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The Political Shape of the Debate About Regulating Social Media

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These days, calls to treat social media platforms as common carriers are mostly coming from the Right, likely because such platforms are perceived (rightly or wrongly) as run by progressives who are especially likely to censor conservative voices. But the link to the argument in the *Citizens United* dissent may help explain why some top scholars on the Left, such as Erwin Chemerinsky,^[41] Michael Dorf,^[42] Genevieve Lakier,^[43] and Nelson Tebbe,^[44] have suggested similar regulations.^[45]

Some advocacy groups on the Left have likewise accused platforms of improperly restricting their speech.^[46] And of course even many conservatives, while generally more skeptical of government regulation of private actors, have long been open to some regulation, especially when the private companies have been seen as monopolies or close to it.^[47]

Hard-core libertarians, who oppose virtually all government regulation of private business transactions, are likely to oppose common carrier status for platforms (and perhaps the concept of a common carrier altogether).^[48] And of course many liberals, moderates, and conservatives may conclude that, even if such common carrier rules aren't theoretically impermissible, they are likely to be unsound in practice. But my point here is simply that the concerns about platform power are not exclusively a matter for one or another side of the ideological divide.

^[41] Prasad Krishnamurthy & Erwin Chemerinsky, *How Congress Can Prevent Big Tech from Becoming the Speech Police*, Hill (Feb. 18, 2021), <https://perma.cc/645W-LMLP>.

^[42] Michael C. Dorf, *Could Clarence Thomas Be Right About Twitter?*, Verdict (Apr. 14 2021), <https://perma.cc/D7AB-8Z4M>.

^[43] Genevieve Lakier & Nelson Tebbe, *After the "Great Deplatforming": Reconsidering the Shape of the First Amendment*, Law & Political Economy [LPE] Project (Mar. 1. 2021), <https://perma.cc/56F3-KMBE>.

^[44] *Id.*

[45] Rebecca Tushnet had long before likewise expressed some concern about excessive intermediary power. Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 Geo. Wash. L. Rev. 986, 1010, 1015 (2008).

[46] See, e.g., Natasha Lennard, *Facebook's Ban on Far-Left Pages Is an Extension of Trump Propaganda*, Intercept (Aug. 20, 2020), <https://perma.cc/Z2JC-YEEB> (arguing that Facebook was banning a wide variety of "anarchist[]" and anti-fascist[]" groups); Andre Damon, *Facebook Purges Left-Wing Pages and Individuals*, Int. Comm. of the Fourth International [World Socialist Web Site] (Jan. 23 2021), <https://perma.cc/7EX8-ADUY>.

[47] See, e.g., Ryan Cooper, *Even Republicans are Getting Fed Up with Monopolies. Here's Why*, The Week (Apr. 1 2016), <https://perma.cc/Z876-N337>. Likewise, some arguments for wedding providers' right to refuse service to same-sex weddings under religious freedom protections or under the compelled speech doctrine—generally seen as a conservative position—have acknowledged that those exemptions might be denied if there are too few other alternatives to those businesses' services. See, e.g., Douglas Laycock, *Afterword*, in *Same-Sex Marriage and Religious Liberty: Emerging Conflicts 200–01* (2008) ("Religious dissenters can live their own values, but not if they occupy choke points that empower them to prevent same-sex couples from living their own values. If the dissenters want complete moral autonomy on this issue, they must refrain from occupying such a choke point."); Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1485 (2012) ("An objector in the stream of commerce may object only if a 'substantial hardship' would not result."); Executive Summary of Statement of William Bassett et al., Hearing Before Hawaii Senate Committee on Judiciary and Labor 9–10 (Oct. 28, 2013), <https://perma.cc/LW3R-XT4M>; Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. Rev. 1595, 1629–30 (2018); cf. *Attorney Gen. v. DeSilets*, 636 N.E.2d 233, 242–43 (Mass. 1994) (concluding that whether landlords should get religious exemption from bans on housing discrimination against unmarried couples should turn on "whether the rental housing policies of people such as the defendants can be accommodated, at least in the [particular geographical] area, without significantly impeding the availability of rental housing for people who are cohabiting," and in particular on whether "a large percentage of [housing] units are unavailable to cohabitants"); see also John Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly 172* (2012) (calling for a similarly "fact-specific contextual analysis" with regard to private clubs' right to exclude).

[48] See, e.g., Katherine Mangu-Ward, *Don't Try to Fix Big Tech with Politics*, Reason, July 2021, <https://perma.cc/8CQ7-2J6T> (Mangu-Ward is the editor-in-chief of *Reason* magazine, the most prominent libertarian publication in the U.S.); John Samples, *Why the Government Should Not Regulate Content Moderation of Social Media*, Cato Institute (Apr. 9, 2019), <https://perma.cc/XKR4-8V6Z> (Samples is Vice President of the Cato Institute, one of the most prominent libertarian think tanks in the U.S.).