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How to Get Away With Discrimination: The Use of Algorithms to Discriminate in the Internet Entertainment Industry

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HOW TO GET AWAY WITH DISCRIMINATION: THE USE OF ALGORITHMS TO DISCRIMINATE IN THE INTERNET ENTERTAINMENT INDUSTRY

SUMRA WAHID*

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I. INTRODUCTION

In July 2021, Ziggi Tyler posted a video on TikTok, a popular video sharing platform, where he expressed his frustration with being a Black content creator on TikTok.¹ The video showed Ziggi typing phrases such as “Black Lives Matter” or “Black success” into his Marketplace creator bio, which the app would immediately flag as inappropriate content.² However, when Ziggi replaced those words with “white supremacy” or “white success,” no inappropriateness warning appeared.³ Although a TikTok spokesperson responded to the video clarifying that the app had mistakenly flagged phrases without considering word order, Ziggi refused to let an algorithm absolve TikTok from blame, telling *Vox* that the company should have identified the system’s issues sooner.⁴

Black content creators have often addressed how their work on social

1. See Ziggi Tyler (@ziggityler), TIKTOK (July 5, 2021), <https://www.tiktok.com/@ziggityler/video/6981541106118872325> (showing how TikTok flags speech affiliated with Black people as inappropriate).

2. See *id.* (sharing a screen recording personally testing the flagging of “Black content”); see also Shirin Ghaffary, *How TikTok’s Hate Speech Detection Tool Set Off a Debate About Racial Bias on the App*, VOX (July 7, 2021, 8:24 PM), <https://www.vox.com/rcode/2021/7/7/22566017/tiktok-black-creators-ziggi-tyler-debate-about> (explaining Creator Marketplace as a feature that connects popular account holders with brands who pay them to promote products of services).

3. See Ghaffary, *supra* note 2 (demonstrating an inherent bias in the TikTok hate speech detector).

4. See *id.* (reporting what TikTok’s spokesperson and Ziggi Tyler said to Recode).

media is overlooked, in part because social platforms including TikTok, Instagram, and YouTube, use algorithms that have inherent racial and gender biases to recommend and filter what users see.⁵ Two studies presented at the 57th Annual Meeting of the Association for Computational Linguistics prove that natural language processing algorithms can amplify the same biases that humans possess.⁶ Yet algorithms continue to be touted as objective tools to identify offensive language, leading to further entrenchment of human biases against minority communities.⁷

In 2020, over the span of two months, Facebook deleted over thirty Facebook accounts of Syrian journalists and activists on the pretext of terrorism, despite the content demonstrating that the account holders were actually against terrorism.⁸ As companies rely more on automated tools for content moderation, they make more mistakes and are slower to respond.⁹ In failing to penalize civil rights infringements caused by internet and technology companies' biased algorithms, the legal system risks engraining discriminatory practices in society.¹⁰

Users who are subjected to discrimination by a digital media company's algorithm face particular barriers to receiving redress different than facing discrimination in traditional physical spaces. Title VII of the Civil Rights Act of 1964 protects individuals from employment discrimination, however, content creators are unable to assert a claim under Title VII because their contracts with digital media companies often classify creators as independent

5. *See id.* (addressing the widespread issue of algorithms affecting Black content creators).

6. *See* Shirin Ghaffary, *The Algorithms that Detect Hate Speech Online are Biased Against Black People*, VOX (Aug. 15, 2019, 11:00 AM), <https://www.vox.com/recode/2019/8/15/20806384/social-media-hate-speech-bias-black-african-american-facebook-twitter> (explaining that the studies deduced that artificial intelligence models for processing hate speech were 1.5 times more likely to flag tweets as offensive or hateful when written by African Americans).

7. *See id.* (comparing the intended objective effect of these algorithms with the actual biased effect on users).

8. *See* Olivia Solon, *'Facebook Doesn't Care': Activists Say Accounts Removed Despite Zuckerberg's Free-Speech Stance*, NBC NEWS (June 15, 2020), <https://www.nbcnews.com/tech/tech-news/facebook-doesn-t-care-activists-say-accounts-removed-despite-zuckerberg-n1231110> (providing a notable example of Facebook's translation of a Palestinian man's post that said "good morning" into "attack them" and demonstrating how Facebook's algorithm associated the authors' ethnicity with terrorism).

9. *See id.* (discussing the result of Facebook sending home contracted content reviewers during COVID-19).

10. *See* Ghaffary, *supra* note 2 (explaining how social media platforms acknowledge that algorithms can be flawed yet are still used for hate speech detection projects).

contractors.¹¹ Section 1981 offers individuals the right to sue for intentional discrimination in the making and enforcement of contracts, however, creators struggle to prove the intention element because current law refuses to recognize a digital media company's role in the actions its algorithm takes. Still, the law has created avenues of redress for those facing discrimination from private entities who are not employers or contracting partners. Common carriers and private entities who substantially affect interstate commerce are subject to liability for discrimination suits. Though many legal practitioners, including Supreme Court Justice Clarence Thomas, have explored the idea of classifying digital media companies as common carriers, Section 230 of the Communications Decency Act provides those companies with immunity from civil liability.¹² As such, users face difficulty moving forward in a common carrier discrimination suit against a digital media company for restricting access to the users' content. As of 2022, seldom have litigators asserted discrimination under the theory of interfering interstate commerce, though the amount of advertising and sales affected by digital media companies daily would certainly subject such companies to Commerce Clause regulation.

This Comment argues that internet social media/content platforms should be held liable when they create and use algorithms that discriminate between content users.¹³ Part II describes social media algorithms and provides examples of algorithmic discrimination, including a recent case that was dismissed for failure to state a complaint.¹⁴ Part III analyzes whether algorithmic bias is legally actionable discrimination under three different legal frameworks, applying those frameworks to the facts of *Newman v. Google LLC*, a recent discrimination case against YouTube.¹⁵ Part IV

11. CONTRACTS COUNSEL, *Content Creator Agreement*, <https://www.contractscounts.com/t/us/content-creator-agreement#toc-independent-contractors-no-partnership-or-joint-venture> (last visited Sept. 1, 2022).

12. See *Biden v. Knight First Amend. Inst. at Colum. Univ.*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring) ("There is a fair argument that some digital platforms are sufficiently akin to common carriers or places of accommodation to be regulated in this manner.").

13. See Maeve Allsup, *Google Beats YouTube Users' Suit Alleging Racial Discrimination*, BLOOMBERG LAW (June 25, 2021), <https://news.bloomberglaw.com/us-law-week/google-beats-youtube-users-suit-alleging-racial-discrimination> (reporting that the Northern District of California dismissed a federal claim against YouTube for racial discrimination).

14. See *infra* Part II (discussing the missed opportunities that minority creators suffer as a result of content suppression by platform algorithms).

15. See *infra* Part III (looking at § 1981, common carrier regulation, and the Commerce Clause).

recommends several changes to policy governing internet social media platforms and suggests that courts classify internet social media platforms that gather and utilize data as common carriers.¹⁶ Finally, Part V concludes by reiterating that algorithmic discrimination is a legitimate legal issue that should provide a legal remedy.¹⁷ Part V also emphasizes that unregulated algorithmic discrimination could expand beyond social media platforms and create a discrepancy in how our legal system addresses discrimination in jobs, stores, and classrooms as they begin to operate on the internet.¹⁸

II. BACKGROUND

A. *Social Media Technologies Have Created a Socially Acceptable Form of Social Categorization*

1. *Social Media Platforms Use Algorithms for User Satisfaction and Profit*

As the internet has become a more integral component of society, algorithms have become a ubiquitous part of our lives.¹⁹ An algorithm is a mathematical set of rules developed by programmers that instructs a computer program on how to perform the tasks the program user wants to do, ranging from launching a rocket to police profiling systems.²⁰ Social media platforms utilize algorithms to filter through massive amounts of content to deliver the most relevant content to each individual user.²¹ Facebook, Twitter, and Instagram have all switched to using algorithms to

16. See *infra* Part IV (suggesting legislative, judicial, and social recommendations to support the proposition that social media content creators could remedy discriminatory harm through the legal system).

17. See *infra* Part V (concluding this Article's overall arguments and assertions).

18. See *infra* Part V (suggesting that this issue will need to be addressed in the future as the issue becomes more pervasive).

19. See Stephen F. Deangelis, *Artificial Intelligence: How Algorithms Make Systems Smart*, WIRED, <https://www.wired.com/insights/2014/09/artificial-intelligence-algorithms-2/> (last visited Oct. 23, 2022) (confirming the widespread use of algorithms in everyday life).

20. See Greg A. Dukeman, *Atmospheric Ascent Guidance for Rocket-Powered Launch Vehicles*, NASA MARSHALL SPACE FLIGHT CTR. (Jan. 1, 2002) (detailing the mathematics of an algorithm that launches rockets); Tim Lau, *Predictive Policing Explained*, BRENNAN CTR. FOR JUST. (Apr. 1, 2020) (explaining that algorithms are used by police to prevent future crime by calculating the likelihood of crime in certain areas).

21. See Maria Alessandra Golino, *Algorithms in Social Media Platforms*, INST. FOR INTERNET & JUST. SOC'Y (Apr. 24, 2021), <https://www.internetjustsociety.org/algorithms-in-social-media-platforms> (explaining what a social media algorithm is and why they exist).

organize content based on relevance, rather than chronologically.²²

Social media algorithms are designed to use several different methods concurrently to recommend relevant content to users.²³ These methods include content-based design, context-aware design, and machine learning design.²⁴ Content-based design matches users, based on their profile and displayed interests, to specific content of a similar category that the system predicts the user will like.²⁵ Context-aware designs extract personal data, such as geographic location, to include it in algorithmic calculations.²⁶ Most commonly, algorithms utilize the machine learning design that allows computers to simulate human learning and make recommendations based on continuous new knowledge.²⁷ Social media platforms create these algorithms in order to maximize user engagement, leading to more exposure to advertisements and, ultimately, increased profits.²⁸ Social media platforms allow brands or content developers to pay the platform to ensure the algorithm promotes them.²⁹

22. See Brent Barnhart, *Everything You Need to Know About Social Media Algorithms*, SPROUTSOCIAL: SPROUT BLOG (Mar. 26, 2021), <https://sproutsocial.com/insights/social-media-algorithms/> (explaining that social media platforms' use of algorithms is a recent shift from the previously chronological presentation of user feeds).

23. See Golino, *supra* note 21 (defining social media platforms as a technical means of sorting posts based on relevancy that considers different aspects).

24. See *id.* (discussing the various designs of algorithms and how the different designs work).

25. See *id.* (expanding that content-based designs can include collaborative filtering where the algorithm matches users to other users who share similar interests).

26. See *id.* (describing context-aware algorithms); see also Nicholas Scott Rodgers, *Understanding Personal Data in the World of Social Media 1* (2020) (Undergraduate Honors Capstone Projects, University of Utah) (Digital Commons) (defining personal data to include data that has been encrypted or obfuscated in such a way that it is not directly tied to a user but can still be used to re-identify a person, such as IP addresses, browser tracking IDs, or behavior data from a site).

27. See Golino, *supra* note 21 (explaining machine learning artificial intelligence).

28. See *id.* (emphasizing that social media platforms make part of their revenue from marketing and how that affects algorithm promotion); Sang Ah Kim, *Social Media Algorithms: Why You See What You See*, 2 GEO. L. TECH. REV. 147, 147–48 (2017) (explaining that engaging in the context of social media means interacting with content on the platform and how engagement benefits social media companies).

29. See Golino, *supra* note 21 (explaining that brands or creators may pay a fee to the social media platform to ensure promotion).

2. *Content Creators of Color Are Adversely Affected by Algorithm Biases*

Social media platforms, such as YouTube, TikTok, and Snapchat, have announced their own versions of creator funds to incentivize popular social media creators to stay active on their respective platforms.³⁰ This development distinguishes the average social media user, who may post for personal enjoyment or connection to friends, from a content creator, who builds, produces, or creates content, often creating social trends or facilitating important discussions on social media platforms.³¹ Content creators often rely on the money they receive from creator funds, partnerships with brands, and the sale of merchandise to maintain their viewership.³² In theory, anyone who posts on social media consistently and retains high engagement could become a content creator.³³

However, not all aspiring content creators have the same experiences with social media platforms, particularly creators of color.³⁴ Many popular white content creators tend to benefit—in the form of accolades and opportunities to work in entertainment or with popular brands—from concepts originally created by smaller, often minority, creators.³⁵ Minority creators regularly develop content that gains little traction and soon after, when a white creator

30. See Katherine Kim, *Social Media is All-in on the Content Creator Economy. What Does that Mean for Brands?*, SPROUTSOCIAL: SPROUT BLOG (June 29, 2021), <https://sproutsocial.com/insights/content-creators-social-media/> (detailing that creators have long argued they were not receiving the fair share of profits they brought to the platform).

31. See *id.* (explaining who content creators are).

32. See Ish Baid, *The Only 3 Ways to Make Money as a Content Creator*, BETTER MKTG. (Aug. 22, 2019), <https://bettermarketing.pub/the-only-3-ways-to-make-money-as-a-content-creator-fcf5e0e2398d> (detailing three different revenue stream categories that a content creator can make money from and explaining how the advertising stream works through AdSense, brand sponsorships, and affiliate links).

33. See Chintan Zilani, *How to Become a Content Creator: Six Controversial Tips*, ELLIOT CONTENT MARKETER (Oct. 17, 2021), <https://elitecontentmarketer.com/content-creator/> (asserting “anyone with a knack for creating audio, video, text or visuals can become a content creator and build their personal media empire”).

34. See Taylor Edwards, *While White Social Media Creators are Constantly Rewarded, Black Creators are Often Left in the Dust*, THE BLACK EXPLOSION (May 3, 2021), <https://www.blackexplosionnews.com/blog/2021/5/3/while-white-social-media-creators-are-constantly-rewarded-black-creators-are-often-left-in-the-dust> (addressing the racial disparities in the creator economy, particularly how Black creators continue to struggle to receive recognition for their work).

35. See *id.* (providing examples including TikTok creator Addison Rae appearing on Jimmy Fallon’s late night talk show to perform dances originated by mostly Black TikTok creators and demonstrating the financial impact of the lack of recognition BIPOC creators face).

posts an identical video, it begins a viral phenomenon.³⁶ Lack of exposure could result in a creator missing out on opportunities such as lucrative sponsorships and brand deals, hosting and acting jobs, and collaborations with multi-national corporations.³⁷

Now, some minority content creators are asking the courts to level the playing field. In 2020, a group of Black and Hispanic YouTube content creators brought a class action suit against Google, YouTube's parent company, claiming that the algorithm "regulate[s], restrict[s], flag[s] and block[s] creator content" based on discriminatory factors.³⁸ Plaintiff Kimberly Newman posted videos "regarding issues and current events which are important to the African American community, from a Black perspective" on her YouTube channel.³⁹ Despite generating "approximately one million views annually," YouTube applied "Restricted Mode" to Newman's videos, which limited the monetization of her videos to generate a total of \$2,672.68.⁴⁰ Because YouTube has a practice of using algorithms to censor videos based on metadata from information regarding the race, identity, and viewpoint of creators, subscribers, and viewers, rather than the

36. See Kalhan Rosenblatt, *Months After TikTok Apologized to Black Creators, Many Say Little Has Changed*, NBC NEWS (Feb. 9, 2021, 5:11 AM), <https://www.nbcnews.com/pop-culture/pop-culture-news/months-after-tiktok-apologized-black-creators-many-say-little-has-n1256726> (reporting interviews from Black TikTok creators and TikTok executives on the prevalence of discrimination on the app and the impact it has on Black creatives).

37. See Gary Henderson, *How Much Does Influencer Marketing Cost?*, DIGIT. MKTG. (Dec. 11, 2017), <https://www.digitalmarketing.org/blog/how-much-does-influencer-marketing-cost> (providing general guidelines for how much influencers are charging brands); Geoff Weiss, *TikTok Taps Brittany Broski, Lil Yachty to Host Live New Year's Eve Festivities*, TUBEFILTER (Dec. 14, 2020), <https://www.tubefilter.com/2020/12/24/tiktok-taps-brittany-broski-lil-yachty-new-years-eve/> (reporting that a popular white TikTok creator will be hosting the app's New Year's special with a celebrity co-host); TikTok for Business, *Brand Collaborations With TikTok Content Creators Drive Big Results*, TIKTOK (Jan. 10, 2022), <https://www.tiktok.com/business/en-US/blog/brand-collaborations-tiktok-creators-drive-big-results> (providing insight into how brands and companies can work with creators to promote their businesses and why it would benefit their business).

38. See Complaint at 27–28, *Newman v. Google LLC*, No. 20-CV-04011-LHK, 2021 WL 2633423 (N.D. Cal. June 25, 2021) (listing the defendant's toolkit for unlawful conduct).

39. See *id.* at 45 (indicating that Newman's content is targeted towards audiences who are curious or sympathetic to current events from the Black perspective, regardless of the viewers' racial background).

40. See *id.* at 46 (asserting that YouTube's algorithm is based on information regarding the race, identity, and viewpoints of the creators rather than the content of the videos posted on the platform).

content of the video posted, Newman asserted her videos were flagged either because she was Black or was posting pro-Black content.⁴¹ The Northern District of California granted Google’s motion to dismiss with leave to amend on the grounds that Plaintiffs failed to state a federal claim and the matter was never addressed on the merits.⁴²

3. *Objective Algorithms Are Capable of Bias*

A content creator appears on a user’s social media feed because they have been chosen by the algorithm, either because the creator paid to be promoted or the algorithm itself determined that the content is popular or relevant to the user.⁴³ Despite the carefully designed systems that deliver content to users, the content that a user might find interesting or relevant may still not be featured on that user’s feed.⁴⁴ Individual experiences and data demonstrate that algorithms perpetuate and exacerbate existing societal biases.⁴⁵

A 2019 study highlighted that social media algorithms are 1.5 times more likely to flag as hate speech, suppress, or remove content featuring African American Vernacular English (“AAVE”).⁴⁶ The study noted that toxic language detection on social media was not based on text alone, but incorporated interpretations of the speaker’s identity, including race.⁴⁷ Despite these findings, social media algorithms continue to exhibit biases

41. *See id.*

42. *See Newman v. Google LLC*, No. 20-CV-04011-LHK, 2021 WL 2633423, at *5, *10–12, *15, *19–21 (N.D. Cal. June 25, 2021) (explaining that plaintiffs failed to adequately allege intentional racial discrimination under § 1981, that the First Amendment does not apply to actions by Google because it is not a state actor, and that the Lanham Act does not apply to YouTube’s “Restricted Mode”).

43. *See Golino, supra* note 21 (referring to the fact that influencers can pay to have their posts promoted).

44. *See Barnhart, supra* note 22 (stating “there are plenty of instances of algorithms seemingly ‘hiding’ content on Facebook at random despite being optimized to a T”).

45. *See Merlyna Lim, Beyond a Technical Bug: Biased Algorithms and Moderation are Censoring Activists on Social Media*, THE CONVERSATION (May 16, 2021, 8:17 AM), <https://theconversation.com/beyond-a-technical-bug-biased-algorithms-and-moderation-are-censoring-activists-on-social-media-160669> (describing instances of algorithmic discrimination against BIPOC activists).

46. *See MAARTEN SAP ET AL., THE RISK OF RACIAL BIAS IN HATE SPEECH DETECTION 1668* (Ass’n for Computational Linguistics, 57th ed. 2019) (investigating how annotators’ insensitivity to differences in dialect can lead to racial bias in automatic hate speech detection models).

47. *See id.* at 1671 (suggesting dialect and race priming as a method to mitigate how algorithms annotate).

when flagging hate speech or offensive content.⁴⁸

For example, in *Brignac v. Yelp, Inc.*, a Black business owner alleged other non-Black business owners offering the same service were ranked higher within Yelp’s algorithm.⁴⁹ The Southern District of New York has recognized that algorithms can target particular demographic groups.⁵⁰ By contrast, the Ninth Circuit determined that Google’s algorithm did not treat content created by a terrorist organization any different than other third-party created content.⁵¹

B. *Equal Rights to Contracting Under the Law: Section 1981*

Section 1 of the Civil Rights Act of 1866 encompassed what would later be codified as § 1981, providing all citizens with the right to make and enforce contracts free from nongovernmental discrimination.⁵² The statute prohibits intentional race discrimination in the making and enforcing of contracts involving both public and private actors.⁵³ In order to maintain a cause of action under § 1981, a plaintiff must show both that he was subjected to intentional discrimination and that the discrimination interfered with a contractual relationship.⁵⁴ Prior to 2020, courts used the same

48. See Tyler, *supra* note 1 (explaining how Ziggi Tyler showed TikTok labeling “Black Lives Matter” and “Black success” as offensive). See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (demonstrating how an example of action taken to correct racial injustices, in this case segregation, failed to make immediate impact due to a lack of unbiased enforcement of desegregation); *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013) (evaluating why Section 5 of the Voting Rights Act was passed and why the legislative purpose to prevent minority voter suppression is all but absolved in the present).

49. See *Brignac v. Yelp, Inc.*, No. 19-cv-01188-EMC, 2019 WL 5268898, at *1 (N.D. Cal. Oct. 17, 2019) (deciding a motion for summary judgment based on standing, leaving the issue of § 1981 discrimination undecided).

50. See *Nat’l Coal. on Black Civic Participation v. Wohl*, 498 F. Supp. 3d 457, 466 (S.D.N.Y. 2020) (discussing how robocalls target groups using proxies, such as zip codes for race).

51. See *Gonzalez v. Google LLC*, 2 F.4th 871, 894 (9th Cir. 2021) (finding YouTube’s recommendations are based on the user’s inputs); see also *Fair Hous. Council of San Fernando Valley v. Roommates.com LLC*, 521 F.3d 1157, 1161 (9th Cir. 2008) (discussing the “Roommates” website registration process in greater detail).

52. See 42 U.S.C. § 1981(a)–(b) (defining “make and enforce contracts” to include the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship).

53. See *Amini v. Oberlin Coll.*, 440 F.3d 350, 358 (6th Cir. 2006) (referencing the statute’s application to State action and nongovernmental actors); see also *Runyon v. McCrary*, 427 U.S. 160, 173 (1976) (“§ 1981 . . . reaches private conduct”).

54. See *Ganthier v. N. Shore-Long Island Jewish Health Sys.*, 298 F. Supp. 2d 342, 347 (E.D.N.Y. 2004) (quoting *Krulik v. Bd. of Educ.*, 781 F.2d 15, 23 (2d Cir. 1986))

standard for race discrimination cases under § 1981 as those arising under Title VII of the Civil Rights Act of 1964.⁵⁵ However, in 2020, the Supreme Court used a simple “but-for” test in the context of § 1981, where a plaintiff must demonstrate that but for the defendant’s unlawful conduct, the plaintiff would make the same contract as her white counterpart.⁵⁶ In *Comcast Corp.*, the Court found the language of the Civil Rights Act of 1866 and § 1981 were suggestive of a but-for causation requirement.⁵⁷ The Court read the statute to guarantee the right to equivalent contractual outcomes and processes without extra hurdles to securing that contract.⁵⁸

The first lawsuit using § 1981 to allege discrimination in a television casting decision was in 2012.⁵⁹ Two Black applicants to *The Bachelor* lost a § 1981 suit, where they asserted that their rejection and the lack of a Bachelor of color in the show’s history constituted racial discrimination.⁶⁰ The Court held that while § 1981 applies to casting decisions regarding the formation and execution of contracts, producers have the right to unilaterally control their own creative content.⁶¹ In another case dealing with the failure

(finding plaintiff must show intentional discrimination that interfered with a contract); *Keum v. Virgin Am. Inc.*, 781 F. Supp. 2d 944, 954 (describing the elements necessary to state a section 1981 claim are (1) the plaintiff is a member of a racial minority; (2) an intent to discriminate on the basis of race by the defendant; and (3) the discrimination concerns one or more of the activities enumerated in the statute).

55. See Lucy Bednarek & Tiaundra Foster, *Supreme Court Requires But-For Causation for Section 1981 Claims*, JDSUPRA (April 7, 2020) <https://www.jdsupra.com/legalnews/supreme-court-requires-but-for-17758/> (discussing the impact of *Comcast Corp. v. National Association of African American-Owned Media* on the § 1981 standard); see also *Ganthier*, 298 F. Supp. 2d at 347 (emphasizing that the essential element of a § 1981 claim is whether the discrimination occurred because of race).

56. See *Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020) (stating that the plaintiff must show race was a but-for cause of the injury).

57. See *id.* at 1015 (reasoning that the statute directs to a counterfactual that fits naturally with but-for causation).

58. See *id.* (holding that the plaintiff had the burden over the life of its § 1981 lawsuit of showing that plaintiff’s race was but-for cause of its injury).

59. See Christina Shu Jien Chong, *Where are the Asians in Hollywood? Can § 1981, Title VII, Colorblind Pitches, and Understanding Biases Break the Bamboo Ceiling?*, 21 UCLA ASIAN PAC. AM. L.J. 29, 52 (2016) (discussing whether § 1981 is an adequate remedy for discrimination against Asian Americans in the television and film industry).

60. See *Claybrooks v. Am. Broad. Co.*, 898 F. Supp. 2d 986, 989 (M.D. Tenn. 2012) (highlighting that many contestants of color, even when they are not the lead Bachelor or Bachelorette, are eliminated early in the show, insinuating that producers are not doing enough to support contestants of color after they were hired).

61. See *id.* at 992, 1000 (parsing the § 1981 question from the First Amendment issue

to cast, the Ninth Circuit asserted that an actress failed to state a § 1981 retaliatory fail-to-hire claim because she did not apply for an open position when she sought to reprise her role.⁶²

In *National Association of African American-Owned Media v. Charter Communications, Inc.*, a Black television network studio's meetings with a national broadcasting company were repeatedly refused, rescheduled, or postponed.⁶³ Although the broadcasting company stated it was not launching any new channels, the studio claimed that the company negotiated with white-owned networks during the same period and secured agreements with Disney and Time Warner Sports.⁶⁴ The court recognized that generally explainable corporate acts, supplemented by claims that white-owned companies were not treated similarly, are sufficient under § 1981 to plausibly claim the company denied the network studio the same right to contract as white-owned companies.⁶⁵

With the rise of digital streaming entertainment companies, courts have seen a new slew of § 1981 discrimination actions.⁶⁶ When a Black comedian received an offer from streaming conglomerate Netflix for an original stand-up program, the comedian brought suit alleging that non-Black talent were being offered astronomically higher offers for similar work.⁶⁷ Netflix's refusal to negotiate the offer to the comedian was anomalistic to its general practice of negotiating after making an offer, leading the district court to find that the comedian plausibly alleged that Netflix's lack of response could be retaliation based on race.⁶⁸

and deciding what issue controls).

62. See *Rowell v. Sony Pictures Television*, 743 F. App'x. 852, 854 (9th Cir. 2018) (clarifying that the open position the plaintiff applied for is inherent to a retaliatory failure to hire claim).

63. See *Nat'l Ass'n of Afr. Am.-Owned Media v. Charter Commc'ns, Inc.*, 915 F.3d 617, 620 (9th Cir. 2019) (describing how Charter's senior vice president evaded discussions with Entertainment studios representatives for five years).

64. See *id.* (relaying the studio's allegation that Charter communicated not having faith in the studio's tracking model).

65. See *id.* at 626 (providing the example that Charter secured contracts with white-owned, lesser-known networks during the same period).

66. See generally *Chong*, *supra* note 59, at 61, 78 (discussing the prevalence of casting discrimination in the film industry and the likelihood of § 1981 remedies).

67. See *Hicks v. Netflix, Inc.*, 472 F. Supp. 3d 763, 767–68 (C.D. Cal. 2020) (providing a timeline of Hicks' career and Netflix's offer to her).

68. See *id.* at 777 (accepting the fact that Netflix's standard practice of negotiating in good faith typically results in increased compensation beyond opening offer).

C. Internet Communications Are Currently Not Regulated as Common Carriers

In 1934, Congress passed the Communications Act of 1934, classifying telephone companies as common carriers and requiring them to make their services available at affordable rates.⁶⁹ Under Title II of the Communications Act, it is unlawful for communication services to unjustly or unreasonably discriminate in practices, regulations, or services, directly or indirectly.⁷⁰ Telegraph and telephone companies are regulated as common carriers because they lay physical networks of wires to connect information from one user to another.⁷¹ The legislature’s reasoning followed from traditional common carriers such as railroads, which lay networks of tracks to carry people, freight, and communications, via letters transported on railways, and the electric telegraphs and telephones adopted for dispatching trains and handling other business.⁷²

In *United States v. Federal Communications Commission*, the D.C. Circuit Court of Appeals developed a two-pronged framework to determine whether a state-owned telecommunications network qualified as a common carrier.⁷³ Subsequently, courts have applied the two-pronged “common carrier” test to determine whether a carrier is considered a common carrier under the Communications Act.⁷⁴ A court considers (1) whether the carrier holds itself out to uniformly serve all potential users and (2) whether the carrier allows customers to transmit intelligence of their own design and choosing.⁷⁵ Generally, Section 230 of the Communications Decency Act

69. See Peter K. Pitsch & Arthur W. Bresnahan, *Common Carrier Regulation of Telecommunications Contracts and the Private Carrier Alternative*, 48 FED. COMM’NS L.J. 447, 448 (1996) (describing the purpose of the Communications Act of 1934).

70. See Communications Act of 1934, 47 U.S.C. §§ 202, 309–99 (1934) (enacting anti-discrimination provisions in common carrier law); Mark A. Hall, Note, *Common Carriers Under the Communications Act*, 48 UNIV. CHI. L. REV. 409, 410 (1981).

71. See *Biden v. Knight First Amend. Inst. at Colum. Univ.*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring) (explaining the limitations on telecommunications carriers).

72. See *id.* at 1223–24, (comparing examples from traditional carriers with digital carriers).

73. See *U.S. Telecom Ass’n v. FCC*, 295 F.3d 1326, 1329 (D.C. Cir. 2002) (extrapolating from common law the applicable test to determine common carrier status).

74. See *Iowa Telecomms. Servs., Inc. v. Iowa Utils. Bd.*, 563 F.3d 743, 746 (8th Cir. 2009) (determining how to find common carrier status).

75. See *id.* (emphasizing that the key factor in determining common carriage is whether the carrier offers indiscriminate services to whatever public its service may

provides digital platform companies with the benefit of avoiding liability for moderating speech on their platforms.⁷⁶ While Section 230 will not be explored in depth in this Article, it is a noteworthy barrier to an otherwise valid legal strategy for plaintiffs asserting algorithmic discrimination.⁷⁷ Curiously, digital media platforms willingly accept immunities that require them to classify as service providers, while claiming a special forbearance from Title II FCC enforcement of other service providers, such as telecommunications services.⁷⁸

Although computers developed in an environment free from regulation, computer services grew on top of regulated telephone services.⁷⁹ In the 1970s, the Federal Communications Commission (“FCC”) decided it would only regulate basic services that provide transmissions of information that are virtually transparent in terms of its interaction with the third-party supplied information, including traditional voice services.⁸⁰ This attempt to unbundle enhanced services from physical networks led to the FCC’s classification of the World Wide Web as an enhanced service.⁸¹ However, public interest has yet to be considered as a justification for regulation.⁸²

legally and practically be of use).

76. 47 U.S.C. § 230(c)(2).

77. See generally Adam Candeub, *Bargaining for Free Speech: Common Carriage, Net Neutrality, and Section 230*, 22 Yale J.L. & Tech. 391, 423 (“[Courts] went further in interpreting section 230, giving internet platforms greater protection than the old common law distributor immunity”).

78. See Valarie C. Brannon & Eric N. Holmes, CONG. RSCH. SERV., R46751, Section 230: An Overview (2021) (discussing how platform companies benefit from the Good Samaritan law). See generally Candeub, *supra* note 77, at 429–31 (discussing how the immunities from section 230 allow companies to discriminate in social media and broadband internet access under common carriage and the potential solutions offered in network neutrality).

79. See John Blevins, *The FCC and the “Pre-Internet,”* 91 IND. L.J. 1309, 1315 (2016) (detailing how data services depended on private telephone networks).

80. See *id.* at 1316 (classifying basic services as “pure” while everything else is considered an enhanced service); *Mozilla Corp. v. FCC*, 940 F.3d 1, 22–23 (D.C. Cir. 2019) (classifying a broadband Internet service as an information service when “a consumer goes beyond the [walled garden] offerings and accesses content provided by parties other than the cable company”).

81. See Blevins, *supra* note 79, at 1321–22.

82. See *German All. Ins. Co. v. Lewis*, 233 U.S. 389, 407 (1914) (“[B]usiness of common carriers is obviously of public concern, and its regulation is an accepted governmental power.”).

D. The Commerce Clause is Frequently Used as a Tool of Anti-Discrimination

The Constitution guarantees American citizens the right to equal protection against discrimination from government entities.⁸³ Although the Equal Protection Clause exclusively applies to state action, the Supreme Court has held that discrimination by a private actor may be treated as state action if it is sufficiently connected to the State.⁸⁴ Congress has the power to enforce the Fourteenth Amendment through appropriate legislation, such as Title II of the Civil Rights Act.⁸⁵ Importantly, the Act's public accommodations provision guarantees the enjoyment of goods, services, and facilities of any place of public accommodation free from discrimination.⁸⁶ The Supreme Court enforced the public accommodations provision through the Commerce Clause in *Heart of Atlanta Motel v. United States*, reasoning that Congress has the power to regulate interstate commerce and local activity that may substantially effect that commerce.⁸⁷

Several circuits have addressed whether an online counterpart to a brick-and-mortar public accommodation is subject to regulation under Title III of the Americans with Disabilities Act.⁸⁸ In *Andrews v. Blick Art Materials, Inc.*, the Eastern District of New York reasoned that failing to apply Title III to online retail stores would contravene the statute's purpose and exempt a huge part of mainstream American life based on the internet from the Act's

83. See U.S. CONST. amend. XIV, § 1.

84. See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (associating acts of a regulated utility with some governmentally protected monopoly with State action).

85. See U.S. CONST. amend. XIV, § 5.

86. See Civil Rights Act of 1964, 42 U.S.C. § 2000a (1964); 47 U.S.C. § 202 (1934) (anti-discrimination laws in the areas of public accommodations and common carrier regulation, respectively).

87. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964) (deciding Congress could regulate interstate commerce by prohibiting racial discrimination by motels serving travelers); see also *Wilson v. Twitter*, No. 3:20-cv-00054, 2020 WL 3410349, at *1, *7 (S.D.W. Va. May 1, 2020) (arguing some courts have found that stores on digital platforms must still comply with the Title III of the ADA). See generally 42 U.S.C. § 2000a (1964) (providing the right to public accommodations free of discrimination from establishments affecting interstate commerce or supported by the State in providing entertainment).

88. See *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 390–91 (E.D.N.Y. 2017) (referring to cases from the First, Second and Seventh Circuits in support of applying Title III of the ADA to online sites).

requirements.⁸⁹ Title II of the Civil Rights Act of 1964 is implemented in an identical manner to Title III of the ADA, regulating public places of accommodation if their operations affect commerce by discriminating based on race, color, religion, or national origin.⁹⁰ The legislative intent behind the Civil Rights Act demonstrates that barring a Black citizen from a public accommodation or facility is contrary to the Constitution, a similar reasoning cited by the Eastern District of New York in *Andrews*.⁹¹

In 1951, the Supreme Court confirmed that the dissemination of news and national advertising offering products for sale on a national scale are parts of interstate commerce.⁹² In *Lopez v. United States*, the Court held that Congress may regulate channels or instrumentalities of interstate commerce, persons or things in interstate commerce, and activities that substantially affect interstate commerce.⁹³ Under that principle, the Eleventh Circuit reasoned that a non-state actor's behavior crossing state lines may be regulated and that the internet is an instrumentality of interstate commerce.⁹⁴

III. ANALYSIS

To determine whether minority content creators could succeed in a discrimination action in federal court against social media digital platforms, this Comment will apply several federal frameworks to the facts of *Newman v. Google*.⁹⁵ *Newman* was dismissed pursuant to a motion to dismiss for failure to state a complaint.⁹⁶ Therefore, the goal of this Comment's analysis

89. *See id.* at 395 (looking to and interpreting the Legislature's intent for the ADA's purpose and how that applies to online sites).

90. *See Daniel v. Paul*, 395 U.S. 298, 301 (1969).

91. *See id.* at 306 (quoting President Kennedy's sentiments to Congress in 1963).

92. *See Lorain J. Co. v. United States*, 342 U.S. 143, 151 (1951) (reasoning that the local dissemination of news and advertising requires continuous interstate transmission of materials and payments).

93. *See generally Lopez v. United States*, 514 U.S. 549, 558–59 (1995) (expanding on the *Wickard* court's rejection of distinctions between direct and indirect effects on interstate commerce).

94. *See United States v. Ballinger*, 395 F.3d 1218, 1243 (11th Cir. 2005) (interpreting that Congress did in fact forbid the conduct of a multi-state criminal, who is a private individual, and had the power to do so); *United States v. Pipkins*, 378 F.3d 1281, 1295 (11th Cir. 2004) (stating pagers, telephones, and mobile phones are instrumentalities of interstate commerce and a defendant used the internet to promote his online escort service); *United States v. Panfil*, 338 F.3d 1299, 1300 (11th Cir. 2003) (referring to the internet as an instrument of interstate commerce).

95. *See generally Newman v. Google LLC*, No. 20-CV-04011-LHK, 2021 WL 2633423, at *1, *6–7 (N.D. Cal. June 25, 2021) (addressing the issue of Black YouTube creators asserting discrimination by the company's algorithm).

96. *See id.* at *4, *16 (dismissing the complaint for failure to state a claim, with leave

will be to determine whether the plaintiff's complaint can survive dismissal pursuant to a 12(b)(6) motion under each of the proposed legal frameworks.⁹⁷

A. Algorithms Created by Social Media Platforms Discriminate Because They Remove or Suppress Content by Minority Creators Based on Biased User Data

Social media algorithms' use of personal data, combined with their ability to recognize and predict user patterns of interest based on personal identifiers, gives social media platforms a seemingly "hands off" approach to promoting content.⁹⁸ The Supreme Court has acknowledged the inherent bias of objective tools in society before, particularly in the areas of education and voting rights.⁹⁹ As segregation was upheld under the "separate but equal" doctrine, algorithmic discrimination continues to persist without remedy under the guise of an objective tool.¹⁰⁰ The Supreme Court eventually recognized the disparate effects of a policy meant to treat all different racial groups equally, as *Brown v. Board of Education* detailed how separate schools created feelings of inferiority in Black students and deprived non-white students of opportunities and benefits their white counterparts received.¹⁰¹ As history repeats itself, the legal system will eventually have to address the disparate effects of presumably objective social media algorithms that deprive minority creators of financial opportunities and affect their mental health and confidence.¹⁰² The effect of

to amend, in accordance with the Federal Rules of Civil Procedure Rule 12(b)(6)).

97. *See id.* at *4 (the legal standard of evaluating a 12(b)(6) motion requires the court, accepting factual allegations in the complaint as true, to find that the pleading alleges enough facts to state a claim of relief that is plausible on its face without conclusory statements or unwarranted inferences) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

98. *See id.* at *7 (stating that any restrictions placed on the plaintiffs by the algorithm was an error).

99. *See generally* *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013) (addressing ID requirements for voting purposes that disproportionately affected minority voters); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (addressing segregation in grade schools).

100. *See Brown*, 347 U.S. at 490–92 (listing cases that applied the separate but equal doctrine to public education unchallenged).

101. *See id.* at 493–95 (describing how "separate but equal" "may affect the hearts and minds" of Black students).

102. *See* Brian Contreras, *Fed up with TikTok, Black Creators are Moving on*, LA TIMES (Sep. 16, 2021, 5:00 AM), <https://www.latimes.com/business/technology/story/2021-09-16/fed-up-with-tiktok-black-users-are-moving-on> (reporting on Black

algorithmic bias is comparable to the second-generation barriers that Section 5 of the Voting Rights Act sought to correct, where an “objective” voting requirement effectively prevented minority voters from participating in the electoral process.¹⁰³ The careful drafting of voting requirements by legislators is equivalent to the meticulous design of algorithms by social media platforms that adopt and perpetuate biases against minority creators.¹⁰⁴

Just as Brignac relied on Yelp’s algorithm to obtain a user ranking that boosted his business to Yelp users, creators rely on a social media platform’s algorithm to distribute their content onto users’ feeds.¹⁰⁵ Although *Gonzalez* decided YouTube’s algorithm was neutral because it recommended content based on user viewing history, *Newman* demonstrated that videos made by creators of color were not recommended by YouTube’s algorithm to platform users, despite meeting the same criteria as other videos made by white creators.¹⁰⁶ Despite the holding in *Gonzalez*, YouTube’s algorithm is more equivalent to the website in *Roommates*, which used data on users’ sex and sexual orientation to send periodic emails informing them of housing opportunities matching their preferences.¹⁰⁷ YouTube also takes into account race, sexual identity, and viewpoint, however, it utilizes that data to restrict access to content, rather than recommend it.¹⁰⁸ The *Gonzalez*

TikTokers who felt over-scrutinized and under-protected by the platform, and revealing that the frequent takedowns of the creators’ work “can be depressing” and “beyond tiring”).

103. See *Shelby Cnty.*, 570 U.S. at 563–64, 573–74 (2013) (Ginsburg, J., dissenting) (describing second generation barriers in the form of objective voting requirements that ultimately targeted minority voters and providing the examples that led up to the 2006 reauthorization of the Voting Rights Act).

104. See *id.* at 563 (explaining how second-generation barriers were drafted in Congress to appear in the form of gerrymandering, the adoption of at-large voting, and the incorporation of majority-white areas into city limits).

105. See *Brignac v. Yelp, Inc.*, No. 19-cv01188-EMC, 2019 WL 5268898 at *1 (N.D. Cal. Oct. 17, 2019) (explaining how Brignac took advantage of services to help his user ranking and how a businessowner using Yelp must rely on Yelp’s algorithm even if they do not pay for advertising).

106. See *Gonzalez v. Google LLC*, 2 F.4th 871, 894-95 (9th Cir. 2021) (emphasizing that YouTube’s algorithm does not prompt the type of content to be submitted); see also *Newman v. Google LLC*, No. 20-CV-04011-LHK, 2021 WL 2633423, at *1, *3 (N.D. Cal. June 25, 2021) (drawing emphasis to the decimation in the algorithm).

107. See *Fair Hous. Council of San Fernando Valley v. Roommates.com LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (describing how the plaintiff claimed that the website was “effectively a housing broker doing online what it may not lawfully do offline” and violating the Fair Housing Act).

108. See Complaint, *supra* note 38, at 4–5 (relaying what a YouTube representative

plaintiffs challenged YouTube's failure to remove harmful content that violated community guidelines, whereas *Newman* challenges YouTube's choice to remove and suppress content that meets community guidelines.¹⁰⁹ The concept of algorithmic discrimination is furthered by the fact social media platforms do not flag recognized offensive terms, such as "white supremacy," for review or removal as consistently as content associated with minority identifiers.¹¹⁰

The assertion of algorithmic discrimination in *Newman* is better compared to plaintiff's assertion in *Brignac* than *Gonzalez*, particularly because the facts of *Newman* and *Brignac* both show that the platform responded to discrimination allegations by claiming that the bias was unintentional.¹¹¹ However, digital platforms need to take accountability for the non-neutral tools developed by their engineers, especially when the algorithm is used to advertise and promote content in violation of anti-discrimination laws.¹¹² In *Gonzalez v. Google*, plaintiffs alleged Google aided and abetted international terrorism by providing a platform that knew about ISIS' content on the platform and not taking it down.¹¹³ The Ninth Circuit found that the

told one of the Plaintiff's at a meeting, noting that it does not restrict based solely on whether the content violates YouTube's Terms of Service).

109. See *Gonzalez*, 2 F.4th at 892 (stating the plaintiff claims that Google did not do enough to remove or suppress ISIS content); Complaint, *supra* note 38, at 10 (asserting in paragraphs "f" and "g" how plaintiffs and all similarly situated persons complied with Terms of Service but were excluded from promotion based on race, identities, and viewpoints of creators while videos containing racist and misogynistic hate speech, which is a direct violation of community guidelines, were promoted).

110. See Jessica Gassam Asare, *Social Media Continues to Amplify White Supremacy and Suppress Anti-Racism*, FORBES (Jan. 8, 2021, 8:43 PM), <https://www.forbes.com/sites/janicegassam/2021/01/08/social-media-continues-to-amplify-white-supremacy-and-suppress-anti-racism/?sh=3ef83a794170> (reporting on the struggles of accounts posting anti-racist content having their content taken down or shadowbanned); Matthew Grady, *White Supremacy Thriving Online, Despite Prevention Efforts*, VOICE OF AM. NEWS (Oct. 20, 2019 10:54 PM), https://www.voanews.com/a/extremism-watch_white-supremacy-thriving-online-despite-prevention-efforts/6178570.html (quoting Change the Terms, a coalition working to stop hate online, saying "Twitter has done very little to stop white supremacists from organizing, fundraising, recruiting and normalizing attacks on women and people of color on its platform.").

111. See *Brignac v. Yelp*, No. 190cv01188-EMC, 2019 WL 2372251, at *6 (N.D. Cal. June 5, 2019) (noting that Yelp denied *Brignac*'s claim that Yelp acted intentionally); *Newman*, 2021 WL 2633423, at *7 (conveying that YouTube acknowledged unnecessary restrictions as an error).

112. See Complaint, *supra* note 38, at 25–26 (describing YouTube in its advertiser capacity).

113. See *Gonzalez*, 2 F.4th at 892 (holding Google was protected by Section 230

YouTube algorithm's functions, to notify/recommend content, were meant to facilitate the communication of content to others, but that the algorithm was not content itself.¹¹⁴ That assertion need not be disputed to find legitimacy in the claims in *Newman*. In addressing that YouTube does not discriminate based on content, *Gonzalez* left open the question of whether the algorithm can discriminate based on the creator's identity, which is where *Newman* lies.¹¹⁵ Newman's assertion that the algorithm is treating minority creators disparately is in fact furthered by the notion that YouTube's algorithm looks to user data history to make recommendations, because it eliminates an alternative reason (that YouTube flagged the content of the videos) as to why the plaintiffs' content is not recommended to users who view similar content.¹¹⁶

YouTube's current system uses "[t]ools to classify, curate, censor and sell advertisements for YouTube videos based on metadata defendants create from information regarding the race, identity, and viewpoint of creators, subscribers and viewers . . ." ¹¹⁷ However, YouTube could program algorithms to conduct the necessary tasks using the content of the videos as a data set, rather than the personal data of the creator or subscriber.¹¹⁸ Innately, the most popular content on any given platform nullifies content created by creators of color.¹¹⁹ In finding Florida's statute regulating social media providers was an unconstitutional restriction of speech, the Northern District of Florida acknowledged that recommendations on what to watch and who to follow are equivalent to the platform's speech, even when made by algorithms.¹²⁰ Therefore, Internet companies perpetuate and allow an

immunity because it was not making itself out to be the creator of the content).

114. *See id.* at 894 (holding "Google matches what it knows about users based on their historical actions and sends third-party content to users that Google anticipates they will prefer").

115. *See* Complaint, *supra* note 38, at ¶ 7 (explaining that one of the abuses YouTube perpetrated by allowing the filtering tool to target Plaintiffs based on race and identity).

116. *See id.* at 32; *Gonzalez*, 2 F.4th at 894 (concluding that YouTube uses algorithms as a recommendation tool).

117. *See* Complaint, *supra* note 38, at 4, 46 (relaying information received by a content creator from a YouTube official in a meeting where the creator was required to sign a non-disclosure agreement).

118. *See id.* at 4–5, 33 (suggesting YouTube has overlooked a non-biased algorithm that could accomplish the necessary tasks).

119. *See id.* at 9–10, 35, 37, 47 (exhibiting instances where non-Black creators' videos were available when searching the name of Black creators).

120. *See generally* NetChoice LLC v. Moody, 546 F. Supp. 3d 1082, 1093 (N.D. Fla. 2021) (reasoning that social media platforms cannot be said to be indistinguishable from newspapers or traditional mediums through a First Amendment lens).

inherently biased system to work without monitoring or checking the algorithm's prejudices.¹²¹

B. Internet Companies Can Discriminate Under § 1981 Because Their Algorithms Enjoin Minority Creators from Creating or Enforcing Contracts that Their White Counterparts Make

To establish a prima facie case under § 1981, Newman must show she is a member of a racial minority, that the defendant intended to discriminate on the basis of race, and the discrimination concerned one or more of the activities protected by the statute.¹²² The plaintiffs in *Newman* would have no difficulty establishing membership in a protected class, as stated in their complaint and corroborated through their videos on YouTube.¹²³ Plaintiffs could also establish that the discrimination concerned activities enumerated in the statute because the suppression of their content affects the money they make from AdSense and the likelihood to obtain paid contracts with sponsors.¹²⁴ Although *Claybrooks* concerned a television show's selection of an applicant to be in a leading role and *Newman* concerns the distribution of creator content, both cases pertain to the execution of contracts.¹²⁵ Plaintiffs can show that the lack of exposure, and thus the lack of contracting and financial opportunities, is a result of their race.¹²⁶ Where a prima facie case under § 1981 against an algorithm becomes difficult is in proving the intent to discriminate.

The Ninth Circuit in *Newman* applied the intent-to-discriminate standard, which admittedly is a difficult standard for algorithmic discrimination

121. See Rebecca Heilweil, *Why Algorithms can be Racist and Sexist*, Vox (Feb. 18, 2020, 12:20 PM), <https://www.vox.com/recode/2020/2/18/21121286/algorithms-bias-discrimination-facial-recognition-transparency> (concluding that algorithms are made by biased people and fed biased data).

122. See *Keum v. Virgin Am. Inc.*, 781 F. Supp. 2d 944, 954 (N.D. Cal. 2011) (stating what a plaintiff must allege to state a claim pursuant to § 1981 in assessing whether a complaint can survive a 12(b)(6) motion).

123. See Complaint, *supra* note 38, at 1, 3, 14–15 (including a description of each plaintiff and their YouTube channels).

124. See *Ganthier v. N. Shore-Long Island Jewish Healthy Sys.*, 298 F. Supp. 2d 342, 347 (E.D.N.Y. 2004) (detailing the factors under the shared Title VII and § 1981 that a plaintiff must prove for a race discrimination case).

125. See *Claybrooks v. Am. Broad. Co.*, 898 F. Supp. 2d 986, 992 (M.D. Tenn. 2012) (detailing how casting decisions can fall under Title VII as making or enforcing contracts as covered by § 1981).

126. See *Ganthier*, 298 F. Supp. 2d at 347 (requiring under the intent standard that the discrimination a plaintiff faces is a result of the plaintiff's identity).

actions.¹²⁷ YouTube and other platforms have acknowledged their algorithms, which place content in viewing order and use key words and associations of identity to categorize content, actively take into account factors including race.¹²⁸ But, Newman and her co-plaintiffs would have difficulty proving that YouTube had an intent to discriminate against them because of their race.¹²⁹ YouTube successfully asserted that the plaintiffs could not identify a YouTube policy that discriminates on its face on the basis of race, or that YouTube intentionally discriminated.¹³⁰

Still, Newman and her co-plaintiffs can prevail considering the Ninth Circuit's view on entertainment broadcasting.¹³¹ Specifically, *Rowell*, *Claybrooks*, and *Charter Communications* deal with the creators and talent of entertainment content and the broadcasting companies that control who sees the content.¹³² Similarly, social media content is created by and features talent that a social media platform will display and control through its algorithms.¹³³ *Newman*'s scenario most closely resembles the *Claybrooks* facts, where the prospective Bachelors' rejection parallels a prospective creator's suppression.¹³⁴ However, *Newman* differs from the aforementioned cases because the plaintiffs cannot cite to specific actions of the platforms, such as refusing meetings or rejecting applications, to demonstrate direct control over the algorithm's decision-making.¹³⁵

127. See Complaint, *supra* note 38, at 1, 6 (requiring a plaintiff to allege sufficient facts to support the inference that defendant intentionally and purposefully discriminated against them under the intent-to-discriminate standard).

128. See *id.* at 2 (discussing a private meeting between a plaintiff and a YouTube executive where plaintiff was asked to sign a non-disclosure agreement).

129. See *Ganthier*, 298 F. Supp. 2d at 347 (requiring plaintiff to show defendant had the intent to discriminate).

130. See Complaint, *supra* note 38, at 6 (stating defendant correctly asserts plaintiff did not assert sufficient facts to prove this element).

131. See generally *Rowell v. Sony Pictures Television*, 743 F. App'x. 852, 854 (9th Cir. 2018).

132. See generally *id.* (concerning a soap opera actress and the show she sought to be on); *Claybrooks v. Am. Broad. Co.*, 898 F. Supp. 2d 986, 986 (M.D. Tenn. 2012) (regarding applicants to a reality television show); *Nat'l Ass'n of Afr. Am.-Owned Media v. Charter Commc'ns, Inc.*, 915 F.3d 617, 620 (9th Cir. 2019) (discussing a case about broadcasting companies and television networks).

133. See Complaint, *supra* note 38, at 25 (stating YouTube has complete control over 95% of all video content that is available to the public).

134. See *Claybrooks*, 898 F. Supp. 2d at 989 (stating plaintiffs are "males who unsuccessfully applied to be the Bachelor"); Complaint, *supra* note 38, at 25 (discussing "suppression practices").

135. See *Newman v. Google LLC*, No. 20-CV-04011-LHK, 2021 WL 2633423, at *11 (N.D. Cal. June 25, 2021) (stating plaintiff presented no facts other than a personal

The *Newman* outcome is clearer under the *Comcast Corp.* but-for test, which is the appropriate framework for § 1981 action.¹³⁶ The plaintiffs in *Newman* would receive the same type and volume of contracting opportunities that white creators would receive but for the fact that YouTube’s algorithm limited who could access plaintiffs’ content.¹³⁷ While algorithms are a tool, and thereby an extension of the company that uses it, a court rejecting this view may still find liability under the but-for § 1981 standard.¹³⁸ Attributing an algorithm as a product of the engineers hired by YouTube, places clear liability on YouTube.¹³⁹ The engineers employed by the technology company are responsible for making and modifying the algorithms they use.¹⁴⁰ In developing the algorithm during the course of employment, both engineers and YouTube can be held liable for discriminatory harm caused by the algorithm.¹⁴¹ This assertion is only furthered by the example of Timnit Gebru, co-leader of Google’s Ethical A.I. team, who was fired because she complained about YouTube’s biased filtering and blocking tools.¹⁴²

Ultimately, though the *Newman* plaintiffs would have the clearest result

belief that the defendant purposefully and intentionally discriminated on the basis of race).

136. See *Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020) (“To prevail, a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right.”).

137. See Complaint, *supra* note 38, at 38 (explaining how, but for the flag that marked the video inappropriately, the video would have reached a wide audience and would have generated substantial revenue).

138. See *Nat’l Ass’n of Afr. Am.-Owned Media v. Charter Commc’ns, Inc.*, 915 F.3d 617, 620 (9th Cir. 2019) (referring to the broadcasting company executive who refused, rescheduled, or postponed meetings as a comparison to an employer taking actions that contribute to a § 1981 violation); *Comcast Corp.*, 140 S. Ct. at 1014 (analyzing § 1981 in a but-for analysis where the plaintiff must demonstrate that but for the defendant’s conduct, the plaintiff would make the same contract as white person in their position).

139. See generally Casey Chin, *AI is the Future—But Where are the Women?*, WIRED (Aug. 17, 2018, 7:00 AM), <https://www.wired.com/story/artificial-intelligence-researchers-gender-imbalance/> (citing how artificial intelligence work is 79% male dominated in Google’s 641 person “machine intelligence” team alone).

140. See Heilweil, *supra* note 121 (explaining how algorithms are tested for biases, usually only against one group of people).

141. See Chin, *supra* note 139 (providing the example that IBM and Microsoft’s algorithms were near perfect at identifying men with lighter skin, but frequently erred when presented with photos of darker-skinned women).

142. See *Newman v. Google LLC*, No. 20-CV-04011-LHK, 2021 WL 2633423, at *13 (N.D. Cal. June 25, 2021) (stating the issue was not considered by the court because it was not raised early enough in the pleading documents).

in their favor under the but-for standard, the pleading could survive a 12(b)(6) motion under the intent-to-discriminate standard.¹⁴³ The pleading would have to show how the algorithm has direct control over a creator's content.¹⁴⁴

*C. Social Media Platforms Can Be Classified as Common Carriers,
Which are Regulated by Anti-Discrimination Law, Because They Carry
Information Between Users in the Same Way Traditional
Telecommunications Services Do*

Title II anti-discrimination common carrier regulations can apply to digital media platforms if the law classifies them as telecommunications carriers.¹⁴⁵ Like telephone wires that laid down physical networks to connect people and ideas, communication over the Internet uses networks to transfer data packets between different users.¹⁴⁶ Social media platforms are comparable to telecommunications companies because they facilitate the distribution of speech.¹⁴⁷ YouTube allows all users to use the platform to reach the same potential audiences, and requires everyone to agree to the same Community Guidelines and Terms of Service.¹⁴⁸ Therefore YouTube, and similar social media platforms, meet the first element of the test to determine common carriage, by holding themselves out to serve all potential users equally.¹⁴⁹ Importantly, in applying this test, courts must differentiate between Internet providers and services provided on the Internet.¹⁵⁰ Because an individual

143. See *Ganthier v. N. Shore-Long Island Jewish Health Sys.*, 298 F. Supp. 2d 342, 348 (E.D.N.Y. 2004) (explaining that a plaintiff fails to plead a 1981 claim if they cannot prove intentional discrimination).

144. *Keum v. Virgin Am. Inc.*, 781 F. Supp. 2d 944, 954 (2011) (where plaintiff had to plead plausible facts to establish defendant's intent to discriminate).

145. See *Verizon v. FCC*, 740 F.3d 623, 630 (D.C. Cir. 2014) (emphasizing that the Communications Act does not subject information-service providers to common carrier regulations).

146. See *Biden v. Knight First Amend. Inst. at Colum. Univ.*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring) (comparing digital network infrastructures with the physical wires of traditional phone companies, which are traditional common carriers).

147. See *id.* (stating digital platforms are at minimum communication networks comparable to phone companies).

148. See *Complaint*, *supra* note 38, at 7 (explaining that YouTube provides and competes for the audiences, advertising, and revenue for everyone using their services).

149. See *Iowa Telecomms. Servs., Inc. v. Iowa Utils. Bd.*, 563 F.3d 743, 746 (8th Cir. 2009) (applying the Telecom Association test to determine whether Sprint was a telecommunications carrier subject to common carrier regulations).

150. See *Mozilla Corp. v. FCC*, 940 F.3d 1, 19, 23 (D.C. Cir. 2019) (supporting the FCC's decision to treat broadband Internet service providers as deregulated information services rather than regulated telecommunications services, which have so far been

can open a social media account without forming an individualized contract, social media platforms cannot assert, in the way Sprint did, that its contracts are confidential and individually negotiated, unless the platform offered an in-house opportunity in a casting or contracting capacity.¹⁵¹

Social media platforms also meet the second element of test by providing a digital medium where individuals can communicate their thoughts to other users through the service.¹⁵² Because social media platforms assert that they are merely distributors of speech, they bear a closer comparison to traditional phone companies rather than newspapers.¹⁵³ YouTube and Facebook have continuously argued in courts that they are merely distributors or publishers of content and are absolved from liability for the harm of the content itself under Section 230.¹⁵⁴ Therefore, discriminatory content posted by a third-party creator and distributed by YouTube may not be regulated.¹⁵⁵ Ironically, the application of Section 230 immunity to social media platforms furthers the assertion that the platforms should be regulated as common carriers because they serve as the medium for third-party speech in the same way physical telecommunications services do.¹⁵⁶ As telegraph companies were immune from defamation suits in transmitting an obviously defamatory message, Section 230 of the Communications Decency Act provides social media platforms with immunity from suits resulting from publication of third-party users.¹⁵⁷

treated as mutually exclusive under the law).

151. See *Iowa Telecomms. Servs., Inc.*, 563 F.3d at 747 (discussing how Sprint is not a telecommunications common carrier because Sprint's contracts are individually negotiated and confidential).

152. See *id.* at 746 (detailing that the second prong in the Telecom Association test requires the carrier to allow customers to transmit intelligence of their own design and choosing).

153. See *Biden v. Knight First Amend. Inst. at Colum. Univ.*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring) (“[U]nlike newspapers, digital platforms hold themselves out as organizations that focus on distributing the speech of the broader public.”).

154. See *Gonzalez v. Google LLC*, 2 F.4th 871, 886 (9th Cir. 2021) (applying Section 230 immunity to Google's interactive computer service); *Force v. Facebook, Inc.*, 934 F.3d 53, 71 (2nd Cir. 2019) (concluding that Facebook did not “develop” Hamas' Facebook posts, thus Section 230 immunity applies).

155. See *generally* *Gonzalez*, 2 F.4th at 871 (confirming that YouTube cannot be held liable for the content posted by ISIS members).

156. See *Biden*, 141 S. Ct. at 1224 (comparing the immunities offered to digital platforms to traditional telecommunications services).

157. See *O'Brien v. W.U. Tel. Co.*, 113 F.2d 539, 542 (1st Cir. 1940) (considering the effect of delayed transmissions in placing the burden of defamatory statements on

Additionally, digital platforms possess enormous control over the platform, akin to a communications utility, acting as the gatekeeper between a user and the other speech.¹⁵⁸ Unlike a phone company that held itself out differently for potential users of dark fiber, social media platforms are available for use to anyone with an email address, and can still be accessed without an account.¹⁵⁹ Not only do digital platforms possess the virtual monopoly that most common carriers possess, they also operate within the second prong of the Telecom Association test because digital platforms allow users to create their own speech.¹⁶⁰ On social media platforms such as YouTube, messages and ideas are carried through the network that comprises the Internet in the same way telephone calls are transmitted across networks of phone line.¹⁶¹

Ultimately, YouTube and other social media platforms are common carriers under the Telecom Association test because they are comparable to telecommunications services.¹⁶² The FCC's reclassifications of broadband, domain name services, and internet protocol addresses as information services has no bearing on the regulation of digital platforms, that self-identify as distribution services akin to telecommunications services, as common carriers.¹⁶³

That social media platforms like YouTube and TikTok were not traditionally recognized as common carriers does not exclude them from common carrier regulation, as the platforms have become services of public interest much like the insurance rates in *German Alliance Insurance Company v. Lewis*.¹⁶⁴ E-mail and the Internet were classified as enhanced

telegraph companies for transmitting them, rather than the sender of the message).

158. See *Biden*, 141 S. Ct. at 1224 (classifying Google as the gatekeeper between a user and the speech of others).

159. See *Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1484 (D.C. Cir. 1994) (holding that there was insufficient evidence to regulate dark fiber services as common carriers).

160. See *Biden*, 141 S. Ct. at 1224 (emphasizing how Facebook and Google have almost complete control of market shares in the digital sphere).

161. See *Iowa Telecomms. Servs., Inc. v. Iowa Utils. Bd.*, 563 F.3d 743, 747 (8th Cir. 2009) (accepting the parties' concession that Sprint meets the second part of the test because it provides the necessary system of cables and wires).

162. See *Biden*, 141 S. Ct. at 1224 (comparing digital social media platforms to telecommunications companies).

163. See *generally* *Mozilla Corp. v. FCC*, 940 F.3d 1, 23–25 (D.C. Cir. 2019) (determining that the FCC reasonably reclassified certain Internet services as information services, thus absolving them from regulation as common carriers).

164. See *German All. Ins. Co. v. Lewis*, 233 U.S. 389, 406, 408 (1914) (recognizing that fire insurance is so affected by the public interest that regulation is justified).

services in the late 1990s.¹⁶⁵ However, now that there is relatively universal access to both services, and Internet access is a service often provided with telephone services, there is a necessity to revisit the FCC's classification to meet society's current needs.¹⁶⁶ While the deregulation of the Internet contributed to its growth in its early stages, there is a need for regulation of what has become a fundamental service in society.¹⁶⁷ Social media platforms receive the benefits of common carrier status, but have yet to bear the responsibility of compliance with federal anti-discrimination law.¹⁶⁸ Like the shopping malls in *PruneYard*, the cable operators in *Turner*, and the universities in *Rumsfeld* that were free to choose which speakers, cable channels, or recruiters to specially promote, YouTube remains free to promote creators through its algorithm with the appropriate anti-discrimination precaution.¹⁶⁹

Under the common carrier lens, the *Newman* plaintiffs can establish that YouTube holds itself out to all of its users in the same manner in its terms of service, offering the same services to everyone without the option of negotiating.¹⁷⁰ Looking to the second prong of the Telecom Association test, the *Newman* plaintiffs could easily establish that YouTube provides users with the ability to communicate messages of their own design and choosing, as the plaintiffs all posted different types of content on the platform.¹⁷¹ Notably, the legal framework proposed in this section fails when applied to digital media companies, as is the case in *Newman*, only because they are immunized from civil liability based on good faith restrictions to material

165. See generally Kevin Werbach, *Digital Tornado: The Internet and Telecommunications Policy* 1, 31 (FCC, Office of Plans & Pol'y, Working Paper No. 29, 1997) (listing specific enhanced services and defining enhanced services as those offered over common carrier transmission facilities).

166. See *id.* at 32 (stating that Internet access has always been treated as an enhanced service even when packet-switched transport functions are considered basic services).

167. See *id.* (detailing how Internet Service Providers have never been subject to regulation by the FCC under Title II of the Communications Act).

168. See *Biden v. Knight First Amend. Inst.* at Colum. Univ., 141 S. Ct. 1220, 1226 (2021) (Thomas, J., concurring) (suggesting digital platforms receive the immunities of Section 230 without holding any responsibilities, like nondiscrimination).

169. See *id.* (comparing digital platforms to other common carriers and places of public accommodation).

170. See Complaint, *supra* note 38, at 18 (explaining that the provisions in YouTube's terms of service agreement are part of a uniform consumer contract that every one of YouTube's 2.3 billion users must execute and agree to upon accessing the website).

171. See *id.* at 14–15 (describing the range of content plaintiffs posted, from cooking videos to current events relevant to African Americans).

that the company considers obscene, lewd, or otherwise objectionable.¹⁷² Unless courts are willing to challenge platforms and genuinely question whether the “provider or user” has a consistent and legitimate reason to remove content, there is little viability in expanding common carrier anti-discrimination regulation digital media platforms.¹⁷³ The biggest hurdle in proceeding with a common carrier regulation suit is the legal presumption that digital platforms are enhanced, deregulated telecommunications services.¹⁷⁴ Social media platforms are the modern-day telegraph services, and for the protection of its users, should be regulated as such.¹⁷⁵

D. The Civil Rights Act Applies to Social Media Platforms Through the Commerce Clause on the Principle of Interstate Commerce

As the presence of online advertisements and online retail grows, social media and most Internet activities fall squarely within the umbrella of interstate commerce.¹⁷⁶ Social media platforms involve themselves with interstate commerce by selling advertisements, which subjects them to Congressional regulation on discriminatory practices as decided in *Heart of Atlanta Motel*.¹⁷⁷ The *Heart of Atlanta Motel* framework applies to private entities that are considered public places of accommodation that impact interstate commerce.¹⁷⁸ In *Lewis v. Google LLC*, the Ninth Circuit was

172. See *Wilson v. Twitter*, No. 3:20-cv-00054, 2020 WL 3410349, at *1 (S.D. W. Va. May 1, 2020) (stating that courts have generally accorded Section 230 immunity a broad scope to the Communications Decency Act’s purpose); 47 U.S.C. § 230(c)(2) (2018) (providing parameters for what type of digital platform is protected by Section 230 immunity and what conduct from a protected platform is protected conduct).

173. Communications Act of 1934, 47 U.S.C. § 202 (making it unlawful for common carriers to discriminate).

174. See Werbach, *supra* note 164, at 32 (discussing how the Internet has always been considered an enhanced service).

175. See generally Biden v. Knight First Amend. Inst. at Colum. Univ., 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring) (suggesting social media platforms should be regulated like telegraphs, which were bound to serve all customers alike, without discrimination).

176. See Bret Swanson, *If Any Economic Activity Meets the Definition of Interstate Commerce, It’s the Internet*, AM. ENTER. INST. (Oct. 13, 2017), <https://www.aei.org/technology-and-innovation/telecommunications/the-internet-is-interstate-commerce/> (referring to the nature of advertising and the use of cloud data services (that have no physical headquarters), which would make local governance of digital platforms impossible).

177. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964) (concluding that Congress can regulate local activities that might have an effect on interstate commerce).

178. See *id.*

incorrect in finding YouTube was not a place of public accommodation, particularly because it chose not to categorize YouTube within 42 U.S.C. § 2000a based on the distinction that an online platform was not a place.¹⁷⁹ As a platform with a specific domain name and IP address where one can access videos, music, and movies for a fee, YouTube is easily classified as a “place of exhibition or entertainment” conducting operations that affect commerce, subjecting YouTube to the anti-discrimination rules in the Commerce Clause.¹⁸⁰ Additionally, social media platforms are governmentally protected monopolies, courtesy of Section 230, that could associate their acts with State action.¹⁸¹

In *Biden*, Justice Thomas’ concurrence suggests the legislature could treat digital platforms as places of public accommodation if the platform provides entertainment or other services to the public.¹⁸² *Wilson* emphasizes that courts are now ordering online retail platforms to comply with Title III of the Americans with Disabilities Act.¹⁸³ The *Wilson* court noted that placing the emphasis of Congress’ intention of the word “place” on the physicality of the location is an overly formal distinction that simply makes no sense.¹⁸⁴ Just as limiting the application of Title III to physical retailers is antithetical to Congress’ intended purpose in creating the ADA, restricting Title II to physical spaces of community gathering goes against Congress’ will in enacting the Civil Rights Act.¹⁸⁵

Like the business in *Lorain Journal Company* that distributed news and

179. See 851 F. App’x 723, 724 (9th Cir. 2021) (affirming the district court decision that YouTube’s websites are not a place of public accommodation because deciding the opposite would render the examples Congress provided pointless).

180. See 42 U.S.C. 2000a (1964) (listing examples of public accommodations including an inn or motel; a restaurant or other dining area; a theater, concert hall, or other space of exhibition; and other covered establishments that hold out to serve patrons).

181. See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350-51 (1974) (associating acts of a regulated utility with some governmentally protected monopoly with State action).

182. See *Biden v. Knight First Amend. Inst. at Colum. Univ.*, 141 S. Ct. 1220, 1225 (Thomas, J., concurring) (referencing the definition of places of public accommodation).

183. See *Wilson v. Twitter*, No. 3:20-cv-00054, 2020 WL 3410349, at *1, *9 (S.D.W. Va. May 1, 2020) (analogizing the Civil Rights Act to the Americans with Disabilities Act and how the ADA has addressed discrimination online).

184. See *id.* at *8 (evaluating the transition of the *Quill* physicality test).

185. See *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 391 (E.D.N.Y. 2017) (stating online stores were places of public accommodation under Title III); see also *Daniel v. Paul*, 395 U.S. 298, 307–08 (1969) (reasoning that Congress’s language regarding Title II should be read broadly, rather than narrowly in terms of what public accommodations are covered).

advertisements to a town in interstate commerce solely for profit, digital media platforms disseminate news and advertisements for products in interstate commerce for the platforms' own profit.¹⁸⁶ The *Newman* complaint specifically lays out how the algorithm categorizes third-party content in order to sell advertisements on the platform.¹⁸⁷ YouTube's sale of advertisement space is directly analogous to contracting for the insertion of advertising materials in periodicals.¹⁸⁸ Not only do advertisements on digital platforms reach individuals between states, but platforms, such as YouTube, engage in the sales of advertising space and contracting with companies and creators throughout the country.¹⁸⁹

Supporting the notion that online advertisements satisfy the substantial effect to interstate commerce required by *Heart of Atlanta Motel*, courts have determined that providing information over the Internet satisfies the commerce requirement of the Lanham Act.¹⁹⁰ Through Lanham reasoning, the use of trademarks in an Internet domain name also creates an avenue for interstate commerce regulation.¹⁹¹ Most digital platforms, including YouTube, have trademarked the terms featured in their domain name, thus creating another exhibition of interstate commerce that Congress can regulate under the Commerce Clause.¹⁹²

While neither of the aforementioned analyses of social media as interstate commerce are as direct as goods or people crossing state lines, *Lopez* emphasized that there is not a required minimum effect on interstate commerce, so long as it is substantial.¹⁹³ With millions of users across the

186. See *Lorain J. Co. v. United States*, 342 U.S. 143, 151–52 (1951) (noting that advertising requires continuous interstate transmission of materials and payments).

187. See Complaint, *supra* note 38, at 25 (explaining that YouTube prices and sells advertising space on the platform in connection with individual videos posted, based on the demographics of the channel subscribers and video viewers).

188. See generally *Lorain J. Co.*, 342 U.S. at 151 (reasoning that local dissemination of national advertising requires interstate transmission of goods, materials, and payments).

189. See generally Complaint, *supra* note 38, at 25–26, (discussing how and why YouTube sells advertising space).

190. See *Savannah Coll. of Art & Design, Inc. v. Houeix*, 369 F. Supp. 2d 929, 942 (S.D. Ohio 2004) (construing the Lanham “use in commerce” requirement broadly).

191. See *id.* (holding that the use of a trademark in a domain name satisfies the Lanham “use in commerce” requirement).

192. See YouTube, Reg. No. 6441347; TikTok, Reg. No. 5974902 (referencing the active trademarks registered with the United States Patent and Trademark Office).

193. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 251–52 (1964) (holding that the motel served individuals from other states, making it a tool of interstate commerce).

country and, as a personal competitor for advertisement revenues, YouTube, and almost all other social media platforms, have an impressive impact on interstate commerce.¹⁹⁴ Therefore, the plaintiffs in *Newman* would succeed in a discrimination case brought under the Fourteenth Amendment through the reasoning that YouTube, as a private entity, must comply as a participant affecting a substantial part of interstate commerce.¹⁹⁵

IV. POLICY RECOMMENDATION

While the government sought to keep Internet governance within the private sector back in 1997, the prevalence of the Internet today calls for more comprehensive regulations.¹⁹⁶ The most recent regulation addressing how social media platforms function on the Internet was passed in 1996.¹⁹⁷ With more people aspiring to become content creators on digital platforms, the government must take considerable action to hold platforms accountable for all types of discrimination.¹⁹⁸

As Justice Thomas detailed in his concurrence, regulating digital platforms as common carriers is a natural progression from the Section 230 immunities provided under the Telecommunications Act.¹⁹⁹ This solution would allow Section 230 to remain intact and applicable to digital platforms for the purpose of shielding them from liability for third-party content, while requiring the platforms to comply with common carrier anti-discrimination law.²⁰⁰

Recently proposed legislation by Senator Ed Markey and Representative Doris Matsui also leaves Section 230 standing while directly addressing

194. See Complaint, *supra* note 38, at 2 (claiming YouTube directly competes with other creators for audiences and revenue).

195. See *id.* at 24 (stating that YouTube has the perpetual right to monetize ninety-five percent of the videos at the data of over two billion users).

196. See *The Framework for Global Electronic Commerce*, THE WHITE HOUSE (Jul. 1, 1997), <https://clintonwhitehouse4.archives.gov/WH/New/Commerce/read.html> (encouraging the creation of a private organization that manages Domain Name System (“DNS”) and Internet Protocol (“IP”) addresses, and is run like a corporation).

197. See Telecommunications Act of 1996, 47 U.S.C. § 609 (amending the Communications Act of 1934 to account for new technologies and separating basic telecommunications services from the new emerging computer services).

198. See *generally* *Newman v. Google LLC*, No. 20-CV-04011-LHK, 2021 WL 2633423, at *4 (N.D. Cal. July 25, 2021) (representing a class of creators).

199. See *Biden v. Knight First Amend. Inst.* at Colum. Univ., 141 S. Ct. 1220, 1222–24 (2021) (Thomas, J., concurring) (suggesting digital platforms be regulated as common carriers).

200. See 47 U.S.C. § 230(c)(2) (2018) (providing immunity to telecommunications services for blocking or screening offensive content authored by third parties).

algorithmic discrimination.²⁰¹ The Algorithmic Justice and Online Transparency Act of 2021 prohibits algorithms on social media platforms that discriminate based on race and gender.²⁰² The bill calls for a task force within the Federal Trade Commission to investigate and review algorithms for discrimination.²⁰³ The Federal Trade Commission published guidance around the same time the bill was proposed, encouraging businesses to be more transparent about how their algorithms work.²⁰⁴ While the movement for transparency from Big Tech is commendable, it does not offer courts guidance on how to approach algorithmic discrimination cases.²⁰⁵

Both common carrier regulation and Commerce Clause enforcement are viable avenues for enforcing discrimination remedies on private digital media platforms because the Internet is already run like a corporation.²⁰⁶ Domain names and IP addresses are purchased, advertisements appear regularly on almost every website, and private companies still dictate the direction Internet regulation should go.²⁰⁷ The courts should apply the same mechanisms of enforcing civil rights to traditional private organizations to companies in the technology industry.²⁰⁸ After all, civil rights do not disappear just because human interactions occur over a screen.²⁰⁹

201. See Lauren Feiner, *New Bill Would ‘Open Up Big Tech’s Hood,’ Make Many Companies Explain how They Decide Which Content to Show*, CNBC (May 28, 2021, 2:53 PM), <https://www.cnbc.com/2021/05/28/markey-matsui-bill-would-force-social-media-content-algorithm-transparency.html> (reporting the proposed legislation).

202. See *id.* (discussing the purpose of the bill).

203. See *id.* (discussing what the bill intends to create in other government agencies).

204. See Elisa Jillson, *Aiming for Truth, Fairness, and Equity in Your Company’s Use of AI*, FED. TRADE COMM’N, (Apr. 19, 2021) <https://www.ftc.gov/business-guidance/blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai> (stating that the FTC will conduct hearings on algorithms).

205. See *id.* (requiring businesses to take action to develop less potentially discriminatory practices).

206. See National Telecommunications and Information Administration, *A Proposal to Improve the Technical Management of Internet Names and Addresses*, DEPT. OF COM. (Feb. 20, 1998) (proposing the new governing body of the Internet be run as a corporation, with the chair being a former CEO).

207. See *id.* (discussing how domain names and IP addresses will be required after 1997).

208. See generally *Newman v. Google LLC*, No. 20-CV-04011-LHK, 2021 WL 2633423, at *5–6 (N.D. Cal. July 25, 2021) (seeking federal remedies under § 1981).

209. See generally *id.* (seeking to remedy a civil rights violation).

V. CONCLUSION

Ultimately, the Northern District of California was incorrect in dismissing *Newman v. Google*, and the plaintiffs of the suit should consider amending their complaint to include different avenues for remedy. Social media content creators work on an ever-evolving platform, but that does not mean that traditional methods of fighting discrimination are unequipped to address the issue. From § 1981's contractual equality framework, to the more sweeping common carrier and interstate commerce frameworks, Newman and the Black content creators in the class action have actionable claims that the courts should consider seriously. Without checks from any branches of government, private Internet companies will continue to get away with egregious instances of discrimination that hinder society and directly contradict Congress' intent when they enacted anti-discrimination policies into several statutes. The judiciary is waiting for Congress to provide them with a new toolkit to combat algorithmic discrimination, yet courts already have the tools before them. What the judiciary really needs from Congress is an explicit classification of what digital platforms are in the context of commerce. With that made clear, minority creators may finally find racial justice against Big Tech.