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What's In a Name?: Common Carriage, Social Media, and the First Amendment

Christopher S. Yoo
UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

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ABSTRACT

Courts and legislatures have suggested that classifying social media as common carriers would make restrictions on their right to exclude users more constitutionally permissible under the First Amendment. A review of the relevant statutory definitions reveals that the statutes provide no support for classifying social media as common carriers. Moreover, the fact that a legislature may apply a label to a particular actor plays no significant role in the constitutional analysis. A further review of the elements of the common law definition of common carrier reveals that four of the purported criteria (whether the industry is affected with a public interest, whether the social media companies possess monopoly power, whether they are involved in the transportation and communication industries, and whether social media companies received compensating benefits) do not apply to social media and do not affect the application of the First Amendment. The only legitimate common law basis (whether an actor holds itself out as serving all members of the public without engaging in individualized bargaining) would again seem inapplicable to social media and have little bearing on the First Amendment. The weakness of these arguments suggests that advocates for limiting social media's freedom to decide which voices to carry are attempting to gain some vague benefit from associating their efforts with common carriage's supposed historical pedigree to avoid having to undertake the case-specific analysis demanded by the First Amendment's established principles.

* John H. Chestnut Professor of Law, Communication, and Computer & Information Science and Founding Director of the Center for Technology, Innovation and Competition, University of Pennsylvania.

INTRODUCTION

Calls for regulating social media are coming from both ends of the political spectrum. For example, President Joe Biden's most recent State of the Union address included a call for holding social media companies more accountable.[1] This language echoed criticisms raised in an executive order issued by his predecessor.[2]

Courts have also begun to suggest that bringing social media within the ambit of the hoary legal category of common carrier would make it easier to regulate them without violating the First Amendment of the U.S. Constitution. For example, when the Supreme Court dismissed as moot the appeal of a lower court decision holding that blocking critics from interacting with Donald Trump's Twitter account violated the First Amendment, Justice Thomas suggested that treating Internet platforms as common carriers might make government-imposed limits on their rights to exclude users more constitutionally permissible under the First Amendment.[3] Furthermore, an Ohio trial court denied a motion to dismiss the Ohio Attorney General's complaint seeking a declaratory judgment that Google is a common carrier, noting that representations that would take Google outside the ambit of common carriage exceeded the four corners of the complaint and thus could not be considered on demurrer.[4]

State legislatures have begun to follow suit. Notably, the Florida and Texas legislature enacted statutes that included findings designating social media as common carriers as well as substantive provisions prohibiting social media from discriminating against posts by our about political candidates.[5]

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[1] President Joe Biden, State of the Union Address (Feb. 7, 2023), *in* 169 CONG. REC. H728, H735 (Feb. 7, 2023).

[2] Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020).

[3] Biden v. Knight First Amendment Inst., 141 S. Ct. 1220, 1222–25, 1226 (2021) (Thomas, J., concurring).

[4] Ohio ex rel. Yost v. Google LLC, Case No. 21-CV-H-06-274, slip op. at 6–11 (Ohio Ct. Common Pleas May 24, 2022), *available at* https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=3672&context=historical.

[5] An Act Relating to Social Media Platforms, §§ 1(6), 2, 4, 2021 Fla. Laws. 503, 505, 513–14 (finding that "[s]ocial media platforms . . . should be treated similarly to common carriers" and prohibiting them from deplatforming political candidates); An Act Relating to Censorship of or Certain Other Interference with Digital Expression, Including Expression on Social Media Platforms or Through Electronic Mail Messages, §§ 1(3)–(4), 7, 2021 Tex. Gen. Laws 3904, 3904, 3909 (finding that "social media platforms function as common carriers" for multiple reasons and prohibiting discrimination on the basis of viewpoint or geographic location).

The judges reviewing these statutes took divergent views as to the constitutional significance of characterizing social media as common carriers. When reviewing the district court's decision to enjoin of the Florida statute as a violation of the First Amendment, the Eleventh Circuit unanimously agreed that social media companies are not common carriers and that the fact that a law characterizes social media platforms as common carriers did not affect the constitutional analysis.[6] When the Fifth Circuit confronted the same issue with respect to the Texas statute, the panel split three ways, with one judge concluding that common carriage favored holding the statute constitutional,[7] the dissenting judge disagreeing on this precise point,[8] and the third judge comprising the majority declining to join the section of the opinion relying on common carriage.[9]

The grant of certiorari in both *NetChoice* cases positions the Supreme Court to resolve this dispute by mid-2024.[10] Interestingly, an earlier appearance of the challenge to the Texas statute on the shadow docket provided an opportunity for three justices to weigh in on this issue. When the Court vacated the Fifth Circuit's stay of the mandate of the district court's decision enjoining the Texas statute as unconstitutional, Justices Alito, Thomas, and Gorsuch dissented, arguing that the constitutionality of imposing nondiscrimination mandates on entities with "common carrier-like market power" remained too unsettled for the Court to take such an action.[11] In the meantime, scholars have split on this issue, with

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6 NetChoice, LLC v. Att'y Gen., 34 F.4th 1196, 1220–21 (11th Cir. 2022), *cert. granted*, _ S. Ct. _ (Oct. 10, 2023) (No. 22-277).

7 NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 469–79 (5th Cir. 2022) (opinion of Oldham, J.), *cert. granted*, _ S. Ct. _ (Oct. 10, 2023) (No. 22-555).

8 *Id.* at 506 (Southwick, J., concurring in part and dissenting in part) (finding that classifying social media as common carriers "would not likely change any of the preceding analysis" because "common carriers retain their First Amendment protections for their own speech").

9 *Id.* at 443 n.*.

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11 NetChoice, LLC v. Paxton, 142 S. Ct. 1715, 1716 (2022) (Alito, J., joined by Thomas and Gorsuch, JJ., dissenting from grant of application to vacate stay).

some arguing that characterizing social media companies as common carriers helps render regulation of them constitutional[12] and others drawing the opposite conclusion.[13]

This Article revisits these issues in the aftermath of the divergent Court of Appeals decisions in the *NetChoice* cases. Part I explores statutory arguments for treating social media as common carriers and examines the constitutional implications of those arguments. Part II conducts a similar analysis on calls to apply the common law definition of common carrier to social media. Having found that neither of these approaches justifies treating social media as common carriers, Part III explores the motivation behind efforts to classify them as such.

I. COMMON CARRIAGE AS A MATTER OF STATUTE

Determining the significance of potentially classifying social media as common carriers devolves into two key questions: Do social media satisfy the definition of common carriers? If so (or not), what are the constitutional implications? Answering both questions requires separately examining the outcome under the definitions of common carrier included in statutes and those developed by the common law.

A. Current Statutory Definitions

In many cases, statutes provide definitions of common carriage. Many of these definitions are not as helpful as one might hope. For example, the Interstate Commerce Act of 1887 used the term common carrier liberally without defining it.[14] The definition contained in the Communications Act of 1934 is hopelessly circularly, defining a "common carrier" as "any person engaged as a common carrier

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[12] *See* Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J.L. & TECH. 391 (2020); Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*; 1 J. FREE SPEECH L. 377 (2021).

[13] *See* Ashutosh Bhagwat, *Why Social Media Platforms Are Not Common Carriers*, 2 J. FREE SPEECH L. 127 (2022); Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463 (2021).

[14] Ch. 104, 24 Stat. 379.

for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy."[15]

One can piece together a more useful definition from multiple other provisions of the same statute. The statute defines "telecommunications carrier" as "any provider of telecommunications services," clarifying that "[a] telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services."[16] "Telecommunications services" are in turn defined as "the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used,"[17] where "telecommunications" are defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[18] The statute reinforces this point by specifically other services involving editorial discretion, such as radio broadcasting[19] and cable service,[20] from the definition of common carrier.

The result is a definition that restricts common carriage to dumb pipes that provide mere transportation of information without exercising any editorial judgment over the content being conveyed.[21] As the two judges who authored the majority opinion upholding the FCC's decision to reclassify last-mile Internet service providers (ISPs) as common carriers concluded, social media companies such as Facebook, Twitter, and YouTube "are not considered common carriers that hold themselves out as affording neutral, indiscriminate access to their platform without any editorial

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15 47 U.S.C. § 153(11) (2012). This definition is subject to statutory exceptions and excludes radio broadcasting. *Id.*

16 *Id.* § 153(51). The statute gives the FCC discretion to determine whether fixed and mobile satellite services are common carriers. *Id.*

17 *Id.* § 153(53). The definition also includes services offered "to such classes of users as to be effectively available directly to the public." *Id.*

18 *Id.* § 153(50).

19 *Id.* § 153(11).

20 *Id.* § 541(c).

21 A similar conclusion applies to the definition of common carrier included in mobile services. The statute permits common carriage regulation only for commercial mobile services. 47 U.S.C. § 332(c)(1)–(2). The statute in turn defines commercial mobile service as "any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public." *Id.* § 332(d)(1).

filtering."[22] The Supreme Court has confirmed that such firms are not properly subject to common carriage regulation.[23]

B. Potential Statutory Redefinitions

But what if a legislature amended a statute to declare a social media company to be a common carrier? The Florida statute flirted with this approach by including legislative findings that social media platforms should be "treated similarly to common carriers."[24] The legislative findings included in the Texas statute were more direct, finding that "social media platforms function as common carriers" and that "social media platforms with the largest number of users are common carriers by virtue of their market dominance."[25]

Legislative findings have limited impact on constitutional analysis. The Supreme Court has recognized that although "Congress' predictive judgments are entitled to substantial deference," that deference "does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law.'"[26] In short, "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."[27]

Although the legislative findings of these statutes purport to classify social media as common carriers, their substantive provision fell short of doing so. Instead of barring discrimination, which courts have recognized to be the "*sine qua non* of common carrier status,"[28] these statutes employ newly defined

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[22] U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 392 (D.C. Cir. 2017) (Srinivasan, J, joined by Tatel, J., concurring in the denial of rehearing en banc).

[23] *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 975 (2005) ("The [Communications] Act regulates telecommunications carriers, but not information-service providers, as common carriers.").

[24] Act of May 24, 2021, ch. 2021-32, § 1(6), 2021. Fla Laws 503, 505.

[25] Act of Sept. 9, 2021, ch. 3, § (3)–(4), 2021 Tex. Gen. Laws 3904, 3904

[26] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 666 (1994) (quoting Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 129 (1989)).

[27] *Sable*, 492 U.S. at 129 (quoting Landmark Commc'ns, Inc. v. Virginia*,* 435 U.S. 829, 843 (1978)).

[28] Verizon v. FCC, 740 F.3d 623, 651 (D.C. Cir. 2014) (quoting Nat'l Ass'n of Regul. Util. Comm'rs v. RCC, 533 F.2d 601, 08 (D.C. Cir. 1976)).

terms of art, including "censor," "deplatform," and "shadow ban."[29] As such, it is not clear whether the substantive provisions of these statutes can be fairly read as treating social media companies as common carriers.

That said, it would have made no difference had either Florida or Texas implemented their legislative findings by imposing true common carriage obligations on social media companies. As the Eleventh Circuit held, "[n]either law nor logic recognizes government authority to strip an entity of its First Amendment rights merely by labeling it a common carrier."[30] Thus, statutes that deem social media companies to be common carriers "should be assessed under the same standards that apply to other laws burdening First-Amendment-protected activity."[31]

A similar criticism applies to statutory regimes in the area of broadcasting and cable television that are similar to, but slightly different from, common carriage, which some commentators have dubbed "quasi-common carriage."[32] As the Court noted in *Turner Broadcasting System, Inc. v. FCC*, the constitutional analysis of access mandates in broadcast regulation turned on what the Court perceived to

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[29] The Florida statute requires that social media platforms "apply censorship, deplatforming, and shadow banning standards in a consistent manner among its users on the platform." Fla. Stat. § 501.2041(2)(b). The statute defines "censor" to "include any action taken by a social media platform to delete, regulate, restrict, edit, alter, inhibit the publication or republication of, suspend a right to post, remove, or post an addendum to any content or material posted by a user. The term also includes actions to inhibit the ability of a user to be viewable by or to interact with another user of the social media platform." *Id.* § 501.2041(1)(b). It defines "deplatform" as "the action or practice by a social media platform to permanently delete or ban a user or to temporarily delete or ban a user from the social media platform for more than 14 days." *Id.* § 501.2041(1)(c). It defines "shadow ban" as "action by a social media platform, through any means, . . . to limit or eliminate the exposure of a user or content or material posted by a user to other users of the social media platform." *Id.* § 501.2041(1)(f).

The Texas statute prohibits censorship based on the viewpoint of users, their expression, or their geographic location. TEX. BUS. & COM. CODE ANN. § 143A.002(a). The statute defines "censor" as "to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression." *Id.* § 143A.001(1). The canon *ejusdem generis* confirms that the inclusion of "discriminate" in the catchall phrase should be construed as limited by the terms preceding it and not as a separate, independent basis for liability.

[30] *NetChoice, LLC v. Att'y Gen.*, 34 F.4th at 1221.

[31] *Id.*

[32] *See* Rob Frieden, *The Rise of Quasi-Common Carriers and Conduit Convergence*, 9 I/S: J.L. & POL'Y INFO. SOC'Y 471, 484–90 (2014); Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2317–18, 2326–28 (2021); Brent Skorup & Joseph Kane, *The FCC and Quasi-Common Carriage: A Case Study of Agency Survival*, 18 MINN . J.L. SCI . & TECH. 631, 650–61 (2017). Prominent examples include rules giving political candidates access to broadcasting, 47 U.S.C. §§ 312(a)(7), 315; broadcasting's now-defunct Fairness Doctrine, Editorializing by Broadcast Licensees, Report, 13 F.C.C. 1242 (1949); and cable access regimes such as must carry and access for public, educational, and governmental programming, 47 U.S.C. §§ 531, 534.

be "the special physical characteristics of broadcast transmission, not the economic characteristics of the broadcast market."[33] Similarly for cable, the Court emphasized that its decision was "justified by special characteristics of the cable medium," specifically "the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control."[34]

In so holding, the Court confirmed that the First Amendment analysis is based on facts, not labels. In so holding, *Turner* confirmed an earlier decision of the D.C. Circuit holding that "[a] particular system is a common carrier by virtue of its functions, rather than because it is declared to be so."[35] Notably, Justice Thomas, the leading judicial advocate for treating social media as common carriers,[36] similarly noted in the opinion that served as the principal authority for the Eleventh Circuit's decision[37] that "[l]abeling [a regulation governing cable television] a common carrier scheme has no real First Amendment consequences."[38]

II. COMMON CARRIAGE AS A MATTER OF COMMON LAW

Social media's failure to satisfy a statutory definition of common carriage does not end the inquiry. When statutory criteria are insufficient, courts and regulators necessarily "resort[]to the common law to come up with a satisfactory definition."[39] Common law courts have experimented with a range of factors for determining which entities fall within the category and which do not,[40] although commentators

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33 *Turner Broad.*, , 512 U.S. at 640; *accord id.* at 637 ("The justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium.") (citing FCC v. League of Women Voters of Cal. 468 U.S. 364, 377 (1984); Red Lion Broad. Co. v. FCC 395 U.S. 367, 388–89, 396–99 (1968); NBC v. United States, 391 U.S. 190, 226 (1943)).

34 *Id.* at 656, 661.

35 Nat'l Ass'n of Regul. Util. Comm'rs v. FCC, 525 F.2d 630, 644 (D.C. Cir. 1976).

36 *See supra* note 3 and accompanying text.

37 *See supra* note 31 and accompanying text.

38 Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 825 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part).

39 Verizon v. FCC, 740 F.3d 623, 651 (D.C. Cir. 2014).

40 For earlier explorations of these themes, see Christopher S. Yoo, *Common Carriage's Domain*, 35 YALE J. ON REG. 991, 994–97 (2018); Christopher S. Yoo, *Is There a Role for Common Carriage in an Internet-Based World?*, 51 HOUS. L. REV. 545, 552–63 (2013) [Yoo, *Role for Common Carriage*]; Yoo, *supra* note 13, at 465–75.

have appropriately characterized the resulting body of law as "unhelpful."[41] That said, the Fifth Circuit identified two factors that may determine whether a firm is a common carrier:

- whether "the carrier hold[s] itself out to serve any member of the public without individualized bargaining" and
- "whether the transportation or communications firm was 'affected with a public interest,'" taking into account whether it holds a monopoly.[42]

Justice Thomas's concurrence in *Knight* echoed all of these criteria[43] while also suggesting that common carriage status may be a quid pro quo for "special government favors."[44]

A. Invalid Rationales

The second factor identified by the Fifth Circuit can be broken into three components: whether the firm is "affected with a public interest," is in the transportation or communications industries, or possesses monopoly power. On closer inspection, none of these subfactors nor the quid pro quo factor that Justice Thomas mentioned can serve as an adequate basis for determining whether a firm is a common carrier. Nor do any of them affect the First Amendment analysis.

1. "Affected with a Public Interest"

One oft-cited component of the definition of common carriage turns on whether the firm in question is "affected with a public interest."[45] As Judge Oldham's opinion in the Fifth Circuit's

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41 *See* Kevin Werbach, *Only Connect*, 22 BERKELEY TECH. L.J. 1233, 1247 (2007) ("Common law sources are also unhelpful, offering competing and largely inconsistent rationales.").

42 *NetChoice, L.L.C. v. Paxton*, 49 F.4th at 471–73 (opinion of Oldham, J.).

43 Biden v. Knight First Amendment Inst., 141 S. Ct. 1220, 1222–23 (2021) (Thomas, J., concurring).

44 *Id.* at 1223.

45 *Id.* at 1223; *NetChoice, L.L.C. v. Paxton*, 49 F.4th at 471, 473 (opinion of Oldham, J.). For scholarly invocations of the concept, see, e.g., BRETT M. FRISCHMANN, INFRASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES 103, 218 (2012); Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1208–09 (2008); Thomas B. Nachbar, *The Public Network*, 17 COMMLAW CONSPECTUS 67, 79–84 (2008); James B. Speta, *A Common Carrier Approach to Internet*

NetChoice case notes,[46] the Supreme Court first put forth the concept in *Munn v. Illinois*[47] as a justification to uphold economic regulation during the *Lochner* era when the Court routinely struck down such regulation as a violation of substantive due process. The opinion fails to note the fact that the concept immediately drew a steady stream of criticism[48] that culminated in the abandonment of the test in *Nebbia v. New York*, which concluded "there is no closed class or category of businesses affected with a public interest" and that the principle is "not susceptible of definition and form[s] an unsatisfactory test of the constitutionality of legislation directed at business practices."[49] Thereafter, the Supreme Court regarded the doctrine as "discarded."[50] Most recently, in *Jackson v. Metropolitan Edison Co.*, the Court again reiterated that whether a firm was affected with a public interest was "not susceptible of definition and form[ed] an unsatisfactory test."[51] Thus, after *Nebbia*, the test "disappeared from constitutional jurisprudence."[52]

It thus comes as no surprise that Justice Thomas denigrated this tenet as "hardly helpful, for most things can be described as 'of public interest.'"[53] Indeed, even by the doctrine's proponents concede that this test poses significant problems.[54] Unfortunately, Judge Oldham's opinion in the Fifth Circuit's *NetChoice* case endorsing the doctrine failed to discuss the substantial authority rejecting it.

Interconnection, 54 FED. COMM. L.J. 225, 277–78 (2002); Richard S. Whitt, *Evolving Broadband Policy: Taking Adaptive Stances to Foster Optimal Internet Platforms*, 17 COMMLAW CONSPECTUS 417, 491–92 (2009); Tim Wu, *Why Have a Telecommunications Law? Anti-Discrimination Norms in Communications*, 5 J. ON TELECOMM. & HIGH TECH. L. 15, 17 (2006).

46 *NetChoice, L.L.C. v. Paxton*, 49 F.4th at 472–73 (opinion of Oldham, J.).

47 Munn v. Illinois, 94 U.S. 113, 125–26, 130 (1876).

48 Yoo, *Role for Common Carriage supra* note 40, at 551–52. In addition to criticizing the concept's coherence, the Supreme Court regarded the mere fact that something was indispensable insufficient to bring it within this category, otherwise food, clothing, and housing would all be subject to extensive price regulation. New State Ice Co. v. Liebmann, 285 U.S. 262, 272 (1932).

49 Nebbia v. New York, 291 U.S. 502, 536 (1934).

50 Olsen v. Nebraska *ex rel*. W. Reference & Bond Ass'n, 313 U.S. 236, 245 (1941).

51 419 U.S. 345, 353 (1974).

52 Stephen A. Siegel, *Understanding the* Lochner *Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 206 n.85 (1984).

53 Biden v. Knight First Amendment Inst., 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring).

54 Susan P. Crawford, *Transporting Communications*, 89 B.U. L. REV. 871, 883–85 (2009); Nachbar, *supra* note 45, at 81; Kevin Werbach, *The Network* Utility, 69 DUKE L.J. 17651, 1790 (2011)..

Even more importantly for purposes of this Article, the courts that have considered the issue have concluded that the fact that a party may be affected with a public interest has no impact on the First Amendment analysis. A prime example is a Seventh Circuit decision, which rejected arguments that a newspaper was supposedly affected with a public interest justified preventing it from "arbitrarily refus[ing] to publish advertisements suggest expressing ideas, opinions or facts on political and social issues."[55] If a newspaper was not a firm affected with a public interest during the 1970s, it is hard to see how a modern social media company could be classified so today.[56] It explains why the Eleventh Circuit held that public importance alone was not "sufficient reason[] to recharacterize a private company as a common carrier."[57]

2. Monopoly Power

Both Justice Thomas and Judge Oldham suggested the possession of monopoly power formed part of the justification for treating a firm as a common carrier,[58] as did the three Justices dissenting from the Supreme Court's decision to dissolve the Fifth Circuit's stay.[59] The trial courts reviewing both the Florida and Texas statutes and the Eleventh Circuit disagreed, rejecting claims that market power could justify classifying a firm as a common carrier.[60] The judges reviewing the FCC's 2015 Open Internet Order split on the issue.[61]

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[55] Chicago Jt. Bd., Amalgamated Clothing Workers of Am. v. Chicago Trib. Co., 435 F.2d 470, 472, 478 (7th Cir. 1970).

[56] *See also* German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 424 (1914) (Lamar, J., dissenting) (holding up newspapers as an example of firms that should not be classified as affected with a public interest even though "nothing is so dependent on the public, nothing reaches so many persons, and so profoundly affects public thought and public business" as newspapers).

[57] *NetChoice, LLC v. Att'y Gen.*, 34 F.4th at 1221.

[58] *Knight*, 141 S. Ct. at 1222, 1224; *NetChoice, L.L.C. v. Paxton*, 49 F.4th at 472, 476 (opinion of Oldham, J.).

[59] *NetChoice*, 142 S. Ct. at 1717 (entertaining the possibility that the "possess[ion of] some measure of common carrier-like market power" might justify mandating nondiscrimination).

[60] *NetChoice, LLC v. Att'y Gen.*, 34 F.4th at 1221; *Paxton*, 573 F. Supp. 3d at 1106; *Moody*, 54 F. Supp. 3d at 1091.

[61] *Compare USTA*, 825 F.3d at 708 (rejecting the argument that common carriage depended on monopoly power), *with id.* at 744–54 (Williams, J., concurring in part and dissenting in part) (drawing the opposite conclusion); US. Telecom Ass'n v. FCC, 855 F.3d 381, 418, 431–35 (D.C. Cir. 2017) (Kavanaugh, J., dissenting

The claim that monopoly power is a key criterion for common carriage is questionable as a historical matter. Monopoly power was not a traditional requirement at English common law nor during the 19th century regulation of the railroads.[62] It was first put forth by Bruce Wyman in 1904 as part of his attempt to justify certain types of economic regulation in the face of the *Lochner* era's constitutionalization of laissez-faire economics.[63] Wyman's proposal prompted responses from Charles Burdick and Edward Adler pointing out that monopoly power had never been a requirement for common carriage.[64] Indeed, none of the leading judicial precedents on the definition of common carriage include monopoly power as a requirement.[65]

Even if monopoly power were a requirement, it is not clear that all of the entities covered by the statutes at issue in the *NetChoice* decisions would meet it. Indeed, Justice Thomas's concurrence in *Knight First Amendment Institute* noted that whether Twitter fell within that standard remained an open question.[66]

In any event, Supreme Court precedent makes clear that the possession of monopoly power does not affect the First Amendment analysis.[67] For example, Justice Douglas noted in *CBS, Inc. v. Democratic National Committee* that even though "[s]ome newspapers in our history have exerted a powerful—and some have thought—a harmful interest on the public mind," government intervention to

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from the denial of rehearing en banc) (same).

62 *See* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836–1937, at 131–48 (1991); Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1332–33 (1998); Nachbar, *supra* note 45, at 96–100; Speta, *supra* note 45, at 259.

63 Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 217, 232–40 (1904). For an excellent discussion of the debate surrounding Wyman's proposal, see Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1292–93, 1304–21, 1403–10 (1996).

64 Edward A. Adler, *Business Jurisprudence*, 28 HARV. L. REV. 135, 148 (1914); Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 COLUM. L. REV. 514, 518–25 (1911).

65 *See, e.g.*, Nat'l Ass'n of Reg. Util. Comm'rs v. FCC (*NARUC II*), 533 F.2d 601, 608 (D.C. Cir. 1976); Nat'l Ass'n of Reg. Util. Comm'rs v. FCC (*NARUC I*), 525 F.2d 630, 641, 642 (D.C. Cir. 1976).

66 *Knight*, 141 S. Ct. at 1225.

67 For earlier discussions, see Christopher S. Yoo, *Technologies of Control and the Future of the First Amendment*, 53 WM. & MARY L. REV. 747, 761–67 (2011) [hereinafter Yoo, *Technologies of Control*]; Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697, 717–51 (2010) [hereinafter Yoo, *Myth of the Internet*].

compensate for any such adverse effects "would be the greater of two evils."[68] Douglas continued: "Of course there is private censorship in the newspaper field. . . . But if the Government is the censor, administrative *fiat*, not freedom of choice, carries the day."[69]

Justice Douglas's words reflect the well-established state action doctrine, which holds that the First Amendment restrictions on interfering with speech applies only to the state, not private individuals.[70] In the words of Justice O'Connor, "the First Amendment as we understand it today rests on the premise that it is government power, rather than private power, that is the main threat to free expression; and as a consequence, the Amendment imposes substantial limitations on the Government even when it is trying to serve concededly praiseworthy goals."[71] In fact, Justice Thomas's endorsement of the constitutionality of treating social media a common carriers was accompanied by a statement approving the decision not to grant certiorari in a case holding that editorial judgments exercised by private Internet websites were protected by the First Amendment.[72]

A majority of the Court embraced these principles in *Miami Herald Publishing Co. v. Tornillo*, which invalidated a state statute purporting to give a right of reply to political candidates who were criticized by a newspaper[73] just five years after upholding a similar rule for broadcasters.[74] This was true even though "[n]ewspapers have become big business . . . [with] [c]hains of newspapers, national newspapers, national wire and news services, and one-newspaper towns [being] the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events."[75] Nor did the emergence of "vast

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68 412 U.S. 94, 152–53 (1973) (Douglas, J., concurring in the judgment).

69 *Id.* at 153

70 *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921 (2019) (providing the most recent reaffirmation of the state action doctrine).

71 *Turner*, 512 U.S. at 685 (O'Connor, J., joined by Scalia and Ginsburg, JJ., and joined by Thomas, J., in part, concurring in part and dissenting in part).

72 *Knight*, 141 S. Ct. at 1221 (Thomas, J., concurring) (opining that the Court "properly reject[ed]" the petition for certiorari in *Freedom Watch, Inc. v. Google Inc.*, 816 Fed. Appx 497 (D.C. Cir. 2020).

73 418 U.S. 241, 249, 251, 253 (1974).

74 Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

75 *Tornillo*, 418 U.S. at 248–49.

accumulations of unreviewable power in the modern media empires" or the fact that "the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers, have made entry into the marketplace of ideas served by the print media almost impossible" alter this conclusion.[76] The Court applied similar principles in *Pacific Gas & Electric Co. v. Public Utility Commission of California* when invalidating efforts to force an electric utility to include in its billing envelopes newsletters with content with which it disagreed as a violation of the First Amendment.[77]

Turner Broadcasting System, Inc. v. FCC further emphasized that holding an economic monopoly did not justify imposing regulation that restricted a speaker's First Amendment rights.[78] The Court acknowledged that courts and commentators had heavily criticized the rationale for applying a lower First Amendment standard to broadcasting.[79] In any event, it found that rationale inapposite to cable television because the latter lacked "the unique physical limitations of the broadcast medium," specifically its scarcity and susceptibility to interference.[80] The Court also confirmed that the mere fact that a daily newspaper "may enjoy monopoly status in a given locale" does by itself not affect the constitutional analysis.[81] Although the Court reaffirmed *Tornillo*,[82] it refused to extend it to cable television because of the "important technological difference" that existed "between newspapers and cable television," which was the fact that there could only be one cable connection to any home.[83] It was these "physical characteristics, compounded by the increasing concentration of economic power in the cable industry," that justified upholding the statute.[84]

This portion of the Court's opinion has drawn some criticism in the academic commentary.[85] That said, the Court's analysis in *Turner* reaffirmed the fundamental principles enunciated in *Tornillo* that

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76 *Id.* at 250–51.
77 475 U.S. 1 (1986).
78 512 U.S. 622 (1994).
79 *Id.* at 638.
80 *Id.* at 638-39.
81 *Id.* at 656.
82 *Id.* at 653-54.
83 *Id.*
84 *Id.* at 632–33.
85 *See, e.g.*, Ronald W. Adelman, *Turner Broadcasting* and the Bottleneck Analogy: Are Cable Television

economic monopoly was insufficient to render a restriction on speech constitutional while creating a limited exception cable operators because they possess exclusive physical control over the only connection into a subscribers' home. *Turner*'s reaffirmation of *Tornillo* and careful discussion of why it was inapplicable to cable made clear that this exception is limited to situations arising from monopoly control over a physical connection, not mere economic monopoly.[86]

As the Eleventh Circuit eloquently put it in the context of social media, *Tornillo* "squarely rejected the suggestion that a private company engaging in speech within the meaning of the First Amendment loses its constitutional rights just because it succeeds in the market place and hits it big."[87] The exception recognized in *Turner* for actors with control over the only physical conduit for all speech into a home would seem inapplicable to social media, which exercise no control over any physical connection and whose platforms do not give it any physical ability to prevent users from receiving content from other social media providers.

3. Involvement in Transportation or Communication

Justice Thomas argued that "whatever may be said of other industries, there is clear historical precedent for regulating transportation and communications networks in a similar manner as traditional common carriers."[88] Judge Oldham's opinion in the Fifth Circuit's *NetChoice* case similarly emphasized that particular criteria applied to "transportation and communications firms."[89] Numerous commentators have invoked the same consideration.[90]

Operators Gatekeepers of Speech?, 49 SMU L. REV. 1549, 1550, 1555–56 (1996); Laurence H. Winer, *The* Red Lion *of Cable, and Beyond?—*Turner Broadcasting v. FCC, 15 CARDOZO ARTS & ENT. L.J. 1, 48–50 (1997).

[86] Yoo, *Technologies of Control*, *supra* note 67, at 764–65; Yoo, *Myth of the Internet*, *supra* note 67, at 746–47.

[87] *NetChoice v. Att'y Gen.*, 34 F.4th at 1222.

[88] *Knight*, 141 S. Ct. at 1223.

[89] *NetChoice LLC v. Paxton*, 49 F.4th at 471 (opinion of Oldham, J.) (emphasizing that two identified criteria applied "[f]or transportation and communications firms," discussing examples in which the first criterion applied to transportation and communications firms, and including "the transportation or communications firm" as a modifier to the second criterion).

[90] Crawford, *supra* note 54, at 885, 915; Nachbar, *supra* note 45, at 81–84, 109; Speta, *supra* note 45, at 252–53, 255, 257; Whitt, *supra* note 45, at 491–92; Wu, *supra* note 45, at, 30–31.

The most eloquent statement of the perils of using such industry classifications comes from Holmes's *The Path of the Law*, in which he criticized the practice of grouping legal phenomena "under the head of Railroads or Telegraphs."[91] Simply gathering principles "under an arbitrary title which is thought likely to appeal to the practical mind" provides little basis "to discern the true basis for prophecy."[92] The proper approach is to begin by "discover[ing] from history how it has come to be what it is" and then proceeding with "consider[ing] the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price."[93] The danger of simply accepting an industry classifications is ending up with "too little theory in the law rather than too much."[94]

Even proponents of using ties to transportation and communications concede that "the mere existence of a long history of state involvement with transport does not necessarily tell us what the principled *basis* of that involvement is."[95] As Adam Candeub, whose article provided the foundation for Justice Thomas's concurrence in *Knight*, observed:

> It is a fair riposte to these ideas that they are descriptive at too general a level and fail to provide a convincing rule of decision. How involved in transportation or communications must an industry be before it becomes a common carrier[?] Why private car services but not Uber? . . . Teasing out common carriage law's definitional criteria may be, in the end, desultory."[96]

This observation is particularly compelling in light of the practice since the 1970s to lift nondiscrimination mandates from many transportation and communications industries.[97]

Most importantly, it is hard to see how the mere fact that a firm operates in the transportation and communications industry alters the First Amendment analysis. Indeed, were connection to the

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91 Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 474–75 (1897).
92 *Id.* at 475.
93 *Id.* at 476.
94 *Id.*
95 Crawford, *supra* note 54, at 884.
96 Candeub, *supra* note 12, at 405.
97 Kearney & Merrill, *supra* note 62, at 1335–39 (describing the deregulation of airlines, railroads, trucking, broadcasting, cable television, and telephony).

communications industry sufficient, there would have no point for the Supreme Court to engage in the extensive discussions of the physical details of the underlying technology that is the hallmark of its decisions on broadcasting and cable television. On the contrary, these cases confirm that constitutionality depends on an analysis of specific practices and justifications rather than industry-level generalizations.

4. Quid Pro Quo

Justice Thomas's concurrence in *Knight* suggested that common carriage status may be a quid pro quo for "special government favors," such as monopoly franchises (or some other measures to protect the firm from competition) or "immunity from certain types of suits."[98] Judge Oldham suggested that the immunity provided by Section 230 represented such a benefit.[99] Commentators have offered similar views.[100]

As an initial matter, quid pro quo is a questionable basis for common carriage as a historical matter. In fact, courts have routinely rejected arguments that the mere fact that a company is operating under a franchise or exercises the power of eminent domain is sufficient to justify regulating it as a common carrier.[101] Indeed, it bears noting that one of the seminal cases on common carriage (*Munn v. Illinois*) was selected specifically because the entity in question was not operating under state corporate charter.[102]

Furthermore, the landmark Supreme Court case in *Charles River Bridge* and its modern reaffirmation in *Winstar* make clear that any such quid pro quo must be explicitly spelled out at the time the supposed benefit is accepted.[103] As such, it cannot justify a statutory nondiscrimination mandate imposed after the fact.

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98 Biden v. Knight First Amendment Inst., 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring).
99 *NetChoice v. Paxton*, 49 F.4th at 477 (opinion of Oldham, J.).
100 *See, e.g.*, Candeub, *supra* note 12, at 395, 403, 406, 412; Volokh *supra* note 12, at 454–60.
101 FORD P. HALL, THE CONCEPT OF A BUSINESS AFFECTED WITH A PUBLIC INTEREST 96–97 (1940).
102 Herbert Hovenkamp, *The Takings Clause and Improvident Regulatory Bargains*, 108 YALE L.J. 801, 813–14 (1999).
103 *See* Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 546 (1837); United States v. Winstar Corp., 518 U.S. 839 (1996).

It is true that the federal government may employ its taxing and spending power to impose conditions on the receipt of federal funding that it could not impose directly as regulatory restrictions.[104] Exercises of those powers are subject, however, to the unconstitutional conditions doctrine, which limits the government's ability to make benefits contingent on permitting infringement of the recipients' constitutionally protected rights, particularly the freedom of speech.[105] To cite one classic example, the Supreme Court has held that a state may not deny tax-exempt status to veterans just because they refused to sign an oath eschewing any advocacy to overthrow the government.[106] In the absence of any overarching theory explaining the doctrine,[107] courts have looked to particular factors when determining its scope. For example, such restrictions are less permissible when imposed on actors that advocate against the government.[108] The fact that media often serve as an oppositional check against the government arguably places them in a similar position.

With respect to the purported benefits supposedly giving rise to the quid pro quo, the supposed benefits at issue in this context do not involve either taxing or spending. They are also subject to a number of constraints that limit the extent to which they can provide benefits. Modern communications statutes prohibit licensing authorities from issuing exclusive franchises undercuts government's ability to use the grant of a legal monopoly as part of a quid pro quo.[109]

It is also unlikely that Section 230 can properly be regarded as a benefit provided to common carriers. The immunity that Section 230 provides extends only to *interactive computer services*.[110] As the Eleventh Circuit noted, an amendment to another provision enacted as part of the same statute describing defenses to criminal liability for conveying obscenity and child pornography, among other things,

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104 *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 561–63 (2012) (opinion of Roberts, C.J.); South Dakota v. Dole, 483 U.S. 203, 209–11 (1987).

105 Perry v. Sinderman, 408 U.S, 593, 597 (1972).

106 Speiser v. Randall, 357 U.S. 513, 518–19 (1958).

107 *See, e.g.*, Dogan v. City of Tigard, 512 U.S. 374, 407 n.2 (1994) (Stevens, J., dissenting).

108 United States v. Am. Libraries Ass'n, 539 U.S. 194, 213 (2003) (citing Legal Services Corp. v. Velasquez, 531 U.S. 553 (2001)).

109 47 U.S.C. §§ 253, 541(a)(1) (2018).

110 47 U.S.C. § 230(c).

specifies, "Nothing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers."[111] This distinction undercuts characterizing Section 230 as a benefit extending to common carriers.

B. The Valid Rationale: Holding Out

As Justice Thomas, the Fifth Circuit, and the Eleventh Circuit recognized, the most widely accepted definition of common carriage turns on whether the firm holds itself out as serving all members of the public without engaging in individualized bargaining.[112] Indeed, this criterion constitutes the central consideration in all leading judicial discussions of common carriage.[113]

Holding out thus amounts to little more than the requirement that the provider "abide by its representation and honor its customers' expectations."[114] The fact that providers can avoid any carriage obligations simply by refraining from making an offer in the first instance eliminates any suggestion that such a restriction is impermissibly coercive. It also means that firms can evade being treated as common carriers simply by making individualized decisions about what types of content to carry.[115]

Courts have recognized that social media platforms do not hold themselves out to all comers. As the Eleventh Circuit held, social-media platforms "require[] users, as preconditions of access, to accept

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111 *NetChoice v. Att'y Gen.*, 34 F.4th at 1220–21 (citing 47 U.S.C. § 223(e)(6)).

112 *Knight*, 141 S. Ct. at 1222 (Thomas, J., concurring); *NetChoice, L.L.C. v. Paxton*, 49 F.4th at 471 (opinion of Oldham, J.); *NetChoice v. Att'y Gen.*, 34 F.4th at 1220.

113 *See* FCC v. Midwest Video Corp., 440 U.S. 689, 701 (1979); U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 740 (D.C. Cir. 2016); Verizon v. FCC, 740 F.3d 623, 651 (D.C. Cir. 2014); Cellco P'ship v. FCC, 700 F.3d 534, 548 (D.C. Cir. 2012); Nat'l Ass'n of Regul. Util. Comm'rs, 533 F.2d 601, 608 (D.C. Cir. 1976); Nat'l Ass'n of Regul. Util. Comm'rs, 525 F.2d 630, 641 (D.C. Cir. 1976). Congress, courts, and agencies have applied the same formulation in a wide variety of contexts. *See* 15 U.S.C. § 375(3); 46 U.S.C. § 40102(7)(A); 40 C.F.R. § 202.10(b); Edwards v. Pac. Fruit Express Co., 390 U.S. 538, 540 (1968); Woolsey v. Nat'l Transp. Safety Bd., 993 F.2d 516 524 n.2. (5th Cir. 1993); Flytenow, Inc. v. FAA, 808 F.3d 882, 887–88 (D.C. Cir. 2015); Nichimen Co. v. M. V. Farland, 462 F.2d 319, 326 (2d Cir. 1972); Kelly v. Gen. Elec. Co., 110 F. Supp. 4, 6 (E.D. Pa.), *aff'd*, 204 F.2d 692 (3d Cir. 1953).

114 U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 389 (D.C. Cir. 2017) (Srinivasan, J., joined by Tatel, J., concurring in the denial of the petition for rehearing en banc).

115 In the words of Thomas Nachbar, this makes holding out "a conspicuously empty" definition of common carriage. Nachbar, *supra* note 45, at 93.

their terms of service."[116] This means that "[s]ocial-media users . . . are *not* freely able to transmit messages 'of their own design and choosing' because platforms make—and have always made—'individualized' content- and viewpoint-based decision about whether to publish particular messages or users."[117]

The exchange that took place during the D.C. Circuit's decision not to rehear the decision upholding the 2015 Open Internet Order en banc confirms this conclusion. When then-Judge Kavanaugh objected that classifying ISPs as common carriers impermissibly abridged their editorial discretion,[118] the authors of the majority opinion countered that "web platforms such as Facebook, Google, Twitter, and YouTube . . . are not considered common carriers that hold themselves out as affording neutral, indiscriminate access to their platform without any editorial filtering."[119] The Open Internet Order did not implicate the First Amendment because it only purported to regulate services over which providers exercised no editorial discretion.[120] This discussion not only confirmed that social media companies do not satisfy the holding-out criterion for common carriage; the clear negative implication of Judge Srinivasan and Tatel's comment is that any attempt to regulate media that pick and choose who to carry would raise serious First Amendment concerns.

The fact that the criticism of social media is largely driven by their decisions to deplatform content of which they disapproved makes it all but impossible to say that they are holding themselves out to serve the entire public without exercising editorial discretion over who to carry. Contrary to what some commentators have suggested,[121] decisions such as *FAIR v. Rumsfeld* and *PruneYard* are not to the contrary.[122] Those cases require entities to convey speech with which they disagree only when reasonable

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116 *NetChoice v. Att'y Gen.*, 34 F.4th at 1220.

117 *Id.* (quoting FCC v. Midwest Video Corp., 440 U.S. 689, 701 (1979)).

118 *U.S. Telecom Ass'n v. FCC*, 855 F.3d at 484–89 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

119 *Id.* at 392 (Srinivasan, J., joined by Tatel, J., concurring in the denial of the petition for rehearing en banc).

120 *Id.* at 388–89.

121 *See, e.g.*, Volokh, *supra note* 12, at 416–52.

122 Rumsfeld v. Forum for Acad. & Inst. Rights, Inc., 547 U.S. 47 (2006); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

observers would not attribute that speech to the facility owners.[123] Conversely, decisions such as *Hurley* and *Dale* invalidated nondiscrimination mandates when others are likely to perceive the inclusion of an outside party as carrying an expressive message.[124] The vitriol aimed at social media platforms over their decisions to carry or block certain content leaves little doubt that people regard decisions about what to carry as part of the platforms' expression and responsibility.

III. UNDERSTANDING THE MOTIVATIONS FOR INVOKING COMMON CARRIAGE

If calling a regime common carriage has no impact on the constitutional analysis, what is accomplished by trying to bring new regulatory regimes within its ambit? The motivation appears designed to invoke the following syllogism:

> Major premise: Old regimes such as common carriage must comply with the First Amendment.
>
> Minor premise: New regulations of social media are like common carriage.
>
> Conclusion: These new regulatory regimes must comply with the First Amendment.

Judge Oldham said as much when he opined, "Given the firm rooting of common carrier regulation in our Nation's constitutional tradition, any interpretation of the First Amendment that would make Section 7 facially unconstitutional would be highly incongruous."[125]

The preceding sections showing how social media do not constitute common carriers undercuts the validity of the minor premise. The major premise is highly questionable as well. The Supreme Court has never directly addressed the First Amendment status of common carriers,[126] which has led scholars to note the paucity of judicial decisions exploring the relationship between common carriage and the First

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123 *Rumsfeld*, 547 U.S. at 65; *PruneYard*, 447 U.S. at 86–88.

124 Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 575–77 (1995); Boy Scouts of Am. v. Dale, 530 U.S. 640, 648, 653, 658 (2000).

125 *NetChoice, L.L.C. v. Paxton*, 49 F.4th at 469 (opinion of Oldham, J.)

126 *See* Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463, 480–82 (2021);

Amendment.[127] Indeed, the few indications that the Court has provided are contradictory. On the one hand, some Supreme Court dicta suggest that common carriers receive a level of First Amendment protection that is even lower than the standard applied to broadcasters.[128] On the other hand, the majority decision in *Sable* held that "the 'unique' attributes of broadcasting" that justified extending a lower First Amendment standard to broadcasting did not apply to telephony.[129] A concurring opinion by Justice Thomas, the leading supporter for restricting social media as common carriers,[130] has similarly noted that "the Court has declined to apply the lesser standard of First Amendment scrutiny imposed on broadcast speech . . . to federal regulation of telephone dial-in services."[131] *Reno v. ACLU* similarly held that the rationales for giving broadcasting less constitutional protection than other media had no application to Internet-based speech.[132] Unsurprisingly, this ambiguity has led lower courts to divide over whether the nondiscrimination mandates associated with common carriage pose problems under First Amendment.[133] It is worth noting that lower courts have recognized in a wide variety of contexts that common carriers have the First Amendment right to offer services over which they do exercise editorial discretion.[134]

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127 *See, e.g.*, ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 102–06 (1983); Susan Dente Ross, *First Amendment Trump?: The Uncertain Constitutionality of Structural Regulation Separating Telephone and Video*, 50 FED. COMM. L.J. 281, 299 (1998).

128 *See* FCC v. League of Women Voters of Cal., 468 U.S. 364, 378 (1984) (noting that "[u]nlike common carriers, broadcasters are entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public duties") (alteration and internal quotation marks omitted); Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 739 (1996) (plurality opinion) (noting that cable operators' "speech interests" in leased access channels are "relatively weak because [the companies] act less like editors, such as newspapers or television broadcasters, than like common carriers, such as telephone companies").

129 Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 127 (1989).

130 *See supra* note 3 and accompanying text.

131 FCC v. Fox Television Stations, Inc., 556 U.S. 502, 532 (2009) (Thomas, J., concurring).

132 521 U.S. 844, 868–70 (1997).

133 *Compare* U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 740–42 (D.C. Cir. 2016) ("Common carriers have long been subject to nondiscrimination and equal access obligations akin to those imposed by the rules without raising any First Amendment question."), *with* NetChoice, LLC v. Att'y Gen., 34 F.4th at 1219 n.17 (questioning "what work a common-carrier designation would perform in a First Amendment analysis"); *NetChoice, L.L.C. v. Paxton*, 49 F.4th at 505 (Southwick, J., concurring in part and dissenting in part) ("The only precedents that discuss" the intersection of common carriage and the First Amendment "reinforce the idea common carriers retain their First Amendment protections for their own speech.").

134 These include (1) dial-a-porn, Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co., 827 F.2d 1291, 1297 (9th Cir. 1987); Carlin Comnc'n, Inc. v. S. Bell Tel. & Tel. Co., 802 F.2d 1352, 1361 (11th Cir. 1986); Network Commc'ns v. Mich. Bell Tel. Co., 703 F. Supp. 1267, 1275 (E.D. Mich. 1989); (2) the use of customer data as commercial speech, Nat'l Cable & Telecomms. Ass'n v. FCC, 555 F.3d 996 (D.C. Cir. 2009); U.S. West, Inc. v. FCC, 182 F.3d 1224, 1233, 1235–37 (10th Cir. 1999); Verizon Northwest, Inc. v. Showalter, 282 F. Supp. 2d 1187

Judge Oldham attempted to establish the major premise by arguing the Supreme Court had long looked askance at constitutional challenges to the regulation of common carriers except during the *Lochner* era, when the Court would routinely strike down economic regulation as violations of parties' right to freedom of contract.[135] This sleight of hand attempts to confound judicial review of economic regulation under substantive due process with judicial review of speech regulation under the First Amendment. The Supreme Court has made clear that this is a false equivalency. As the famous footnote four in *Carolene* products made clear, the judicial deference regarding constitutionality that emerged from the rejection of the *Lochner* line of precedents applied only to challenges to economic regulation and did not extend to regulation that restricts political processes or to challenges brought under the Bill of Rights, including the First Amendment.[136]

In the end, attempts to connect social media with a well-established legal category without a close analysis of whether that category represents a proper analogue falls prey to the logical fallacy of honor by association. Handwaving attempts to associate the regulation of social media with the historical pedigree of an old body of law do not obviate the need for careful application of established principles of the First Amendment to each emerging set of facts.

CONCLUSION

Those invoking common carriage as a way to prevent social media platforms from excluding certain users must confront two basic questions: First, do social media platforms satisfy the definition of common carriers? Second, if so, would that affect the First Amendment analysis?

(W.D. Wash. 2003); and (3) the right of telephone companies to offer video content, US West, Inc. v. United States, 48 F.3d 1092, 1098 (9th Cir. 1994), *vacated and remanded for consideration of mootness*, 516 U.S. 1155 (1996); Chesapeake & Potomac Tel. Co. of Va. v. United States, 42 F.3d 181, 190 (4th Cir. 1994), *vacated and remanded for consideration of mootness*, 516 U.S. 415 (1996); S. New England Tel. Co. v. United States, 886 F. Supp. 211, 217 (D. Conn. 1995); NYNEX Corp. v. United States, No. Civ. 93-323-P-C, 1994 WL 779761, at *2 (D. Me. Dec. 8, 1994); BellSouth Corp. v. United States, 868 F. Supp. 1335, 1339 (N.D. Ala. 1994); Ameritech Corp. v. United States, 867 F. Supp. 721, 728 (N.D. Ill. 1994). The latter issue had been fully briefed and argued before the Supreme Court when the enactment of a statute repealing the ban rendered these cases moot.

135 *NetChoice, L.L.C. v. Paxton*, 49 F.4th at 472–73 (opinion of Oldham, J.).

136 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

The simple answer to both questions is no. Social media do not fall within existing statutory or common law definitions of common carrier, and neither the existing factors nor the addition of new factors to bring them within the scope of the definition would have any effect on the First Amendment analysis. The weakness of these arguments suggests that advocates for limiting social media's freedom to decide which voices to carry are attempting to gain some vague benefit from associating their efforts with common carriage's supposed historical pedigree to avoid having to undertake the case-specific analysis demanded by the First Amendment's established principles.