TOWARDS A REGULATORY THEORY OF PLATFORM RULE: CORPORATE "SOVEREIGNTY" THROUGH IMMUNITIES

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ABSTRACT

The scale of inflammatory, divisive, false and harmful online content has prompted much soul-searching about its sources, causes and possible responses. This has brought the sweeping immunity in section 230 of the Communication Decency Act (intended to empower platforms as moderators) under intense scrutiny. Far from providing relief, it appears to have turned platforms into a source of the problem. This Article offers a fresh take on section 230, which is - despite its apparent commonplaceness - shown to be an extraordinary legal intervention as it gives important actors, otherwise key to controlling a space, a "carte blanche immunity for wrongful conduct." That extraordinariness requires an explanation going beyond standard arguments about giving young internet companies some "breathing space" or removing disincentives for content moderation. The discussion starts with the proposition that an immunity entails self-governance, not as a matter of cause and effect, but in purely analytical term being immune *means* to self-govern within the scope of the immunity, that is to act without legal accountability. Building on the basic understanding of an immunity as self-governance, the Article traces the provenance of section 230 and its sweeping application to online platforms through three very different, but complementary, legal contexts: *first,* within the landscape of immunities as extraordinary legal devices often employed in support of governing activity; *second,* within the conception of the corporation as a self-governing institution embedded in immunities and impunities; and, *third,* within the constitutional framework and its capacity to recognise the "sovereignty-sharing" arrangement of government and platform in cyberspace. The Article's overarching argument is that section 230 taps into the governing propensity of platforms not just as intermediaries or gatekeepers of online content, but as corporate actors which are, it is argued, inherently immune/self-governing actors with a long-standing history of "sovereignty-sharing" with government. Through this corporate prism the extraordinary "sovereign" role of platforms in cyberspace becomes intelligible. Normatively, the argument recasts platforms as hybrid private-public actors, consistent with the body of corporate scholarship, which postulates the *sui generis* nature of the corporation as a neither quite private nor quite public. Section 230 intensifies this argument in the case of online platforms. Repositioning online platforms as sitting "on the fence" of the private-public constitutional divide then provides the foundation for asking how constitutional restraints applicable to government may be adapted to ensure platform accountability.

INTRODUCTION

The idea of corporate "sovereignty" - mooted in popular rhetoric and academic literature to capture the independence of large corporations from the state[1] - appears nowhere more apt

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than in respect of online platforms. By providing the essential infrastructure underpinning network society and the terms and conditions upon which that infrastructure may be used, they lay down in stone or, more accurately, in code the rules and underlying values upon which social, economic and political interactions may take place, with little or no state oversight.[2] They are present at every level of the network infrastructure – from the devices and operating systems, browsers and app stores to payment systems, e-commerce marketplaces, social networks, search engines and the sharing economy - and determinative of their operations and participants.[3] Government appears, willingly or unwillingly, sidelined.[4]

This Article explores platform "sovereignty" in the amorphous field of online "content." Online content captures a wide range of communications, interactions, transactions, behaviors and spaces mediated by online networks controlled by platforms. As the online and offline world are inextricably linked,[5] the content that has attracted the most controversy due to its profound real world impacts is misinformation, conspiracy theories, election manipulation, political polarized content, terrorist propaganda, child sexual exploitation, and trolling and harassment.[6] Yet, this is just the tip of the iceberg of misleading, negligent, defective, abusive, exploitative or otherwise harmful content.[7] Generative AI further intensifies the "content" problem as it magnifies the spectre of disinformation and so deception, manipulation and distrust, and, by implication, the question of responsibility, particularly by key platforms acting as its developers and distributors.[8]

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discussions on the topic. I am grateful for helpful comments and suggestions by Brenda Hannigan, Lutz Christian-Wolff, Eliza Mik and Jonathan Glusman. Errors and any blind spots are entirely my own.

[1] JOSHUA BARKAN, CORPORATE SOVEREIGNTY – LAW AND GOVERNMENT UNDER CAPITALISM (2013); PHILIP J. STERN, THE COMPANY-STATE –CORPORATE SOVEREIGNTY & THE EARLY MODERN FOUNDATION OF THE BRITISH EMPIRE IN INDIA (2011); Kristen E. Eichensehr, *Digital Switzerlands*, 167 U. PA. L. REV. 665 (2019); Julie E. Cohen, *Law for the Platform Economy*, 51 U. C. DAVIS. L. REV. 133 (2017) (constructing platforms as "emerging transnational sovereigns"); Kate Klonick, *The New Governors: the People, Rules, and Processes Governing Online Speech*, 136 HARV. LAW REV. 1598 (2018); Frank Pasquale, *From Territorial to Functional Sovereignty: The Case of Amazon. Law and Political Economy*, L.P.E. (June 12, 2017), https://lpeproject.org/blog/from-territorial-to-functional-sovereignty-the-case-of-amazon/ (using a functional definition of sovereignty to show the finality of platform rule); Eldar Haber, *Privatisation of the Judicary*, 40 SEATTLE U. L. REV. 115 (2016) (arguing for the quasi-judicial nature of the role of search engines in right-to-be-forgotten requests); Anupam Chander, *Facebookistan*, 90 N. C. L. REV. 1807 (2012) (on the diffusion of the sources of platform rules).

[2] *See*, *e.g.*, Kevin J. Boudreau & Andrei Hagiu, *Platform Rules: Multi-Sided Platforms as Regulators* in PLATFORMS, MARKETS, AND INNOVATION (2009) (on the legal, technological, informational and other instruments platforms use to "regulate").

[3] Annabelle Gawer, *Digital platforms' boundaries: The interplay of firm scope, platform sides, and digital interfaces*, 54 LONG RANGE PLANNING (2021) (on how platforms exert control through digital interfaces).

[4] *See infra* Part III.B.

[5] Julie E. Cohen, *Cyberspace As/And Space*, 107 COLUM. L. REV. 210, 213 (2007) ("[A] theory of cyberspace and space must consider the rise of networked space, the emergent and contested relationship between networked space and embodied space, and the ways in which networked space alters, instantiates, and disrupts geographies of power.").

[6] For a particularly egregious example, see Alexandra Stevenson, *Facebook Admits It Was Used to Incite Violence in Myanmar*, N.Y. TIMES (Nov. 6, 2018); Olivia Solon, *Facebook Struggling to End Hate Speech in Myanmar Investigation Finds*, THE GUARDIAN (Aug. 16, 2018)

[7] Gilad Abiri, *Moderating from Nowhere*, 47 B. Y. L. REV. 757 (2022); Evelyn Douek, *Content Moderation as System Thinking*, 131 HARV. LAW REV. 1598 (2022); Eric Goldman, *Content Moderation Remedies*, 28 Mich. Tech. L. Rev. 1 (2021); Hannah Bloch-Wehba, *Global Platform Governance: Private Power in the Shadow of the State*, 72 SMU. L. REV. 27 (2019); Julie Adler, *The Public's Burden in a Digital Age: Pressures on Intermediaries and the Privatization of Internet Censorship*, 20 J. L. POL. 231 (2011).

[8] Giovanni Zagni & Tommaso Canetta, *Generative AI Marks the Beginning of a New Era for Disinformation*, EUROPEAN DIGITAL MEDIA OBSERVATORY (April 5, 2023) https://edmo.eu/2023/04/05/generative-ai-marks-the-beginning-of-a-new-era-for-disinformation/

Corporate "sovereignty" acts in this discussion as a provocation to interrogate platform (self)governance in contradistinction to traditional Westphalian sovereignty denoting the state as the single supreme legal and political authority.[9] The modest starting proposition for this provocation is that platform (self)governance is grounded, in the first instance, in the broad immunity in section 230 of the Communication Act 1996 (CDA),[10] which has been granted to online intermediaries and absolves them from standard gatekeeping duties, that is from liability for third party wrongdoing that occurs on their domains.[11] For clarification, an immunity is not a *delegation of legal responsibility* (i.e. a *duty* to regulate) which is a standard measure of regulatory diffusion,[12] but the opposite: a *grant of governing autonomy* (i.e. *a freedom* of conduct[13] within the scope of the immunity).[14] Platforms are for most intents and purposes left to their own devices; they are in charge of what comes and goes on their site without accountability, that is "sovereign" with a small "s" in cyberspace.[15] They are the final authority. Whilst this may, in light of the *status quo* for almost three decades, not appear to be extraordinary, the argument made in this Article is that section 230 *is* extraordinary, albeit not unprecedented, and traceable to corporate self-government and a long-standing history of "sovereignty-sharing" between government and corporation.[16]

The building blocks for this argument are three-fold. The *first* building block lies in the nature of an immunity as a grant of self-governance within the scope of the immunity, of a liberty of conduct without legal accountability.[17] The duality of immunity/self-governance is not a matter

[9] *See e.g.* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 198 (1967) ("[T]here must reside somewhere in every political unit a single, undivided, final power, higher in legal authority than any other power, subject to no law, a law unto itself."); DIETER GRIMM, SOVEREIGNTY (2009, trl. 2015) 104 ("Sovereignty in its legal usage has a connection to rule, in the sense that it involves the *right* to rule, in which the holder of this right, as far as it extends, is controlled by no one else."). For early expression of discontent with the state-centric definition of sovereignty, *see e.g.* SUSAN STRANGE, THE RETREAT OF THE STATE – THE DIFFUSION OF POWER IN THE WORLD ECONOMY (1996); or Stephen D. Krasber, SOVEREIGNTY – ORGANIZED HYPOCRISY (1999).

[10] 47 U.S. Code § 230; *see infra* Part I.A.

[11] For (comparative) explorations of EU immunities, *see* Celine Castets-Renard, *Algorithmic Content Moderation on Social Media in EU Law: Illusion of Perfect Enforcement*, 2020 J. L.T.P. 283 (2020); András Koltay, *The Private Censorship of Internet Gatekeepers*, 59 U. LOUISVILLE L. REV. 255 (2021); GIOVANNI DE GREGORIO, DIGITAL CONSTITUTIONALISM IN EUROPE 95-105 (2022).

[12] *See* Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53 (1986) (on the pervasiveness of collateral or third-party liability as an enforcement strategy).

[13] Ori J. Herstein, *A Legal Right to Do Legal Wrong*, 34 OXF. J. LEG. STUD. 21, 38 (2014) ("Because they disable liability, immunities protect freedom… Liability can result in curtailing one's freedom to act.")

[14] The line between the two may be blurred, *see e.g.* Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L. J. 377 (2006) (on the gaps that flow from regulatory delegation); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003) (on the blurred public-private character of modern governance); Paul Starr *Meaning of Privatization*, *The*, 6 YALE L. & POL'Y REV. 6 (1988); Jody Freeman, *The Private Role in the Public Governance*, 75 N. Y. L. REV. 543 (2000).

[15] To denote that platform "sovereignty" falls outside classical unitary state-centric concept of sovereignty in law and politics. See GRIMM, *supra* note 9, at 21-22 (on the indivisibility of the sovereignty concept).

[16] See Barkan, *supra* note 1, at 20-39; Stern, *supra* note 1. More recently, this phenomenon has been captured through concepts such as "privatization" or "public-private partnerships": Daniel Guttiman, *Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 AMIN. L. REV. 859 (2000); Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813 (2000).

[17] Herstein, *supra* note 13, at 38 ("Because they disable liability, immunities protect freedom. This is important because… rights to do wrong allow for a relative measure of liberty to violate one's obligations. Liability can result in curtailing one's freedom to act… Immunities… have the very real effect of protecting the immune party's freedom to [do wrong].") Note the term "self-governance" ambiguously denotes both the governance of the self and governance free from accountability; so the "self" may be refer to the object or the unrestrained nature of governance.

of cause and effect, but rather in purely analytical terms an immunity *means* self-governance.[18] They are one and the same thing. For sure, this self-governance is a low-order concept that connotes autonomous decision-making without legal accountability or "pure" self-governance (i.e. doing whatever you like), rather than some higher-level, legal directed self-governance.[19] Still, given this duality the seemingly antithetical statuses of online platforms as neutral "non-entities" entitled to immunities *and* as powerful governors of cyberspace emerge as two sides of the same coin; freedom from liability has shifted the online governance to platforms.[20] Yet, it may be objected that as the grant of the immunity to platforms is made by government, government may also withdraw it. Thus platform autonomy is contingent on the government's willingness to maintain it, and so sovereignty properly so-called belongs after all to the state.[21] This is valid as a matter of formal constitutional hierarchy, but *de facto* it assumes that government would be legally or practically capable to assume oversight over cyberspace.[22] Even formally, as shown below, a grant of an immunity has the curious nature of being a product of law and governmental authority, whilst also creating exemptions from law and governmental authority.[23]

The *second* building block for the "sovereignty-sharing" argument lies in the nature of the corporation and corporate self-governance, to which platform immunities/self-governance may be traced. This idea of corporate self-governance and its ambiguous relationship with state sovereignty are not new.[24] A corporation is a collective entity that gives individuals a framework to govern themselves autonomously *shielded* from outside accountability.[25] For Thomas Hobbes, the founding father of the modern state, corporations which were chartered corporations at his time, were antithetical to statehood: "Likewise law and charters are taken for the same thing. Yet [corporate] charters are donations of the sovereign; and not laws, *but exemptions from law*."[26] Taking a similar line but vis-a-vis modern corporations, the political geographer Joshua Barkan has argued that the "Anglo-American corporation and modern political sovereignty are founded in and bound together through a principle of *legally sanctioned immunity from law*."[27] Theis Article proposes that platform immunities/self-governance perpetuate and intensify the immunities/self-governance through which the corporation itself is conceived and empowered. Through a corporate prism, platform immunities become intelligible and less extraordinary, but hardly unproblematic – particularly

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[18] *Id.*

[19] Gavin Phillipson & Robert M. Simpson, *Tackling Extreme Speech on Social Media Platforms: a Normative Taxonomy of Regulatory Approaches*, *forthcoming* in OXFORD HANDBOOK OF HATE SPEECH (2024) (identifying a spectrum of five regulatory models from "pure" laissez-faire self-regulation to punitive state control).

[20] *See infra* Part I.A, and Conclusion. *See also*, Cohen, *supra* note 1, at 153-161 (arguing *inter alia* that privileges given to platforms by the state lie at the heart of the transformation of our political economy).

[21] For this positivist argument, *see*, *e.g.*, Lori McMillan, *The Business Judgment Rules as an Immunity Doctrine*, 4 WM. & MARY BUS.L.REV. 521, 539-40 (2013) ("Under no circumstances can private corporations be viewed as having inherent grants of power that transform them into autonomous entities, not subject to any level of government, especially when corporations owe their very existence to legislation issued by state government.")

[22] *See infra* Part III.B.

[23] *See* BARKAN, *supra* note 1, at 4.

[24] *See* BARKAN, *supra* note 1; GRIETJE BAARS, THE CORPORATION, LAW AND CAPITALISM: A RADICAL PERSPECTIVE ON THE ROLE OF LAW IN THE GLOBAL POLITICAL ECONOMY (2017) (on the legally sanctioned evasion of accountability through the corporate form); KATHARINA PISTOR, THE CODE OF CAPITAL – HOW THE LAW CREATES WEALTH AND INEQUALITY (2019) (on the role of law in encoding the creation of private wealth as, for example, through the corporate form).

[25] *See infra* Part III.A.

[26] THOMAS HOBBES, THE LEVIATHAN, 221 (first published 1691, 2014).

[27] *See* BARKAN, *supra* note 1, at 4.

given that immunities, although granted by government, also undermine it, or in Barkan's words: "This paradoxical relation, in which corporations emerge from law but continually threatens the validity and existence of the state."[28] Similarly, Hobbes viewed the corporation as weakening the state: "[it belongs to] those things that weaken or tend to the dissolution of a commonwealth… [A]nother infirmity of a Commonwealth [is]… the great number of corporations, which are as it were many lesser Commonwealths in the bowels of a greater, like worms in the entrails of a natural man."[29] So for both Hobbes and Barkan corporate self-governance is both dependent on, and in conflict with, governmental authority. Likewise platform immunities/self-governance is not just descriptive of platform autonomy per se, but captures the symbiotic and conflictual relationship of platform and government. It is symbiotic as platform and government are co-dependent actors in the online governance arrangement,[30] and conflictual as platform self-governance displaces governmental oversight and so creates the potential for conflicting priorities.[31] Thus a site of contestation in respect of the immunities are the proper boundaries of the "self" in self-governance and what may or may not be legitimately removed from public oversight. Are Google, Facebook and Twitter simply governing themselves when they govern their domains and select and deselect third-party content? If so, should they be entitled to do as they please? This leads to the *third* building block of the "sovereignty-sharing" argument, namely the constitutional order which defines the relationship between government and citizen, or public and private actors. Where within this order should platforms be located in light of the immunities?

The Article is divided into three Parts which follow broadly the three building blocks and provide complementary accounts of platform immunities/self-governance. The discussion uses the decisions by the Supreme Court and the Ninth Circuit in *Gonzalez v. Google LLC*[32] and *Twitter, Inc. v. Taamneh ET AL.*[33] as triggers for the analysis, but not as its primary target. Part I positions platform immunities in section 230 within the wider landscape of immunities, which are, it will be argued, extraordinary legally sanctioned inroads into the rule of law. Furthermore, contrary to accepted wisdom, section 230 is not rooted in the traditional Good Samaritan immunity, but rather in the right-to-rule immunities of governmental actors in support of their governing activities. Such construction accommodates the governing purpose that animated section 230 and its judicial interpretation. Part II takes a corporate prism to platform immunities. It deconstructs the corporation and examines how the immunities and impunities of the corporation beget, through section 230 and its judicial interpretation, further immunities. It will

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[28] *Id.*

[29] HOBBES, *supra* note 26, at 253.

[30] Their symbiotic relationship may be understood as mutualism, rather commensalism, parasitism, or competition, in line with the types of symbiotic relationships in nature. Article, *Symbiosis: The Art of Living Together*, NATIONAL GEOGRAPHIC, https://education.nationalgeographic.org/resource/symbiosis-art-living-together/ For an early account of the symbiotic relationship of government and platform, *see* Micheal D. Birnhack & Niva Elkin-Koren, *The Invisible Handshake: The Reemergence of the State in the Digital Environment*, 8 VJOLT 1 (2003) (on the complicity between online intermediaries and government).

[31] This particularly applies to "pure" self-governance, see Phillipson, *supra* note 19).

[32] 598 U.S. 617 (2023) *per curiam* vacated Gonzalez v. Google LLC, 2 F.4th 871 (9th Cir. 2021) and remanded for reconsideration in light of Twitter, Inc. v Taamneh ET AL. 598 U.S. 471 (2023). The Ninth Circuit had in *Gonzalez*, 2 F.4th, decided three appeals with similar facts: Gonzalez v. Google, 18-16700 (ISIS shooting in Paris); Taamneh v. Twitter, 18-17192 (ISIS shooting in Istanbul); Clayborn v. Twitter, 19-15043 (ISIS shooting in San Bernardino). For a useful summary, *see* Tom Wheeler, *The Supreme Court takes up Section 230*, BROOKINGS (Jan 31, 2023) https://www.brookings.edu/blog/techtank/2023/01/31/the-supreme-court-takes-up-section-230/

[33] 598 U.S. 471 (2023), reversed *Gonzalez*, 2 F.4th (for failing to state a plausible claim for "aiding and abetting international terrorism" under the Anti-Terrorism Act).

be shown how section 230 taps into the governing propensity of platforms not simply as an intermediary or gatekeeper of online content, but as a corporation and its self-governing institutionality. The platform immunity thereby perpetuates and intensifies the "exemptions from law" foundation upon which the corporation itself is built. Notably, in its interpretation of section 230 the judiciary explicitly uses corporate-specific arguments of blind profit-maximization and technological passivity to expand the immunity for corporate actors. Part III reflects on the relationship between government and corporation as ontologically similar actors with ordering propensity, and shifting regulatory competencies. Section 230 has shifted *governing competence* to platforms on the ground that it protects the inherent democracy-enhancing nature of the internet. Rather than arguing against the legitimacy of section 230, this Article endorses it but concludes with the normative argument that First Amendment jurisprudence has the latent capacity to accommodate "platform sovereignty" by recognising them as hybrid private-public actors. As platforms displace not just traditional public spaces for communications, but also assume, via the immunities, one of the state's most exclusive prerogatives, namely the competence to regulate, they ought to be understood as hybrid private-public actors to whom *adjusted* constitutional restraints ought to apply.

I. THE EXTRAORDINARINESS OF IMMUNITIES

That platform "sovereignty" should be grounded in a legal immunity seems far-fetched until one considers quite how extraordinary a legal device an immunity in fact is. An immunity is a legally sanctioned inroad into the rule of law (and its requirement of generality), a legal right to do a legal wrong,[34] a denial of law granted by law.[35] Their law-denying nature explains why for some political philosophers immunities - or the suspension of law – lay at the heart of sovereignty. For Giorgio Agamben "[t]he primary demonstration of sovereignty is not the creation of the law per se, but rather the capacity to place subjects under the ban, and thus outside of the operation of the law and its protection."[36] In his conception, sovereignty reveals itself by the sovereign's power to suspend the law,[37] which seems but an iteration of the early conceptions of sovereignty by Jean Bodin or Thomas Hobbes, according to whom the sovereign himself was clothed with immunity, or incapable of unlawful behaviour - echoing the old English maxim "the king can do no wrong."[38] Although in both Bodin's and Hobbes' case, it has been

[34] Herstein, *supra* note 13, at 32 (arguing an immunity decouples enforcement or liability from a duty leaving the duty otherwise in place) Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30, 55 (1913) (Hohfeld defines immunities as the opposite to liability, and the correlative of disability; and, in contrast to the affirmative nature of a right or a power, as "one's freedom from the legal power or 'control' of another as regards some legal relation.") On the generality requirement of the rule of law, *see e.g.* Hugh Collins, *Roberto Unger and the Critical Legal Studies Movement,* 14 J. L. & SOC. 387, (1987) ("Unger describes the third ideal-type of law, the liberal legal order, as general, public, positive, and autonomous. The law is general because the ideal of the rule of law commits us to the formal equality of citizens beneath the law, thereby removing the exemption of the ruler from the law which is a hall-mark of bureaucratic law.") ROBERTO M. UNGER, LAW IN MODERN SOCIETY; TOWARDS A CRITICISM OF SOCIAL THEORY 52-54 (1976).

[35] *See supra* notes 27 and 28, and accompanying text.

[36] Robert A. Yelle, *The Ambivalence of the Sovereign Ban: The Homer Sacer and the Biblical Herem,* in SOVEREIGNTY AND THE SCARED: SECULARISM AND THE POLITICAL ECONOMY OF RELIGION 74, 75 (2018). See also BARKAN, *supra* note 1, 6.

[37] Yelle, *id.* Note, similarly chartered corporation in the 17th and 18th century that acted as corporate sovereigns in overseas territories were also often granted the power to suspend the law, see BARKAN, *supra* n 1, at 35.

[38] Herbert Barry, *The King Can Do No Wrong*, 11 VA. L. Rev. 349 (1925); JEAN BODIN, ON SOVEREIGNTY: SIX BOOKS OF THE COMMONWEALTH (first published 1577, 2009); HOBBES, *supra* note 26, xx ; *see* also GRIMM, *supra*

argued that interpreting their concepts of sovereignty as absolutism misconstrues their ideas,[39] there *is* a conceptual affinity between the idea of a supreme authority and immunity from accountability; the former suggests the latter.

Consistently despite the early rejection of the old English maxim by the Supreme Court,[40] the affinity continues to shine through modern immunities in both domestic and international law. Under international law, the sovereign immunity protects a state and its officials from (certain) suits in the domestic courts of other states, and reflects and affirms the equality of states as a pillar of the international legal order: one state cannot, or should not, sit in judgment of another.[41] Meanwhile at the domestic level, the beneficiaries of sweeping immunities are also invariably governmental actors, arguably to give them autonomy in the discharge of their duties, albeit not without remedies for gross violations.[42] So the maxim "the king can do no wrong" continues to have some currency in the context of governmental actors.[43]

What sets section 230 CDA apart from these latter governmental immunities is not its scope (it is also sweeping), but rather the fact that it is granted to private actors. This first Part introduces section 230 and its application to platforms. It explores the provenance of section 230 within the domestic immunities landscape and argues that it does not provide a good fit with the traditional narrow Good Samaritan immunity but is more akin to the wide right-to-rule immunities reserved to governmental actors.

A. Platform Immunities under section 230 – The Magna Carta of the Internet

1. Section 230 of the Communication Decency Act 1996 and its Rationale

Section 230 absolves "interactive computer service" providers from liability for third-party content in civil law and under state criminal liability.[44] Thus online platforms are absolved from the gatekeeping duties imposed on offline publishers and distributors;[45] they incur no liability

note 8, at 22 ("Bodin's sovereign was above the law, but not above justice"), at 29 (on Hobbes' sovereign "Unlawful behavior by the sovereign is inconceivable.")

[39] *See* David Dyzenhaus, *Hobbes on the Authority of Law*, in HOBBES AND THE LAW 186 (2012); DANIEL LEE, THE RIGHT OF SOVEREIGNTY (2021) (critiquing commentaries of Bodin's sovereignty as absolutism).

[40] Langford v. United States, 101 U.S. 341, 353 (1879) ("We do not understand that either in reference to the government of the United States, or of the several states, or of any of their officers, the English maxim has an existence in this country."), see also Barry, *supra* note 38.

[41] HAZEL FOX, THE LAW OF STATE IMMUNITY 57 (2d ed. 2008) (foreign sovereign immunity reflects "the maxim *par in parem non habet imperium:* one sovereign State is not subject to the jurisdiction of another State."); see Anne Peter, *Immune against Constitutionalisation?,* in IMMUNITIES IN THE AGE OF GLOBAL CONSTITUTIONALISM (2015) (on the mismatch between state immunity in international law and human rights as the foundation for global constitutionalism).

[42] *See infra* Part I.B. and C. Note, in the UK the Crown Proceedings Act 1947 introduced the possibility of governmental liability.

[43] *But see* Erwin Chemerinsky, *Against Sovereign Immunity*, 53 SLR 1201 (2001) (rejecting the justifications for governmental immunities, including the separation of powers argument).

[44] 47 U.S.C. § 230(1). For the exceptions, see 47 U.S.C. § 230(e)(1)-(5) (dealing with federal criminal law, intellectual property law, state law consistent with the immunities, privacy law and sex trafficking law). On the background to the sex trafficking exception, see On sex trafficking, *see* Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12 (1st Cir. 2016); Doe No. 1 v. Backpage, 2018 WL 1542056 (D. Mass. March 29, 2018).

[45] This Article focuses on platforms as the most important intermediaries but will use the terms "platforms" and "intermediaries" interchangeably to denote hosts of third party content.

for leaving wrongful content up nor for taking legal content down - nor any other moderating activity.[46] Primary authors may be liable,[47] but not intermediaries:

> No provider or user of an interactive computer service shall be treated as the *publisher or speaker* of any information provided *by another information content provider*.
>
> No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected. [48]

Enacted in 1996, arguably one driver behind section 230 was to give fledging internet companies "some breathing space to permit rapid growth."[49] More specifically, section 230 sought to remove the disincentives for platforms to engage in content moderation. Case law at the time had put intermediaries in a bind: their voluntary moderation, based on platform use policies, could trigger a publisher's liabilities;[50] meanwhile, adopting an "anything goes" attitude left online intermediaries in the clear.[51] Christopher Cox, the US Representative who co-sponsored section 230, observed: "A legal standard that protected only websites where "anything goes" from unlimited liability for user-generated content would have been a body blow to the internet itself."[52] After all, the sheer scale of user-generated content was unprecedented and required some oversight. Absolving intermediaries from liabilities removed the disincentives to their adoption of content moderation policies, or so it was assumed.

Section 230 creates a constitutional settlement of sorts by allocating governing competence over large swaths of online content to intermediaries, most prominently the large platforms as the most visible and impactful intermediaries.[53] It leaves them to make the final judgment call on third party content. The judiciary has added to that swath by interpreting section 230 widely

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[46] Content moderation captures a broad range of activities over and beyond the leaving up-taking-down binary. See Douek, *supra* note 7, at 535-548; *see also* Jacob Rowbottom, *A Thumb on the Scale: Measures Short of a Prohibition to Combat Hate Speech*, 14 J. MEDIA LAW 119 (2022).

[47] Suing the primary wrongdoers may often be impractical or ineffective due e.g. to their anonymity; their location outside the jurisdiction; and the replication of the wrong by many others.

[48] 47 U.S.C. § 230(c)(1) and (2) respectively (emphasis added). The Article will refer to section 230 immunity interchangeably in the singular or plural.

[49] *See e.g*. Gonzalez, 2 F.4th at 921; see also TARLETON GILLESPIE, CUSTODIAN OF THE INTERNET: PLATFORMS, CONTENT MODERATION, AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA 213 (2018) (arguing that section 230 was an "enormous gift to the young Internet industry"); *cf* Christopher Cox, *The Origins and Original Intent of Section 230 of the Communications Decency Act*, J. O. L. T. para 61 (Aug. 27, 2020) (arguing that the protection of an infant industry is a "creation myth" of section 230).

[50] Stratton Oakmont v. Prodigy Services Co., 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 24, 1995) (finding Prodigy, a bulletin board operator, liable for a third party defamatory statement because it had engaged in content moderation and so assumed control over its site).

[51] Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991).

[52] Cox, *supra* note 49, para 28; *see also*: The PACT Act and Section 230: The Impact of the Law that Helped Create the Internet and an Examination of Proposed Reforms for Today's Online World: Hearing Before the Subcomm. on Communications, Technology, Innovation, and the Internet, U.S. Senate Comm. on Commerce, Science, and Transportation (testimony of Chris Cox, Former U.S. Rep. Chris Cox (July 28, 2020), https://bit.ly/3FwFf8X (explaining that Section 230 eliminated the moderator's dilemma).

[53] JEFF KOSSEFF, THE TWENTY-SIX THAT CREATED THE INTERNET (2019) (reflecting on the profound impact of section 230 on the evolution of the internet).

and given platforms, as one judge observed, a "carte blanche immunity for wrongful conduct"[54] in an unmistakable "mission creep."[55] However, in the first place Section 230 gives platforms a carte blanche to moderate or govern as they please. Given its quasi-constitutional dimension, section 230 has been called the "Magna Carta of the Internet."[56] – although the comparison fails in so far as Magna Carta replaced the absolute rule of the King with the rule of law,[57] whilst section 230 removes the rule of law in cyberspace in favour of the rule of platforms.[58]

This platform rule has triggered a rising tide of discontents,[59] as platforms have used their freedom to pursue their own commercial interests, often at public expense.[60] Rather than engaging in the socially beneficial behavior of making illegal or harmful content less accessible, their highly profitable recommender algorithms have had the effect of amplifying dangerous, divisive and extremist content with deleterious effects on the most vulnerable members of society and on collective welfare by exacerbating polarization, stirring up hate, violence, political unrest, harassment and criminal behavior.[61] Consequently, the immunities regime, which has remained in place virtually unchanged since its inception, has come under scrutiny.[62] So far it has emerged from that scrutiny fully intact.

2. Platforms as "Neutral" Actors? The Innocent Messenger

The Supreme Court had the opportunity to review the scope of section 230 in *Gonzalez* in which the families of the victims of the terrorist attacks in Paris brought an action against Google (as well as Facebook and Twitter in parallel suits), [63] arguing that the platforms had supported ISIS' acts of international terrorism by allowing "ISIS to post videos and other content to communicate the terrorist group's message, to radicalize new recruits, and to generally further its mission,"[64] By pairing targeted recommendations with advertising, the platforms had also

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[54] Doe v. America Online, Inc.,783 So.2d 1010, 1019 (Fla. 2001) (Lewis , J. dissenting)
[55] Force v. Facebook, Inc., 934 F.3d 53, 80 (2d Cir. 2019).
[56] Alan Z. Rozenshtein, *Section 230 and the Supreme Court: Is Too Late Worse Than Never?*, LAWFARE (Oct. 20, 2020), https://www.lawfareblog.com/section-230-and-supreme-court-is-too-late-worse-than-never.
[57] Jesús Fernández-Villaverde, *Magna Carta, the Rule of Law, and the Limits on Government*, 47 INT. REV.L.ECON. 22, 23 (2016) (documenting how Magna Carta delivered procedures to replace the whim of the King)
[58] *See* calls for a Magna Carta for platforms, *see e.g.* Kai Zhu ET AL., *Is It Time for a Platform Magna Carta?* (March 3, 2022) https://ssrn.com/abstract=4083494. More generally for reform of platform governance, *see e.g.* Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87 (2016) (arguing for a new framework for regulating platforms that takes inot account their business models and internal logic); Gregory M. Dickinson, *The Internet Immunity Escape Hatch*, 47 BYU L. REV. 1435, 1471 (2022) (arguing that reform of section 230 need not come from Congress but could be spearheaded by the judiciary); Tomer Kenneth & Ira Rubenstein, *Gonzalez v. Google: The Case for Protecting "Targeted Recommendations"*, 72 DUKE LAW J. ONLINE 176 (2023) (arguing for denying the benefit of section 230 for some but not all recommendation algorithms); Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM LAW. REV. 401 (2017); Jason A. Gallo & Clare Y. Cho, *Social Media: Misinformation and Content Moderation Issues for Congress*, CONG. RSCH. SERV., R46662 (Jan. 27, 2021) (listing the section 230 reform proposals introduced in the 116th Congress); Chris Riley & David Morar, *Legislative Efforts and Policy Frameworks within the Section 230 Debate*, BROOKINGS (Sept. 21, 2021) https://www.brookings.edu/articles/legislative-efforts-and-policy-frameworks-within-the-section-230-debate/.
[59] *Id.*
[60] *See infra* Part II.A.3. For a general description, *see* e.g., Cohen, *supra* note 1, 148-53.
[61] *See infra* Part II.A.3.
[62] For the only reform of Section 230, *see* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) which has created an exemption from the immunity from civil or criminal liability for online sex trafficking. *See supra* note 58 on the reform proposals generally.
[63] *See supra* note 32.
[64] *Gonzalez*, 2 F.4th at 880.

profited from that amplification - a profit which they then shared with ISIS in line with their normal business models.[65] The families' claims rested on the Anti-Terrorism Act (ATA) as amended by the Justice Against Sponsors of International Terrorism Act 2016 (JASTA) which introduced secondary civil liability for "aiding and abetting international terrorism."[66] Although the Supreme Court accepted the case for review, it eventually decided not to review section 230 after all, on the ground that the complaint "appears to state little, if any, plausible claim for relief."[67] In light of its decision in *Taamneh* where, according to the Court, the complaint had failed to state a viable claim for "aiding and abetting international terrorism,"[68] the "materially identical" claim in *Gonzalez* was also likely to fail on the same ground. The Court shied away from a review of section 230 arguably because it would have threatened to upend the business model of platforms based on targeting recommendations accompanied by adverts and to lead to "a vast change in the functioning of social media as newly cautious platforms sharply limited what they allowed on their services."[69]

For the time being, cyberspace will remain subject to traditional legal orthodoxy on section 230 as upheld by the Ninth Circuit in *Gonzalez*.[70] The immunity stands as long as the platform can show that it is "neutral" vis-à-vis the content it transmits. "Neutrality" has crystalized as the touchstone for distinguishing between "deserving" intermediaries and "undeserving" primary content providers which, according to section 230, are those "*responsible*, in whole or in part, for the *creation or development* of [the wrongful] information…"[71] The line between content creators and intermediaries is necessarily blurred as intermediation has (always) some effect on the message.[72] Yet, according to established authority, an intermediary will forgo the benefit of the immunity *only* where it "contributes materially to the alleged illegality of conduct,"[73] or

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[65] *Id*.

[66] JASTA amended ATA by introducing secondary civil liability for aiding and abetting international terrorism, to supplement the existing direct civil liability in 18 U.S.C. § 2333 (informed by standard tort principles as distinguishable from criminal liability: *Boim v. Holy Land Found. For Relief & Dev.*, 549 F.3d 685, 692-95 (7th Cir. 2008)).

[67] *Gonzalez*, 598 U.S. at 622.

[68] *Taamneh*, 598 U.S. at 30.

[69] Scot R. Anderson ET AL., *The Supreme Court Punts in Section 230*, LAWFARE (May 19, 2023) https://www.lawfareblog.com/supreme-court-punts-section-230. *See also* Brief for the Chamber of Commerce of the US as Amicus Curiae Supporting Respondents at 24-30 , Gonzalez v. Google LLC 598 U.S. 617 (2023) (No 21-1333) [hereinafter Brief for Chamber of Commerce]; Brief of Google LLC in Opposition at 22 Gonzalez v. Google LLC, 598 U.S. 617 (2023) (No 21-1333) ("This Court should not lightly adopt a reading of section 230 that would threaten the basic organizational decisions of the modern internet.")

[70] *Gonzalez*, 2 F.4th at 891-97.

[71] 47 U.S.C. § 230(f)(3): "Information content provider. The term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *See e.g.*, Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1172 (9th Cir. 2008) (distinguishing between "providing neutral tools" from "materially contributing" to the alleged unlawfulness); Marshall's Locksmith Serv. v. Google, LLC, 925 F.3d 1263, 1271 (D.C. Cir. 2019) (as the algorithms were neutral tools, Section 230 immunity ensued).. Some commentators have argued that neutrality has no textual basis in section 230; *see e.g.* Brief for Lawyers' Committee for Civil Rights under Law and Five Civil Rights Organizations as Amicus Curiae for Neither Party, at 14-19, Gonzalez v. Google LLC, 598 U.S. 617 (2023) (No 21-1333) [hereinafter Brief for Lawyers' Committee for Civil Rights].

[72] *See e.g.* Brief for Chamber of Commerce, *supra* note 69, at 25 (arguing that the necessary organisation of content by a platform inevitably "conveys an implied message"); Marshall's Locksmith Service v. Google, 925 F.3d 1263 (D.C. 2019) (where the platform had to "translate" the third-party input of location into picture form but were still "neutral"). *See also* MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN, 3-18 (1964) (on why, counterintuitively, "the medium is the message").

[73] *Roommates.com*, 521 F.3d at 1168 (9th Cir. 2008) (where the platform provided discriminatory preferences boxes advertising rooms for rent); FTC v. LeadClick Media, LLC, 838 F.3d 158, 176 (2d Cir. 2016) (where the platform

"enhance[s] the…[illegal] sting of the message,"[74]Although targeted recommendations, as at issue in *Gonzalez,* have a significant effect on the visibility and effectiveness of the recommended content, the Ninth Circuit held that the amplification of ISIS messages by Google's targeted recommendations did not undermine its neutrality given that its algorithms treated ISIS content like any other third-party content and did not "materially contribute" to its unlawfulness.[75]

The Supreme Court used much the same reasoning when it reversed the Ninth Circuit on the substantive claim of "aiding and abetting international terrorism" in *Taamneh v Twitter.*[76] Whilst the Ninth Circuit had found that Google's profit-sharing arrangement was not barred by section 230, the secondary liability was on the facts not viable. Although Google had *knowingly* assisted ISIS, i.e. there had been "numerous reports from news organizations that Google placed adverts on ISIS videos,"[77] its assistance of the terrorist attacks had been *too insubstantial* to reach the required threshold.[78] For the Supreme Court that interpretation went too far as "[it] would effectively hold any sort of communications provider liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them."[79] According to the Supreme Court, platform culpability required more:

> The mere creation of those platforms… is not culpable. To be sure, it might be that bad actors like ISIS are able to use platforms like defendants' for illegal—and sometimes terrible—ends. But the same could be said of cell phones, email, or the internet generally… Viewed properly, defendants' "recommendation" algorithms are merely part of that infrastructure. All the content on their platforms is filtered through these algorithms, … [which] *appear agnostic as to the nature of the content*, matching any content (including ISIS' content) with any user who is more likely to view that content. The fact that these algorithms matched some ISIS content with some users thus does not convert defendants' *passive* assistance into active abetting.[80]

The Supreme Court - much like the Ninth Circuit Court in the "neutrality" context - fastened onto the idea that a platform is beyond reproach when its algorithm treats all content the same

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"developed" third-party content by giving instructions on editing "fake news"); *but see* Kimzey v. 13 Yelp! Inc., 836 F.3d 1263, 1269 (9th Cir. 2016) (section 230 was available where the platform had merely transformed negative reviews to conform to its star-rating system).

[74] *Roommates.com*, 521 F.3d at 1172, citing with approval *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003) and clarifying Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003). For an alternative formulation of the test, see FTC v. Accusearch Inc., 570 F.3d 1187, 1199 (10th Cir. 2009) (where the platform was held to have "knowingly… transform[ed] virtually unknown information into a publicly available commodity" here, the publication and sale of personal data obtained illegally by the third party providers).

[75] *Gonzalez*, 2 F.4th at 894.

[76] *Taamneh*, 598 U.S. at 27-29 (noting in particular, the need for (a) a nexus between the "substantial assistance" of the alleged aider and the particular terrorist attached; (b) the aider's knowledge beyond "some general awareness;" and (c) some "culpable conduct of defendants directed toward ISIS.")

[77] *Gonzalez*, 2 F.4th at 903; 904-05 (on the foreseeability requirement and the knowledge requirements).

[78] *Gonzalez*, 2 F.4th at 905-07 (on the substantiality requirements).

[79] *Taamneh*, 598 U.S. at 5.

[80] *Taamneh*, 598 U.S. at 23 (emphasis added); Jack Hoover, *For Better or Worse, the Supreme Court Rewrote JASTA*, LAWFARE (May 25, 2023), https://www.lawfareblog.com/better-or-worse-supreme-court-rewrote-jasta (arguing that the Supreme Court replaced the test for "aiding and abbeting" in Halberstam v. Welch, 705 F. 2d 472 (1983) with the test of "conscious, voluntary, and culpable participation in another's wrongdoing" based on the common law).

regardless of its nature (see further Part II.A.3). Yet, it did so at a level below the section 230 immunity, and so effectively created a double insulation for platforms.

3. Platforms as Quasi-Public Actors? The Powerful Ruler

Whereas the above controversy centred on whether platforms are *neutral* infrastructure providers and therefore deserving of the immunity, platform content moderation has also come under scrutiny by challenging their status as *private* actors. Are they not quasi-public actors on whom constitutional restraints ought to be imposed?[81] Should their content moderation be protected speech under the First Amendment as "editorial discretion", or is it in fact a form of "censorship" against which the First Amendment provides a shield? Notably, the First Amendment provides another shield that protects platform autonomy.[82] Whilst in *Gonzalez v Google LLC* the platforms were brought before the courts for their *failure* to effectively moderate terrorist content, legislation in various US states has sought to stop or restrict their content moderation.[83] The Florida Bill S.B. 7072: Social Media Platforms[84] attempted to counter the alleged "biased silencing" by social media platform by prohibiting them from "deplatforming, deprioritizing, or shadow-banning candidates regardless of how blatantly or regularly they violate a platform's community standards and regardless of what alternative avenues the candidate has for communicating with the public."[85] Meanwhile, Texas' House Bill 20[86] seeks to prevent platforms from "censoring" user expression based on their viewpoint, and thereby extends the obligation of non-discrimination applicable to "common carriers", such as communication and transport providers, to them.[87] It defines "censor" broadly as "block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression."[88] The Bill substantially restricts a liberty given in section 230, namely the right to block and screen objectionable material "whether or not such

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[81] *See infra* Part III.C.2. *See also*, e.g., Frank Pasquale, *Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power*, 17 THEORETICAL INQUIRIES IN LAW 487 (2016) (reflecting on the position of platforms as speakers and enablers of speech).

[82] On the overlap, *see e.g.* Cary Glynn, *Section 230 as First Amendment Rule*, 131 HARV. LAW REV. 2027 (2018); Eric Goldman, *Why Section 230 Is Better than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTIONS 33 (2019), and the discussion *infra* Part III.C.

[83] *See e.g.* Chris Riley & David Morar, *Legislative Efforts and Policy Frameworks within the Section 230 Debate*, BROOKINGS (Sept. 21, 2021), https://www.brookings.edu/articles/legislative-efforts-and-policy-frameworks-within-the-section-230-debate/

[84] 2021 Fla. Sess. Law Serv. Ch. 2021-32 (S.B. 7072) (West) (codified at Fla. Stat. §§ 106.072, 287.137, 501.2041, and 501.212); NetChoice, LLC v. Attorney General of Florida, 34 F.4th 1196 (11th Cir. 2022) (upheld an injunction that suspended the Bill as it violated the First Amendment right of private platforms to moderate content on their domains), *cert. granted*, 2023 WL 6319654 (U.S. Sept. 29, 2023) (No. 22-277).

[85] NetChoice, LLC v. Attorney General of Florida, 34 F.4th 1196, 1229 (11th Cir. 2022) (commenting on §§106.072(2) and 501.2041(2)(h) of S.B. 7072).

[86] Tex. Bus. & Com. Code § 120, and Tex. Civ.Prac. & Rem.Code §143A.002. *See also*, NetChoice, LLC v. Paxton, 49 F.4th 439, 494 (5th Cir. 2022) (upheld the Bill), *cert. granted*, 2023 WL 6319650 (U.S. Sept. 29, 2023) (No. 22-555).

[87] *Paxton*, 49 F.4th at 469. *See also*, Benjamin F. Jackson, Censorship and Freedom of Expression in the Age of Facebook, 44 N. M. L. REV. 121, 127 (2014) (arguing for First Amendment protection against social media censorship); Vera Eidelman, *Facebook Shouldn't Censor Offensive Speech*, ACLU (July 20, 2018), https://www.aclu.org/news/free-speech/facebook-shouldnt-censor-offensive-speech (arguing that Facebook moderation should broadly follow First Amendment standards and not go beyond it).

[88] Tex. Civ.Prac. & Rem.Code §143A.002(a): '"Censor" means to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression.'

material is constitutionally protected." [89] Significantly, the point of departure for Florida's and Texas' legislation was not that platforms are *neutral* infrastructure providers and so rightly legally invisible but rather that they are powerful *de facto* governors that ought to be subject to constitutional restraints. Despite the apparent tension between these two perspectives, they are two sides of the same coin: the grant of an immunity means autonomy or self-governance, and so is implicitly a grant of *unchecked* power.[90]

Why then have platforms been granted this extraordinary autonomy? Assuming that their immunity is not wholly unprecedented and shows some continuities with the past, the next two sections map its possible antecedents in either the "Good Samaritan" immunity of private actors, or in right-to-rule immunities bestowed on governmental actors. It is the latter, not the former, that emerges as the more compelling forebear.

B. Private Actor Immunities: "Good Samaritans" and section 230 CDA

1. The Costs of Section 230

Immunities for private actors are relatively rare and narrow because any immunity challenges the rule of law in a number of ways. *First,* an immunity does not simply entail that an actor is not liable under a legal regime but signals their exit from a regime that *is* applicable to everyone else.[91] Typically, section 230 has generated "a rift between the law applicable to online versus offline entities by barring some victims from seeking recovery merely because the defendant happens to operate online."[92] Offline industries have to absorb potential liabilities and the cost of safety measures as a normal cost of doing business, whilst online businesses can hide behind the immunity. This is consistent with the discriminatory effect of an immunity; it creates an exemption from a rule for some, but not others. It thus clashes with demands of formal justice which requires that like cases must be treated alike, with costs for the actual or perceived fairness of a legal system.[93]

Second, an immunity also entails a denial of the right of others who will not be able to assert a right which would be available but for the immunity.[94] Once again, this shines through the grievances about section 230 and its wide judicial interpretation: "What was enacted as a narrow protection from defamation liability has become an all-purpose licence to exploit and

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[89] 47 U.S. Code § 230(c)(2)(A). The Bill is premised on the idea that the freedom given to platforms by section 230 is circumscribed by their obligations under the First Amendment as "common carriers." *Paxton*, 49 F.4th at 469.
[90] See *infra* Part I.C.; *see also* Klonick, *supra* note 1;
[91] Zeran v. America Online, Inc. 129 F.3d 327, 330 (4th Cir. 1997) ('By its plain language § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third party user of the service….'); Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 254-55 (4th Cir. 2009) ("Section 230 immunity, like other forms of immunity, is generally accorded effect at the first logical point in the litigation process. As we have often explained in the qualified immunity context, "immunity is an *immunity from suit* rather than a mere defense to liability."') See also Herstein, *supra* note 13, at 41 ("Immunities allow individuals to act without the shadow of liability, that is, free of retaliation, coercion, sanction or interference through the exercise of legal power.") Contrast, Cox *supra* note 49 (suggesting that section 230 is not designed to protect against actual wrongdoing).
[92] Dickinson, *supra* note 58, 1471.
[93] Herstein, *supra* note 13, 43 (noting, for example, the frequent availability of residual remedies where an absolute immunity, e.g. presidential immunity, would bar liability for damages).
[94] An immunity for one person translates into a disability for another: Hohfeld, *supra* note 35, 32.

profit from third-party conduct, with ordinary people… left to pay the price."[95] Given that section 230 '"immunize[s] internet companies from nearly all forms of private liability,"[96] including under foreign law if the case is brought in the US,[97] it has "almost completely prevented people from holding internet companies accountable for harms, even when those harms were facilitated or caused by the internet platforms."[98] It is, of course, a standard incident of an immunity that it forecloses accountability for *actual* wrongdoing with potentially substantial costs for individuals and society at large.[99] The Supreme Court's determined finding in *Taamneh* (and then *Gonzalez*) that there was no viable substantive claim against the platforms and thus no need for invoking the safe habor of section 230, speaks to the sensitivity of an immunity as an absolution from actual wrongdoing, particularly in the case of highly damaging content like terrorist propaganda.

Third, an intermediary immunity in particular, deprives government of an effective enforcement strategy. Intermediaries can be, and *are* routinely, relied upon as gatekeepers to exercise control over end-users in innumerable domains, including banking, consumption, employment or education.[100] Thus an immunity, like section 230, carries high regulatory costs by removing a highly efficient regulatory strategy.

Finally, apart from these justice and rights-based and regulatory costs, the real controversy surrounding section 230 arises out of the fact that the immunity has led to profound changes in the communicative strata to which it applies. In other words, the immunity has not left the to-be-regulated space intact, but for the "Good Samaritan" interventions by platforms. Quite the reverse, the liberty granted has enabled and encouraged platform business models that seek to attract and amplify, rather than suppress, the problematic content that is in the purview of section 230.[101] While this may be more blatant for sites that build their business around nastiness, like revenge porn, "dirty" gossip, or incel platforms, the same dynamics are at play

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[95] Brief for the States of Tennessee et al., as Amicus Curiae Supporting Petitioners at 1, Gonzalez v. Google LLC, 598 U.S. 617 (2023) (No 21-1333) [hereinafter Brief for States of Tennessee ET AL.].
[96] *Id* at 15.
[97] Cohen v. Facebook, Inc., 252 F. Supp. 3d 140, 160 (n14) (E.D.N.Y. 2017), *aff'd in part, dismissed in part sub nom.* Force v. Facebook, Inc., 934 F.3d 53 (2d Cir. 2019).
[98] Brief for States of Tennessee ET AL., *supra* note 96, at 9 [internal marks and emphasis omitted].
[99] *See infra* note 101 and accompanying text.
[100] Kraakman, *supra* note 12; see also Peter P. Swire, *Of Elephants, Mice, and Privacy: International Choice of Law and the Internet*, 32 INTERNATIONAL LAWYER 991, 1015-1024 (1998) (arguing that as a matter of regulatory strategy, it is far easier to target a few large actors as gatekeepers than innumerable small ones).
[101] *See infra* Part II.A.3.; *see also e.g.*, Danielle Keats Citron & Benjamin Wittes, *The Problem Isn't Just Backpage: Revising Section 230 Immunity*, 2 GEO. L. TECH. REV. 453, 467 (2018) ("Blanket immunity fosters irresponsible behavior, such as setting up sites for the purpose of causing others to suffer severe embarrassment, humiliation, and emotional distress."); Sam Bayard, *New Jersey Prosecutors Set Sights on JuicyCampus*, DIG. MEDIA. L. PROJECT (Mar. 21, 2008) http://www.dmlp.org/blog/2008/new-jersey-prosecutors-set-sights-juicycampus; Charlie Warzel, *Big Tech Was Designed to Be Toxic*, NEW YORK TIMES (Apr. 3, 2019) ("[T]hese platforms *were* intentionally designed to keep you glued to your screen for one more video, one more retweet, one more outraged share of a hate read."); Brief for the National Police Association, Inc. and National Fallen Officer Foundation as Amicus Curiae Supporting Petitioners, Gonzalez v. Google LLC, 598 U.S. 617 (2023) (No 21-1333) (on the societal effects of social media in terms of fuelling radicalization, violence, and hate crime); CARRIE GOLDBERG, NOBODY'S VICTIM: FIGHTING PSYCHOS, STALKERS, PERVS AND TROLLS (2019) (on the human costs of the decision of some platforms not to intervene); Liu, T. Pinar Yildirim, Z. John Zhang, *Implications of Revenue Models and Technology for Content Moderation Strategies*, 41 MARKETING SCIENCE 831 (2022) (showing the effects of the revenue model of a site on its interest in content moderation); Neil W. Netanel, *Applying Militant Democracy to Defend Social Against Media Harms*, 48 CARDOZO LAW REV. 102 (2023).

for generalist platforms, as illustrated by *Gonzalez* and *Taamneh*.[102] It is *this* that has turned the focus on platform processes, their recommender algorithms, and their compatibility with the immunity. For present purposes, the question is whether the significant individual and collective costs of section 230 can reasonably be explained and justified against its characterisation as a "Good Samaritan" immunity which normally acts as a tightly circumscribed immunity for private actors.

2. Platforms as Good Samaritans?

Section 230 is entitled 'Protection for "Good Samaritan" blocking and screening of offensive material' and so ostensibly draws on the traditional Good Samaritan immunity which protects private individuals who voluntarily provide emergency (medical) care to injured parties from civil liability for negligent acts or omissions arising from that care.[103] This private actor immunity is designed "to encourage prompt emergency care by granting immunity from civil damages and removing the fear of liability…"[104] In this respect there are continuities with section 230 which also seeks to encourage prompt interventions by platforms uninhibited by a fear of potential collateral liability arising from such editing activities. Yet, here the similarities already end.

Traditionally Good Samaritans are as trained and untrained bystanders protected from liability in respect of their voluntary interventions in emergencies when better professional help is not at hand.[105] In contrast, section 230 promotes routine, rather than emergency, interventions by online intermediaries often as the most capable interveners with effective technological tools at their disposal.[106] In that sense, they are far more akin to the final professional end-point rather than the bystander caught in an emergency. Indeed, as section 230 envisages platform intervention when government itself could not intervene due to First Amendment restraints,[107] intermediaries may well be the *only* source of intervention.[108]

Furthermore, the traditional Good Samaritan immunity applies *only* where there is no pre-existing duty to render assistance,[109] whilst section 230 removes not just the threat of liabilities flowing from *voluntary* interventions, but – according to judicial interpretation – also from

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[102] *Id.*
[103] Danny R. Veilleux, *Construction and Application of "Good Samaritan" Statutes*, 68 A.L.R. 4TH 294 (orig. publ. 1989).
[104] McMillan, *supra* note 21, at 560.
[105] *See, e.g.*, Wis. Stat. § 895.48(1): "Any person who renders emergency care at the scene of any emergency or accident in good faith shall be immune from civil liability for his or her acts or omissions in rendering such emergency care." *See also e.g.* Muller v. McMillan Warner Insurance Co., 714 N.W.2d 183 (Wise. 2006); Gragg v. Neurological Associates, 263 S.E.2d 496 (Ga. Ct. App. 1979); Lewis v. Soriano, 374 So.2d 829 (Miss. 1979). See also, Barry W. Szymanski, *The Good Samaritan Statute: Civil Liability Exemptions for Emergency Care*, 80 WIS. LAW. 10 (2007).
[106] For the exclusivity of platform intervention, *see* 47 U.S. Code § 230(b)(2): "It is the Policy of the United States… to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered* by Federal or State regulation." (emphasis added) The expectation of technological tools, shines through § 230(a)(2): "These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops."
[107] *See infra* Part III.B.
[108] Even where liability regimes (against the primary wrongdoer) are available, intermediary intervention is often the more realistic and effective avenue for protecting rights. *See* Kraaakman, *supra* note 12.
[109] McMillan, *supra* note 21, 558.

existing duties *requiring* interventions, i.e. distributors' liability based on notice.[110] Platforms are protected for omissions where standard law would have required intervention, i.e. when, as in *Gonzalez,* they are aware of the harmful content but fail to intervene, or fail to do so promptly.[111] Taking it a step further, the Good Samaritan immunity is never available where the Samaritan created, or helped to create, the very emergency in which she rendered assistance,[112] whereas in *Gonzalez* and like cases the platforms algorithms contributed, through amplification, to the very "emergency" to which they are meant to respond.[113] Still, amplification does not deprive platforms of the safe habor of section 230. If section 230 was concerned with Good-Samaritan-like interventions, these added atypical protections would be counterproductive. If, however, section 230 was intended to deliver a new settlement of governing competencies, then its expansive interpretation becomes intelligible as the principled demarcations of that competence (*see infra* Part III.B.).

The most compelling objection to section 230 being a Good-Samaritan-like immunity is that corporate platforms are by their very nature, i.e. their profit-maximising orientation, unlikely to be *Good* Samaritans. Their content interventions are not driven, and possibly cannot be driven, by the selfless motivation of a Good Samaritan, but by commercial imperatives, which may or may not demand the wholesomeness of the site.[114] This profit-orientation also means that their content moderation is not as easily discouraged as wholly selfless interventions could be, and thus less in need of an immunity.[115] Whilst selflessness is often incorporated into Good Samaritan statutes through a requirement that the Samaritan must not expect to be paid,[116] the broader point is that profit-driven behavior is not *a priori* worthy of protection from standard liability analogous to Good Samaritan interventions. It may well command protection for its own good reasons, but not under the Good Samaritan label.

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[110] *Zeran v. Am. Online*, 985 F. Supp. 1124, 1133 (E.D. Va. 1997) (holding that "distributor" liability, or the liability for knowingly distributing wrongful material, was merely a species of "publisher's" liability); for a critique of this reading of section 230, *see e.g.* Brief for American Association of Justice as Amicus Curiae Supporting Petitioners at 5-21, Gonzalez v. Google LLC, 598 U.S. 617 (2023) (No 21-1333) [hereinafter Brief for American Association of Justice] ; *see also* e.g. Dickinson, *supra* note 58, 1444-1447 (on the wide variety of claims from which platforms are insulated, including non-publication claims, such as product or unfair competition claims).

[111] *See supra* note 77 and accompanying text. *See also* Dickinson, *supra* note 58, 1444 (on the various instances when section 230 was successfully invoked as a bar to claims against platform when they had *knowingly* facilitated wrongdoing). Doe v. Am. Online, Inc., 783 So. 2d 1010, 1011–12, 1018 (Fla. 2001) (Section 230 barred action against AOL for violating Florida statutes prohibiting distribution of child pornography despite allegation that AOL was aware that a particular user of its service was transmitting unlawful photographs but declined to intervene)

[112] Veilleux, *supra* note 103, Part III §7 ('Requirement that "emergency" not be created by person rendering treatment').

[113] *See e.g.* Brief for the Cyber Civil Rights Initiative and Legal Scholars as Amicus Curiae Supporting Petitioners at 6, Gonzalez v. Google LLC, 598 U.S. 617 (2023) (No 21-1333) [hereafter Brief for Cyber Civil Rights Initiative] ("Lower courts have wrongly read Section 230 to award ICSPs unconditional immunity from liability no matter how passive they remain… or even how actively they may promote or profit from that harm… It makes Section 230 incomprehensible as a Good Samaritan law."). Note this point (about contributing to the "emergency" through amplification) is separate from the issue as to whether their conduct reached the threshold for secondary liability.

[114] *See supra* note 101 and *infra* Part II.A.3.

[115] The immunities are premised on the debatable assumption that the law, as it stood, would discourage content moderation by intermediaries; *but see e.g.* Douek *supra* note 7, at 605 ("Faced with a regulatory framework they disliked, the argument goes, platforms would simply stop regulating speech on their platforms. In theory, this is a plausible argument. In practice, however, this objection falls away pretty quickly. The level of content moderation that platforms are legally required to perform is minimal, true. But this only proves the point: almost all existing content moderation is voluntary and yet there is plenty of it.")

[116] Veilleux, *supra* note 103, Part I.§2[a] ('Good Samaritan statutes often require the person providing the emergency care to do so in good faith and without expecting payment for the assistance in order to qualify for the statutory immunity').

C. Right-to-Rule Immunities and section 230: Gifts with Strings Attached

A more promising avenue for explaining the grant of the sweeping immunity to platforms, and its maintenance despite its significant societal costs, may be found in those types of immunities, which are justified by their governing purposes.[117] This kind of immunity acts, in Hohfeldian terms, as a second-order right in support of a first-order right-to-rule claim – generally made by government in the form of the claim that "citizens have a legal duty to obey the prescriptive or proscriptive laws which it enacts."[118] Right-to-rule claims may require immunities to facilitate their effective implementation; so there is "a wide range of legal immunities that may be invoked in the name of the right to rule… as necessary protection for the officers of the state in the rightful pursuit of their duties."[119]

1. The Right-to-Rule Immunity of Judges

A classic right-to-rule immunity is the immunity of judges which protects them in their judicial capacity from the threat of civil liability for compensation by disgruntled litigants:[120] Although historically the judicial immunity arose as a corollary of the maxim that the "king can do no wrong" and neither could his delegates for dispensing judgment,[121] the immunity has persisted to ensure judges are "at liberty to exercise their independent judgment about the merits of a case without fear of being mulcted for damages…[by] an unsatisfied litigant…"[122] This immunity seeks to promote fair and principled decisions (judges should be able to follow their own convictions free from the fear of personal liability),[123] and also protects the finality of judgments other than by way of appeal.[124] For present purposes, it is significant that the autonomy or self-governance conferred on judges by the immunity is grounded in the imperative of fair and principled decisions. This justification in turn imposes a good faith restraint on the exercise of their otherwise unfettered autonomy in the decision-making.[125] Thus, self-governance as a low-

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[117] DUDLEY KNOWLES, POLITICAL OBLIGATIONS: A CRITICAL INTRODUCTION 25 (2010) (applying Hohfeld's categorisation to governmental right to rule claims). See also, McMillan, *supra* note 21, at 542-555 for a succinct summary of judicial prosecutorial and legislative immunity. Also under international law, diplomatic immunity, immunity of the head of state.

[118] KNOWLES, *id*. at 26; *see also* David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AM. POLIT. SCI. REV. 139, 141 (2013) (noting Max Weber's observations that "managers, no less than government officials, are understood to have a right to rule within their jurisdiction, and their subordinates to have a reciprocal duty to obey.")

[119] KNOWLES, *id*. at 26.

[120] Bradley v. Fisher, 80 U.S. 335, 347 (1871) ("a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself"); *see also* Pierson v. Ray, 386 U.S. 547 (1967); Stump v. Sparkman, 435 U.S. 349 (1978); J. Randolph Block, *Stump* v. *Sparkman and the History of Judicial Immunity*, *1980* DUKE L.J. 879 (1980). For exceptions, e.g., Douglas K. Barth, Note, *Immunity of Federal and State Judges from Civil Suit-Time for a Qualified Immunity?*, 27 CASE W. RES. L. REV. 727 (1977); Margaret Z. Johns, *A Black Robe Is Not a Big Tent: The Improper Expansion of Absolute Judicial Immunity to Non-Judges in Civil-Rights Cases*, 59 SMU L. Rev. 265 (2006).

[121] McMillan, *supra* note 21, at 544.

[122] Dennis v. Sparks, 449 U.S. 24, 31 (1980).

[123] McMillan, *supra* note 21, at 546.

[124] McMillan, *supra* note 21, at 547.

[125] Note Herstein *supra* note 13, at 39 (arguing that the duty persists despite the immunity which only takes away its legal enforcement mechanism: "even though the right-holder is under a duty (ie lacks a privilege) not to [commit the legal wrong], others still lack the power to alter the wrongdoer's legal rights in order to practically curtail, normatively disable, deter or directly enjoin the wrongdoer's freedom…")

order concept denoting an unfettered freedom or full autonomy is transformed into self-governance as a higher-order concept that looks to decision-making aligned with the governing purpose behind the immunity, that is fair and principled decisions. More concretely, a judge who uses the immunity to make a decision for her personal benefit violates the underlying premise of the grant. There may not be a remedy for that violation, given that the immunity itself forecloses standard legal remedies, and residual remedies are reserved for very serious transgressions.[126] Still, the absence of a remedy does not affect the normative expectation that judicial autonomy ought to be exercised, as a matter of good faith, with fairness and legal principle as overriding imperatives.

2. Section 230 as a Right-to-Rule Immunity?

This right-to-rule type of immunity chimes with the governing rationale of section 230. Congress did not simply seek to protect a fledging industry from a flood of potential claims,[127] but was concerned with creating an effective self-governing environment within which intermediaries would play a key role.[128] The freedom *from* liability would give them the freedom *to* take the action, as and when needed, and encourage the creation of innovative technologies to protect the vulnerable, especially children. According to its preamble, section 230 seeks "to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet"[129] and "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material."[130] The governing purpose is the primary rationale of section 230.[131] It is not for nothing that the section's overall title is "Protection for private blocking and screening of offensive material." Active moderation was the primary goal, but inactivity also required protection to balance the incentives:

> Congress recognized that merely immunizing an ICS provider's decision to take down content, without providing any protection for a decision to leave other content up, could create perverse incentives that could chill legitimate expression. Without some

[126] For unsuccessful challenges to the impeachment of federal judges, see e.g. Nixon v. United States, 938 F.2d 239 (1991) (impeachment for perjury); Hastings v. United States, 802 F. Supp. 490 (D.D.C. 1992) (impeachment for soliciting and accepting a bribe). Despite the immunity, a judge may be held criminally responsible for fraudulent or corrupt behavior, *see e.g.* Braatelien v. United States, 147 F.2d 888 (8th Cir. 1945). See also, Associated Press, *Two Pennsylvania judges ordered to pay $200m to kids-for-cash scandal victims*, THE GUARDIAN (Aug 17, 2022). https://www.theguardian.com/us-news/2022/aug/17/pennsylvania-judges-kids-for-cash-damages-ciavarella-conahan

[127] Dickinson, *supra* note 58, at 1441 ("[to] shield online entities from an economically crippling duty to moderate the content flowing through their system"); 47 U.S.C. § 230(b)(2)("to preserve the vibrant and competitive free market."); but see Brief for American Association for Justice, *supra* note 109, at 7 (noting that the protective judicial approach has continued even though "providers of interactive computer services are no longer fledgling and fragile enterprises in need of government subsidy at the expense of the victims of harmful online speech.")

[128] *See infra* Part III.B.

[129] 47 U.S. Code § 230(b)(3).

[130] 47 U.S. Code § 230(b)(4); *see also* Brief for American Association of Justice, *supra* note 110, at 5.

[131] U.S. Dep't of Justice, *Attorney General William P. Barr Delivers Remarks at the National Association of Attorneys General 2019 Capital Forum* (Dec. 10, 2019), https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-national-association-attorneys-general ('The purpose of Section 230 was to protect the "Good Samaritan" that takes affirmative steps to police its own platform for unlawful or harmful content. Granting broad immunity to platforms that facilitate illegal conduct occurring on the online spaces they create is not consistent with that purpose.')

> protection against being held liable for everything its users posted, a provider could face pressure to over-moderate and/or under-publish content.[132]

In the early influential case of *Zeran v. America Online, Inc.*[133] the Fourth Circuit similarly understood that the purpose of section 230 was to encourage "service providers to self-regulate the dissemination of offensive material over their services"[134] and to act in place of "intrusive government regulation of speech"[135] and avert "the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium."[136] In short, for the Court section 230 implemented a new settlement of governing competencies justified by the participatory nature of the new medium. Existing civil and most criminal law had to go.

Julie Cohen has argued that "members of Congress endorsed the marketplace metaphor as the principal justification for section 230's broad grant of immunity… [as] such immunity would foster and preserve the emerging network as a vibrant marketplace of ideas."[137] In fact, Congress had the choice, or so it thought, between encouraging an "anything goes" marketplace of ideas (without the immunity)[138] *and* a marketplace of ideas overseen and regulated by intermediaries with effective content moderation policies (with the immunity). Congress chose the latter and so endorsed the First Amendment rationale of the marketplace of ideas managed by gatekeepers. Structurally this would have appeared broadly consistent with the offline mass media landscape where traditional media providers with distinct ideological profiles, such as TV or print media, compete with one another.[139] Yet, contrary to Congress' expectations, generalist platforms in fact have run most profitably with an almost "anything goes" marketplace of ideas,[140] and so have not been too concerned about their governing mandate.[141] Indeed, content moderation risks losing users to sites with no moderation: "If a platform creates a site that matches users' expectations, users will spend more time on the site and advertising revenue will increase."[142]

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[132] Brief for Free Press Action as Amicus Curiae for Neither Party at 7, Gonzalez v. Google LLC, 598 U.S. 617 (2023) (No 21-1333) (arguing for an absolute immunity for decisions to remove content, and an immunity based on notice for decisions to keep up content).
[133] Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997). *See also*, Klonick *supra* note 1, at 1604-09.
[134] *Zeran*, 129 F.3d at 331.
[135] *Zeran*, 129 F.3d at 330.
[136] *Zeran*, 129 F.3d at 330*; but see* e.g., *Gonzalez*, 2 F.4th at 921-913 ("Section 230 's sweeping immunity is likely premised on an antiquated understanding of the extent to which it is possible to screen content posted by third parties. There is no question § 230(c)(1) shelters more activity than Congress envisioned it would. Whether social media companies should continue to enjoy immunity for the third-party content they publish, and whether their use of algorithms ought to be regulated, are pressing questions that Congress should address.")
[137] Cohen, *supra* note 1, at 164.
[138] *See supra* note 115.
[139] See, for example, Rep. Gilchrest: "And with the advent of the information age, we need to recognize the need for competition among information media so that the free marketplace of idea can be communicated through a free marketplace of information outlets. This bill seeks to exploit the market's ability to maximize quality, maximize consumer choice, and minimize prices." 142 CONG. REC. H1175 (daily ed. Feb. 1, 1996).
[140] Lobel, *supra* note 58, 101-104 (describing the "everything platform"). Specialised platforms appear to be more easily implicated in third party wrongdoing, as e.g. FTC v. Accusearch Inc., 570 F.3d 1187, 1199 (10th Cir. 2009) (where the platform was held to have "knowingly… transform[ed] virtually unknown information into a publicly available commodity," here, concerning the publication and sale of personal data obtained illegally by the third party providers).
[141] *See infra* Part II.A.3. But for a comprehensive discussion of the heterogeneous nature of content moderation, *see* Douek *supra* note 7, at 539-48.
[142] Klonick *supra* note 1, at 1627.

Viewing section 230 through the lens of right-to-rule immunities reveals the centrality of its governing expectations. By extension, as in the case of judicial immunity, the low-order self-governance becomes normatively fettered by the purpose of the immunity. The platform immunity is premised on their role as "Samaritans" (Hebrew; guardians or watch-keepers) of cyberspace, both in a descriptive and normative way.[143] The immunity is a gift with strings attached.[144] This point is not undermined by the permissive language in which section 230 is expressed (intermediaries are not liable for "any action *voluntarily* taken…"[145]) given that more prescriptive language would have defeated the immunity.[146] Despite this permissiveness, platforms violate the spirit of their immunity when they fail to engage in content moderation, and do so robustly. Such blatant violation occurred, for example, in the lead-up to the January 6 attack on the Capitol when "Facebook groups swelled with at least 650,000 posts attaching the legitimacy of Joe Biden's victory… with many calling for executions or political violence"[147] and Facebook failed to intervene promptly. Yet, like any right-to-rule immunity, section 230 is subject to the intractable tension that the grant intended to create autonomy simultaneously takes away the instrument for accountability for the exercise of that autonomy. Moreover, in contrast to judicial immunity, section 230 suffers further from a lack of remedies for serious transgressions as a residual disciplining device.[148]

Such right-to-rule reading of section 230 has ramifications for its interpretation. If content governance is the rationale of the immunity, it is contradictory that "neutrality" as one of its preconditions should be interpreted as requiring, *or rather allowing*, platforms to treat all contents the same regardless of its nature, whether automatically or manually.[149] As further explored below, neutrality in this governing conception of the immunity ought to entail that platforms are not themselves invested in the content, comparable to a judicial self-interest, in a way that would compromise their mandate to govern in the public interests.[150] Otherwise, they should lose the benefit of the immunity.

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[143] *See e.g.* GILLESPIE, *supra* note 49, 207 (arguing that being a custodian of the content is the essence of platforms, their added value).

[144] GILLESPIE, *supra* note 49, at 213 (arguing that section 230 is an "enormous gift to the young Internet industry"). It may well be contested at what level that custodianship is adequately discharged, *see e.g.* Brief for Petitioner at (i), Twitter, Inc. v Taamneh ET AL. 598 U.S. 471 (2023) (No 21-1496) ("Whether a defendant that provides generic, widely available services to all its numerous users and "regularly" works to detect and prevent terrorists from using those services "knowingly" provided substantial assistance under Section 2333 merely because it allegedly could have taken more "meaningful" or "aggressive" action to prevent such use.")

[145] 47 U.S. Code § 230(c)(2).

[146] *But see*, the EU Digital Services Act 2022/2065 combines a reaffirmation of intermediary immunities (Art 4 -8) with a requirements of a governance framework (e.g. due diligence obligations); *see also* Miriam C. Buiten, *The Digital Services Act From Intermediary Liability to Platform Regulation*, 12 JIPITEC 361 (2021).

[147] Craig Silverman ET AL., *Facebook Hosted Surge of Misinformation and Insurrection Threats in Months Leading Up to Jan. 6 Attack, Records Show*, MEDIAWELL (Jan. 4, 2022). Brief for Giffords Law Center to Prevent Gun Violence as Amicus Curiae for Neither Party at 5-6, Gonzalez v. Google LLC, 598 U.S. 617 (2023) (No 21-1333) ("As online hate speech and harassment have increased, so too have hate crimes in the United States. According to the FBI, between 1996 and 2014, the number of hate crimes generally declined in the United States… Beginning in 2015, however, the number of hate crimes began to rise, with an alarming 48% increase from 2015 to 2020…There is a deadly nexus between hate-motivated violence and firearms.")

[148] *See supra* note 126.

[149] Brief for Cyber Civil Rights Initiative, *supra* note 113, at 6 ("This erroneous interpretation distorts Section 230 in several ways. It directly contradicts the statute's stated goals…"); Brief for Child USA as Amicus Curiae Supporting Petitioners at 13, Gonzalez v. Google LLC, 598 U.S. 617 (2023) (No 21-1333) [hereafter Brief for Child USA] ("To hold that Section 230 protects Google for engaging in behavior that is the opposite of that which its text expressly encompasses would be patently absurd.")

[150] *See infra* Part II.A.3

It may be objected that the construction of section 230 as a right-to-rule immunity is misguided, as platforms are not governmental actors and so not legitimate bearers of a right-to-rule immunity. Such reasoning may also be inverted: being in receipt of a right-to-rule immunity in fact confers a quasi-governmental role on platforms and so is constitutive of their public function. This argument goes to the concluding proposition of this Article, namely that platforms are hybrid private-public actors, not simply by virtue of their economic and political power over the online sphere, but by virtue of their government-granted empowerment through immunities.[151]

This brings us to Part II of the Article which introduces the corporation as an entity conceived and empowered through the grant of immunities, and so as an inherently self-governing institution, in the first instance, and as a *sui generis* hybrid public-private body, in the second place. The proposition is that platform self-governance manifests and extends the foundational logic of corporate self-governance. Whilst the debate on section 230 invariably touches on platforms as profit-driven entities, the argument here is that the corporation as a self-governing institution is central to unpacking the wider setting of section 230 and its judicial interpretation. The conceptual lineage between corporate and platform immunities/self-governance means that the discourse on platform immunities/self-governance replicates and extends the more generic one on corporate immunities and impunities**.** This corporate lineage also throws into sharp relief what makes platform governance especially challenging.

II. PLATFORM (SELF)GOVERNANCE AS AN AMPLIFICATION OF CORPORATE IMMUNITIES AND IMPUNITIES

When Hobbes spoke about corporate charters as being "not laws, but exemptions from law,"[152] he invoked the idea of immunity and its centrality to the corporate actor. Yet, he was writing about chartered corporations, the predecessors of the modern corporation, whose *raison d'être* was to govern. These corporations received their corporate status as a privilege from the Crown - a gift or donation of sovereignty[153] - in return for serving "public" purposes, such as, governing towns (the City of London Corporation or Plymouth Company), establishing universities and colleges (Dartmouth or Harvard College), overseeing trades and providing quality control (The Worshipful Company of Cordwainers), engaging in overseas ventures (British East India Company) or running colonies (Massachusetts Bay Company).[154] The corporate grant, tied to specific purposes, was accompanied by explicit governing remits and incidental privileges, such as monopoly rights, law making as well as coercive powers.[155] The charters created "bodies corporate and politic"[156] that combined business and public interests and acted with relative

[151] *See infra* Part III.C.
[152] HOBBES, *supra* note 26, at 221.
[153] HOBBES, *supra* note 26, at 221 ("Yet charters are donations of the sovereign…").
[154] See respectively for examples: the City of London Charter ("William Charter") (1067); Charter of the Plymouth Council (1620); Dartmouth College Charter (1769); Harvard Charter (1650); The Worshipful Company of Cordwainers (1439); Charter of the Colony of the Massachusetts Bay in New England (1628); and generally Daniel J.H. Greenwood, *The Semi-Sovereign Corporation*, in PROPERTY AND SOVEREIGNTY 267 (2013).
[155] BARKAN, *supra* note 1, 34 (on the special powers granted to corporations in foreign territories in order to allow the state to direct the conduct of subjects abroad indirectly; "the charter empowered corporations to deploy a wide array of disciplinary and military tactics.").
[156] Term used in corporate charters, *see e.g.* STERN, *supra* note 1, 7 (on the first charter of the English East India company of 1600, referring to the corporation as "one body corporate and politk").*See also* Daniel J.H. Greenwood,

autonomy free from sovereign oversight.[157] This explains, *in part,* why Hobbes saw them as "many lesser commonwealths in the bowels of a greater, like worms in the entrails of a natural man."[158]

The modern corporation introduced by statute in the early to mid-19th century,[159] rejected key features of chartered corporations that had made them controllers of markets as opposed to actors within markets. The new corporation became freely available by registration, was not tied to any stipulated (public) purposes and consequently also not endowed with governing remits nor with monopoly privileges.[160] It was reconceived as a *private* entity operating in the market in line with liberal ideology and the rise of capitalism.[161] This reconstruction of the corporation was and, to an extent, remains reflected in the rejection of the "concession" or "grant" theory of the corporation which postulated its public nature due to its indebtedness to the Crown grant.[162] Instead, the "aggregate" theory and the "real" or "natural entity" theory located the corporation in the private realm as *either* the aggregation of contracts between incorporators (similar to partnerships),[163] *or* as a real or natural social entity 5rethat has an existence prior to, and independent of, its formal validation in law.[164]

Yet, the purely private conception of the corporation has, once more, been called into question,[165] prompted by the rise of corporate capitalism, widespread and systemic corporate wrongdoing causing large scale societal harms,[166] and the emergence of global corporate conglomerates that dwarf most states in revenue, employment, logistical capabilities and global

Neofeudalism: The Surprising Foundations of Corporate Constitutional Rights, 2017 U. ILL. L. REV. 163, 171- 77 (2017) (on the transformation of the corporation from body politic to business corporation).

[157] BARKAN, *supra* note 1, at 28-35, 31 ("Whilst grants were construed to have benefits for the incorporators, the logic behind them was to benefit the King and good government."). *See also*, STERN, *supra* note 1, 209 (on how the need for renewal of the charter acted as a level of control, ultimately to dismantle the corporate independence).

[158] HOBBES, *supra* note 26, at 253. For the other part, their ontological likeness, *see infra* Part III.

[159] *See e.g.* Paddy Ireland, *Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility*, 34 CAMB. J. ECON. 837 (2010) (on the drivers behind the push for incorporation by registration and limited liability)

[160] Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1455 (1987) ("The transformation of the private law of corporations from 1819 to the 1920s is best described as a move from a circumstance in which a corporation could do only those things specifically allowed by its charter to one in which a corporation could do anything not specifically prohibited to it."). Note, EMILY ERIKSON, BETWEEN MONOPOLY AND FREE TRADE 47 (2014) ("By the late seventeenth century, [the British East India] Company had begun to take on the characteristics of a modern corporation… with permanent capital, regular stockholders' meetings, and a large administrative bureaucracy...").

[161] Ciepley, *supra* note 118, at 139-140.

[162] John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L. J. 655, 667 (1926) ("[T]he concession theory may be indifferent as to the question of the reality of a corporate body; what it must insist upon is that its legal power is derived [from the state]."); see also Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985); Tara Helfman, *Transatlantic Influences on American Corporate Jurisprudence: Theorizing the Corporation in the United States*, 23 I. J. G. L. S. 383, (2016)

[163] *See e.g.* FRANK EASTERBROOK & DANIEL FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATIONS LAW 10-12 (1991) (presenting corporate personality as merely a convenient device)

[164] Horwitz, *supra* note 162, 216-223 (on the slow adoption of the natural entity theory by the judiciary from the beginning of the 20th century); Frederic W. Maitland F, *Moral Personality and Legal Personality*, 6 J.SOC. COMP. LEG. 192, 197 (1905) ("Group-personality is no purely legal phenomenon. The lawgiver may say that it does not exist, where, as a matter of moral sentiment, it does exist.")

[165] Ciepley, *supra* note 118. For early critics of the corporation serving only shareholders, see ADOLF A. MERLE & GARDINER MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932). There is now a large body of literature on the topic, e.g., JOEL BAKAN, THE CORPORATIONS: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER (2004); COLIN MAYER, FIRM COMMITMENT: WHY THE CORPORATION IS FAILING US AND HOW TO RESTORE TRUST IN IT (2013); WILLIAM MAGNUSON, FOR PROFIT: A HISTORY OF CORPORATIONS (2022).

[166] *Id.*

presence[167] and outmanoeuvre and undermine public regulation in favour of their own rule.[168] If public law and regulation cannot discipline these large transnational actors, perhaps the corporate institution itself must be re-imagined. After all, its designation as "private" is not an empirical fact, but a political construction with repercussions for its rights and obligations as well as the legitimacy of governmental interventions.[169] For example, the Bills in Texas and Florida that seek to restraint platform content moderation, reconceives them as "common carriers" comparable to telephone companies,[170] and implicitly as hybrids: they are partly *private* (with free speech entitlements for their own speech) and partly *public* (with limited entitlement to "censor" third party speech).[171]

In corporate jurisprudence, David Ciepley and others have argued for the hybrid private-public nature of the modern corporation.[172] His argument is that just because incorporation is universally available cannot detract from the fact that incorporation and attendant privileges are governmentally granted and displace the applicable law in contract, tort and property binding on everyone else.[173] Re-assembling the "grant" theory, Ciepley shows how the modern corporation is wholly dependent on that grant without which its economic success story would not have occurred; contracts could not achieve the same result.[174] As these privileges bestow on the corporation its extraordinary economic versatility, he asks what, if anything, this grant

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[167] Ciepley, *supra* note 118, at 139.

[168] See e.g. David Ciepley, *Can Corporations Be Held to the Public Interest, or Even to the Law?*, 154 J. BUS. ETHICS 1003 (2018); PISTOR, *supra* note 24, at 67-76 (explaining the reasons for the mobility of global corporations and their ability to forum-shop); W. Hussain & J. Moriarty, *Accountable to Whom? Rethinking the Role of Corporations in Political CSR*, 149 J. BUS. ETHICS 519 (2018); Luigi Zingales, *Towards a Political Theory of the Firm*, 31 J. ECO. PERSPECTIVES 113; DAVID J. ROTHKOPH. POWER INC: THE EPIC RIVALRY BETWEEN BIG BUSINESS AND GOVERNMENT (2012); Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERK. J. INT'L. L. 45 (2002); Mica PanOć, *Transnational Corporations and the Nation State*, in TRANSNATIONAL CORPORATIONS AND THE GLOBAL ECONOMY 244 (1998) (predicting the long-term demise of the nation state in light of the growth of TNCs).

[169] *See e.g.* Ciepley, *supra* note 118; *see also*, Rutger Claassen, *Political Theories of the Business Corporation*, 18 PHILOSOPHY COMPASS 1 (2022); Abraham A. Singer, *The Corporation's Governmental Provenance and its Significance*, 35 ECONOMICS AND PHILOSOPHY 282 (2019); David Milton, *Theories of the Corporation*, 1990 DUKE L. J. 201 (1990).

[170] *Paxton*, 49 F.4th at 455, 469 ("The common carrier doctrine… vests States with the power to impose nondiscrimination obligations on communication and transportation providers that hold themselves out to serve all members of the public without individualized bargaining… The Platforms are communications firms of tremendous public importance that hold themselves out to serve the public without individualized bargaining."). *See also* Thomas J's *obiter* statement in Biden v. Knight First Amend. Inst. at Columbia Univ., 593 U.S. 1220, _ (2021) ("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. Historically, at least two legal doctrines limited a company's right to exclude. First,…certain businesses, known as common carriers, [are subject] to special regulations, including a general requirement to serve all comers.").

[171] *Paxton*, 49 F.4th at 455 ("So First Amendment doctrine permits regulating the conduct of an entity that hosts speech, but it generally forbids forcing the host itself to speak or interfering with the host's own message.") Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH LAW 463 (2021) (examining the common carrier, and the public accommodation doctrines, and the control of providers in avoiding those categories).

[172] Ciepley, *supra* note 118, 151-156; *see also e.g*. Janne Mende, *Business Authority in Global Governance: Companies Beyond Public and Private Roles*, 19 J.I.P.T. 200 (2022); Malcolm S. Slater, *Rehabilitating Corporate Purpose*, Harvard Business School NOM Unit Working Paper No. 19-104 (2019); Michael Bennett & Rutger Claassen, *Taming the Corporate Leviathan: How to Properly Politicise Corporate Purpose*?, in WEALTH AND POWER: PHILOSOPHICAL PERSPECTIVES 145 (2022); Simon Deakin, *The Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise*, 37 QUEEN'S L.J.. 339 (2012); WILLIAM G. ROY, SOCIALIZING CAPITAL; THE RISE OF THE LARGE INDUSTRIAL CORPORATION IN AMERICA 41-77 (1999).

[173] Ciepley, *supra* note 118, at 143-51.

[174] *Id*; *see also* Susan Mary Watson, *The Corporate Legal Person*, 19 J. CORP. LAW STUDIES 137, 162-64 (2019).

ought to entail for its governance: "What is the public benefit to justify the special privilege? Why do they get to enjoy rights without corresponding duties? Corporations may offer heightened productivity. This is a public benefit, however, only if the fruits of increased productivity are widely spread."[175] Thus Ciepley effectively argues that incorporation is a gift with strings attached, closely mirroring the governing expectation that attaches to platform immunities.[176]

Putting aside for the moment the argument about the corporation's hybrid nature, the following Part deconstructs the corporate actor to show continuities with section 230 and its judicial interpretation. Does Hobbes' contention about corporate charters being "exemptions from law" and of the corporation as "a commonwealth within the commonwealth" extend to the modern corporation, and, if so, how does it connect to platform governance enabled by section 230? This Part argues that the corporation is an intrinsically self-governing profit-driven group actor enabled by immunities; and that its self-governance is reinforced by *impunities* that arise from its impersonal nature. Section 230 and its judicial interpretation perpetuate and intensify these two corporate dynamics. Using *corporate-specific* arguments of blind profit-maximisation and amoral passivity, the judiciary has drastically expanded the immunities in section 230 and thus the platforms' autonomous rule of the online domain.

A. Platform Immunities and Corporate Immunities and Rationality

Corporate self-governance is, much like platform self-governance, grounded in immunities or privileges.[177] Yet, these corporate immunities are not merely the attributes of the entity but constitutive of it. They create and define what it means to be a for-profit corporation and provide its foundational logic. Corporate self-governance emerges, in the first place, from two sets of core immunities running in opposite directionality: *on the one hand*, the corporate person and limited liability shield shareholders from accountability to outsiders; *on the other hand,* the "business judgment rule" shields the corporation from disgruntled shareholders.[178] Thus corporate autonomy emerges from these protective shields against both the intrusion from outside getting in (corporate personhood and limited liability) and from the inside getting out (the business judgment rule). Together they create an insulated institution that is, in its very constitution, habituated to self-rule.[179]

1. Corporate Privileges of Personhood and Limited Liability, and Profit Maximization

The legal recognition of the corporate person which allows for "a group of natural persons to act effectively in a common capacity"[180] is its most foundational privilege. The grant of corporate personality entails the separation of the rights and duties of the unified group actor

[175] Ciepley, *supra* note 118, at 153.
[176] *See e.g.* Ciepley, *supra* note 168 (arguing that corporations must benefit the public in return for public privileges); *see also* BARKAN, *supra* note 1, at 8.
[177] The Article uses the terms "privilege" and "immunity" interchangeably as signalling a freedom from an otherwise applicable duty/liability regime. Note Hohfeld, *supra* note 34, 30, distinguishes between "privilege" (as the opposite of a duty) and "immunities" (as the opposite of liability). Thus a privilege is stronger as it grants a right to act in a particular way, whilst an immunity only takes away a "penalty" for a course of conduct but does not grant a right *per se* to engage to engage in that immunized conduct.
[178] *See infra* Part II.A.1.and 2.
[179] For further corporate privileges, *see infra* Part II.B.1.
[180] Rutger Claassen, *Hobbes Meets the Modern Business Corporation*, 53 POLITY 101, 104 (2021).

from those of its individual members.[181] As the corporation's *raison d'être* is for it to own property, enter into contracts, and sue and be sued in its own right, its members are shielded from accountability for the acts of the group actor.[182] Thus at the very time that the law creates the corporate actor and corporate accountability, it removes the accountability of the individuals behind it; it immunizes shareholders from culpability.[183] The corporation becomes the shield between its members and outsiders, and does so by suspending the rules applicable to partnerships as the "original" collective body.[184]

That shield is strengthened by limiting shareholders' derivative accountability for corporate actions through limited liability. Although limited liability is now seen as integral to the corporation, at the time of its introduction in the early to mid-19th century, it was controversial.[185] In Britain limited liability became available in 1855, a decade after free incorporation by registration,[186] and in California only in 1932.[187] The controversy arose because has shown, limited liability displaces the basic principle of law and morality that one ought to repay one's debts; an eminent lawyer expressed his objection to limited liability in *The Law Times* (1856) as follows:

> [H]e who acts through an agent should be responsible for his agent's acts, and […] he who shares the profits of an enterprise ought also to be subject to its losses; […] there is a moral obligation, which it is the duty of the laws of a civilised nation to enforce, to pay debts, perform contracts and make reparation for wrongs. Limited liability is founded on the opposite principle and permits a man to avail himself of acts if advantageous to him, and not to be responsible for them if they should be disadvantageous; *to speculate for profits without being liable for losses*.[188]

This remains correct. Still, despite the displacement of standard liabilities, limited liability was introduced as an investment incentive on the assumption that the pooling of small investor capital into large, even very large, aggregate corporate capital funds for large industrial projects would only occur if investors were assured that they could lose no more than their initial investment.[189] The ability to "speculate for profits without being liable for losses" was increased by allowing for corporate groups, which depends on permitting corporations

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[181] *See e.g.* John Armour ET AL., *The Essential Elements of Corporate Law: What is Corporate Law?* (Harvard John M. Olin Discussion Paper Series, No. 643, July 2009) (on the common elements of corporate law across different national jurisdictions).

[182] For the considerable early struggle with the group personality and the degree to which it implicated the natural actors, i.e. shareholders, behind it, *see* Horwitz, *supra* note 162, at 177-78 (in the context of corporate claim to constitutional entitlements); *see also* PISTOR, *supra* note 24, at 67-71 (on contentiousness of the existence of corporations outside their place of incorporations).

[183] *Supra* note 181 (in partnerships the accountability of the individual members of the group remains).

[184] Ciepley, *supra* note 118, at 141-142.

[185] *See e.g.* Band of Augusta v. Earle , 38 U.S. (13 Pet.) 519 ,586 (1839) (CJ Taney arguing that shareholders "must at the same time take upon themselves the liabilities of citizens and by bound by their contracts…").

[186] Ireland, *supra* note 159, at 841-844 (on the controversy caused by the Limited Liability Act 1855); Watson, *supra* note 174, at 152-155.

[187] PISTOR, *supra* note 24, at 61. In 1811, New York became the first state to have a simple public registration procedure to start corporations for manufacturing (The Act Relative to Incorporations for Manufacturing Purposes of 1811).

[188] Ireland, *supra* note 159, at 844 (quoting Edward Cox editor of THE LAW TIMES (1856) (emphasis added)).

[189] Ireland, *supra* note 159, at 841-844 (providing as an alternative explanation for the push for limited liability, a growing class of rentier investors who had spare cash but were unwilling to assume the risks of investments).

themselves to become shareholders. In corporate groups limited liability creates a double insulation which protects the business itself and not just its investors from accountability.[190]

The upshot of these two corporate privileges is an entity whose shareholders are largely immunized from liability for the debts of the corporation, but which is run for their sole benefit. This generates the corporation's incentive to take heightened risks: "[f]or shareholders, the greater the company's risk… the greater their expected profit because limited liability places a floor on their losses, but no ceiling on their gains." [191] Paddy Ireland has further argued that "the *de jure* regime of limited liability [transformed] into a *de facto* regime of no liability"[192] when partly paid shares (which entailed some outstanding liability) gave way to the practice of issuing fully paid shares (with no residual liability) in the early 20th century. It turned limited liability from a qualified immunity into a *de facto* full immunity and "perfected" the corporation as an entity that institutionalizes shareholder *ir*responsibility in the pursuit of profit: "The no-obligation, no-responsibility, no-liability nature of corporate shares permits their owners—or their institutional representatives—to enjoy income rights without needing to worry about how the dividends are generated."[193]

Although these privileges have been naturalized and de-politicized as freely available entitlements[194] and "a normal and regular mode of doing business,"[195] much like any immunity, they displace otherwise applicable liability regimes.[196] They create exemptions from law and thus come at a cost. Limited liability is a loss-shifting mechanism at the expense of creditors, including involuntary creditors, whose would-be rights against shareholders are foreclosed.[197] More importantly, much like section 230, these foundational immunities have also profoundly changed the underlying strata upon which they operate: "Limited liability incentivises shareholders to make corporation pursue risky investments, since they reap the benefits, while the costs are passed on to third parties… they can push through these cost-externalizing strategies."[198] So once more, it is only half the story to ask what happens, or should happen, when something goes wrong, the other half concerns the behaviors the immunities incentivize in the first place. For the purposes of this Article, the main point is that the corporate privileges of personhood and limited liability generate an internal space of self-governance uninhibited by the specter of shareholder liability and driven by the corporate rationality of profit-maximization. Meanwhile, the corporation is also insulated from claims by disgruntled shareholders being heard on the "outside" as discussed in the next section.

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[190] SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 131 (2004) (particularly where subsidiaries are undercapitalized); *see also* PISTOR, *supra* note 24, at 53, 63.
[191] Ciepley, *supra* note 118, at 148.
[192] Ireland, *supra* note 159, at 845.
[193] Ireland, *supra* note 159, at 856.
[194] Ireland, *supra* note 159, at 838.
[195] Horwitz *supra* note 162, at 181.
[196] Ciepley, *supra* note 118, at 141-45.
[197] Ciepley, *supra* note 118, at 145; *see also* Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L. J. 1879 (1991).
[198] Rutger, *supra* note 169, at n14; *see also* Ciepley, *supra* note 118, at 145-46 ("If the corporation were a private, contractually established business entity… it would respond to market forces like one. But in key respects it does not… [B]ecause government places corporations under different rules of property and liability, they malfunction when the logic of liberalism is indiscriminately applied to them, even turning toxic – displaying elevated irresponsibility and depressed productivity."); *but see* e.g. Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N. Y. U. L. REV. 733 (2005) (arguing against the profit-maximising duty of managers as either grounded in law or economics on the basis that such conduct is socially efficient).

2. Corporate Self-Governance and the "Business Judgment Rule"

William Blackstone in his *Commentaries* (1753) described this internal space of corporate self-governance in governmental terms, reminiscent of Hobbes' "commonwealth within a commonwealth":

> If this was a mere voluntary assembly, the individuals which compose it might indeed read, pray, study... but they could neither frame, nor receive, any laws or rules of their conduct; none at least, which would have *any binding force, for want of a coercive power to create a sufficient obligation*… But, when they are consolidated and united into a corporation, they and their successors are then considered as one person in law: as one person, *they have one will, which is collected from the sense of the majority of the individuals*: *this one will may establish rules and orders for the regulation of the whole, which are a fort of municipal laws of this little republic*.[199]

Thus for Blackstone the recognition of the corporate person was not just of significance externally but produced the necessary authority internally. It gave the collectivity the authority to self-govern through "rules and orders for the regulation the whole." The formality of this internal governance space responds to the vulnerability of investors who lock their wealth in the corporation, delegate its management to the board and are subject to majority decision-making.[200]

Modern corporate law enables, in a structured way, corporate self-governance through the recognition of its freedom to decide on "municipal laws of this little republic" in its constitution, by-laws and resolutions and through the respect accorded to decisions made pursuant to them.[201] Explicit recognition of corporate self-governance also comes in form of the "business judgment rule" which shelters corporations from claims from shareholders except in the case of disqualifying behavior by the directors.[202] An early expression of the rule by Thayer J in *Republican Mountain Silver Mines v. Brown* echoes Blackstone's "little republic":

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[199] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND IN FOUR BOOKS (VOL. 1) 468 (1953) (emphasis added).

[200] *See e.g.* Armour, *supra* note 181, at 18-22 (on the function of default or mandatory rules as enabling, protective, and standardising). Contrast to the decision-making in partnerships based on contracts and default rules.

[201] See e.g. Williams v. Geier, 671 A.2d 1368, 1381 (1996) ("At its core, the Delaware General Corporation Law is a broad enabling act which leaves latitude for substantial private ordering, provided the statutory parameters and judicially imposed principles of fiduciary duty are honored."); or EVA MICHELER, COMPANY LAW: A REAL ENTITY THEORY (2021) (*inter alia* on how company law "evolves with a view to supporting autonomous action by organizations"). Note, the EU Digital Services Act 2022/2065 may be understood to structure the governance of platforms of their online domains, analogous to how corporate law structures the self-governance of companies.

[202] Sinclair Oil Corporation v. Levien, Del. Supr., 280 A.2d 717, 720 (1971) ("A board of directors enjoys a presumption of sound business judgment, and its decisions will not be disturbed if they can be attributed to any rational business purpose. A court under such circumstances will not substitute its own notions of what is or is not sound business judgment."); *see also* Cede & Co. v. Technicolor, Inc., 634 A.2d 345 (1993) (The business judgment rule… operates to preclude a court from imposing itself unreasonably on the business and affairs of a corporation The rule operates as both a procedural guide for litigants and a substantive rule of law. As a rule of evidence, it creates a presumption that in making a business decision, the directors of a corporation acted on an informed basis [i.e., with due care], in good faith and in the honest belief that the action taken was in the best interest of the company." (internal citation omitted)); or more recently, Stone *v.* Ritter, 911 A. 2d 362 (2006).

> Corporations are in a certain sense legislative bodies. They have a legislative power when the directors or shareholders are duly convened that is fully adequate to settle all question affecting their business interests or policy, and they should be left to dispose of all questions of that nature without applying to the courts for relief. A stockholder in a corporation cannot successfully invoke the powers of a chancery court to control its officers or board of managers… he must seek redress within the corporation, in the mode prescribed by its charter and by-laws, rather than by an appeal to the court.[203]

Once more, the corporation is described in government-like terms with its own autonomous governing domain. By refusing to "substitute its own notions of what is or is not sound business judgment,"[204] the judiciary leaves the corporation to its own devices.[205] Although the business judgement rule has traditionally been framed either as a rule of judicial abstention,[206] or as standard of review,[207] Lori McMillian has argued that it may be understood as an immunity.[208] Like right-to-rule immunities, it is designed to "allow directors the liberty to exercise their independent judgment and authority by making decisions that they think are appropriate, especially on things that may be controversial or risky."[209]

Notably, the space demarcated for corporate self-governance by the business judgment rule is prima facie very limited. It immunizes directors' decisions *only* from claims by shareholders and thereby has a purely internal focus. It allows for internal autonomous decision-making and forces disgruntled shareholders to seek a resolution within corporate processes. The rule does *not* shelter the corporation from claims by "outsiders," including corporate employees, customers, users, contractors, or society at large. This gives it a narrow ambit, but one aligned both with facilitating internal self-governance and with allowing for external accountability of the corporate person under ordinary law. In the platform context, the rule would, for example, foreclose claims by shareholders challenging the directors' decisions on the platform's algorithms, but not claims by users or others.[210]

Despite its narrow ambit, the justification of the business judgment rule provides the seeds for its ready de-facto expansion. The rule is justified on the ground that judges are ill-equipped to review decisions made by business people or, in more positive terms, it represents the "law's implementation of broad economic policy, built upon economic freedom and the

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[203] Republican Mountain Silver Mines v. Brown, 58 Fed. 644, 647 (C. C. 8th, 1893).

[204] *Sinclair Oil Corporation*, 280 A.2d at 720; *see also* Michele Healy Ubelaker, *Comment, Director Liability under the Business Judgement Rule: Fact or Fiction*, 35 S. W. L. J. 775 (1981) (commenting on shareholders "almost insurmountable barrier to establishing the liability of directors" for negligence or illegal activities in corporate law).

[205] *See e.g.* Lyman P.Q. Johnson, C*orporate Officers and the Business Judgment Rule*, 60 BUS. LAW 439 (2005) (arguing against the expansion of the business judgment rule - "a cornerstone concept of corporate law" – to corporate officers).

[206] *See e.g.* Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83 (2004); or Bernard S. Sharfman, *The Importance of the Business Judgment Rule*, 14 N. Y. U. J. L. & BUS. 27, 31 (2017) ("In essence, the Rule is a self-imposed constraint on a court's equitable powers.")

[207] Douglas Branson, *The Indiana Supreme Court Lecture: The Rule That Isn't a Rule - The Business Judgment Rule*, 36 VAL. U. L. REV. 631 (2002) (arguing that the business judgment "rule" is in fact a standard of judicial review).

[208] McMillan, *supra* note 21, 540 (where the author argues against the "abstention rule" on the ground that "directors are not even remotely analogous to a level of government that is granted a power that would make them separate but somehow equal to the state.") However, framing the rule as an immunity has largely the same effect.

[209] McMillan, *supra* note 21, 565-66 (where the author locates the values underpinning immunities as well as the business judgment rule in the "socially important role" played by the beneficiary).

[210] *Cf* Ciepley, *supra* note 118, 141 (where the author argues that the corporation has "the right to establish and enforce rules within its jurisdiction *beyond* those of the laws of the land" (emphasis in the original)).

encouragement of informed risk taking."[211] It signals a deference to, or preference for, private ordering based on the presumed governmental incompetence and illegitimacy in meddling with the market:

> [I]nformal norms generate outcomes that are generally welfare-enhancing, while law *at best* generates outcomes that are mixed (and tend strongly towards the welfare-reducing), informal norms should come with a strong presumption of legitimacy… [W]hen society is interested in maximizing utilitarian considerations, and… in resolving standard legal disputes within groups, lawmakers are unlikely to improve upon the customary rules the group develops through voluntary, private interaction.[212]

This reasoning also holds sway beyond *internal* corporate governance. If judges must stay out of adjudicating the merits of business decisions at the behest of shareholders, why would they be more competent in corporate disputes with outsiders, or almost-insiders like platform users? This explains, in parts, the existence of section 230 and its expansive interpretation, which in effect extends the business judgment rule to the "external" domain of platforms.[213]

3. Platform Immunities and "Blind" Profit-Maximisation: Immunities beget Immunities

Platform immunities are located at a level above the foundational corporate privileges, but platform behavior in the shadow of section 230 has been driven by the foundational corporate logic of profit-maximization: "A pervasive concern about content moderation — perhaps the most universal and persistent — is that platforms pursue their own political and financial interests..."[214] Whilst this is, of course, to be expected, what *is* surprising is that the foundational corporate logic of the *blind* pursuit of shareholder value should, as shown below, operate in an exculpatory way vis-à-vis the entitlement to section 230 *and* the liability under the substantive legal regime.[215] The initial corporate immunities beget further immunities: the interpretation of section 230 has been marked by a corporate-specific reasoning that treats *blind* profit-maximisation as a cleanser of wrongfulness, on the one hand, and by a judicial abstention from scrutinising corporate decision-making (to determine the entitlement to the immunity), on the other hand.

Section 230. The Ninth Circuit in *Gonzalez* followed established jurisprudence in holding that Google had not foregone its entitlement to section 230 because its algorithms were "content-neutral" by not treating content by ISIS differently than any other third-party content.[216] The

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[211] Branson, *supra* note 207, at 632.

[212] Jonathan R. Macey, *Public and Private Ordering and the Production of Legitimate and Illegitimate Legal Rules*, 82 CORNELL L. REV. 1123, 1140-41 (1997); *see also* Sharfman, *supra* note 206, at 43-44 ("Private ordering of authority is considered efficient because it allows for the implementation of market-driven corporate governance arrangements… Courts understand that this private ordering has been agreed to… and will feel compelled to respect the wishes of those parties to have the Board manage the company with minimal interference, including interference from the courts.")

[213] *See infra* Part III.A. and B. (on the wider ideological/neoliberal background within which platform governance of cyberspace falls).

[214] Douek, *supra* note 7, at 586, see also at 559 ("In a sense, every content moderation decision is commercial: private platforms are *profit- driven entities* that moderate because it is in their business interests.")

[215] *See infra* Part II.

[216] Force v. Facebook, Inc., 934 F.3d 53, 70 (2d Cir. 2019) ("The algorithms take the information provided by Facebook users and 'match' it to other users… based on objective factors applicable to any Content."); Dyroff v. Ultimate Software Grp., 934 F.3d 1093, 1096 (9th Cir. 2019) ("Ultimate Software… is immune from liability under

Court thereby validated algorithms that considered *all* third-party content an equal source of profit irrespective of its harmful effects, and took the minimalist view that an automated process is "neutral" if it subjects, as a matter of procedure, all content equally to its automated criteria.[217] Such content-neutrality test is one few algorithms would or could fail.[218] Whilst section 230 expressly outsources the governance of online content to the "business judgment" of intermediaries, the ambit of section 230 *is* determined by law and subject to judicial oversight. Yet, the judiciary has, with some notable voices of dissent,[219] set a low bar for the entitlement to the immunity. By not inquiring into the substantive criteria underlying algorithms or their effect,[220] it has placed that substantive ordering outside the "neutrality" review and sheltered algorithms as a form of corporate decision-making from its oversight.

The procedural test seeks to accommodate the fact that search or recommender algorithms necessarily engage in ordering activity as a core and routine part of their operation, and thus that they do *not*, as a matter of substance, treat all content the same.[221] They evaluate, prioritize and order content in response to user queries.[222] By the same token it may also be taken to accommodate the fact that section 230 further incentivizes platforms to *not* treat all content the same way substantively.[223] Yet, the inevitable or incentivized substantive ordering by platforms does not mean that a requirement of "neutrality" is meaningless or inoperable at the substantive level. For example, there is much evidence to show that algorithms may be beset with racial, gender and other biases which would offend expectations of neutrality, *and* which researchers *are* seeking to address.[224] Equally, when such substantive ordering has been

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the CDA because its functions, including recommendations and notifications, were content-neutral tools used to facilitate communications."); Marshall's Locksmith Serv. v. Google, LLC, 925 F.3d 1263, 1270–71 (D.C. Cir. 2019) (stating that using neutral algorithms "that do not distinguish between legitimate and scam locksmiths" to decide which information appears on a map is protected by section 230)

[217] *Gonzalez*, 2 F.4th at 894 ("the algorithms do not treat ISIS-created content differently than any other third-party created content, and thus are entitled to § 230 immunity."

[218] *Gonzalez*, 2 F.4th at 896 ("Contrary to the dissent's assertion, we do not hold that 'machine-learning algorithms can *never* produce content within the meaning of Section 230.' We only reiterate that a website's use of content-neutral algorithms, without more, does not expose it to liability for content posted by a third-party." The majority, however, did not specify when an algorithm would fall foul of section 230 under its test.). *See also* Brief for Lawyers' Committee for Civil Rights, *supra* note 71, at 4 (arguing against the validity of such procedural test of neutrality as it "improperly immunize[s] artificial intelligence algorithms that are procedurally indiscriminate but make substantive decisions that are discriminatory.").

[219] *See e.g. Force*, 934 F.3d (Katzman, J., diss. in part); *Gonzalez*, 2 F.4th (Gould, J., diss. in part).

[220] See *supra* note 216 and 218 (on the substantive body of empirical literature examining the effect of algorithms).

[221] Brief for Internet Infrastructure Coalition ET AL as Amicus Curiae in Support of Affirmance, at 7, Gonzalez v. Google LLC, 598 U.S., 617 (2023) (No 21-1333) [hereinafter Brief for Internet Infrastructure Coalition] ("[Petitioners] misdescribe and malign the actual operation of the automated algorithms that are necessary at every level of the Internet to organize, process, route, convey, and transport information and communications.").

[222] *See e.g. Marshall's Locksmith Service*, 925 F.3d at 1270 ("Defendants' algorithms organize, rank, categorize, correlate, and display results for organic, map, and paid results.").

[223] *See e.g*. U.S. Dep't of Justice, Attorney General William P. Barr Delivers Remarks at the National Association of Attorneys General 2019 Capital Forum (Dec. 10, 2019), https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-national-association-attorneys-general ("The purpose of Section 230 was to protect the 'good Samaritan' interactive computer service that takes affirmative steps to police its own platform for unlawful or harmful content. Granting broad immunity to platforms that take no efforts to mitigate unlawful behavior or, worse, that purposefully blind themselves — and law enforcers — to illegal conduct occurring on, or facilitated by, the online spaces they create, is not consistent with that purpose.")

[224] *See e.g.* Ziad Obermeyer ET AL., *Dissecting Racial Bias in an Algorithm Used to Manage the Health of Populations*, 366 SCIENCE 447 (2019) (showing a widely used algorithm, typical of the health-industry approach and affecting millions of patients, exhibiting significant racial bias); *or* Cass R. Sunstein, Governing by Algorithm? No Noise and (Potentially) Less Bias, 71 DUKE L.J. 1176 (2022) (arguing in favour of the use of "properly constructed" algorithms by the administrative state).

manifestly visible, e.g., through preference categories, as is rarely the case, the judiciary has intervened.[225] The Second Circuit acknowledged that substantive differentiation may offend "neutrality" expectations in *Force v Facebook*: "We do not mean that Section 230 requires algorithms to treat all types of content the same. To the contrary, Section 230 would plainly allow Facebook's algorithms to, for example, de-promote or block content it deemed objectionable."[226] Still, it cautioned that "such conduct could constitute "development" of third-party content."[227] This suggests that "neutrality" goes after all beyond procedural neutrality, even if it cannot be foregone simply on the basis of substantive differentiation.

In line with the governance mandate behind the immunity, "neutrality" ought to import something akin to judge-like independence, or not being invested in the content itself.[228] At the very least, corporate self-interest ought not be inconsistent with "objective" content moderation in the public interest.[229] As it stands, most platforms are far too invested in the third party content to be effective moderators. Empirical evidence shows that although platform interest in content moderation varies depending on its revenue model (advertising or subscription) and technological sophistication,[230] "a platform under advertising may not benefit from a better technology because its use may reduce its user base. So a social media platform under advertising may not have the incentive to perfect its technology for content moderation."[231] Even before the moderation stage,[232] the advert-based business model incentivizes platforms to promote the very content that they ought to moderate, and section 230 gives them the liberty to do so. Thus for them it may be profitable for their algorithms to recommend more extreme content than the user first sought out by tapping into user vulnerabilities. Escalation drives up watch-time:

> Google knows the most enticing and addictive content is often intense, violent, or tortious. YouTube may be one of the most powerful radicalizing instruments of the 21st century, constantly increasing the stakes higher by taking a user to more extreme content than where the user started. Sites that want to monetize their troves of content have an incentive to keep users coming back and to keep them on the site as long as possible.[233]

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[225] *See e.g. Roommates.com*, 521 F.3d (an algorithm prompting discriminatory preferences).
[226] *Force* , 934 F.3d at 70 (n24).
[227] *Id.*
[228] *See e.g.*, the "neutrality" requirement in the EU Data Governance Act 2022/868 (Art. 12(a) and Recital 33 "A key element by which to increase the trust and control of data holders, data subjects and data users in data intermediation services is the neutrality of data intermediation services providers… It is therefore necessary that data intermediation services providers act only as intermediaries in the transactions, and do not use the data exchanged for any other purpose.").
[229] As shines through the some judicial reasoning, *see e.g. Force*, 934 F.3d at 70 ("The algorithms take the information provided by Facebook users and 'match' it to other users—again, materially unaltered—based on objective factors applicable to any content, whether it concerns soccer, Picasso, or plumbers."). *See also*, YouTube, *The Four Rs of Responsibility, Part 2: Raising Authoritative Content and Reducing Borderline Content and Harmful Misinformation*, OFFICIAL YOUTUBE BLOG (Dec 3, 2019) https://blog.youtube/inside-youtube/the-four-rs-of-responsibility-raise-and-reduce/ (noting a change in YouTube's algorithms to emphasize the "authoritativeness" of the source e.g. top and local news channels).
[230] Liu, *supra* note 101.
[231] *Id.* at 833.
[232] *See supra* note 101 and accompanying text.
[233] Brief for the Counter Extremism Project and Hany Farid as Amicus Curiae Supporting Petitioners at 6, Gonzalez v. Google LLC, 598 U.S. 617 (2023) (No 21-1333) [hereinafter Brief for the Counter Extremism Project]. There is a large body of evidence to support this interaction between the content delivery and revenue model, *see*, *e.g.* Singh,

Extreme content is profitable. Although these algorithms procedurally treat all content indiscriminately, substantively they incentivize divisive or polarizing content, such as ISIS content, regardless of any Terms of Use to the contrary. On that basis they are implicated in and arguably "responsible, in whole or in part, for the creation or development" of such content. Platforms provide the fertile soil on which such content can thrive. This makes them unlikely moderators and, by implication, unworthy candidates for the immunity.[234] It does not necessarily entail their liability for third-party content, but the possibility of liability based on real culpability ought not to be foreclosed.

The alternative construction of neutrality (requiring the platform not to be invested in the content) explains why the judiciary has fastened onto procedural neutrality as a basis for section 230 and why the Supreme Court has chosen not to disturb it. Procedural neutrality protects the advert-based business model of platforms. As a conditionality for the immunity, it imposes minimal restraints on platform activities and their pursuit of profit. In fact, the automated *blind* pursuit of profit – treating terrorist content the same as a cooking recipes – *is* the conditionality. Treating the "blind" pursuit of profit as "neutral" overlaps with the argument that platforms are passive infrastructure providers and so cannot be blamed for the use to which their infrastructure is put. An infrastructure is "dumb" or amoral, as shines through the judicial approach to the substantive liability under the ATA which has generated another layer of *de-facto* immunities for platforms.

Anti-Terrorism Act**.** The Ninth Circuit in *Gonzalez* excused Google from *direct liability* under the ATA[235] for the knowing provision of resources to ISIS on the basis that its "actions were [not] motivated by anything other than *economic self-enrichment*."[236] Google did not share "ISIS's vision and objectives" nor "intended ISIS to succeed in any future acts of terrorism", it merely "split ad revenue with ISIS in furtherance of its own financial best interest."[237] Thus once more the blind pursuit of profit spared the platforms from corrective regulation. The Court relied on *Kemper v. Deutsche Bank AG* where Deutsche Bank escaped civil liability for conspiracy under the ATA on the basis that its banking transactions with Iranian customers in violation of US sanctions were "motivated by economics, not by a desire to 'intimidate or coerce.'… Deutsche

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Spandana, *Why Am I Seeing This?, Case Study: YouTube*, NEW AMERICA (Mar. 25, 2020), https://www.newamerica.org/oti/reports/why-am-i-seeing-this/case-study-youtube/; Kate Cox. *Former Facebook Manager: "We took a page from Big Tobacoo's playbook",* ARSTECHNICA (Sept. 25, 2020) https://arstechnica.com/tech-policy/2020/09/former-facebook-manager-we-took-a-page-from-big-tobaccos-playbook/; SINAN ARAL, THE HYPE MACHINE: HOW SOCIAL MEDIA DISRUPTS OUR ELECTIONS, OUR ECONOMY, AND OUR HEALTH- AND HOW WE MUST ADAPT (2020).

[234] See e.g. *Gonzalez*, 2 F.4th at 923 (Gould, J. diss. in part) ("I would hold that where the website (1) knowingly amplifies a message designed to recruit individuals for a criminal purpose, and (2) the dissemination of that message materially contributes to a centralized cause giving rise to a probability of grave harm, then the tools can no longer be considered 'neutral.'"); *cf* majority in *Force*, 934 F.3d at 70 ("plaintiffs assert that Facebook's algorithms suggest third-party content to users 'based on what Facebook believes will cause the user to use Facebook as much as possible' and that Facebook intends to 'influence' consumers' responses…This does not describe anything more than Facebook vigorously fulfilling its role as a publisher.")

[235] The civil remedies in 18 U.S.C. § 2333 are predicated on a criminal violation in 18 U.S.C. § 2339B(a)(1) [knowingly providing material support or resources to a designated foreign terrorist organization]; *see also* 18 U.S.C. § 2339B (Findings and Purpose) "(6) Persons, entities, or countries that knowingly or recklessly contribute material support or resources, directly or indirectly, to persons or organizations that pose a significant risk of committing acts of terrorism… should reasonably anticipate being brought to court in the United States to answer for such activities."

[236] *Gonzalez*, 2 F.4th at 900 (emphasis added).

[237] *Gonzalez*, 2 F.4th at 900-01.

Bank built is sanction-evading business because it was 'lucrative.'"[238] So an entity primed to systematically disregard everything other than its profits avoids liability on the basis of being such an entity. IBM followed the same corporate logic when it supplied Nazi-Germany with punch card technology that enabled the Holocaust logistically, and also when it got involved in the Allies' operations: "[i]t was an irony of the war that IBM equipment was used to encode and decode for both sides of the conflict."[239] IBM's behavior was wholly consistent with the blind pursuit of shareholder value.[240] Still, it is one thing for corporations to pursue profit in disregard of other values, which is problematic in itself, it is quite another matter for the law to condone such behavior by relieving corporations of accountability on the basis of that disregard. It effectively creates another layer of immunities, as platforms can simply pursue their corporate objectives on a morally blind basis to escape liability.

An alternative interpretation would have been available. Intentionality under the ATA has also been interpreted as knowledge *or* recklessness, namely a deliberate indifference to the nature of the clients' activities.[241] Indeed intentionality is generally not concerned with motivation but with knowledge and foreseeable consequences in order to stop good intentions excusing bad acts.[242] The road to hell is paved with good intentions. Thus in *Boim v. Holy Land Found. For Relief & Dev* the Seventh Circuit used the objective standard of foreseeable consequences of one's actions to infer intentionality.[243] Despite the humanitarian *motivation* of the donors, they would have known that, as a foreseeable consequence, their donations to Hamas would augment Hamas' resources that "would enable it to kill more people in Israel."[244] On that basis "such donations would appear to be intended… to intimidate or coerce a civilian population."[245] The majority in *Gonzalez* simply asserted that Google's profit-sharing with ISIS was

[238] 911 F.3d 383, 390 (7th Cir. 2018) ("To the objective observer, its interactions with Iranian entities were motivated by economics."). For the same approach to "aiding and abetting" under the Alien Tort Statute as a "concerted action" type liability, *see e.g.*, Presbyterian Church Of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009) ('[T]he *mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone."); In re Terrorist Attacks on September 11, 2001, 718 F. Supp. 2d 456, 493-94 (S.D.N.Y. 2010) ("[A]n individual who knowingly, but not purposefully, aids and abets in the violation of international law, is not subject to liability under the ATS."); Aziz v. Alcolac, Inc., 658 F.3d 388, 401 (4th Cir. 2011) ("[F]or liability to attach under the ATS for aiding and abetting a violation of international law, a defendant must provide substantial assistance with the purpose of facilitating the alleged violation.").

[239] EDWIN BLACK, IBM AND THE HOLOCAUST: THE STRATEGIC ALLIANCE BETWEEN NAZI GERMANY AND AMERICA'S MOST POWERFUL CORPORATION 344 (2001); *see also* Stephens, *supra* note 168, at 45-46, 49-50.

[240] Stephens, *supra* note 168, at 46.

[241] Weiss v. National Westminster Bank PLC, 768 F.3d 202, 206 (2d Cir. 2014); relying on the Supreme Court decision in the criminal case of Holder v. Humanitarian Law Project, 561 U.S. 1, 16–17 (2010) ("Congress plainly spoke to the necessary mental state for a violation of § 2339B, and it chose knowledge about the organization's connection to terrorism, *not specific intent to further the organization's terrorist activities*" (emphasis added)).

[242] For tort intentionality, see *Boim v. Holy Land Found. For Relief & Dev.*, 549 F.3d 685, 692 (7th Cir. 2008) ("When a federal tort statute does not create secondary liability, so that the only defendants are primary violators, the ordinary tort requirements relating to fault, state of mind, causation, and foreseeability must be satisfied…To give money to an organization that commits terrorist acts is not intentional misconduct unless one either knows that the organization engages in such acts or *is deliberately indifferent to whether it does or not, meaning that one knows there is a substantial probability that the organization engages in terrorism but one does not care*." (emphasis added)).

[243] *Boim*, 549 F.3d at 694.

[244] *Id.*

[245] *Id* (internal citation marks omitted).

distinguishable from the "voluntary donations specifically and purposefully directed to a foreign terrorist organization."[246] No further explanation was proffered.

Meanwhile for the Supreme Court in *Taamneh* it was the platforms' passivity as infrastructure providers that foreclosed their *secondary liability* for aiding and abetting international terrorism.[247] Platforms are innocent not because they pursue their economic self-interest but because they did not engage in any *acts* that could be considered culpable in the first place: "The mere creation of their media platform… is not culpable. To be sure, it might be that bad actors like ISIS are able to use platforms… for illegal—and sometimes terrible—ends. But the same could be said of cell phones, email, or the internet generally."[248] As the platform did not give "ISIS any special treatment or words of encouragement" the use of "algorithms [that] appear agnostic to the nature of the content matching any content (including ISIS' content) with any user who is more likely to view that content… does not convert defendants' passive assistance into active abetting."[249] So the provision of the infrastructure was said to be inherently passive, irrespective of how much corporate *activity* goes into its optimization.

4. Rubber-stamping the Rule of Corporate Platforms

What is striking about the judiciary's scrutiny of platform entitlement to the immunity in section 230 is its refusal to engage with the algorithms at the heart of the wrongdoing. These algorithms may be inaccessible to public or judicial scrutiny,[250] their outputs are not.[251] This judicial unwillingness, or "abstention" aka the business judgment rule, goes beyond section 230 by exculpating platforms also from substantive liabilities. It is telling that Justice Thomas in *Taamneh* staked the majority's opinion against Twitter's culpability firmly on its status as a passive infrastructure provider but then talked about the actual infrastructure tentatively: "these platforms *appear* to transmit most content without inspecting it …[or] the algorithms

[246] *Gonzalez*, 2 F.4th at 900, but see Gould, J.,(diss. in part) at 927 ("I would hold that, on the facts alleged, a knowing provision of resources to a terrorist organization constitutes aid to international terrorism because an entity like Google appears to intend the natural and foreseeable consequences of its actions.").
[247] The direct liability claim under the ATA was not appealed.
[248] *Taamneh*, 598 U.S. at 23.
[249] *Id*.
[250] On the inaccessibility of algorithms due to trade secret protection or their black-box nature *see e.g.* Frank Pasquale, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION (2015) (critiquing the non-transparent use of algorithmic decision-making); *or* Christian Katzenbach, Lena Ulbricht, *Algorithmic Governance*, 8 I. P. R. 1, 10 (2019) (on automated content moderation: "platforms such as Facebook, YouTube and Twitter have long remained highly secretive about this process, the decision criteria, and the specific technologies and data in use."). Note, also *Gonzalez*, 2 F.4th at 923 ("Whether social media companies should continue to enjoy immunity for the third-party content they publish, and whether their use of algorithms ought to be regulated, are pressing questions that Congress should address.").
[251] *See e.g.* Sally Weale, *Social Media Algorithms 'Amplifying Misogynistic Content',* THE GUARDIAN (Feb 6, 2024) https://www.theguardian.com/media/2024/feb/06/social-media-algorithms-amplifying-misogynistic-content. for a small selection of the large body of empirical studies on algorithms, *see e.g.* Milli Smitha ET AL., *Engagement, User Satisfaction, and the Amplification of Divisive Content on Social Media*, ARXIC CORNELL UNI. (May 26, 2023), https://arxiv.org/abs/2305.16941; Ro'ee Levy, *Social Media, News Consumption, and Polarization: Evidence from a Field Experiment*, 11 AM. ECON. REV. 831 (2021); Joe Whittaker ET AL., *Recommender Systems and the Amplification of Extremist Content*, 10 I. P. R. (2021); Luke Munn, *Angry by Design: Toxic Communication and Technical Architectures*, 7 HUMANIT. & SOC. SCIENCE COMMUN. 1 (2020); Dimitar Nikolov ET AL., *Quantifying Biases in Online Information Exposure*, 70 JASIST 218 (2018); or generally Bruno Lepri ET AL., *Fair, Transparent, and Accountable Algorithmic Decision-Making Processes*, 31 PHIL. & TECH. 611 (2018) (*inter alia* on techniques to improve transparency and accountability).

appear to be agnostic as to the nature of the content…"[252] His tentativeness may partly be a nod to the large body of literature that evidences the moulding effect of algorithms on content consumption.[253] At the same time, it also speaks to his unwillingness to engage with that evidence and so exercise oversight over the platform governance of their domains. As it stands, the judiciary has rubber-stamped the algorithmic rule by platforms; their business judgment must be trusted.

Grounding section 230 entitlement in "blind" (amoral) profit-maximization and "dumb" (amoral) technology as evidence of neutrality betrays how closely its interpretation follows corporate rationality and self-rule. Of course, section 230 is, on its face, not limited to corporate actors,[254] nor are profit-maximization or the use of technology corporate prerogatives. Yet, it is inconceivable that blind profit-maximization would act in an exculpatory way in the case of an individual wrongdoer. While profit-maximization may be beneficial economically, it is not inherently virtuous and at best amoral.[255] Transposed to the individual wrongdoer, it would likely be translated as greed which would aggravate wrongdoing rather than exculpate it. Equally, it is unlikely that an automated tool at the behest of an individual would attract the same kind of legal forgiveness as those under corporate control; individual intentionality would be imputed into the tool and be closely scrutinized.[256] Individual judgment is evaluated against an expectation of moral agency; corporate judgment does not raise that expectation.[257] Indeed, as the use of technology for decision-making can perfect the moral blindness, automated decision-making may be understood as a natural extension of corporate rationality and amorality.[258] Section 230 hands corporate platforms a far more generous gift than it does to individuals.

What then explains this privileged legal treatment of platforms considering that in principle the corporation is designed to have the same legal accountability, or subjecthood, as human actors? Why do the privileges upon which the corporation is founded beget, without much ado, further privileged treatment? The answer lies in the ontological difference between the human and corporate person *and* in the legal system's readiness to treat the corporation both as an impersonal actor with no moral agency and as capable, willing governors in need of more freedoms. To these complementary dynamics, the discussion turns now.

B. Platform Immunities and the Impunities of Impersonal Corporate Actors and Technologies

The breadth of the immunities bestowed on corporate platforms, via an expansive interpretation of section 230, and exemptions from substantive liability, draws on corporate

[252] *Taamneh*, 598 U.S. at 23 (emphasis added).
[253] For a small selection, *see supra* note 233 and 251.
[254] 47 U.S.C. § 230(1) & (2) apply to a "provider or user of an interactive computer service" which is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server…" (47 U.S.C. § 230(f)(2)).
[255] *See infra* Part II.B.
[256] C. Soares, *Corporate Versus Individual Moral Responsibility*, 46 J. BUS. ETHICS 143 (2003) (noting the tendency to limit agency to individual agents, and denying the existence and relevance of collective moral agency, based on forms of individualism which have their source in the Enlightenment).; *see e.g.* Stephens, *supra* note 168, at 62-68 (on the amorality of corporations and difficulty of applying criminal law designed for human actors).
[257] *Id*.
[258] *See infra* Part II.B.3.

impunities. Although corporations have often been anthropomorphized as real or natural person in order to boost arguments in favour of their legal *entitlements* on an equal footing with individuals,[259] judicial practice also suggests the opposite: they are let off the hook when an individual in like circumstances would not be.[260] The following section shows that corporate impunities are, at least partly, due to the impersonality of the corporate actor.[261] This impersonality also has its basis in the legal privileges of the corporation which have the effect of distancing the corporate person from its human participants, by separating their assets and liabilities and thereby furthering corporate autonomy. This corporate autonomy makes it, on the one hand, challenging to apply liability regimes intended for individuals to the corporate collective actor. On the other hand, it creates an easily scalable entity which, with growing size, increases its separateness and ontological difference from its human participants. The scalability in turn allows for large entities with significant governing capacity and incentives. As shown below, these dynamics are played out *par excellence* online and undergird platform rule.

1. Corporate Autonomy, Scalability and Impunities

Incorporation and limited liability generate the foundational corporate self-governance and its animating rationality, but that self-governance operates within a wider set of corporate privileges that give rise to an entity that is largely autonomous from its human participants. Commercially this is very advantageous and creates a versatile economic vehicle that easily scales up.

Autonomy through Privileges. Limited liability does not just immunise investors from corporate liabilities, it also strengthens corporate autonomy by distancing the corporate entity from its investors. By virtue of limited liability corporate credit becomes solely dependent on corporate assets rather than the shareholders' financial standing.[262] Equally, as the share value is anchored solely in corporate assets and prospects rather than those of its shareholders, the tradability of shares is facilitated.[263] Giving investors an easy exit option strengthens corporate autonomy but also orientates its activities strongly towards shareholder retention through a focus on the short-term share price.[264]

Corporate autonomy is further underwritten by the economic privileges of "asset lock-in" and "entity shielding." Asset lock-in prevents shareholders from pulling their investment from the corporate capital and thus secures a permanent capital fund; and "entity shielding" extends the

[259] *See* Santa Clara County v. Southern Pacific Railroad Co., 118 U.S. 394 (1886) (holding that corporations may assert rights as "persons" under the Fourteenth Amendment, without providing an explanation); analysed in Barkan, *supra* note 1, 65-86; Horwitz, *supra* note 162; or Greenwood, *supra* note 156.
[260] *See supra* Part II.A. and Soares, *supra* note 256.
[261] *See infra* note 289 and 290 and accompanying text (showing that the corporate capacity for responsibility and guilt is also contingent on political and jurisprudential thought).
[262] Ciepley, *supra* note 118, at 144.
[263] *Id.*
[264] *See e.g.* Lynne Dallas, *Short-termism, the Financial Crisis and Corporate Governance*, 2011 J. CORP. L. 265 (2011) (exploring the excessive focus of corporate managers, asset managers, investors on short-term portfolio returns as a contributing cause of the financial crisis); *cf* Mark J. Roe, *Stock Market Short-Termism's Impact*, 167 U. PA. L. REV. 71 (2018) (arguing the alleged calamitous impact of the short-termism of the stock market is not borne out by the evidence); *see also supra* note 198 and accompanying text.

same prohibition to the creditors of the shareholders. [265] The attendant displacement of otherwise applicable rules of property and contract law is economically highly advantageous:

> [Asset lock-in] lowers the corporation's capital costs, because lenders need not fear expropriation by withdrawing investors… It [also] allows the corporation to specialize its assets to the production process rather than keep them in more liquid form out of fear that investors withdrawal will force a sell-off. This in turn allows the corporation to specialize its works to its specialized assets… the classic means to increased productivity.[266]

In combination the privileges of "asset lock-in, entity-shielding, and limited liability completely disentangle corporate assets and liabilities from investor assets and liabilities… [and jointly effect that] the assets of the corporation alone bond the contracts of the corporations alone."[267] Effectively, these economic privileges provide the meaty substance for the initial formal recognition of the corporation as a person. By sheltering the corporation from the "normal" rights of its creditors and the "normal" rights of its investors and their creditors, the corporation as an autonomous entity, whose assets and liabilities do not collapse into those of its investors, is carved out. Judicial interpretation has reinforced that autonomy by treating the corporation in various legal contexts as a "real" or "natural" person rather than merely an aggregation of its shareholders,[268] and this treatment becomes more compelling the bigger the corporation.

Scalability and Market Governance. The disentanglement of corporate assets and liabilities from those of its shareholders gives the corporation its capacity to scale up - unperturbed by changes in its membership. This explains why it has become the firm of choice for reducing the vagaries of the market by absorbing market transactions. When Ronald Coase in his seminal article on "The Nature of the Firm" in 1937[269] explained why the firm is often more efficient for "co-ordinating the market" than bilateral transactions governed by the invisible hand of the price mechanism,[270] he drew no distinctions between partnerships and corporations as the entrepreneur-co-ordinator:[271] "Outside the firm, price movements direct production, which is co-ordinated through a series of exchange transactions on the market. Within the firm, these market transactions are eliminated and… substituted [by] the entrepreneur-co-ordinator, who directs production."[272]

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[265] Ciepley, *supra* note 118, at 144; see also Henry Hanmann ET AL., *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333 (2006) (proposing that "entity shielding" is more significant to explain the success of corporations as limited liability); or Jean-Philippe Robé, *The Legal Structure of the Firm*, 1, ACCOUNT. ECON. & LAW 1, 22-25 (2011) (on " how the creation of a corporations locks-in the assets contributed and leads to the creation of an autonomous and separate form of assets: shares")

[266] Ciepley, *supra* note 118, at 144.

[267] *Id.*

[268] Note, Santa Clara County v. Southern Pacific Railroad Co., 118 U.S. 394 (1886) is often treated as the first Supreme Court decision where the corporate personhood was fully recognised, this is not the case; see *Horwitz, supra* note 162, at 182 (arguing that Hale v. Henkel, 201 U.S. 43 (1905) is the first decision where Supreme Court treated the corporation not simply as the aggregation of its shareholders, but as an entity itself.)

[269] Ronald H Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

[270] *Id.* at 390-91. The costs that may be saved by going "in-house" are: (1) the costs of determining the price (search and information costs), (2) of negotiating the contract (bargaining costs), and (3) of policing and enforcement costs; *see* Lobel, *supra* note 58, 106.

[271] *Id.* at 392 note 1 ("Of course, it is not possible to draw a hard and fast line which determines whether there is a firm or not… It is similar to the legal question of whether there is the relationship of master and servant or principal or agent.")

[272] *Id.* at 388.

Yet, the corporation with its built-in scalability has proven far more suitable for coordinating the market through vertical integration, and for reducing competition through horizontal mergers than the poorly scalable unlimited liability partnerships:

> The "Great Depression" of 1873-96 saw business confronted with chronic overproduction, severe price cutting and falling profits. Their response was to try to fix outputs and prices through mergers in which a large number of unincorporated, unlimited partnerships, many of them family firms, amalgamated to form large incorporated, limited liability JSCs with significant share of the market… In the inter-war period, similar processes underlay the increasing dominance of the JSC and "the rise of the corporate economy."[273]

Even outside periods of economic upheaval and uncertainty "a businessman might count amongst the costs of the market the fact that by competing with other firms in a market, he has to forgo externalities, economies of scale or monopoly profits, which would be possible if he enlarged the firm."[274] As the corporate entity can easily accommodates such enlargement, it can replace 'the "invisible hand" of the market place by the more conscious [in-house] integration and organization of economic activities within large firms.'[275] Size matters. Such enlargement may not just be economically favourable, but also logistically necessary. Alfred Chandler argued in *The Visible Hand* in 1977 that the organisational requirements and economies of scale of many modern industries, notably transportation and communication, both classic network industries, demand large-scale centralized, hierarchical organizations administered by skilled managers to "supervise these functional activities over an extensive geographical area."[276] Whether required for the particular industry or advantageous for investors, the corporate capacity to scale up makes it uniquely adept at co-ordinating, or *governing,* market activities.

These market concentration and co-ordination dynamics are not restricted to local markets, although spatial distribution was, according to Coase, a factor limiting enlargement: "the cost of organising and the losses through mistakes will increase with an increase in spatial distribution of the transactions."[277] Coase also foreshadowed the role of communication media in decreasing organization costs and mistakes: "[i]nventions [such as the telephone or telegraph] which tend to bring factors of production together, by lessening spatial distribution, tend to increase the size of the firm."[278] The effect of the internet on transaction costs has pulled in opposite directionality in terms of firm size.[279] On the one hand, it has lowered the organisation costs of spatial distribution and so favoured smaller actors across larger spaces.[280] On the other hand, these lower organisation costs have occurred on the back of very large global platforms, e.g. YouTube, Uber, Airbnb, Deliveroo Amazon, Google, who use network

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[273] Ireland, *supra* note 159, 839 (JSC stands for joint-stock companies).
[274] LESLIE HANNAH, THE RISE OF THE CORPORATE ECONOMY 3 (1976).
[275] *Id.*
[276] ALFRED D. CHANDLER, THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 87 (1977).
[277] Coase, *supra* note 269, at 397.
[278] *Id*.
[279] *See e.g.* Niva Elkin-Koren & Eli M. Salzberger, *Transaction Costs and the Law in Cyberspace*, in LAW, ECONOMICS, AND CYBERSPACE 90 (2004).
[280] Lobel, *supra* note 58, 108-09 ("The platform breaks down both supply and demand into tiny modalities: short-term rentals, a few minutes of personal assistance, a couple of hours of furniture installation…")

communications to integrate their "production" on a global scale.[281] Platforms lower transaction costs at "the three stage of pre-deal, deal-making, and post-deal: (1) search costs; (2) bargaining and decision costs; and (3) policing and enforcement costs,"[282] and can do so with increased efficiency the larger they are: "With more users, as well as enhanced matching algorithms, pricing software, resource division to tailor each deal, and data mining to monitor the exchange, transaction costs are reduced dramatically."[283]

For present purposes, the points of note are: *first*, corporations have long been used to scale up to absorb market transactions and thereby to replace the invisible hand of the market with their own visible governing hand. *Second*, platforms have put a twist on this logic by replacing the fictional market with actual marketplaces under their control: "Organizationally speaking, the platform is the key: platforms do not enter or expands markets; they replace (and rematerialize) them."[284] These marketplaces are different from the fictional ones precisely because they are controlled or governed by platforms. *Third*, the impersonality that makes the corporation so scalable and so adept at absorbing and coordinating markets (i.e. makes the corporation a governor), also makes it a slippery subject of law and regulation (i.e. governee), to which the discussion turns now.

Impunities of the Impersonal Corporate Actor. The corporation is, as a group person, ontologically different from individuals, which explains the difficulty of pinning fault on the corporation.[285] In corporations the moral attribution of fault is ambiguous and complex, and has preoccupied academics for some time.[286] Fault in the corporation may, in principle, attach to the autonomous corporate singularity ("it") or, as a form of diffused fault to the multitude, the shareholders ("they"). Yet, much as corporate privileges legally distance investors from corporate activities and heighten corporate autonomy, they also morally distance them from corporate wrongdoing: "shareholders are less likely to… feel responsible because each is only one of many shareholders. This diffused responsibility should further insulate shareholders from social or moral sanctions."[287] At the same time, the corporation itself may - as an impersonal person with "no soul to damn, no body to kick"[288] - not be a suitable target for legal

[281] Orly Lobel, *Coase & the Platform Economy*, in SHARING ECONOMY HANDBOOK (2018); Annabelle Gawer, *Digital platforms' boundaries: The interplay of firm scope, platform sides, and digital interfaces*, 54 LONG RANGE PLANNING 1 (2021).
[282] Lobel, *supra* note 58, at 106.
[283] *Id* at 107.
[284] Cohen, *supra* note 1, at 135.
[285] *See e.g*. Soares, *supra* note 256, 143 ("For the upholders of the theory of individual responsibility rooted in methodological individualism…, one cannot ascribe moral responsibility to a corporation, only to "flesh-and-blood" individuals who are moral persons."); Brent Fisse & John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 11 SYDNEY LAW REV. 468 (1988)(on the inadequacies of methodological individualism in accounting for the corporateness of corporate action and responsibility); CHRISTOPHER HARDING & ALISON CRONIN, BAD BUSINESS PRACTICE, 33-53 (2022) (on the normative theories for allocating collective responsibility).
[286] *See supra* note 162-164 and accompanying text (on the aggregation and real entity theories as responses to the traditional grant or concession theory). For an alternative expression of the binary, *see e.g.* Soares, *supra* note 256, 144 ("The debate around this problematic have two contestants: nominalists and realists. For the former, corporations are collections of individuals, or aggregations of human beings. For the latter, a corporation has an existence and a meaning as well as a moral/legal personality of its own.").
[287] Elhauge, *supra* note 198, at 759.
[288] John C. Coffee Jr, *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981) (quoting Edward, First Baron Thurlow 1731-1806).

interventions, or not easily so.[289] So incorporation generates, in addition to the immunities, a set of impunities. Again, Blackstone's observation on the "invisibility" of the chartered corporations in law is equally pertinent to the modern corporation:

> There are also certain privileges and disabilities that attend an aggregate corporation… being… invisible, and existing only in intendment and consideration of law. It can neither maintain, or be made defendant, to, an action of battery or such like personal injuries; for a corporation can neither beat, nor be beaten, in it's [*sic*] *body* politic. A corporation cannot commit treason, or felony, or other crime, in it's [*sic*] corporate capacity: though it's members may, in their distinct individual capacities.…[290]

Blackstone's list of corporate impunities is instructive because it reflects on the nature of the corporation as lacking human corporality and morality which makes various crimes and punishments a poor fit. It is also instructive because the list of excluded torts and crimes has changed over time and so emerges as more contingent and constructed than inevitable and fixed due to the corporate nature.[291] How does this affect platform liability? The following does not rehash the debate on corporate moral agency, but focuses on how traditional theories on corporate fault or absence thereof have resurfaced, and been re-appropriated, in the deliberations on the fault of platforms and their algorithms.

2. Impunities of the Artificial Corporate Entity and the Passive Inanimate Platform

The classic theory of the corporation as a purely artificial entity, or fictional person, has an intuitive appeal, especially for lawyers trained in human-based intentionality as the default. The private variant of the artificial entity theory understands the corporation as no more than the legal recognition of the aggregation of its investors and their contractual nexuses.[292] The corporation is no more than the sum of its parts. For the purpose of moral agency, an artificial entity cannot be at fault, only its human participants can.[293] As this theory constructs the corporation as a type of tool, device or artefact, it shares much with the theoretical thinking about "technologies"[294] and their moral or political attributes. Intuitively, technologies are politically and morally neutral tools which acquire their meaning, function and action *only* through the human actors who use them or, as the case may be, abuse them. A knife is neither good nor bad. It makes no sense to blame the technology itself for the murder: "We all know that people have politics, not things. To discover either virtues or evils in [technologies]… seems

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[289] On the position of directors, *see* Horwitz, *supra* note 162, at 183 ("[I]in 1875… American law tended to conceive of directors as agents of shareholders. After 1900 however, directors were more frequently treated as equivalent to the corporation itself.") . On the potential ineffectiveness of sanctions, see Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1177 n.57 (1982) ("[T]he idea of optimal sanctions is based on the supposition that managers not only may but also should violate the rules when it is profitable to do so.").

[290] Blackstone, *supra* note 199, 464 (internal marks omitted, emphasis added).

[291] See e.g., MICHAEL B. BLANKENSHIP (ED), UNDERSTANDING CORPORATE CRIMINALITY (1993).

[292] *See supra* note 163 and accompanying text. Note, the aggregation theory defines the corporation as the aggregation of the contracts existing between its individual participants. It is the private variant of the grant theory which also views the corporation as an essentially fictitious person, albeit a public one; *see e.g.* David Gindis, *From Fictions and Aggregates to Real Entities in the Theory of the Form*, 5 J. I. ECON. 25 (2009).

[293] *See supra* note 287 and accompanying text.

[294] Langdon Winner, *Do Artefacts Have Politics?* 109(1) DEADALUS 121, 127 (1980) ("The things we call 'technologies' are ways of building order in our world. Many technical devices and systems important in everyday life contain possibilities for many different ways of ordering human activity.")

just plain wrong, a way of mystifying human artifice and of avoiding the true sources, the human sources of freedom and oppression, justice and injustice."[295] Whilst this view may be intuitively persuasive, Langdon Winner has shown, in his seminal article *Do Artefacts Have Politics?,* that technologies are after all not politically neutral:

> Consciously or not, deliberately or inadvertently, societies choose structures for technologies that influence how people are going to work, communicate, travel, consume… In the processes by which structuring decisions are made, different people are differently situated and possess unequal degrees of power as well as unequal levels of awareness. [296]

Although Winner had physical constructs in mind, his reasoning may be extended to social or legal constructs, including the corporation which has been described as a "masterpiece of legal technology."[297] It certainly has been an immensely successful device or tool for socializing property.[298] In light of the critical literature on the corporation as an institution, it may fairly be said that the corporation would generally not be treated as a politically or morally neutral legal technology, even if there may be disagreements on its relative virtues and vices. [299]

This, however, has not stopped the argument of neutral inanimate technology taking center-stage in the platform immunity jurisprudence. Online platforms have benefited from an appeal to neutral technology in significant ways, and thereby re-enacted, albeit in a transformed way, the artificial entity, or neutral technology, thesis of the corporation. *First,* platforms have sought to position themselves as the providers of pure infrastructures, comparable to bridges, roads or tunnels, and as such they hold no further interest in, or knowledge about, the traffic that passes on, through or under them: "censoring information that passes over their services or... blacklisting accused customers, [would be] analogous to demands that toll road operators inspect trunks of cars or exclude certain drivers on their highways."[300] Coincidentally, Winner used the very example of low-hanging overpasses under which no public buses could pass to show that even bridges have politics.[301] Still, the label "platform" evokes the idea of an ignorant, disinterested inanimate structure. Using arguments of impersonal neutrality, platforms have been keen to shift the gist of online wrongdoing to outsiders, to "external" human actors: its users as either content providers (supply) or content consumers (demand).[302] The platform itself is merely a neutral matchmaker or infrastructure provider giving no more than "passive assistance," in Justice Thomas' words.[303] Don't shoot the disinterested messenger.[304]

Second and related, the platform's appeal to their services as the provision of an inanimate neutral infrastructure is heightened by their use of technology as the decision-maker. As under the artificial entity theory of the corporation moral agency is only located in its human

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[295] *Id.* 122.
[296] *Id.* 127.
[297] BAARS, *supra* note 24, at 3.
[298] Ciepley, *supra* note 118, 146-47 (commenting on superior scale and stability of the corporation for socializing property as opposed to individuals in partnership).
[299] *See supra* note 168 and 172 and accompanying text.
[300] Brief for Internet Infrastructure Coalition, *supra* note 221, 14.
[301] Winner, *supra* note 294, at 123-124.
[302] Ifeoma Ajunwa, *Facebook Users Aren't the Reason Facebook Is in Trouble Now*, WASH. POST (Mar. 23, 2018).
[303] *Taamneh*, 598 U.S. at 23; *see supra* note 80 and accompanying text).
[304] *See supra* Part II.A.3.

participants, the use of algorithms "neutralises" corporate decisions. It removes responsibility from the only actors, the human actor, who can, under the neutral technology theory, be the bearer of moral responsibility, and thereby distances the corporation from its decisions:

> [they replace] individual authority… perceived or portrayed as inadequate, inefficient, partial, paternalistic, corrupt, or illegitimate… [with] fully formalized, automated decisions [that] have become more and more attractive as effective and supposedly neutral…, in particular if they implement an empirical component that can be presented as 'carrying' the actual decision. Responsibility can then be shifted to the data themselves.[305]

As decision-making is transferred to "neutral" technology, responsibility dissipates. In *Gonzalez* and *Taamneh* the platforms' use of algorithms to decide on content delivery and ad placement translated into corporate impunity, in circumstances when an individual's decision to forward ISIS videos to interested users to expose them to more adverts would not have counted as neutral or fault-free.

This differential human-versus-machine legal treatment continues despite the general awareness of the politics of technology, and despite the specific evidence of the politics of algorithms.[306] As shown above recommender algorithms often inflame rather dampen division and extremism, enhance rather than suppress borderline content.[307] Algorithms encode corporate intentionality, and as such provide evidence of platform fault.[308] Where better does the platform show its intentionality than in the embedded instructions of its algorithms? Algorithms are human artefacts with politics that capture and externalize the politics of the platform, and thus must be subject to scrutiny. The law has long gotten around the problem of not being able to shine a torch into the mind of a wrongdoer by inferring an intention from an act's foreseeable consequences and observable effects.[309] Construing platforms as disinterested, inanimate things belies their significant efforts in constructing the online user experience, in shaping supply-and-demand dynamics. The efforts have paid dividends: "YouTube's recommendation system is responsible for generating over 70 percent of viewing time on the platform."[310] Platforms are neither disinterested nor ignorant about the traffic that passes through them; not only do they know what is in the trunk, they have put most of the content there in the first place.

3. Impunities of the Real Corporate Entity and the "Broken Systems" of Platforms

[305] Bernhard Rieder, *Big Data and the Paradox of Diversity*, 2 DIGITAL CULTURE AND SOCIETY 39, 43 (2016). Consistently human interference with automated results is treated with suspicion, *see e.g.* Grind, Kristen ET AL., *How Google Interferes with Its Search Algorithms and Changes Your Results*, W. S. J. (Nov. 15, 2019), https://www.wsj.com/articles/how-google-interferes-with-its-search-algorithms-and-changes-your-results-11573823753

[306] *See supra* note 233 and 251 and accompanying text.

[307] *Id*.

[308] *Id*.

[309] *See e.g. Boim*, 549 F.3d at 694 ("[I]t is a matter of external appearance rather than subjective intent, which is internal to the intender.")

[310] Singh, *supra* note 233.

Alternatively and prevalent in corporate jurisprudence since the early 1900s, the corporation has been understood as a real, not artificial, collective entity, such as a town.[311] While recognising the reality of the corporate person makes it possible to account for its autonomous behaviour separate from its human participants, it remains a slippery entity for the purposes of attributing fault. The collective nature of this real entity has often the effect of neutralizing the pursuit of profit as an *impersonal* organisational goal achieved through an *impersonal* bureaucracy to which blameworthiness does not easily stick, and within which individual responsibility disappears.[312] The real entity theory shares common ground with the cultural theory of structuralism within which the individual is submerged in larger systems "following rules which they are not free to control or change… and possibly not even perceive."[313] Given its focus on the rules and patterns underlying structures, structuralism dethrones the individual as the most significant actor in the generation of decisions: "This decentering… raises a number of problems (such as: What, if the subject is no longer in control, becomes of the notion of personal responsibility?)"[314]

The real entity theory of the corporation and its legal effects shines through the Ninth Circuit's holding that Google could not be directly liable under the ATA as its actions were only motivated by "economic self-enrichment."[315] Whilst the court imputed intentionality to the corporation itself, blameworthiness disappeared in the impersonal profit-driven nature of the organisation. The impersonality of the entity also runs, as an undercurrent, through Evelyn Douek's description of content moderation as a "vast system of administration"[316] consisting of a range of processes and processors:

> "Content moderation"… includes… increased reliance on automated moderation; sticking labels on posts; partnerships with fact-checkers; greater platform and government collaboration; adding friction to how users share content; giving users affordances to control their own online experience; looking beyond the content of posts to how users behave online to determine what should be removed; and tinkering with the underlying dynamics of the very platforms themselves. The people and processes that determine how user generated content is treated on online platforms are therefore far more heterogeneous than depicted in the standard account.[317]

What is peculiarly absent from Douek's account on platform "system thinking" is a sense of the real fault or blameworthiness in the "systemic failures", "systemic errors" or "broken systems."[318] This apparent absence of fault is consistent with her argument against the value of individual actions against platforms for wrongful behaviour: "individual cases are poor vehicles

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[311] Horwitz, *supra* note 162, at 179-81 (drawing on the concept of "group personality" by Otto Gierke in Germany in 1887 and the subsequent writing by J. F. Maitland in the English speaking world); see OTTO GIERKE, DAS DEUTSCHE GENOSSENSCHAFTSRECHT (1887); F.W. MAITLAND, COLLECTED PAPERS (1911); ERNST FREUND, THE LEGAL NATURE OF THE CORPORATIONS (1897). *But see* Ciepley, *supra* note 118, at 143 (arguing that the corporation does not have an existence prior to incorporation, comparable to a town).

[312] *See e.g.*, Fisse, *supra* note 285, at 469 ("Prosecutors are able to take the short-cut of proceeding against corporations rather than against their more elusive personnel and so individual accountability is frequently displaced by corporate liability, which now serves as a rough-and-ready catch-all device.")

[313] THOMAS A. SCHMITZ, MODERN LITERARY THEORY AND ANCIENT TEXT: AN INTRODUCTION, 31 (2007)

[314] *Id.* 34.

[315] *Supra* note 236 and 237 and accompanying text.

[316] Douek, *supra* note 7, at 531.

[317] *Id.*

[318] Douek, *supra* note 7, at 569.

for identifying or reviewing systemic errors… individual remedies will be ineffective in reforming broken systems."[319] Individual cases may be precisely what is needed to generate an understanding of the fault in the platform bureaucracy. Such complaints lend human reality, specificity, and trauma to the consequences of platform failures and lift them from the abstract to the concrete. They add pressures that generalized allegations of "system failures" cannot. The *Gonzales* action is a case in point, but so would be cases like the action brought by Tawainna Anderson's whose 10-year daughter died of asphyxiation in the course of performing a viral TikTok challenge, but whose claims of negligence and strict products liability against TikTok were dismissed under section 230.[320] Individual complaints make the consequences of "broken system" personal and bring questions of responsibility and wrongdoing to the fore. This explains why case law has long proven an effective vehicle for triggering systemic (legislative) changes to industries.[321] They concretize reasonable expectations and show why and how "broken systems" must be fixed.[322] Individual complaints would challenge the rule of impersonal corporate platform, but section 230 and its interpretation forecloses them.

4. Platforms as Governees or Governors?

The interpretation of platform immunities in section 230 is embedded in a landscape of corporate immunities and impunities. The corporation's foundational rationality of blind profit maximization coupled with its impunities and impersonal nature separate from its human participants, makes the jurisprudence of platform immunities based on their apparent neutrality and faultlessness unexceptional.

However, the corporate prism also opens up avenues for critical engagement with section 230 and its interpretation. Taking the corporation seriously - as a legal technology "with politics" or as a "real entity" with fault capacity - demands that it should be treated *on a par* with the human actor for whom the blind pursuit of profit would not generally act in an exculpatory way. There is no reason why the initial corporate privileges and rationality should trigger further immunities, as opposed to matching corporate responsibility with individual responsibility analogous to the corporate alignment with individual rights. Such levelling up would recognize the corporate platform's full subject-hood and allow for the law's disciplining effect on its otherwise unchecked economic self-interest. By extension, section 230 should be much more narrowly defined, and platforms ought to get its benefit only if their corporate interest does not get in the way of a fair-minded capacity to moderate.

Yet, such construction would assume that platforms are best understood as a normal legal subject answerable to the law applicable to private citizens. Arguably this is not the best fit. The corporate platform may also be viewed as an extraordinary legal vehicle with an autonomous impersonality capable of scaling up and carving out wide spheres of governance that call for alternative restraint mechanisms. On this reading, section 230 and its judicial interpretation do

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[319] *Id.*

[320] Anderson, et al. v. TikTok, Inc., et al., No. 2:22-cv-01849-PD (E.D. Pa.)

[321] *See e.g.* Richard A. Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. LAW. REV. 1717, 1736 (1982) ("the reason that common law doctrines mattered in this setting [i.e. industrial accidents] is that they were narrowly drawn and functioned as "gatekeeper" rules.')

[322] Brandenburg v. Ohio, 395 U.S. 444 (1969) or Dobbs v. Jackson Women's Health Organization, 597 U.S. (2022); *see also* Douek, supra note 7, at 269 ('Case-by-case review a poor model of content moderation oversight because such review will, first, fail to identify systemic failures and, second, skew risk tolerance by highlighting mistakes that may be the product of reasonable ex ante decisions at the systems level.')

not just as tap into the gatekeeping capacity of online intermediaries, but leverage - through corporate-specific rulings - their governing propensity as corporate actors. With this perspective, platforms are more clearly revealed as empowered governors, not simply immunised governees. By implications, the narrow focus on their fault gives way to broader issues revolving around their democratic legitimacy and accountability as governors and appropriate legal frameworks that may attach to their governing activity. The latter will, of course, also seek to ensure the fair-mindedness of platform rule.

Questions of governor accountability already permeate the narratives by and about platforms. Referring to Terms and Conditions as "Community Standards", publishing transparency reports, commitments to free speech,[323] Meta's Oversight Board[324] or Google's AI Principles (notably 'Be accountable to people'[325]) are infused with the markers of their emerging status as governor and attendant pressures for accountability and democratic legitimacy. This is not to say that platforms are just like any standard public actors, but neither are they standard private actors like their users. Yet, currently by occupying a middle ground, platforms are neither subject to the laws applicable to private actors nor to the standards applicable to governmental actors; they fall outside the legal loop. This brings us to Part III of this Article on the "sovereignty-sharing" arrangement of platform and government, and how constitutional jurisprudence could recognise the hybrid private-public nature of online platforms.

III. PLATFORM SOVEREIGNTY OR/AND DIGITAL SOVEREIGNTY

The above discussion positions platform self-governance, enabled by section 230 and magnified by an expansive judicial reading, as an extension of corporate self-governance. Implicit in the argument is that the power of platforms in the information sphere is neither a wholly novel aberration nor simply the result of pure market forces or special online dynamics, such as network effects, but the outcome of legal entitlements that have been put in place by government and cultivated thereafter.[326] This backing that platforms have had from government belies common narratives of government-platform antagonism, or alternatively of platforms conquering a law-less frontier that government is slow to catch up on.[327] The "unregulated" frontier is very much the product of political choices and legal ordering.[328]

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[323] Google's Terms and Policy (Dec. 30, 2023) https://support.google.com/googlecurrents/answer/9680387?hl=en ("Our products are platforms for free expression, but we don't permit hate speech.")

[324] Meta's Oversight Board (Feb. 9, 2024) https://www.oversightboard.com/ ("The purpose of the board is to promote free expression by making principled, independent decisions regarding content on Facebook and Instagram...").

[325] Sundar Pichai, *AI at Google: Our Principles* (Jun. 7, 2018) https://www.blog.google/technology/ai/ai-principles/

[326] *See e.g.* Cohen, *supra* note 1, 153-161 (showing how the law has "systematically facilitated the platform economy's emergence"); Niva Elkin-Koren & Eldar Haber, *Governance by Proxy: Cyber Challenges to Civil Liberties*, 82 Brook. L. Rev. (2016) (on the collaborations between governments and online intermediaries in managing behavior); or generally beyond the online sphere, *see e.g.* Steve Tombs & David Whyte, *The Shifting Imaginaries of Corporate Crime*, 1 J. WHITE COLLAR AND CORP. CRIME 16 (2020) (on the symbiotic relationship between state and corporations as the source of corporate crime).

[327] This narrative is frequently implicit, but also at times explicit, see e.g. ANU BRADFORD, DIGITAL EMPIRES: THE GLOBAL BATTLE TO REGULATE TECHNOLOGY (2023) (arguing that the America's digital empire is an unregulated market economy); SHOSHANNA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM (2019) (presents the surveillance capitalism as a coup by private actors); DEBORAH L. SPAR, RULING THE WAVES: CYCLES OF DISCOVERY, CHAOS, AND WEALTH (2001) (arguing that at the first stage of technological revolution, the innovators occupy a lawless frontier).

[328] *See supra* note 326.

By the same token, whilst the concept of "digital sovereignty" connotes the assertion or reassertion of governmental control over the online domain,[329] the regulatory changes put in place recently, for example, in Europe, have still left platform immunities and self-governance wholly intact.[330] The EU Digital Services Act makes the governing role of platforms implicit in the immunities more explicit by stipulating minimum process and due diligence requirements for their ordering activities,[331] and puts in place a form of regulated self-regulation.[332] The requirements draw on rule-of-law expectations normally reserved to governmental actors to protect citizens against the exercise of arbitrary public power.[333] In similar vein, albeit substantively different, the platform moderation Bills enacted in Texas and Florida are premised on the assumption that such moderation is "censorship" analogous to governmental censorship and thus ought to be subject to First Amendment restraints.[334] So irrespective of any formal recognition of their public or private status, these regulatory initiatives already constitute platforms as private-public governors – largely in tune with their own rhetoric, as noted above. The final Part reflects on the broader political context for this symbiotic platform-state relationship and proposes a possible constitutional avenue for platform accountability.

A. Shifting Spheres of Governing Competence of State and Corporation

A useful point of departure for reflecting on the interaction between platform and government is, once more, the corporation, whose relationship with the state is of longstanding and grounded in their ontological likeness. Much as the corporation is different from the human actor, it is similar to the state, which is itself an abstract collective entity.[335] It is not without reason that Hobbes, Blackstone, and Thayer J described the corporation respectively as a "commonwealth," a "little republic" or "legislative bodies."[336] In reverse, the modern state as a quintessential ordering framework is "corporate" in its conceptual origin and design. Hobbes drew on the corporation of his time to conceive the state as the "Artificial Man"[337] who comes into being when '[natural men] confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will… [and] this multitude so united in one person, is called a *Commonwealth …* [or the] great *Leviathan*…'[338]

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[329] Julia Pohle & Thorsten Thiel, *Digital Sovereignty*, in PRACTICING SOVEREIGNTY, DIGITAL INVOLVEMENT IN TIMES OF CRISES 47 (2021) (analysing the contested nature of digital sovereignty, used by government to convey their reassertion of authority over the internet).

[330] Art 4-10 of the Digital Services Act 2022/2065, which largely reproduces the long-standing immunities in Art 12-15 of the Electronic Commerce Directive 2000/31/EC.

[331] *See* e.g. Art 11 - 48 of the Digital Services Act entitled "Due Diligence Obligations for a Transparent and Safe Online Environment." (including duties to provide notice-and-takedown mechanisms, to give explanations to affected parties, to have an internal complaints handling system, to take effective actions against those who abuse the platform etc.).

[332] On rule of law requirements on private actors, *see e.g.*, see also Ioannis Kampourakis, ET AL., *Reappropriating the Rule of Law: Between Constituting and Limiting Private Power*,14 JURISPRUDENCE 76 (2023); Uta Kohl, *Platform Regulation of Hate Speech – a Transatlantic Speech Compromise*, 14 J. MEDIA LAW 25 (2022).

[333] *See e.g.*, Art 17 of the Digital Services Act (duty to give reasons for a moderation decision to affected users).

[334] *Supra* notes 86 – 89 and accompanying text.

[335] Benjamin de Carvalho, *The Making of the Political Subject: Subjects and Territory in the Formation of the State,* 45 THEOR. SOC. 57 (2016) (describing the political "subjectification" of the "subjects of the king" as central to the reconstitution of the state as an abstract entity).

[336] *See supra* notes 29, 199 and 203.

[337] Barkan, *supra* note 1, at 23 (drawing also on theological foundations of the Roman Catholic Church in the 12th century that used corporateness to establish "the relation between the individual body of God and the collective body of believers who maintained their corporate status by partaking of the sacrament.")

[338] HOBBES, *supra* note 26, at 134.

and represented by the Sovereign.[339] It is then not surprising that the blueprint for written constitutions laying down the fundamental framework for constitutional republics were corporate charters: "The Massachusetts Bay Colony… began as the Massachusetts Bay Company, the charter of which served as the colony's first written constitution… [and a] similar story holds for Virginia and several other American colonies."[340] State and corporation are two of a kind; or, as Barkan puts it, they "double one another":[341]

> Both corporations and states are collective entities composed of individuals united in a single body. They are both created, usually sharing some animating act of incorporation that establishes their legal existence, and these acts are codified, or more accurately, constituted through charters and constitutions. Once constituted, corporations and states share a range of techniques – from the consensual to the coercive – for establishing order within their institutional structures and across the places and territories in which they operate.[342]

As collective ordering structures, state and corporation share an inherent propensity to regulate, that is to establish order within their institutionalized structures and spheres of competence.

These spheres have seen dramatic expansions and contractions over time. As mentioned above, in the early modern period chartered corporations played central governing roles in England at home and abroad: "the Crown removed itself from the direct management of much of daily life, using corporation to manage hospitals, schools, philanthropy, and imperial trade in a specially decentralized and liberal mode of government."[343] The state routinely "outsourced" the business of government to chartered corporations as "bodies corporate and politic", most comprehensively in overseas territories,[344] which eventually attracted stringent criticisms from liberal thinkers. Adam Smith in *The Wealth of Nations* did not just denounce the British East India Company's monopoly as economically inefficient but also its mercantile sovereignty in India as oppressive and corrupt: "No other sovereigns ever were, or, from the nature of things, ever could be, so perfectly indifferent about the happiness or misery of their subjects." [345]

The spheres of competence of state and corporation were decisively disentangled, or so it was thought, in the mid-19th century with the rise of liberalism and capitalism, and the attendant separation of the private sphere of the market from the political or *public* domain.[346] The separation entailed, at least as an ideal, the withdrawal of government from the market place

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[339] HOBBES, *supra* note 26, at 135; see also Stern supra note 1, at 7 (on the legal and conceptual similarity between the early modern chartered corporations and the monarchy at the time).
[340] Ciepley, *supra* note 118, at 142.
[341] BARKAN, *supra* note 1, at 4.
[342] BARKAN, *supra* note 1, at 5.
[343] BARKAN, *supra* note 1, at 29.
[344] See on the governing functions of chartered corporations, see Greenwood, *supra* note 156, 171-174 on the quasi-governmental role of chartered corporations. On the governmental function of chartered corporations in overseas territories, see e.g. STERN, supra note 1.
[345] ADAM SMITH, WEALTH OF NATIONS 411 (1776); see also Julie Murray, *Company Rules: Burke, Hastings, and the Specter of the Modern Liberal State*, 41 EIGHTEENTH-CENTURY STUDIES 55 (2007) (Edmund Burke accused the East India Company in 1786 of no longer being "a Company formed for the extension of the British commerce, but in reality a delegation of the whole power and sovereignty of this kingdom sent into the East.")
[346] Ciepley, *supra* note 118, 139; or ERIKSON, *supra* note 160, at 46-47 (on the emergence of "economics" in England in response to the British East India Company)

and the withdrawal of business enterprise from governing.[347] The nature of the public-private division is necessarily contestable and has been fiercely contested in law and politics, as manifested in vastly different interpretations of its boundary across time and space.[348] Of significance here, neoliberalism, and specifically neoliberal tech-utopianisms, have in America successfully discredited the capacity of government to deliver public goods online.[349] Section 230 embodies this neoliberal tech-utopianism in so far as the immunity and its broad interpretation has been justified on the basis of protecting the inherently democratic internet from oppressive governmental intrusions.[350] The jurisprudence on section 230, however, also shows resistance to, and contestation of, that narrative by civil society and government.[351]

B. A New "Constitutional" Settlement and the "Governmental Intruder" Narrative

Section 230 was, on its face, designed to remove disincentives, in the form of existing liability regimes, for online intermediaries to actively moderate content. By removing those legal regimes, government could no longer tread where it had trodden previously and done so within its settled constitutional limits: in the case of common law causes of actions of defamation, fraud or negligence for centuries, or more recently through statutory actions such as aiding and abetting international terrorism.[352] The rationale for the radical disruption of existing normativity was to provide a broad base for moderation by platforms going beyond governmental constitutional limits. Private actors can do what government cannot, i.e. remove hate speech or disinformation, as is implicit in section 230 which encourages the removal of objectionable material "whether or not such material is constitutionally protected."[353] But for the immunity, any editorial control exercised by platforms over constitutionally protected content, could collaterally expose them to liability for other content.[354] Section 230 addresses that collateral threat by incapacitating government in respect of what it could regulate in order

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[347] See e.g. Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. Rev. 1423 (1982); or Gordon S. Wood, *The Emergence of the Public-Private Distinction in Early America*, in THE PUBLIC AND THE PRIVATE IN THE UNITED STATES 1 (1999).

[348] *See e.g.*, Robert McCloskey, American Conservatism in the Age of Enterprise (Cambridge, 1951); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970 (1975); Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296 (1982) (on the difficulty of constitutional positivism in retaining the private/public dichotomy in the absence of a normative theory of rights); Joan Williams, The Development of the Public/Private Distinction in American Law, 64 TEX. LAW REV. 225, 231-242 (1985) (on the different judicial classification of the corporation in the early nineteenth century).

[349] See Paul Starr, *How Neoliberal Policy Shaped the Internet—and What to Do About It Now*, AM. PROSPECT (Oct. 2, 2019); or Netanel, *supra* note 101, at 131-41 ("American technology policy and current First Amendment doctrine exhibit a far-reaching neoliberal aversion to regulating private power."). For a recent critical history of the rise of neoliberalism in America generally, *see* NAOMI ORESKES, ERIC M. CONWAY, THE BIG MYTH: HOW AMERICAN BUSINESS TAUGHT US TO LOATHE GOVERNMENT AND LOVE THE FEE MARKET (2023).

[350] *See infra* Part III.B.

[351] *See e.g.*, Brief for States of Tennessee ET AL, *supra* note 96, at 7 ("This broad interpretation of Section 230 has resulted in the widespread preemption of state laws and the concomitant erosion of traditional state authority…")

[352] Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L REV. 1650 (2009) (showing the uneven and in parts incoherent First Amendment jurisprudence in civil claims in tort, contract and property law).

[353] 47 U.S.C. § 230(c)(2)(A); but note, Blum v. Yaretsky, 457 U. S. 991, 1004 (1982) ("[O]our precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.")

[354] *See supra* notes 50 and 51 and accompanying text.

to encourage platforms to regulate what it could not. "Regulation" is the subject-matter of section 230 and its objective.

That this new radical quasi-constitutional settlement was so readily accepted is explicable by a political climate that treated government as an illegitimate intruder in cyberspace,[355] even though section 230 is itself a governmental intervention of magnitude.[356] After all, the immunity does not create or recreate a law-less zone but redistributes existing legal entitlements. It does not return platforms to an *a priori* lawless space but removes their accountability in a law-*full* space.[357] Still, the "governmental intruder" narrative from which section 230 arose, also provided the backbone of the decision in *Reno v. ACLU* where the Supreme Court struck down, as unconstitutional, much of the rest of the Communications Decency Act of 1996,[358] intended to protect children from "indecent" and "patently offensive" content.[359] The Court did so, in large parts, by emphasizing the "specialness" of the Internet and its "democratizing" effect,[360] echoing the sentiment early expressed by Judge Dalzall who described the Internet as "the most participatory form of mass speech yet developed" and as such entitled to "the highest protection from governmental intrusion,"[361] or more poetically: "the Internet may fairly be regarded as a never-ending worldwide conversation. Government may not, through the CDA, interrupt that conversation."[362] This egalitarian, deeply democratic cyberspace would strive best without its input.

The "governmental intruder" narrative has subsequently supported the expansive reading of section 230, starting with *Zeran v. America Online, Inc.,* where the court immunized the intermediaries even when on notice of the wrongdoing on the basis that distributor liability would also amount to "intrusive government regulation of speech."[363] Following that spirit, courts have sheltered platforms from negligence, unfair competition law, product liability, intentional infliction of emotional distress, public nuisance, cyberstalking, securities violations and more, going well beyond the First Amendment shield.[364] Federal and state governments have objected to their incapacitation by the expansive interpretation of the immunity.[365] State governments, in particular, have pointed to the "widespread preemption of state law and the

[355] Note, *Section 230 as First Amendment Rule*, 131 HARV. LAW REV. 2027 (2018) (arguing that although the First Amendment does not require section 230, it should in fact do so).
[356] *See supra* note 323 and accompanying text.
[357] *Id.*
[358] Title V Telecommunications Act of 1996, Pub. L. 104–104, 110. Stat. 56,
[359] 521 U.S. 844 (1997) (disapplying the protective concepts of "indecent" and "patently offensive" content developed in the earlier cases of *Ginsberg* v. *New York*, 390 U. S. 629 (1968) and *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978) in the context of traditional print and broadcast media).
[360] *Reno*, 521 U.S. at 868-869 ("Neither before nor after the enactment of the CDA have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry.")
[361] ACLU v. Reno 929 F. Supp. 824, 883 (ED Pa. 1996).
[362] *Id*, *see also* Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123 (9th Cir. 2003) (To avoid chilling speech Congress "made a policy choice . . . not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages."); Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) (same).
[363] *Zeran*, 129 F.3d at 330.
[364] Brief for States of Tennessee ET AL., *supra* note 96, at 7; *see also* Dickinson, *supra* note 58, 1471.
[365] See e.g. Brief for the United States as Amicus Curiae in Support of Vacateur, Gonzalez v. Google LLC, 598 U.S. 617 (2023) (No 21-1333) (arguing for a narrower immunity than presently endorsed by courts, based on whether the relevant liability targets conduct as opposed to publishing in a narrow sense e.g. product liability claims).

concomitant erosion of traditional state authority to allocate loss among private parties"[366] and, notably, framed their objections in terms of " the importance of state sovereignty" in a "system of dual sovereignty."[367] Poignantly, their loss of sovereignty does not entail a gain for the federal government, but one for platforms.

Section 230 has handed governing competence over cyberspace to corporate actors, that is to inherently undemocratic social systems. It is, of course, plausible that the technologies that underlie network society call for the "centralized, hierarchical managerial control" of the corporation.[368] Winner posed this question in relation to earlier large-scale technologies: "Was Plato right in saying that a ship at sea needs steering by a decisive hand and that this could only be accomplished by a single captain and an obedient crew?"[369] This is effectively a capacity argument reminiscent of the Crown's early modern practice of using chartered corporations for outsourcing or delegating regulation when it lacked the will or capacity to do so itself.[370] Still, it is one thing to surrender control over cyberspace to corporate actors on the basis that the scale of the technology required their firm, undemocratic leadership (as may or may not be the case) and quite another to argue that democracy would be enhanced through that transferral.[371] With some foresight Winner warned that the "autonomy of politics" can only be salvaged by keeping technological systems controlled by corporations "separate from the polity as a whole."[372]

C. Hybrid Private-Public Actors and Hybrid Constitutional Accountability

Scaling section 230 back would be one way of addressing the democratic and accountability deficits of platform rule, albeit one that only reduces the problem rather than addresses it. An alternative would be to embrace platforms as governors and adapt constitutional restrictions imposed on government to platforms as hybrid private-public actors.[373] Existing jurisprudence on the First Amendment rarely and reluctantly treats private actors as having crossed the constitutional divide to become "state actors" and so duty bearers rather than rightsholders.[374] That reluctance is partly due to the binary public-private nature of the liberal order and the concomitant difficulty of accommodating hybrid actors and partly to the intractable inconclusiveness of the public and private categories as well as a neoliberal readiness to define "state function" minimally.[375] Nevertheless, as will be shown now, First Amendment

[366] Brief for States of Tennessee ET AL., *supra* note 96, at 2.
[367] *Id.* at 3.
[368] Winner, *supra* note 294, at 132.
[369] *Id.* (engaging with Chandler's view that large scale operations in production, transportation, or communication require a centralized, hierarchical organization to control it, *see supra* note 276).
[370] *See e.g.*, ERIKSON, *supra* note 160, at 41 (on the contribution of the British East India Company to building the capacity of the state and its military); or BARKAN, *supra* note 1, 28-35 (on the use of corporations in the 17th century as a technique of managing public welfare)
[371] For an early critical account of the transferral, *see* Neil W. Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CALIF. L. REV. 395 (2000).
[372] Winner, *supra* note 294, at 132.
[373] For academic writing in support of this in the context of the corporation, see *supra* note 172.
[374] *See e.g.*, Rebecca Tushnet, Power Without Responsibility: Intermediaries and the First Amendment, 76 GEO. WASH. L. REV. 101 (2008).
[375] Manhattan Cmty. Access Corp. v. Halleck 139 S.Ct. 1921 (2019) ("[T]o qualify as a traditional, exclusive public function within the meaning of our state-action precedents, the government must have traditionally and exclusively performed the function."), citing Rendell-Baker v. Kohn, 457 U. S. 830, 842 (1982); Jackson v. Metropolitan Edison Co., 419 U. S. 345, 352-353(1974); Evans v. Newton, 382 U. S. 296, 300 (1966)); Flagg Bros., Inc. v. Brooks, 436 U. S. 149, 158 (1978) ("very few" functions fall into that category).

jurisprudence has the latent capacity to recognize platforms as hybrid actors on whom *adjusted* constitutional restraints could and should be imposed.

1. Adjusted Constitutional Restraints for Hybrid "State Actors"

The possibility of recognizing a private "state actor" with adjusted constitutional restraints was opened up by the seminal case of *Marsh v. Alabama* where the Supreme Court held that a private corporation that wholly owned a town was not like a private homeowner but *functioned* like a municipality, or governmental actor, and was therefore subject to First Amendment restraints.[376] The corporation could not "govern a community of citizens so as to restrict their fundamental liberties,"[377] and more specifically restrict Mrs. Marsh's right to distribute Jehovah's Witnesses literature on the sidewalks of the town. Still, the Supreme Court did not treat the corporation like a pure governmental actor but acknowledged its property rights that had to be "balanced" against the First Amendment liberties of the town's citizens and in that balancing exercise "the latter occupy a preferred position."[378] The balancing approach means that the constitutional restrictions on the corporation may need to be adjusted to acknowledge both the commercial interests of the corporation and the fact that a for-profit corporation does not pose the same threat of tyranny as government with its monopoly of coercive force.[379]

Consistently, in *Food Employees v. Logan Valley Plaza, Inc* (1968)[380] the Supreme Court held that a private "state actor" may be able to "limit the use of that property by members of the pubic in a manner that would not be permissible where the property [were] owned by a municipality… [but may not] wholly… exclude those members of the public wishing to exercise their First Amendment rights on the premises *in a manner and for a purpose generally consonant with the use to which the property is actually put*."[381] So even where a private actor is treated as a "state actor" and so subject to constitutional restraints, the restraints must accommodate the reasonable demands of the commercial activities and implicitly recognize the actor's hybridity.

By implication, legislation like the Florida or Texas Bills which treats content moderation by platforms as "censorship" equivalent to governmental censorship, fails to leave room for their profit-orientated moderation activities and the ordering which their role necessarily entails. Indeed, their roles are not ones which government in a liberal democracy would ever assume precisely because media is meant to act as the fourth estate and so requires independence from government. In Europe, platform hybridity has been accommodated by imposing accountability mechanisms, such as transparency and minimum procedural duties on online platforms, whilst leaving their primary commercial content moderation activities intact.[382] Of course, the critical

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[376] Marsh v. Alabama, 326 U.S. 501 (1946).
[377] *Marsh*, 326 U.S. at 509.
[378] *Id.* ("When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position.")
[379] In *Marsh* the balancing of interests translated into a prohibition of censorship, analogous to the restraint that would have been imposed on government, but a "balancing" exercise would appear to allow for the possibility of other outcomes, that take into account the commercial nature of the "state actor."
[380] Food Employees v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).
[381] Id., at 319-20 (emphasis added).
[382] *See supra* note 331.

question is why platforms should be treated as hybrid actors in the *Marsh* tradition of the company town in the first place.

2. Hybrid "State Actors" in the Communicative Sphere

The threshold question of when a private actor becomes a "state actor" - or, more accurately, a hybrid actor - has proven highly contentious.[383] Whilst some *corporate* scholarship has posited that corporations are necessarily hybrid by virtue of their granted privileges,[384] constitutional jurisprudence has taken a narrower approach. In those cases where government is not entangled in the contentious activity,[385] the "public function" test as per *Marsh* has provides the main route to the imposition of constitutional restraints. [386] Yet, *Marsh* was an easy case as the corporation owned the whole town including its civic infrastructure, and so it was not necessary to settle on any minimum requirement. The Supreme Court though observed that the overarching interest to be protected was the public's "interest in the functioning of the community in such manner that *the channels of communications remain free*"[387] and for citizens "to make decisions which affect the welfare of the community and nation… they must be informed. In order to enable them to be properly informed, their information must be uncensored."[388] The "channel of communication" in contention in *Marsh* was the sidewalk where the distribution of the censored leaflets had taken place.

A sidewalk is a curious "channel of communication" and, at first sight, not one at all. It is a space for walking and, only incidentally, for talking. For that reason, government can be involved in its creation without turning it into state-owned media. Yet, it is restrained from interfering with communications that occur on them.[389] Sidewalks are, like other public spaces, "negative" spaces in two related ways. Spatially, they emerge as residues of what is left over from private property, and so may be understood as not-private spaces.[390] In *Marsh* the company-town scenario meant that there were no residual not-private spaces left which triggered the corporation's constitutional obligations.[391] Second, whilst the primary purpose of a public space is provided by its intended primary functionality, such as walking or driving, other uses are possible as long as they are compatible with the primary function. This flows from the

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[383] Julie K. Brown, *Less is More: Decluttering the State Action Doctrine*, 73 MO. L. REV. (2008).
[384] *See supra* note 172.
[385] Arguably, by virtue of section 230 government *is* entangled in the content moderation activities of platforms; see *infra* note 409 and accompanying text.
[386] Manhattan Cmty. Access Corp. v. Halleck 139 S.Ct. 1921 (2019) ("a private entity can qualify as a state actor in limited circumstances – including… "(i) when the private entity performs a traditional, exclusive public function…; (ii) when the government compels the private entity to take a particular action…; or (iii) when the government acts jointly with the private entity….") ; *see also*, Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296 (2001) (discussing doctrines under which a private entity may be a state actor, such as state control, public function, and sufficient entwinement). Matthew P Hooker, *Censorship, Free Speech & Facebook: Applying the First Amendment via the Public Function Exception*, 15 WASH. J. L. TECH & ARTS 35 (2019)
[387] *Marsh*, 326 U.S. at 507 (emphasis added).
[388] *Marsh*, 326 U.S. at 508.
[389] The public forum doctrine developed in Hague v. CIO, 307 U.S. 496 (1939); see also Schneider v. Irving 308 U.S. 147 (1939); Ward v. Rock Against Racism, 491 U. S. 781, 796 (1989). Packingham v. North Carolina, 582 U.S. 98 (2017) ("A basic rule, for example, is that a street or park is a quintessential forum for the exercise of First Amendment rights."); *see also*, Dawn Carla Nunziato, *From Town Square to Twittersphere: The Public Forum Doctrine Goes Digital*, 25 B. U. J. SCI. & TECH. L. (2019).
[390] As reflected in public forum doctrine, seeking to ensure Hague v. CIO, 307 U.S. 496 (1939).
[391] *Id.*

foundational liberal norm that anything that is not prohibited is permitted;[392] a norm reversed on private property.[393] Public spaces are thus *prima facie* free, and that freedom is further constitutionally protected in the case of speech by the First Amendment. The public forum doctrine, as first recognized in 1939 in *Hague v. Committee for Industrial Organization,*[394] protects speech in public spaces, like streets and parks, without discrimination based on viewpoint to ensure that "even if all private property owners were permitted to discriminate against the speech of their choosing, there would remain some publicly owned places conducive to expressive purposes that the state must preserve as open spaces for public discussion and debate."[395] Effectively *Marsh* extends this doctrine to private actors where the private actor occupies *all* public spaces.

Later cases have struggled with applying *Marsh's* contextuality to other offline and online scenarios, arguably because they focused too much on characterizing the private actor as a "state actor," rather than on the extent to which it occupied *all* relevant public forums. Still and consistent with *Marsh* and *Hague*, courts have generally allowed private landowners, such as shopping centers, to use their property rights to restrict the free speech of visitors,[396] on the ground of available public alternatives such as "any public street, on any public sidewalk, in any public park, or in any public building."[397] Equally, where private actors occupied municipal parks, their temporary and spatially delimited speech restrictions did not reach the comprehensive restriction implicit in a company town scenario.[398] The Fourth Circuit observed in *United Auto Workers v. Gaston Festivals* that Gaston Festival was not comparable to the *Marsh* scenario as "UAW has virtually complete freedom to spread its messages in Gastonia; its only restriction is that, on a single day of the year on which GFI holds the Fish Camp Jam, the Local may not obtain a booth to distribute literature in the particular downtown area of Gastonia permitted for use by the festival."[399] The bottom line is whether or not there are alternative public spaces available.

Of course, even in *Marsh* citizens could have exercised their free speech beyond the borders of the town and so the idea of not-private alternatives must lie in having *reasonable* alternatives

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[392] Jeremy Waldron, *The Rule of International Law*, 30 HARV. J. L. & PUB. POL'Y 15 (2007) (distinguishing between the rule of law in domestic and international law and the different treatment of silences in the law); *see e.g.* Edmonson v Leesville Concrete Co., 457 U.S. 922, 936 (1982) ("One great object of the Constitution is to permit citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law.")

[393] On private property, visitors are entitled to do what is expressly or impliedly granted by the occupier's licence to enter, and any act or activity in excess of the licence amounts to a trespass to land; *see e.g.* McKee v. Gratz, 260 U.S. 127, 136 (1922) ("The strict rule of the English common law as to entry upon a close must be taken to be mitigated by common understanding with regard to the large expanses of unenclosed and uncultivated land…A license may be implied from the habits of the country,")

[394] Hague v. CIO, 307 U.S. 496 (1939).

[395] DAWN NUNZIATO, VIRTUAL FREEDOM: NET NEUTRALITY AND FREE SPEECH IN THE INTERNET AGE, 42 (2009). (discussing the constitutional implication of the "near complete shift in cyberspace from public to private ownership of forums and conduits for expression"); see also András Koltay, *The Protection of Freedom of Expression from Social Media Platforms*, 73 MERCER LAW REV. 523 (2022).

[396] *Lloyd Corp v Tanner* 407 U.S. 551 (1972); Hudgens v NLRB 424 U.S. 507 (1976), which overruled Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); *cf. PruneYard Shopping Center v Robins* 447 US 74 (1980) (upholding a California law protecting the right to pamphleteer in privately owned shopping centers).

[397] *Lloyd Corp v Tanner* 407 U.S. 551 (1972).

[398] United Auto Workers v. Gaston Festivals, Inc., 43 F.3d 902, 908 (4th Cir. 1995) (distinguishing cases where "the city remained "entwined in the management or control of the park"); Reinhart v. City of Brookings 84 F.3d. 1071(8th Cir. 1996); Lansing v. City of Memphis 202 F.3d 821 (2000); *but cf* Evans v. Newton, 382 U.S. 296 (1966).

[399] *United Auto Workers*, 43 F.3d at 909-10.

or alternatives that are *reasonably* effective in allowing citizens to be informed. This point is relevant to the internet with a private infrastructure secured by a few platforms, which together comprehensively occupy the communicative sphere and displace traditional offline public spaces which are arguably no longer reasonable alternatives for citizens to be informed.[400] So when the Ninth Circuit in *Prager University v Google LLC*[401] held that despite "its ubiquity and its role as a public-facing platform,"[402] YouTube remained a private forum because it did not perform a public function as "the function of hosting speech on a private platform could not be considered "an activity that only governmental entities have traditionally performed,'"[403] it misconstrued the underlying basis of the decision in *Marsh* and later cases. In *Marsh* the corporation was treated as a "state actor" not because it run the sewage facility, police, postal services or fulfilled other municipal functions, but because it displaced, through its ownership of the whole town *all* public spaces and the freedom they entail. The provision of these public spaces *is* an "exclusive prerogative of the state."[404] Furthermore, in so far as online communications substantially sideline and displace communications in traditional public spaces, the latter are arguably no longer reasonable alternatives for citizens to be informed. Platform domains *are* the 21st century "streets, sidewalks, parks, and other similar public places [that] are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely."[405] This was recognised by the Supreme Court in *Packingham v. North Carolina:*

> A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context. A basic rule, for example, is that a street or a park is a quintessential forum for the exercise of First Amendment rights… Even in the modern era, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire. While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace.[406]

The hybrid status of platforms emerges not from their hosting activities *per se*, but from their substantial displacement of traditional public spaces. The "state actor" doctrine in conjunction with the "public forum" doctrine ensure that there are meaningful public channels of communications left for citizens to exercise their constitutional freedoms.

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[400] *See e.g.* Nunziato, *supra* note 395.
[401] No. 18-15712, 1 (9th Cir. Feb. 26, 2020) ("Despite YouTube's ubiquity and its role as a public-facing forum, it remains a private forum, not a public forum subject to judicial scrutiny under the First Amendment."); see also Cyber Promotions, Inc. v. America Online, Inc., 948 F. Supp. 436 (E.D. Pa. 1996).
[402] *Prager*, 9th Cir. Feb. 26, 2020 at 2.
[403] *Id*, citing Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019) (holding that the operation of public access cable channels was not a "traditional, exclusive public function"); *see also* relevant function "must be both traditionally and exclusively governmental" citing *Lee v. Katz*, 276 F.3d 550, 555 (9th Cir. 2002). To meet this standard, the function must be "traditionally the exclusive prerogative of the state" (Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982)).
[404] *See e.g.* Jackson, supra note 87, at 147 (arguing inter alia but for minor exceptions, government has owned and controlled traditional public forums, such as public streets, sidewalks and parks).
[405] Food Employees v. Logan Valley Plaza, Inc., 391 U.S. 308, 315 (1968).
[406] 582 U.S. 98 (2017) (concerning the constitutionality of a North Carolina law that prohibited the use by registered sex offenders of social media sites); see also Koltay, *supra* note 395, at 559.

There is an alternative argument for the (hybrid) "state actor" status of platforms which directly draws on section 230. The immunity confers on platforms one of the most "exclusive prerogatives of the state"[407] namely the authority to govern. Since the immunity disempowers state and federal governments for the very purpose of conferring on platforms governing authority over the online public sphere, platforms step into the shoes of government. State governments have complained that section 230 has "resulted in the widespread preemption of state laws and the concomitant erosion of traditional state authority to allocate loss among private parties."[408] Their inability to enforce claims in negligence, unfair competition law, product liability, harassment, securities violations or terrorist publications is not intended to signal the irrelevance or end of those laws online, but rather that it is up to platforms to replace them. Platforms govern in place of the state as a direct and intended consequence of section 230. For this reason, it may be argued that they also engage the judicial precedents according to which a private actor becomes a state actor "when it has been delegated a public function by the State."[409]

Yet, none of this is to suggest that the First Amendment applies to platforms as hybrid actors in the same way as it does to "pure" governmental actors; it applies, as argued above, in a way that must take account of their legitimate commercial interests and so ought to embrace their own commercially directed content moderation.[410] What precise shape the constitutional control mechanisms ought to take remains to be debated.[411] Equally, it remains to be debated in what way their democratic legitimacy may be secured.

CONCLUSION

If the king can do no wrong, and if platforms can do no wrong, then platforms must be the king. This is reasoning in reverse, yet latform rule enabled by section 230 immunity resonates with Lord Halsbury's explanation of the old English maxim about the immunity of the king: "The law clothes the person of the sovereign with absolute perfection… For the prerogative is created for the benefit of the people and cannot be exerted to their prejudice, and the law will presume no injury where it has provided no remedy. The sovereign is regarded in law as being incapable of thinking or meaning to do an improper act."[412] Section 230 was created for the benefit of the people and clothes platforms in perfection; as it removes a remedy, it presumes that there is no injury and that platforms are incapable of thinking or doing an improper act.

The Article shows that the immunity in section 230 of the Communication Decency Act 1996 is not intelligible as a Good Samaritan immunity but much more akin to traditional right-to-rule immunities of governmental actors. Indeed, section 230 transfers governing competence to platforms. By being immune from legal accountability, they become the final arbiters of right and wrong. Although this transfer is extraordinary given its significant regulatory costs and the

[407] Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).
[408] Brief for States of Tennessee ET AL., *supra* note 96, at 2.
[409] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296 (2001) (on doctrines under which a private entity may become a state actor, such as state control, public function, and sufficient entwinement), *see also* West v. Atkins, 487 U.S. 42, 56 (1988); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 627-628 (1991).
[410] *See supra* note 143 and accompanying text.
[411] For the European answer to that question, *see supra* note 331.
[412] Barry, *supra* note 38, at 354 (citing Lord Halsbury's great compilation of the Laws of England).

fact that platforms are prima facie private actors, the Article shows that platform rule of cyberspace is not unprecedented and may in fact be traced to corporate self-government. Platform immunities and self-governance perpetuate and intensify the immunities and self-governance upon which the corporation is embedded. Platform rule does not just arise out of the status of platforms as intermediaries of online content but is premised on their nature as corporate actors with an inherent governing propensity. Consistently, the judicial interpretation of the boundaries of section 230 draws on corporate-specific reasoning of blind profit-maximization and amoral neutral technology.

Against this corporate perspective, platform governance of cyberspace may be understood as falling within a history of "sovereignty-sharing" between government and corporation. Constitutionally, this "sovereignty-sharing" argument entails that platforms ought to be understood as hybrid private-public actors to whom *adjusted* constitutional restraints apply – restraints which should reflect both their commercial interests and their public role. Currently, by occupying an ambiguous legal space between governees and governors, they are neither subject to the laws applicable to private actors nor to those applicable to governmental actors and so fall outside the legal loop altogether. Platforms are in fact the king.