. Were all websites subject to the same responsibilities and consequences? And did such consequences manifest as publisher liability or distributor liability? Was there a distinction between websites that moderated content, as opposed to those that did not? Following two cases whose opposite conclusions created an insoluble rift in website liability, Congress sought to resolve these questions by enacting Section 230 of the CDA. But, with new solutions came new problems.

To lay the foundation for Justice Thomas's later critique, this Part begins by briefly describing the early stages of the internet and the cases that gave rise to Section 230. It then evaluates the first case to interpret Section 230 after its enactment which opened the door to broad statutory interpretations that prevail today.

A. The Internet as the New Public Forum

The Supreme Court recognizes that the most important place for individuals to exchange views in today's society is cyberspace: "the 'vast democratic forums of the Internet' in general, and social media in particular."[20] Americans use social media to engage in a wide array of topics "as diverse as human thought."[21]

In the internet's early stages, courts faced the difficult task of trying to fit ISPs within the frameworks of traditional common law publisher-distributor liability.[22] Under this framework, a party is liable for distributing defamatory material if it has *knowledge* of the

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[20] *Id.* (quoting Reno v. ACLU, 521 U.S. 844, 868 (1997)).

[21] *Id.* at 1735–36 (quoting *Reno*, 521 U.S. at 870 (internal quotations omitted)).

[22] *See* Stephanie Blumstein, *The New Immunity in Cyberspace: The Expanded Reach of the Communications Decency Act to the Libelous "Re-Poster,"* 9 B.U. J. SCI. & TECH. L. 407, 410 (2003) (citing Andrew J. Slitt, Note, *The Anonymous Publisher: Defamation on the Internet After* Reno v. American Civil Liberties Union *and* Zeran v. American Online, 31 CONN. L. REV. 389, 395 (1998)) ("Fundamental to considering cyber-defamation, courts have had to determine whether to apply to a defendant the standard of liability for a publisher or a distributor."); Michelle J. Kane, Note, Blumenthal v. Drudge, 14 BERKELEY TECH. L.J. 483, 487 (1999) ("With the advent of the Internet, courts struggled to stretch defamation law to cover statements made in cyberspace."); Kean J. DeCarlo, *Tilting at Windmills: Defamation and the Private Person in Cyberspace*, 13 GA. ST. U. L. REV. 547, 551 (1997) (noting that the difficulty with applying common law frameworks in the context of internet postings stems from the internet's analogous characteristics with both traditional publishers and distributors, each carrying separate liability schemes).

defamatory content, yet fails to remove it.[23] Therefore, unless the party knows or has reason to know of the defamatory material, it cannot be held liable.[24] Newsstands and bookstores are paradigmatic examples of entities subject to distributor liability.[25] On the other hand, a party is liable for publication of defamatory material if it exercises editorial control or judgment over the published content.[26] Traditional examples include magazines and newspapers.[27] Courts employ a sliding scale from distributor to publisher liability depending on the degree of editorial control the disseminator exerted.[28]

The digital age's new landscape consisted of myriad online services.[29] Different services included extensive file libraries containing texts and images, bulletin boards providing spaces for users to post messages for others to read, and discussion groups facilitating group conversations between participants.[30] Some websites allowed users to freely post on the online platform without review or edits

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[23] *See* Sarah Beckett Boehm, Note, *A Brave New World of Free Speech: Should Interactive Computer Service Providers Be Held Liable for the Material They Disseminate?*, 5 RICH. J. L. & TECH. 7, ¶ 6 (1998), http://law.Richmond.edu/jolt/v5i2/boehm.html [https://perma.cc/TN5M-DG6S].

[24] *See* Walter Pincus, *The Internet Paradox: Libel, Slander, & the First Amendment in Cyberspace*, 2 GREEN BAG 2d 279, 280 (1999); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113 (5th ed. 1984).

[25] *See* Pincus, *supra* note 24.

[26] *See* DeCarlo, *supra* note 22, at 552. Publishers can be held liable for defamatory statements contained in their works even without proof of specific knowledge of the defamatory statement's inclusion. KEETON ET AL., *supra* note 24.

[27] *See* DeCarlo, *supra* note 22, at 552.

[28] *See id.* (noting that the general rule was that "the more discretion a disseminator of news has to modify the published information, the higher is the disseminator's duty of care and corresponding liability."); Brent Skorup & Jennifer Huddleston, *The Erosion of Publisher Liability in American Law, Section 230, and the Future of Online Curation*, 72 OKLA. L. REV. 635, 639 (2020) ("A sliding scale for liability developed, based on the degree to which the transmitter or publisher edited the statement."); Blumstein, *supra* note 22, at 409 ("Courts will impose varying degrees of liability depending on the amount of editorial control a defendant possessed.").

[29] *See, e.g.*, Alina Selyukh, *The Big Internet Brands of the '90s—Where Are They Now?*, NPR (July 25, 2016, 4:41 PM), https://www.npr.org/sections/alltechconsidered/2016/07/25/487097344/the-big-internet-brands-of-the-90s-where-are-they-now [https://perma.cc/PST3-RDWB] (discussing different ISPs in the early days of the internet).

[30] *See* Matthew C. Siderits, *Defamation in Cyberspace: Reconciling* Cubby Inc. v. CompuServe, Inc. *and* Stratton Oakmont v. Prodigy Services Co., 79 MARQ. L. REV. 1065, 1065 n.2, 1071 (1996).

from the host site.[31] Others engaged in more involved editorial functions, including deleting posts altogether.[32] Thus, the early 1990s saw an asymmetrical application of intermediary liability to ISPs, ultimately spurring the creation of Section 230 of the CDA.[33]

B. Background of Section 230

The first case to address whether an ISP is subject to either publisher or distributor liability came in 1991. In *Cubby, Inc. v. CompuServe Inc.*, a CompuServe competitor sued the company for libel, citing allegedly defamatory statements posted on one of CompuServe's special-interest forums.[34] At the time, CompuServe hosted an online general information service through which subscribers could access thousands of outside sites and special-interest forums.[35] CompuServe did not remove or alter any content posted by users on its site.[36] Accordingly, the court compared CompuServe to a bookstore, a common example of a distributor of information, because it did not exert any editorial control.[37] Under this framework, CompuServe only faced liability as a distributor if it had either knowledge or reason to know of the allegedly defamatory content

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31 *See id.* at 1074 (noting that CompuServe had "no power to review the contents" of a publication it hosted on its site before it was uploaded).

32 *See, e.g.*, Peter H. Lewis, *Personal Computers: An Atlas of Information Services*, N.Y. TIMES (Nov. 1, 1994), https://www.nytimes.com/1994/11/01/science/personal-computers-an-atlas-of-information-services.html [https://perma.cc/39VP-MPMT] (noting that in its early days, Prodigy, among the first ISPs, censored objectionable messages posted by users on their communal bulletin boards).

33 *See infra* note 45 and accompanying text.

34 Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 137 (S.D.N.Y. 1991).

35 *Id.* CompuServe's special-interest forums were comprised of electronic bulletin boards, interactive online conferences, and topical databases. *Id.* The special-interest forum at issue in this case was called the Journalism Forum. *Id.* The Journalism Forum published a daily newsletter, *Rumorville USA*, that reported on the journalism industry. *Id. Rumorville USA* posted the allegedly defamatory comments. *Id.*

36 *Id.* ("CompuServe has no opportunity to review Rumorville's contents before [it is uploaded] into CompuServe's computer banks, from which it is immediately available to approved . . . subscribers.").

37 *Id.* at 140 ("CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand . . . .").

before publishing.[38] It was undisputed that CompuServe had neither.[39] Thus, the court held CompuServe immune from all liability.[40]

Four years later, another New York court faced a similar question, yet took a different approach. In *Stratton Oakmont, Inc. v. Prodigy Services Co.*,[41] the court recognized heightened liability where Prodigy, a web service that hosted online bulletin boards, made clear it moderated content on its online message boards.[42] The court found that Prodigy's "conscious choice, to gain the benefits of editorial control, [sic] opened it up to a greater liability than CompuServe and other computer networks that [made] no such choice."[43] Through this holding, the court extended common law publisher liability to online services.[44]

Shortly after the *Stratton Oakmont* decision, a group of ISPs complained to Congress about the practical consequences they faced in the case's wake.[45] If the sites attempted to filter content—even in good faith[46]—they would subject themselves to the heightened "publisher" standard of liability.[47] Thus, they threatened to adopt a

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38 *Id.* at 139 ("[The knowledge requirement] is deeply rooted in the First Amendment, made applicable to the states through the Fourteenth Amendment.").

39 *Id.* at 141.

40 *Id.* at 141–42.

41 Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

42 *Id.* at *4 (finding that Prodigy "held itself out to the public and its members as controlling the content of its computer bulletin boards"). Prodigy's Vice President and General Counsel at the time of the suit, however, denies that Prodigy was actively screening and monitoring postings from its bulletin boards. *See* Marc Jacobson, *Prodigy: It May Be Many Things to Many People, but It Is Not a Publisher for Purposes of Libel, and Other Opinions*, 11 ST. JOHN'S J. LEGAL COMMENT. 673, 676 (1996). Jacobson maintains that Prodigy did not screen material itself, but rather employed screening software that automatically blocked postings containing one of the "seven dirty words," as pronounced by the Supreme Court in FCC. v. Pacifica Found., 438 U.S. 726, 729 (1978). Jacobson, *supra*, at 677.

43 *Stratton Oakmont*, 1995 WL 323710, at *5.

44 *See* Catherine Tremble, *Wild Westworld: Section 230 of the CDA and Social Networks' Use of Machine-Learning Algorithms*, 86 FORDHAM L. REV. 825, 832 (2017).

45 *See* Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH. 569, 594 (2001).

46 *See* Tremble, *supra* note 44, at 832. In *Stratton*, Prodigy's automated screening tool that amounted to editorial control was used to screen for offensive language and remove offending content. *Id.*

47 *See* Blumstein, *supra* note 22, at 411–12.

purely "hands-off" approach to ensure that courts would consider them distributors rather than publishers.[48] Under *Stratton Oakmont*'s new liability scheme, ISPs were better served by leaving offensive and defamatory content published by its users online, as removing such content created liability.[49]

Congress recognized it could not reconcile a higher standard of liability for publisher-ISPs attempting to monitor offensive content with distributor-ISPs that "let anything go."[50] This asymmetrical liability scheme—coupled with increasing public concern about the rise of pornography on the internet[51]—prompted legislative reform concerning internet regulation.[52]

Senator James Exon originally introduced the CDA, aiming to purify the internet[53] and keep it from transforming into a "red light district."[54] Senator Exon was primarily motivated to curtail growing access to pornography resulting from the internet's increasing prominence.[55] House Representatives Jim Cox and Ron Wyden similarly pushed for protection from indecency but were more concerned with an overly government-regulated internet.[56] With these goals in mind, the two representatives introduced an amendment to the CDA—Section 230.[57]

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48 *See* Freiwald, *supra* note 45, at 593; JOEL R. REIDENBERG ET AL., FORDHAM CTR. ON L. & INFO. POL'Y, SECTION 230 OF THE COMMUNICATIONS DECENCY ACT: A SURVEY OF THE LEGAL LITERATURE AND REFORM PROPOSALS 5 (2012), http://www.fordham.edu/download/downloads/id/1825/clip_section_230_of_the_communications_decency_act_report.pdf [https://perma.cc/4GS7-DDGL] [hereinafter *CLIP Survey*].

49 *See* Pincus, *supra* note 24, at 282.

50 *CLIP Survey*, *supra* note 48, at 5–6.

51 *See* Freiwald, *supra* note 45, at 594 n.110; *see generally, Cyberporn and Children: The Scope of the Problem, the State of the Technology, and the Need for Congressional Action: Hearings on S. 892 Before the S. Comm. on the Judiciary*, 104th Cong. 169 (1995) (demonstrating widespread concern about online pornography).

52 *See* Freiwald, *supra* note 45, at 594–95.

53 *See* Ellen Messemer, *Sen. Dole Backs New Internet Antiporn Bill*, NETWORK WORLD, June 12, 1995, at 12.

54 Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMMC'NS L.J. 51, 53 (1996).

55 *See* Tremble, *supra* note 44, at 833.

56 *See* 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Wyden) (stating that the law should provide relief from indecency on the web without involving Federal regulation).

57 *See* Tremble, *supra* note 44, at 834.

Section 230 aimed to reverse the liability scheme established in *Stratton Oakmont* and encourage ISPs to moderate offensive content in good faith, without fear of punishment.[58] This immunity is specifically addressed in Section 230(c), titled "Protection for 'Good Samaritan' Blocking and Screening of Offensive Material."[59] Section 230(c) has two parts: (1) "Treatment of publisher or speaker" and (2) "Civil liability."[60] Section 230(c)(1) provides that "[n]o 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."[61] This provision is famously referred to as the "twenty-six words that created the Internet."[62] It expressly precludes courts from treating ISPs as publishers within the traditional liability framework.[63] Next, Section 230(c)(2) removes liability for any good-faith restriction for objectionable material, even if such material is constitutionally protected.[64] It also removes liability for providing users the tools to restrict such material.[65]

C. Zeran *and Expansive Immunity*

Within one year of the CDA's enactment, the Supreme Court struck down portions of the Act as unconstitutional under the First Amendment.[66] Section 230, however, remained intact.[67] Section 230 has since ignited significant debate among scholars regarding its interpretation, application, and implications in an increasingly virtual

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58 H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep) ("One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material."); *see also* David Lukmire, *Can the Courts Tame the Communications Decency Act?: The Reverberations of* Zeran v. America Online, 66 N.Y.U. ANN. SURV. AM. L. 371, 380 (2010).

59 47 U.S.C. § 230(c) (2012).

60 *Id.*

61 *Id.* § 230(c)(1).

62 *See generally* JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET (2017).

63 *See* Skorup & Huddleston, *supra* note 28, at 651.

64 47 U.S.C. § 230(c)(2)(A).

65 *Id.* § 230(c)(2)(B).

66 *See* Reno v. ACLU, 521 U.S. 844, 849 (1997).

67 *See id.* at 858–59.

world.[68] The first major—and most significant[69]—interpretation of Section 230 came from the Fourth Circuit in *Zeran v. American Online, Inc*.[70] There, the *Zeran* court focused on policy reasons for establishing broad immunity for ISPs under Section 230(c)(1) and interpreted the statute to bar all tort-based liability.[71]

In *Zeran*, an anonymous user posted a message on AOL's bulletin board advertising t-shirts for sale that contained slogans in support of the Oklahoma City Federal Building bombing.[72] The post instructed interested purchasers to contact Kenneth Zeran and listed his personal contact information.[73] As a result, Zeran received repeated calls, hate mail, and death threats.[74] Zeran notified AOL of the defamatory "hoax" messages, demanded AOL remove the posts, and asked for a retraction.[75] AOL removed the original posting but did not post a retraction.[76] Over the next five days, an anonymous user continued to post messages with similar information, which AOL failed to screen.[77] Zeran received threatening calls and messages for the ensuing month.[78]

Zeran sued AOL for the defamatory postings initiated by a third party.[79] He argued that once he notified AOL of the hoax messages, AOL had a duty to promptly remove the postings, issue a retraction, and properly screen any future defamatory material.[80] In response, AOL raised Section 230 as a defense to liability for its role as

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68 *See CLIP Survey*, *supra* note 48, at 8.

69 *See* Eric Goldman & Jeff Kosseff, *Commemorating the 20th Anniversary of Internet Law's Most Important Judicial Decision*, *in* ZERAN V. AMERICAN ONLINE 6, 6 (Eric Goldman & Jeff Kosseff eds., 2020) (ebook) ("[*Zeran*] is widely considered the most important Internet Law ruling ever.").

70 129 F.3d 327, 328 (4th Cir. 1997).

71 *Id.* at 330 (noting that immunity applies "to any cause of action" that seeks to impose liability on ISPs for information originating with users); *see also CLIP Survey*, *supra* note 48, at 10.

72 *Zeran*, 129 F.3d at 329.

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.*

77 *Id.*

78 *Id.*

79 *Id.* at 330.

80 *Id.*

publisher of the third-party content.[81] Zeran claimed that AOL functioned like a distributor, not a publisher.[82] Since Section 230 only protects publishers, Zeran argued, AOL had no defense against distributor liability.[83] The Fourth Circuit rejected Zeran's distinction between publisher and distributor immunity.[84] The court found Zeran's narrower reading of "publisher" as wholly separate from "distributor" to be inconsistent with Congress's policy goals.[85] Moreover, it found that permitting liability upon notice for distributors defeated the dual purposes advanced by Section 230: promoting free speech on the internet and protecting the internet from government regulations.[86]

The Fourth Circuit's decision in *Zeran* influenced subsequent judicial interpretations of Section 230 protections in two important ways. First, its broad interpretation of "publisher" expanded the statute's reach of protection.[87] Second, the court indicated that Section 230 protects defendants from *any* cause of action in which they are the "publisher or speaker of any information" provided by a third-party user.[88] Untethering Section 230 from the defamation context created a world in which defendants could invoke Section 230 immunity in almost all areas of law.[89]

In the twenty-six years since Section 230's enactment, courts have consistently expanded the statute's protection by broadly

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81 *Id.*

82 *Id.* at 331.

83 *Id.* at 331–32.

84 *Id.* at 332 ("[Distributor] liability is merely a subset, or a species, of publisher liability, and is therefore also foreclosed by [Section] 230.").

85 *Id.* at 333 (noting that if ISPs were subject to liability upon notice, i.e., distributor liability, this would create an impossible burden on ISPs and defeat the dual purposes advanced by Section 230 of the CDA).

86 *Id.* (noting that liability upon notice would "reinforce[] service providers' incentives to restrict speech," thereby interfering with the goal to promote free speech on the internet, and also reinforce their incentives to "abstain from self-regulation," thereby creating a greater need for government regulation).

87 *Id.* at 332 (noting that the distinction between "publisher" and "distributor" indicates only that different standards of liability may be applied *within* the larger publisher category and that "distributors are . . . also a type of publisher for purposes of defamation law.").

88 *Id.* at 330–31.

89 Some courts claim there are only two areas of law where Section 230's immunity is inapplicable: intellectual property law and federal criminal law. *See* Tremble, *supra* note 44, at 843.

construing the definition of "publisher."[90] Courts have also generally construed the text of Section 230(c)(1) in favor of immunity.[91] The Supreme Court, however, has yet to take a case interpreting this increasingly debated statute,[92] leading Justice Thomas to write a statement respecting the denial of certiorari in *Malwarebytes v. Enigma Software Group USA, LLC*[93] and making Justice Thomas the first Supreme Court Justice to opine on the statute's application and interpretation. In Justice Thomas's opinion, lower courts have incorrectly expanded Section 230 "beyond the natural reading of the text."[94] Justice Thomas recognized that *Malwarebytes* was not the appropriate case for the Court to interpret Section 230.[95] However, he cautioned that it "behoove[d]" the Court to determine the "correct interpretation" of Section 230 in the future.[96]

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[90] *See, e.g.*, Batzel v. Smith, 333 F.3d 1018, 1030–31 (9th Cir. 2003) (expanding the definition of "publisher" to email listservs); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1121, 1125 (9th Cir. 2003) (expanding the definition of "publisher" to dating websites); Doe v. MySpace, Inc., 474 F. Supp. 2d 843, 849–50 (W.D. Tex. 2007) (expanding the definition of "publisher" to social networking sites), *aff'd*, 528 F.3d 413 (5th Cir. 2008); Blumenthal v. Drudge, 992 F. Supp. 44, 52–53 (D.D.C. 1998) (expanding the definition of "publisher" to gossip sites).

[91] *See, e.g.*, Marshall's Locksmith Serv., Inc. v. Google, LLC, 925 F.3d 1263, 1267 (D.C. Cir. 2019) ("Congress inten[ded] to confer broad immunity for the re-publication of third-party content."); Doe v. Backpage.com, LLC, 817 F.3d 12, 18 (1st Cir. 2016) ("There has been near-universal agreement that [S]ection 230 should not be construed grudgingly."); Jones v. Dirty World Ent. Recordings, LLC, 755 F.3d 398, 408 (6th Cir. 2014) (quoting Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1174 (9th Cir. 2008) (en banc)) ("[C]lose cases . . . must be resolved in favor of immunity."); Doe v. MySpace, Inc., 528 F.3d 413, 418 (5th Cir. 2008) ("Courts have construed the immunity provisions in [Section] 230 broadly in all cases arising from the publication of user-generated content."); Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1321 (11th Cir. 2006) ("The majority of federal circuits have interpreted [Section 230] to establish broad . . . immunity."); *Carafano*, 339 F.3d at 1123 ("[Section] 230(c) provides broad immunity for publishing content provided by third parties." (citation omitted)); Zeran v. Am. Online, 129 F.3d 327, 330 (4th Cir. 1997) ("Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium.").

[92] *See* Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 13 (2020) (Thomas, J., statement respecting denial of certiorari) ("[The Court has] never interpreted this provision.").

[93] *Id.*

[94] *Id.* at 18.

[95] *Id.* at 14.

[96] *Id.* at 18.

II. JUSTICE THOMAS'S TAKE: *MALWAREBYTES* AND *KNIGHT V. TRUMP*

The Supreme Court has never interpreted the reach of Section 230.[97] This has not stopped Justice Thomas, however, from publishing his own thoughts on the statute and the overly broad interpretation he believes courts have read into it.[98] The first pass Justice Thomas took at Section 230, as will be discussed in Part II.A, came in his statement respecting the denial of certiorari in *Malwarebytes*.[99] This statement made *Malwarebytes* the first case to produce Section 230 commentary from the Supreme Court. A year later, Justice Thomas again wrote about Section 230 but, as will be discussed in Part II.B, this time he included specific proposals calling for its reform.[100] In this statement, Justice Thomas wholly rejected the Second Circuit's application of the public forum doctrine in the context of digital platforms.[101] He instead pushed for the application of two alternative common law doctrines: the common carrier doctrine and the public accommodations doctrine.[102] In both proposals, Justice Thomas argued that digital platforms' resemblance to these legal doctrines gives legislators strong arguments for similarly regulating digital platforms.[103]

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97 While the Supreme Court struck down the anti-indecency portion of the CDA in *Reno*, that did not affect the separate provision of Section 230. *See* Reno v. ACLU, 521 U.S. 844, 849 (1997). The Supreme Court has previously denied certiorari to Section 230 cases, including *Backpage.com* and *Force*. *See generally* Backpage.com, LLC v. Dart, 807 F.3d 229 (7th Cir. 2015), *cert. denied*, 137 S. Ct. 46 (2016); Force v. Facebook, Inc., 934 F.3d 53 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2761 (2020). However, the two cases discussed in this Part comprise two of the three cases from which a Justice has issued further comment on Section 230. The third and final case producing discussion from Justice Thomas is *Doe v. Facebook, Inc. See* 142 S. Ct. 1087 (2022) (Thomas, J., statement respecting denial of certiorari).

98 *See Malwarebytes, Inc.*, 141 S. Ct. at 13 (2020) (Thomas, J., statement respecting denial of certiorari) ("[M]any courts have construed the law broadly to confer sweeping immunity on some of the largest companies in the world.").

99 *Id.*

100 *See* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1222 (2021) (Thomas, J., concurring).

101 *Id.* at 1222, 1225.

102 *Id.* at 1222–25.

103 *Id.* at 1226 ("The similarities between some digital platforms and common carriers or places of public accommodation may give legislators strong arguments for similarly regulating digital platforms.").

A. Malwarebytes

In *Malwarebytes*, two competing software companies enabled internet users to filter unwanted content from their computers, such as that posing security risks.[104] Enigma Software Group ("Enigma") alleged that Malwarebytes reconfigured its software to hamper users from accessing Enigma's products, thereby diverting users to use Malwarebytes.[105] In doing so, Enigma alleged that Malwarebytes engaged in unlawful anticompetitive conduct.[106] Malwarebytes responded by invoking a provision of Section 230 that immunized computer-software providers from liability for providing tools "to restrict access to material" that it "considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[107]

The Ninth Circuit previously recognized that this provision established a subjective standard regarding what online material is "objectionable."[108] The court, however, distinguished *Malwarebytes* from the broad recognition of immunity for subjectively objectionable content found in *Zango Inc. v. Kaspersky Lab, Inc*.[109] *Zango* involved a software company—similar to those in *Malwarebytes*—and a program developer who provided users access to a variety of online entertainment.[110] *Malwarebytes*, on the other hand, involved two *competitors* in the software market.[111] Highlighting this crucial difference, the *Zango* court held that the phrase "otherwise objectionable" did not include software the provider found objectionable for anticompetitive reasons.[112]

Respecting the Court's denial of certiorari in *Malwarebytes*, Justice Thomas issued a statement advocating for future review of

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104 Enigma Software Grp. USA, LLC v. Malwarebytes, Inc., 946 F.3d 1040, 1047 (9th Cir. 2019).

105 *Id.* at 1044.

106 *Id.* at 1048.

107 *Id.* at 1051 (citing 47 U.S.C. § 230(c)(2)).

108 Zango, Inc. v. Kaspersky Lab, Inc., 568 F.3d 1169, 1173 (9th Cir. 2009).

109 *Id.*

110 *Id.* at 1170.

111 *Enigma*, 946 F.3d at 1050 ("This is the first [Section] 230 case we are aware of that involves direct competitors.").

112 *Id.* at 1045.

Section 230.[113] Although the issue in *Malwarebytes* only concerned Section 230(c)(2)'s safe harbor provision of immunity for restrictions made or facilitated in good faith, Justice Thomas called for a revision of the entire Section.[114] In his statement, Justice Thomas did not hide his disapproval of the judicial interpretation of Section 230 since its enactment.[115]

First, Justice Thomas questioned the *Zeran* court's interpretation of publisher liability as subsuming distributor liability.[116] He pointed to a separate CDA provision, Section 502,[117] that explicitly imposed distributor liability for knowingly displaying obscene material to children.[118] He found it "odd" to understand the CDA as simultaneously eliminating distributor liability under Section 230 yet imposing it under Section 502.[119] Justice Thomas also relied on Congress's explicit goal of overturning the *Stratton Oakmont* decision[120] to preclude the term "publisher" from having two tiers of liability.[121] Since *Stratton* used the terms "publisher" and "distributor" to distinguish the two categories, rather than "primary publisher" and "secondary publisher," Congress likely intended for the word "publisher" as used in Section 230 to mirror the *Stratton Oakmont* distinction.[122] His final textualist argument queried Congress's

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[113] *See generally* Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13 (2020) (Thomas, J., statement respecting denial of certiorari).

[114] *Id.* at 18 (calling for restraint of the "sweeping immunity" courts have read into Section 230 as a whole).

[115] *Id.* at 14 ("Courts have long emphasized nontextual arguments when interpreting [Section] 230, leaving questionable precedent in their wake.").

[116] *Id.* at 15 (stating that "there are good reasons to question this interpretation.").

[117] Communications Decency Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 133–34 (1996) (codified at 47 U.S.C. § 223(d)).

[118] *Malwarebytes*, 141 S. Ct. at 15 (Thomas, J., statement respecting denial of certiorari).

[119] *Id.* Justice Thomas fails to point out, however, that Section 502, now codified at 47 U.S.C. Section 223(d), applies specifically in the context of underage children, while Section 230 applies more generally. *See* 47 U.S.C. § 223(d). This provision is titled "Sending or displaying offensive material to persons under 18." *Id.*

[120] H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep) (commenting on Sections 509 and 230(c)(1)).

[121] *Malwarebytes*, 141 S. Ct. at 15 (Thomas, J., statement respecting denial of certiorari).

[122] *Id.* at 15–16. One prominent scholar in Internet Law interprets the reference to *Stratton Oakmont* and the legislative intent behind Section 230 as Justice Thomas questioning Congress's intent to overturn the *Stratton Oakmont* decision. Eric Goldman, *Justice Thomas Writes a Misguided Anti-Section 230 Statement "Without the Benefit of Briefing"*—Enigma v. Malwarebytes, TECH. & MKTG. L. BLOG (Oct. 20, 2020),

decision against "simply creat[ing] a categorical immunity in [Section] 230(c)(1)" to eliminate both publisher and distributor liability simultaneously if that is what it intended in the first place.[123] Because this categorical language appears in the very next subsection,[124] Justice Thomas argued that the difference in language meaningfully supported the separation of "distributor" and "publisher" liability.[125]

Second, Justice Thomas argued that it was "dubious" "to say that editing a statement and adding commentary [sic] does not 'creat[e] or develo[p]' the final product, even in part."[126] He argued that ISPs that take part in creating or developing the final product through traditional editorial functions necessarily fell under the statute's definition of an "information content provider," and must therefore be held liable under Section 230(c)(1).[127]

Third, Justice Thomas argued for a narrow interpretation of Section 230(c)(1) because to read it broadly rendered Section 230(c)(2)—the Good Samaritan provision—superfluous.[128] If Section 230(c)(1) immunized companies from liability to protect *any* decision to edit or remove content, that provision swallowed Section

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https://blog.ericgoldman.org/archives/2020/10/justice-thomas-writes-a-misguided-anti-section-230-statement-without-the-benefit-of-briefing-enigma-v-malwarebytes.htm [https://perma.cc/FJK5-EG72]. Because Goldman's interpretation of Justice Thomas's statement supports the alternative position that publisher and distributor liability both collapse into publisher liability, this Author argues that Justice Thomas referenced the legislative history behind Section 230 to reinforce Congress's stated goal to overturn *Stratton Oakmont*, not to question it.

123 *Malwarebytes*, 141 S. Ct. at 16 (Thomas, J., statement respecting denial of certiorari).

124 47 U.S.C. § 230(c)(2).

125 *Malwarebytes*, 141 S. Ct. at 16 (Thomas, J., statement respecting denial of certiorari) (citing Russello v. United States, 464 U.S. 16, 23 (1983)).

126 *Id.*

127 *Id.* (citing 47 U.S.C. § 230(f)) (emphasizing that an information content provider includes "anyone 'responsible, *in whole or in part*, for the creation or development' of the content," and rejecting the interpretation that traditional editorial functions cover "only substantial or material edits and additions."). Justice Thomas incorrectly cherry-picks the definition provided in Section 230(f)(3). He equates anyone responsible, in whole or in part, for the creation or development of a *final product* with the statute's actual definition: "any person or entity that is responsible, in whole or in part, for the creation or development of *information provided*." 42 U.S.C. § 230(f)(3) (emphasis added). The provision itself does not target contributors of the final *product*.

128 *Malwarebytes*, 141 S. Ct. at 16–17 (2020) (Thomas, J., statement respecting denial of certiorari).

230(c)(2)'s protection for editorial functions in good faith.[129] Justice Thomas cited *Barnes v. Yahoo!, Inc.* to illustrate an instance where, in his opinion, a court misconstrued the broad reach of Section 230(c)(1).[130] Justice Thomas warned that this broad interpretation has negative real-world effects, like protecting a company that removes content based on racial discrimination.[131]

Justice Thomas ended his statement[132] respecting the denial of certiorari by conceding that he proceeded entirely "[w]ithout the benefit of briefing on the merits."[133] That he made such strong critiques of Section 230 as a whole without any briefing on the merits is reason for pause.

B. Knight First Amendment Institute v. Trump

In 2017, the Knight First Amendment Institute sued then-President Trump for blocking several users from interacting with his Twitter account, @realDonaldTrump, due to their criticism of his presidency and policies.[134] The Knight Institute alleged that Trump's Twitter account constituted a "public forum" under the First Amendment because he regularly used his account to conduct official business in his capacity as President of the United States.[135]

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[129] *Id.* at 17.

[130] *Id.* at 17 (citing Barnes v. Yahoo!, Inc., 570 F.3d 1096 (9th Cir. 2009)). Contrary to Justice Thomas's claim, this case explains the different and independent applications of the two provisions he claims are impermissibly collapsed with a broad reading of Section 230(c)(1). *See generally Barnes*, 570 F.3d 1096. The *Barnes* court found that Section 230(c)(1) provides complete immunity for all publication decisions for content generated entirely by third parties. *Id.* at 1105. Section 230(c)(2), on the other hand, provides an additional shield for screening or removal actions done in good faith. Crucially, the court noted that any provider of an interactive computer service can take advantage of Section 230(c)(2) liability, even if unprotected by Section 230(c)(1). *Id.*

[131] *Malwarebytes*, 141 S. Ct. at 18 (Thomas, J., statement respecting denial of certiorari) (citing Sikhs for Just., Inc. v. Facebook, Inc., 697 F. App'x 526 (9th Cir. 2017), *aff'g*, 144 F. Supp. 3d 1088 (N.D. Cal. 2015)).

[132] Justice Thomas's fourth and final argument in *Malwarebytes* is a critique of the extension of Section 230's applicability to traditional product-defect claims. *Id.* at 17–18 (Thomas, J., statement respecting denial of certiorari). The main case discussed in this Note, *Biden v. Knight*, involves a First Amendment speech claim. Thus, the discussion is outside the scope of this Note.

[133] *Id.* at 18.

[134] Knight First Amend. Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541, 549, 553–54 (S.D.N.Y. 2018).

[135] *Id.* at 574–75.

Moreover, the statements he made constituted official statements from the President.[136] The Second Circuit affirmed the lower court's summary judgment in favor of the Knight Institute.[137] It agreed with the lower court's holding that Trump's account constituted a "public forum" because it was intentionally created to be used for public discussion and official purposes relating to the presidential role.[138] Accordingly, selective exclusion based on viewpoint amounted to viewpoint discrimination in violation of the First Amendment.[139]

The Supreme Court granted Trump's petition for a writ of certiorari in April 2021, months after President Biden assumed office.[140] Because Trump was no longer President, the Court swiftly vacated the judgment and ordered the Second Circuit to dismiss the case as moot in a two-sentence opinion.[141] Justice Thomas, however, took this opportunity to readdress his discontent for courts' interpretations of Section 230.[142] Moreover, in a move that arguably toes the line between the separation of powers, Justice Thomas encouraged legislators to reconsider digital platforms through the frameworks of historical legal doctrines.[143]

Biden v. Knight is the second case to produce a substantive statement from a Supreme Court Justice regarding the reach of Section 230's immunity, albeit from the same Justice.[144] It is the first,

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136 *See* Elizabeth Landers, *White House: Trump's Tweets Are 'Official Statements*,*'* CNN (June 6, 2017, 4:37 PM), https://www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/ [https://perma.cc/7HAH-Z7JF].

137 Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 230 (2d Cir. 2019).

138 *Id.* at 237.

139 *Id.* at 234 ("[I]n blocking the Individual Plaintiffs the President engaged in prohibited viewpoint discrimination . . . .").

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

141 *Id.* at 1220–21. In vacating the Second Circuit's opinion, the Court importantly eliminated any precedent for treating government officials' private social media accounts open to the public as public forums subject to the First Amendment. *Id.*

142 *Id.* at 1221. Recall that Justice Thomas's first expression of discontent with Section 230 appeared in his statement respecting the Court's denial of certiorari in *Malwarebytes*. *See supra* Part II.A.

143 *Knight*, 141 S. Ct. at 1226 (Thomas, J., concurring) ("The similarities between some digital platforms and common carriers or places of public accommodation may give legislators strong arguments for similarly regulating digital platforms.").

144 *See supra* Part II.A.

however, to address the statute specifically within the context of the modern digital age at the Supreme Court level. In his concurrence, Justice Thomas conceded that the principal legal difficulty surrounding digital platforms is that "applying old doctrines to new digital platforms is rarely straightforward."[145] After rejecting the Second Circuit's initial determination that Trump's Twitter account operated as a constitutionally protected public forum,[146] Justice Thomas acknowledged that part of the difficulty in navigating digital platforms through frameworks of established legal doctrines stemmed from the incongruity between privately controlled online content and publicly available platforms.[147] Justice Thomas then proposed solutions analogous to two common law doctrines that limit the right of a private company to exclude.[148]

The following Sections evaluate Justice Thomas's perspective on three legal doctrines he discussed in his *Biden v. Knight* concurrence as applied to digital platforms: (1) the public forum doctrine; (2) the common carrier doctrine; and (3) the public accommodations doctrine.

1. Public Forum Doctrine

Justice Thomas rejected the notion that a private account on social media can create a constitutionally protected public forum.[149] He argued that the ultimate control lay in the hands of the privately controlled company and not the private user.[150] He further argued that the Second Circuit's conclusion that Trump's Twitter account constituted a public forum was "in tension with, among other things, [the Court's] frequent description of public forums as 'government-controlled spaces.'"[151] Drawing from previous Court dicta, Justice Thomas defined a designated public forum as "property that the

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145 *Knight*, 141 S. Ct. at 1221 (Thomas, J., concurring).

146 *Id.* at 1222.

147 *Id.*

148 *Id.*

149 *See id.* (noting that designation as a public forum depends on governmental control over that space, and here, "[a]ny control Mr. Trump exercised over the account greatly paled in comparison to Twitter's authority").

150 *See id.* ("Whether governmental use of private space implicates the First Amendment often depends on the government's control over that space.").

151 *Id.* (quoting Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018)).

State has opened for expressive activity by part or all of the public."[152]

First Amendment application in the context of governmental use of a private space "depends on the government's control over that space."[153] Relying on the Court's reasoning in *Southeastern Promotions, Ltd. v. Conrad*,[154] Justice Thomas used two scenarios to illustrate the difference between a government-controlled and non-government-controlled space. In the first scenario, a government agency rents out a conference room of a hotel to hold a public hearing regarding the agency's proposed regulation.[155] Here, the First Amendment applies because the government controls the space. Accordingly, the government is prohibited from excluding anyone in opposition to its proposal. In the second scenario, government officials informally gather with constituents in the hotel bar.[156] Here, the hotel retains control of the space. Thus, the government officials are permitted to request removal of individual patrons who hold views with which they disagree.

Private users of Twitter—the digital platform at issue in *Knight v. Trump*—have control over who can interact with their content and to what extent.[157] But, Twitter also reserves the right to completely remove a user's account altogether.[158] In its Terms of Service, Twitter claims the unrestricted authority to "remove any person from the platform—including the President of the United States—'at any time for any or no reason.'"[159]

In Justice Thomas's view, "private parties control the avenues for speech"[160] in the context of digital platforms. This resembles the second scenario. In the case of the privately-owned Twitter account,

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152 *Id.* at 1221–22 (quoting Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992)).

153 *Id.* at 1222.

154 420 U.S. 546, 555 (1975) (holding that a municipal theater's prohibition of a theater company's show constituted an unlawful prior restraint, and thus violated the theater company's First Amendment right in the public forum).

155 *Knight*, 141 S. Ct. at 1222 (Thomas, J., concurring).

156 *Id.*

157 *Id.*

158 *Id.* at 1221.

159 *Id.* (citing TWITTER INC., USER AGREEMENT (2020)).

160 *Id.* at 1222.

Justice Thomas viewed Twitter's "unbridled control of [Trump's] account" as sufficient to outweigh any showing of control on Trump's part as a governmental actor acting in his official capacity.[161] Thus, Twitter's comparative power over the account precluded its designation as a public forum. Justice Thomas turned next to offer two other legal doctrines he believed could properly apply.

2. Common Carrier Doctrine

Justice Thomas saw many similarities between digital platforms and traditional common carriers.[162] He listed several factors courts have historically considered in defining common carriers: whether the company holds itself out to provide access to all, the extent of the company's market power, whether the company operates in industries traditionally regarded as common carriers, and whether the company receives any governmental benefits or privileges in exchange for common carrier regulation.[163]

First, Justice Thomas pointed out the common carrier's "general requirement to serve all comers."[164] He rooted this consideration in the historical precedent of our legal system and its British predecessor.[165] In his view, that digital platforms made themselves available to the public supported the application of the common carrier doctrine to these online platforms.[166]

Next, Justice Thomas acknowledged that scholarship is split on whether market power is an adequate indicator of common carriage status.[167] Nonetheless, he argued that the "analogy to common carriers is even clearer for digital platforms that have dominant market share."[168] He provided examples of Facebook and Google's dominance in their respective markets to illustrate that these industries may have substantial barriers to entry.[169]

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161 *Id.*
162 *Id.* at 1224.
163 *See generally id.* at 1222–25.
164 *Id.* at 1222 (internal citations omitted).
165 *Id.*
166 *Id.* at 1224.
167 *Id.* at 1222–23. For examples of the split, see Yoo, *supra* note 14, at 466 nn.7–9 and accompanying text.
168 *Knight*, 141 S. Ct. at 1224 (Thomas, J., concurring).
169 *Id.*

Justice Thomas continued to build his analogy with the "clear historical precedent for regulating transportation and communications networks in a similar manner as traditional common carriers."[170] He emphasized that, at their core, digital platforms are communications networks that carry information from one user to another in the way that all other communications networks do.[171] Just as courts required telegraphs to "serve all customers alike, without discrimination" because of their resemblance to railroad companies and other common carriers, so too should they with digital platforms.[172]

Finally, Justice Thomas suggested that common carrier status may be conferred in exchange for "special government favors."[173] Without explicitly stating so, Justice Thomas is likely referring to the immunity offered in Section 230 as a *quid pro quo* for common carrier status.[174] His opinion made no direct comparison.

In the alternative, Justice Thomas relied on *German Alliance Insurance Co.* v. *Lewis* to argue that common carrier regulations may be justifiably imposed on some industries not historically recognized as common carriers.[175] This pseudo-common carrier status arises when "a business, by circumstances and its nature, . . . rise[s] from private [concern] to be of public concern."[176] Justice Thomas conceded that most things can qualify as matters of "public concern."[177] But he stressed that digital platforms surely met the test for non-common carrier industries subject to common carriage regulations because of their similarity to communications networks, which have been historically recognized as traditional common carriers.[178]

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170 *Id.* at 1223.

171 *Id.* at 1224 ("A traditional telephone company laid physical wires to create a network connecting people. Digital platforms lay information infrastructure that can be controlled in much the same way.").

172 *Id.* at 1223 (quoting Primrose v. W. Union Tel. Co., 154 U.S. 1, 14 (1894)).

173 *Id.*

174 *See* Yoo, *supra* note 14, at 472.

175 *Knight*, 141 S. Ct. at 1223 (Thomas, J., concurring) (citing German All. Insurance Co. v. Lewis, 233 U.S. 389, 411 (1914)).

176 *Id.* (quoting *German*, 233 U.S. at 411).

177 *Id.*

178 *Id.*

3. Public Accommodations Doctrine

In the event that the common carrier analogy does not hold, Justice Thomas proposed that legislatures treat digital platforms like places of public accommodation.[179] Places of public accommodation, like common carriers, hold themselves out to the public.[180] But they "do not 'carry' freight, passengers, or communications" in the way that common carriers do.[181] He defined places of public accommodation as places providing "lodging, food, entertainment, or other services to the public . . . in general."[182] Decisively, Justice Thomas stated that digital platforms "bear resemblance to that definition."[183]

With a notably shorter discussion of the analogy to public accommodations, Justice Thomas hinged the application of the public accommodations doctrine to digital platforms on the "entertainment" they provide to the public.[184] He also briefly cited *Pruneyard Shopping Center v. Robins*, highlighting that the impositions of First Amendment regulations on digital platforms "would not prohibit the company from speaking or force the company to endorse the speech."[185] In the way that this distinction allowed First Amendment protection to outweigh individuals' property right to exclude, Justice Thomas argued that the same should be true of digital platforms.[186]

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[179] *Id.* at 1225 ("Even if digital platforms are not close enough to common carriers, legislatures might still be able to treat digital platforms like places of public accommodation.").

[180] *Id.*

[181] *Id.* at 1223 (internal citation omitted).

[182] *Id.* at 1225 (quoting *Public Accommodation*, BLACK'S LAW DICTIONARY (11th ed. 2019)).

[183] *Id.*

[184] Following his definition of "public accommodation," Justice Thomas provided an additional reference to 42 U.S.C. § 2000a(b)(3). In a parenthetical, he highlighted that this provision "cover[s] places of 'entertainment.'" *Id.*

[185] *Knight*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring) (citing Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980)). In *Pruneyard*, the Court held that a state could properly recognize individual state-protected rights of expression on the property of a privately owned shopping center, open to the public, without violating the shopping center's federally recognized property or First Amendment rights. *Pruneyard*, 447 U.S. at 88. This holding did not compel the private property owner to accept the individuals' views. *Id*. Moreover, the shopping center remained "free to publicly dissociate themselves from the views of the speakers" in question. *Id.*

[186] *Knight*, 141 S. Ct. at 1222–24 (Thomas, J., concurring).

III. FAILED ANALOGIES

In *Biden v. Knight*, Justice Thomas called upon legislators to recognize that digital platforms are "sufficiently akin to common carriers or places of accommodation" such that they should be regulated under either common law framework.[187] The precise definitions of a "common carrier" and a "place of public accommodation," however, are elusive.[188] Moreover, the two concepts are so intertwined that the distinction is slight.[189] Common carriers have historically constituted one of two types of public accommodations.[190] Thus, the latter concept completely subsumes the former. Nonetheless, Justice Thomas treated common carriage and public accommodations as two distinct concepts. Accordingly, this Part addresses each in turn.

A. Social Media Platforms Are Not Common Carriers

Early English common law defined a "common carrier" as "a person [who] holds himself out to carry goods for everyone as a business."[191] Crucially, a carrier that reserves the right to pick and choose its passengers does not assume common carriage status.[192] Common carriage responsibility at common law came from a combination of different factors. Two of the most important factors included the "public-facing" nature of the business and the degree to which it affected the public interest.[193] Social media platforms undoubtedly maintain a "public-facing" nature because "a primary

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187 *Id.* at 1224.

188 *See* Yoo, *supra* note 14, at 465; *see also* Christopher S. Yoo, Essay, *Common Carriage's Domain*, 35 YALE J. ON REGUL. 991, 994–95 (2018) ("Over the years, scholars and courts have repeated[ly] attempted to devise a coherent framework for determining when common carriage should apply, without much success.").

189 *See* Yoo, *supra* note 14, at 479.

190 *Id.* The second type of entity historically and universally accepted as constituting public accommodations is an innkeeper. *See* Bell v. Maryland, 378 U.S. 226, 298 (1964) (Goldberg, J., concurring) (describing the obligation of innkeepers and common carriers to indiscriminately serve all patrons and passengers, respectively, at common law).

191 Alfred Avins, *What Is a Place of "Public" Accommodation?*, 52 MARQ. L. REV. 1, 2 (1968) (quoting Ingate v. Christie, 175 Eng. Rep. 463, 464 (1850)).

192 *See* Hunt v. Clifford, 209 A.2d 182, 183 (Conn. 1965) ("Since passengers were not accepted on this school bus indiscriminately but were restricted to pupils embraced in the contract of transportation, the bus was not being operated as a common carrier of passengers.").

193 *See* Munn v. Illinois, 94 U.S. 113, 125–26 (1876).

function of social-media providers is to receive content from users and in turn to make the content available to other users."[194] This means that the platforms always aim to serve the public. The degree to which an entity affects the public interest is "hardly helpful,"[195] however, because almost all entities could be construed to fit that mark. The most frequently recited factor is whether the business at issue offers its services to the public indiscriminately.[196]

There are two primary explanations why digital platforms do not serve the public indiscriminately in a manner that would confer common carrier status. First, social media platforms narrow their services to those potential users with either a valid phone number or email address. Second, the platforms employ algorithms that create individualized experiences for each user, actively monitoring available content.

The public's ability to enjoy what digital platforms offer is predicated on whether potential users have preexisting phone numbers or email addresses.[197] Accordingly, these platforms do not hold themselves out as available to the entire public. Rather, they are available only to the portion of the public with the requisite contact information. Whether an entity holds itself out as offering services to the public is widely accepted as the crux of common carrier status.[198] Thus, this analogy fails on a crucial tenet of the doctrine.

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194 NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082, 1085 (N.D. Fla. 2021).

195 Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring).

196 *See* Mark A. Hall, *Common Carriers Under the Communications Act*, 48 U. CHI. L. REV. 409, 413 (1981).

197 *See* Force v. Facebook, Inc., 934 F.3d 53, 58 (2d Cir. 2019) ("Facebook users must first register for a Facebook account, providing their names, *telephone numbers, and email addresses*.") (emphasis added); *Facebook Help Center*, FACEBOOK, https://www.facebook.com/help/158461840955940 [https://perma.cc/6ART-8NBQ] (providing sign-up options with either a mobile phone number or email address); *Twitter Help Center*, TWITTER, https://help.twitter.com/en/using-twitter/create-twitter-account [https://perma.cc/3JUS-5DG7] (stating the same requirements); *YouTube Help*, YOUTUBE, https://support.google.com/youtube/answer/161805?hl=en [https://perma.cc/BPZ7-4XBD] (requiring potential users to create a Google account in order to sign up for YouTube).

198 *See* Yoo, *supra* note 14, at 473–74; *see also* Nat'l Ass'n of Broads. v. FCC, 740 F.2d 1190, 1203 (D.C. Cir. 1984) ("[T]he *sine qua non* of a common carrier is the obligation to accept applicants on a non-content oriented basis.").

Further, digital platforms' use of algorithms independently defeats the common carrier analogy. Historically, common carriers have little control over the content communicated through their networks.[199] By contrast, digital social media platforms exert direct control over the content with which users interact by filtering content through algorithms to personalize user experiences.[200] The common carriage status of social media companies ultimately "turns on whether they hold themselves out as serving all members of the public *without* making individualized business decisions."[201] As it stands, social media companies exercise too much discretion over the content prioritized and displayed to users to qualify as common carriers.[202] The digital platforms these companies offer employ algorithms that both moderate content and provide individualized

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199 *See* Ryan Gerdes, *Scaling Back § 230 Immunity: Why the Communications Decency Act Should Take a Page from the Digital Millennium Copyright Act's Service Provider Immunity Playbook*, 60 DRAKE L. REV. 653, 656 (2012).

200 *See* Tremble, *supra* note 44, at 838–39 (discussing how Facebook's algorithm prioritizes posts based on user's previous interests and a post's ability to gain "likes"); Will Oremus et al., *How Facebook Shapes Your Feed*, WASH. POST (Oct. 26, 2021, 7:00 AM), https://www.washingtonpost.com/technology/interactive/2021/how-facebook-algorithm-works/ [https://perma.cc/6HVM-5LWB] (describing Facebook's "precisely tailored" algorithm to elevate posts that encourage individual interaction); *Force*, 934 F.3d at 58 (explaining Facebook's algorithms that "automatically analyze Facebook users' prior behavior" on its site to predict and display content most likely to interest and engage users); Adam Mosseri, *Shedding More Light on How Instagram Works*, INSTAGRAM (June 8, 2021), https://about.instagram.com/blog/announcements/shedding-more-light-on-how-instagram-works [https://perma.cc/MUL4-3UAH] (describing the "variety of algorithms" Instagram employs to "personalize your experience"); FERENC HUSZÁR ET AL., ALGORITHMIC AMPLIFICATION OF POLITICS ON TWITTER (2021), https://cdn.cms-twdigitalassets.com/content/dam/blog-twitter/official/en_us/company/2021/rml/Algorithmic-Amplification-of-Politics-on-Twitter.pdf [https://perma.cc/T8UW-232Q] (studying algorithmic amplification within the context of political groups and its role in shaping political content consumption).

201 Yoo, *supra* note 14, at 505 (emphasis added).

202 *Force*, 934 F.3d at 66 (noting that interactive computer services have made editorial decisions regarding third-party content "since the early days of the Internet"). For more details on how Facebook utilizes machine learning and ranking algorithms to design personalized News Feeds for individual users, see Akos Lada et al., *How Machine Learning Powers Facebook's News Feed Ranking Algorithm*, ENG'G META (Jan. 26, 2021), https://engineering.fb.com/2021/01/26/ml-applications/news-feed-ranking/ [https://perma.cc/MN6G-NNNE].

navigation through the seemingly endless stream of available content.[203] Content moderation algorithms plainly constitute individualized business decisions because these mechanisms determine whether certain content is permitted to exist on the platform.[204] Navigation algorithms are yet another way social media companies exert editorial discretion over third-party content because the "matchmaking"[205] goal of these algorithms is nothing more than deciding where and in what format to place the content shown to a user in the first place.[206] Social media companies retain a degree of control over their content such that they may not be properly categorized as common carriers.[207]

Moreover, Justice Thomas's argument that the analogy to common carriers is "even clearer" for those platforms that enjoy "dominant market share" is misplaced.[208] Common carriage status has never "turn[ed] on whether the entity in question possesses market power,"[209] a conclusion Justice Thomas concedes.[210] In *Miami Herald Publishing Co. v. Tornillo*, the Supreme Court established that "the concentration of market power among large social-media providers does not change the governing First Amendment principles."[211]

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[203] For more on the distinction between content and navigation algorithms, see Sofia Grafanaki, *Platforms, the First Amendment and Online Speech: Regulating the Filters*, 39 PACE L. REV. 111, 117–18 (2018).

[204] *Id.* at 138. The decision whether to publish or withdraw content fits squarely in the realm of traditional editorial functions. *See* Zeran v. Am. Online, 129 F.3d 327, 330 (4th Cir. 1997).

[205] *Force*, 934 F.3d at 65 (describing the "matchmaking" function as an algorithm's way to "predict and show the third-party content that is most likely to interest and engage users").

[206] *See id.* at 66 (rejecting plaintiff's argument that Facebook is ineligible for Section 230(c)(1) immunity "by virtue of simply organizing and displaying content exclusively provided by third parties.").

[207] For an in-depth discussion of content moderation and social media companies, see generally Olivier Sylvain, *Platform Realism, Informational Inequality, and Section 230 Reform*, 131 YALE L.J. F. 475 (2021).

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

[209] Yoo, *supra* note 14, at 479.

[210] *Knight*, 141 S. Ct. at 1223, 1225 (Thomas, J., concurring).

[211] Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 249–50 (1974).

In Justice Thomas's alternative argument, digital platforms cannot still be regulated like common carriers under the *German Alliance* precedent.[212] In that case, the Court subjected fire insurance rates to state regulation even though fire insurance companies were not traditional common carriers.[213] Although a contract for fire insurance is personal, the "effect of insurance . . . is to distribute the loss over as wide an area as possible."[214] Since a large part of the country was protected by fire insurance and thus subjected to its rates, the regulation of fire insurance rates "demonstrate[d] the interest of the public" such that state regulation was justified.[215]

Insurance contracts are, by nature, interdependent. Their relation to other insurance holders is to create a fund of assurance and credit.[216] Thus, even though a fire insurance company was not a traditional common carrier, the business was properly considered "of the greatest public concern" and necessarily subject to governmental regulation.[217] By contrast, participation in social media platforms creates networks of people with whom users can engage and communicate. While these networks are also interdependent, the connection between mutual funds in the event of a fire and mutual networks providing interpersonal contact is too attenuated to properly apply the *German Alliance* precedent in the digital social media context.

B. Social Media Platforms Are Not Places of Public Accommodation

The common law definition of public accommodation explicitly includes innkeepers and common carriers.[218] Public accommodation status for businesses outside these two categories often turns on whether the business holds itself out as serving the public.[219] Following the Civil War, many states initially passed statutes requiring

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212 *See supra* notes 180–83 and accompanying text.
213 *See* German All. Ins. Co. v. Lewis, 233 U.S. 389, 413 (1914).
214 *Id.* at 412.
215 *Id.* at 413.
216 *Id.* at 414.
217 *Id*.
218 *See* Yoo, *supra* note 14, at 476.
219 *See id.* at 477 (citing Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996)).

places of public accommodation to serve all members of the public, regardless of race.[220] While many states eventually repealed these statutes, state courts interpret public accommodations laws narrowly.[221] This reaffirmed the understanding that public accommodations regulations only extended to innkeepers and common carriers.[222]

Presently, public accommodations law is primarily statutory.[223] The Civil Rights Act of 1964 specifically provides a list of places that constitute public accommodations, including inns, restaurants, gas stations, and places of entertainment.[224] The Americans with Disabilities Act ("ADA") similarly provides a defined list of places of public accommodation subject to its provisions.[225] This more expansive list includes common carriers, innkeepers, restaurants, places of entertainment, retail stores, offices of physicians and lawyers, laundromats, barber shops, funeral parlors, hospitals, insurance agents, and schools.[226] Notably, all of the specified examples of places of public accommodation in both statutes are physical spaces.[227]

Circuits are split on whether non-physical spaces, like websites, constitute places of public accommodation.[228] In the context of the ADA, the First, Second, and Seventh Circuits have found that the statute applies to non-physical spaces like websites, regardless of whether the website is connected to a physical space.[229] Courts in these circuits turn to Congress's intent, policy concerns, and the

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220 *See id.* (noting that courts applied public accommodations status only to places explicitly listed in civil rights statutes).

221 *See id.*

222 *See id.*

223 *See id.* at 478.

224 42 U.S.C. § 2000a(b)(1)–(3).

225 *Id.* § 12181(7).

226 *Id.*

227 *See id.*; 42 U.S.C. § 2000a(b)(1)–(3).

228 Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1225 (2021) (Thomas, J., concurring).

229 Gil v. Winn Dixie Stores, Inc., 242 F. Supp. 3d 1315, 1318 (S.D. Fla. 2017); *see also* Morgan v. Joint Admin. Bd., 268 F.3d 456, 459 (7th Cir. 2001) ("The defendant asks us to interpret 'public accommodation' literally, as denoting a physical site, such as a store or a hotel, but we have already rejected that interpretation.").

legislative history behind the ADA, finding that "Congress intended the ADA to adapt to changes in technology."[230]

Meanwhile, the Third, Sixth, and Ninth Circuits have found that places of public accommodations are limited to physical spaces.[231] Courts in these circuits rely on the enumerated categories explicitly listed in the statute and specifically note that all examples are physical spaces.[232] In a recent opinion, the Eleventh Circuit joined this group of circuits and held that it could not broaden the definition of public accommodation to include non-physical spaces, such as websites, absent congressional action.[233]

Importantly, this circuit split almost exclusively revolves around the categorization of "a place of accommodation" for the purposes of the ADA. Accordingly, many of the opinions look to the intent behind the ADA to justify the extension of public accommodations status to non-physical spaces like websites.[234] Opinions rejecting this extension rely heavily on the textual argument that the statutes only list physical places.[235]

The public accommodations doctrine does not apply to social media platforms under either reasoning. From a purely textual standpoint, several circuit courts are sufficiently convinced that it is not within their judicial duty to expand the definition for places of public

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230 *Gil*, 242 F. Supp. at 1319 (internal citation omitted). *See also* Carparts Distrib. Ctr. v. Auto. Wholesaler's Ass'n, 37 F.3d 12, 21–22 (1st Cir. 1994) (finding that even if the meaning of "public accommodations" is ambiguous, which the court finds it is not, public policy concerns persuade that its meaning is "not limited to actual physical structures").

231 *Gil*, 242 F. Supp. at 1319.

232 *See*, *e.g.*, Ford v. Schering-Plough Corp., 145 F.3d 601, 614 (3d Cir. 1998) (finding that "public accommodation" does not refer to non-physical spaces); Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1010–11 (6th Cir. 1997) (stating that a public accommodation is a physical place); Earll v. Ebay, Inc., 599 F. App'x 695, 696 (9th Cir. 2015) (finding that a "place of public accommodation" requires a physical place).

233 Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266, 1284 (11th Cir. 2021), *reh'g en banc denied per curiam*, No. 17-13467-CC, 2022 U.S. App. LEXIS 5561 (11th Cir. Mar. 2, 2022).

234 *See, e.g.*, Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 200–01 (D. Mass. 2012) ("[T]he legislative history of the ADA makes clear that Congress intended the ADA to adapt to changes in technology.").

235 *Ford*, 145 F.3d at 614 (relying on *noscitur a sociis*, a Latin canon, to hold that "public accommodation" does not refer to non-physical spaces).

accommodation without a directive from the legislature.[236] Notwithstanding unexpected technological advancements that followed both the Civil Rights Act and the ADA's enactments, the explicit enumeration of physical spaces as examples of places of public accommodations leaves little room to extrapolate the definition to non-physical spaces.[237]

Alternatively, expanding the definition of "places of public accommodation" to include non-physical spaces in the context of Section 230 requires consideration of the policy and legislative intent behind Section 230 itself.[238] The legislative intent behind this provision's enactment importantly sought to protect the robust growth of the then-nascent internet and limit governmental regulation.[239] Neither goal suggests that Section 230 was designed to regulate spaces that qualify as traditional places of public accommodations.

First, imposing public accommodations duties on social media platforms would stunt the "vibrant and competitive free market that presently exists for the Internet and other interactive computer services."[240] Requiring these platforms to indiscriminately avail themselves to the public would prohibit their use of algorithms to individualize user experience.[241] Social media platforms like Facebook and Twitter aim to facilitate conversations between users and create connections.[242] These purposes would be impossible to achieve

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[236] *See, e.g.*, *Gil*, 993 F.3d at 1284 ("Absent congressional action that broadens the definition of 'places of public accommodation' to include websites, we cannot extend ADA liability . . . .").

[237] *See, e.g.*, Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000) ("All the items on this list, however, have something in common. They are actual, physical places where goods or services are open to the public, and places where the public gets those goods or services.").

[238] *See supra* notes 234–35 and accompanying text.

[239] 47 U.S.C. § 230(b)(1)–(2) ("It is the policy of the United States—(1) to promote the continued development of the Internet and other interactive computer services and other interactive media; [and] (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.").

[240] *Id.* § 230(b)(2).

[241] *See, e.g.*, Force v. Facebook, Inc., 934 F.3d 53, 67 (2d Cir. 2019) ("'[C]onnections' or 'matches' of information and individuals . . . would . . . not occur[] but for the internet services' particular editorial choices regarding the display of third-party content.").

[242] *See, e.g.*, Kathleen Chaykowski, *Mark Zuckerberg Gives Facebook a New Mission*, FORBES (June 22, 2017, 12:19 PM), https://www.forbes.com/sites/kathleenchaykowski/

without the algorithms that individualize the experience through editorial functioning.[243]

Second, the important policy goal of limiting governmental regulation urges against imposing public accommodations duties on digital platforms and ISPs.[244] When Section 230 was introduced, the internet was seen as a medium of amplified opportunity and individual empowerment.[245] Under this view, it was crucial to create safeguards that would not only encourage democratic discourse on the internet, but also protect the internet from paternalistic governmental regulation.[246] This second goal, in particular, militates against an understanding that the drafters of Section 230 intended the public accommodations doctrine—a doctrine that *invites* governmental regulations—to apply to the non-physical space of the digital platforms it protects. Recognizing digital platforms and ISPs as places of public accommodation would grant governments the power to limit their "right to exclude."[247] This would necessarily saturate websites with governmental regulations, directly opposing the statute's stated purpose.

2017/06/22/mark-zuckerberg-gives-facebook-a-new-mission/?sh=6e0608f61343 [https://perma.cc/JJ2R-JNBH] ("[Facebook CEO Mark] Zuckerberg unveiled Facebook's updated purpose: '[g]ive people the power to build community and bring the world closer together.'"); Nicholas Thompson, *Jack Dorsey on Twitter's Role in Free Speech and Filter Bubbles*, WIRED (Oct. 16, 2018, 6:28 PM), https://www.wired.com/story/jack-dorsey-twitters-role-free-speech-filter-bubbles/ [https://perma.cc/8B7E-FH9Q] (noting that Twitter CEO Jack Dorsey states Twitter's purpose is "to serve the public conversation").

243 *See, e.g.*, Will Oremus, *Why Facebook Won't Let You Control Your Own News Feed*, WASH. POST (Nov. 15, 2021, 12:45 PM), https://www.washingtonpost.com/technology/2021/11/13/facebook-news-feed-algorithm-how-to-turn-it-off/ [https://perma.cc/UH7S-PSKY] (referencing an internal Facebook report that found when users turned off the algorithm on their news feeds, it caused them to "interact less").

244 47 U.S.C. § 230(b)(2) (stating that one of the policy goals behind Section 230 is to ensure the internet and other interactive computer services remain "unfettered by Federal or State regulation").

245 *See* Cannon, *supra* note 54, at 93.

246 *See id.*

247 Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1225 (2021) (Thomas, J., concurring).

CONCLUSION

Of all types of ISPs, social media platforms have garnered the most attention and created the most controversy over how to address liability.[248] This includes platforms such as Facebook, Twitter, and YouTube, where third-party users may post or upload their own content. On its face, these websites seem to unequivocally fall within the protections provided by Section 230: they are interactive computer service providers that host information provided by other, third-party content providers.[249] Many scholars arguing against immunity for these platforms, however, point to their intricate content moderation.[250] In their view, this editorial function amounts to creating or developing the information.[251] This makes the digital platforms information *content* providers, not just interactive computer service providers.[252]

Since the internet has become the "modern public square,"[253] a clear liability scheme for facilitators of public conversations in this medium is essential to the future of free speech. In the years since its enactment, Section 230 and its judicial interpretations as applied to social media platforms have spurred much controversy, particularly across political lines. While the political right demands

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[248] Cameron F. Kerry, *Section 230 Reform Deserves Careful and Focused Consideration*, BROOKINGS (May 14, 2021), https://www.brookings.edu/blog/techtank/2021/05/14/section-230-reform-deserves-careful-and-focused-consideration/ [https://perma.cc/8UBN-596U] (noting that many concerns about online content impacted by Section 230 focus on "the largest of the social media platforms like Facebook, YouTube, and Twitter").

[249] 47 U.S.C. § 230(c)(1) (shielding "provider[s] . . . of an interactive computer service" from liability for "any information provided by another information content provider").

[250] *See* Tremble, *supra* note 44, at 865–67 (arguing that Facebook's use of algorithms to increase user engagement constitutes material contribution to the development of the content).

[251] *See id.*

[252] *Compare* 42 U.S.C. § 230(f)(3) (providing, "[t]he term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."), *with id.* § 230(f)(2) (providing, "[t]he term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.").

[253] Packingham v. North Carolina, 137 S. Ct. 1730, 1732 (2017).

accountability for social media's "de-platforming of conservatives,"[254] the political left seeks accountability for social media's part in disseminating false information.[255] As it stands, there are numerous bills pending in Congress to reform or repeal this provision.[256]

The Supreme Court, by contrast, has not indicated any intention to address this statute. Justice Thomas is the only Justice who has opined on Section 230's current scope. Most recently, he released his third solo statement disparaging Section 230's expansive reach in *Doe v. Facebook, Inc*.[257] While Justice Thomas does not offer substantive proposals for reform like he did in *Biden v. Knight*, his statement in *Doe* reinforces his calls to repeal Section 230 and sends out a "bat signal" for litigants pursuing social media companies.[258] Justice Thomas calls on those litigants to bring an appropriate suit before the Court to give the Justices an opportunity to tackle the controversial issues raised by Section 230.[259]

While Justice Thomas is right to suggest the need for legislative reform given the prevalence of digital platforms, this Note explicitly rejects the analogies to the common carrier and public accommodations doctrines he proposed in *Biden v. Knight*. Social media

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[254] Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J.L. & TECH. 391, 394 n.9 (2020) (citing Sue Halpern, *The Search for Anti-Conservative Bias on Google*, NEW YORKER (Dec. 19, 2018), https://www.newyorker.com/tech/annals-of-technology/the-search-for-anti-conservative-bias-on-google [https://perma.cc/3U5Z-Y8FJ]).

[255] *See, e.g.*, Shannon Bond, *Democrats Want to Hold Social Media Companies Responsible for Health Misinformation*, NPR (July 22, 2021, 3:59 PM), https://www.npr.org/2021/07/22/1019346177/democrats-want-to-hold-social-media-companies-responsible-for-health-misinformat [https://perma.cc/ZNW2-6PQ9].

[256] *See* Elizabeth Nolan Brown, *Section 230 Is the Internet's First Amendment. Now Both Republicans and Democrats Want to Take It Away*, REASON (July 29, 2019, 8:01 AM), https://reason.com/2019/07/29/section-230-is-the-internets-first-amendment-now-both-republicans-and-democrats-want-to-take-it-away [https://perma.cc/GE2A-LM3J]; Cristiano Lima, *How a Widening Political Rift over Online Liability Is Splitting Washington*, POLITICO (July 9, 2019), https://www.politico.com/story/2019/07/09/online-industry-immunity-section-230-1552241 [https://perma.cc/7CBW-H6YQ].

[257] 142 S. Ct. 1087 (2022) (Thomas, J., statement respecting denial of certiorari).

[258] Kelsey Reichmann, *Thomas Sends Out Bat Signal for Suits Going After Web Publishers*, COURTHOUSE NEWS SERV. (Mar. 7, 2022), https://www.courthousenews.com/thomas-sends-out-bat-signal-for-suits-going-after-web-publishers/ [https://perma.cc/X5CG-ZEL9].

[259] *See generally Doe*, 142 S. Ct. 1087.

platforms' well-known use of algorithms definitively precludes common carriage status. The legislative history of Section 230 prohibits the imposition of the public accommodations doctrine.

Traditional common law doctrines do not apply to the modern context of digital platforms and social media. Rather, proposals for reform should be tailored to remedy the specific and dangerous real-world consequences that can result from social media activity. For example, providers or users of interactive computer services who display deliberate indifference to unlawful or harmful content or conduct should not enjoy Section 230 immunity. If a social media company knows of a harmful post or knows of or reasonably anticipates a dangerous outcome arising from such a post, that company should have a legal duty to block the post or otherwise minimize its amplification.[260] Deliberate indifference to such harms does not deserve Section 230 protection.

Whatever the legislative fix, it must align with the legislative purpose behind the statute in the first place. This requires protecting the internet from governmental regulation, not inviting it in.

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[260] *See* Sylvain, *supra* note 207, at 511.