

# Response to “Regulatory Implications of Turning Internet Platforms into Common Carriers”

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	340
II.	RESPONSE TO SPIWAK’S ARTICLE .....	340
	<i>A. NetChoice v. Paxton</i> .....	340
	<i>B. H.B. 20</i> .....	343
III.	CONCLUSION.....	347

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## I. INTRODUCTION

An article by Lawrence Spiwak in the Federal Communications Law Journal, *Regulatory Implications of Turning Internet Platforms into Common Carriers*,<sup>1</sup> critiques my article<sup>2</sup> and one by Eugene Volokh,<sup>3</sup> both of which examine the legality of nondiscrimination obligations on social media firms and other communications networks.

## II. RESPONSE TO SPIWAK'S ARTICLE

### A. *NetChoice v. Paxton*

The arguments *Regulatory Implications* forwards have obvious applications to the Supreme Court's decision in *NetChoice v. Paxton* expected this year.<sup>4</sup> This case will review the constitutionality of H.B. 20, a Texas state law that requires the dominant social media companies to refrain from viewpoint discrimination, applying a common carrier type non-discrimination requirement that telephones, telegraphs, and airlines currently work under. Given the importance of the case, I asked the editors for an opportunity to respond to the critique, and they kindly agreed.

My article, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230* ("Bargaining for Free Speech"), points out that communications law and regulation, in a broad sense, grants certain privileges, particularly toleration of monopoly, in exchange for non-discrimination obligations or liability protections.<sup>5</sup> I contrasted that "deal" with Section 230 of the Communications Act of 1934, which gives Internet platforms, including the dominant social media firms, big carrots but no sticks, relieving the Internet platforms of liability in exchange for no corresponding public benefit, such as non-discrimination obligations.<sup>6</sup> Although written years before its passage, the article shows that Texas's H.B.

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1. 76 FED. COMM. L.J. 1, 7-19 (2023) [hereinafter *Regulatory Implications*].

2. *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J.L. & TECH. 391 (2020).

3. *Treating Social Media Platforms Like Common Carriers?* 1 J. FREE SPEECH L. 377 (2021).

4. *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 446 (5th Cir. 2022), cert. granted in part sub nom. *NetChoice, LLC v. Paxton*, 144 S. Ct. 477 (2023).

5. *Id.* at 396 ("In exchange for liability relief from tort or antitrust law and for other government-granted privileges, a dominant network firm provides public goods it can uniquely offer: a universal communications platform enabling free speech and promoting democratic institutions."). See also *S. Pac. Commc'ns Co. v. Am. Tel. & Tel. Co.*, 556 F. Supp. 825, 1095 (D.D.C. 1982), as amended (Jan. 10, 1983), *aff'd*, 740 F.2d 980 (D.C. Cir. 1984) ("Under the controlling decisions of the Supreme Court, it is undisputed that matters subject to a pervasive scheme of public utility or common carrier regulation are not subject to the antitrust laws.") (cleaned up); *Verizon Commc'ns, Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 412 (2003) ("One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm [the Telecomm. Act of 1996]. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny.").

6. *NetChoice*, 49 F.4th at 465-66.

20 is very much in the tradition of common carrier communications regulation in imposing non-discrimination obligations.

Rather than respond to this straightforward argument, *Regulatory Implications* creates a strawman: my article supports public utility regulation for the Internet or social media. The article states that it “assume[s] *arguendo* [that] . . . calls for common carrier regulation of Internet platforms are, in fact, calls for public utility regulation similar to FCC regulation of telephone companies, [and asks] then what would such a regulatory regime for Internet platforms look like . . . the purpose of this paper is to offer a few insights”<sup>7</sup> and claims, that I “sit squarely in the public utility camp for platform regulation.”<sup>8</sup>

That’s a false assumption and a false claim. Public utility regulation is the economic regulation of utilities, such as electricity, gas, water, and sometimes telephones particularly their consumer pricing, usually assuming that these services are a natural monopoly.<sup>9</sup> It typically involves comprehensive rate and service regulation. In contrast, common carrier anti-discrimination requirements are judge-made rules with their origins in the late Middle Ages.<sup>10</sup> Like their more modern cousins, public accommodation law,

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7. *Regulatory Implications*, *supra* note 1, at 4, 6.

8. *Id.* at 7. My article does not mention public utility law at all, except by once referencing a book with the phrase in its title. The article was about common carrier non-discrimination requirements. It is undisputed that public utility law and common carrier law are different. Common carrier law is a set of rules originating in the 14<sup>th</sup> century or so in England dealing primarily with non-discrimination and liability. See Thomas B. Nachbar, *The Public Network*, 17 *COMMLAW CONCEPTUS* 67, 76 (2008) (“At common law, and as a matter of custom pre-dating legal recognition, certain industries have been regulated under nondiscrimination regimes. The most familiar form of nondiscrimination rules are those imposed on so-called ‘common carriers,’ businesses carrying persons or goods from place to place.”). Public utility law, in contrast, is a late 19<sup>th</sup> century invention with much broader regulatory implications. See William Boyd, *Just Price, Public Utility, and the Long History of Economic Regulation in America*, 35 *YALE J. ON REG.* 721, 754-57 (2018) (“Building on the experience of state railroad commissions and the Interstate Commerce Commission, state regulation of public utilities emerged around the turn of the century . . . These were quintessential Progressive-era laws, built on principles of scientific management and regulation by experts. Statutory mandates were typically broad and open-ended, founded on the goal of ensuring that rates were just, reasonable, and nondiscriminatory in order to strike the appropriate balance between ratepayers and investors.”).

9. See ALFRED KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* (1988); Meredith Hurley, *Traditional Public Utility Law and the Demise of A Merchant Transmission Developer*, 14 *Nw. J. L. & SOC. POL’Y* 318, 320-21 (2019) (“[D]uring this era [late 19<sup>th</sup> century], public utility law developed primarily around supporting vertically integrated utilities by granting them regulated monopolies and by protecting them from competing firms. In the early twentieth century, many states established state Public Utility Commissions (PUCs) to heavily regulate both the public utilities or investor-owned utilities.”). See generally Harry M. Trebing, *Public Utility Regulation: A Case Study in the Debate Over Effectiveness of Economic Regulation*, 18 *J. OF ECON. ISSUES* 223-50 (1984) (“In its modern form, [public utility regulation] began in *Munn v. Illinois* 94 U.S. 113 (1876), when the U.S. Supreme Court upheld the power of the state to regulate prices for a firm that possessed the economic power to exploit its customers.”).

10. James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 *FED. COMM. L.J.* 225, 227 (2002) (“Since at least the middle ages, most significant carriers of communications and commerce have been regulated as common carriers.”).

these rules simply require businesses to serve all comers without discrimination.<sup>11</sup> Most retail businesses today operate under such mandates.

As the title of my article makes clear, it was talking about common carrier law, which is historically administered by courts. The article *never discusses public utility law at all*, and any reading otherwise misinterprets my article. Further, it is a common misconception that Title II of the Communications Act of 1934 embraces a comprehensive public utility model; it is at best partial.<sup>12</sup> *Regulatory Implications* appears to adopt this view in its discussion of Sections 201, 202, and 203 of the Act. But, the Communications Act of 1934 does not; it regulates “common carriers,”<sup>13</sup> which courts have interpreted to refer to the historical meaning of the term<sup>14</sup>—so that my discussion of the Act does not necessarily implicate public utility principles at all.

Further, I have never called for a “dedicated regulator” to treat social media as public utilities. Indeed, I have attacked ferociously the administrative state in many of my writings.<sup>15</sup> My article concludes, with the second of two mentions of administrative agencies, stating a “new deal is necessary, starting with, at least, a proper judicial understanding of section 230 and then statutory or regulatory reform, which is within the power of the FCC or FTC. These reforms would include an anti-discrimination requirement that dominant platforms share blocking technologies with users so that individuals, not corporate platforms, set the boundaries of on-line speech.”<sup>16</sup> My interest is in simple common carrier-type non-discrimination rules, and I am at best agnostic about whether administrative agencies should

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11. *Day v. Owen*, 5 Mich. 520, 523 (1858) (“[A] common carrier can not refuse to carry any person of legal conduct and intention upon the ground of any physical or personal quality or defect, or to suit the preference or antipathies of other passengers.”); Kevin Werbach, *Only Connect*, 22 BERKELEY TECH. L.J. 1233, 1246 (2007) (“Common carriage is primarily a non-discrimination approach.”).

12. Barbara A. Cherry, *Historical distortion: How misuse of “public utility and “natural monopoly” misdirects U.S. telecommunications policy development*, 2015 Regional Conference of the International Telecommunications Society (ITS) (Oct. 25-28, 2015) (“In the FCC’s open Internet proceeding, I filed a research paper coauthored with Jon Peha (Cherry & Peha, 2014), which was written to redirect inquiry to the proper legal basis for classifying a service – simply the coexistence of certain technical and commercial functionalities of the service – as a common carriage (‘telecommunications service’) under Title II of the federal Communications Act. This redirection was necessary to refute the mischaracterization, whether intentional or unintentional, that such classification is based on assessment of market structure, market power or monopoly. This research paper (Cherry & Peha, 2014) relied in significant part on my prior research that explains how conflation between the two legal statuses of common carrier and public utility has contributed to such mischaracterization (Cherry, 1999, 2006, 2008b).”). Further, the Communications Act, through its use of the term “common carrier,” incorporates historical understandings of common carrier law. See *NARUC v. FCC*, 525 F.2d 630, 640 (1976).

13. Part I of Title II of the Communications Act (title “Common Carrier Regulation”) explicitly regulates common carriers. See 47 U.S.C. §§ 201-03. Section 201 regulates “common carriers.”

14. *Nat’l Ass’n of Regul. Util. Comm’rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (Courts “have concluded that the circularity and uncertainty of the common carrier definitions set forth in the statute and regulations invite recourse to the common law of carriers.”).

15. See, e.g., D.A. Candebub, *Preference and Administrative Law*, 72 ADMIN. L. REV. 607 (2021); D.A. Candebub, *Tyranny and Administrative Law*, 59 ARIZ. L. REV. 49, 52 (2017).

16. *Bargaining for Free Speech*, *supra* note 2, at 433.

take the lead, although elsewhere my preference for court-adjudicated standards is clear.

Rather than require the complex pricing schemes of public utility law, social media non-discrimination laws, like House Bill 20 (H.B. 20), require simple non-discrimination mandates, of the sort which regulate railroads,<sup>17</sup> restaurants,<sup>18</sup> FEDEX,<sup>19</sup> and telegraphs,<sup>20</sup> and which courts have enforced for centuries. And, that's all my article—or, for that matter, supporters of H.B. 20—argue for. My article states “simple de-platforming . . . can be analyzed under a non-discrimination framework. The question of whether one is discriminatorily terminated from a network is not a deep technical issue. Rather, it is akin to the discrimination question in civil rights and employment law that courts routinely answer.”<sup>21</sup>

### B. H.B. 20

Armed with this misreading that my article advocates comprehensive public utility regulation of social media, *Regulatory Implications* suggests non-discrimination of the type H.B. 20 requires is, in fact, invasive public utility rate regulation and then proceeds through a litany of hypotheticals.

First, “[r]ather than regulate internet platforms’ economic conduct (e.g., prices), however, the government would regulate the platforms’ speech. The problem, of course, is that because neither common carriage nor public utility

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17. “A railroad may decline to carry persons . . . 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.” EDWARD LILLIE PIERCE, A TREATISE ON AMERICAN RAILROAD LAW (1857); *Councill v. W. & Atl. R.R. Co.*, 1 I.C.C. 339, 347 (1887). See also *Heard v. Ga. R.R. Co.*, 1 I.C.C. 428, 435-36 (1888); *Henderson v. United States*, 339 U.S. 816, 818 (1950).

18. *Boynnton v. Virginia*, 364 U.S. 454, 462-63 (1960).

19. *FedEx Corp. v. United States*, 121 F. App’x 125, 126 (6th Cir. 2005); Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 379 (2021) (“And though UPS and FedEx aren’t bound by the First Amendment, they are common carriers and thus can’t refuse to ship books sent by “extremist” publishers.”).

20. *Primrose v. W. Union Tel. Co.*, 154 U.S. 1, 14, (1894) (“Telegraph companies resemble railroad companies and other common carriers, in that they are instruments of commerce, and in that they exercise a public employment, and are therefore bound to serve all customers alike, without discrimination.”).

21. *Bargaining for Free Speech*, *supra* note 2, at 431. But, instead of responding to *Bargaining for Free Speech*, in *Regulatory Implications*, the author quotes me out of context claiming “Candeub expressly calls for a new ‘regulatory deal’ for network regulation which would ‘probably require an administrative agency’ and because he draws heavily from communications law and policy debates, he appears to sit squarely in the public utility camp for platform regulation.” *Regulating Implications*, *supra* note 1, at 7. The article fails to mention that my reference to an “administrative agency” was specifically in regard to non-discriminatory search engine results. See *supra* note 2, at 431 (“The question of search results is, of course, far more complex--and much has been written about how fairness in search results could be maintained. It would probably require an administrative agency, either the FCC or FTC, to examine search algorithms.”).

regulation were ever intended to serve this function, how that regulatory regime would work in practice is unclear.”<sup>22</sup>

To the contrary, the history of common carrier law shows how it imposed non-discrimination mandates on businesses carrying speech and messages—even accepting the tendentious assertion that the messages carriers bear are their own expression. For instance, common carrier principles were applied to telegraphs when they refused to carry news stories critical of telegraph companies in the 19<sup>th</sup> century.<sup>23</sup> And, indeed, judicial rulings hold that requiring carriers to bear others’ messages does not convert those messages into carrier expression. Companies that carry *others’* speech cannot claim it as their own. This is the conclusion that the Fifth Circuit in *NetChoice* came to, pointing out that the platforms, themselves, have strenuously advocated such a view in Section 230 cases.<sup>24</sup> Even more important, the Supreme Court appeared to side with this view just last term in *Taamneh*, stating that Internet search platforms’ “‘recommendation’ algorithms are merely part of that infrastructure. All the content on their platforms is filtered through these algorithms, which allegedly sort the content by information and inputs provided by users and found in the content itself. As presented here, the algorithms appear agnostic as to the nature of the content.”<sup>25</sup>

Second, my article looks to other examples in communications law in which, in a broad sense, the government granted certain privileges, such as tolerating monopoly, in exchange for non-discrimination obligations or liability protections. My examples are network neutrality regulation, the 1992 Cable Act, and broadcast licensing. I contrast these examples with Section 230 of the Communications Act of 1934, which offers all carrot and no stick, relieving the Internet platforms of liability in exchange for no corresponding public benefit. *Regulatory Implications* claims that “Candeub misstated the law, but his analogies are uniformly inapposite” and tries to show how each analogy is “inapposite.”<sup>26</sup>

The FCC’s 2015 network neutrality order that reclassified broadband access as a common carrier and imposed minimal non-discrimination

22. *Regulatory Implications*, *supra* note 1, at 6.

23. “The telegraph was the first communications industry subjected to common carrier laws in the United States . . . . But by the end of the nineteenth century, legislators grew ‘concern[ed] about the possibility that the private entities that controlled this amazing new technology would use that power to manipulate the flow of information to the public when doing so served their economic or political self-interest’ . . . . For example, Western Union, the largest telegraph company, sometimes refused to carry messages from journalists that competed with its ally, the Associated Press—or charged them exorbitant rates. And the Associated Press in turn denied its valuable news digests to newspapers that criticized Western Union. Western Union also discriminated against certain political speech, like strike-related telegraphs. And it was widely believed that Western Union and the Associated Press ‘influenc[ed] the reporting of political elections in an effort to promote the election of candidates their directors favored.’ In response, States enacted common carrier laws to limit discrimination in the transmission of telegraph messages.” *Paxton*, 49 F.4th at 470-71.

24. *Paxton*, 49 F.4th at 467-68 (The Platforms’ position in this case is a marked shift from their past claims that they are simple conduits for user speech and that whatever might look like editorial control is in fact the blind operation of “neutral tools.”).

25. *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 499 (2023).

26. *Regulatory Implications*, *supra* note 1, at 9.

requirements—is a typical common carrier-type regulation.<sup>27</sup> *Regulatory Implications* claims that network neutrality is not an example of a regulatory deal because the FCC forbore from Title II’s more burdensome public utility-type regulation and therefore the “FCC’s reclassification strategy was more jurisdictional than philosophical.” It’s not clear what this means; perhaps the claim is correct, but I’m not sure what a “philosophical reclassification strategy” is, however.

*Regulatory Implications* argues that network neutrality is a type of price regulation. Fair enough. It sets traffic interconnection rates at zero—and that from a public utility pricing perspective may not be a justified move. Agreed. Of course, the application of the argument is someone lessened given that modern networks do, indeed, have marginal termination rates that are close to zero—a fact that reciprocal compensation under Section 251 of the Telecommunications Act revealed decades ago.<sup>28</sup>

But then *Regulatory Implications* argues that my article failed to deal with the fact that the Act only prohibits “unjust and unreasonable” discrimination—and that standard cannot be applied to social media. Well, regardless of the application of the Communications Act of 1934 to H.B. 20 (and there is none), it is true that common carrier and public utility law certainly allow “reasonable” discrimination based on different services. *Regulatory Implications* correctly points to *Orloff v. FCC* as an example of a case examining the “reasonable discrimination” principle.<sup>29</sup> This case allowed Verizon to offer different cell phone plans to different customers.<sup>30</sup>

And, here, *Regulatory Implications* makes a serious error—because it seems to insist that social media non-discrimination laws include a secret public utility pricing plan. It argues that reasonable discrimination rules cannot apply to social media, claiming that “If the government wants to exert more control over how Internet platforms curate content, then the full panoply of public utility regulation is probably required so that the regulator can decide, for example, whether Donald Trump is ‘similarly situated’ to an Instagram influencer.”<sup>31</sup>

But H.B. 20 doesn’t require that. It’s a common carrier—public accommodation-type law. It only requires that whatever rules and standards the platform uses in moderating content, it cannot apply them in a viewpoint discriminatory way. Unlike what a public utility regulation requires, H.B. 20 does not require a “pricing” of Donald Trump—after all, social media provides its services for free! And, most important, the social media firms

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27. Protecting and Promoting the Open Internet, *Final Rule* 30 FCC Rcd. 5601, 5604 ¶ 6 (2015). Although the order was upheld by the D.C. Circuit in *United States Telecom Ass’n v. FCC*, 855 F.3d 381, 382 (D.C. Cir. 2017), the FCC later abrogated it. In *The Restoring Internet Freedom, Declaratory Ruling, Order, Report and Order*, 33 FCC Rcd. 311 (2018) [hereinafter *Restoring Internet Freedom Declaratory Ruling*].

28. *Ace Tel. Ass’n v. Koppendrayner*, 432 F.3d 876, 880 (8th Cir. 2005) (“[T]he MPUC reasonably concluded that the additional costs for terminating a telephone call were approximately zero[.]”).

29. *Regulatory Implications*, *supra* note 1, at 13; see also *Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003), *cert denied*, 542 U.S. 937 (2004).

30. *Orloff*, 352 F.3d at 420.

31. *Regulatory Implications*, *supra* note 1, at 13-14.

already adopt different pricing schemes for their real customers, the advertisers.

More basically, pricing problems, which are indeed issues of public utility regulation, are not present in simple common carrier non-discrimination regulation. Contrary to the logic of *Regulatory Implications*, restaurants, retailers, airlines, and telephone companies can without any diminishment of economic efficiency serve all people of all races, religions, and backgrounds without making determinations of whether they are similarly situated—and should be charged different prices. The social media firms can serve their users in the same fashion.

And, nondiscrimination and public accommodation laws are simple to follow; almost every public-facing business today follows them, from retail shopping to ski resorts.<sup>32</sup> Indeed, common carriers under their nondiscrimination obligations must serve all regardless of race, religion, or other status.<sup>33</sup> We need neither regulatory agencies nor public utility law to enforce those obligations; courts enforce these anti-discrimination mandates.

Rather than recognize the obvious harm of social media censorship, *Regulatory Implications* looks to an article by an economist, George Ford,<sup>34</sup> cited in the FCC's Restoring Internet Freedom Order.<sup>35</sup>

Spiwak's article claims Ford's work "conclusively demonstrated that industry investment suffered as a result of reclassification [the FCC's decision to regulate ISPs as common carrier in 2015 network neutrality order]."<sup>36</sup> The article therefore implies that Texas's non-discrimination requirement on platforms will have a similar negative impact on social media capital investment—without giving any evidence of such a similar effect.

In the article relied upon,<sup>37</sup> Ford finds a decrease in ISP industry investment *since 2010*. Reclassification occurred in 2015. How this article shows investment "suffered as a result of reclassification" is a mystery. Actually, Ford contends that the *threat* of reclassification, which he asserts occurred when President Obama took office, caused the decrease in investment. Apparently, then, *Regulatory Implication's* real beef is with Democratic presidents. But, by providing a fair social media environment that is more fair to conservatives, the Texas social media law will likely help with that problem.

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32. See, e.g., N.J. Stat. Ann. § 10:5-4 (West 1993).

33. *Morgan v. Virginia*, 328 U.S. 373, 374-75, 383-86 (1946); *Mitchell v. United States*, 313 U.S. 80, 94-95 (1941) (finding that federal law prohibits common carriers from discriminating based on race and requires them to provide equal access to accommodations).

34. Dr. George S. Ford, *Net Neutrality, Reclassification and Investment: A Counterfactual Analysis*, No. 17-02 PERSPECTIVES, PHX. CTR. ADVANCED & ECON. LEGAL PUB. POL'Y STUDIES (2017), <https://www.phoenix-center.org/perspectives/Perspective17-02Final.pdf> [<https://perma.cc/DKW2-594X>] (subsequently published as George S. Ford, *Regulation and Investment in the U.S. Telecommunications Industry*, 50 APPLIED ECON. 6073, 6082 (2018)).

35. *Restoring Internet Freedom Declaratory Ruling*, at paras. 95-98, *aff'd by, in part, vac'd by, in part, rem'd by* *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (citing Ford, *Net Neutrality, Reclassification and Investment*, *supra* note 34).

36. *Regulatory Implications*, *supra* note 1, at 14 (Discussing Protecting and Promoting the Open Internet, *Final Rule*, 30 FCC Rcd. 5601, 5604 ¶ 6 (2015)).

37. Ford, *supra* note 34, at 6073-84.



*Regulatory Implications* continues in the same vein critiquing my analysis of cable and broadcast law—and claims I misuse the economic concept of a “public good.” For the sake of space, I leave these matters to the curious and thoughtful reader and trust her judgment.

I will just remark on one last point. Before the Twitter files and *Missouri v. Murthy*<sup>38</sup> exposed the extent of platform collusion with government to censor Americans, my article foresaw the threat. It quotes the much more-prescient Professor Seth Kreimer, writing in 2006, who foresaw “[r]ather than attacking speakers or listeners directly, governments [will] enlist private actors within the chain as proxy censors to control the flow of information” on the Internet.<sup>39</sup> And, that’s what government did to silence critics of federal and state COVID responses, reporters covering Hunter Biden’s laptop, and other unpopular voices critical of the government.

The stifling of leading public health experts or major news stories on the cusp of an election is partisan interference with the democratic process. Texas’ H.B. 20 prohibiting viewpoint discrimination would have made such interference illegal.

### III. CONCLUSION

*Regulatory Implications* finds my claim paradoxical that non-discrimination rules would make it more difficult for government to pressure the platforms to silence its critic—because those rules are government-created. I do not dispute the claim that regulation tends to bring administrative agencies and regulated entities closer. Of course it does. But, common carrier non-discrimination law, adjudicated by the courts, is unlikely to do so. And has not done so during the centuries before comprehensive public utility regulation run by administrative agencies emerged in the late 19<sup>th</sup> and early 20<sup>th</sup> century. Common carrier-type non-discrimination laws, like H.B. 20, give individuals a legal leg to stand on when faced with ever greater government and business collusion aimed at free speech. One would hope that all free market enthusiasts, of which I certainly count myself, would look favorably on the law.

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38. *Missouri v. Biden*, 80 F.4th 641, 657 (5th Cir. 2023), *opinion withdrawn and superseded on reh’g*, 83 F.4th 350 (5th Cir. 2023), *cert. granted sub nom.* *Murthy v. Missouri*, 144 S. Ct. 7 (2023) (“Relying on the above record, the district court concluded that the officials, via both private and public channels, asked the platforms to remove content, pressed them to change their moderation policies, and threatened them—directly and indirectly—with legal consequences if they did not comply. And, it worked—that ‘unrelenting pressure’ forced the platforms to act and take down users’ content.”).

39. *Bargaining for Free Speech*, *supra* note 2, at 432.

