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GANESH SITARAMAN

Deplatforming

ABSTRACT. Deplatforming in the technology sector is hotly debated, and at times may even seem unprecedented. In recent years, scholars, commentators, jurists, and lawmakers have focused on the possibility of treating social-media platforms as common carriers or public utilities, implying that the imposition of a duty to serve the public would restrict them from deplatforming individuals and content.

But, in American law, the duty to serve all comers was never absolute. In fact, the question of whether and how to deplatform—to exclude content, individuals, or businesses from critical services—has been commonly and regularly debated throughout American history. In the common law and the major infrastructural and utility sectors—transportation, communications, energy, and banking—American law has long provided rules and procedures for when and how to deplatform.

This Article offers a history and theory of the law of deplatforming across networks, platforms, and utilities. Historically, the American tradition has not been one of either an absolute duty to serve or an absolute right to exclude. Rather, it has been one of reasonable deplatforming—of balancing the duties to serve and the need to, in limited and justifiable cases, exclude. Theoretically, deplatforming raises common questions across sectors: Who deplatforms? What is deplatformed? When does deplatforming occur? What are permissible reasons for deplatforming? How should deplatforming take place? The Article uses the history of deplatforming to identify these and other questions, and to show how American law has answered them.

The history and theory of deplatforming shows that the tension between service and exclusion is an endemic issue for common carriers, utilities, and other infrastructural services—including contemporary technology platforms. This Article considers ways in which past deplatforming practices can inform current debates over the public and private governance of technology platforms.

AUTHOR. New York Alumni Chancellor's Chair in Law, Vanderbilt University Law School. Thanks to Rebecca Allensworth, Margaret Blair, Ed Cheng, Evelyn Douek, Joshua Macey, Lev Menand, Morgan Ricks, Jim Rossi, J.B. Ruhl, Nelson Tebbe, and Shelley Welton. Thanks also to participants in the Networks, Platforms, and Utilities (NPU) Zoom Scholars workshop, Knight First Amendment Institute seminar, and faculty workshops at Boston College and Marquette University Law Schools for helpful comments and suggestions.



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INTRODUCTION

In January 2021, President Donald Trump and many of his supporters were banned from Twitter,¹ Facebook,² and other social-media services.³ The immediate reaction to the “great deplatforming,”⁴ as some have called it, varied from support,⁵ to objections,⁶ to claims of “incoherence.”⁷ Since that time, much of the discussion has focused on the possibility of treating social-media platforms

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1. *Permanent Suspension of @realDonaldTrump*, TWITTER (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension [<https://perma.cc/6MY3-JLW3>].
 2. Nick Clegg, *In Response to Oversight Board, Trump Suspended for Two Years; Will Only Be Reinstated if Conditions Permit*, FACEBOOK (June 4, 2021), <https://about.fb.com/news/2021/06/facebook-response-to-oversight-board-recommendations-trump> [<https://perma.cc/WHN8-CC3X>].
 3. Sara Fischer & Ashley Gold, *All the Platforms That Have Banned or Restricted Trump so Far*, AXIOS (Jan. 11, 2021), <https://www.axios.com/2021/01/09/platforms-social-media-ban-restrict-trump> [<https://perma.cc/T67B-9K6T>].
 4. Jen Patja Howell, Evelyn Douek, Quinta Jurecic & Jonathan Zittrain, *The Lawfare Podcast: Jonathan Zittrain on the Great Deplatforming*, LAWFARE (Jan. 14, 2021, 12:00 PM), <https://www.lawfareblog.com/lawfare-podcast-jonathan-zittrain-great-deplatforming> [<https://perma.cc/4QKH-FTUE>]; Genevieve Lakier & Nelson Tebbe, *After the “Great Deplatforming”: Reconsidering the Shape of the First Amendment*, LPE PROJECT (Mar. 1, 2021), <https://lpeproject.org/blog/after-the-great-deplatforming-reconsidering-the-shape-of-the-first-amendment> [<https://perma.cc/8FPB-9SM6>].
 5. Zephyr Teachout, *We’re All Better Off Without Trump on Twitter. And Worse Off with Twitter in Charge.*, WASH. POST (Jan. 14, 2021, 12:24 PM EST), <https://www.washingtonpost.com/outlook/2021/01/14/trump-twitter-ban-big-tech-monopoly-private> [<https://perma.cc/CZU4-ZQ56>]; Paul Waldman, *Twitter’s Trump Ban Is Even More Important than You Thought*, WASH. POST (Jan. 18, 2021, 12:58 PM EST), <https://www.washingtonpost.com/opinions/2021/01/18/twitters-trump-ban-is-even-more-important-than-you-thought> [<https://perma.cc/9DPA-Y2JQ>].
 6. For objections, see, for example, Jessica Guynn, *‘They Want to Take Your Speech Away,’ Censorship Cry Unites Trump Supporters and Extremists After Capitol Attack*, USA TODAY (Jan. 16, 2021, 3:03 PM ET), <https://www.usatoday.com/story/tech/2021/01/15/censorship-trump-extremists-facebook-twitter-social-media-capitol-riot/4178737001> [<https://perma.cc/FN9Z-PJEV>]; Grace Curley, *Every American Should Be Against Twitter’s Ban of Trump*, BOS. HERALD (Jan. 9, 2021, 4:02 PM), <https://www.bostonherald.com/2021/01/09/curley-every-american-should-be-against-twitters-ban-of-trump> [<https://perma.cc/G9LY-3UQF>]; and Suzanne Nossel, *Banning Trump from Facebook May Feel Good. Here’s Why It Might Be Wrong*, L.A. TIMES (Jan. 27, 2021, 3:15 AM PT), <https://www.latimes.com/opinion/story/2021-01-27/facebook-donald-trump-oversight-board> [<https://perma.cc/YKF2-72KS>].
 7. Andrew Marantz, *The Importance, and Incoherence, of Twitter’s Trump Ban*, NEW YORKER (Jan. 15, 2021), <https://www.newyorker.com/news/daily-comment/the-importance-and-incoherence-of-twitters-trump-ban> [<https://perma.cc/68BG-KCAJ>].

as common carriers or public utilities.⁸ Proponents of this approach, including conservatives like Richard Epstein and Justice Clarence Thomas, emphasize that common carriers and public utilities have an obligation to serve all customers.⁹ The subtle implication, of course, was that President Trump and others who were deplatformed should be reinstated.

After Elon Musk took over Twitter, controversies over deplatforming have only continued. Musk had promised the social-media platform would be a home for free speech. But his Twitter soon suspended Kanye West's account for posting a swastika,¹⁰ accounts that showed the location of Musk's private jet (after promising not to), and even accounts that had shared those tweets.¹¹ Musk's Twitter even announced a policy banning posts promoting competitor social-media platforms, although it soon reversed course.¹²

Deplatforming has also not been limited to individuals and content on social media. Cloud-infrastructure giant Amazon Web Services (AWS) deplatformed the conservative social-media network Parler,¹³ as did the Apple App Store and

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8. See, e.g., Ganesh Sitaraman & Morgan Ricks, *Tech Platforms and the Common Law of Common Carriers*, 73 DUKE L.J. (forthcoming); Adam Candebub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J.L. & TECH. 391, 429-33 (2020); Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 381-83 (2021); Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463, 465-73 (2021). For an earlier treatment, see Adam Thierer, *The Perils of Classifying Social Media Platforms as Public Utilities*, 21 COMMLAW CONSPPECTUS 249, 250 (2013).
 9. See Tunku Varadarajan, *The 'Common Carrier' Solution to Social-Media Censorship*, WALL ST. J. (Jan. 15, 2021, 12:39 PM ET), <https://www.wsj.com/articles/the-common-carrier-solution-to-social-media-censorship-11610732343> [<https://perma.cc/GU9T-8B2K>] (interviewing Richard Epstein); *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring) (observing that tech platforms could potentially be subject to common-carrier obligations).
 10. Charisma Madarang, *Kanye Tweets Swastika, Elon Musk Suspends His Twitter Account*, ROLLING STONE (Dec. 2, 2022), <https://www.rollingstone.com/music/music-news/kanye-west-swastika-elon-musk-twitter-1234640112> [<https://perma.cc/8PVY-TU7N>].
 11. Mike Isaac & Kate Conger, *Twitter Suspends Accounts of Half a Dozen Journalists*, N.Y. TIMES (Dec. 15, 2022), <https://www.nytimes.com/2022/12/15/technology/twitter-suspends-journalist-accounts-elon-musk.html> [<https://perma.cc/J4CL-NER3>].
 12. Chas Danner, *Elon Musk Tried to Ban Leaving Twitter*, N.Y. MAG. (Dec. 18, 2022), <https://nymag.com/intelligencer/2022/12/elon-musks-twitter-bans-sharing-links-to-many-competitors.html> [<https://perma.cc/5FN4-6FUH>].
 13. John Paczkowski & Ryan Mac, *Amazon Will Suspend Hosting for Pro-Trump Social Network Parler*, BUZZFEED NEWS (Jan. 9, 2021, 10:08 PM), <https://www.buzzfeednews.com/article/johnpaczkowski/amazon-parler-aws> [<https://perma.cc/D2L5-BMMU>].

Google Play Store.¹⁴ Google has removed apps that secretly collect user data,¹⁵ and Apple has excluded apps that have not been updated.¹⁶ Amazon has shut down accounts of thousands of merchants seeking to sell goods on Amazon Marketplace.¹⁷ With examples like these in the news, as well as many others, scholars have raised a variety of issues about deplatforming individuals and content—including First Amendment analyses¹⁸ and the workability and desirability of existing procedures¹⁹—and have even proposed creating federal procedural rules for platforms.²⁰

Deplatforming in the tech sector is thus hotly debated, and at times, it might even seem “unprecedented.”²¹ But in American law, the duty to serve all comers was never absolute.²² In fact, the question of whether and how to deplatform—to exclude content, individuals, or businesses from critical services—has been

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14. Brian Fung, *Parler Has Now Been Booted by Amazon, Apple, and Google*, CNN (Jan. 11, 2021, 6:54 AM ET), <https://www.cnn.com/2021/01/09/tech/parler-suspended-apple-app-store/index.html> [<https://perma.cc/DFD6-A7A8>].
 15. Byron Tau & Robert McMillan, *Google Bans Apps with Hidden Data-Harvesting Software*, WALL ST. J. (Apr. 6, 2022, 2:27 PM ET), <https://www.wsj.com/articles/apps-with-hidden-data-harvesting-software-are-banned-by-google-11649261181> [<https://perma.cc/GQE8-TDDP>].
 16. Emma Roth, *Apple App Store Appears to Be Widely Removing Outdated Apps: Wiping Apps that Haven't Been Updated in a 'Significant Amount of Time'*, VERGE (Apr. 23, 2022, 6:44 PM EDT), <https://www.theverge.com/2022/4/23/23038870/apple-app-store-widely-remove-outdated-apps-developers> [<https://perma.cc/V6AB-XDQV>].
 17. Jason Del Ray, *Amazon Ousted Thousands of Merchants with No Notice—Showing the Danger of Relying on the Shopping Platform*, RECODE (Mar. 8, 2019, 9:23 AM EST), <https://www.vox.com/2019/3/8/18252606/amazon-vendors-no-orders-marketplace-counterfeits> [<https://perma.cc/7MCN-326N>].
 18. See, e.g., Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. FREE SPEECH L. 97, 97 (2021).
 19. See Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV. 526, 531-32 (2022); Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418, 2453-54 (2020); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1631-35 (2018).
 20. See Rory Van Loo, *Federal Rules of Platform Procedure*, 88 U. CHI. L. REV. 829, 875 (2021).
 21. Danny Crichton, *The Deplatforming of President Trump: A Review of an Unprecedented and Historical Week for the Tech Industry*, TECHCRUNCH (Jan. 9, 2021, 11:46 AM EST), <https://techcrunch.com/2021/01/09/the-deplatforming-of-a-president> [<https://perma.cc/32EP-UWRA>] (“From Twitter to PayPal, more than a dozen companies have placed unprecedented restrictions or outright banned the current occupant of the White House from using their services, and in some cases, some of his associates and supporters as well.”).
 22. To be fair to Epstein, he does note that service had to be on “fair, reasonable and nondiscriminatory” terms, and suggests there be a “narrow” exception for “violence and threats of force.” But he does not discuss why President Trump’s tweets would fall on the permissible side of that line. See Varadarajan, *supra* note 9.

commonly and regularly debated throughout American history. In the common law and the major infrastructural and utility sectors – transportation, communications, energy, and banking – law has long provided rules and procedures for when and how to. And yet, despite the increasingly familiar argument that tech platforms are akin to common carriers, infrastructure, or public utilities,²³ the practice of deplatforming across the common law and the traditional networks, platforms, and utilities sectors has gone unexamined.

This Article offers a history and theory of the law of deplatforming across networks, platforms, and utilities. Part I shows that there has been a long history of deplatforming in the common law and in the transportation, communications, energy, and banking sectors. These areas of law are generally considered the traditional “regulated industries,”²⁴ or as a new casebook calls them, “Networks, Platforms, and Utilities” (NPU).²⁵ In each of these sectors, firms excluded individuals or activities – even if the firm was an essential service, a government monopoly, or had a legal duty to serve the public. The American tradition has not been one of either an absolute duty to serve or an absolute right to exclude. Rather, it has been one of *reasonable deplatforming*: balancing the duties to serve and the need to, in limited and justifiable cases, exclude.

In the nineteenth century, for example, common-law courts required innkeepers and other common carriers to “accept all comers,” but they also created exceptions for persons who could be excluded from service, including thieves and belligerents.²⁶ In the early twentieth century, the law grappled with excluding individuals and content from the postal system, telephone service, and broadcast communications.²⁷ Over time, these rules migrated into state- and

23. See *supra* notes 8–9 and accompanying text; see also Peter Swire, *Should the Leading Online Tech Companies Be Regulated as Public Utilities?*, LAWFARE (Aug. 2, 2017, 9:00 AM), <https://www.lawfareblog.com/should-leading-online-tech-companies-be-regulated-public-utilities> [<https://perma.cc/SN8U-5TQK>] (analogizing tech companies to public utilities and criticizing that regulatory approach); K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1634–39 (2018) (evaluating public-utility regulation as a template to redress the private control of tech platforms).

24. See generally RICHARD J. PIERCE, JR. & ERNEST GELLHORN, *REGULATED INDUSTRIES IN A NUTSHELL* (4th ed. 1999) (describing traditionally regulated industries). I include banking, even though it was not usually taught or included in regulated-industries textbooks because it shares many similar features of infrastructure and utilities. See, e.g., Morgan Ricks, *Money as Infrastructure*, 2018 COLUM. BUS. L. REV. 757 (2018) (arguing that bank regulation falls within the broader category of infrastructure regulation); Alan M. White, *Banks as Utilities*, 90 TUL. L. REV. 1241 (2016) (applying public-utility law to banks).

25. See MORGAN RICKS, GANESH SITARAMAN, SHELLEY WELTON & LEV MENAND, *NETWORKS, PLATFORMS, AND UTILITIES: LAW AND POLICY* (2022).

26. See *infra* Section I.A.

27. See *infra* Section I.B.

federal-NPU regulatory systems. Legal rules enable the government to ban certain individuals from access to the banking system, energy sector, and air travel.²⁸ Although the substantive and procedural rules vary somewhat from sector to sector, there are common approaches and dilemmas. This history shows that deplatforming is not unprecedented or unique to tech platforms; it is an inevitable, endemic issue that emerges in governing infrastructure industries. Far from ensuring that deplatformed individuals must be reinstated, the common-carrier and public-utility framework sanctions deplatforming under a limited, but significant, set of scenarios. The critical question, therefore, is not whether to permit deplatforming, but rather who decides the rules of deplatforming and what those rules should be.

Having presented the history and practice of deplatforming across NPUs, the Article then zooms out from particular sectors and explores theoretical questions about deplatforming in Part II. Understanding deplatforming requires considering (1) foundational issues, (2) the reasons for deplatforming, and (3) the process of deplatforming. Foundational issues answer the basic questions: Who deplatforms (public or private)? What is deplatformed (conduct or an entity)? Why is the service important (essential, civic, or commercial reasons)? Are platforms liable for injuries? When does deplatforming take place (reactively, preemptively, or preventively)? And what justifies replatforming? The reasons for deplatforming can vary from sector to sector, but they have been remarkably common and stable throughout history: ensuring service provision (the failure to pay, capacity and congestion concerns, and/or service-quality degradation); preventing harms (injury to other users, society, and/or national security); and adhering to social regulations (public morality and, earlier in history, racial discrimination). There are also consistently impermissible reasons for deplatforming. The process of deplatforming has involved both *ex ante* measures (generally applicable rules and notice requirements) and *ex post* measures (case-by-case determinations and opportunities to challenge exclusion). Describing these factors helps to clarify the shape of reasonable deplatforming in American history and illuminates persistent dilemmas in deplatforming as well.

Part III then turns to the contemporary issue of tech platforms' decision to deplatform individuals and content. To start, it shows that neither private deplatforming (by firms) nor public deplatforming (by law) are novel. Contemporary private practices among big-tech platforms track the historical approach to reasonable deplatforming remarkably well. Recently proposed and subsequently passed regulation at the state level, however, differs from the traditional American approach in that it significantly reduces the scope for reasonable deplatforming. Importantly, some courts and commentators have said that a

28. See *infra* Sections I.C.–E.

platform's terms of service mean that it is not open to all comers and, therefore, is not a common carrier or public utility. The history of deplatforming reveals that this is incorrect: as we will see, terms of service existed even in the nineteenth and early-twentieth centuries, and they foreclosed neither the duty to serve nor the power to exclude. The history and theory of deplatforming also contributes to specific debates, including over bots and anonymity, bans on crypto-mining, platform liability, and the boundary between content moderation and commercial nondiscrimination in cases where platforms deplatform other platforms. A brief conclusion follows.

In reviewing the history and theory of deplatforming, this Article makes several contributions. First, it provides an account of deplatforming—exclusions from service provision—across the common law and statutory laws of networks, platforms, and utilities. It is, of course, not a treatise, and as such, it does not offer a comprehensive accounting of every case or statute from every subsector. But, so far as I can tell, it is the first transsectoral account of this dynamic across NPU law. This history shows that deplatforming is and has been an endemic issue for infrastructural enterprises. Second, this Article identifies the justifications, mechanisms, and dilemmas that have characterized the practice of reasonable deplatforming in American history. Together, these analyses on their own terms contribute to the recent revival of the study of the law governing networks, platforms, and utilities.²⁹ In particular, they show that despite a general view that common carriers and public utilities must accept all comers, there have always been exceptions—and the exceptions have followed consistent patterns. The theoretical analysis, combined with the historical examples, also provides a framework for thinking about designing deplatforming regimes. This is critical because the history of deplatforming also offers some cautionary tales. Careful and thoughtful design, not simplistic arguments about unconstrained rights to exclude or absolute duties to serve, should be the way forward for courts and policymakers. Third, this Article offers important lessons for tech platforms. History shows that deplatforming in the tech sector is nothing new and that the quest for a platform that doesn't deplatform is misguided. Moreover, the fact that tech platforms require following their terms of service for access does not mean they are not common carriers or public utilities. More broadly, this Article contributes to the literature that seeks to show that the legal framework that

29. For examples of recent scholarship on the topic of networks, platforms, and utilities law, see WILLIAM J. NOVAK, *NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE* 108-45, 180-217 (2022) (centering public utilities and regulated industries in the heart of the creation of the American state); RICKS, SITARAMAN, WELTON & MENAND, *supra* note 25; Dan Awrey & Joshua Macey, *The Promise and Perils of Open Finance*, 40 *YALE J. ON REG.* 1 (2023); Lina M. Khan, *The Separation of Platforms and Commerce*, 119 *COLUM. L. REV.* 973 (2019); Rahman, *supra* note 23; Ganesh Sitaraman, *The Regulation of Foreign Platforms*, 74 *STAN. L. REV.* 1073 (2022).

applies to networks, platforms, and utilities can provide helpful insights and guidance for regulating contemporary tech platforms. The American tradition of reasonable deplatforming may provide a guide for tech deplatforming – whether privately directed, imposed under the common law, or regulated by statute.

A few caveats are also in order. The first is about scope. One of the standard tools of NPU law are exit restrictions, in which a regulated firm is not permitted to shut down service to some set of customers.³⁰ For example, a railroad would have, during the heyday of the Interstate Commerce Commission, been prohibited from shutting down a rail line to a city without permission from the regulator. This dynamic is similar to deplatforming, but it is distinct. Exit restrictions are generally part of a system of route allocation or an exclusive franchise or monopoly provision. They are thus linked both to entry restriction and universal-service mandates within the service area. They are part of the structural regulatory rules that shape the industrial organization of the sector, rather than rules of behavior on the NPUs themselves. The history and purposes of exit restrictions thus differ from the tradition that I trace here. As a result, I do not treat exit restrictions in this Article.

A harder case, but also one that I cabin, is about platform design and accessibility. The question is whether the duty to serve all comers includes an obligation not merely to *accept* anyone seeking to use the service (subject to reasonable deplatforming rules) but also for the platform to design its service in a way that everyone can actually use it. Or, to put it differently, if you cannot access the platform because you require a special accommodation or design feature, must the platform adapt to offer that accommodation? It is, of course, the case that the scope of the duty to serve will necessarily shape the extent of the right to exclude.³¹ But with one notable exception,³² the cases and history offered here have comparatively little to say about this topic. This may be, in part, because some NPUs require no or minimal accommodations for use due to standardized parts or connections (e.g., electric grid, pipelines, water pipes, telephones, telegraphs), because technologies did not permit accommodation at the time (e.g., radio technology could not accommodate the deaf in the early twentieth century), and because NPU enterprises have an incentive to maximize their customer base. It is perhaps also partly because policies requiring accommodations

30. See RICKS, SITARAMAN, WELTON & MENAND, *supra* note 25, at 27.

31. Cf. Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Legal Reasoning*, 23 YALE L.J. 16, 30–32 (1913) (distinguishing between jural opposites such as rights/no rights and jural correlatives such as rights/duties).

32. This was at issue in the *Express Cases*, discussed *infra* in text accompanying notes 343–344. There, the express services wanted railroads to offer special railcar accommodations. The Supreme Court sided with the railroads, though the balance of opinion in state supreme courts went the other way.

for individuals have been a function of antidiscrimination and civil-rights laws,³³ which apply far more broadly than firms in NPU sectors as a condition on their duty to serve. This latter tradition is intertwined with but distinct from the tradition I trace here – the duty to serve within economic regulation, and its exceptions. An account of the intersections of these traditions would be welcome but is beyond the scope of this Article.

The second caveat is about terminology. Throughout the Article, I use “platform” interchangeably with infrastructure industries, regulated industries, and public utilities. For those who think only about contemporary tech platforms, this usage might seem odd. But in doing so, I align with others who also note the functional similarities between tech platforms and the traditional regulated industries (primarily, but not exclusively, the transportation, communications, energy, and banking sectors) – and likewise think that “platform” is a better (or at least, not worse) term than others one might devise.³⁴ As a result, “deplatforming” is the exclusion or ejection of not only individuals or entities, but also content or particular behavior from a platform.³⁵ The distinction between entity deplatforming and content deplatforming is explored throughout the Article, and expressly in Part II. In defining platforms and deplatforming this way, I intend for them to be broader than the common, casual usage, which focuses on social-media companies. Rather, I mean to expand the meaning of these terms to apply to NPUs generally. Doing so, as we shall see, illuminates a range of practices, possibilities, and perils.

33. See, e.g., Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327.

34. The field of NPU law includes the common law of carriers and statutory regimes in the transportation, communications, energy, and banking sectors, in addition to some others. Inclusion in the category itself is perhaps best defined analogically, rather than formalistically, based on consideration of a variety of factors that include status as a service, network effects and economies of scale, and other features. For discussions on terminology and the scope of what counts as a network, platform, or utility, see RICKS, SITARAMAN, WELTON & MENAND, *supra* note 25. Note that terminology has always been a problem in the field, which has had names ranging from the law of “public service corporations,” to public utilities, to regulated industries. See, e.g., Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies. Part I*, 11 COLUM. L. REV. 514, 515 n.8 (1911) (“This term ‘Public Service Company’ is not entirely satisfactory, but it is difficult to find a substitute which is not unwieldy.”). For others who also see tech platforms as related to utilities, see, for example, sources cited *supra* notes 8-9, 23, which describe similarities between platforms and utilities.

35. This is similar to, but not the same as, how experts define content moderation. Grimmelmann, for example, defines that term as “the governance mechanisms that structure participation in a community to facilitate cooperation and prevent abuse.” James Grimmelmann, *The Virtues of Moderation*, 17 YALE J.L. & TECH. 42, 47 (2015).

I. THE HISTORY AND PRACTICE OF DEPLATFORMING

The history and practice of deplatforming in America has been remarkably consistent across time and sectors. In both the common-law era and the age of statutes, the law has sought to balance two different issues: the benefits of certain infrastructural platforms serving the public neutrally and the need to exclude certain users and uses of those platforms. Drawing on the language of the common law and the Interstate Commerce Act (1887), we can call this a tradition of *reasonable deplatforming*. Platforms had a duty to serve but could engage in deplatforming when reasonable. The reasonableness of exclusions had both substantive and procedural components, which are enumerated in the theory described in Part II, and they have remained largely stable over time — even in spite of radical economic deregulation starting in the 1970s and the mid-twentieth-century shift toward a more absolutist First Amendment.

This Part provides an account of the legal rules across the common law and the communications, transportation, energy, and banking sectors. The common-law cases are limited to areas outside those that later received comprehensive statutory regulation; common-law cases in those areas are treated along with statutory and case law in the relevant sector.

A. *The Common Law of Innkeepers and Common Carriers*

Since the Middle Ages, common-law courts imposed on certain types of businesses a duty to serve members of the public.³⁶ Ferries,³⁷ gristmills,³⁸ horse-shoeing blacksmiths,³⁹ and inns,⁴⁰ among others, were required to neutrally accept all comers, under what was sometimes called the law of innkeepers and common carriers.⁴¹ The leading case of *Jackson v. Rogers*⁴² described this

36. See CHARLES M. HAAR & DANIEL W. FESSLER, *THE WRONG SIDE OF THE TRACKS: A REVOLUTIONARY REDISCOVERY OF THE COMMON LAW TRADITION OF FAIRNESS IN THE STRUGGLE AGAINST INEQUALITY* 63-79 (1986) (discussing the early history of this obligation).

37. For a history of the development of the common law on ferries, see *id.* at 78-108.

38. See *id.* at 72-73.

39. Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156, 158 (1904) (citing an anonymous note supposedly written in 1450).

40. *White's Case*, 2 Dyer 343 (1586). For a discussion of the early innkeeper rules and the rise of the duty of care and duty to serve, see generally David S. Bogen, *The Innkeeper's Tale: The Legal Development of a Public Calling*, 1996 UTAH L. REV. 51.

41. CHARLES K. BURDICK, *CASES ON THE LAW OF PUBLIC SERVICE INCLUDING THE LAW PECULIAR TO COMMON CARRIERS AND INNKEEPERS* (2d ed. 1924).

42. *Jackson v. Rogers*, (1683) 89 Eng. Rep. 968.

nondiscrimination rule, holding that an action could lie against a common carrier who refused to transport goods, just as it would lie “against an innkeeper for refusing [a] guest, or a smith on the road who refuses to shoe my horse”⁴³ As Matthew Hale observed, the scope of this obligation, which also applied to charging arbitrary or excessive prices, extended to “the wharf and crane and other conveniences [that] are affected with a public interest” because “they cease to be *juris privati* only.”⁴⁴

At the same time, the common law of innkeepers and common carriers included important exceptions to the duty to serve all comers: capacity constraints, failure to pay, and injury to others or to the service itself. Perhaps most intuitively, capacity constraints and the obligation of payment allowed innkeepers and common carriers to deny service. English courts had long declared that innkeepers did not need to house a guest if they did not have space.⁴⁵ In the United States, commentators took the same position. “An innkeeper is bound,” Joseph Story observed, “to take in all travelers and wayfaring persons, and to entertain them, *if he can accommodate them for a reasonable compensation*; and he must guard their goods with proper diligence.”⁴⁶ Common carriers likewise were required to “receive and carry all goods offered for transportation” unless “his coach is full.”⁴⁷

Innkeepers and common carriers could also exclude customers if the person or their property was a danger to other users of the service or might degrade the service. If a person wished to transport something that was “of a nature which will at the time expose [the carrier] to extraordinary danger or . . . popular rage,”

43. *Id.* On the innkeeper situation, consider also Blackstone. 3 WILLIAM BLACKSTONE, COMMENTARIES *165-66 (“[I]f an innkeeper, or other victualler, hangs out a sign and offers his house for travelers, it is an implied engagement to entertain all persons who travel that way, and upon this universal *assumpsit* an action on the case will lie against him for damages if he, without good reason, refuses to admit a traveler.”).

44. Matthew Hale, *A Treatise in Three Parts* (1670), reprinted in 1 A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 45, 77-78 (Frances Hargrave ed., Dublin, E. Lynch et al. 1787).

45. See *Lane v. Cotton* (1701) 88 Eng. Rep. 1458, 1464-65 (“If an innkeeper refuse to entertain a guest where his house is not full, an action will lie against him . . . , and so against a carrier, if his horses be not loaded, and he refuse to take a packet proper to be sent by a carrier.”); *id.* at 1464 (“[T]he innkeeper . . . is bound to receive all manner of people into his house till it be full”). For a later English statement of the same point, see FREDERICK CHARLES MONCREIFF, THE LIABILITY OF INNKEEPERS 19 (1874) (“[I]f his house is full, he is justified in refusing guests.”).

46. JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS, WITH ILLUSTRATIONS FROM THE CIVIL AND THE FOREIGN LAW 415 (Edmund H. Bennett ed., 7th ed. 1863) (emphasis added); see also *id.* at 403 (“[A]n innkeeper is not, if he has suitable room, at liberty to refuse to receive a guest, who is ready and able to pay him a suitable compensation.”).

47. *Id.* at 453-54.

the carrier could exclude it.⁴⁸ While riding circuit in 1835, Story heard a case in which a steamboat company refused service to a passenger who was also a carriage operator. The passenger intended to solicit other steamboat passengers to use his carriage service upon their arrival. After describing the obligation to serve, Story stated that the steamboat could nonetheless exclude passengers “who refuse to obey the reasonable regulations of the boat, or who are guilty of gross and vulgar habits of conduct; or who make disturbances on board”⁴⁹ Even if a passenger was not *presently* engaged in problematic conduct toward others, Story explained, *past* conduct could also warrant exclusion: “Suppose a known or suspected thief were to come on board, would they not have a right to refuse him a passage? Might they not justly act upon the presumption that his object was unlawful? . . . I think they might, upon the just presumption of what his conduct would be.”⁵⁰

Other courts held similarly. In 1837, one court found for an innkeeper who excluded a stagecoach driver who had been involved in “frequent altercations.”⁵¹ The court noted that the innkeeper need not “be held to wait until an affray is begun before he interpose, but may exclude common brawlers, and any one who comes with intent to commit an assault or make an affray.”⁵² In an 1844 case, a railroad-depot operator excluded an innkeeper who had regularly harassed disembarking passengers.⁵³ The court found that the depot had the “authority to make reasonable and suitable regulations” to “ensure the safety and promote the comfort of passengers.”⁵⁴ This authority included expelling “from his premises all disorderly persons, and all persons not conforming to regulations necessary and proper to secure such quiet and good order.”⁵⁵ The New Hampshire Supreme Court described the exception this way:

Like innkeepers, carriers of passengers are not bound to receive all comers. The character of the applicant, or his condition at the time, may furnish just grounds for his exclusion. And his object at the time may

48. *Id.* at 454.

49. *Id.* at 562.

50. *Id.* at 562-63 n.1. On the pickpocket example, see also *Pearson v. Duane*, 71 U.S. 605, 613-14 (1866). The Supreme Court there references the English case of *Coppin v. Braithwaite*, in which a ship captain refused service to a reported “pickpocket and associate of what was called the ‘swell mob.’” *Id.*

51. *Markham v. Brown*, 8 N.H. 523, 528-29 (1837).

52. *Id.*

53. *Commonwealth v. Power*, 48 Mass. 596 (1844).

54. *Id.* at 600.

55. *Id.* at 601.

furnish a sufficient excuse for a refusal; as, if it be to commit an assault upon another passenger, or to injure the business of the proprietors.⁵⁶

By the early twentieth century, so many courts had confronted this question that Bruce Wyman could systematically categorize the permissible and impermissible reasons for exclusion in his well-known treatise on public-service corporations. Wyman concluded that exclusion was impermissible if a person is merely “disagreeable,” “unmannerly,” engages in “slight misbehavior,” or is deemed “immoral” or “undesirable.”⁵⁷ But there were many permissible reasons for exclusion. Wyman concluded that “present misconduct” cases were straightforward.⁵⁸ But past misconduct—such as suspected thievery and habitual drunkenness—could also justify abrogating the duty to serve.⁵⁹

B. Communications

Like the common law of innkeepers and common carriers, communication law has also engaged questions of deplatforming. From the postal system to the telephone and telegraph to broadcasting, deplatforming has been a recurring issue.

1. Postal System

Since the early Republic, there has been debate over whether the Post Office could exclude people from the mail altogether, or more narrowly, exclude certain pieces of mail. Prior to the Civil War, the marquee exclusion debate was over abolitionist literature.⁶⁰ Northerners sent abolitionist publications to Southern elites. Pro-slavery Southerners—and even, at one point, the postmaster of New York—responded by attempting to prevent the sending of abolitionist content via the post.⁶¹ Pro-slavery critics claimed that abolitionist literature would destabilize their states and potentially lead to revolts by the people

56. *Bennett v. Dutton*, 10 N.H. 481, 486-87 (1839) (citations omitted).

57. 1 BRUCE WYMAN, *THE SPECIAL LAW GOVERNING PUBLIC SERVICE CORPORATIONS* 465-69 (1911). For an excellent discussion of the exceptions to the innkeeper’s duty, which covers similar ground as described in this section, see generally Comment, *Innkeeper’s Right to Exclude or Eject Guests*, 7 *FORDHAM L. REV.* 417 (1938).

58. WYMAN, *supra* note 57, at 521.

59. *Id.* at 522.

60. Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37*, 89 *NW. U. L. REV.* 785, 817-36 (1995).

61. *Id.* at 818.

they had enslaved.⁶² The Senate took up the debate, and a subcommittee proposed to let state laws on what materials were unmailable govern.⁶³ After ferocious debates in Congress, these attempts to exclude abolitionist content failed.⁶⁴

After the Civil War, Congress passed laws excluding a variety of materials from the mail, including poisons and explosives, obscene materials, advertisements for lotteries, films of prize fights, and materials designed to defraud.⁶⁵ In *Ex Parte Jackson*,⁶⁶ the Court confronted whether Congress had the power to pass such laws and whether the Fourth Amendment's protection against search and seizure applied. The petitioner had mailed a circular related to a lottery scheme and was convicted of sending information about a lottery through the mail.⁶⁷ Writing for the Court, Justice Field initially observed that the power "to establish post offices and post-roads"⁶⁸ extended to the power to take "all measures necessary to secure [the mail's] safe and speedy transit, and the prompt delivery of its contents."⁶⁹ What could be mailed had varied over time, and Congress's power to "designate what shall be carried necessarily involves the right to determine what shall be excluded."⁷⁰ Although, Field said, the Fourth Amendment provided a constraint on exclusion as did the First Amendment freedom of the press,⁷¹ neither infringed upon Congress's power to exclude "demoralizing" mail like lottery circulars so long as the mail was either open to inspection, there was a warrant for its opening, or there was other evidence of a legal violation.⁷²

In the early twentieth century, federal courts again took up postal-exclusion cases. These cases centered on three constitutional questions: whether the Post

62. *Id.* at 818-19.

63. *Id.* at 823-25.

64. *Id.* at 835.

65. See Robert Eugene Cushman, *National Police Power Under the Postal Clause of the Constitution*, 4 MINN. L. REV. 402, 404, 409-418 (1920). These included the Act of March 3, 1865, ch. 89, 13 Stat. 504 (obscene materials); Act of July 27, 1868, ch. 246, 15 Stat. 194 (lotteries); and the Comstock Act of 1873, ch. 258, 17 Stat. 599, which penalized mailing any "obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character," anything promoting abortion, or any "article or thing" with an "indecent or immoral use."

66. 96 U.S. 727 (1877).

67. *Id.* at 728.

68. *Id.*

69. *Id.* at 732.

70. *Id.*

71. *Id.* at 733. For a history of the sanctity and privacy of the mail, see generally Efrat Nechushtai, *Making Messages Private: The Formation of Postal Privacy and Its Relevance for Digital Surveillance*, 54 INFO. & CULTURE 133 (2019).

72. *Jackson*, 96 U.S. at 736.

Office had the power to exclude materials, and whether such exclusions violated the Fifth Amendment's Due Process Clause or the First Amendment. *Hoover v. McChesney*⁷³ involved the Postmaster General's order to stop delivery of all mail and postal money orders to the Southern Mutual Investment Company and its officers, including T.B. Hoover, who the postmaster said were conducting an illegal lottery via mail. The Circuit Court in Kentucky observed that mail service was critical to civic and business life, and that the post office had a legal monopoly on mail carriage.⁷⁴ While the court upheld Congress's power to determine mailable matter and to exclude immoral and fraudulent materials, it held that the order to exclude Hoover *completely* from the mail, and not just to exclude fraudulent mail, was a deprivation of his property right⁷⁵ to the use of the mail without due process of law under the Fifth Amendment.⁷⁶ The court, importantly, distinguished between specifically banned materials and banning a person entirely from access to such an important resource.

In *Lewis Publishing Co. v. Morgan*,⁷⁷ the Court upheld a requirement that newspapers list their publisher and label advertisements as such in order to receive second-class mail status (which came with a discounted rate). A few years later, in *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*,⁷⁸ the Supreme Court went much further, upholding the Postmaster General's banning of the *Milwaukee Leader* from receiving second-class mail status. The postmaster argued that postal statutes required second-class materials to publish "information of a public character" and that the newspaper's articles critical of the U.S. government and the war effort did not meet that test.⁷⁹ The Court upheld the postmaster's total exclusion of the *Leader*. The majority observed that the *Leader* was not totally excluded from the use of the mail; it simply could not receive the discounted rate.⁸⁰ Justices Brandeis and Holmes dissented, observing that the postmaster had the power only to exclude specific items, not entire publications.⁸¹ A generation later, after World War II, the Court reversed this

73. 81 F. 472 (C.C.D. Ky. 1897).

74. *Id.* at 477-78.

75. In doing so, the court analogized the post office to a common carrier. It appears the characterization of the right as a property right rather than a liberty right is due to the fact that common carriage is a limitation on the property right to exclude. For a discussion of the relationship between property rights and networks, platforms, and utilities (NPU), see Sitaraman & Ricks, *supra* note 8.

76. *Hoover*, 81 F. at 479.

77. 229 U.S. 288 (1913).

78. 255 U.S. 407 (1921).

79. *Id.* at 426 (Brandeis, J., dissenting).

80. *Id.* at 416 (majority opinion).

81. *Id.* at 436-38 (Holmes, J., dissenting).

position and channeled Brandeis in *Hannegan v. Esquire, Inc.*,⁸² upholding the right of Esquire Magazine to receive second-class status despite publication of “lewd” materials.

Under the Cold War backdrop of a struggle over freedom and civil rights,⁸³ the Supreme Court further restricted the power to exclude from the mail. A statute allowed the Postmaster General to detain “communist political propaganda.”⁸⁴ The postmaster implemented this policy by detaining the *Peking Review* until receiving a reply card from the recipient, confirming that the recipient wanted the mail. The Supreme Court held in *Lamont v. Postmaster General*⁸⁵ that the detention of mail was unconstitutional, arguing that a recipient has a right to receive mail without having to act by sending the card back. Around the same time, however, the Court did uphold other restrictions on mail service, including the distribution of obscene materials even to consenting adults.⁸⁶

Despite the expansion of First Amendment rights to mail service throughout the twentieth century, there are still restrictions on using the mail. Perhaps the most prominent is the federal mail-fraud statute.⁸⁷ Rather than operating as an *ex ante* ban on individuals or content (as prior orders of the postmaster did), the statute instead criminalizes sending materials through the mail that are involved in “any scheme or artifice to defraud” or any other unlawful actions.⁸⁸ Penalties are imposed after the fact and can include fines or prison.⁸⁹

2. Telegraph and Telephone

Examples of deplatforming in telecommunications go back more than a century. Some of the primary justifications for deplatforming in these areas were (1)

82. 327 U.S. 146 (1946).

83. Cf. MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000) (arguing that the desire to improve the United States’s international image during the Cold War helped facilitate the expansion of civil rights).

84. An Act to Adjust Postal Rates, and for Other Purposes, § 305, Pub. L. No. 87-793, 76 Stat. 832, 840 (1962) (codified at 39 U.S.C. § 4008), *invalidated by* *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

85. 381 U.S. at 307.

86. *United States v. Reidel*, 402 U.S. 351, 356-57 (1971).

87. 18 U.S.C. § 1341 (2018).

88. *Id.* For the classic analysis of the statute, see generally Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771 (1980).

89. In *Badders v. United States*, 240 U.S. 391 (1916), Justice Holmes upheld the mail-fraud statute for a unanimous Court. He observed that Congress’s power to exclude need not be tied to another underlying regulatory power, but that the “overt act of putting a letter into the post[]office of the United States is a matter that Congress may regulate.” *Id.* at 393.

a failure to pay for the service; (2) use of the services for illegal activity, including activities that violated public-morality legislation; (3) disruption of service for others or harassment of other users; and (4) obscene or indecent uses.

First, and perhaps most straightforwardly, courts have regularly permitted termination of phone service for failure to pay for the service. At the same time, courts have recognized the possibility of abuse and placed restrictions on termination when there are disputes about a bill or when the failure to pay was for a different service (e.g., business versus home).⁹⁰

Second, courts have regularly held that even though telecommunications companies have an obligation to offer service to all comers, it does not extend to facilitating illegal activity—and some have even found that companies have a *duty* to discontinue service in such cases.⁹¹ In one Ohio case, for example, Western Union was sued for discontinuing service to a person who was using its wires to send illegal gambling information from racetracks to bookmakers.⁹² The federal court observed that Western Union's terms of service prohibited use for illegal activities, but went further:

Even without such provision in the tariffs, the defendant would not only be authorized, it would be obligated, to discontinue service which contributes to and facilitates the operation of a business or enterprise in violation of law. Any person or company that knowingly assists in a scheme to violate the law is subject to prosecution.⁹³

In another case, the Florida Supreme Court upheld a state law barring public utilities from furnishing their wire services for gambling.⁹⁴ The court not only observed that restrictions on bookmaking were a valid public-morals regulation under the state's police power, but also distinguished telegraph services from newspapers. The difference, the court said, was that the telegraph was significantly faster than newspapers or other magazines; this technological difference made bookmaking viable and wires a reasonable target of regulation.⁹⁵ Notably, discontinuation of service is mandated by federal law when any FCC-regulated

90. See, e.g., *KARL OAKES*, 86 C.J.S. TELECOMMUNICATIONS § 99 (permitting the suspension of service but not without just cause); *Denham v. Sw. Bell Tel. Co.*, 415 F. Supp. 530, 534 (W.D. Okla. 1976) (recognizing a “right to collect . . . [a] past due account by reasonable means”); *Josephson v. Mountain Bell*, 576 P.2d 850 (Utah 1978) (barring a telephone-service provider from disconnecting home-phone service due to nonpayment on a business-phone service).

91. See Jeffrey A. O’Connell, Note, *Constitutional Protection of Summary Telephone Disconnections for Illegal Use*, 82 COLUM. L. REV. 98, 98 & n.2 (1982) (citing cases).

92. *Hamilton v. W. Union Tel. Co.*, 34 F. Supp. 928 (N.D. Ohio 1940).

93. *Id.* at 929.

94. *McInerny v. Ervin*, 46 So. 2d 458 (Fla. 1950).

95. *Id.* at 463.

common carrier is informed by law enforcement that it is being used for illegal gambling.⁹⁶ Before discontinuing service, a law-enforcement agency must notify a common carrier of the illegal use and the carrier must give reasonable notice to the subscriber.⁹⁷

Third, disruption of service and harassment of others have been common justifications. As early as the 1880s, courts enforced duty-to-serve obligations on telephone companies.⁹⁸ Cases about terminating service followed soon after. In a 1909 common-law case, for example, the Iowa Supreme Court found in favor of a telephone company that had denied telephone service to a user.⁹⁹ The user had interfered in other phone conversations and disrupted phone service for other users on a party line,¹⁰⁰ including with indecent language. Despite being warned, the user continued this behavior. The court observed:

A single patron by meddling and discourtesy might deprive his neighbors of the benefits of a convenient invention, and destroy the value of the property devoted to the public service. This power to regulate is essential in order to enable the defendant to perform such service, and is clearly to be implied from the nature of the enterprise. But it ought never to be arbitrarily exercised. Reasonable caution must be taken lest injustice be done. Some allowance is to be made for the infirmities of human nature So that, when rules to guide patrons have not been promulgated in advance, it is not unreasonable that any patron misusing his privileges be duly warned thereof by the telephone company, and given an opportunity to mend his ways, before being finally deprived of this most convenient means of business and social communication. Such was the course pursued by defendant¹⁰¹

96. 18 U.S.C. § 1084(d) (2018). For a discussion of cases on this point, see 74 AM. JUR. 2D TELECOMM. § 42.

97. 18 U.S.C. § 1084(d) (2018).

98. See, e.g., *Chesapeake & P. Tel. Co. v. Baltimore & Ohio Tel. Co.*, 7 A. 809 (1887). In that case, the court required a Maryland telephone company in partnership with telegraph operator Western Union to treat a telegraph company on similar footing: “The law requires [it] to be impartial, and to serve all alike.” *Id.* at 811.

99. *Huffman v. Marcy Mut. Tel. Co.*, 121 N.W. 1033, 1034 (Iowa 1909).

100. A party line was a shared phone line between multiple households. Use of the phone line did not preclude other households from picking up and hearing (or participating in) the conversation.

101. *Huffman*, 121 N.W. at 1034.

Because the company had reasonable pre-stated rules and had issued a warning to comply with them, it was justified in excluding the user—even from “this most convenient means of business and social communication.”¹⁰²

Harassing other users has remained a justification for discontinuing phone service. In a 1982 case from Minnesota, the Eighth Circuit upheld a telephone company’s termination of service without a notice or hearing. The subscriber repeatedly made “harassing,” “abusive and profane” calls and continued to do so after being formally warned by the phone company.¹⁰³ The court upheld the termination, noting that the phone-company regulations prohibited the “use of foul or profane language” and “interfere[nce] with the service of other subscribers.”¹⁰⁴ At the same time, the justifications to deplatform for illegal uses or harassing uses is not open-ended. Courts have found that companies cannot refuse or terminate service “merely because of the bad character of the” customer or because subscribers might use an otherwise lawful service for illegal purposes.¹⁰⁵

A fourth category of deplatforming in telecommunications involves obscenity and indecent behavior. In *Sable v. FCC*,¹⁰⁶ the Supreme Court considered a total statutory ban on obscene and indecent telephone messages.¹⁰⁷ Sable operated a “dial-a-porn” service, in which individuals could call dedicated phone lines and listen to pornographic audio recordings for a fee, proceeds of which were divided between the phone company, Pacific Bell, and Sable.¹⁰⁸ In 1983, Congress criminalized the use of telephone services for obscene or indecent purposes to those under eighteen years old or nonconsenting adults, and delegated power to the FCC to promulgate regulations outlining how “dial-a-porn” providers could operate in compliance with the law. The FCC’s regulations were repeatedly

102. *Id.*

103. *Occhino v. Nw. Bell Tel. Co.*, 675 F.2d 220, 222 (8th Cir. 1982).

104. *Id.* at 224.

105. 86 C.J.S. *Telecommunications* § 99; *see also* *Shillitani v. Valentine*, 53 N.Y.S.2d 127, 131 (Sup. Ct. 1945) (“[A] telephone company may not refuse to furnish service and facilities because of mere suspicion or mere belief that they may be or are being used for an illegitimate end . . . nor because the character of the applicant is not above reproach, nor because such person is engaged in immoral or illegal pursuits, where they have no connection with the service applied for.”), *modified on other grounds*, 56 N.Y.S.2d 210 (App. Div.1945), *aff’d*, 71 N.E.2d 450 (N.Y. 1947).

106. 492 U.S. 115 (1989).

107. The provision was Section 223(b) of the Communications Act of 1934, as amended in 1988, and then codified at 47 U.S.C. § 223(b) (2018).

108. *Sable*, 492 U.S. at 118.

struck down by the Second Circuit, before Congress passed the more sweeping provision in 1988.¹⁰⁹

The Supreme Court upheld the ban on obscene telephone usage but not on indecent usage.¹¹⁰ It observed that “[s]exual expression which is indecent but not obscene is protected by the First Amendment.”¹¹¹ Nonetheless, indecent material could still be regulated to advance a compelling government interest, including the protection of minors; the regulations must simply use the least restrictive means to do so.¹¹² Congress’s total ban was not the least restrictive means for protecting minors. The Court was also attentive to differences in technologies, and it described how telephonic communications differed from broadcast communications.¹¹³ We will discuss deplatforming in broadcast communications in the next Section.

By the 1990s, the approach to regulating telephones moved away from deplatforming and toward monetary penalties. Congress now confronted the problem of unwanted automated calls (robocalls) and unsolicited facsimiles (junk faxes). Both could degrade telephone service and annoy or harass other users. At the time, robocalls would not hang up, even if the user had already hung up.¹¹⁴ In at least one instance, a robocall prevented a mother from dialing

109. The FCC initially restricted the hours of such service to nights and required a credit-card payment, but the Second Circuit concluded that was not narrowly tailored. It then required a credit card or ID code, but the Second Circuit said it had not adequately considered call-blocking technologies. It then rejected premises blocking and adopted a rule requiring a credit card, ID code, or message-scrambling device that would only be sold to adults. The Second Circuit upheld these regulations with respect to obscene speech, but not indecent speech. At that point, Congress banned all obscene and indecent telephone use for adults and children alike. See *id.* at 121-22 for a history of these regulations and cases.

110. *Id.* at 124.

111. *Id.* at 126.

112. *Id.*

113. *Id.* at 127-28. Interestingly, the distinction in earlier “dial-a-porn” cases could be interpreted to have been somewhat blurry. Under one such service, thousands of people could call and hear the same pornographic recording. This, one scholar has observed, looks more like a radio broadcast via telephone than a system of one-to-one communications. Jerome A. Barron, *The Telco, the Common Carrier Model and the First Amendment—The “Dial-a-Porn” Precedent*, 19 RUTGERS COMPUT. & TECH. L.J. 371, 388 (1993) (describing *Carlin Commc’ns, Inc. v. Mountain States Tel. & Tel.*, 827 F.2d 1291, 1294 (9th Cir. 1987)). Barron and others have observed that questions of editorial versus business judgment, or of the status as a publisher or common carrier, emerged even with the telephone. Barron, *supra*, at 385-89; Angela J. Campbell, *Publish or Carriage: Approaches to Analyzing the First Amendment Rights of Telephone Companies*, 70 N.C. L. REV. 1071, 1075 (1992).

114. Walter Allison, *Unplanned Obsolescence: Interpreting the Automatic Telephone Dialing System After the Smartphone Epoch*, 119 MICH. L. REV. 147, 148-49 (2020).

911 when her child needed emergency care.¹¹⁵ Robocalls also sometimes tied up hospital, fire, and police telephone lines.¹¹⁶ Rather than mandate terminations of service (as with illegal gambling), Congress now took a different approach. Under the Telephone Consumer Protection Act, Congress banned the use of robocall technologies without recipient consent and authorized the FCC to create exceptions to that policy.¹¹⁷ It also banned junk faxes, without providing an exception authority – though the FCC created exceptions anyway.¹¹⁸ While the law initially tamped down unwanted calls, the FCC’s exceptions reopened the door to abuse; over time, enforcement of these laws – primarily through class-action litigation for damages – has not been successful in curbing the harms.¹¹⁹

3. *Broadcast*

Broadcast differs from other communications enterprises in that Congress chose not to designate broadcasters as common carriers under the Communications Act.¹²⁰ But governments have pursued deplatforming policies in the broadcasting sector in two ways: content restrictions and licensing rules. The Supreme Court has long recognized that while merely offensive content cannot be banned under the First Amendment, obscene, indecent, and offensive content can be regulated.¹²¹

Perhaps less well known is that during the middle of the twentieth century, the FCC could deny or determine not to renew broadcast licenses for a variety of reasons.¹²² It is possible to interpret the licensing regime itself as a form of deplatforming. In the early twentieth century, the ability to broadcast on the then-new technology of radio was unregulated. Conflicting broadcasts on the same

115. *Id.* at 148. The child lived. *Id.*

116. *Id.*

117. Spencer Weber Waller, Daniel B. Heidtke & Jessica Stewart, *The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology*, 26 LOY. CONSUMER L. REV. 343, 356 (2014).

118. *Id.* at 357-58.

119. *Id.* at 377-78 (describing the failure of private litigation generally); see also Justin (Gus) Hurwitz, *Telemarketing, Technology, and the Regulation of Private Speech: First Amendment Lessons from the FCC’s TCPA Rules*, 84 BROOK. L. REV. 1, 3 (2018) (noting that “the TCPA has not eliminated the scourge of unwanted telephone calls”).

120. 47 U.S.C. § 153(11) (2018).

121. See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (upholding FCC actions in a situation of patently offensive words); *Kingsley Int’l Pictures Co. v. Regents of the Univ. of N.Y.* 360 U.S. 684 (1959) (striking down a statute that barred the airing of a potentially offensive film).

122. Licenses are required under Section 301 of the Communications Act, as codified in 47 U.S.C. § 301 (2018).

frequency disrupted service, including for military uses.¹²³ The licensing regime created by the Radio Act of 1927 thus deplatformed actual and potential radio broadcasters by limiting broadcasting to those with a certificate of public convenience and necessity.¹²⁴

Within the licensing regime, there were many justifications for exclusion. First, until the late 2010s, licenses were denied to foreigners under a long-standing ban on foreign ownership, designed partly to prevent interference with national-security operations or foreign propaganda over U.S. communications networks.¹²⁵ Restrictions on foreign ownership, control, or influence were also common across many other NPUs.¹²⁶ Second, the FCC could deplatform a broadcaster by denying a renewal of its license for practical reasons: making misrepresentations to FCC; failing to stay on its assigned frequency and thereby potentially disrupting other broadcasters; and engaging in fraudulent billing practices.¹²⁷ Third, after the civil-rights revolution,¹²⁸ the FCC denied license renewals based on racially discriminatory practices in the 1970s.¹²⁹ Finally, the FCC could, in some situations, deny licenses or renewals based on the content of broadcasts. The FCC denied license renewals in cases in which a radio announcer was vulgar and offensive¹³⁰ and a college radio was insufficiently

123. See Daniel R. Ernst, *The Shallow State: The Federal Communications Commission and the New Deal*, 4 U. PA. J.L. & PUB. AFF. 403, 409-10 (2019); Matthew L. Spitzer, *Controlling the Content of Print and Broadcast*, 58 S. CAL. L. REV. 1349, 1352-53 (1985). While some have focused on “scarcity” as the reason for this regime, it appears that the underlying issue was more in the form of coordination and disruption of stable service. Compare Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 267-69 (2003) (describing scarcity grounds) with C. Edwin Baker, *Keynote Address: Three Cheers for Red Lion*, 60 ADMIN. L. REV. 861, 867-68 (2008) (noting that the tragedy-of-the-commons problem is at the heart of the regime).

124. Interestingly, one of the other motivations for regulation appears to have been fears that broadcasters would use their power to engage in private censorship of viewpoints. This led to the combination of a public-interest standard for licensees and a prohibition on government censorship. For an argument to this effect, see Charles D. Ferris & Terrence J. Leahy, *Red Lions, Tigers and Bears: Broadcast Content Regulation and the First Amendment*, 38 CATH. U. L. REV. 299, 310-11 (1989).

125. For a discussion of the longstanding ban and its watering down in the 2010s, see Sitaraman, *supra* note 29, at 1113-18.

126. *Id.* at 1106-27 (describing restrictions).

127. Jonathan Weinberg, *Broadcasting and Speech*, 81 CALIF. L. REV. 1101, 1125 n.110 (1993).

128. See generally BRUCE ACKERMAN, 3 WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014) (discussing the changes in constitutional and statutory interpretation during the civil-rights era).

129. Weinberg, *supra* note 127, at 1125 n.110.

130. Palmetto Broadcasting Co., 33 F.C.C. 250, 259 (1962), *aff'd sub nom.* Robinson v. FCC, 334 F.2d 534 (D.C. Cir. 1964), *cert. denied*, 379 U.S. 843 (1964).

supervised and broadcast indecent speech.¹³¹ Congress also intended the FCC to revoke licenses for violations of the ban on broadcasting illegal lottery information.¹³²

C. *Transportation*

Transportation law covers a wide range of businesses – railroads, motor carriers, ocean shipping, airlines, in addition to local services from stagecoaches in the nineteenth century to mass transit in the twenty-first century. From the 1880s until its demise a century later, the Interstate Commerce Commission (ICC) regulated many common carriers in transportation. This Section first considers exceptions to the duty to serve for railroads and other surface-transportation carriers under the ICC regime in the late nineteenth and early twentieth century. It then moves to the present day and outlines some of the ways in which airlines can refuse to serve passengers.

1. *Railroads and Other Common Carriers*

In transportation law, common carriers have long been subject to a duty to serve. The Interstate Commerce Act of 1887 (ICA) imposed a variety of nondiscrimination duties on railroads and other common carriers, including banning “undue or unreasonable” preferences and requiring interconnection between lines.¹³³ The Act was strengthened significantly by the 1906 Hepburn Act,¹³⁴ and amended multiple times thereafter. In its heyday, the ICA required common carriers to “provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers.”¹³⁵

As the invocation of “reasonableness” suggests, these duties to serve were never absolute. Railroads and other common carriers were nonetheless allowed to exclude items or individuals for a variety of reasons. In his treatise on public-service corporations, Bruce Wyman offered a remarkably comprehensive account

131. Trs. of the Univ. of Pa. Radio Station WXPB (FM), 69 F.C.C.2d 1394, 1429-30 (1978).

132. Comment, *Administrative Enforcement of the Lottery Broadcast Provision*, 58 YALE L.J. 1093, 1102-07 (1949).

133. Act of Feb. 4, 1887, ch. 104, § 3, 24 Stat. 379.

134. Act of June 29, 1906, ch. 3591, 34 Stat. 584. It was also strengthened by the Elkins Act of 1903. Ch. 708, 32 Stat. 847.

135. For an annotated version of the ICA, including references to each portion amended, see RICKS, SITARAMAN, WELTON & MENAND, *supra* note 25, at ch. 10, app. A. This provision was added in the Transportation Act of 1920.

of the justifications for common carriers' refusals of service.¹³⁶ Wyman's primary categories included illegal behavior, protection of the service itself, and of other users of the service.¹³⁷ Illegality meant that carriers could refuse to transport a particular good or person. Carriers, therefore, could not transport liquor, game, or fish, where local laws make its transportation illegal.¹³⁸ They also could refuse to transport individuals out of a quarantine zone.¹³⁹

Protection of both the service and its users was designed to ensure not only public and personal safety but also the continued quality of the service. Thus, in the late nineteenth and early twentieth centuries, carriers were allowed to refuse to transport hazardous goods like explosives.¹⁴⁰ Carriers also did not have to take persons carrying dangerous items, like bayonets, "cumbrous parcels," or animals.¹⁴¹ Individuals who were themselves dangerous could also be excluded. "[A] railroad," Wyman observed, "is not bound to receive on its cars or to permit to remain upon its cars one going upon a train or staying upon it to assault a passenger, commit larceny or robbery, or perpetrating any other crime."¹⁴² In one case, a railroad ejected a passenger who pulled a knife. The Kentucky court approved, noting that the railroad needs to ensure the protection and safe travel of its employees and passengers.¹⁴³ Danger also extended to those with contagious diseases, the intoxicated, and profane passengers, though they generally could not be excluded if they were no longer sick, drunk, or behaving badly.¹⁴⁴ Importantly, exclusions of individuals from transportation services applied not only to ejecting them from the service but also to preemptively refusing service.¹⁴⁵

Indeed, courts have even found that common carriers have a *duty* to refuse service to those who might injure or harm others. In *Holton v. Boston Elevate Railway Co.*,¹⁴⁶ for example, the Massachusetts Supreme Judicial Court addressed a situation in which an excessively drunk passenger on a streetcar pushed another passenger, resulting in her broken leg. The streetcar operator knew the passenger was intoxicated, and the injured woman argued that the operator had

136. WYMAN, *supra* note 57, at chs. 13, 16-18, 20.

137. *Id.* at chs. 17, 18.

138. *Id.* at 489-91. However, the carriers would not be liable if they had no reasonable grounds to know that packages included illegal liquor, game, or fish.

139. *Id.* at 491.

140. *Id.* at 503.

141. *Id.* at 507.

142. *Id.* at 508.

143. *Id.* at 509.

144. *Id.* at 510-14, 521-22.

145. *Id.* at 514, 522.

146. 21 N.E.2d 251 (Mass. 1939).

therefore behaved negligently in not refusing service to the drunk passenger. The court observed that the rule “that a common carrier is bound to accept anybody and everybody who presents himself for transportation and pays the regular fare, has its limitations.”¹⁴⁷ Because common carriers owe duties to passengers, including of safe transportation, they have an “obligation to refuse to accept as a passenger” one who might injure others, certainly including someone “who manifested a boisterous and belligerent attitude and threatened to assault persons within his reach.”¹⁴⁸ The court concluded that it was a question of fact for a jury to determine whether the drunk passenger exhibited such behavior that the streetcar driver was negligent in not refusing him service.¹⁴⁹

2. Airlines

Moving from surface transportation in the past to air travel in the present, there are a range of ways in which airlines refuse service to passengers. Federal law mandates that airlines refuse to transport individuals who do not consent to be searched for dangerous weapons and other substances.¹⁵⁰ Federal law also grants discretion to airlines to deny service to individuals whom the airline decides are or might be a danger to safety.¹⁵¹ Under this “permissive removal” authority, pilots have considerable power to remove passengers, including if a passenger seems nervous or disruptive; pilots do not have to conduct an investigation prior to removal.¹⁵²

In addition to being denied a single trip on a flight, individuals can also be banned altogether from flying. Airlines each have their own no-fly lists in which they have barred certain passengers from ever traveling on the airline again, usually because they are a danger to safety onboard or because they have refused to

147. *Id.* at 253.

148. *Id.*

149. *Id.* at 253-54.

150. 49 U.S.C. § 44902(a) (2018).

151. *Id.* § 44902(b) (“Subject to regulations of the Administrator of the Transportation Security Administration, an air carrier, intrastate air carrier, or foreign air carrier may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety.”).

152. *Cordero v. Cia Mexicana De Aviacion, S.A.*, 681 F.2d 669, 672 (9th Cir. 1982) (“The reasonableness of the carrier’s opinion, therefore, is to be tested on the information available to the airline at the moment a decision is required. There is correspondingly no duty to conduct an in-depth investigation”); Patrick J. McDonald, *Cerquiera v. American Airlines: What Are the Appropriate Limits of an Air Carrier’s Permissive Removal Power?*, 20 GEO. MASON U. C.R. L.J. 111, 115 & n.21 (2009) (describing cases of airlines’ excluding certain customers).

follow the instructions of a crew member.¹⁵³ With increasing numbers of unruly passengers since the COVID-19 pandemic, major carriers have even called for the creation of a unified no-fly list; individuals on this list would be banned from every carrier.¹⁵⁴ A unified no-fly list would cover a wider set of individuals than the current federal no-fly list. That list, developed after the September 11 attacks, restricts some 64,000 people from travel on any airplane in U.S. airspace.¹⁵⁵ This list is itself a subset of a broader list, the Terrorist Screening Database, which includes about 800,000 people.¹⁵⁶ Inclusion on the list is based on an investigation including multiple factors, although the government is not permitted to include race, political views, or speech.¹⁵⁷ It is hard to tell whether those factors are considered implicitly because citizens on the federal government's lists have limited due-process rights: they do not get advance notice of listing and are not always told of the reasons for listing.¹⁵⁸ They do, however, have an opportunity to offer information to attempt to reverse their exclusion.¹⁵⁹

Luggage and cargo can also be excluded from air transportation. As with individuals, airlines must remove property if owners do not allow it to be searched.¹⁶⁰ As a general matter, hazardous and dangerous materials are also prohibited on airlines.¹⁶¹ A separate regulatory regime governs their transportation.¹⁶²

The purposes behind these denials of service largely fall into three categories: safety of other passengers, safety and smoothness of the service, and safety of the general public and nation. Individuals who are dangerous or disruptive

153. Ed Bastian, *Why We Need a National No-Fly List*, WASH. POST (Feb. 22, 2022, 12:58 PM EST), <https://www.washingtonpost.com/opinions/2022/02/22/why-we-need-national-no-fly-list> [<https://perma.cc/K7M6-QPJQ>]; Mary Schlangenstein & Alan Levin, *No-Fly List Talks Intensify in U.S. on Surge in Violent Incidents*, BLOOMBERG (Feb. 14, 2022), <https://www.bnnbloomberg.ca/no-fly-list-talks-intensify-in-u-s-on-surge-in-violent-incidents-1.1723128> [<https://perma.cc/TJL2-SJZ4>].

154. Schlangenstein & Levin, *supra* note 153.

155. Eric Halliday & Rachael Hanna, *Adding Domestic Extremists to the No-Fly List*, LAWFARE (May 19, 2021, 5:52 PM), <https://www.lawfareblog.com/adding-domestic-extremists-no-fly-list> [<https://perma.cc/6JNK-8Q3Z>].

156. *See id.*; JEROME P. BJELOPERA, BART ELIAS & ALISON SISKIN, CONG. RSCH. SERV., R44678, THE TERRORIST SCREENING DATABASE AND PREVENTING TERRORIST TRAVEL 5 (2016).

157. Halliday & Hanna, *supra* note 155.

158. *Id.*

159. *Id.*

160. 49 U.S.C. § 44902(a)(2) (2018).

161. 49 C.F.R. §§ 175.1, 175.3 (2022) (prohibiting hazardous materials not in line with the regulation); *id.* § 175.10 (2022) (listing exceptions); *see also id.* § 1540.111 (2022) (prohibiting weapons and listing exceptions).

162. 49 U.S.C. § 5103 (2018) (providing statutory authority for said regime).

might injure other passengers directly or reduce the quality of service more generally. And with the possibility of airplane hijackings, particularly after September 11, the general nonflying public is also at risk if planes are turned into weapons themselves.

D. Energy

In the energy sector, deplatforming rules occur both at the retail level and in the transmission of electricity and fossil fuels. At the retail level, the most obvious form of deplatforming is shutting off power or other utilities due to nonpayment. Importantly, gas, electricity, and water are “essential” services. Failure to have access to these services could have grave consequences. For example, shutting off electric or gas heat during a cold winter could lead to freezing to death. Utilities have long provided notice of a pending shutoff,¹⁶³ and the Supreme Court found in the 1970s that due process requires at least notice and a chance to object.¹⁶⁴ In some states, the law is even more protective of individuals’ access to utility services. In Massachusetts, for example, utilities cannot shut off services needed to heat residential homes between November 15 and March 15 of each year.¹⁶⁵ During the rest of the year, shutoffs are permissible – but not without protections. If a resident is seriously ill, has an infant less than one year old, or if all adults are above sixty-five and have a minor in the home, then the Department of Public Utilities must approve of the shutdown if the resident is also financially insecure.¹⁶⁶

Power shutoffs have also been used to target illegal behavior, particularly illegal behavior that requires significant electricity. The City of Los Angeles, for example, has authorized its Department of Water and Power to halt service to

163. See Note, *Fourteenth Amendment Due Process in Terminations of Utility Services for Nonpayment*, 86 HARV. L. REV. 1477, 1479 (1973).

164. See O’Connell, *supra* note 91, at 106 (citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978)).

165. See Off. of the Att’y Gen., *Frequently Asked Questions About Electric and Gas Utilities*, MASS.GOV, <https://www.mass.gov/info-details/frequently-asked-questions-about-electric-and-gas-utilities> [<https://perma.cc/8KB4-T32H>]; Charlie Harak, Jenifer Bosco & Ana Girón Vives, *Utilities Advocacy for Low-Income Households in Massachusetts*, NAT’L CONSUMER L. CTR. 18-21 (2019), <https://www.nclc.org/wp-content/uploads/2022/08/stay-connected-handbook.pdf> [<https://perma.cc/U4Z9-PGSL>].

166. Off. of the Att’y Gen., *supra* note 165; Harak et al., *supra* note 165, at 10-18, 21-25.

illegal-marijuana cultivators and dispensaries.¹⁶⁷ Other cities, like Pasadena and Anaheim, have done the same.¹⁶⁸

Since the middle of the nineteenth century, utilities have also been allowed to restrict service if a user refuses to comply with the utility's reasonable terms and conditions of service – even in cases where the utility had a complete monopoly. In an 1858 case, for example, a user seeking gas service for lighting his shop refused to agree to the local-monopoly gas company's terms and conditions of service.¹⁶⁹ The Supreme Court of Wisconsin announced that the company “ha[s] a right to make all such needful rules and regulations for their own and the convenience and security of the public, as are reasonable and just, and to exact a promise of conformity thereto.”¹⁷⁰ But the court also observed that any such terms and conditions “must be reasonable, just, lawful, not capricious, arbitrary, oppressive, or unreasonable,” and then proceeded to evaluate the particular terms that the gas company imposed.¹⁷¹

At the transmission level, the scope of deplatforming emerges in electricity “wheeling” requirements. In *Otter Tail Power Co. v. United States*,¹⁷² a number of Midwestern municipalities set up their own utilities. Otter Tail refused to sell electricity wholesale to them, even though it had previously offered them retail service. It also refused to “wheel” power to the cities – that is, to transmit electricity the cities procured from elsewhere across Otter Tail's electric lines. The Supreme Court found that the Federal Power Act did not protect the cities because the statute did not create a common-carrier system in electricity transmission.¹⁷³ But the statute also did not bar application of the antitrust laws, and the Court found that the actions were anticompetitive and violated the antitrust laws.¹⁷⁴ Importantly, the *Otter Tail* Court observed that the obligation to wheel power was not “impervious.”¹⁷⁵ If wheeling would “erode [Otter Tail's] integrated system and threaten its capacity to serve adequately the public,” that would be grounds for a refusal to wheel.¹⁷⁶ After *Otter Tail*, Congress stepped in

167. Ethan Varian, *LA City Council Votes to Shut Off Utilities at Illegal Marijuana Shops*, L.A. DAILY NEWS (Mar. 9, 2019, 5:41 PM), <https://www.dailynews.com/2019/03/08/la-city-council-votes-to-shut-off-utilities-at-illegal-marijuana-shops> [<https://perma.cc/X2M3-9HKV>].

168. *Id.*

169. *Shepard v. Milwaukee Gas Light Co.*, 6 Wis. 539 (1858).

170. *Id.* at 548.

171. *Id.*

172. 410 U.S. 366 (1973).

173. *Id.* at 373-74.

174. *Id.* at 377-79.

175. *Id.* at 381.

176. *Id.*

and empowered FERC to order utilities to wheel power.¹⁷⁷ The original statutory provision required that wheeling had to either conserve energy or improve reliability.¹⁷⁸ Reforms over time loosened those requirements, but an exception has remained for situations in which wheeling would “unreasonably impair the continued reliability of electric systems”¹⁷⁹

Rules around when exclusions are permissible also exist in the transportation of fossil fuels. Under current Texas state law, for example, petroleum producers can sell to “common purchaser[s]” and common carriers for transportation and sale.¹⁸⁰ Common purchasers and carriers that own their own production facilities are not allowed to discriminate against other producers. But this nondiscrimination rule has an exception: it applies only to gas of “a similar kind or quality.”¹⁸¹ The reason for the exception goes back to service quality and degradation. Because gas can be commingled in pipelines, it is important for gas entering the pipelines to be similar. But even this justification may depend on the circumstances. In a 1922 case, for example, the ICC confronted the question of whether a pipeline’s minimum-tender rule – a requirement that producers have a minimum amount of oil in order to use the pipeline – was a violation of its common-carrier duties.¹⁸² One justification the pipeline offered was that smaller batches of oil would mean more mixing and contamination between different types and grades of oil.¹⁸³ The ICC observed that if there were reasonable changes to the pipeline’s operations that could accommodate these differences, the pipeline could be obligated to make those changes so that it could fulfill its common-carrier duties.¹⁸⁴

177. Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, § 203, 92 Stat. 3117, 3136-38 (codified as amended at 16 U.S.C. § 824j (1982)).

178. *See id.*

179. 16 U.S.C. § 824j(b) (2018). For other discussions of wheeling rules, see Floyd L. Norton IV & Michael B. Early, *Limitations on the Obligation to Provide Access to Electric Transmission and Distribution Lines*, 5 ENERGY L.J. 47, 47-51 (1984); Joe D. Pace, *Wheeling and the Obligation to Serve*, 8 ENERGY L.J. 265, 267-74 (1987); David S. Copeland, *Requiring Transmission Access by Electric Utilities: The Shifting Roles of Regulation and Antitrust*, 64 ANTITRUST L.J. 291, 292-95 (1996).

180. TEX. NAT. RES. CODE ANN. § 111.087(a) (West 2023).

181. *Id.* For a discussion, see A. Scott Anderson, *The Texas Approach to Gas Proration and Ratable Take*, 57 U. COLO. L. REV. 199, 213-14 (1986).

182. *Brundred Bros. v. Prairie Pipe Line Co.*, 68 I.C.C. 458 (1922).

183. *Id.* at 464.

184. *Id.*

E. Banking and Payments

Participation in the modern economy requires access to bank accounts to hold money and payment systems to make transactions. Banks and payment networks thus serve utility-like or infrastructural roles.¹⁸⁵ And yet, as in other areas, individuals and services can be deplatformed from banking and payment systems.

The most straightforward deplatforming practice is based on national security. Economic sanctions are a form of preventing transactions with individuals, charities, businesses, and even entire countries.¹⁸⁶ Under the International Emergency Economic Powers Act, the president can restrict or prohibit transactions with foreign persons or entities after the declaration of a national emergency.¹⁸⁷ The Office of Foreign Asset Control within the Treasury Department identifies individuals or entities, and lists them on the Specially Designated Nationals and Blocked Persons List.¹⁸⁸ U.S. entities are then not allowed to transact with them.¹⁸⁹ Another list, the Consolidated Sanctions List, includes individuals or entities for whom only certain transactions are blocked.¹⁹⁰ The key to this system is that financial institutions, “the primary gatekeepers to international commerce and capital,” can freeze assets or prevent their transfer.¹⁹¹ Banks, therefore, play a critical role in the sanctions regime – and one that effectively involves deplatforming users or specific transactions.

Banks in the United States also refuse to serve individuals, despite the significant consequence this might have for individuals’ ability to participate in the national economy. When attempting to get a bank account, banks usually screen applicants through consumer-reporting agencies such as ChexSystems and Early Warning Services, which collect checking- and savings-account information

185. For arguments in this vein, see, for example, Ricks, *supra* note 24, at 758-72; and White, *supra* note 24.

186. See, e.g., Perry S. Bechky, *Sanctions and the Blurred Boundaries of International Economic Law*, 83 MO. L. REV. 1, 4-5 (2018) (describing country-based sanctions programs and list-based sanctions programs).

187. 50 U.S.C. § 1702(a) (2018).

188. For a brief overview, see NINA M. HART, CONG. RSCH. SERV., IF12063, ENFORCEMENT OF ECONOMIC SANCTIONS: AN OVERVIEW 1 (2022).

189. *Id.*

190. *Id.*

191. Juan C. Zarate, *Harnessing the Financial Furies: Smart Financial Power and National Security*, 32 WASH. Q. 43, 49 (Oct. 2009).

including bounced checks and unpaid or late-paid overdraft fees.¹⁹² According to some reports, a single instance that is flagged can be enough for banks to blacklist a person from opening an account for five years.¹⁹³ Scholars, policy experts, and government officials have observed a number of problems with the system. Some banks do not have adequate reporting procedures and fail to provide customers who dispute inaccurate information with the results of their investigations.¹⁹⁴ Banks may use the screening mechanism as a way to exclude individuals who are unlikely to earn them a profit, rather than those who are high risk.¹⁹⁵ Account exclusion disproportionately affects Black customers,¹⁹⁶ and some have suggested that these reports might offer a pretext for racial discrimination in which minorities are excluded from accounts while white individuals are not.¹⁹⁷ At the reporting agencies, information about an individual's record (including whether they have one) is opaque, and "it is nearly impossible for a consumer to resolve a ChexSystems record" issue.¹⁹⁸ Some customers have reported that they were not notified in advance that their accounts were being closed and later discovered that the account problems were not their fault.¹⁹⁹ In

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192. *About ChexSystems*, CHEXSYSTEMS, INC., <https://www.chexsystems.com/about-chexsystems> [<https://perma.cc/5QB9-HEKS>]; see also Spencer Tierney, *Blocked from Getting a Bank Account? Learn About ChexSystems*, NERDWALLET (Jan. 19, 2023), <https://www.nerdwallet.com/article/banking/blocked-by-chexsystems-what-to-know> [<https://perma.cc/74SJ-PU34>] ("If you've been denied a bank account, it might be because of a report on ChexSystems . . ."); *About*, EARLY WARNING SERVS., <https://www.earlywarning.com/about> [<https://perma.cc/4CF7-ST9P>] (describing Early Warning's "network intelligence" services to "help financial institutions get money moving").
193. James Marvin Perez, *Blacklisted: The Unwarranted Divestment of Access to Bank Accounts*, 80 N.Y.U. L. REV. 1586, 1590 (2005).
194. See, e.g., Press Release, Consumer Fin. Prot. Bureau, CFPB Takes Action Against JPMorgan Chase for Failures Related to Checking Account Screening Information (Aug. 2, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-jpmorgan-chase-failures-related-checking-account-screening-information> [<https://perma.cc/3BAN-FWKX>].
195. See Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REG. 121, 182 (2004) (noting that banks haven't taken steps to increase access to accounts from those who would be blacklisted "because the expected returns from such accounts are low").
196. Molly Cohen, Carly Bertolozzi, Jacob Dumez, Jessica Lindquist & Maya Oubre, *Blacklisted: How ChexSystems Contributes to Systemic Financial Exclusion*, S.F. OFF. FIN. EMPOWERMENT 3 (2021), <https://sfgov.org/ofe/files/2021-06/Blacklisted-How%20ChexSystems%20Contributes%20to%20Systematic%20Financial%20Exclusions.pdf> [<https://perma.cc/2CZD-R4T5>].
197. See, e.g., Perez, *supra* note 193, at 1606.
198. Cohen et al., *supra* note 196, at 7, 8, 12-14.
199. See *id.* at 10.

short, criticisms include accuracy, consistency, transparency, and dispute resolution.²⁰⁰

Individuals can also be excluded from payment systems. Payment networks enable customers and merchants to make monetary transactions. The two primary credit-card networks are Visa and MasterCard.²⁰¹ Card networks include three services: issuer banks, which issue credit cards to consumers; acquirer banks, which offer services to merchants; and payment processing, which provides authorization, clearing, and settlement (ACS) services between issuers and acquirers.²⁰² Payment networks make money by charging fees for usage. Importantly, payment systems benefit from network effects: the more customers and merchants on a single network, the more valuable it is for both buyers and sellers.²⁰³

Payment networks can also deplatform users. In 2020, Visa, MasterCard, and Discover deplatformed Pornhub, a website featuring pornographic videos, after reports that the website included child-abuse material.²⁰⁴ A few months later, in April 2021, MasterCard announced new rules regarding payments for adult content.²⁰⁵ MasterCard observed that it had long prohibited merchants from using its network “to engage in unlawful activity,” and that it was now applying that rule more aggressively to illegal adult content.²⁰⁶ In particular, acquirer banks will need to ensure that merchants have “controls in place to monitor, block and, where necessary, take down all illegal content,” in addition to verifying the age and identity of those depicted in adult content and instituting a content-review

200. See Chi Chi Wu, *Account Screening Consumer Reporting Agencies: A Banking Access Perspective*, NAT'L CONSUMER L. CTR. & CITIES FOR FIN. EMPOWERMENT FUND 3-4 (2015), <https://cfefund.org/wp-content/uploads/2016/08/Account-Screening-CRA-Agencies-Banking-Access-report.pdf> [<https://perma.cc/9PYL-XYKW>].

201. Stephen Wilks, *Private Interests, Public Law, and Reconfigured Inequality in Modern Payment Card Networks*, 123 DICK. L. REV. 307, 316 (2019). The other two major credit-card networks are American Express and Discover. Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. REV. 1321, 1327 (2008).

202. Wilks, *supra* note 201, at 316-17.

203. For a discussion on the network effects of payment systems, see *id.* at 322-25.

204. Jazmin Goodwin, *Mastercard, Visa and Discover Cut Ties with Pornhub Following Allegations of Child Abuse*, CNN BUS. (Dec. 14, 2020, 4:36 PM ET), <https://www.cnn.com/2020/12/14/business/mastercard-visa-discover-pornhub/index.html> [<https://perma.cc/G4T7-LFWH>].

205. See John Verdeschi, *Protecting Our Network, Protecting You: Preventing Illegal Adult Content on Our Network*, MASTERCARD (Apr. 14, 2021), <https://newsroom.mastercard.com/news/perspectives/2021/protecting-our-network-protecting-you-preventing-illegal-adult-content-on-our-network> [<https://perma.cc/7DG6-RQQU>].

206. *Id.*

process, a complaint-review process, and an appeals process.²⁰⁷ Later that year, in August, the website OnlyFans, which serves as a platform for pornography, among other things, announced it would ban pornography on its site due to “requests of our banking partners and payout providers,” before reversing course a week later.²⁰⁸

* * *

The history of deplatforming is surprisingly rich and broad. In all the primary NPU sectors, questions have arisen about when individuals or behaviors could be excluded from provision of an otherwise critical service. As we have seen, the law has grappled with balancing the duty to serve and the right—or even duty—to exclude. While these practices differed from sector to sector, there are noticeable patterns. The next Part revisits the tradition of reasonable deplatforming from a theoretical perspective.

II. THE THEORY OF REASONABLE DEPLATFORMING

The history of deplatforming shows that deplatforming is an endemic issue in network, platform, and utility (NPU) sectors. Enterprises in these sectors may be public services or private businesses with a duty to serve. In spite of this duty, enterprises across these sectors—common carriers and innkeepers, telecommunications, transportation, energy, and banking—have been permitted, and at times required, to deplatform entities and conduct. The central debate, therefore, should not be about whether deplatforming is legitimate in a general sense. It should be about the contours of deplatforming: who decides and what the rules are.

This Part uses the history in Part I to outline a theory of reasonable deplatforming. The theoretical framework here outlines a number of foundational issues, key questions, and tradeoffs with which any deplatforming regime will have to engage. This framework can thus act as a guide for those seeking to design a deplatforming regime.

207. *Id.*; see also AN 5196 Revised Standards for New Specialty Merchant Registration Requirements for Adult Content Merchants, MASTERCARD (Apr. 13, 2021), https://secpay.com/MC_RevisedStandardsForNewSpecialtyMerchantRegistrationRequirementsForAdultContentMerchants.pdf [<https://perma.cc/4W4C-554F>] (providing additional guidance to customers about the new rules).

208. Issie Lapowsky, *OnlyFans Shows Visa and Mastercard Are ‘Choke-Points’ of Online Speech*, PROTOCOL (Aug. 20, 2021), <https://www.protocol.com/policy/onlyfans-visa-mastercard> [<https://perma.cc/C5SY-C7PE>]; Adi Robertson, *The Payments Mess that Almost Scared OnlyFans Away from Sex Work*, VERGE (Aug. 27, 2021, 9:55 AM EST), <https://www.theverge.com/2021/8/27/22641095/onlyfans-sex-work-ban-online-porn-payment-processing-controversy> [<https://perma.cc/G4G9-RW9J>].

A. Foundational Issues

1. Who Deplatforms?

One of the central questions of deplatforming is *who* is responsible for deplatforming. In the common-law era, private platforms excluded individuals or behaviors from service, and the rules on which exclusions were permissible developed on a case-by-case basis via judicial decision. Over time, however, the private law of deplatforming shifted, in effect, from property and tort to contract. Private platforms increasingly established policies, regulations, or terms of service, and conditioned usage on compliance. As we have seen, for example, a railroad depot, telegraph service Western Union, and telephone operator AT&T deplatformed users for violations of terms of service—actions that courts upheld.²⁰⁹

In addition, public law can require or permit deplatforming for specified reasons. Federal laws on using common-carrier communications services for illegal bookmaking and on excluding dangerous individuals and items from airline service are examples.²¹⁰ In those instances, the public itself has determined that exclusion from the platform is desirable. Public forms of deplatforming differ from private deplatforming in that they implicate various constitutional prohibitions. For example, federal laws in the postal context were challenged regularly in the twentieth century as violating free-speech and due-process rights under the First and Fifth Amendments.²¹¹

Despite possible constitutional limitations, one of the reasons for a public regulatory regime was a worry about *private* deplatforming—a concern that a private corporation would have too much power over an important infrastructural service. In the broadcasting context, this was one of the motivations for the regime set up by the 1927 Radio Act. In the midst of a mass-communications revolution, policymakers feared that broadcasters would use their power to censor viewpoints. They therefore established a system with (a) a public interest standard for licensees that over time led to the fairness doctrine and (b) a prohibition on government censorship.²¹² The two rules would prevent private and public censorship, respectively.

Public regulation might be more important in specific situations. First, in some cases, private enterprises have a profit motive to retain or even encourage harmful conduct. Take an example from the tech-platform context: if content

209. See *supra* notes 53, 90, 99.

210. See *supra* Sections I.B.2, I.C.2.

211. See *supra* Section I.A.

212. Ferris & Leahy, *supra* note 124, at 310-11.

inciting violence or genocide is more likely to go viral and therefore to earn the platform a higher profit, the platform may be unlikely to moderate that content. Liability or regulation may be more desirable in such cases. Second, there is a critical question of who deplatforms *within* the private platform. There may be a big difference between a CEO making individual deplatforming decisions and a (legal or operational) department that follows publicly stated guidelines. The societal concern with the power to deplatform should shape the institutional design of both public and private regimes.

Within the category of public deplatforming, there are questions of institutional choice and competence. Deplatforming rules can be set *ex post*, as with common-law actions through the courts, or *ex ante* by legislatures and regulators. Legislation and regulation can take place at the state or federal levels. There is a standard set of tradeoffs between the common law and regulation: retrospective versus prospective, reactive versus proactive, uncertainty in the rule, institutional competence and expertise, political accountability, participation of interested parties, and collective-action problems.²¹³ Similarly, as between legislatures and regulators, there are standard tradeoffs, most notably political accountability versus expertise. And finally, the debate over state versus federal regulation centers on the need for interstate problem-solving and the benefits of uniformity versus those of decentralization. Notably, the history of NPU law is one that—until deregulation—showed a steady shift from the common law toward state regulation to federal legislation and, ultimately, federal-agency regulation.²¹⁴ The primary reason for these shifts were the need for uniform, stable rules; the need to govern interstate activity; and the comparative expertise of agency administrators over legislators and judges.²¹⁵ Still, there may be benefits to a common-law approach, particularly in light of a polarized and gridlocked Congress.

2. *What is Deplatformed?*

Another important distinction is who or what exactly is deplatformed. Historically, both conduct and entities have been deplatformed. A *conduct ban* restricts a certain behavior or activity that is transient. Thus, the drunk traveler can be turned away from an inn or from train service, but only when he is drunk. It is the drunkenness, not the traveler, that is deplatformed. An *entity ban* excludes

213. LISA BRESSMAN, EDWARD RUBIN & KEVIN STACK, *THE REGULATORY STATE* 95-97 (2d ed. 2013).

214. See WILLIAM K. JONES, *CASES AND MATERIALS ON REGULATED INDUSTRIES* 22-50 (2d ed. 1976).

215. See *id.* at 32, 44-45.

an object, individual, or business altogether from the service – regardless of its conduct. For example, a known thief can be excluded, even if not in the midst of stealing; explosives can be excluded from transportation even if they are unlikely to go off; and an illegal-marijuana cultivator can be denied electricity even if the proprietor also uses electricity to power a television. The identity of the entity is the object of deplatforming. Importantly, the two types of deplatforming are not completely separate. A pattern of banned conduct can lead to an entity being deplatformed entirely. As we will see below, the distinction between a specific conduct ban, a pattern of conduct, and an entity ban is important both for the timing of a ban and for evidentiary purposes. With respect to entities, it is worth noting that users can themselves be businesses that might be in competition with the platform itself. We will discuss anticompetitive deplatforming below.

3. *Why is the Service Important?*

Deplatforming excludes users from important services. How and why these services are important differs, and rules about deplatforming have differed based on the nature of the service. There have long been debates over the scope of what businesses have special duties in the marketplace. Historically, the focus was on firms that held themselves out as open to the public.²¹⁶ Among other things, scholars have also suggested that the appropriate focus is firms that are natural monopolies,²¹⁷ virtual or functional monopolies,²¹⁸ and those that benefitted from eminent domain.²¹⁹

Rather than engage in an abstract debate about platform regulation generally, three categories emerge from the history of deplatforming, which each raise distinctive issues for that practice. First are “essential” services, in a relatively strict sense of the word. Shutting off electricity, when it is used for heat, could literally result in people freezing to death in the winter. As a result, some states outright prohibit the termination of such services in the winter.²²⁰ As important

216. See Burdick, *supra* note 34, at 514; Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1312 (1996).

217. See Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 553 (1968).

218. WYMAN, *supra* note 57, at 100–34 (observing that firms could effectively be monopolies in context, even if not natural monopolies under economic theory). The scope of inclusion under a “virtual monopoly” theory could potentially extend quite broadly, for example, to sectors with labor shortages. Indeed, some have argued that this was the origin of the public-service obligation. See Norman F. Arterburn, *The Origin and First Test of Public Callings*, 75 U. PA. L. REV. 411, 422, 427 (1927) (arguing that labor shortages after the Black Death motivated the duty to serve).

219. See HAAR & FESSLER, *supra* note 36, at 200 (discussing these theories).

220. See *supra* Section I.D (discussing Massachusetts’s policies).

as communications or transportation services might be, they are unlikely to lead to death, and, therefore, are not subject to these extreme limitations on deplatforming.

Second are free-speech institutions.²²¹ Platforms in the communications sector – the postal system, telegraph, telephone, broadcast – differ from other platforms in that they implicate civic, democratic, and free-speech values. The postal system, for example, was understood at the time of the Founding not simply as a mode of communication and commerce, but as a civic system that would enable democracy and stitch together an expansive nation.²²² As Tim Wu notes, the common-carrier tradition for communications platforms is part of a free-speech tradition that differs from the First Amendment tradition and is concerned partly with fears of private censorship and corporate power.²²³ Deplatforming from these services raises different issues – not ones of life and death, but of both liberal (fears of government power) and republican (fears of private domination) values. As we have seen, access to platforms that implicate these values can still be limited to some degree.

A third category are commercial services, such as transportation and banking. These services are critical for participation in modern commerce, but they are less likely to directly implicate existential or constitutional values. Restrictions on deplatforming in these areas have been, therefore, more expansive because the countervailing interest in access is not as strong as with some other services. Notably, platforms have regularly been *prohibited* from deplatforming or self-preferencing their own vertically integrated businesses.²²⁴ Courts and legislatures have adopted a more expansive duty to serve because fair access to infrastructure enables and expands commerce.²²⁵

221. Cf. Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1256 (2005) (taking an institutional approach to the First Amendment); Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2309-31 (2021) (describing postal laws and common-carrier rules as a non-First Amendment tradition of free speech).

222. See generally RICHARD R. JOHN, *SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE* (1995) (discussing the civic aims of the postal system).

223. Tim Wu, *Is Filtering Censorship? The Second Free Speech Tradition*, BROOKINGS INST. (Dec. 27, 2010), <https://www.brookings.edu/research/is-filtering-censorship-the-second-free-speech-tradition> [https://perma.cc/NSK6-QUFR].

224. For a comprehensive account of these “neutrality mandates,” see generally Morgan Ricks, *Neutrality Mandates* (unpublished manuscript) (on file with the author).

225. *Id.*

4. *Are Platforms Liable?*

Another issue is whether private platforms are responsible for the wellbeing of their users as well as their goods. From the time of the common law, platforms had a duty to protect their users and their users' goods.²²⁶ A user could sue a platform for injuries caused by another user.²²⁷ These rules persisted into the twentieth century: if a platform negligently allowed a user on its service, it could be held liable for injuries caused to another.²²⁸ Liability rules incentivize platforms not only to deplatform users who have harmed or might harm others but also to develop *ex ante* rules about impermissible conduct in order to prevent harmful behavior from taking place.

Whether platforms are liable for harms also raises the question of whether platforms have an affirmative duty to deplatform. As we have seen, in at least some situations, courts have found that a platform could be held negligent in its duty of care to provide safe service because it did not refuse service to an individual who was likely to injure other passengers.²²⁹ *Ex post* liability in this situation created a duty to deplatform, because it was reasonably foreseeable that allowing the violent individual onto the platform would cause harm.

5. *When to Deplatform?*

When does deplatforming take place? The most conventional answer is during or after a prohibited behavior. We can call this *reactive deplatforming*. When a person is caught in the midst of prohibited conduct, the person or behavior can be stopped during the conduct and removed from the platform. If the conduct has concluded, the person can also be deplatformed or the content removed after the fact. Reactive deplatforming has the benefit of evidence of wrongdoing—the person is (or has), or at least arguably is (or has), engaged in the prohibited behavior. Thus, a belligerent drunk can be kicked out of an inn or streetcar; a person can have their telegraph service terminated upon notification by law enforcement of illegal behavior; an unruly airline passenger can be removed from a flight; and an illegal-marijuana cultivator can have their power shut off.

226. The standard for common carriers was strict liability, but it eventually gave way to negligence. See Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127, 1136, 1154-55 (1990); George Jarvis Thompson, *The Relation of Common Carrier of Goods and Shipper, and Its Incidents of Liability*, 38 HARV. L. REV. 28, 30, 47 (1924).

227. See *supra* text accompanying note 146-149.

228. See *supra* text accompanying note 148.

229. See *supra* text accompanying notes 146-148.

But deplatforming can also occur before a prohibited behavior takes place in either a preemptive or preventive fashion. *Preemptive deplatforming* involves excluding people before they engage in prohibited behavior. Preemptive deplatforming appears in two contexts. First are people who have exhibited a pattern or practice of the prohibited behavior, such that it is reasonably foreseeable that they will engage in the prohibited behavior in the future. Under the common law, the innkeeper could thus exclude completely a person who had engaged in “frequent altercations” and did not need to wait until a new altercation before kicking the brawler out of the inn. Similarly, a telephone party line user who repeatedly interferes with phone service can have his service terminated.²³⁰ Radio stations could have license renewals denied for repeated vulgar broadcasts.²³¹ More controversially, banks exclude potential customers for past overdrafts.²³² This pattern or practice could even harden into a reputation for an individual that permits preemptive deplatforming. As Justice Story observed, there was no duty to serve the known thief.²³³ The second type of preemptive deplatforming is when there is a suspicion of future prohibited behavior. Airlines thus have “permissive removal” authority to deplane passengers even before they engage in prohibited behavior, if they appear as if they might disrupt the flight or injure other passengers.²³⁴ An intoxicated person talking about violence against others can also be excluded from a streetcar, even before taking a violent action – merely because it is reasonably foreseeable that the drunk might become belligerent.²³⁵

Preventive deplatforming, in contrast, involves establishing a set of prophylactic conditions for use of the service that seek to prevent prohibited behavior from occurring – but doing so has the consequence of deplatforming those who do not meet the conditions. Traditionally, this meant terms of service. The common-law rules on deplatforming provided de facto terms of service for common carriers and innkeepers, but businesses – like the railroad depot or telegraph company – also developed their own terms of service. In modern times, preventive deplatforming can be as simple as the rule that a person must be searched before flying on a plane.²³⁶ Those refusing to be searched for whatever reason fail to meet the conditions of service and are deplatformed. But they can also be more expansive, as with Mastercard’s corporate policy for providers of adult online content. Mastercard effectively requires adult-content providers to develop an

230. See *supra* text accompanying notes 104–108.

231. See *supra* text accompanying notes 130–132.

232. See *supra* Section I.E.

233. See STORY, *supra* note 46, at 563.

234. See *supra* notes 150–152 and accompanying text.

235. See *supra* text accompanying notes 142–145.

236. See *supra* Section I.C.2.

internal administrative and regulatory system that ensures (or at least takes substantial steps toward ensuring) that they are not engaging in illegal behavior. Compliance with corporate policy gives Mastercard confidence that adult-content providers are not using the platforms for illegal activities—and without Mastercard having to monitor individual transactions.

6. *When to Replatform?*

If entities or content are deplatformed, can they be replatformed and, if so, under what conditions? As we have seen in a number of situations, institutions have made it exceedingly difficult, if not impossible, for individuals who have been banned—from banking, through ChexSystems, or from flying on the terrorist watch list—to regain access. Replatforming criteria and processes are particularly important when deplatforming occurs due to a mistake. In both the banking and flight contexts, for example, permanent bans could take place because of inaccurate evidence or confusion about a person's identity. Yet, in both contexts, as we have seen, the process for contesting and correcting an incorrect decision to deplatform is extremely difficult. The consequences of permanent deplatforming matter. In some cases, like the banking context, permanent exclusion is particularly severe because it has secondary effects. Not having a bank account, for example, makes a simple thing like paying a bill difficult, as it involves an in-person trip to a check casher to convert a paycheck into dollars for a fee and then additional fees to get a money order to pay the bill.²³⁷

Even if deplatforming is not based on a mistake, the process and criteria for replatforming also matter. At a high level of generality, there are three approaches worth further analysis. First is *automatic replatforming*, which occurs when deplatforming is time limited. On this approach, replatforming is an entitlement that occurs after the exclusion period. For example, Meta has adopted such an approach, restricting accounts from public figures who incite or celebrate violence from one month to two years.²³⁸

Second is *replatforming after rehabilitation*. Here, the deplatforming entity requires some amount of process (such as education or training) or a substantive

237. For discussions of the challenges of being unbanked, see JOHN P. CASKEY, *FRINGE BANKING: CHECK-CASHING OUTLETS, PAWNSHOPS, AND THE POOR* (1994). For a more recent account on the unbanked and underbanked, see LISA SERVON, *THE UNBANKING OF AMERICA* (2017); *2015 FDIC National Survey of Unbanked and Underbanked Households*, FED. DEPOSIT INS. CORP. (Oct. 20, 2016), <https://www.fdic.gov/analysis/household-survey/2015/index.html> [<https://perma.cc/4VCG-FEKU>].

238. *Restricting Accounts of Public Figures During Civil Unrest*, META (Jan. 30, 2023), <https://transparency.fb.com/enforcement/taking-action/restricting-accounts-of-public-figures> [<https://perma.cc/9BVL-CD5Z>].

test to make it more likely that the deplatformed entity is not reengaging in the behavior that caused the deplatforming in the first place. Consider the case of a violent drunkard on a ferry or carriage. Such a person could be deplatformed while drunk, but then replatformed when sober. Drunkenness may be an easy case because it passes with time. More difficult cases emerge when a person is deplatformed for a behavior that could occur at any point like theft, and the platform needs to assess whether they will engage in such behavior again.

A third approach, which could be combined with either of the first two, is *conditional or controlled replatforming*. Here, the replatformed entity regains access to the platform but with additional guardrails such as limited access or heightened monitoring. Meta, for example, may require that a group administrator approve individual posts when a group's posts repeatedly violate Meta's policies.²³⁹

Note that the nature of the violation is critical to thinking about replatforming decisions. Extreme violations (such as blowing up the railroad) might warrant permanent bans with no opportunity for replatforming. Minor, comparatively insignificant violations might lead to temporary bans and automatic replatforming—or even just a notice and warning. A pattern or practice of impermissible behavior might suggest rehabilitation and conditional access.

B. *Why Deplatform?*

Across the history of deplatforming in NPUs, there are a number of justifications for the practice that are recurring. These justifications can be placed into three categories: (1) service provision issues, including a failure to pay for the service, capacity constraints and congestion, and degradation of service quality; (2) harms, including injury to other users, and injury to society and national security; and (3) social regulation, including public-morality issues. This last category is the most controversial and also explains how the duty to serve coexisted with racial discrimination and Jim Crow. Finally, there are also a number of *impermissible* reasons for deplatforming that are recurring. This last category reaffirms the importance of the foundational duty to serve.

1. *Service Provision*

One set of common reasons to deplatform is related to the provision of the service itself: the failure to pay for the service, capacity and congestion on the service, and service quality degradation.

²³⁹ *Restricting Accounts*, META (Feb. 23, 2023), <https://transparency.fb.com/enforcement/taking-action/restricting-accounts> [<https://perma.cc/C6NH-ESRA>].

a. *Failure to Pay*

Failure to pay the required fees for a service has consistently been considered a legitimate reason to deplatform individuals—either by preventing them from using the service in the first place or by terminating their access to the service. The reasoning behind this justification is straightforward. The service provider needs funds in order to operate, and, if user fees generate those funds, the failure to pay makes service provision difficult if not impossible. But the failure to pay is not an absolute justification for deplatforming for two reasons. First, as we have seen, some jurisdictions place limits on termination of essential services like electricity even for the failure to pay.²⁴⁰

Second, in most NPU sectors for much of history, platform rates were regulated. Under the common law, common carriers had to charge just and reasonable prices.²⁴¹ Over time, states and the federal government shifted from a litigation-based approach to policing prices to an administrative approach in which the government would ensure that carriers adhere to their posted prices or government would set prices themselves.²⁴² Part of the reason for rate regulation is itself tied to the problem of private deplatforming. A platform seeking to exclude a user need not ban them from the service. It could instead simply charge an exorbitant fee for the service. Any user that cannot pay the outrageous charge would then be excluded. If a platform could charge differential prices, its ability to pick and choose which users to serve would be effectively the same as if it was arbitrarily denying service. Neutrality mandates, or nondiscrimination rules, therefore included both open access and just and reasonable rate requirements.²⁴³ The latter emerged in the common law first as a prohibition on upward deviations from the conventional price, and then to encompass both upward and downward deviations from the conventional price.²⁴⁴ Requirements to charge posted prices followed and, later, so did cost-of-service ratemaking.²⁴⁵

b. *Capacity and Congestion*

Another common justification for a refusal to serve all comers is a lack of capacity. An innkeeper did not need to serve a traveler if the inn was already full,

240. See *supra* Section II.A.3.

241. See William Boyd, *Just Price, Public Utility, and the Long History of Economic Regulation in America*, 35 *YALE J. ON REG.* 721, 726 (2018).

242. See RICKS ET AL., *supra* note 25, at 129-80.

243. See Ricks, *supra* note 224, at 19.

244. *Id.* at 10-11.

245. See RICKS ET AL., *supra* note 25, at 129-80.

and a common carrier did not need to serve a traveler if it no longer had seats available.²⁴⁶ Some infrastructural services also suffer from possible congestion problems. For example, airports are allowed to charge different prices (congestion pricing) at different times of day for airlines that seek to land at the airport.²⁴⁷ Runway, gate, and staff scarcity means that not every plane can use the airport terminal at the same time. This differentiated treatment has survived judicial review in spite of nondiscrimination regulations,²⁴⁸ even though airlines might not be able to land planes at their preferred times.

Scarcity has also been one of the justifications for ex ante restrictions. Although the primary concern of the 1927 Radio Act appears to have been the “chaos” in the sector—including instability and service interference due to “pirate” radio stations moving frequencies²⁴⁹—a commonly accepted justification for the Radio Act’s licensing regime is the scarcity of spectrum.²⁵⁰ Limited availability of spectrum requires some rule to determine who gets to use the spectrum. The federal licensing regime, which necessarily excludes some who might want to have a radio station, has been justified by the need to allocate the limited resource.²⁵¹

c. Service-Quality Degradation

Disruption or degradation of the service has also been a common justification for deplatforming users. As we have seen, telephone companies have terminated service to users who were disrupting the service for others,²⁵² pipelines can exclude inferior-grade oil if it will degrade overall quality,²⁵³ and passengers can be removed from transportation services if they might disrupt the service.²⁵⁴ The reasoning behind service degradation as a justification for exclusion is simple. Platforms seek to provide a consistent quality of service. If a user’s actions will

246. See Section I.A.

247. See *Air Transp. Ass’n of Am. v. U.S. Dep’t of Transp.*, 613 F.3d 206, 208 (D.C. Cir. 2010).

248. *Id.* at 213.

249. See *supra* notes 123–124 and accompanying text; see also Thomas W. Hazlett, *The Wireless Craze, the Unlimited Bandwidth Myth, the Spectrum Auction Faux Pas, and the Punchline to Ronald Coase’s “Big Joke”: An Essay on Airwave Allocation Policy*, 14 HARV. J.L. & TECH. 335, 369–71 (2001) (describing the events and public sentiment that led to the passage of the 1927 Radio Act).

250. This is a common reading of *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375–77 (1969). For a discussion of scarcity issues, see Spitzer, *supra* note 123, at 1354–55, 1358–64.

251. See Spitzer, *supra* note 123, at 1354–55, 1358–64.

252. See *supra* notes 98–105 and accompanying text.

253. See *Brundred Bros. v. Prairie Pipe Line Co.*, 68 I.C.C. 458, 464 (1922).

254. See *supra* note 141 and accompanying text.

prevent service provision altogether or degrade the quality of service, then the infrastructure is less useful to everyone, and the dynamic effect of degraded service quality is a weaker commercial marketplace or civic service.

There will, of course, be line-drawing questions about what constitutes service-quality degradation and what does not. For example, in the famous *Hush-A-Phone*²⁵⁵ and *Carterphone*²⁵⁶ cases, the FCC confronted whether AT&T's disconnecting service from users for attaching hardware elements onto telephones was permissible. AT&T's reasoning was that exclusion was necessary to maintain the integrity of the network. The D.C. Circuit found that network integrity was not at issue in *Hush-A-Phone*, and the FCC came to the same conclusion in *Carterphone* years later. Similarly, in issuing its policy on net neutrality, the FCC recognized that the requirement that broadband providers not block, throttle, prioritize based on payment, or treat edge providers and consumers in a discriminatory fashion, had to include an exception for "reasonable network management,"²⁵⁷ though the exact lines would, of course, have to be determined.

2. Harms

A second set of justifications for deplatforming are about harms or injuries, both to other users of the platforms or to society and national security more broadly. Harm- or injury-based justifications recognize that platforms are well-positioned to prevent harms to others.

a. Injury to Other Users

Individuals can be deplatformed if they are injuring or might injure other users. The common law and transportation law allow for excluding individuals who are themselves dangerous because they are drunk, thieves, or terrorists.²⁵⁸ Communications platforms like telephones have excluded people using them to harass or threaten others.²⁵⁹

Deplatforming to protect other users of the service has multiple justifications. First is a straightforward consumer-protection justification. The public has an interest in protecting users of important services from injury or theft. Second are commercial justifications. For a service to be maximally valuable, people need to trust that they can use it safely and effectively. If one user poses a

255. *Hush-A-Phone Corp. v. United States*, 238 F.2d 266 (D.C. Cir. 1956).

256. *Use of the Carterfone Device in Message Toll Tel. Serv.*, 13 F.C.C.2d 420 (1968).

257. *Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601 ¶¶ 15, 16, 21 (2015).

258. *See supra* Sections I.A, I.C.

259. *See supra* Section I.B.2.

threat to others, the service itself may be seen as dangerous and therefore find fewer users, reducing commerce overall. Exclusion of dangerous users, therefore, can enhance confidence in the service and as a result expand usage. Indeed, historically, innkeepers and common carriers had a legal duty to protect travelers and their goods.²⁶⁰ Scholars have observed that this rule had both protection and commercial justifications – and placed liability on platforms because they are the best cost avoiders.²⁶¹

b. Injury to Society and National-Security Concerns

Expanding beyond the individual, in many NPU areas, injury to society – or more broadly, to national security – has also been a justification for deplatforming. Airlines and banking are perhaps the most obvious examples. Passengers cannot take an airplane without being searched, terrorists and other passengers on the no-fly list are barred altogether from flying, and specific items are prohibited on airplanes.²⁶² After September 11, the social and national-security justifications for such exclusions became tragically clear. Planes cannot only be destroyed, killing the passengers on the plane, but can also be used as missiles to injure others. In banking, preventing money laundering also has social and national-security benefits. Deplatforming individuals, entities, and transactions from the banking system can both ensure that the financial system does not facilitate antisocial operations (such as drug trafficking or hiding money from the Internal Revenue Service), and that adversaries and terrorists cannot easily use banks for their operations. For social and national-security harms, the justification is more about the harms as pure externalities, rather than harm to other users. Money launderers, for example, do not directly harm other users of banks, though their actions might harm society or the country more broadly.

3. Social Regulation

The third set of justifications for deplatforming is the most controversial. These justifications are, in one form or another, a form of social regulation. Whether through legal rules or social norms, deplatforming seeks to exclude persons or conduct deemed undesirable. The type of conduct or personal characteristics that are deplatformed are, of course, normatively contested, and they

^{260.} See *supra* notes 46-47 and accompanying text.

^{261.} See generally Stephen G. Gilles, *Negligence, Strict Liability, and the Cheapest Cost-Avoider*, 78 VA. L. REV. 1291 (1992) (arguing that the cheapest cost-avoider criterion is the best conception of strict liability).

^{262.} See *supra* Section I.C.2.

have changed over time as views about society and behavior have changed. Two categories are worth noting. The first are public-morality violations. These can be actions that either have been made illegal or have not but violate community norms. The second is the case of racial discrimination and Jim Crow.

a. Illegal Behavior and Public Morality

Platforms are generally permitted—and may even be obligated—to deplatform users who are engaged in illegal behavior. Examples, as we have seen, include illegal bookmaking, marijuana cultivation, depiction of child pornography, or moving illegal goods. Note that while the legality of the behavior is a formalistic category, whether the underlying behavior *should* be illegal is ultimately normative. People may have different views about gambling, for example. If the underlying behavior is illegal and if an intermediary infrastructure service is necessary to facilitate the illegal activity, then deplatforming could be an effective way to stop the illegal action. Platforms can be required to terminate service explicitly by law²⁶³ or because they might themselves be held accountable for aiding the illegal behavior.²⁶⁴

A few considerations recur with respect to illegal activities. First is whether the platform knows about the illegal behavior. If a platform does not know that its service is being used in that way—as with packages carrying illegal goods—then it was not traditionally held culpable.²⁶⁵ Second, some users may engage the infrastructural service for both illegal and legal purposes. Some cases thus distinguish between the user engaging the service primarily for the illegal purpose and the user using the service incidentally for illegal activities.²⁶⁶ The use of a phone line for illegal bookmaking thus differs from a single gambler using their phone to place a bet.

A related category are behaviors that violate some standard of public morality but where the behavior itself is not necessarily illegal in all contexts. Examples include use of infrastructural services for lewd, offensive, indecent, or obscene purposes. While earlier courts did engage deplatforming for public-morality reasons in transportation services, modern debates center on communications networks. In spite of the strong First Amendment values at stake, courts have

263. See, e.g., *supra* note 105 and accompanying text.

264. *Id.*

265. See WYMAN, *supra* note 57, at 489-91 (making this point with respect to liquor and game laws).

266. See 86 C.J.S. *Telecommunications* § 99 (2023).

regularly upheld narrowly tailored restrictions barring the use of communications platforms for public-morality reasons.²⁶⁷

b. Racial Discrimination and Jim Crow

How do the duty to serve all comers and the exceptions for deplatforming intersect with racial discrimination and Jim Crow? The history, as Professor Joseph Singer has shown in his leading work on the topic, is not straightforward.²⁶⁸ Singer argues that prior to the Civil War, it is likely that all businesses holding themselves out to the public had a duty to serve, and courts “uniformly held that the right of access did extend to every person without regard to race,”²⁶⁹ even as Northern courts held that segregation was permissible. As one treatise writer observed in 1857, railroads “cannot make unreasonable discriminations between persons soliciting its means of conveyance, as by refusing them on account of personal dislike, their occupation, condition in life, *complexion, race, nativity, political or ecclesiastical relations.*”²⁷⁰ Indeed, in one 1859 Ohio case, in which a “mulatto” woman was excluded from a city rail service due to “her complexion,” the court found that her exclusion was impermissible under the duty to serve.²⁷¹

From the end of the Civil War until 1900, the situation varied in the country and changed over time. In the aftermath of the war, state and federal laws on public accommodations imposed a duty to serve regardless of race.²⁷² Some states interpreted these laws as mandating integration, while others read them

267. See *supra* Sections I.B.2, I.B.3.

268. See Singer, *supra* note 216, at 1303–1411. For additional discussion, see generally A.K. Sandoval-Strausz, *Travelers, Strangers, and Jim Crow: Law, Public Accommodations, and Civil Rights in America*, 23 L. & HIST. REV. 53 (2005).

269. Singer, *supra* note 216, at 1294, 1298.

270. EDWARD L. PIERCE, A TREATISE ON AMERICAN RAILROAD LAW 489 (New York, Baker, Voorhis & Co. 1867) (1857) (emphasis added). Pierce’s full statement is worth quoting: “The company is under a public duty, as a common carrier of passengers, to receive all who offer themselves as such and are ready to pay the usual fare, and is liable in damages to a party whom it refuses to carry without a reasonable excuse. It may decline to carry persons after its means of conveyance have been exhausted, and refuse such as persist in not complying with its reasonable regulations, or whose improper behavior—as by their drunkenness, obscene language, or vulgar conduct—renders them an annoyance to other passengers. But it cannot make unreasonable discriminations between persons soliciting its means of conveyance, as by refusing them on account of personal dislike, their occupation, condition in life, complexion, race, nativity, political or ecclesiastical relations.” *Id.* (footnote omitted).

271. *State v. Kimber*, 3 Ohio Dec. Reprint 197, 198 (Ohio Ct. C.P. 1859). The opinion notably quotes Pierce’s treatise. *Id.* at 197–98.

272. Singer, *supra* note 216, at 1299.

as permitting segregation.²⁷³ With the end of Reconstruction, Southern states retreated from these positions. Some states, like Tennessee and Delaware, eliminated all public-accommodations laws, giving businesses the right to exclude anyone, including whites.²⁷⁴ After the *Civil Rights Cases* in 1883 and *Plessy v. Ferguson* in 1896, Southern states moved from permitting segregation to mandating segregation.²⁷⁵ Of course, violence and force operated as nonlegal means to deny access.

4. *Impermissible Reasons and the Duty to Serve*

Although there is a recurring pattern of justifications for deplatforming, there is also a consistent set of impermissible reasons for deplatforming. In most NPU areas, the service provider was subject to a duty to serve. In other words, deplatforming is the exception, not the rule. But it is worth expressly discussing three important categories in which deplatforming is expressly *not* justified.

First, in the mid-twentieth century, there were revolutions in constitutional and statutory law related to civil-rights issues. The First Amendment was transformed during the mid-twentieth century to become far more protective of speech than it was at the start of the century.²⁷⁶ Further, the civil-rights revolution took aim at Jim Crow, including by barring racial discrimination from places of public accommodations.²⁷⁷ These shifts put significant constitutional and statutory limits on the value of earlier practice in the domains in which they operated. In these areas, we might say that the American tradition has been one of growing civil liberties and civil-rights protections, and that the Jim Crow period was the exception, not the rule.

Second, platforms cannot exclude individuals based on mere preferences, even if the person may be seen as objectionable. This restriction should be of some comfort to both liberals and conservatives, as it protects individuals from deplatforming in a wide range of cases. As Bruce Wyman catalogued, straightforward malice and favoritism were impermissible reasons to deplatform, as were merely finding a person “disagreeable,” “[u]nmannerly,” “[i]mmoral,”

273. *Id.* at 1362.

274. *Id.* at 1354.

275. *Id.* at 1299.

276. See generally LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE* (2016) (tracing the emergence of a more expansive First Amendment doctrine beginning with the New Deal).

277. For an overview of the civil-rights revolution, see generally 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014).

“undesirable,” or engaged in “slight misbehavior.”²⁷⁸ As one court observed, “[s]ome allowance is to be made for the infirmities of human nature.”²⁷⁹ Courts have thus objected to excluding an “exasperated traveller” who used a “profane retort,”²⁸⁰ or an individual who spat in a waiting room.²⁸¹

Importantly, even in the middle of the nineteenth century, the duty to serve extended to individuals with differing political views and religious beliefs²⁸² and to persons whom carriers viewed as immoral. As we have seen, mid-nineteenth-century treatises expressly included political and religious views as impermissible reasons for deplatforming. Examples of “immorality” as an impermissible reason are also common. In one case, Wyman observes that a court held that a woman “in bloomers” could not be rejected from staying at an inn, despite the innkeeper’s objection to her mode of dress.²⁸³ In an 1880 case, *Brown v. Memphis & C.R. Co.*,²⁸⁴ railroad personnel ejected a Black woman from the ladies’ car on the grounds that she was a “notorious and public courtesan.”²⁸⁵ The judge directed the jury on the law, saying that as long as “unchaste women” were conducting themselves in “unobjectionable” ways while traveling, there were no grounds to exclude them from a common carrier.²⁸⁶ “The carrier is bound to carry good, bad, and indifferent, and has nothing to do with the morals of his passengers, if their behavior be proper while travelling.”²⁸⁷ Classifications based on chastity, therefore, were unreasonable.

Finally, platforms were regularly barred from excluding their competitors or favoring their own vertically integrated businesses. In other words, *anticompetitive deplatforming* was generally disfavored. Nondiscrimination rules, or neutrality mandates, covered a wide range of behavior in both the common law and under federal statutory restrictions.²⁸⁸ Telegraph and telephone companies

278. WYMAN, *supra* note 57, at 463–69.

279. *Huffman v. Marcy Mut. Tel. Co.*, 121 N.W. 1033, 1034 (Iowa 1909).

280. WYMAN, *supra* note 57, at 467 & n.1 (citing *Rex v. Ivens* (1835) 173 Eng. Rep. 94).

281. *People v. McKay*, 9 N.W. 486, 486 (Mich. 1881).

282. See PIERCE, *supra* note 270, at 489.

283. WYMAN, *supra* note 57, at 467 & n.3 (citing *Regina v. Sprague* (1899) 63 J.P. 233).

284. 5 F. 499 (C.C.W.D. Tenn. 1880).

285. *Id.* at 500. The ejection was likely motivated by race, not status. There was an initial attempt by the lawyers to claim that the woman had to sit in a segregated car. But the railroad had no such policy. The claim she was a courtesan came later. *Id.*

286. *Id.* at 501.

287. *Id.*

288. For a general account of such neutrality mandates, see generally Ricks, *supra* note 224. In federal law, another tool to address anticompetitive deplatforming was the separation of platforms and commerce. For a discussion that covers multiple sectors and applies the principle to tech platforms, see Khan, *supra* note 29.

could not preference other businesses they owned.²⁸⁹ Pipelines have common-carrier duties.²⁹⁰ Railroads that owned commodities and transported them could not discriminate against competitors – and were eventually banned from owning commodities companies.²⁹¹ In short, for much of American history, the tradition of deplatforming has generally not been permitted in cases where the justification is merely commercial or competitive gain.

Importantly, regulators have also been willing to investigate whether platforms were using permissible justifications as a veil to cover up impermissible ones. In the 1922 pipeline case, the ICC did not blindly accept the pipeline's assertion that small batches would mix and contaminate larger batches of oil in its system. It observed that the pipeline was "controlled by the same interests" that operated the biggest oil shipper, showed that the pipeline's arguments were pretextual or unpersuasive, and concluded that the policy of limiting oil transport to large batches "essentially deprives the lines of the common carrier status with which they were impressed by the interstate commerce act."²⁹² Whether deplatforming was reasonable did not depend on whether the platform claimed it was so.

C. *How to Deplatform*

Perhaps the most striking thing about the history of deplatforming is the wide range of procedural protections that have been adopted. In some cases, there have been relatively few procedural protections, while others have more extensive ones. The range of deplatforming processes can be broken down into two main categories: (1) *ex ante* procedures, like notice, warnings, and opportunities to cure, and (2) *ex post* procedures, like the opportunity to contest or appeal.

1. *Ex Ante: Terms of Service and Notifications*

Under the common law in the early- to mid-nineteenth century, an innkeeper or common carrier would simply exclude an individual. The individual would then have to sue the common carrier for a violation of the duty to serve. Courts then determined whether the exclusion was a reasonable exception to the duty.²⁹³ But even under the common law, platforms issued what we would call

289. See, e.g., *Louisville Transfer Co. v. Am. Dist. Tel. Co.*, 1 KY. L.J. 144, 145-46 (1881).

290. See RICKS ET AL., *supra* note 25, at 729-810.

291. Hepburn Act, ch. 3591, 34 Stat. 584, 585 (1906).

292. *Brundred Bros. v. Prairie Pipe Line Co.*, 68 I.C.C. 458, 463, 466 (1922).

293. See *supra* Section I.A.

terms of service: publicly announced policies for usage of the service with which users had to comply. Wyman called them individual regulations on the “personal conduct of the patron.”²⁹⁴ These terms of service established conditions precedent before service was allowed and could put individuals on notice that violation could lead to deplatforming. Thus, the gas company could require users to agree to terms and conditions before starting gas service, and a railroad terminal could exclude an innkeeper who was harassing arriving passengers in violation of its terms. In modern times, the Transportation Security Administration (TSA) has announced in advance what items cannot be brought on airplanes.²⁹⁵

Platforms have also generally offered notice, warnings, and an opportunity to cure the error before deplatforming individuals completely. In the railroad-terminal case, the terminal told the innkeeper to stop harassing passengers before banning him from the terminal.²⁹⁶ Telephone and electricity companies send a notice of termination for a failure to pay prior to shutting off service. TSA allows individuals with impermissible items to repack them in their checked baggage.²⁹⁷ Notifications enable someone who is at risk of being deplatformed to stop or change their conduct. In some cases, there are also privately created or publicly mandated opportunities for a person to cure their violations and get back into the system. Most states require electric utilities to offer customers an installment payment plan before shutting off service.²⁹⁸ “Second chance accounts” offer individuals an opportunity to get a bank account with limited features to rebuild their banking history and eventually regain access to a full bank account.²⁹⁹

Still, in some cases, there are no warnings or opportunities to cure. A terrorist can be added to the no-fly list without first being warned; an unruly airline passenger can be added to the airline’s no-fly list after a single incident; and individuals, entities, and entire countries can be excluded from the banking system without any mandatory warning—whether due to a past overdraft or for

294. BRUCE WYMAN, 2 *THE SPECIAL LAW GOVERNING PUBLIC SERVICE CORPORATIONS* 768 (1911). He noted that the category was more properly considered as exclusion and refusals from service. The difference is simply that these regulations were stated up front rather than litigated after the fact.

295. See, e.g., *What Can I Bring?*, U.S. TRANSP. SEC. ADMIN., <https://www.tsa.gov/travel/security-screening/whatcanibring/all> [<https://perma.cc/SWR7-XWZE>].

296. *Commonwealth v. Power*, 48 Mass. 596 (1844); see *supra* text accompanying note 53 for a discussion.

297. See *What Can I Bring?*, *supra* note 295.

298. See NAT’L CONSUMER L. CTR., *SURVIVING DEBT* ch.15 (14th ed. 2023) (ebook).

299. See Spencer Tierney & Chanelle Bessette, *Second Chance Checking Accounts Across the U.S.*, NERDWALLET (Apr. 20, 2023), <https://www.nerdwallet.com/article/banking/second-chance-checking> [<https://perma.cc/8GBT-UVLE>].

national-security reasons. Situations in which warnings are absent—with the notable and controversial exception of the ChexSystems process—involve extraordinarily bad actions (e.g., violent airline passengers) or significant national security or social harms (e.g., terrorism and economic sanctions).

2. *Ex Post: Opportunities to Contest or Appeal*

Opportunities to contest or appeal deplatforming have historically been the province of public law. Under the common law, those who were excluded from service could bring an action against a platform that excluded them. With the rise of state and federal regulation over NPUs, regulators have often required NPUs to create procedures for contesting a deplatforming decision. For example, individuals generally have a right to a hearing before their electric service is terminated.³⁰⁰

Private actors can also offer their own internal procedures to review or contest a deplatforming decision. Mastercard's corporate policy for adult content providers requires those providers themselves to institute an internal appeals process.³⁰¹ But in some cases, private opportunities to contest deplatforming may not be easy. The process of challenging exclusion from banking due to a ChexSystems review, for example, has been criticized as “nearly impossible.”³⁰²

Where the federal government itself deplatforms, the Due Process Clause of the Constitution provides a backstop. As we have seen, total exclusion from the postal system without an opportunity to contest deplatforming can violate constitutional due-process rights.³⁰³ The federal government has therefore created programs to enable individuals to contest their deplatforming, though these processes can be quite limited. Contesting placement on the federal no-fly list, for example, involves submitting information to the Department of Homeland Security's Traveler Redress Inquiry Program.³⁰⁴ But this program may not provide

300. See, e.g., Harak et al., *supra* note 165, at 68.

301. AN 5196 Revised Standards for New Specialty Merchant Registration Requirements for Adult Content Merchants, *supra* note 207, at 2 (“The Merchant must support a complaint process that allows for the reporting of content that may be illegal or otherwise violates the Standards and must review and resolve all reported complaints within seven (7) business days. In the event that such review yields evidence of illegal content, the Merchant must remove that content immediately.”).

302. Cohen et al., *supra* note 196, at 7–8, 12–14.

303. See *Hoover v. McChesney*, 81 F. 472, 479–81 (C.C.D. Ky. 1897).

304. DHS Travel Redress Inquiry Program, U.S. TRANSP. SEC. ADMIN., <https://www.tsa.gov/travel/passenger-support/travel-redress-program> [<https://perma.cc/SVL6-R96D>]; see also BART ELIAS, CONG. RSCH. SERV., R43456, RISK-BASED APPROACHES TO AIRLINE PASSENGER

all of the reasons for a person's placement on the list, nor does it provide a live hearing in which a person can contest the evidence.³⁰⁵ Individuals are allowed to send evidence for review, but they are not told after a review if they remain on the list.³⁰⁶

D. Designing Reasonable Deplatforming: Selected Lessons

For private firms in NPU sectors, policymakers or courts, the central question is not whether to deplatform at all, but *how* to design a system of reasonable deplatforming. The history of deplatforming suggests that the practice is inescapable for NPU enterprises. As a result, the theoretical framework identified above can act as a guide for those trying to design deplatforming. Any regime of deplatforming will have to engage with the questions noted above. While the particular shape of deplatforming may differ based on the context, it is possible to draw some generalizable lessons from the history and theory of deplatforming.

1. The Necessity of Public Governance

At the level of *who* deplatforms, one of the central lessons from history and theory is that at least some minimal amount of public governance is likely essential. In industries that are infrastructural in nature, platforms can leverage their power to benefit themselves at the expense of users, commerce, the public interest, and national security. Some kind of public governance has always existed and will be necessary to ensure that critical utility-like services are available to the public. In the earliest years, public governance was *ex post*, implemented via common-law rules that were developed through case-by-case adjudication. Over time, public governance shifted to an *ex ante* approach. Importantly, public governance is more important the more concerned one is about the abuse of power by private platforms and if the business models of private platforms incentivize harmful carriage.

SCREENING 16-17 (2014) (describing the legal mandate and process); Justin Florence, Note, *Making the No Fly List Fly: A Due Process Model for Terrorist Watchlists*, 115 *YALE L.J.* 2148, 2157-59, 2165-80 (2006) (describing the difficulties involved with removal from watch lists and advocating for reforms).

305. *What to Do If You Think You're on the No Fly List*, ACLU, <https://www.aclu.org/know-your-rights/what-do-if-you-think-youre-no-fly-list> [<https://perma.cc/9SCV-Z47R>].

306. *Id.*

2. *The Stakes of Entity Bans*

The stakes involved in entity bans are much greater than in bans of individual pieces of content. Deplatforming an individual or organization completely prevents them from accessing the infrastructural resource at all. Mistaken deplatforming can be devastating for entities, as when individuals lose bank accounts. The high stakes of entity deplatforming suggest that processes to ensure that sound evidence goes into the deplatforming decision and to address mistakes are critical, and that platforms need replatforming criteria.

3. *The Benefits of Ex Ante Solutions*

If users do not engage in impermissible behavior, then deplatforming will not be necessary. If platforms can do more to prevent impermissible behavior, the tensions and challenges of deplatforming—especially at scale—may not be as frequent. Designing a deplatforming regime should therefore involve a great deal of investment in notices, terms of appropriate use, and the criteria for deplatforming and replatforming. Barriers to entry or use—such as training modules, education, and policy reminders—might slow the scalability of the platform, but they could also reduce the need for (and increase the ease of) deplatforming since users are on greater notice of possible violations.

4. *The Inevitability and Dangers of Social Regulation*

No individual or society can escape its historical context. Social norms and movements will invariably shape the scope of permissible and impermissible uses of platforms. While private governance and public laws can and should be designed to prevent the worst abuses, if society as a whole is dominated by a particular view or animus, it is unlikely that private terms of service or public law will be able to withstand that force. What social norms should be included in rules on deplatforming are ultimately normative. This makes social regulation both inevitable and dangerous. There are different strategies for addressing this danger while still allowing for social regulation. Legislation requires passing multiple veto-gates. Common-law adjudication relies on bringing lawsuits and winning them based on underlying tort claims. The development of terms of service could incorporate feedback and participatory mechanisms. But there will always be a tension between the need to use platforms to prevent social harms and the dangers inherent in deciding what counts as a harm.

III. TECH AND DEPLATFORMING

In recent years, deplatforming has received significant public attention, especially the deplatforming of President Trump and others after the insurrection on January 6, 2021. The history and theory of deplatforming sheds light on deplatforming in the contemporary tech context. In this Part, we turn to deplatforming in the tech sector and explore how the discussion above can illuminate a range of contemporary debates and issues.

A. *Private Governance in Historical Context*

Private governance regimes, and private deplatforming, have been common throughout history. NPU firms regularly engaged in conduct or entity deplatforming during the common-law era and after statutory regulation. Whether it was railroads or streetcars, telephones or electric companies, private deplatforming has been a regular feature in infrastructure sectors. Tech platforms have followed in those footsteps. They deplatform many activities that fall into historically common categories.³⁰⁷

While some believe that a common-carrier or public-utility model would prevent deplatforming, or at least restrict it to a minimum, this position is inconsistent with the long historical practice of reasonable deplatforming under American law. Under certain circumstances, private corporations could deplatform individuals or content—even though they have a legal duty to serve all comers. Nor does the First Amendment necessarily change that. Even under the First Amendment, private exclusions from telephone and other communications technologies have been upheld.³⁰⁸

At the same time, conservatives who worry that tech platforms might deplatform them for their political beliefs might find some solace in the fact that the common-carriage and public-utility regimes generally did not allow for deplatforming a person because of their political or religious beliefs. But if speech or actions turn into harm toward others, then deplatforming can be justified. In the

307. For an expansive account of multiple firms' content-moderation criteria, see generally TARLETON GILLESPIE, *CUSTODIANS OF THE INTERNET: PLATFORMS, CONTENT MODERATION, AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA* (2018).

308. See *supra* text accompanying notes 101, 111. For an excellent overview of the First Amendment and its intersection with common-carrier settings, see Lakier, *supra* note 221, at 2316–31. For a discussion of the view that the First Amendment does not apply to private actors and of the contested and possibly changing politics of the First Amendment in the tech-platform context, see generally evelyn douek & Genevieve Lakier, *First Amendment Politics Gets Weird: Public and Private Platform Reform and the Breakdown of the Laissez-Faire Free Speech Consensus*, U. CHI. L. REV. ONLINE (June 6, 2022), <https://lawreviewblog.uchicago.edu/2022/06/06/douek-lakier-first-amendment> [<https://perma.cc/8BL6-2W42>].

context of this history, Twitter's deplatforming of President Trump – which was based on the incitement of violence, not on the mere expression of political views³⁰⁹ – would look permissible, rather than impermissible, under the American tradition of reasonable deplatforming.

Indeed, for all the controversy over tech deplatforming, when placed in historical context, what is different is not the fact of deplatforming, but the scale. Tech platforms need to monitor millions of users to prevent these harms. The vastness of this challenge has led to the development of extensive adjudicatory mechanisms for individuals to contest deplatforming decisions.³¹⁰ The most notable, of course, is the Oversight Board, launched by Facebook in 2020.³¹¹ The Board, consisting of independent scholars, jurists, and former public officials, can hear appeals of Meta's decisions to take down content. Board decisions are meant to have precedential value, similar to a court decision.

In a recent paper, Evelyn Douek argues that the adjudicatory framework to online platforms' content-moderation decisions is flawed precisely because of the extraordinary scale of tech-platform moderation.³¹² Douek argues that a regulatory approach, in which platforms establish general rules, is superior even if it ends up being somewhat overinclusive or underinclusive. History shows that while adjudication has been common, it has also been coupled with *ex ante* rules even if they are not perfectly tailored. For example, railroad terminals developed policies on soliciting passengers, and telephone companies deplatformed individuals for violating their terms of service. Federal law requires excluding items from the airplane cabin, even though the rules may be somewhat over- or underinclusive. The difference between 3 ounces of toothpaste and 3.1 ounces is

309. Twitter, *Permanent Suspension of @realDonaldTrump*, TWITTER BLOG (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension [https://perma.cc/4EMT-VQ9E].

310. See, e.g., Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1647-48 (2018).

311. See Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418 (2020). For critiques, see Evelyn Douek, *What Kind of Oversight Board Have You Given Us?*, U CHI. L. REV. ONLINE (May 11, 2020), <https://law-reviewblog.uchicago.edu/2020/05/11/fb-oversight-board-edouek> [https://perma.cc/8Q23-9GR2]; Evelyn Douek, *Facebook's "Oversight Board:" Move Fast with Stable Infrastructure and Humility*, 21 N.C. J.L. & TECH. 1 (2019).

312. Douek, *supra* note 19; see also evelyn douek, *The Siren Call of Content Moderation Formalism 3*, in *NEW TECHNOLOGIES OF COMMUNICATION AND THE FIRST AMENDMENT: THE INTERNET, SOCIAL MEDIA, AND CENSORSHIP* (Lee Bollinger & Geoffrey Stone eds., 2022) ("A formalistic model, invoking judicial-style norms of reasoning and precedent, is doomed to fail at this scale and complexity.").

unlikely to raise security problems, but clear rules require line drawing.³¹³ Douek's regulatory approach is more akin to standard understandings of risk regulation in the administrative state,³¹⁴ which also recognize that there are tradeoffs in all directions.³¹⁵

Indeed, proving Douek's point, many tech platforms have significantly expanded their terms of service and other regulatory policies over time,³¹⁶ including by establishing policies for extremely specific situations from posts by world leaders³¹⁷ to posts about hot tubs.³¹⁸ eBay has a list of 68 policies on goods that are prohibited or restricted for sale.³¹⁹ In 2021 alone, it blocked 88 million

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313. For a helpful discussion of the shift to risk-based security in the airline context, see generally Solomon Wang & Nina Brooks, *Evolving Risk-Based Security: A Review of Current Issues and Emerging Trends Impacting Security Screening in the Aviation Industry*, 48 J. AIR TRANSP. MGMT. 60 (2015).
314. See, e.g., CASS R. SUNSTEIN, *RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT* (2002) (describing risk regulation).
315. See *RISK VERSUS RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT* (John D. Graham & Jonathan Baert Wiener eds., 1995) (observing tradeoffs in risk regulation in the context of health and the environment).
316. See, e.g., Sarah Jeong, *The History of Twitter's Rules*, VICE (Jan. 14, 2016, 10:00 AM ET), https://www.vice.com/en_us/article/z43xw3/the-history-of-twitthers-rules [https://perma.cc/6XBC-LCGV].
317. Twitter, *World Leaders on Twitter: Principles & Approach*, TWITTER BLOG (Oct. 15, 2019), https://blog.twitter.com/en_us/topics/company/2019/worldleaders2019.html [https://perma.cc/4YYZ-G8DS].
318. Twitch, *Let's Talk About Hot Tub Streams*, TWITCH BLOG (May 21, 2021), <https://blog.twitch.tv/en/2021/05/21/lets-talk-about-hot-tub-streams> [https://perma.cc/L4NQ-3Y3X].
319. eBay's policies include: adult items policy; airsoft, air rifles & BB guns policy; alcohol policy; animal products policy; animal traps policy; artifacts and cave formations policy; beta & OEM software policy; bullion policy; chance listings policy; charity listings policy; collectible currency policy; compilations of information policy; cosmetics policy; counterfeit item policy; coupons policy; credit and debit card policy; disaster and tragedy policy; electronic equipment policy; electronically delivered items policy; embargoed goods policy; encouraging illegal activity policy; event tickets policy; fertilizer and pesticides policy; firearms and accessories policy; food policy; funeral items policy; gift cards policy; government items policy; hazardous materials policy; human body parts policy; illegal drugs and drug paraphernalia policy; illegal explicit content policy; Intangible items policy; International trading policy; Jewelry policy; knives policy; live animals policy; lockpicking devices policy; lottery tickets policy; medical devices policy; military items policy; offensive material policy; personal information policy; plants and seeds policy; police-related items policy; prescription and over-the-counter drugs policy; price gouging policy; product safety policy; products with eligibility requirements policy; prohibited adult items policy; protecting minors policy; real estate policy; replica coins and currency policy; replica, toy, and prop firearms policy; selling art policy; services policy; slot machines policy; social media and reviews manipulation policy; stamps policy; stocks and securities policy; stolen property policy; tobacco and e-cigarettes policy; travel policy;

suspected counterfeit goods and 375 million more items from publication—in addition to deplatforming 66,000 users for selling prohibited and restricted items and 35,000 users for intellectual-property violations.³²⁰

These programs are certainly not perfect, and not everyone will agree about the most controversial cases or categories because they turn on contested normative values. But from a historical perspective, there is nothing new about making such determinations. What is new is the scale at which tech platforms must make these decisions and the extensive systems they are building to do so.

B. Public Governance in Historical Context

Tech platforms' expansive private governance regimes raise an important question: should private companies, or individual owners of private companies, have unchecked, unguided power to decide what content or individuals can be deplatformed, or should the public determine what policies govern deplatforming? This question is not a new one. In the broadcast context, for example, policymakers were concerned that the new technology concentrated power in private hands and would lead to private censorship. Similarly, in the transportation context, lawmakers were concerned that concentrated, powerful railroads could deplatform other businesses either directly or, more commonly, by charging different rates and giving special preferences to their business allies. And even before the ICC was created, common-law courts understood the power that platforms had over other businesses; in response, courts developed the duty to serve.³²¹ In these cases, as in others, public governance helped constrain private power.

Public governance regarding deplatforming has, like private governance, been a common response to concentrations of private power in NPU sectors. So far as I can tell, scholars of deplatforming do not appear to have made this point, perhaps because they generally focus on social media and the First Amendment and not on tech platforms more broadly. Genevieve Lakier and Nelson Tebbe, for example, analyze the possibility of public regulation after the “great deplatforming,” but with reference to the First Amendment public-forum doctrine, not

used clothing policy; vehicle, parts and accessories policy; violence and violent criminals policy; virtual currency policy; weapons policy. See EBAY, *Prohibited and Restricted Items*, <https://www.ebay.com/help/policies/prohibited-restricted-items/prohibited-restricted-items?id=4207> [<https://perma.cc/9ZVM-QVFX>].

320. 2021 *Global Transparency Report*, EBAY 4-5 (Apr. 2022), https://www.ebaymainstreet.com/sites/default/files/2022-04/ebay_Transparency-Report-2022_Letter_Social_v5.pdf [<https://perma.cc/XQ5Z-TKYB>].

321. See, e.g., HAAR & FESSLER, *supra* note 36, at 55-77 (discussing the early history of the duty to serve, including worries that platforms would prevent commerce).

to public-utility regulation.³²² While Lakier and Tebbe do discuss broadcast regulations, a wider view of all the NPU sectors brings additional value to the conversation. Deplatforming took place on the telegraph and telephone as well, and some exclusions from those services were related to content. The dial-a-porn cases, for example, confronted a contested issue of public morality and the use of a telecommunications technology in a one-to-many (one pornographer to many listeners) manner that commentators have recognized is arguably similar to broadcast radio.³²³ Scholars at the time even debated whether telephones were engaged in editorial functions or were mere common carriers – akin to contemporary debates over tech platforms.³²⁴ More broadly, the history and practice of deplatforming in the communications sector should open up policymakers' imagination. The Radio Act's regime was innovative at the time: it rejected both the editorial and common-carrier models and instead offered a system that attempted to navigate between worries about both public and private power. Whether or not one thinks it succeeded, it is an example of policy innovation to confront thorny challenges head-on.

Of course, scholars today debate extensively whether public regulation of tech platforms is viable and desirable given the emergence of a more absolutist First Amendment in the late twentieth century.³²⁵ But it is unclear whether trimming one's constitutional sails is a sensible course of action at a moment of extraordinary technological, political, and judicial change. Strange bedfellows have emerged on questions of tech regulation, with Republicans like Senator Josh Hawley and Democrats like Senator Elizabeth Warren supporting aggressive action against big tech.³²⁶ Justice Clarence Thomas, a bellwether for the future of the conservative legal movement,³²⁷ has also signaled that tech platforms might

322. See Lakier & Tebbe, *supra* note 4.

323. See Barron, *supra* note 113, at 401.

324. *Id.*; see generally Campbell, *supra* note 113 (considering whether telephone companies exercise editorial control and discretion).

325. See, e.g., *supra* note 8. For a helpful overview of the complexity of this problem, see douek & Lakier, *supra* note 308.

326. Compare, e.g., JOSH HAWLEY, *THE TYRANNY OF BIG TECH* (2021) (arguing that large tech platforms are the most serious threat to freedom in America since the trusts of the late nineteenth century), with Elizabeth Warren, *Here's How We Can Break up Big Tech*, MEDIUM (Mar. 8, 2019), <https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9eoda324c> [<https://perma.cc/48VX-8LN5>] (arguing that large tech platforms like Amazon, Facebook, and Google should be broken up to promote competition and protect the privacy and interests of consumers).

327. See, e.g., Ian Millhiser, *Clarence Thomas is the Most Important Legal Thinker in America*, THINKPROGRESS (July 3, 2018, 8:00 AM), <https://archive.thinkprogress.org/clarence-thomas-most-important-legal-thinker-in-america-c12af3do8c98> [<https://perma.cc/XA3K->

be regulated as common carriers.³²⁸ As he has argued, “regulations that might affect speech are valid if they would have been permissible at the time of the founding.”³²⁹ The common law of common carriage was, of course, well understood at the Founding. And there are strong arguments that tech platforms *are* common carriers under the common law.³³⁰ At a minimum, a common law of reasonable deplatforming may be permissible.

Courts are also increasingly likely to engage the clash between the First Amendment and the public governance of tech deplatforming in coming years. The Eleventh Circuit, for example, recently decided a case about a Florida law targeting tech platforms. The Florida law treats social-media platforms as common carriers and adopts a variety of content moderation and disclosure rules.³³¹ These include: not deplatforming candidates for office for more than fourteen days; not prioritizing or shadow banning posts by or about candidates; not banning or censoring journalistic enterprises, with the exception of obscenity; not making changes more than once in thirty days; offering disclosures of rule changes and deplatforming guidelines; and providing notice prior to deplatforming.³³²

In reviewing the Florida law, the Eleventh Circuit rejected the state’s argument that the First Amendment did not apply because the law required platforms to host others’ speech and instead held that provisions ran afoul of the First Amendment’s protections against speaker, content, and viewpoint discrimination.³³³ The court found that social-media platforms are not common carriers, in part because their terms of service mean they are not open to all comers.³³⁴ This is a point scholars have made as well.³³⁵ But it is inconsistent with the

Y6PV] (arguing that no Justice in the last forty years has done “more to reshape the way thousands of the nation’s top lawyers think about the law”).

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

329. *Id.* (citing *United States v. Stevens*, 559 U.S. 460, 468 (2010)).

330. See Sitaraman & Ricks, *supra* note 8.

331. See *NetChoice v. Att’y Gen. of Florida*, 34 F.4th 1196, 1203-05 (11th Cir. 2022).

332. *Id.* at 1206.

333. *Id.* at 1224.

334. Other reasons included Supreme Court cases distinguishing broadcast restrictions and cable operators from electricity and railroads; statutes differentiating interactive computer services from common carriers; and social-media platforms’ Section 230 liability exemption. *Id.* at 1231 n.26.

335. See Yoo, *supra* note 8, at 475 (“Holding out thus appears to be the most widely accepted common law definition of common carriage that courts apply in the absence of a specific statutory definition. The problem is the ease with which it can be evaded. Companies can avoid being treated as common carriers simply by defining their services as not being available to the entire public.”); Volokh, *supra* note 8, at 382 n.12 (“Social media platforms today might not be

history of common carriage. Holding oneself out to the public did *not* mean that the common carrier was open to all comers without exception. Access has *always* been qualified. Indeed, the common law of deplatforming—the many justifications for exclusion or ejection from the service—itsself functionally served as a form of terms of service. But more formally, as with the cases of the railroad depot and the gas company, firms sometimes had terms of service that included justifications for deplatforming and this did not eliminate their duty to serve. Interestingly, the Eleventh Circuit also observed that Florida’s law “extend[s] beyond the historical obligations of common carriers” because it did not enable a platform to remove content based on “its impact on others.”³³⁶ Here the court was quite correct. The Florida law does not track the American tradition of reasonable deplatforming because the Florida law more expansively restricts what kind of deplatforming is reasonable.

The Fifth Circuit has also weighed in, reviewing a Texas law that imposes nondiscrimination and disclosure requirements on social-media platforms.³³⁷ Among other things, the Texas law prohibits platforms from “censor[ing]” users based on their viewpoints.³³⁸ The Fifth Circuit upheld the Texas law against a facial First Amendment challenge by tech platforms, holding that the platforms are neither speakers nor exercising editorial discretion in hosting users. According to the court, rather than chilling speech, the law instead prohibits censorship.

The Fifth Circuit argued that common carrier rules supported its decision, finding that platforms were common carriers.³³⁹ But, like the Eleventh Circuit, the court did not get the history of reasonable deplatforming quite right. The court’s analysis of common carriage rules was generally thorough and skilled, including correctly acknowledging that generic terms of service do not undermine the status of holding oneself out to the public or the application of common carriage obligations.³⁴⁰ But the court did not discuss the widespread and regular exceptions to the duty to serve.³⁴¹ The Texas law, like the Florida one, does not

common carriers under some definitions of the term, because they don’t hold themselves out as ‘neutral conduits of information.’”).

336. *NetChoice*, 34 F.4th at 1219 n.17.

337. *NetChoice v. Paxton*, 49 F.4th 439 (5th Cir. 2022).

338. *Id.* at 446 (citing TEX. CIV. PRAC. & REM. CODE § 143A.002(a)). The statute defines “censor” as to “block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression.” TEX. CIV. PRAC. & REM. CODE § 143A.001(1). The law includes exceptions for content moderation authorized by federal law, or that prevents sexual exploitation of children or sexual harassment, direct incitement of criminal activity, specific threats of violence, and unlawful expression. *Id.* at § 143A.006.

339. *Paxton*, 49 F.4th at 469.

340. *Id.* at 469-70.

341. *Id.* (noting two examples of deplatforming without drawing the broader conclusion).

replicate all of the traditional exceptions to nondiscriminatory access under common carriage law.³⁴²

C. *Deplatforming Platforms*

Can platforms deplatform other platforms? Historically the answer was often no: nondiscrimination rules and the duty to serve meant that platforms had to allow other companies, including other platforms, to use their services at reasonable rates.³⁴³ One exception was where a user-platform required special accommodation in order to use the service-platform. For example, express companies—private messenger firms—needed to travel on the railroads in order to deliver packages long distances. But express firms did not operate as ordinary passengers on the train. They often needed more space and would even hire an entire traincar to carry their packages. Some railroads created their own express companies, and others established exclusive deals with existing companies. When railroads started to preference their own firms or partners and deny equal service to competitors, competitor express companies challenged their exclusion all around the country. The balance of opinion in the federal and state courts followed the traditional nondiscrimination rule and found for the express companies. But the Supreme Court disagreed in the *Express Cases* and instead held that the railroads did not have a duty to serve because the express companies required special accommodations. The cases were controversial even at the time.³⁴⁴

In the tech context, deplatforming platforms has also emerged as an issue. After January 6th, Amazon Web Services (AWS)—the dominant cloud infrastructure provider—deplatformed Parler, a conservative social-media platform that was hosting content that AWS determined supported violence.³⁴⁵ Later in 2021, Mastercard announced it would not serve adult entertainment platforms through its payment system, only to change its mind.³⁴⁶ These two examples raise different issues than the historic one that shaped the *Express Cases*. Neither are questions of self-preferencing or competition. Importantly, these are also not cases about the boundary between commercial nondiscrimination and content

342. Indeed, it does not consider service provision and does not consider harms to others, outside of a limited set of specific circumstances. See *supra* note 338 (citing relevant statutes).

343. For a discussion of the traditional rules, see WYMAN, *supra* note 294, at chs. 31–36.

344. See, e.g., WYMAN, *supra* note 57, at 404–10 (discussing the *Express Cases*, criticisms of them, and problems they created for transportation regulation).

345. Sam Shead, *Parler Sues Amazon for Withdrawing Support After U.S. Capitol Riot*, CNBC (Jan. 12, 2021, 9:42 AM EST), <https://www.cnbc.com/2021/01/12/parler-sues-amazon-for-withdrawing-support-after-us-capitol-riot.html> [<https://perma.cc/2CUX-4RT3>].

346. See *supra* notes 204–208 and accompanying text.

moderation because commercial nondiscrimination is not at issue. Neither AWS nor Mastercard run social-media platforms or seek to preference their own vertically aligned businesses over the deplatformed ones. Rather, these two instances raise questions about what counts as harm (in the case of Parler) and whether adult entertainment should be subject to social regulation (in the case of Mastercard).

In the case of deplatforming Parler, AWS had adopted terms of service for its hosting service, warned Parler over examples of inciting violence on the platform that were not being addressed, and when Parler did not remove the content, suspended its services.³⁴⁷ Violence, not political viewpoints or anticompetitive behavior, was the stated issue.

The Mastercard example is notable because Mastercard's response was not to deplatform OnlyFans and other adult entertainment sites, but rather to develop an elaborate set of requirements for service. As we have seen, Mastercard responded by requiring adult content providers to have a set of procedures and policies to ensure that they are not facilitating child pornography, human trafficking, or violating individual privacy. In essence, one platform is mandating that another develop preventive procedures in order to gain access. As extraordinary as this downstream regulation is, it too is not without a historical antecedent. Transportation carriers, for example, could not only exclude specific items from transportation but could also impose reasonable packing requirements on shippers.³⁴⁸ The packing requirement ensured that the items would not be damaged in transit. The Mastercard regulations are, in some ways, a modern, albeit far more extensive, version of this practice.

Under Elon Musk's leadership, Twitter's suspension of competitor Mastodon's Twitter account and subsequent block of links to Mastodon for "being potentially harmful" was far more problematic, even though Twitter later withdrew the policy.³⁴⁹ While it is not a case of vertical integration and self-preferencing, the action appears straightforwardly anticompetitive—a practice that has been generally disfavored under the tradition of reasonable deplatforming. As in the case of electricity wheeling requirements, under *Otter Tail* and thereafter,

347. See Russell Brandom, *These Are the Violent Threats that Made Amazon Drop Parler*, VERGE (Jan. 13, 2021, 10:17 AM EST), <https://www.theverge.com/2021/1/13/22228675/amazon-parler-takedown-violent-threats-moderation-content-free-speech> [https://perma.cc/N24T-BPUH].

348. See, e.g., WYMAN, *supra* note 57, at 358–59 (discussing packing requirements).

349. Charisma Madarang, *Elon Musk's Twitter Bans and Blocks Links to Rival Mastodon*, ROLLING STONE (Dec. 15, 2022), <https://www.rollingstone.com/culture/culture-news/twitter-suspends-mastodon-account-1234648316> [https://perma.cc/3GBK-G6YS]; Chas Danner, *Elon Musk Tried to Ban Leaving Twitter*, N.Y. MAG. (Dec. 18, 2022), <https://nymag.com/intelligencer/2022/12/elon-musks-twitter-bans-sharing-links-to-many-competitors.html> [https://perma.cc/UWQ9-CYPQ].

platforms can engage in anticompetitive discriminatory practices when they do not allow competitors to use their facilities under the ordinary terms offered to others.

D. Service Provision: On Bots, Anonymity, and Crypto Mining

A number of recent proposals can be better understood as invoking the traditional justifications for deplatforming, including capacity, congestion, and service-quality degradation. For example, Elon Musk suggested in the spring of 2022 that, as owner of Twitter, he would “defeat the spam bots”³⁵⁰ and “authenticate all real humans.”³⁵¹ Once owner, he did not undertake these efforts, but even the possibility of these practices, as ill-defined as they were, was controversial.³⁵² Although there might never be agreement on the desirability of removing bots or authenticating humans, a plausible justification for doing so might be tied to service-quality degradation. As James Grimmelmann has observed, cacophony (a situation in which it is hard to find what you’re looking for) and abuse (negative-value content) both reduce the quality of service.³⁵³ If spam bots and anonymous accounts degrade service quality by flooding the service such that it is less valuable to other users, that could be a reasonable justification for deplatforming. Of course, that does not mean there are not tradeoffs. Anonymity might have benefits as well. But discussions on the topic seem to assume the benefits without noting the real costs to the quality of service.

Another example is cryptocurrency mining. In early 2022, Kosovo banned cryptocurrency mining.³⁵⁴ The small country faced energy production and import shortages, and so halted private mining in order to ensure adequate energy for its population.³⁵⁵ Other areas have similarly seen strains on the electric grid

350. Elon Musk (@elonmusk), TWITTER (Apr. 21, 2022, 12:53 PM), <https://twitter.com/elonmusk/status/1517215066550116354> [<https://perma.cc/MEG3-E345>].

351. Elon Musk (@elonmusk), TWITTER (Apr. 21, 2022, 21:56 PM), <https://twitter.com/elonmusk/status/1517215736606957573> [<https://perma.cc/QCG5-BAPJ>].

352. See, e.g., Lily Hay Newman, *Elon Musk’s Twitter Buy Exposes a Privacy Minefield*, WIRED (Apr. 26, 2022, 3:54 PM), <https://www.wired.com/story/elon-musk-twitter-privacy-anonymity> [<https://perma.cc/CB3-SGWM>]; Jillian C. York, Gennie Gebhart, Jason Kelley, & David Greene, *Twitter Has a New Owner. Here’s What He Should Do*, ELEC. FRONTIER FOUND. (Apr. 25, 2022) (describing the importance of anonymity), <https://www.eff.org/deeplinks/2022/04/twitter-has-new-owner-heres-what-he-should-do> [<https://perma.cc/TE7W-5BKJ>] (describing the importance of anonymity).

353. Grimmelmann, *supra* note 35, at 53-54.

354. *Kosovo Bans Cryptocurrency Mining to Save Electricity*, REUTERS (Jan. 5, 2022, 11:39 AM EST), <https://www.reuters.com/markets/commodities/kosovo-bans-cryptocurrency-mining-save-electricity-2022-01-04> [<https://perma.cc/C9VX-R794>].

355. *Id.*

and higher prices for all consumers due to crypto mining.³⁵⁶ Deplatforming cryptocurrency mining can be seen as a way to address congestion and capacity (in the form of a single user using more of the service) and to prevent service-quality degradation for all other users.

E. Replatforming

Should social-media platforms replatform users who have been suspended and, if so, how? With the replatforming of former President Trump and others on Twitter, Facebook, and YouTube, it is worth comparing the platforms' processes and explanations. Elon Musk, at the helm of Twitter, reinstated Trump in November 2022, after tweeting a poll to users asking them to vote on whether he should be reinstated. The vote, by some 15 million accounts, was 51.8 percent in favor and 48.2 percent opposed.³⁵⁷ It is not clear whether each account was independently held or whether some individuals voted multiple times. YouTube replatformed former President Trump in March 2023 with short announcements on Twitter and no full explanations of process, criteria, or reasoning.³⁵⁸

Facebook had the most extensive process. Facebook restricted Trump's access to the social-media platform and to Instagram on January 6, 2021, suspended those accounts permanently on January 7, 2021, and referred the situation to the Facebook Oversight Board. The Oversight Board upheld the decision to deplatform Trump, but also observed that "it was not appropriate for Facebook to impose the indeterminate and standardless penalty of indefinite suspension" because that was not within its set of stated penalties.³⁵⁹ The Oversight Board found that Trump's tweets violated Facebook's rules banning "praise or support of people engaged in violence" and that "there was a clear, immediate risk of

356. See, e.g., Lois Parshey, *How Bitcoin Mining Devastated this New York Town*, MIT TECH. REV. (Apr. 18, 2022), <https://www.technologyreview.com/2022/04/18/1049331/bitcoin-cryptocurrency-cryptomining-new-york> [<https://perma.cc/WSL3-J62E>]; Naureen Malik & Michael Smith, *Bitcoin Mining Threatens to Further Strain Texas' Electric Grid*, GOV. TECH. (Mar. 16, 2022), <https://www.govtech.com/computing/bitcoin-mining-threatens-to-further-strain-texas-electric-grid> [<https://perma.cc/BR7B-BLQA>].

357. Elon Musk (@elonmusk), TWITTER (Nov. 18, 2022, 7:47 PM), <https://twitter.com/elonmusk/status/1593767953706921985> [<https://perma.cc/27CA-JQJP>].

358. YouTubeInsider (@YouTubeInsider), TWITTER (Jan. 12, 2021), <https://twitter.com/YouTubeInsider/status/1349205689395245056> [<https://perma.cc/CJP3-L774>]; YouTubeInsider (@YouTubeInsider), TWITTER (Mar. 17, 2023), <https://twitter.com/YouTubeInsider/status/1636731005263544320> [<https://perma.cc/4KMV-LJ44>].

359. *Case Decision 2021-001-FB-FBR*, FACEBOOK OVERSIGHT BD. 1, <https://www.oversightboard.com/sr/decision/2021/001/pdf-english> [<https://perma.cc/RX6X-ETB3>].

harm.”³⁶⁰ But it also found that an indefinite suspension of his account was unwarranted because this was not a “clear, published procedure” and was “not described in the company’s content policies.”³⁶¹ In other words, the Board’s decision sought to hold Facebook to its own stated policies. In response, Facebook suspended Trump for two years and then established policies for deplatforming and replatforming public figures in times of unrest or violence.³⁶² These policies include progressively longer suspension periods for increasingly harmful posts; an evaluation of whether the public figure’s posts might pose a continuing danger if they were to return to the platform after the suspension period; and special conditions of use and penalties for replatformed public figures.³⁶³ Meta reinstated Trump in January 2023.³⁶⁴

Notably, Meta’s policy is focused on the role of public figures in times of civil unrest.³⁶⁵ In June 2023, Instagram (which, like Facebook, is also owned by Meta) reinstated Robert F. Kennedy, Jr. Kennedy had been removed in 2021 for “repeatedly sharing debunked claims about the coronavirus or vaccines.”³⁶⁶ After Kennedy announced a presidential bid in 2023, an Instagram spokesperson said that the company had reinstated his 760,000-follower account, “[a]s he is now an active candidate for president.”³⁶⁷

These different approaches engage a number of the theoretical and design questions discussed above. First and most notably, Meta has adopted – both on its own and through its Oversight Board – a commitment to publicly posted policies and procedures for usage. The Oversight Board has held Meta to these policies and recommended revisions as necessary. This is in contrast to Musk’s Twitter, which did not evaluate Trump’s replatforming with respect to any preexisting or new policies, and YouTube, which appears to have offered no

360. *Id.* at 3.

361. *Id.* at 4.

362. Nick Clegg, *In Response to Oversight Board, Trump Suspended for Two Years; Will Only Be Reinstated if Conditions Permit*, FACEBOOK (June 4, 2021), <https://about.fb.com/news/2021/06/facebook-response-to-oversight-board-recommendations-trump> [<https://perma.cc/US9E-ZSJ4>].

363. *Restricting Accounts of Public Figures During Civil Unrest*, META (Jan. 30, 2023), <https://transparency.fb.com/enforcement/taking-action/restricting-accounts-of-public-figures> [<https://perma.cc/9BVL-CD5Z>].

364. Nick Clegg, *Ending Suspension of Trump’s Accounts with New Guardrails to Deter Repeat Offenders*, META (Jan. 25, 2023), <https://about.fb.com/news/2023/01/trump-facebook-instagram-account-suspension> [<https://perma.cc/XM49-SRHH>].

365. META, *supra* note 363.

366. Cristiano Lima, *Instagram Reinstates Robert Kennedy Jr. After Launch of Presidential Bid*, WASH. POST (June 4, 2023, 5:16 PM EDT), <https://www.washingtonpost.com/technology/2023/06/04/robert-kennedy-instagram> [<https://perma.cc/F3TD-N5UX>] (quoting Instagram).

367. *Id.*

explanation for its actions. At the same time, Instagram's decision to replatform Kennedy was also accompanied by little explanation. None of the platforms appear to have offered a truly comprehensive set of standards for replatforming, including how and why decisions will be made. There does not appear to be, for example, a blanket rule that running for president automatically allows someone to be replatformed (nor would such a rule make much sense, as anyone could so declare in order to regain access). Platforms' replatforming decisions might gain legitimacy if they established more expansive criteria and processes for making such decisions.

Second, Meta's decision to adopt a series of escalating penalties and to take into account the likelihood of future harm tracks the tradition of reasonable deplatforming. The idea that suspended accounts will not be reinstated if there is a high likelihood of future violations parallels the common-law notion that a pattern or practice of bad behavior can be a reasonable justification for preemptive deplatforming.

Finally, the protection against legal liability for platforms' hosted content, under Section 230 of the Communications Decency Act (CDA), may be shaping the platforms' decisions to a significant degree. If social-media platforms were liable for injuries to other users or to the general public for the content they host, they may become less likely to replatform users that open them up to legal liability. It is unclear whether Musk or YouTube have engaged in any diligence or procedures that would absolve them of negligence in their replatforming decisions, if such a standard were in place.

F. Platform Liability: On Section 230, Terrorism, and Cloud Computing

Under the common law, platforms owed a duty of care to their users, including protecting them and their belongings from injury. Platforms that failed to protect their users could be held liable in tort. But platforms who unjustly excluded users could also be sued under the common law for violating their duty to serve. In some cases, deplatforming (a violation of the latter obligation) was necessary to fulfill the former obligation. Liability thus formed a backdrop that, at least in some cases, made deplatforming necessary.

Today, some tech platforms are insulated from liability under Section 230 of the CDA. The debate over whether Section 230 should remain law is vast and contested. But one lesson of the history of deplatforming across NPU is that the backdrop of liability does shape when and how platforms remove or exclude users. Removing the Section 230 shield, in other words, might push platforms to take even greater care with respect to their policies on both access and exclusion.

It appears that both lawyers and jurists may be unaware of important common-law duties and their exceptions. In *Twitter, Inc. v. Taamneh*, the Supreme

Court considered whether tech platforms could be liable in tort for aiding and abetting terrorism because they hosted videos from terrorist group ISIS, and because ISIS benefitted from financial proceeds of advertisements on the platforms.³⁶⁸ Writing for a unanimous Court, Justice Thomas observed that the “plaintiffs’ complaint rests . . . heavily on defendants’ failure to act” and that it would “have more purchase” if there was an “independent duty in tort that would have required defendants to remove ISIS’ content.”³⁶⁹ The plaintiffs offered no such duty and the Court did not resolve the issue of what would happen in the event of such a duty existing, but it did observe that “such a duty . . . would not transform defendants’ distant inaction into knowing and substantial assistance” to support the aiding and abetting claim.³⁷⁰

The history of deplatforming and common-carrier obligations suggests that the Court and plaintiffs may have missed an important common-law foundation for liability. Under the common law, there is a strong argument that tech platforms are common carriers.³⁷¹ That common-law designation would give them both duties to serve and potentially duties to deplatform, based on common-law tort liability. Indeed, as we have seen, courts have found platforms negligent for not excluding users who might foreseeably injure others.³⁷²

Platform liability rules might also apply to cloud computing. As Danielle D’Onfro has persuasively argued, common-law rules on bailment (liability for injuries when holding another’s property) should apply in the cloud computing context to digital property.³⁷³ If courts take up D’Onfro’s suggestion – or if legislatures step in – cloud-computing services might also face liability for negligence if user data in their possession is deleted, corrupted, or stolen. This, in turn, might push them to exercise greater care. To the extent that some users could create these harms to other users, cloud-computing services might need to adopt deplatforming policies in response. Indeed, some cloud platforms already have terms of service that partly track the reasonable deplatforming standard. The terms of service for Amazon Simple Notification Service, which is run by AWS, requires users not to transmit viruses or other harmful programs; not to violate or facilitate the violation of laws; and not to transmit sexually explicit material.³⁷⁴ The terms of Amazon Simple Email Services note that access can be

368. *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 478 (2023).

369. *Id.* at 25.

370. *Id.*

371. See Sitaraman & Ricks, *supra* note 8.

372. See *supra* Section I.C.1.

373. Danielle D’Onfro, *The New Bailments*, 97 WASH. L. REV. 97, 100–03 (2022).

374. *AWS Service Terms*, AMAZON (Aug. 22, 2023), <https://aws.amazon.com/service-terms> [<https://perma.cc/KKJ6-PMMA>].

suspended or terminated if the service is used to send spam.³⁷⁵ In other words, cloud platforms already recognize that some users might harm others – and seek to preventively deplatform that harmful behavior.

CONCLUSION

Despite the contemporary controversy over deplatforming from social-media platforms, the practice of reasonable deplatforming is longstanding in American history. Whether under the common law of innkeepers and common carriers, or within the transportation, communications, energy, or banking sectors, platforms have often had obligations to serve the public – but they have also had the ability to exclude or eject individuals and content in limited circumstances. As lawmakers, judges, and commentators consider the rights and obligations of tech platforms, they should recognize that the American tradition has not been one of either an absolute duty to serve or an absolute right to exclude. Instead, the American tradition has been one of reasonable deplatforming.

375. *Id.*