Article

Public Law, Private Platforms

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INTRODUCTION

The rise of large technology platforms like Facebook, Google, and Airbnb has raised serious questions about the adequacy of our public laws, especially with regard to speech, privacy, and discrimination. For example, the First Amendment once guarded against the gravest threats to free speech—government censorship—but in a world where speech is governed by private algorithms, scholars openly wonder whether the First Amendment is obsolete.[1] The Fourth Amendment was designed to prevent the police from gaining warrantless access to private spaces like the home, but today, thanks to private surveillance networks like Ring, law enforcement agents often simply request data that would be unthinkable a decade ago.[2] And, while anti-discrimination law once covered practically all short-term bookings at inns and hotels, today Airbnb controls nearly a quarter of the hospitality market and much of the platform's offerings are exempt from anti-discrimination law's reach.[3]

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1. *See* discussion *infra* Part I.B; *see also* Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 554 (2018) (noting that one of the foundational assumptions of the First Amendment is that "the government is assumed to be the main threat to the 'marketplace of ideas' through its use of criminal law or other coercive instruments to target speakers (as opposed to listeners) with punishment or bans on publications").

2. *See* discussion *infra* Part I.A.

3. *See* discussion *infra* Part I.C.

My thesis is that these crises—in speech, in privacy, in anti-discrimination law—all relate to the same basic problem, which is the way platforms scramble relatively settled notions of public and private. Of course, at some level of generality, all technological change has the capacity to change society in ways that call for laws to be updated. But this is something more specific. Today's most pressing problems at the intersection of law and technology stem from the fact that large private platforms strain the already tenuous public/private distinction that pervades our law.

Our Constitution, for example, focuses on state actors, famously leaving aside the question of private power.[4] And although Congress is free to regulate many aspects of private life, our statutory law has huge carve-outs for private action, even allowing for private discrimination.[5] Debates about the public/private distinction are, of course, not new; they date back to liberalism itself, and they were central to the legal realist revolution in the early twentieth century.[6] But today's digital platforms change the terms of the debate. Platforms have become

4. *See* discussion *infra* Part III.A.

5. *See* discussion *infra* Part II.B (discussing carve-outs for "purely private" conduct).

6. *See* Morton Horwitz, *The History of the Public Private Distinction,* 130 U. PA. L. REV. 1423, 1424 (1982) ("[O]ne can find the origins of the idea of a distinctively private realm in the natural-rights liberalism of Locke and his successors . . . ."); *see also* MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960, at 10–11 (1992) ("One of the most powerful tendencies in late-nineteenth-century law was the move to create a sharp distinction between what was thought to be a coercive public law . . . and a non-coercive private law . . . ."); BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 87 (1998) (describing how Hale, like many legal realists, understood that "all exercises of private rights constitute state action, since they rely for their efficacy on either state enforcement or 'voluntary' cooperation extracted from others under the implicit threat of state enforcement"). The internet is only the latest communications medium to illustrate the imperfect nature of liberalism's public-private distinction. *See, e.g.*, OWEN FISS, LIBERALISM DIVIDED (1996) ("A shift from the street corner to CBS compels us to recognize the hybrid character of major social institutions; it begins to break down some of the dichotomies between public and private presupposed by classical liberalism."); Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 135–46 (2004) (cataloguing three distinct critiques of the public-private distinction in the speech context). The list of articles attacking the public/private distinction is too long to recreate, but it is worth noting that most scholarship seems to agree that the distinction is somewhat incoherent but still an essential feature of our public

our public spaces, and yet because they are privately owned, and because they "merely" coordinate private ordering, they operate without the guardrails of many of our most important laws.

Why does the law allow hosts on Airbnb to discriminate on the basis of race, but Hilton Hotels cannot? Because the Civil Rights Act of 1964 regulates *public* accommodations and creates carve-outs for *private* individual homeowners.[7] Why does American speech law have next to nothing to say about the largest speech platforms in the world?[8] Because the First Amendment is concerned with *public* censorship and not *private* "content moderation."[9] We see something similar in surveillance laws, labor laws, and more. Much of our law was built to apply to public authorities and public spaces, not private authorities or private spaces. If these exceptions were troubling before, they are worse today because the technology now exists to unite these exceptions at enormous scale.

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law. *See, e.g.*, Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1007, 1007 (1987) (describing and partially defending the "shifting, uncertain, and contested boundary between distinct public and private spheres").

7. 42 U.S.C. § 2000a(b)(1) (exempting from public accommodations laws "an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence"); *see also* Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271 (2017) (describing the problem of discrimination on platforms like Airbnb and calling for an expansive interpretation of the public accommodations laws). The problem of discrimination on Airbnb has been well documented. *See, e.g.*, Benjamin Edelman, Michael Luca & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 AM. ECON. J.: APPLIED ECON. 1, 1 (2017) ("[A]pplications from guests with distinctively African American names are 16 percent less likely to be accepted relative to identical guests with distinctively white names."); Benjamin Edelman & Michael Luca, *Digital Discrimination: The Case of Airbnb.com* 1 (Harv. Bus. Sch. Working Paper, Paper No. 14-054, 2014), https://www.hbs.edu/ris/Publication%20Files/Airbnb_92dd6086-6e46-4eaf-9cea-60fe5ba3c596.pdf [https://perma.cc/8E8M-JHBG] ("[N]on-black hosts charge approximately 12% more than [B]lack hosts for the equivalent rental.").

8. *See, e.g.*, Brett M. Pinkus, *The Limits of Free Speech in Social Media*, ACCESSIBLE L. (Apr. 26, 2021), https://accessiblelaw.untdallas.edu/limits-free-speech-social-media [http://perma.cc/9QC4-VNPY].

9. *See* Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2296 (2014) ("[S]ignificant changes in the practices and technologies of free expression, changes that concern a revolution in the infrastructure of free expression. That infrastructure, largely held in private hands, is the central battleground over free speech in the digital era.").

To use the language of the platform, these technologies turn what was once an edge case—a private home rental, backyard surveillance, corporate censorship—into the standard use case. Individual homeowners who are free to discriminate on the basis of race when they rent out their backyard casita are no longer just an unfortunate-but-small slice of the short-term accommodations market; today that *is* the market.[10] Private surveillance networks are not just an additional anxiety on top of government surveillance; accessing private surveillance networks is *how* the government surveils.[11] Private speech outlets—governed by the whims of their owners—are no longer just a necessary evil in a liberal society; they are the *central* free speech challenge in today's democracies.[12]

This account will come as no surprise to anyone who has followed recent debates in speech law, criminal procedure, or civil rights. Free speech scholarship is deeply concerned with the role of private platforms;[13] criminal law scholars have interrogated

10. When Airbnb went public in 2020, it was valued at over $85 billion, making it more valuable than the three largest hotel chains—Marriott, Hilton, and Intercontinental—combined. *See* Tyler Sonnemaker, *Airbnb Is Worth More than the 3 Largest Hotel Chains Combined After Its Stock Popped 143% on Its First Day of Trading*, BUS. INSIDER (Dec. 10, 2020), https://www.businessinsider.com/airbnb-ipo-valuation-tops-three-hotel-chains-combined-opening-day-2020-12 [https://perma.cc/79TD-MRMX]. Today, Airbnb is worth over $100 billion. *See Company Value of Airbnb Worldwide from 2016 to 2021*, STATISTA, https://www.statista.com/statistics/339845/company-value-and-equity-funding-of-airbnb [https://perma.cc/XZN9-U96M].

11. *See* Barry Friedman, *Private Data/Public Regulation* 6 (Hoover Inst., Aegis Series Paper No. 2105, 2021), https://www.hoover.org/sites/default/files/research/docs/friedman_webreadypdf.pdf [https://perma.cc/V2BD-QXUS] (cataloging police reliance on private surveillance tools and noting that "the Fourth Amendment—the only constitutional provision that does any work in this space—still has very little to say about it"); Orin S. Kerr, *Buying Data and the Fourth Amendment* 1 (Hoover Inst., Aegis Series Paper No. 2109, 2021), https://www.hoover.org/sites/default/files/research/docs/kerr_webreadypdf.pdf [https://perma.cc/5UH9-J36Q] ("The government can buy business records without a warrant or any cause. The Fourth Amendment does not apply.").

12. *See* Kyle Langvardt, *A New Deal for the Online Public Sphere*, 26 GEO. MASON L. REV. 341, 342 (2018) ("When the state steps out as a regulator, it only enables nonstate regulators to regulate more aggressively than the government would ever be permitted to—and often in ways that undermine, rather than promote, values of free expression.").

13. *See, e.g.*, Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1599 (2018) ("[P]rivate online platforms have an increasingly essential role in free speech and participation in democratic culture . . . ."); *see also* Langvardt, *supra* note 12, at 342 (noting the irony that a "governmental posture of laissez-faire toward speech

how platforms change surveillance law;[14] and civil rights scholars are carefully attuned to platform discrimination.[15] But despite the recent bevy of legal scholarship about platforms, there is surprisingly little research that sees these different problems as symptoms of the same root cause: the mismatch between private platforms and the public/private distinction in our law.[16]

Why does it matter that we recognize that the public/private distinction lies at the heart of each of these seemingly distinct problems? Because it points towards a smarter way to address platform ills. Regulators seem to have reached consensus that they need to do *something* about the role of platforms in society, but it is far from clear what to do. Since the one common feature

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has produced a public sphere that is closely managed by a few all-seeing private authorities," and suggesting the "limits of private ordering").

14. *See, e.g.*, Jon D. Michaels, *All the President's Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 CALIF. L. REV. 901, 908–19 (2008) (describing the close relationship between the national surveillance complex and private platforms); Alan Z. Rozenshtein, *Surveillance Intermediaries*, 70 STAN. L. REV. 99 (2018) (arguing that major technology firms have incentives to resist state surveillance); Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1095–114 (2002) (describing the scope and costs of government and private sector information sharing).

15. *See, e.g.*, Leong & Belzer, *supra* note 7.

16. The most directly relevant article is twenty years old, which describes what the state action doctrine in its crudest form means in cyberspace. Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation*, 71 U. COLO. L. REV. 1263, 1266 (2000) ("[T]he activities of private corporations, such as America Online or the new domain name governing body ICANN, or the various Internet technical standard-setting groups such as the World Wide Web Consortium or the Internet Engineering Task Force, are not subject to the Constitution because they are not state actors."); *see also* Molly Shaffer Van Houweling, Sidewalks, Sewers, and State Action in Cyberspace (unpublished manuscript), http://cyber.law.harvard.edu/is02/readings/stateaction-shaffer-van-houweling.html [https://perma.cc/DX2V-XJN2] ("[T]he rise of powerful private companies joining forces to mold and control it, should force us to take *Marsh* seriously again."). More recently, Julie Cohen has written in a sociological vein about the rise of the platform economy. *See* Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 204 (2017) ("The uncoordinated patterns of self-interested, strategic intervention by platform firms are producing new legal-institutional formations optimized to their various projects and goals."). For a global perspective, see Hannah Bloch-Wehba, *Global Platform Governance: Private Power in the Shadow of the State*, 72 SMU L. REV. 27, 33–40 (2019) (describing the failures of the early internet governance debates that failed to predict how private rulemaking and self-governance would create a global governance problem).

across these different domains is a commercial actor with enormous economic power, it has become fashionable to turn to antitrust to resolve these problems.[17]

But to the extent that the problem with platforms is their ability to exploit the public/private distinction in American law, antitrust is beside the point. A better remedy would be to revise and expand the doctrines that speak precisely to private commercial activity that has a significant public impact. As Justice Thomas put it recently, "If part of the problem is private, concentrated control over online content and platforms available to the public, then part of the solution may be found in doctrines that limit the right of a private company to exclude."[18] Justice Thomas gave two examples—common carrier rules and public accommodations laws—but there are, in fact, many doctrines

17. The number of scholarly articles, regulatory hearings, and regulatory proposals to address platform power with antitrust has exploded in recent years. *See, e.g.*, Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 797–802 (2017) (describing how antitrust rules could be used to regulate dominant platforms); ZEPHYR TEACHOUT, BREAK 'EM UP: RECOVERING OUR FREEDOM FROM BIG AG, BIG TECH, AND BIG MONEY 219–36 (2020) (arguing for nationalization and decentralization—trust-busting—as solutions to the rise of state-like technology giants); TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018) (arguing for the application of Brandeis-era trust-busting to big technology firms today); *Digital Markets Investigation: Antitrust Investigation of the Rise and Use of Market Power Online and the Adequacy of Existing Antitrust Laws and Current Enforcement Levels*, HOUSE COMM. ON THE JUDICIARY, https://judiciary.house.gov/issues/issue/?IssueID=14921 [https://perma.cc/F8V9-C6JT] (revealing wide ranging attitudes about how to address platform power, and much skepticism about the status quo); Complaint for Injunctive and Other Equitable Relief paras, 64–65, FTC v. Facebook, Inc., No. 1:20-cv-03590-JEB (D.D.C. Dec. 9, 2020) (outlining the Commission's antitrust case against Facebook, built on the fact that, according to the FTC, users face high switching costs where Facebook has sixty percent of the social networking market).

Naturally, this has also sparked a considerable backlash by scholars who argue that antitrust laws are actually well suited to regulating the digital economy. *See, e.g.*, Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952, 1956 (2021) [hereinafter Hovenkamp, *Antitrust*] (arguing that "sustainable competition in platform markets is possible for most aspects of their business" and therefore antitrust laws are well suited to regulating the platform economy); Herbert Hovenkamp, *The Warren Campaign's Antitrust Proposals*, THE REGUL. REV. (Mar. 25, 2019), https://www.theregreview.org/2019/03/25/hovenkamp-warren-campaigns-antitrust-proposals [https://perma.cc/UP75-5WV2] (summarizing and critiquing several reforms promoted by Senator Warren). These arguments have, in turn, sparked a reply.

18. Biden v. Knight First Amend. Inst. at Colum. Univ., 141 S. Ct. 1220, 1222 (2021) (Thomas, J., concurring).

(and exceptions to doctrines) in American law that recognize that private actors can act in a way that is either public in nature or of public import, and impose corresponding restrictions on private ordering in the public interest.[19] Consider just a few: the private search doctrine; the public function test in speech cases; the public policy doctrine in contracts law; the public trust doctrine in property law; the public speech limit to trespass, and many more.[20] These doctrines are an acknowledgment that private ordering has limits when it imposes broader public costs. Courts should embrace, expand, and employ these doctrines to manage the platform economy. These doctrines were essential to the progressive response to the *Lochner* era, to thinkers like Robert Hale who recognized "the public basis of private rights."[21] The problems of the platform economy beg for their reinvigoration.

A word about the Article's scope. The Article is not focused on how the internet enables new forms of unlawful conduct, such as hacking or using the dark web to distribute contraband; my focus is not on *new forms of illegality*.[22] Nor am I arguing that platforms are lawless spaces. To the contrary, intellectual property law and criminal law are robustly enforced, often proactively, on the major private platforms.[23] Rather, I am interested in how our laws aimed at the worst public harms—our public laws—are side-stepped by digital platforms. Old forms of illegal conduct like censorship, surveillance, and discrimination, can today be laundered, through the use of a digital platform, into something that is technically legal.

The Article proceeds in four parts. Part I offers some examples of the phenomenon whereby private platforms impose public costs but evade relevant public law. Part II explains why the

19. *Id.* at 1222–23.

20. *See* Part IV for a detailed outline of these doctrines.

21. FRIED, *supra* note 6, at 19.

22. For an overview of how the internet enables new forms of criminal conduct, see Ahmed Ghappour, *Searching Places Unknown: Law Enforcement Jurisdiction on the Dark Web*, 69 STAN. L. REV. 1075, 1087–90 (2017).

23. For an overview of how major platforms like YouTube manage hundreds of thousands of copyright takedowns in a year, see Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 STAN. TECH. L. REV. 473 (2016). This is part of a broader turn of private parties to internalize and automate regulatory compliance. *See* Kenneth A. Bamberger, *Technologies of Compliance: Risk and Regulation in a Digital Age*, 88 TEX. L. REV. 669, 669–70 (2010) (discussing the broad adoption of compliance-technology products by regulated firms).

public/private distinction in our law is so poorly suited to regulate the public harms from private platforms. Part III isolates the features of private platforms that are such an awkward fit for our public/private distinction. Part IV looks to the private-but-public doctrines for inspiration if not an immediate solution.

I. THREE SEEMINGLY DISTINCT PROBLEMS

Among the most pressing law-and-technology issues today are speech, privacy, and discrimination. These issues are largely addressed in isolation, yet as the following analysis shows, they share a surprising number of overlapping features. At their core, all three issues are in large part a result of the mismatch between large private platforms on the one hand and a legal regime that draws a sharp distinction between public and private on the other.

A. SURVEILLANCE

When the police put security cameras up, even for uncontroversial purposes like improving road safety, there is public outrage.[24] It would be unthinkable—the stuff of dystopian fiction[25]—for the government to propose putting cameras on the

24. *See, e.g.*, Charles Lane, *Red Light Camera Use Declines After Public Outrage*, NPR (May 23, 2016), https://www.npr.org/2016/05/23/479207945/red-light-camera-use-declines-after-public-outrage [https://perma.cc/6A34-9VUE] (describing community backlash at red light traffic camera programs across the country); Brendan Kiley, *Surveillance System or Public-Safety Tool? Seattle Dismantles Controversial Wireless Mesh Network*, SEATTLE TIMES (Feb. 9, 2018), https://www.seattletimes.com/seattle-news/surveillance-system-or-public-safety-tool-seattle-dismantles-controversial-wireless-mesh-network [https://perma.cc/4VH7-NAZW] (describing how the city of Seattle built a network of cameras and mesh wireless nodes that was met with enough public outcry to force the city to dismantle the network); Abbie Alford, *Surveillance Cameras Spark Outrage in Ocean Beach*, CBS 8 SAN DIEGO (Jan. 27, 2016), https://www.cbs8.com/article/news/surveillance-cameras-spark-outrage-in-ocean-beach/509-02d63db3-df5a-4ffe-8bb1-4c1376b09ba8 [https://perma.cc/U6GG-57AP] (describing strong negative public reactions to a city council proposal to install cameras along the beachfront); Brian Didlake, *"Shocking Violation": Lake County Commissioners Order Takedown of Secret Surveillance Cameras*, NEWS 6 ORLANDO (Aug. 12, 2021), https://www.clickorlando.com/news/local/2021/08/12/shocking-violation-of-procedure-lake-county-commissioners-order-takedown-of-traffic-surveillance-cameras [https://perma.cc/A6NP-5U8P] (describing city commission outrage at local sheriff's installation of 100 cameras in public to fight crime).

25. GEORGE ORWELL, NINETEEN EIGHTY-FOUR 2 (1949) ("Big brother is watching you.").

front door of every house in the country, even with protections like a guarantee that a warrant would be required to view the cameras' footage.[26] Even where police *have* put up cameras in public spaces like major intersections—let alone private residences—their use has invited constitutional scrutiny.[27] As the Fifth Circuit put it, "indiscriminate video surveillance raises the specter of the Orwellian state."[28]

And yet today, a network of always-on cameras blankets the country, covering most neighborhoods in the United States, and law enforcement regularly gains access to the footage captured by these cameras.[29] In increasing numbers, individual homeowners have installed internet-connected surveillance cameras

26. Courts have found that people have higher expectations of privacy in their homes. *See, e.g.*, United States v. Vankesteren, 553 F.3d 286, 290 (4th Cir. 2009) (finding that a police-placed pole camera did not violate the Fourth Amendment because it captured activity in open fields and "was not placed within or even near the curtilage of [surveillance target's] home"); Rodriguez v. United States, 878 F. Supp. 20, 24 (S.D.N.Y. 1995) (allowing for secret video surveillance of a city street); McCray v. State, 581 A.2d 45, 48 (Md. Ct. Spec. App. 1990) (allowing secret surveillance footage taken of defendant on the street). Dragnet video surveillance of public places, though, has been condemned. State v. Costin, 720 A.2d 866, 870 (Vt. 1998) (objecting to video surveillance aimed at public places merely "in the hope that it will deter crime or capture what crime might occur").

27. *See* Rachel Levinson-Waldman, *Hiding in Plain Sight: A Fourth Amendment Framework for Analyzing Government Surveillance in Public*, 66 EMORY L.J. 527, 528 (2017) (describing the use of pole cameras and other public surveillance tools, noting that it is "inconceivable that the Founders, who could fairly be described as obsessed with Americans' right to be let alone, could have envisioned, let alone endorsed, the degree and depth of intrusion into individuals' lives that is enabled by present-day surveillance technologies").

28. *See, e.g.*, United States v. Cuevas-Sanchez, 821 F.2d 248, 250–51 (5th Cir. 1987) (concluding that police use of a pole camera to surveil defendant's private backyard for months was a Fourth Amendment search); Shafer v. City of Boulder, 896 F. Supp. 2d 915, 942 (D. Nev. 2012) (holding that covert, long-term videotaping of private citizen's backyard violates the Fourth Amendment). *But see* United States v. Houston, 813 F.3d 282, 288–90 (6th Cir. 2016) (holding that surreptitious installation of pole camera and warrantless surveillance of defendant's trailer and private property for ten weeks did not violate Fourth Amendment).

29. *See* Drew Harwell, *Doorbell-Camera Firm Ring Has Partnered with 400 Police Forces, Extending Surveillance Concerns*, WASH. POST (Aug. 28, 2019) [hereinafter Harwell, *Ring Partnership*], https://www.washingtonpost.com/technology/2019/08/28/doorbell-camera-firm-ring-has-partnered-with-police-forces-extending-surveillance-reach [https://perma.cc/2RQB-UWBF] (describing a sprawling set of public-private partnerships that "let police request the

to watch over—and often inside—their homes.[30] Many of these cameras are linked together by their maker—in Ring's case, Amazon; in Nest's case, Google—so that there are now one or two national networks of cameras that cover huge swaths of private property in the United States. These cameras are of enormous value to law enforcement agents, who increasingly rely on them to solve crimes and therefore encourage their adoption.[31] Ring in particular has worked closely with law enforcement agencies—at least 400 so far—to create a national network of security cameras.[32] Ring doorbell sales have skyrocketed, as Ring is the most popular smart camera for homes and millions of American households—the latest estimate puts it at twenty million homes, and one third of surveyed U.S. smart homes—now have some kind of smart camera on their doors.[33]

What distinguishes Ring's surveillance network from a surveillance system of federal or state cameras? The answer, of course, is that it is privately owned and voluntary. But these private surveillance networks often operate as functional equivalents to government surveillance networks; law enforcement officers regularly obtain surveillance footage from these private surveillance systems, sometimes without needing a search warrant.[34]

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video recorded by homeowners' cameras"); *see also* Drew Harwell, *Home-Security Cameras Have Become a Fruitful Resource for Law Enforcement—and a Fatal Risk*, WASH. POST (Mar. 2, 2021), https://www.washingtonpost.com/technology/2021/03/02/ring-camera-fears [https://perma.cc/D3TN-EUMD] ("Police forces across the U.S. made more than 20,000 requests last year for footage captured by Ring's 'video doorbells' and other home-security cameras, underscoring how the rapid growth of inexpensive home surveillance technology has given American law enforcement an unprecedented ability to monitor neighborhood life.").

30. An estimated 400,000 Ring security devices were sold in December 2019 alone. Rani Molla, *Amazon Ring Sales Nearly Tripled in December Despite Hacks*, VOX RECODE (Jan. 21, 2020), https://www.vox.com/recode/2020/1/21/21070402/amazon-ring-sales-jumpshot-data [https://perma.cc/HR5Q-PSLQ].

31. *See* Harwell, *Ring Partnership, supra* note 29 (comparing the value of the Ring network's expansion to the inception of DNA evidence in criminal cases).

32. *Id*.

33. *Amazon's Ring Leads Google's Nest as 16% of U.S. Homes Adopt Video Doorbells: Strategy Analytics*, BUS. WIRE (Feb. 13, 2020), https://www.businesswire.com/news/home/20200213005824/en/Amazon's-Ring-Leads-Google's-Nest-As-16-Of-US-Homes-Adopt-Video-Doorbells-Strategy-Analytics [https://perma.cc/7Y3A-U8VH].

34. *See* Harwell, *Ring Partnership, supra* note 29 (describing how police departments are able to utilize networks to obtain doorbell footage).

Something similar happens with other kinds of private surveillance tools that ultimately end up in the hands of the police. Consider the example of automatic license plate readers. Less than ten years ago, if the police wanted to track the movements of a suspect's car, they needed a warrant to place a GPS tracker on the vehicle.[35] Justice Scalia, writing for the Court in *Jones*, said, "We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search,'" and therefore requires a valid warrant.[36] Justice Scalia went on to explain that the court's conclusion was influenced by the fact that the "Government physically occupied private property for the purpose of obtaining information."[37]

Today, police departments in many cities need not go to all the trouble. Instead, they can rely on a fleet of cars and trucks—many of which are private—equipped with automatic license-plate readers, scanners that photograph and log the activity of cars as they move throughout the city.[38] Because these license plate readers are merely tracking public activities that can be seen with the human eye, they have been held to not constitute searches that trigger the Fourth Amendment warrant requirement.[39] As a Texas Appellate Court held:

> A car's license plate is exposed to public view. The license plate displayed on a vehicle while traveling on a public roadway is not typically an area where a person has a reasonable expectation of privacy, and we conclude that taking a picture of a license plate displayed on a vehicle that is traveling on a public road would not be subject to Fourth Amendment protection nor would it constitute a search.[40]

This affirmed the lower court's holding that one cannot expect a "right of privacy in and to a license plate. It is no different than an officer taking a photograph of an individual to show that

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35. *See* United States v. Jones, 565 U.S. 400, 402–04 (2012) (affirming the Court of Appeals' decision that placing a tracker on a vehicle was a search and therefore entitled to Fourth Amendment protections).

36. *Id.* at 404 (footnote omitted).

37. *Id.*

38. Tom Simonite, *AI License Plate Readers Are Cheaper—So Drive Carefully*, WIRED (Jan. 27, 2020), https://www.wired.com/story/ai-license-plate-readers-cheaper-drive-carefully [https://perma.cc/34Z2-P8X7] (noting that the town of Rotterdam, NY, has only forty-five police officers but can track 10,000 cars every day using license plate readers).

39. Uhunmwangho v. State, No. 09-19-00119-CR, 2020 WL 1442640, at *9 (Tex. App. Mar. 25, 2020).

40. *Id.* at *6.

an individual was at a particular location."[41] Several other federal and state courts have drawn similar conclusions.[42]

In the surveillance realm, then, we have a problem. Massive, indiscriminate, nation-wide surveillance is anathema. We have constitutional protections in place to limit the government's ability to engage in such surveillance. Yet, because the carve-outs for private action are so great, voluntary surveillance regimes can exist lawfully, even where the surveillance will end up in the hands of government agents.

B. Speech

There is perhaps no greater threat to free speech today than the fact that much of the world's speech happens on private platforms.[43] As Tim Wu put it recently, "the major and minor internet platforms by which the public's attention is actually reached have proved vulnerable to manipulation, distortion and corruption."[44] Yet the First Amendment does nothing to stop all Americans from deciding to speak in the same private online space, subject to the same rules. Not only does the First Amendment *not* guarantee the freedom of political speech on a platform like Facebook, it does not even articulate reasonable standards that

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41. *Id.* at *4.

42. *See, e.g.*, United States v. Miranda-Sotolongo, 827 F.3d 663, 668 (7th Cir. 2016) ("Because the police conducted a check of a database containing only non-private information and did so using only registration information that could be seen by any member of the public, the police did not conduct a Fourth Amendment search."); United States v. Diaz-Castaneda, 494 F.3d 1146, 1152 (9th Cir. 2007) ("[W]hen police officers see a license plate in plain view, and then use that plate to access additional non-private information about the car and its owner, they do not conduct a Fourth Amendment search."); United States v. Ellison, 462 F.3d 557, 563 (6th Cir. 2006) ("Thus, so long as the officer had a right to be in a position to observe the defendant's license plate, any such observation and corresponding use of the information on the plate does not violate the Fourth Amendment."); Chaney v. City of Albany, No. 6:16-CV-1185, 2019 WL 3857995, at *9 (N.D.N.Y. Aug. 16, 2019) (quoting People v. Bushey, 75 N.E.3d 1165, 1168 (N.Y. 2017)) ("Because the purpose of a license plate is to readily facilitate the identification of the registered owner of the vehicle for the administration of public safety, a person has no reasonable expectation of privacy in the information acquired by the State for this purpose and contained in a law enforcement or DMV database."); United States v. Yang, No. 2:16-cr-231-RFB, 2018 WL 576827, at *5 (D. Nev. Jan. 25, 2018) ("The observations of license plate locations noted in the [vigilant] database do not rely upon invasive technology allowing law enforcement officers to essentially peer into the private property of individuals.").

43. *See* Balkin, *supra* note 9, at 2296–97.

44. Wu, *supra* note 1, at 550.

might apply to Facebook, like the requirement that the firm make its speech decisions transparent, fair, and sensible.[45] The information landscape—and free speech concerns—have simply undergone a radical change in recent years, and the law has not caught up.[46] As Balkin puts it, the last twenty years have seen "significant changes in the practices and technologies of free expression, changes that concern a revolution in the infrastructure of free expression. That infrastructure, largely held in private hands, is the central battleground over free speech in the digital era."[47] Wu asks whether the First Amendment has become "obsolete," because despite the Supreme Court's active speech jurisprudence, the First Amendment simply does not touch the most important concerns relating to speech in today's digital environment: private platform algorithms that decide who sees what content and why.[48]

If the government censored political speech in the country, it would be unconstitutional and cause for uproar.[49] But if the people self-organize onto a single platform and then the government puts informal pressure on the platform to establish speech rules, well, this is the world we live in. But unlike government speech controls, this private speech control, which users voluntarily opt into, is legal.[50]

The United States has, of course, a world-unique commitment to freedom of speech.[51] The free speech clause of the First Amendment states plainly that "*Congress* shall make no law . . . abridging the freedom of speech."[52] Because of this bold language, it is now inconceivable that the federal government would engage in a massive, widespread censorship campaign. If the

45. *But see* Klonick, *supra* note 13, at 1616–30 (arguing that Facebook has, through informal norms and staffing, internalized many First Amendment values).

46. *See* Wu, *supra* note 1, at 549 (describing how the Court's recent First Amendment jurisprudence has focused on economic rights and campaign finance, and has largely ignored the core concern of political speech).

47. Balkin, *supra* note 9, at 2296.

48. *See generally* Wu, *supra* note 1.

49. *See* FLOYD ABRAMS, THE SOUL OF THE FIRST AMENDMENT 88 (2017) (discussing how the First Amendment, at its core, protects political speech).

50. *See* Balkin, *supra* note 9, at 2309–10 (discussing how incentives cause private platforms to over-censor and block access to protected speech).

51. *See* ABRAMS, *supra* note 49, at xiv (describing the ant-censorial spirit of the First Amendment "and, as a result, how different American society is from other Western democratic states").

52. U.S. CONST. amend. I (emphasis added).

government sought to prevent people from engaging in political speech in a public square, the regulation would be subject to the strictest of scrutiny.[53] Even if the town square were privately owned and operated, the Court would strike down efforts to control political speech.[54] And yet today, we find ourselves in a situation in which the biggest speech platforms in the United States—the place where the most speech happens, by far—are privately owned, beyond the reach of the Constitution, but nonetheless censoring and editing speech in response to government pressures.[55]

It would be problematic enough that a single firm would have the ability to decide the speech rules for the vast majority of the country and American law would have little to say about it. It would be much worse if the government were able to put pressure on this firm in ways both subtle and outright. Suppose, for example, that the government were able to, in the words of Jack Balkin, hold "one private party A liable for the speech of another private party B, and A has the power to block, censor, or otherwise control access to B's speech."[56] This practice has been called "collateral censorship,"[57] "censorship by proxy,"[58] and "jawboning," and it seems to be commonplace.[59]

53. The Court has long established political speech as the "core" of the constitutional free speech right. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein."). Any time the law draws a distinction "based on the message a speaker conveys," they are subject to strict scrutiny. Reed v. Town of Gilbert, 576 U.S. 155, 163–64 (2015).

54. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501, 502 (1946) (holding that the First Amendment prohibits a state from imposing "criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town's management").

55. *See* Balkin, *supra* note 9, at 2309 (discussing collateral censorship, which encourages private platforms to limit speech of parties on the platform to avoid potential liability).

56. *Id.*

57. Michael I. Meyerson, *Authors, Editors, and Uncommon Carriers: Identifying the "Speaker" Within the New Media*, 71 NOTRE DAME L. REV. 79, 118 (1995) (critiquing "collateral censorship" as "the silencing by a private party of the communication of others").

58. Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 11 (2006) (arguing that internet intermediaries are often proxy censors, acting on the government's behalf).

59. Derek E. Bambauer, *Against Jawboning*, 100 MINN. L. REV. 51, 55

In speech, then, like in surveillance, we have a thing—censorship and other speech controls—that seemed anathema. We built constitutional protections to limit it. But the carve-outs for private action were so large that voluntary, private speech regimes are legally permissible even though functionally they present many of the same problems as those that would be illegal if they were public.

C. DISCRIMINATION

Anti-discrimination laws like the Civil Rights Acts of 1964 and 1968 prohibit discrimination in public accommodations on the basis of protected classes like race, religion, and more.[60] The Americans with Disabilities Act of 1990 similarly prohibits discrimination on the basis of disability.[61] These laws clearly apply to inns and hotels—so-called public accommodations—prohibiting them from discriminating amongst their customers.[62] But

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(2015) (documenting and arguing against the increasingly common practice of government actors seeking "to coerce [internet firms] based on threatened action at the edges of or wholly outside their legal authority"); *see also* Daphne Keller, *Who Do You Sue?* 5 (Hoover Inst., Aegis Series Paper No. 1902, 2019), https://www.hoover.org/sites/default/files/research/docs/who-do-you-sue-state-and-platform-hybrid-power-over-online-speech_0.pdf [https://perma.cc/9T2Z-JU7C] ("By relying on informal or tacit agreements, legislators and other state actors can cause platforms to adopt speech rules that would, if written into law, be struck down by courts on free-expression grounds.").

60. Title II of the Civil Rights Act of 1964 declares: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a(a). Title VIII of the Civil Rights Act of 1968, also known as the Fair Housing Act, makes it unlawful to, among other things, "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(b).

61. Title III of the Americans with Disabilities Act of 1990 prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a).

62. Inns and hotels are among the listed entities that count as places of public accommodations. 42 U.S.C. § 2000a(b)(1). There is a longstanding debate about whether such lists are illustrative or exhaustive. JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 36 (5th ed. 2010) (describing how some courts have treated the list in 42 U.S.C. § 1981 as exhaustive while others have included retail shops and restaurants, entities not named in the statute).

these laws do not apply to individual homeowners renting out small numbers of apartments or rooms within their homes.[63] So for half of a century, accommodations available to the "public" were protected by civil rights laws, while private accommodations like subletting an extra room in one's house were not.

Along comes Airbnb—and VRBO, Roommates.com, and Craigslist, to name just a few—making it much easier for members of the public to book stays in private homes. As the leading public accommodations laws are written, they do not apply to individual rooms booked on Airbnb.[64] But Airbnb is very much a vehicle for the public to book accommodations. Indeed, Airbnb bookings now account for twenty percent of the American short-term lodging market, making the brand the second largest share of the market—behind Marriott but ahead of Hilton.[65] Airbnb has a serious discrimination problem.[66] Discrimination on Airbnb's platform is legal, despite being one of the largest providers of nightly accommodations in the country. Airbnb has taken a huge portion of the consumer lodging market out from under the protection of public accommodations laws. Airbnb and similar businesses are public accommodations that are exempt from the strictures of public accommodations laws.

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In each of these areas—surveillance, speech, discrimination—large private platforms enable conduct that our public

63. Title II of the Civil Rights Act of 1964 exempts owners renting out five rooms or fewer. 42 U.S.C. § 2000a(b)(1). The Fair Housing Act allows people who are renting out rooms in their own homes or apartments to choose who they would like to live with, though they may not advertise that they are looking for a specific race. 42 U.S.C. § 3603(b)(1). The Americans with Disabilities Act copies this exemption, noting that its provisions "shall not apply to private clubs or establishments exempted from coverage under [T]itle II of the Civil Rights Act of 1964 (42 U.S.C. 2000-a(e))." 42 U.S.C. § 12187.

64. There is an important caveat, however: advertisements and rental listings regardless of the type may *not* express a racial preference. Roommate listings do not count, however. *See* Fair Hous. Council of San Fernando Valley v. Roommate.com, 666 F.3d 1216, 1221 (9th Cir. 2012) (holding that the Fair Housing Act and its California equivalent do not apply to listings for roommates, based on statutory language and constitutional privacy concerns activated by "a roommate's unfettered access to the home").

65. Kate Gessner, *Ahead of IPO, Airbnb's Consumer Sales Surpass Most Hotel Brands*, BLOOMBERG SECOND MEASURE (Mar. 25, 2019), https://secondmeasure.com/datapoints/airbnb-sales-surpass-most-hotel-brands [https://perma.cc/9MJU-VDWP].

66. *See* discussion *supra* note 7 and accompanying text.

laws seem designed to prevent. How? The next two parts explain the platform features that allow this and the ways in which these features skate through the public/private distinctions in our law.

II. WHY OUR LAW FAILS

It is common to hear that technology platforms go unregulated because of a defect in the political process. The regulators are either too slow—they cannot keep up with the furious pace of technological innovation[67]—or they are unsophisticated and do not understand the underlying technology.[68] While there is some truth to both of these explanations, and congressional hearings are rife with examples of elected representatives ignorant of the underlying technologies they seek to regulate,[69] neither explanation is very satisfying; if they were true, we should *never* expect regulation to be up to the task of regulating novel technologies. And yet, throughout history, new technologies are routinely brought to heel. The problem is not simply the political process. The gap between the promise of our laws—especially our constitutional and civil rights laws—and what happens on private digital platforms suggests a different, deeper problem. There is simply a mismatch between the aggregation of private

67. S*ee, e.g.*, Gary Marchant, *The Growing Gap Between Emerging Technologies and the Law*, *in* THE GROWING GAP BETWEEN EMERGING TECHNOLOGIES AND LEGAL-ETHICAL OVERSIGHT: THE PACING PROBLEM 19 (Gary E. Marchant, Braden R. Allenby & Joseph R. Herkert eds., 2011); *see also* Meg Leta Jones, *Does Technology Drive Law? The Dilemma of Technological Exceptionalism in Cyberlaw*, 2018 U. ILL. J.L. TECH. & POL'Y 249, 256 (2018) ("[W]hat is sometimes called 'the pacing problem'—the tenet that law cannot keep up with technology.") (citation omitted); Rebecca Crootof & BJ Ard, *Structuring Techlaw*, 34 HARV. J.L. & TECH. 347, 359 (2021) (pushing back against "[t]he facile but persistent claim that 'law cannot keep up with new technologie[s]'") (citation omitted).

68. *See* Emily Stewart, *Lawmakers Seem Confused About What Facebook Does—And How to Fix It*, VOX (Apr. 10, 2018), https://www.vox.com/policy-and-politics/2018/4/10/17222062/mark-zuckerberg-testimony-graham-facebook-regulations [https://perma.cc/TV4V-4FV7] ("Some of the lines of questioning senators from both parties pursued demonstrated they aren't exactly the most tech-savvy bunch, aren't entirely clear on how Facebook works, or maybe have just never used the platform.").

69. *Id.*; *see also* Shannon Liao, *11 Weird and Awkward Moments from Two Days of Mark Zuckerberg's Congressional Hearing*, VERGE (Apr. 11, 2018), https://www.theverge.com/2018/4/11/17224184/facebook-mark-zuckerberg-congress-senators [https://perma.cc/4JET-V9YB] (showcasing multiple Senators' out-of-touch lines of questioning towards Facebook's CEO).

ordering on today's largest platforms and our liberal legal tradition's distinction between public and private domains.

This public/private distinction has several features, each of which makes the law poorly suited to regulating today's platforms. First, American law since the Founding Era has tended to focus on threats to individual liberty from state actions, while ignoring or explicitly exempting private actions. While the Bill of Rights is a remarkable constitutional commitment to individual liberties, it focuses almost entirely on liberties from *state* harms, and it does little to protect us from threats to our liberty from private actors.[70] Second, while we have a great edifice of statutory civil rights law that aims to promote equality and antidiscrimination in public markets, these laws have a longstanding history—especially those developed in the twentieth century—of creating carve-outs for "purely private" activities, especially what happens in one's home.[71] Third, for all the talk of *Lochner* being a part of the anti-canon, American common law is currently designed to empower—and defer to—private ordering.[72] Examples abound, from contract law's reluctance to weigh consideration to the Supreme Court's evisceration of the public

70. Frances Olsen says there are at least two major public/private distinctions in American law. Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT. 319, 320–21 (1993). The first is the distinction between state actors and private actors, and we see this in the constitutional law's focus on state action. *Id.* The second is the distinction between actions in the public market and actions taken in private, especially in the home. *Id.* My contention in this Article is that digital platforms unsettle both of these distinctions.

71. This is the second distinction Frances Olsen notes regarding the line between the public and private market. *Id.*; *cf.* Fair Hous. Council of San Fernando Valley v. Roommate.com, 666 F.3d 1216, 1221 (9th Cir. 2012) ("Government regulation of an individual's ability to pick a roommate thus intrudes into the home, which is entitled to special protection as the center of the private lives of our people.") (internal quotation marks and citation omitted).

72. *See, e.g.*, Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 244 (1998) ("Although it has never been formally overruled, it is well understood among constitutional lawyers that relying on *Lochner* would be a pointless, if not a self-destructive, endeavor."); Jack M. Balkin, "*Wrong the Day It Was Decided":* Lochner *and Constitutional Historicism*, 85 B.U. L. REV. 677, 684 (2005) ("*Lochner* became part of the anti-canon because it was a convenient symbol of the constitutional struggles over the New Deal in the 1930s [sic]."); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 417–18 (2011) (summarizing criticisms of *Lochner*, and concluding that "*Lochner* remains firmly within the anticanon").

cause of action and its embrace of private arbitration.[73] In a world where the law has insulated huge swaths of private ordering from judicial review,[74] platforms are like *Lochner* on steroids. Once we recognize these gaps in our law, it will be much easier to take steps to redress them.[75]

A. EMPHASIS ON STATE HARMS

The intellectual framers of liberal democracy—like Locke, Smith, and Kant, among others—described liberty in terms of freedom from state power.[76] Fundamental to the liberal idea of a legitimate sovereign power was the social contract between, on the one hand, private citizens, who possessed natural rights, and on the other hand, the government, which agreed not to abuse those rights.[77] So it makes sense that in the liberal tradition, the core constitutional rights focused on state threats to liberty, not private harms. As Morton Horwitz put it, "[n]atural rights theories were elaborated in the seventeenth century for the purpose of setting limits on state power."[78] This is clearly reflected in our own core constitutional rights. The First Amendment begins, "Congress shall make no law,"[79] and despite the fact that it was

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73. *See generally* RESTATEMENT (SECOND) OF CONTS. § 79 (AM. L. INST. 1981) (describing a barebones standard to weigh the adequacy of consideration); Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992) (preventing ordinary citizens from bringing action against potentially misguided agencies, without a concrete and actual or imminent harm); Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 58 (2003) (per curiam) (validating the broad reach of the Federal Arbitration Act).

74. *See, e.g.*, *Roommate.com*, 666 F.3d at 1221.

75. *See* discussion *infra* part IV.

76. Horwitz, *supra* note 6, at 1424 ("[O]ne can find the origins of the idea of a distinctively private realm in the natural-rights liberalism of Locke and his successors . . . .").

77. This is a simplification. Paul Brest describes two competing liberal theories, one Lockean and the other Hobbesian:

> From its inception, liberal theory has had two traditions, originating in the writings of Locke and Hobbes respectively. Under the Lockean or "natural rights" version, citizens retain certain inalienable rights, held in the pregovernmental state of nature, that the state may not abridge. Under the Hobbesian or "positivist" version, citizens entering into civil society relinquish all natural rights and possess only those rights granted by legislatures and other lawmaking institutions. As the writings of H.L.A. Hart, Lon Fuller, and Ronald Dworkin illustrate, both of these traditions remain vital in modern liberal theory.

Paul Brest, *State Action and Liberal Theory: A Casenote on* Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296, 1296–97 (1982).

78. Horwitz, *supra* note 6, at 1423.

79. U.S. CONST. amend. I.

little used until the beginning of the twentieth century, the last hundred years has seen the Court develop a First Amendment jurisprudence that is doctrinally limited by and conceptually centered around state action.[80] As Balkin notes, "[t]he conception of free expression—and of the dangers to free expression—that characterized much of the nineteenth and twentieth centuries concerned whether *nation-states and their political subdivisions* would censor or regulate the speech of people living within their borders."[81]

The state action doctrine, of course, is central to much of our constitutional law. In the civil rights context, the state action doctrine, "stems from the Fourteenth Amendment's phrase 'No State Shall,'" and determines whether private conduct triggers constitutional review.[82] It is, as Charles Black famously noted, "the most important problem in American law."[83] The *Civil Rights Cases*[84] first established the state action requirement, but "left its content essentially undefined."[85] During the Progressive Era around the time of the New Deal, several prominent legal realists argued that private harms were just as dangerous as—indeed were indistinguishable from—state harms.[86] Perhaps no one articulated this as clearly as Robert Hale, who argued that "the sphere of private, 'voluntary' market relations was indistinguishable from direct exercises of public power."[87] But many of the legal realists in the post-*Lochner* era recognized that "exercises of private rights should be regarded as a delegation of public authority."[88] A string of cases showed the influence of this thinking. The most well-known state action case, the one

80. Wu, *supra* note 1, at 551–52 (explaining the twentieth century Court's development of First Amendment law and noting that "the First Amendment sat dormant for much of American history").

81. Jack M. Balkin, *Free Speech is a Triangle*, 118 COLUM. L. REV. 2011, 2012 (2018) (emphasis added).

82. David J. Barron, *Privatizing the Constitution: State Action and Beyond*, *in* THE REHNQUIST LEGACY 345–46 (Craig M. Bradley ed., 2006).

83. Charles L. Black, Jr., *The Supreme Court 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 69 (1967).

84. 109 U.S. 3, 11 (1883).

85. Barron, *supra* note 82, at 348.

86. *See* FRIED, *supra* note 6, at 35 (explaining various theorists' perspectives on individualism and its interaction with governmental actions).

87. *Id.* at 36.

88. *Id.* at 19.

taught in today's constitutional law casebooks, is *Shelley v. Kraemer,* where the Court found that judicial enforcement of a private neighborhood association's racially restrictive covenant would constitute state action "in the full and complete sense of the phrase."[89] Beyond racial discrimination cases, the other well-known precedent of the time was *Marsh v. Alabama*, where the Court found that the First Amendment applied with full force to a privately owned and operated company town.[90] This decision was the basis of the Court finding, twenty years later, that the First Amendment prohibited a privately-owned shopping mall from excluding labor picketers.[91] For a period of time after the New Deal Era, it seemed possible to argue, as Charles Black did, that the state action doctrine did not place any serious barrier to constitutional scrutiny of private actions, whether private discrimination or private speech controls.[92]

That argument is impossible to make today. Today's state action doctrine—the core of the idea that the constitution protects from state harms—was radically transformed under Chief Justice Rehnquist's tenure on the Court, from something that was "surprisingly easy to satisfy" into a significant barrier to applying constitutional scrutiny to private conduct. This was among the central jurisprudential legacies of Justice Rehnquist.[93] *Moose Lodge No. 107 v. Irvis* is illustrative.[94] There, a whites-only private social club had a Pennsylvania liquor license. One of the white members brought a Black guest, who was refused service at the lodge consistent with lodge rules; he then brought an equal protection lawsuit. Justice Brennan, in the dissent found the state action easy: "Here, the state has used its great power to license the liquor traffic in a manner

89. Shelley v. Kraemer, 334 U.S. 1, 19 (1948).

90. Marsh v. Alabama, 326 U.S. 501, 509 (1946).

91. Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 325 (1968), *abrogated by* Hudgens v. NLRB, 424 U.S. 507 (1976). The *Hudgens* court held that changes in the law since *Logan Valley* made clear that union members did not have a First Amendment right to enter a shopping center to advertise a strike. *Hudgens*, 424 U.S. at 518–21. As we shall see, the *Hudgens* decision previewed a long line of Supreme Court jurisprudence that cut down the state action doctrine and made it much harder to find that private conduct violated the Constitution.

92. Barron, *supra* note 82, at 347 ("Black questioned the premise that, as a matter of precedent, any well-defined limits on state action really existed.").

93. *Id.* at 346 ("Rehnquist's state action decisions repeatedly restrict[ed] the scope of judicial enforcement authority over private actions . . . .").

94. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

which has no relation to the traffic in liquor itself, but instead permits it to be exploited in the pursuit of a discriminatory practice."[95] Justice Rehnquist, writing for the Court, disagreed. He noted that the club's private rules and ability to discriminate was hardly state action; to conclude otherwise would "utterly emasculate the distinction between private as distinguished from state conduct."[96] Over the next decade, Justice Rehnquist proceeded to remake the doctrine; by the end of his tenure on the Court, "[t]here was not a single method of finding state action that he had not addressed and limited."[97]

This means that it can be hard to find state action today even where it plainly exists. Take indirect speech restrictions. The Court has in fact struck down state efforts to control speech indirectly through a platform.[98] But there is a great deal of jawboning, speech flooding, and algorithmic tweaking that can sidestep constitutional scrutiny because it is too subtle or too secret to form the basis of a lawsuit. As Genevieve Lakier has argued, Justice Rehnquist's majority opinion in *Blum v. Yaretsky* has been interpreted in the context of jawboning to mean that "government coercion that led private actors to deprive others of constitutionally protected rights did not count as state action."[99]

A similar problem occurs in the context of criminal law because the Fourth Amendment only protects against state intrusions on privacy. It does not protect against a huge range of private conduct that results in functionally the same thing—law enforcement access to private information without a warrant. The reason is that our Fourth Amendment jurisprudence protects against state action—state searches and state seizures—not private searches or seizures, even those that lead to the same result as if the state had done the search or seizure in the first place.[100]

95. *Id.* at 189–90 (quoting the district court's reversed decision).

96. *Id.* at 173.

97. Barron, *supra* note 82, at 357.

98. *See* Reno v. ACLU, 521 U.S. 844, 874 (1997) (invalidating a federal law that required platforms to filter content deemed harmful to minors). The same can be seen in lower courts. *See, e.g.*, ACLU v. Mukasey, 534 F.3d 181, 197–98 (3d Cir. 2008) (striking down the Child Online Protection Act because it required platforms to censor content).

99. Genevieve Lakier, *Informal Government Coercion and The Problem of "Jawboning"*, LAWFARE (July 26, 2021), https://www.lawfareblog.com/informal-government-coercion-and-problem-jawboning [https://perma.cc/5E4G-H6QZ].

100. *See, e.g.*, United States v. Jacobsen, 466 U.S. 109, 115 (1984) (holding that law enforcement officials can use evidence received from private actors,

But as we have seen, privacy is compromised in other ways, either by private actors or the government through the use of private platform intermediaries. As Barry Friedman put it recently:

> [T]here has been a sea change, brought upon us by technology, a change so dramatic it has transformed policing itself. Increasingly, the information police collect is digital. Fewer search warrants, more requests for orders to harvest metadata. Purchasing large pools of private data from data brokers. Capturing location information in various ways. Tapping into a network of private security cameras. And so on. Sometimes police collect the data themselves. More often they gather it from third parties. They do so from volunteers, by purchase, and by court order.[101]

There is simply a mismatch between our core privacy law—the Fourth Amendment—and the true threat to privacy today. Nearly every corner of our constitutional law, both as it is written and as it has been interpreted by the Court, is classically liberal. It promises individual rights, but those rights are directed against the state. When private parties violate those rights, there is often no legal recourse.[102] This state-centric conception of liberty, without significant changes to the state action doctrines, will exempt huge swaths of the private digital platform from constitutional scrutiny.

B. CARVE-OUTS FOR "PURELY PRIVATE" CONDUCT

As we have seen, one of the core goals of the New Deal legal reformers was the progressive expansion of American law to cover a greater swath of private market activity. As Keith Whittington notes, "a key move of modern reform liberalism was to shift economic affairs from the private to the public sphere and thus make them more tractable to government control."[103] But as this happened, even many reformers noted that there was a distinction between "private" activity in the public market and "purely private" activity, like choosing whom to invite over for dinner in one's home.

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even if receiving that evidence via state action would violate the Fourth Amendment).

101. Friedman, *supra* note 11, at 1.

102. *See Jacobsen*, 466 U.S. at 115; Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972).

103. Keith Whittington, *Some Dilemmas in Drawing the Public/Private Distinction in New Deal Era State Constitutional Law,* 75 MD. L. REV. 383, 384–85 (2015).

This is a second kind of public/private distinction that is essential to American law. As Frances Olsen noted some time ago, the public/private distinction is at least two separate distinctions: one between state and non-state actors (described above), and another between public market activity and private family activity.[104] This reflects "developments in nineteenth-century political, social, and economic thought that posited basic dichotomies between state and society, between the market and the family, and between politics and the market."[105] These distinctions reinforced the idea of a seemingly natural "realm of non-coercive and non-political transactions free from the dangers of state interference and redistribution."[106] That private realm was—and very much still is—seen as a zone that should be insulated from law's reach. Perhaps nothing makes this so clear as the fact that our iconic civil rights laws explicitly limit their reach to private clubs and homes.[107] Even if private commercial actors could not discriminate in the marketplace—at least not places of public accommodation—private citizens could choose to do so in their private capacity. The "distinction between public and private spheres was one of the fundamental concepts of nineteenth- and early twentieth-century American law."[108]

There were, of course, reformers who warned that this distinction was untenable. Hale in particular thought that "all private action is state action for purposes of the equal protection clause," which would seem to require that all private discrimination run afoul of the Fourteenth Amendment.[109] Hale's own loophole for this was to suggest that courts decline to enforce the Fourteenth Amendment for private acts "provided that carrying out the owner's will does not involve some matter of high public importance."[110] Most reformers, even those committed to expanding state action, did not want to intrude on the private

104. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1527 (1983).

105. HORWITZ, *supra* note 6, at 11.

106. *Id.*

107. Margaret E. Koppen, *The Private Club Exemption from Civil Rights Legislation—Sanctioned Discrimination or Justified Protection of Right to Associate*, 20 PEPP. L. REV. 643, 644–55 (1993) (summarizing civil rights laws' limits in private spaces).

108. BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT 47 (1998).

109. *See* FRIED, *supra* note 6, at 209.

110. Robert L. Hale, *Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 LAWS. GUILD REV. 627, 630 (1946).

home. As Charles Black notes in his masterful account of state action, "what is feared is the intrusion of the [F]ourteenth [A]mendment into the private life——the really private life, not the 'private' life of lunch-counters, housing developments, [and] community swimming pools."[111] Black went on to suggest that these fears were unwarranted, that the "expansion of the 'state action' concept to include every form of state fostering, enforcement, and even toleration does not have to mean that the [F]ourteenth [A]mendment is to regulate the genuinely private concerns of man."[112]

This distinction is baked into the Civil Rights Act of 1964. It prohibits private actors from discriminating in Black's public-but-private realm of "lunch-counters, housing developments, [and] community swimming pools."[113] But it does not prohibit discrimination in dinner parties or private clubs, even when one rents out a bedroom or in-law unit on their property—the so-called Mrs. Murphy exception.[114] If that distinction were once tenable—even essential, many seemed to argue—it is much less tenable today.

One of the core innovative features of the platform is to transform once-private activity—like renting out one's spare bedroom, giving someone a lift, or sending a photo to a friend—into something for which there is now a national or international market. Platforms take purely private activity and turn it into private-but-public activity. And because of the law's carve-outs for private conduct, it often goes unregulated.

C. USING PHYSICAL SPACE TO SEPARATE PUBLIC AND PRIVATE

In criminal law, it is common to hear the English invocation that "a man's home is his castle."[115] This captures the idea that

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111. Black, *supra* note 83, at 100.

112. *Id.*

113. *Id.*

114. *See* James D. Walsh, Note, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605, 605 n.3 (1999) ("Republican Senator George D. Aiken of Vermont coined the term 'Mrs. Murphy' when he reportedly suggested that Congress 'integrate the Waldorf and other large hotels, but permit the 'Mrs. Murphys,' who run small rooming houses all over the country, to rent their rooms to those they choose.'").

115. Semayne's Case [1604] 77 Eng. Rep. 194, 195 (KB) ("That the house of every one is to him as his . . . castle and fortress, as well for his defence against injury and violence, as for his repose . . . ."); *see also* Jonathan L. Hafetz, *"A Man's Home Is His Castle?": Reflections on the Home, the Family, and Privacy*

the home is a private space, a refuge from the public domain. The Fourth Amendment conception of privacy captures this idea nicely. As the Court said in *Olmstead v. United States*, "[t]he well known historical purpose of the Fourth Amendment, directed against general warrants and writs of assistance, was to prevent the use of governmental force to search a man's house, his person, his papers and his effects; and to prevent their seizure against his will."[116] This particular notion of privacy, framed in terms of governmental threat to liberty, predates the Fourth Amendment and was fundamental to the Declaration of Independence.[117] Privacy has, as a constitutional matter, largely been defined in terms of physical spaces.

Something similar happens in civil rights law. "There's no place like home," the Ninth Circuit noted in its decision exempting a for-profit platform, Roommates.com, from the application of public accommodations law.[118] In that case, the Fair Housing Councils of San Fernando Valley and San Diego brought suit against Roommates.com for enabling private discrimination in the roommate market. The platform argued that it was immune from any liability because of Section 230 of the Communications Decency Act (CDA), which offers broad immunity to intermediary platforms for the illegal acts of platform users.[119] The Ninth

During the Late Nineteenth and Early Twentieth Centuries, 8 WM. & MARY J. WOMEN & L. 175, 175 (2002) ("The maxim that a 'man's house is his castle' is one of the oldest and most deeply rooted principles in Anglo-American jurisprudence.").

116. Olmstead v. United States, 277 U.S. 438, 463 (1928).

117. In 1761, a group of merchants hired James Otis, a Boston lawyer, to challenge British use of writs of assistance. His argument turned on two basic ideas. The first was the "fundamental Privilege of House," the old English idea that a man's home is his castle. Hafetz, *supra* note 115, at 183. The core of the American privacy right—which would go on to be enshrined in the Fourth Amendment—was about protecting private citizens, including businesses, from government intrusion. The second idea was that government overreach was inevitable, and indeed the greatest threat to individual liberty. *Olmstead*, 277 U.S. at 474 (Brandeis, J., dissenting). Otis lost his case, but John Adams was in the audience and described it as follows: "[T]hen and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." *Letter from John Adams to William Tudor* (Mar. 29, 1817), *in* THE WORKS OF JOHN ADAMS 248 (Little, Brown & Co. ed., 1856).

118. Fair Hous. Council of San Fernando Valley v. Roommate.com, 666 F.3d 1216, 1218 (9th Cir. 2012).

119. *Id.*

Circuit found that Roommates.com was not immunized by Section 230 of the CDA from potential civil rights claims because it asked users to state preferences about sex, sexual orientation and familial status, and then sorted users accordingly; the court found the platform's role was simply too direct and involved to warrant immunity for *user* conduct.[120] On remand, the lower court held Roommates.com had in fact violated the Fair Housing Act and the California Fair Employment and Housing Act and granted a permanent injunction as well as attorney's fees. On appeal, the Ninth Circuit reversed. The court reasoned: "Government regulation of an individual's ability to pick a roommate . . . intrudes into the home, which 'is entitled to special protection as the center of the private lives of our people.'"[121] Ironically, to support its holding allowing private discrimination in housing, the court relied on *Lawrence v. Texas*, which noted that "In our tradition, the State is not omnipresent in the home."[122]

But a bedroom—the quintessential private physical space—is now, thanks to Airbnb and other services, an asset that can be rented out on the public market. So drawing a distinction, as the civil rights laws do, between the places of public accommodation and private homes becomes much harder. Private homes are private spaces that can also be, at the owner's election, places of public accommodations. The distinction should turn on whether or not they are open to the public; not whether the space has some inherent public or private essence. In today's world—where a bedroom might be a classroom or a broadcast studio—it seems to make much less sense to allow the public/private distinction to turn on the physical nature of the space.

D. DEFERENCE TO PRIVATE ORDERING

Another reason that so much of what happens on the platform is insulated from legal scrutiny is the result of the fact that the platform is merely a site of voluntary exchange, and American law is extraordinarily deferential to private ordering.[123] This

120. Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008).

121. *Roommate.com*, 666 F.3d at 1221 (citing Minnesota v. Carter, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring)).

122. Lawrence v. Texas, 539 U.S. 558, 562 (2003).

123. For a helpful discussion of how the Supreme Court has become more deferential to private ordering in the years since *Lochner,* see G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CALIF. L. REV. 433, 438 (1993) (noting how the modern Court embraces a view that leaves "parties free to transact

is one corollary to the idea, discussed earlier, that the government represents the gravest threat to liberty.[124] Instead of merely ignoring the harms of private coercion, as so much public law does, our private law actively enables it. If anti-discrimination law has carve-outs for voluntary market transactions, enabling those transactions is the very core of contract law.

Here are just a few examples. In contract disputes, courts do not weigh the consideration that supports a contractual promise—they do not ask whether the deal is fair—they merely ask whether the deal adequately represents the two individuals' intended bargain.[125] When private parties, including huge commercial actors, impose contracts of adhesion on individual consumers that compel binding arbitration, courts enforce them.[126] In criminal cases, when the prosecutor and the defendant agree to a plea deal, even where the plea is based on a lie, courts defer to them.[127] The same is true for business deals: "As a general proposition, firms are free to choose the parties with whom they do business."[128] In American law, in many different ways, there is simply deference to—maybe even reverence for—private ordering.[129]

None of these trends invoke *Lochner* or the idea that, as the Court infamously put it, the "right to purchase or to sell labor is part of the liberty" protected by the Fourteenth Amendment's

without state interference and affirm the priority of market ordering over state regulation").

124. *See* discussion *supra* Part II.

125. *See* Batsakis v. Demotsis, 226 S.W.2d 673, 675 (Tex. Ct. App. 1949) ("Mere inadequacy of consideration will not void a contract.").

126. *See* Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 794–96 (2002) (explaining how adhesion contracts are typically enforced by courts despite discrepancies in bargaining power).

127. *See* Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855, 857 (2019) (discussing how judges allow plea bargains to charges which are completely disconnected from any factual allegations against the defendant).

128. Erik Hovenkamp, *The Antitrust Duty to Deal in the Age of Big Tech*, 131 YALE L.J. 1483, 1487 (2022) [hereinafter Hovenkamp, *Antitrust Duty*]; *see also* United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 320 (1897) (noting the owner of a firm "can sell to whom he pleases"); United States v. Colgate & Co., 250 U.S. 300, 307 (1919) ("[T]he long recognized right of [a firm] . . . to exercise his own independent discretion as to parties with whom he will deal.").

129. *See, e.g.*, Steven L. Schwarcz, *Private Ordering*, 97 NW. U. L. REV. 319, 348–49 (2002) (revering the legitimacy of private ordering when proper limits are established).

Due Process Clause.[130] Today, *Lochner* is "anti-canonical."[131] But its general embrace of private ordering, and its skepticism of government interference therein, is not so far off from the core of private law. While the constitutional basis for insisting on freedom of contract has withered, that freedom is so thoroughly woven into society that the constitutional argument hardly seems necessary. As Steven Schwarcz put it, "[p]rivate ordering has lengthy historical precedent and, in recent years, has been rapidly expanding in scope."[132]

Over twenty years ago, Julie Cohen noted that the "economic vision embodied in *Lochner* is alive and well on the digital frontier."[133] That vision includes the "sanctity of private property and freedom of contract," and the "delimited role of public policy in shaping private transactions."[134] Cohen was writing about intellectual property—particularly the turn-of-the-millennium debate about copyright and digital rights management—but her arguments have broader resonance for the entire platform economy today.

Platforms represent the technological perfection of private ordering. The thing a platform does best is solve the coordination problems that might normally make private ordering more difficult—for example, connecting someone who needs a ride with a driver who is nearby. Platforms take much of the usual friction out of private ordering. This is a good thing if you want to see lots of deals get made—as the Uniform Commercial Code does,[135] for example—but it is also a reason that we have not seen greater judicial resistance to the rise of the platform economy. Because users of platforms opt-in—because they voluntarily sign up and collectively decide to share their home, or their car, or their private data—they waive a range of legal protections that would otherwise apply.[136]

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130. Lochner v. New York, 198 U.S. 45, 53 (1905).

131. *See* Greene, *supra* note 72, at 417 (discussing critiques of *Lochner* and concluding that *Lochner* remains "firmly within the anticanon").

132. Schwarcz, *supra* note 129, at 319.

133. Julie E. Cohen, Lochner *in Cyberspace: The New Economic Orthodoxy of "Rights Management"*, 97 MICH. L. REV. 462, 464 (1998).

134. *Id.*

135. *See* CHARLES L. KNAPP, HARRY G. PRINCE & NATHAN M. CRYSTAL, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 42–46 (9th ed. 2021) (describing the Uniform Commercial Code's history and bias towards dealmaking).

136. Again, the legal realists anticipated some of these problems. Morris Cohen noted that "[t]he law of contract, then, through judges, sheriffs, or marshals puts the sovereign power of the state at the disposal of one party to be exercised

Platforms are in some ways a double inversion of public and private. They take once-private spaces and make them more public—private moments shared on Instagram, private homes shared on Airbnb, private surveillance shared on Ring. But they also take things that were once public—like the town square, the state's surveillance regime, the market for transportation and accommodations—and put them in private hands, governed by the platform's own terms of service (and various platform policies). Because so much of our law is aimed at public harms—public actors, public markets—and because it defers to private ordering, it simply seems ill-suited to regulating platform harms.

III. KEY PLATFORM FEATURES

The examples described in Part I are drawn from different industries and different legal regimes, yet they share several notable features. In each of these examples, private firms offer a platform where private parties can coordinate on a massive scale, often in ways that evade public law. What follows is an accounting of the structural features of platforms that create the mismatch between our law—especially our public laws—and platform conduct. I have sorted the features into two categories. First are the platform features that explain why the platform can navigate around our public laws—the fact that the platform is "merely" a private tool for managing widely distributed voluntary private conduct. Second are the features that invite regulatory scrutiny—the features of the platform that turn private conduct into something of public concern.

A. FEATURES THAT SHIELD LIABILITY

1. Private Actors

In each of the modern platform problems described above, private parties interact on a privately-owned platform. This fact is often key to explaining why public law does not apply. For example, the reason that Amazon can work with police departments to create a lawful national network of Ring doorbell cameras—a surveillance network the police could never build themselves—is that the network is private.[137]

over the other party. It thus grants a limited sovereignty to the former." Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 586 (1933).

137. There is some overlap here with the voluntariness of platform conduct. *See infra* Part III.A.2.

The same explanation applies to Airbnb and anti-discrimination law. The Civil Rights Act of 1964 prevents discrimination in "public accommodations."[138] The definition of public accommodations does not turn on the hotel being state-owned or operated, but rather whether the accommodation is "open to the public."[139] Indeed, the Act has a special carveout for private clubs that are not open to the public and therefore do not qualify as public accommodations.[140] Airbnb listings are, of course, very much open to the public,[141] via one of the biggest short-term accommodations companies in the world. But the majority of these listings are for individual homes and many of the listings require approval from the homeowner.

Platform speech is similar. The First Amendment does not prevent the largest threat to free speech in America because the censorship is private.[142] This marketplace of ideas is essentially in private hands, so it is largely outside the First Amendment's reach. As then-Judge Kavanaugh put it, "the real threat to free speech today comes from private entities such as Internet service providers, not from the Government."[143] And yet, the government may not "regulate the editorial decisions of Facebook and Google."[144] This makes these privately-held platforms "the central battleground over free speech in the digital era."[145]

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138. 42 U.S.C. § 2000a(a).

139. *Id*. § 2000a(e).

140. *See id.* ("The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public . . . .").

141. There is no bright line test for "open to the public," but places of commerce like restaurants and hotels are typical examples, whereas private membership clubs are not. As the Ninth Circuit noted in a civil rights lawsuit, fifteen examples of places of public accommodations are listed within the text of the law: "[I]nns, hotels, motels, restaurants, cafeterias, lunch rooms, lunch counters, soda fountains, retail establishments, gas stations, movie houses, theaters, concert halls, sports arenas and stadiums . . . . Nowhere does the statute refer to membership organizations, or otherwise indicate congressional intent to regulate anything other than public facilities." Clegg v. Cult Awareness Network, 18 F.3d 752, 755 (1994) (citing 42 U.S.C. § 2000a).

142. *See* Balkin, *supra* note 9, at 2303–06 (describing modern media companies and the free speech issues surrounding private ownership of mainstream channels of speech).

143. U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 434 (D.C. Cir. 2017) (per curiam) (Kavanaugh, J., dissenting).

144. *Id.* at 433.

145. Balkin, *supra* note 9.

2. Voluntary Participation

Another feature shared by the above examples—and a possible barrier to any proposal for regulation—is that they involve voluntary choices by private actors. Amazon does not force people to use its surveillance cameras; they voluntarily buy them and put them on their front door. Users choose to log onto Facebook and Twitter even though they know the platform censors their speech; if they dislike the censorship, there are alternative websites where they will not be censored.[146] The voluntary nature of these platforms is something the platforms themselves emphasize when they argue against any new regulations.[147] The law rightly draws a distinction between that which is forced upon people and that which they elect. People can and do voluntarily waive their constitutional rights.

Anti-discrimination law also respects individual choice. One justification for carving out private clubs and homes from places of public accommodation is the idea that individual choices are to be respected. As Justice Goldberg put it: "Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race."[148] Justice Goldberg's emphasis here is not on distinguishing private spaces from public spaces, but rather the constitutional importance—inherent in the guarantee of free association—of individual autonomy to choose how to order one's life, even in ways that are antisocial or bigoted. It turns out that this is an invented tradi-

146. The rise of "free speech" platforms like Parler and Rumble are an example of this dynamic. *See* Mike Isaac & Kellen Browning, *Fact-Checked on Facebook and Twitter, Conservatives Switch Their Apps*, N.Y. TIMES (Nov. 11, 2020), https://www.nytimes.com/2020/11/11/technology/parler-rumble-newsmax.html [https://perma.cc/AC3D-2ZHC] ("[M]illions of people . . . have migrated away from Facebook and Twitter since the election.").

147. In 2011, Eric Schmidt, then the Executive Chairman of Google, testified before the Senate Judiciary Committee in an antitrust hearing. Schmidt stated: "We do not trap our users. If you do not like the answer that Google search provides, you can switch to another engine with literally one click, and we have lots of evidence that people do this." *The Power of Google: Serving Consumers or Threatening Competition?: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the Comm. on the Judiciary U.S. S.*, 112th Cong. 6 (2011) (statement of Eric Schmidt, Executive Chairman, Google, Inc., Mountain View, California).

148. Bell v. Maryland, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring).

tion, as Joseph Singer shows—that private spaces were not traditionally exempted from public accommodations until reconstruction, when Jim Crow southerners sought refuge in legal deference to the individual's freedom to choose who to serve and when.[149] This might give us some hope for the ideas explored in Part IV that we could redefine the public/private distinctions for the platform era.

3. Distributed Networks

Another relevant feature of the technically legal platform is that the users and their actions are widely distributed across a network, rather than managed centrally in a top-down manner. This is true at a technical level because, of course, the internet is a distributed network. But this distributed nature of the platform has legal significance. It is part of what makes the platform's activities technically legal.

For example, one reason Airbnb is less likely to be found liable under civil rights law is the fact that its booking system is merely an exchange for distributed guests and hosts. If discrimination happens in Airbnb bookings, Airbnb is not held responsible because the discrimination is actually happening by far-flung individual users of Airbnb, not the platform itself. If Airbnb's website were discriminating against users on the basis of race, the firm would be in legal trouble; Airbnb cannot advertise housing that discriminates on the basis of race.[150] But the Airbnb *hosts*—the ones who actually provide guests with a room for the night—are distributed across the platform and they are free to choose their house guests. Indeed, this is what distinguishes Airbnb from Sheraton and Hilton. Unlike those large hotel chains, Airbnb's housing stock is not centrally managed, it is

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149. Joseph W. Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1351–57 (1996) [hereinafter Singer, *Exclude*] (discussing the evolution of public accommodation statutes throughout Reconstruction, culminating with Jim Crow law requiring, rather than merely allowing, the exclusion of African Americans from public accommodations).

150. While the Fair Housing Act exempts private owner-occupied dwellings from its requirements, it still makes it illegal for anyone to:

> [M]ake, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

42 U.S.C. § 3604(c).

flexible with a distributed architecture where each room is provided, not on the basis of a decision by Airbnb, but by the individual homeowner. This distributed nature of the network also makes it harder to identify the individual wrongdoers.

The same is true for Ring's surveillance network. Constitutional criminal procedure does not prohibit an individual homeowner from installing a camera on their house. It might, however, stop the police from building a nationwide surveillance network—directly or through an intermediary. But if such a network were built up and distributed across private individual homes, it becomes legal.

B. Features That Invite Liability

The previous section described shared features across the platforms that often shield them from liability. This section describes those features that nonetheless draw attention to the platforms and invite—or even demand—that they be liable for the conduct that they host.

1. Central Coordination

Despite the fact that these platforms feature distributed actors making voluntary choices, they are also highly coordinated. This is what gives them value. Airbnb is not worth much if guests cannot connect with hosts and vice versa. Facebook is not useful as a networking service if your friends are not on it; the same is true for Twitter as a speech service.

Platforms emphasize this coordination as a key feature when trying to avoid regulation. For example, Uber says that it is "merely a platform" for connecting drivers and passengers.[151] Facebook and Google say the same thing about their platforms vis-à-vis their decisions regarding content moderation, censorship, and hosting harmful or abusive content.[152] Airbnb says something similar about its platform.[153]

151. As a lawyer for Uber told a judge in New York, "we are the marketplace," emphasizing that the firm was a platform for riders and drivers to meet, in contrast with a taxi company that employs drivers. Noam Cohen, *How Tech Firms Like Uber Hide Behind the "Platform Defense"*, WIRED (Sept. 13, 2019), https://www.wired.com/story/how-tech-firms-like-uber-hide-behind-the-platform-defense [https://perma.cc/3893-BAFK].

152. *See id.* ("A publisher might care about spreading [abusive] material, but they aren't [publishers]. They're platforms . . . .").

153. *See id.* ("A hotel might be required to have zero tolerance about . . . abuses. A platform can shrug its shoulders.").

Yet this "mere coordination" story belies the fact that the platform itself has enormous power. Uber goes to great lengths to get drivers to use the service, to behave a certain way, to drive a certain way, and to drive at certain times. The coordination is not organic; it is centrally managed and manipulated.

This is precisely what makes them seem to be in compliance with the law while also skirting it. Airbnb, Uber, and Facebook have enormous influence over the conduct of users on the platform, but they can stop short of legal responsibility for the actions of their users, who are, after all, distributed private parties engaged in voluntary conduct.

For example, Airbnb says it lets hosts set their own price, but the platform uses machine learning algorithms trained on its huge dataset of over five billion market prices to nudge hosts towards a specific price.[154] This nudging helps hosts and therefore Airbnb maximize bookings, but it also "blur[s] the line between Airbnb as a marketplace and as a more controlling actor."[155]

In the case of Ring, the central-coordination is what makes the service so valuable to law enforcement—there is a single point of contact for law enforcement nationwide, despite the distributed nature of the tens of millions of cameras in the surveillance network. In earlier eras, law enforcement would need to approach homes one-by-one to ask if anyone saw or heard something. Today, the police can simply compel the surveillance data from Ring's law enforcement team.

2. Massive Scale

These are not small platforms; they are massive. The scale is part of the very logic of the platform—what makes them desirable for users and profitable for the firm. Airbnb is a useful tool for connecting hosts with guests because it has so many listings and so many guests looking for a place to stay. Uber is a useful tool for catching a ride because it has so many drivers us-

154. *See* Ellen Huet, *How Airbnb Uses Big Data and Machine Learning to Guide Hosts to the Perfect Price*, FORBES (June 5, 2015), https://www.forbes.com/sites/ellenhuet/2015/06/05/how-airbnb-uses-big-data-and-machine-learning-to-guide-hosts-to-the-perfect-price/?sh=688b6e7e6d49 [https://perma.cc/W46G-VM57] (explaining Airbnb's "price tip" program, wherein Airbnb nudges hosts to set costs within five percent of a suggested price, which the platform advertises makes a host "nearly four times as likely" to get a booking).

155. *Id.*

ing the platform willing to offer a ride. Facebook wants to connect the world, and one of the key attributes of the network is that everyone can be reached on it. As Mark Zuckerberg put it: "there's nothing magical about the number [one] billion. If your mission is to connect the world, then a billion might just be bigger than any other service that had been built. But that doesn't mean that you're anywhere near fulfilling the actual mission."[156]

This enormous scale is also what makes them so notable as largely unregulated entities. If one person has a camera in their backyard, or one small forum administrator censors content on their private page, no one might notice or care. But at the scale of these platforms—Facebook has nearly three billion monthly active users, more than a third of the world's population—it is hard not to notice or care. The scale is what makes it hard to accept the line that these are merely private platforms for private conduct. Their scale makes these platforms a matter of public concern. As one interdisciplinary panel of experts reviewing platform power put it recently: "scale matters acutely. We expect democratic debate and politics to be pluralistic and to protect freedom of speech. But the scale of today's platforms gives them extraordinary power . . . [to] shape both beliefs and behavior."[157]

The massive scale of these platforms also explains why the stakes of their nonregulation are so high.[158] Discrimination on Airbnb—and the platform's exemption from aspects of anti-discrimination law—is notable precisely because the platform has become the largest hospitality brand in the world. The fact that

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156. Lev Grossman, *Inside Facebook's Plan to Wire the World*, TIME (Dec. 15, 2014), https://time.com/facebook-world-plan [https://perma.cc/HMZ3-G457].

157. Francis Fukuyama, Barak Richman, Ashish Goel, Roberta R. Katz, A. Douglas Melamed & Marietje Schaake, *Report of the Working Group on Platform Scale*, STAN. UNIV. 3 (2020), https://fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/platform_scale_whitepaper_-cpc-pacs.pdf [https://perma.cc/8REW-NZZ4].

158. As Twitter's Vice President for Trust and Safety said in 2014:

> [G]iven the scale that Twitter is at, a one-in-a-million chance happens 500 times a day. It's the same for other companies dealing at this sort of scale. For us, edge cases, those rare situations that are unlikely to occur, are more like norms. Say 99.999 percent of tweets pose no risk to anyone. There's no threat involved. . . . After you take out that 99.999 percent, that tiny percentage of tweets remaining works out to roughly 150,000 per month. **The sheer scale of what we're dealing with makes for a challenge.**

Tarleton Gillespie, *"The Scale Is Just Unfathomable"*, LOGIC (Apr. 1, 2018) (emphasis in original), https://logicmag.io/scale/the-scale-is-just-unfathomable [https://perma.cc/WJD9-RND9].

free speech laws do not cover Facebook's content moderation is notable precisely because Facebook controls the largest speech medium in the world. The fact that our due process laws do not apply with the same rigor when police engage in indirect surveillance via a private platform like Ring rather than direct surveillance is notable because it has become such a widespread practice.

It is worth noting that this is not entirely new. James Boyle, writing two decades ago, noted that the "the state can use private surrogates to achieve its goals."[159] For example, many of the earliest plans for protecting intellectual property online delegated enforcement powers to the internet service providers; indeed, today much of the work of monitoring and enforcing intellectual property laws happens in the private databases of the largest technology firms who privately scan the material they house for intellectual property infringement, among other things.[160] But the scale is new. Twenty years ago, a private firm conducting a private search could be dismissed as a small piece of the overall market. Today, eighty-nine percent of adults in the United States use YouTube, and sixty-nine percent use Facebook; if either platform conducts a private search, it will affect a significant slice of the population.[161]

3. Public Markets

One of the most innovative features of the platform economy is the way that it pulls things that were once exclusively private—a spare bedroom, an idle car—and puts them onto a market. This is sometimes referred to as the "sharing economy," where private individuals sell or rent out their under-utilized

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159. James Boyle, *A Nondelegation Doctrine for the Digital Age?*, 50 DUKE L.J. 5, 10 (2000).

160. Most recently, Apple announced—and then delayed in the face of an uproar—plans to scan all users' photos for child sexual abuse material. Jay Peters, *Apple Delays Controversial Child Protection Features After Privacy Outcry*, VERGE (Sept. 3, 2021), https://www.theverge.com/2021/9/3/22655644/apple-delays-controversial-child-protection-features-csam-privacy [https://perma.cc/HD7Y-3ZJH].

161. Brooke Auxier & Monica Anderson, *Social Media Use in 2021*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021 [https://perma.cc/FE9C-7TT3] (reporting the results of a survey of U.S. adults who say they use various online platforms).

stuff on a private exchange.[162] Speech platforms also bring once-private conduct into a public market. Before Instagram and TikTok, it was considerably more difficult for someone to broadcast the intimate details of their lives from their living room. Instagram takes private spaces, like the home, and makes it possible for them to be broadcast to billions of viewers. This is a market, of course, with so-called influencers making a full-time living from the public sharing of their private lives.[163]

This matters for evading regulation because, unsurprisingly, there are often very different rules for private, noncommercial conduct and big business. Because technology allows for such massive and seamless coordination, it turns individual private activity into something larger. Suppose the law applies to whales (e.g., Hilton Hotels, the New York Times) but not little fish (e.g., an individual host, an individual blogger). Then along comes a technology that allows little fish to swim together so tightly that they look and behave much like a whale. Now, the law that carves out space for individual fish loses its intended effect.

4. Tendency Towards Monopoly

One common refrain in response to concerns raised about private platform conduct is that if people do not like Facebook, they do not need to use it. This makes sense, but only insofar as there is an alternative on the market. The more control a platform has over a given market, the less deferential we should be to private platform choices. In other words, enormous market power gives a firm greater responsibility to the wider public and might even make the firm quasi-public.

Consider how this applies in the surveillance debate. The third party doctrine—whereby an individual loses their privacy expectation if they volunteer that information to a third party[164]—makes sense as long as they are truly volunteering the information. But with many basic services, like banking and communications, it is increasingly untenable to argue that one

162. *See, e.g.*, ARUN SUNDARARAJAN, THE SHARING ECONOMY (2016) (describing the market changes that result from the rise of businesses like Airbnb and Uber).

163. Alexandra J. Roberts, *False Influencing*, 109 GEO. L.J. 81, 90–93 (2020) (describing "influencer marketing").

164. *See* Carpenter v. United States, 138 S. Ct. 2206, 2263 (2018) (Gorsuch, J., dissenting).

has "chosen" to give up their privacy interests.[165] In *Riley,* the Court acknowledged as much.[166] Chief Justice Roberts noted that cell phones are "now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."[167] The parties did not have an alternative—to use a cellphone is to give up your location; it is not a conscious "choice" in any meaningful sense. He made a similar point in *Carpenter* as a justification for narrowing the third party doctrine—albeit in one small way and only with regard to cell-site location information: "in no meaningful sense does the user voluntarily 'assume[] the risk' of turning over a comprehensive dossier of his physical movements."[168]

Something similar happens in the speech debate. If a web forum moderator makes choices that do not please me, I can choose to use any number of other services. But if Facebook censors me, where do I turn? For many people, the platform is among the only means with which to reach their friends, family, and customers. Our deference to Facebook's private choices to moderate content makes sense when there is an alternative; that deference is much less warranted when there is no meaningful alternative.

Anti-discrimination law is not too different. How we feel about Airbnb host discrimination depends on whether there is a suitable alternative in the market. One of the principles behind creating a category of services that were called "public accommodations" in the first instance was the idea that we ought to be especially worried about discrimination in essential services where someone might not have access to a reasonable alternative, like with food and shelter.[169]

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165. Justice Gorsuch made a similar argument in his dissent in *Carpenter*:

> Some have suggested the third party doctrine is better understood to rest on consent than assumption of risk. "So long as a person knows that they are disclosing information to a third party," the argument goes, "their choice to do so is voluntary and the consent valid." I confess I still don't see it. Consenting to give a third-party access to private papers that remain my property is not the same thing as consenting to a *search of those papers by the government*.

Id. at 2263 (Gorsuch, J., dissenting) (emphasis in original) (citation omitted).

166. Riley v. California, 573 U.S. 373, 393–94 (2014).

167. *Id.* at 385.

168. *Carpenter*, 138 S. Ct. at 2220 (citing Smith v. Maryland, 442 U.S. 735, 745 (1979)).

169. Singer, *Exclude*, *supra* note 149, at 1436–37.

Finally, many digital platforms seek to control their entire market.[170] It is not just that they seek economies of scale and therefore large market shares; rather, the very logic of some platform economies is monopolistic. Some argue these are natural monopolies, while others disagree.[171] To some, it depends whether the platform operates a two-sided market.[172] Some argue that these firms are monopolistic but not winner-take-all.[173] Without weighing in on any of those debates, it is notable that there is consensus that digital platforms like Facebook do not just seek to maximize profit; they seek to occupy as much of the market as they can. Facebook simply has more value if it has *everyone* on the service. This naturally raises concerns about whether the platform has become an "essential" service," should have a "duty to deal,"[174] or whether the platform "must carry" some kinds of speech.[175]

Taken as a whole, modern platforms illustrate the fragility and contingency of our legal order—unregulated private ordering, a blind eye towards collective harms, and thin conceptions of individual rights as claims from state interference, nothing more; in these ways, platforms expose the limits of our public law to actually secure the common good. Of course, large private power has been a challenge for American law going back to the beginning. The concerns raised by modern platforms would have been recognizable to the legal realists and progressive reformers at the turn of the twentieth century. As Barbara Fried wrote, one of Robert Hale's core contributions to the reform era was to show that "the current de facto arrangement, in which the state by and large declined to intervene in the coercive effects of private bargaining power that itself derived from public authority, was hard to square with any coherent theory of liberty."[176]

Today, that is true to an extreme degree. Again, part of the explanation is that the Internet really is causing new kinds of

170. TIM WU, THE MASTER SWITCH 280–90 (2010) (describing the rise of information monopolies on the Internet).

171. *See* Hovenkamp, *Antitrust*, *supra* note 17, at 1970–71.

172. *See id.*

173. *Id.*

174. *See* Hovenkamp, *Antitrust Duty*, *supra* note 128, at 1487.

175. *See* Daphne Keller, *Why D.C. Pundits' Must-Carry Claims Are Relevant to Global Censorship*, THE CTR. FOR INTERNET & SOC'Y AT STAN. L. SCH.: BLOG (Sept. 13, 2018), http://cyberlaw.stanford.edu/blog/2018/09/why-dc-pundits-must-carry-claims-are-relevant-global-censorship [https://perma.cc/3DAL-FJ6J].

176. FRIED, *supra* note 6, at 18.

problems. For example, while people have had, for some time now, a way of spying on their neighbors, they did not have a way of connecting their home surveillance equipment to all of the other home surveillance equipment in the country, creating a national database of home security cameras. Before, the police might have been able to use a warrant to access a homeowner's own cameras, but there was no third party involved who coordinated all of the homeowners' videos (and the third party doctrine was not nearly as consequential). Today, the police simply have access to something that did not exist before. So part of the explanation is that this is new.

Also, this new fact pattern squares with old doctrine in new and unfortunate ways. Large, private firms have long had considerable power, but the law recognized that power and regulated them accordingly. Big markets today are much more heavily regulated than private arrangements—individual choices, the home life.[177] But this home life is now where so many of us access the wider world and the market. One might respond that the power of Facebook or Ring is no different from the power of a big oil company or a big bank. In many situations, I think that is right.[178] But the platform economy adds a wrinkle. It is not that the platforms themselves are large commercial players; it is that they can hide behind their users for the reasons outlined above—the decentralized, private, voluntary nature of platform use.

In some sense, these are not new problems; platforms merely expose problems that were there all along but simply harder to see. For example, private homeowners have long discriminated in renting out individual rooms, but perhaps the scale of the problem was not known until the problem became visible thanks to Airbnb's enormous reach. This is likely a part of the story, but only a small part. Private discrimination has always been a problem and it always will be. But the size of the market for private home stays was tiny compared to the size of the market today. Police could access home surveillance cameras

177. See Olsen, *supra* notes 70–71, for a discussion of the major public/private distinctions in American law.

178. Andrew K. Woods, *Against Data Exceptionalism*, 68 STAN. L. REV. 729, 756 (2016) ("Many of the features that are cited as evidence of data's unique properties are in fact neither novel nor unique to data. Indeed, for as long as global trade has existed, people have been commingling and moving their assets in and out of different jurisdictions and courts have managed to adapt their old, territorial rules to assets that cross territories.").

before, but they were relatively rare; today they are commonplace.[179]

This explains, in part, the regulatory lament felt in Washington, D.C. The general consensus across political parties is that everything is not fine. On the right, there is a libertarian concern about the power of private platforms to regulate speech, to invade user privacy, and a general worry about viewpoint discrimination.[180] On the left, there is worry about similar issues—speech and surveillance—as well as worry about the economic power of the largest technology platforms.[181] Even Mark Zuckerberg has pleaded with Congress to regulate Facebook.[182] The status quo seems untenable. What to do?

IV. LOOKING AHEAD

If the public/private distinction is in fact the core of the speech, privacy, and discrimination problems on major platforms, what can be done? The promise of understanding the mismatch between our law and private platforms is that it would give us tools to address the problem. I am not certain that it does. But at least it suggests a better place to look for solutions. The two dominant approaches to regulating powerful private platforms are: (1) turning to antitrust law to break up the firms;[183] and (2) treating platforms like public utilities.[184] Neither approach is satisfying because neither one solves the problem of

179. Paul Sullivan, *Weighing the Value of a Home Security System*, N.Y. TIMES (May 1, 2010), https://www.nytimes.com/2010/05/01/your-money/household-budgeting/01wealth.html [https://perma.cc/3RW6-VBL7].

180. *See* Genevieve Lakier, *The Great Free-Speech Reversal*, ATLANTIC (Jan. 27, 2021), https://www.theatlantic.com/ideas/archive/2021/01/first-amendment-regulation/617827 [https://perma.cc/P8XN-UNRL].

181. *See* Cecilia Kang, *Democratic Congress Prepares to Take on Big Tech*, N.Y. TIMES (Jan. 26, 2021), https://www.nytimes.com/2021/01/26/technology/congress-antitrust-tech.html [https://perma.cc/7X9C-XW63] ("'We have a major monopoly and competition problem,' [Senator Amy] Klobuchar said.").

182. Mark Zuckerberg, *Mark Zuckerberg: The Internet Needs New Rules, Let's Start in These Four Areas*, WASH. POST (Mar. 30, 2019), https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/9e6f0504-521a-11e9-a3f7-78b7525a8d5f_story.html [https://perma.cc/5FN8-T93Q].

183. *See* discussion *supra* note 17 and accompanying text.

184. *See, e.g.*, K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1668–80 (2018) (considering whether Google, Facebook, Amazon, Uber, and Airbnb have become so core to Internet and urban infrastructure as to warrant public utility-style regulation).

platforms having huge public impact but remaining private enough to avoid public regulation.

Start with the antitrust approach to platforms. It assumes that the problem with private platforms is their "bigness," to use Brandeis's word.[185] While size and market power are potential problems, they are not the distinguishing feature of the platform economy. Small firms can create platforms that evade public law for all of the reasons described here. Using antitrust rules to break the big platforms apart will not solve the private-but-public platform problem and in some cases will make them worse.

For example, the problem of discrimination by Airbnb hosts is simply not a result of the platform's size. Breaking the firm into nine smaller room-sharing services would have no discernable effect on discrimination and might make it harder to identify and regulate because the discrimination would be distributed across different firms with different norms and practices. Similarly, the problem of law enforcement buying private data on the market will not be solved by turning large firms into small firms. The police buy data from large and small firms alike; if anything, the larger firms are more transparent and are more heavily scrutinized than smaller firms that are more likely to fly under the radar.

Calling the private platforms "public" actors or utilities is also a poor fit.[186] Most digital platforms are not essential facilities or core infrastructure in the same way that electrical or cable utilities are. You have much more choice about whether to use Facebook than you have about whether to pay your electric bill. Airbnb is convenient and fun, but one is hardly forced to stay in a beachside bungalow; there are other options. This is not to say that there are not some ways in which large digital businesses might be held to some of the restrictions of public utilities—like common carriage requirements[187]—but the analogy mostly fails to address the core concerns raised by digital platforms. As Balkin notes, the reason to call a private firm a utility is to "to control price, to secure universal access, and to assure the quality of continuous service," but social media is already

185. LOUIS D. BRANDEIS, THE CURSE OF BIGNESS 100 (Osmond K. Fraenkel ed., 1934) (coining the term "bigness").

186. *But see* Rahman, *supra* note 184, at 1621–22.

187. Norfolk S. Ry. v. James N. Kirby, Proprietary Ltd., 543 U.S. 14, 33 (2004).

mostly free, access is nearly universal, and the businesses very much want to provide continuous service.[188]

If the platforms exploit the distinction between public and private in American law, the most fitting path forward—reviving the call of the legal realist reformers almost a century ago—is to mitigate the distinction. This Part looks first to the public law carve-outs for a way forward and then turns to the overlooked, but just as important, public limits to private law.

A. PUBLIC LAW

1. Broaden State Action

If one of the primary reasons that our constitutional law fails to grapple with private platforms is its focus on state action, then courts should broaden the current conception of state action to accommodate much more private conduct. The simplest and best way to do this would be to adopt the expansive view of state action that the Court embraced in the early Fourteenth Amendment cases and apply it to the First and Fourth Amendment contexts. To explain this, a bit of history into the Fourteenth Amendment state action doctrine is required.

While the *Civil Rights Cases* created the Fourteenth Amendment's requirement of state action, the doctrine was undeveloped until the early twentieth century.[189] When the Court eventually set out to define the requirement, it was broadminded about the relationship between public and private power.[190] This reflected the legal realist notion that "[p]ublic law constructed the 'private' domain by creating common-law rights too often assumed to be always already there."[191] Recognizing that private conduct is only possible because of the state, the Court "made the requirement surprisingly easy to satisfy," finding in almost every case that private conduct could trigger constitutional scrutiny.[192] As Charles Black pointed out in 1967, "astoundingly few Supreme Court holdings have been based, affirmatively, on the state action doctrine, and fewer have escaped explicit or clearly implied overruling."[193] In a string of cases, the Court found state

188. Jack M. Balkin, *How to Regulate (and Not Regulate) Social Media*, 1 J. FREE SPEECH L. 71, 87 (2021) [hereinafter Balkin, *Regulate*].

189. Barron, *supra* note 82, at 347–49.

190. *Id.*

191. *Id.* at 350.

192. *Id.* at 349.

193. Black, Jr., *supra* note 83, at 85.

action satisfied when applied to: private political parties;[194] a company-owned town;[195] a neighborhood association;[196] and a private park.[197] By the end of the New Deal, the idea of "a private domain sealed off from public influence no longer attracted a majority of the Court."[198] As we have already seen, the Rehnquist Court changed all of that, radically reshaping the scope of the state action doctrine to require in most instances direct government action, rather than government inaction, collusion, or collaboration with private actors. But perhaps it is time for the Court to revisit the doctrine.

Today, the existence of civil rights legislation often obviates the need for recourse to the Fourteenth Amendment, allowing litigants to sidestep the state action problem in that context. But where civil rights legislation falls short, as it often does, one possibility would be for the Court to reverse much of Rehnquist's state action jurisprudence and apply the Fourteenth Amendment directly to private platforms. Because the majority of the early twentieth century cases involved racial discrimination,[199] the Court might be especially well-grounded to expand the state action doctrine in the context of racial discrimination on private digital platforms. However, this seems not only ambitious, but also perhaps a bit unrealistic. Much more imaginable is the Court turning to the kind of broadminded about state action in the context of the Fourth Amendment.

The Court could easily and sensibly expand the kinds of private conduct that warrant constitutional scrutiny. For example, under the private search doctrine, "once a private party has conducted an initial search independent of the government, the government may repeat that search, even if doing so would otherwise violate the Fourth Amendment."[200] This meant that in *United States v. Jacobsen*, when FedEx searched packages moving through its warehouse and handed the material over to the police, the government was able to search and seize the material

194. Smith v. Allwright, 321 U.S. 649, 661 (1944); *see also* Terry v. Adams, 345 U.S. 461 (1953) (holding that a state permitting an organization's election processes constituted state action).

195. Marsh v. Alabama, 326 U.S. 501, 504–05 (1946).

196. Shelley v. Kraemer, 334 U.S. 1, 10–11 (1948).

197. Evans v. Newton, 382 U.S. 296, 303–04 (1966).

198. Barron, *supra* note 82, at 351.

199. *See, e.g.*, *Shelley*, 334 U.S. at 1.

200. Andrew MacKie-Mason, *The Private Search Doctrine After* Jones, 126 YALE L.J.F. 326, 326 (2017).

without a warrant.[201] The private search doctrine is distinct from the third party doctrine, but it has a similar logic—the government is not, in fact, invading anyone's privacy by searching material that was shared with another private party: "It is well settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information."[202]

In the context of computer searches, the lower courts have bent over backwards to find that there was no state action when the government was merely relying on information produced by a private party, even where the government clearly worked in tandem with a private party and even where the private party's conduct was required by a federal statute. In *United States v. Jarrett*, "the Government used information provided by an anonymous computer hacker to initiate a search," which was found not to violate the Fourth Amendment.[203] The foreign-based hacker emailed back and forth with an FBI agent for several months, and proceeded to break into a suspect's computer based on what the court characterized as a "wink and a nod" from the FBI.[204] The lower court found that the FBI's encouragement of the hacker was enough to turn the private search into a government search.[205] But on appeal, the Fourth Circuit concluded that "[a]lthough the Government's behavior in this case is discomforting, the Government was under no special obligation to affirmatively discourage [the hacker] from hacking."[206] The court emphasized that "simple acquiescence by the Government does not suffice to transform a private search into a Government search."[207]

In *United States v. Richardson*, the Internet service provider AOL conducted a search of user accounts and found child pornography on Richardson's account, which it promptly handed over to the governmental agency known as the National Center for Missing and Exploited Children (NCMEC), as it was required

201. United States v. Jacobsen, 466 U.S. 109, 118–20 (1984).
202. *Id.* at 117.
203. United States v. Jarrett, 338 F.3d 339, 340 (4th Cir. 2003).
204. *Id.* at 343 (quotations omitted).
205. United States v. Jarrett, 229 F. Supp. 2d 503, 515 (E.D. Va. 2002).
206. *Jarrett*, 338 F.3d at 347 (footnote omitted).
207. *Id.* at 345–46.

to do under federal law.[208] Richardson challenged the constitutionality of the search, alleging that AOL was acting as an agent of the government.[209] But the court rejected the argument, noting that although AOL was required to hand over any evidence of child sexual exploitation, it was not required to conduct the search in the first place, so despite the extraordinarily close relationship between the government and the private actor searching on the government's behalf, the search was fundamentally a "private search."[210]

If there is a place where criminal law could change to be more accommodating of the platform problem, the private search doctrine is a good start. Current doctrine asks whether the government "knew of and acquiesced" to the private search and whether the private individual "intended to assist law enforcement."[211] This test could easily accommodate a much broader range of private action than it currently does. Without even modifying the doctrinal test, courts could grant constitutional protection to a huge amount of privately held digital data. The cases so far have emphasized agency principles and a fact-intensive inquiry to determine the extent of the private searcher's relationship with the government.[212] But agency rules are capacious and could accommodate a finding that, for example, a technology firm like Ring that coordinates its marketing materials with law enforcement agencies around the country is in fact an agent of the government.

In short, the Constitution focuses on state actors. But there are many cases where state action is actually a combination of private-and-public actors. Over the last fifty years, the Court has artificially constricted the set of private actions that warrant constitutional scrutiny. But it need not do so; it could return to the early twentieth century understanding that state action is implicit in so much private market conduct and thereby grant constitutional protections to the users, all of us, on private platforms.[213]

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208. United States v. Richardson, 607 F.3d 357, 366–67 (4th Cir. 2010) (describing the requirements of 42 U.S.C. § 13032).

209. *Id.* at 362.

210. *Id.* at 364–67 ("We conclude that the statutory provision pursuant to which AOL reported Richardson's activities did not effectively convert AOL into an agent of the Government for Fourth Amendment purposes.").

211. *Jarrett*, 338 F.3d at 344.

212. *See id.*; *Richardson*, 607 F.3d at 364.

213. *See* discussion *supra* note 6 and accompanying text.

2. Expand Mosaic Theory

The pattern described in this article—platforms aggregating exceptions to rules—has a constitutional corollary in the mosaic theory. Under that theory, most recently illustrated in *Carpenter*, courts acknowledge that something that is not constitutionally suspect in a single instance can in the aggregate create a larger problem that is constitutionally suspect.[214] In *Carpenter*, that meant that while sharing any single piece of information with a private firm would normally extinguish one's reasonable expectation of privacy with that information, a bundle of location data cobbled together constituted a constitutionally protected mosaic.[215]

This idea has largely been limited to the Fourth Amendment context, where it has its defenders and its critics.[216] But the idea has merit beyond the Fourth Amendment. For example, in the discrimination context, a mosaic theory of harm might suggest that while any single private individual discriminating against another in their private capacity is not suspect, when aggregated across a platform, there is a mosaic of harms that rises to the level of something that merits judicial review. If platforms are fundamentally tools for scaling and aggregating, then we need a theory of harm that accommodates this new dynamic; the mosaic theory is a good candidate.

In speech, for example, we might say that a single instance of someone giving another the ability to express their views is not a problem; to the contrary, it is to be celebrated. But when a central coordinating body gives everyone the ability to speak, and carefully manages who sees what information, that speech-enhancing tools starts to look like something that is actually speech-degrading; a single instance of harm, aggregated together in mosaic, is transformed into something else entirely. Note that the problem is not just size; it is not "small harms are

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214. Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 313 (2012) ("Under the mosaic theory, searches can be analyzed as a collective sequence of steps rather than as individual steps. Identifying Fourth Amendment searches requires analyzing police actions over time as a collective 'mosaic' of surveillance; the mosaic can count as a collective Fourth Amendment search even though the individual steps taken in isolation do not.").

215. Carpenter v. United States, 138 S. Ct. 2206, 2220 (2018).

216. For support of the new approach, see Matthew Tokson, *The* Carpenter *Test as a Transformation of Fourth Amendment Law*, U. ILL. L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4094166 [https://perma.cc/5YQF-XPWW]. For a critique, see Kerr, *supra* note 214.

fine but big harms are suspect." Rather, the mosaic theory suggests that we can draw a line between a single instance of something, however problematic, and a broader pattern of harms.

3. Update the Civil Rights Laws

The Fair Housing Act and the Civil Rights Act of 1964 should be rewritten to address discrimination on modern platforms. Most notably, the carve-outs that allow individual renters to discriminate when renting out their own house should be amended to disallow discrimination on the basis of race or sex.[217] One common reaction to this idea is to defend the individual's right to choose their housemates—for example, if a woman wanted only to have female roommates.[218] One possible solution would be to simply take this head on and prohibit discrimination in roommate selection, unless a safety or religious exception applies. Huge numbers of people safely live together in diverse and mixed home communities; the statute could make this the default option, and require extra justification for anyone seeking an exception to the rule. Under such a new law, a case like *Roommates.com* might come out differently.[219]

Another strategy would be to draft the statute such that roommate discrimination is prohibited only on for-profit housing platforms. This would cover Airbnb and similar services that have established a public market, but would still allow an individual renter to use informal and not-for-profit means to find roommates that suit their individual preferences. The logic of this approach is straightforward. You can have a preference for one kind of roommate or another, even a discriminatory preference; but if you want to turn a room into a liquid asset and access the national market of buyers—if you hold yourself out to the market, in the language of public accommodations—you should not be able to discriminate on the basis of any of the protected

217. *See* Jamila Jefferson-Jones, *Shut Out of Airbnb: A Proposal for Remedying Housing Discrimination in the Modern Sharing Economy*, FORDHAM URB. L.J. (May 26, 2016), https://news.law.fordham.edu/fulj/2016/05/26/shut-out-of-airbnb-a-proposal-for-remedying-housing-discrimination-in-the-modern-sharing-economy [https://perma.cc/7FRM-3N4V].

218. Fair Hous. Council v. Roommate.com, LLC, 666 F.3d 1220, 1220 (9th Cir. 2012) ("Could Congress, in the 1960s, really have meant that women must accept men as roommates? Telling women they may not lawfully exclude men from the list of acceptable roommates would be controversial today; it would have been scandalous in the 1960s.").

219. *Id.*

characteristics. This is more or less the reasoning of one Wisconsin court, which found that two roommates had violated the city of Madison's equal opportunity ordinances by refusing to rent one of the rooms in their home to someone because they "were not comfortable living with a person of her sexual orientation."[220] The court acknowledged that privacy protections within the home are essential, but that renters seeking roommates on the open market "g[i]ve up their unqualified right to such constitutional protection when they rent[] housing for profit."[221]

Finally, and perhaps least controversially, the statute could be re-written to prohibit discrimination of any wholly contained housing units, one where no roommates are currently living, even if the unit is owned by an individual homeowner. This would address a large portion of discrimination on Airbnb that is currently allowed under the FHA, while still allowing people to choose their roommates on an individual basis.

B. Public Limits to Private Law

American common law, including the core domains that enable private ordering essential for the platform economy—contract law and property law—has long recognized public limits to private ordering. As the Supreme Court noted in 1935, in a decision holding that New York state could regulate the price of milk:

> Under our form of government, the use of property and the making of contracts are normally matters of private, and not of public, concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute, for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest.[222]

This, of course, was *Nebbia v. New York*, a turning point in the post-*Lochner* New Deal legal order. But although it represented a turning point for the laissez-faire Court, it was hardly a radical idea. As Barbara Fried notes, a similar concept is found even in the conservative majority in *Adair*—a 1908 case striking down a statute that prohibited "yellow dog" contracts, whereby employers would fire employees for joining a union.[223] Even the

220. State *ex rel.* Sprague v. City of Madison, 205 Wis.2d 110 (1996) (unpublished decision).

221. *Id.*

222. Nebbia v. New York, 291 U.S. 502, 523 (1934).

223. Adair v. United States, 208 U.S. 161 (1908).

"freedom of contract" maximalists on the *Adair* Court, "conceded that individuals' constitutional right to 'negative liberty' from governmental control had to cede to the greater right of the government to control private actions for the public good under its implied police powers."[224]

This idea manifests itself in a range of scenarios in both contract and property law where courts limit the public impact of private ordering. As Hoffman and Hwang put it recently, "Contracts begin with private deals, but are bounded by public interests."[225] And while American property law is deeply committed to the idea of a right to exclude—Justice Brandeis called it "[a]n essential element of individual property"[226]—the law also places many limits on an owner's ability to exclude. As one popular Property casebook put it, "In a variety of circumstances, legal rules limit the possessor's right to exclude non-owners from the property."[227] Indeed, there is a deep tension in the common law between "individual versus shared ownership."[228] Examples of these public limits on private rights include: public accommodations, common carriers, public policy limits to contract, public policy limits on trespass, and speech access cases. This long list is merely illustrative, not comprehensive; the point is that to the extent that private platforms create public harms, as I have illustrated here, there are doctrines that limit private ordering in the public interest.

These doctrines are especially important because so many of them are about ensuring public speech rights despite competing private property or contract interests. To the extent that the First Amendment looks like an impediment to reforming platforms, these doctrines offer one way out.

1. Public Accommodations and Discrimination

The basic idea of public accommodations law is to modify the standard property law "right to exclude"—one of the core property law rights—in order to ensure equal and broad public access to businesses that hold themselves out.[229] Both statutes and

224. FRIED, *supra* note 6, at 44.

225. David Hoffman & Cathy Hwang, *The Social Cost of Contract*, 121 COLUM. L. REV. 979, 986 (2021).

226. Int'l News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

227. SINGER, *supra* note 62, at 4.

228. *Id.* at xxxix.

229. Singer, *Exclude*, *supra* note 149, at 1390.

common law recognize the idea of public accommodations. As Joseph Singer shows, this idea was grounded in very old common law concepts. Indeed, before the Civil War, the public accommodations doctrine was broadly applicable to anyone who "held out" a business to the world.[230] Only after the Civil War, with Black Americans enjoying newly-granted civil rights, "did the courts clearly state for the first time that most businesses had no common-law duties to serve the public."[231] Of course, the Civil Rights Act of 1964—also called the Public Accommodations Act of 1964—created a national statutory scheme ensuring public access to places of public accommodations, though as we have seen the law has a number of gaps.[232]

A quarter of a century ago, Singer noted one considerable gap—retail shops—and he argued for expanding public accommodations law to cover them. His reasoning was that retail shops had become the modern marketplace and they were open to the public at large: "They should be open because they constitute a form of property use that injects the property into market relations——a sphere of social life to which everyone should have access."[233] In 2022, much the same could be said about a private platform like Airbnb.

If we simply returned to the original, more broad-minded concept of public accommodations, courts would conclude as a matter of common law, if not statutory civil rights law, that any business, including an Airbnb host, was a place of public accommodations. Indeed, the logic of the original public accommodations common law seems inconsistent with the carve-out for owner-occupied accommodations in the Civil Rights Act of 1964, at least as applied to today's room-sharing platforms. If the core of the public accommodations doctrine is about "holding oneself out" to the broader market, as Singer notes, then it should not matter the size of the individual accommodation.

2. Common Carrier Doctrines and Viewpoint Discrimination

Relatedly, the common law has long referred to a distinct class of private actors as common carriers—those commercial operations that transport goods and communications in a service

230. *Id.* at 1474 ("[A]ny business that held itself out as ready to serve anyone who came seeking services probably had an obligation to serve its customers.").

231. *Id.* at 1294–95.

232. *Id.* at 1295–97.

233. *Id.* at 1476.

that is open to the public.[234] The common carrier doctrine comes up in a range of different laws.[235] The most important distinction between common carriers and private carriers is that the former may not discriminate against customers because of their viewpoint or politics while the latter can pick and choose their customers.[236] The idea of treating internet platforms as common carriers is not new. For example, Eugene Volokh argues that there is a serious case to be made for treating social media firms as common carriers—at least as to their function as hosts for other peoples' views—and that such a regulation could survive First Amendment scrutiny.[237]

But there is a significant limitation to this strategy as a solution to the platform problems described here. It would address the conservative concern that private platforms are massively censoring rightwing views, but it would do nothing about the problems of "noise," where viewers are flooded with too much information; algorithmic discrimination, where the platform is able to drastically control what users see and when; or foreign election interference. These are the core concerns with the platform's compatibility with a guarantee of free speech.[238]

3. Homeowner Associations and Restraints on Speech

Another limit on how property is allowed to be used comes in the form of speech restrictions on homeowner associations (HOA). Suppose that an HOA grants users entry into a community on the condition that they decline to speak out about sensitive issues. Such an agreement may be struck down by courts on the ground that it is inconsistent with public policy. In *Mazdabrook Commons Homeowners' Ass'n v. Khan*, the New Jersey Supreme Court struck down an HOA agreement that prohibited

234. *Id.*

235. *See* Matt Milner, *Highest Degree of Confusion: The Case Against the Common Carrier Doctrine*, ARIZ. L. REV. SYLLABUS 1, 1 (2011), https://arizonalawreview.org/highest-degree-of-confusion-the-case-against-the [https://perma.cc/8BBL-Y6DE] (describing how, in tort law, common carriers are held "to the 'highest degree of care,' rather than the reasonable care standard that governs most negligence actions").

236. *See, e.g.*, 49 U.S.C. § 14101(a) (obligating common carriers to offer "transportation or service on reasonable request").

237. Eugene Volokh, *Treating Social Media as Common Carriers?*, 1 J. FREE SPEECH L. 377–427 (2021).

238. *See* Balkin, *Regulate*, *supra* note 188, at 76, 82.

homeowners from posting signs supporting political candidates.[239] The court noted that despite the wide latitude homeowners typically have in exerting control over how property is used, that latitude must be weighed against the speech rights of individual homeowners: "Balancing the minimal interference with Mazdabrook's private property interest against Khan's free speech right to post political signs on his own property, we conclude that the sign policy in question violates the free speech clause of the State Constitution."[240]

Why should a court not apply this theory to online platforms? The platforms allow others to access the platform if they agree to certain terms and conditions. The terms limit the speech rights of the users in a number of ways, including giving the platform the ability to censor anyone regardless of their message, to control who sees what information and when, and to limit any efforts at studying the platform's speech rules. Some of these terms are clearly designed to advance a private interest without interfering with some compelling public interest—like the use of platform terms to ensure users do not commit crimes. But same cannot be said for other applications of the platform's terms, especially those that have significant implications for the speech rights of the entire country. Using the *Mazdabrook* balancing test, a platform like Facebook places ownership restrictions on its users—including restrictions on how they use their own property to study the platform—in ways that seem to significantly burden a free speech right.

4. The Public Policy Limit in Contract

The public policy doctrine is the most explicit place that contract law refuses to enforce an agreement that has no other defect other than its impact on broader society. It is an old doctrine, dating to at least the fifteenth century in England.[241] In 1853, the Supreme Court invalidated an agreement between a railroad and a lobbyist, on the grounds that the secret deal was incon-

239. Mazdabrook Commons Homeowners' Ass'n v. Khan, 46 A.3d 507, 522 (N.J. 2012).

240. *Id.* at 510.

241. *See* Dyer's Case, YB 2 Hen. 5, f. 5, pl. 26 (1415) (Eng.) (invalidating a restraint-on-trade term in a contract that would limit a dyer's ability to practice his trade for six months).

sistent with expectations of transparency in the political process.[242] The court noted, "It is an undoubted principle of the common law that it will not lend its aid to enforce a contract to do an act that is illegal, or which is inconsistent with sound morals or public policy, or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions."[243]

The *Restatement (Second) of Contracts* describes a balancing test, where courts weigh whether, "the interest in [the contract term's] enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms."[244] In order to implement this balancing test, courts take account of "the parties' justified expectations" and "any special public interest in the enforcement of the particular term."[245]

The most thorough empirical study into the doctrine's use suggests that there are roughly three sources of public policy[246]: (1) written statutes ("where the rules and authorities clearly point in one direction"); (2) a middle rung consisting of caselaw ("where judges discern and declare public policy through the use of case precedent"); and finally, (3) the weakest sources of public policy, where the litigants "appeal broadly to public policy without reference to statute, regulation, or even precedent."

How might the public policy doctrine apply to platforms? The private platform economy is built on contract. Facebook, Airbnb, Uber—the use of these products is heavily governed by their terms of service. Courts could invalidate platform terms of service that are inconsistent with a huge array of public policies.

Consider an example. Facebook's terms of service prohibit automated data collection. But some of the most important public-minded research relies on automated data collection. For example, two NYU researchers created a tool called Ad Observer that Facebook users could add to their browsers.[247] The tool collects data about which political ads are being targeted at which

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242. Marshall v. Balt. & Ohio R.R. Co., 57 U.S. 314 (1854).

243. *Id.* at 334.

244. RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (AM. L. INST. 1981).

245. *Id.* § 178(2)(a), (c).

246. David Adam Friedman, *Bringing Order to Contracts Against Public Policy*, 39 FLA. ST. U. L. REV. 563, 616–17 (2012).

247. Jeff Horwitz, *Facebook Seeks Shutdown of NYU Research Project into Political Ad Targeting*, WALL ST. J. (Oct. 23, 2020), https://www.wsj.com/articles/facebook-seeks-shutdown-of-nyu-research-project-into-political-ad-targeting-11603488533 [https://perma.cc/4VWV-59ZG].

Facebook users—important information given that Facebook has become one of the places where the most election campaign money is being spent.[248] Yet Facebook wrote the researchers a cease-and-desist letter, ultimately terminating their Facebook accounts for violating the user Terms of Service.[249]

One could imagine a judge finding that this private agreement, as applied in this context, is simply inconsistent with a number of public policies, including the deep commitment to free speech, especially in regard to elections. In the words of the Court, "speech concerning public affairs is more than self-expression; it is the essence of self-government."[250] Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values," and is entitled to special protection.[251]

Indeed, courts regularly invalidate otherwise sound contracts because their enforcement would frustrate the public policy goal of free speech, as outlined in state and federal constitutions. In *Jenni Rivera Enterprises, LLC v. Latin World Entertainment Holdings, Inc.*, the court held that the First Amendment protected a broadcaster's use of material that was disclosed in violation of a nondisclosure agreement.[252] In *Overbey v. Mayor of Baltimore*, a woman challenged the non-disparagement provision of her settlement agreement on First Amendment grounds, and the court found for her, noting that:

> [E]nforcement of [claimant's] waiver of her First Amendment rights—i.e. enforcement of the non-disparagement clause—cuts against strong public interests that are highly relevant to the very right that [claimant] waived . . . . [T]he City had not identified a comparably compelling public good or other legitimate governmental aim that . . . could be furthered by enforcement of the non-disparagement clause.[253]

In *Perricone v. Perricone*, the Connecticut Supreme Court noted that contracts, including contracts that explicitly require

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248. *See* John McCormick, *Midterm-Election Ad Spending Poised to Soar as Streaming TV Attracts Campaigns*, WALL ST. J. (July 19, 2021), https://www.wsj.com/articles/midterm-election-ad-spending-poised-to-soar-as-streaming-tv-attracts-campaigns-11626685200 [https://perma.cc/QK5R-NPLK].

249. James Vincent, *Facebook Bans Academics Who Researched Ad Transparency and Misinformation on Facebook*, VERGE (Aug. 4, 2021), https://www.theverge.com/2021/8/4/22609020/facebook-bans-academic-researchers-ad-transparency-misinformation-nyu-ad-observatory-plug-in [https://perma.cc/L7QL-JREC].

250. Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964).

251. Carey v. Brown, 447 U.S. 455, 467 (1980).

252. 249 Cal. Rptr. 3d 122, 151 (Ct. App. 2019).

253. 930 F.3d 215, 226 (4th Cir. 2019) (alterations in original).

someone's silence like a confidentiality agreement, can be invalidated on free speech grounds if the agreement concerns matters of "great public importance."[254]

If courts regularly invalidate private agreements between two individuals in the name of free speech, it does not seem a far stretch to imagine a court striking down Facebook's agreement with its users, especially the clauses that give Facebook the power to significantly alter the free speech landscape of the country. Such control could be seen to be inconsistent with the purpose of the First Amendment, about which the Supreme Court has said:

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private license. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.[255]

The public policy doctrine could be used to invalidate other platform contracts as well. Consider the contractual relationship between Ring, users of the Ring platform, and local police, whereby police are able to get access to huge volumes of private surveillance video without a warrant. A court could conclude that even though the agreement is valid in other respects—adequate mutual assent, supported by consideration, no structural defect in the negotiation process like duress or undue influence, etc.—enforcing the terms of the agreement would simply be inconsistent with the spirit of the Fourth Amendment. This might sound like a stretch, but consider how public policy doctrine has been used in other contexts. In *Bovard v. American Horse Enterprises, Inc.,* the California Court of Appeal declined to enforce a sales contract for drug paraphernalia because although the paraphernalia was not illegal, "both parties knew that the corporation's products would be used primarily for purposes which were expressly illegal."[256] The question is not whether the contract itself is illegal or concerns an illegal subject, but rather whether the court, in enforcing the agreement, would be putting the state's authority behind an agreement that frustrates other state policy goals. On this admittedly broad ground, the public policy doctrine could be used to invalidate platform terms of service

254. 972 A.2d 666, 689 (Conn. 2009).

255. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (citations omitted).

256. 247 Cal. Rptr. 340, 345 (Ct. App. 1988).

wherever they would be inconsistent with state or federal public policy.

5. Public Access Rights to Private Property

Another area where courts have limited the property owner's right to exclude is when that ownership right impedes the public's speech rights. In *Pruneyard Shopping Center v. Robins*, the Supreme Court held that the property owner's core right to exclude was subject to restrictions in local law, including in that case the California Constitution's guarantee of free speech which the California Supreme Court held to prohibit malls from excluding petitioners.[257] The Court found that "the requirement that appellants permit appellees to exercise state-protected rights of free expression and petition on shopping center property clearly does not amount to an unconstitutional infringement of appellants' property rights under the Taking Clause. There is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center."[258]

Courts have similarly declined to enforce trespass rules against investigative journalists on the grounds that the public interest in having newsworthy information trumps the individual property owner's right to exclude. In *Desnick v. American Broadcasting Co.*, journalists posed as patients for an eye care clinic and exposed alleged fraud.[259] Judge Posner ruled that the tort of trespass did not apply because there was no invasion of a private space, and no interference with the full enjoyment of the property.[260] There are similar cases where the public's speech rights were at stake.[261] Courts have also limited the private property owner's right to exclude for other reasons, like access to basic government services. In *State v. Shack*, the New Jersey Supreme Court found that trespass, which normally reinforces the property right holder's ability to exclude, did not apply to state employees seeking to assist migrant farm workers.[262]

257. 447 U.S. 74, 74–75 (1980).

258. *Id.* at 83.

259. 44 F.3d 1345, 1345 (7th Cir. 1995).

260. *Id.* at 1352.

261. *See, e.g.*, Food Lion, Inc. v. Cap. Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999).

262. 277 A.2d 369, 371–72 (N.J. 1971) ("[T]he ownership of real property does not include the right to bar access to governmental services available to migrant workers and hence there is no trespass within the meaning of the penal

Applying similar logic to platforms we could imagine a court finding that if a law or regulation limited a platform's usual right to exclude, that this would not constitute a taking or a trespass so long as it did not overly burden the platform's private use of its property. For example, if a researcher sought access to Facebook's platform and Facebook ejected them, as happened to the NYU researchers behind the Ad Observer tool, a court might consider extending these public interest exceptions to trespass in the computer context. That could have significance for defendants charged with trespass to chattels as well as explicit computer trespass laws, which are modeled on real property trespass rules.[263] This could also be relevant to the Supreme Court's ever-evolving Fourth Amendment jurisprudence, if indeed the Court returns to ground search and seizure law in property notions like trespass, as Justice Scalia hinted in *Jones*.[264]

6. The Public Trust Doctrine

The Court has repeatedly held that some resources are for common enjoyment and should be held by the government in a public trust.[265] The idea behind the public trust doctrine is that—contra much of our laws around private ordering—the state cannot delegate to private parties an inherently sovereign function, like police powers over shared resources. As a federal court put it recently, in an environment context, "With respect to these core resources, the sovereign's public trust obligations prevent it from 'depriving a future legislature of the natural resources necessary to provide for the well-being and survival of its citizens.'"[266] The public trust doctrine originated in the Roman Corpus Juris Civilis, which laid the basis for much English

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statute."). *But see* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (holding that California's labor regulations, which give labor organizations a right to access farms to meet with workers, constitute per se physical takings and so require compensation under the Constitution's Takings Clause).

263. *See* Orin S. Kerr, *Norms of Computer Trespass*, 116 COLUM. L. REV. 1143, 1149 n.23 (2016).

264. United States v. Jones, 565 U.S. 400, 406 (2012) ("[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers and effects') it enumerates.").

265. *See* Stone v. Mississippi, 101 U.S. 814, 820 (1880) ("[T]he power of governing is a trust committed by the people to the government, no part of which can be granted away.").

266. Juliana v. United States, 217 F. Supp. 3d 1224, 1253 (D. Or. 2016) *rev'd*, 947 F.3d 1159 (9th Cir. 2020) (citation omitted).

and later American common law.[267] The first case in the U.S. to address the public trust doctrine was in 1821, in New Jersey.[268] The court described common property as that which is "common to all the citizens, who take of them and use them, each according to his necessities, and according to the laws which regulate their use," and includes "the air, the running water, the sea, the fish, and the wild beasts."[269]

It would not be much of a stretch to imagine our shared digital resources—the data that is created by our new digital lives—as a kind of commons that is protected from private ownership or manipulation under the public trust doctrine.[270] I do not mean something as radical as a ban on private ownership over data in general. Rather that there are some limited uses of data where the thing that matters about the data is actually the pooled resource—like with public health information—and there we might imagine a court finding, as courts have found in the environmental context, that the dataset is actually a public resource. Indeed, as we think about living increasingly larger shares of our lives in a digital metaverse, one wonders about the wisdom of calling that shared space private.

CONCLUSION

We live an increasing share of our lives on privately-owned digital platforms. They are the spaces where presidential campaigns play out, where we connect with friends and meet romantic partners, where we buy and sell everything from cars and homes to genetic material. They are our public spaces, but they are privately owned. Our law has long drawn a distinction between the "public"—which is regulated—and the "private" which should be left alone. Our new digital platforms fit awkwardly in that framework. Because these platforms affect so much of everyday life, there have been increasing calls to regulate them. But the problem in so many cases is actually their private-but-public nature. To address this, one solution is to turn to the significant

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267. *See* J.B. Ruhl & Thomas A.J. McGinn, *The Roman Trust Doctrine: What Was It, and Does It Support an Atmospheric Trust?*, 47 ECOLOGY L.Q. 117, 121 (2020) (tracing the public trust doctrine back to Roman common law); PLLP Mont., LLC v. Montana, 565 U.S. 576, 603 (2012) (same).

268. *See* Arnold v. Mundy, 6 N.J.L. 1, 1 (1821).

269. *Id.* at 71.

270. Aziz Huq outlines one such argument. *See* Aziz Z. Huq, *The Public Trust in Data*, 110 GEO. L.J. 333 (2022) (explaining a "proof of concept" for how courts might view data as a kind of property held in public trust).

set of public-but-private doctrines that courts have developed over the years to limit private ordering in the public interest.