

WHAT'S IN A NAME? COMMON CARRIAGE, SOCIAL MEDIA, AND THE FIRST AMENDMENT

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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 demonstrates 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.

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INTRODUCTION

Calls for regulating social media are coming from both ends of the political spectrum. For example, President Biden’s most recent State of the Union address advocated holding social media companies more accountable for their content moderation policies.¹ This language echoed criticisms of social media companies’ editorial decisions 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 Clarence 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 legislatures enacted statutes that included findings designating social

¹ See 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 Amend. Inst., 141 S. Ct. 1220, 1222–25, 1226 (2021) (Thomas, J., concurring).

⁴ State ex rel. Yost v. Google LLC, No. 21-CV-H-06-0274, 2022 WL 1818648, at 6–11 (Ohio C.P. May 24, 2022).

media companies as common carriers as well as substantive provisions prohibiting social media from discriminating against posts by or about political candidates.⁵ In the *NetChoice* cases, the judges reviewing both of these statutes took divergent views as to the constitutional significance of statutorily characterizing social media companies as common carriers. When reviewing the district court’s decision to enjoin 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 them as such did not affect the constitutional analysis.⁶ In contrast, 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 point,⁸ and the third judge joining with the majority opinion while specifically refusing 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 in 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 Samuel Alito, Neil Gorsuch, and Clarence Thomas 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

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).

⁶ *NetChoice, LLC v. Att’y Gen.*, 34 F.4th 1196, 1220–21 (11th Cir. 2022), *cert. granted in part sub nom. Moody v. NetChoice, LLC*, 216 L. Ed. 2d 1313 (2023).

⁷ *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 469–79 (5th Cir. 2022) (opinion of Oldham, J.), *cert. granted in part*, 216 L. Ed. 2d 1313 (2023).

⁸ *Id.* at 505 (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 495 n.1.

¹⁰ Amy Howe, *Twelve Cases Added to Supreme Court Calendar*, SCOTUSBLOG (Sept. 29, 2023), <https://www.scotusblog.com/2023/09/twelve-cases-added-to-supreme-court-calendar/> [https://perma.cc/V295-2ZSW].

action.¹¹ In the meantime, scholars have split on this issue, with some arguing that characterizing social media companies as common carriers helps render regulation of them constitutional¹² and others drawing the opposite conclusion.¹³

This Article revisits these issues in the aftermath of the divergent Courts 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.

In the end, social media does not fall within existing statutory or common law definitions of common carrier. Moreover, even if they did, the factors defining this legal category would not have any effect on the First Amendment analysis. The fact that judges and scholars are still trying to make the case for classifying social media as such suggests that advocates for limiting social media's freedom of speech are using the legal category to avoid engaging in the case-specific analysis demanded by the First Amendment's established principles.

I. COMMON CARRIAGE AS A MATTER OF STATUTE

Determining the significance of potentially classifying social media companies as common carriers devolves into two key questions: Do social media companies 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.

¹¹ *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1717 (2022) (Alito, J., joined by Thomas and Gorsuch, JJ., dissenting from grant of application to vacate stay).

¹² See generally Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J.L. & TECH. 391 (2020) (arguing that regulations framed as common carriage are constitutional); Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 381–82, 414, 452–53 (2021) (arguing that common carrier-like models may be constitutional).

¹³ See generally Ashutosh Bhagwat, *Why Social Media Platforms Are Not Common Carriers*, 2 J. FREE SPEECH L. 127, 153, 156 (2022) (concluding that imposing common carrier status on social media platforms would be unconstitutional); Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463, 506–07 (2021) (arguing that labeling a digital platform as a common carrier has no impact on the First Amendment analysis).

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 circular, defining a “common carrier” as “any person engaged as a common carrier 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 current version of the 1934 statute. The statute defines a “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 “Telecommunications” are in turn 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 excluding other services involving editorial discretion, such as radio broadcasting¹⁹ and cable service,²⁰ from the definition of common carrier.

The result is a definition that restricts common carriage to conduits 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

¹⁴ Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887).

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(e)(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).

common carriers that hold themselves out as affording neutral, indiscriminate access to their platform without any editorial 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, stating 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, however, 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

Moreover, although the legislative findings of these statutes purport to classify social media as common carriers, their substantive provisions 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 employed newly defined terms of art, including “censor,” “deplatform,” and “shadow ban.”²⁹ Courts have yet to explore the extent to which these terms

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 & Telecomms. 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 An Act Relating to Social Media Platforms, § 1(6), 2021 Fla. Laws 503, 505.

²⁵ 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), 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. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976)).

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.

coincide with or differ from nondiscrimination. 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, for the purposes of First Amendment analysis, it would make no difference whether 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 analysis 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 be “the special physical characteristics of broadcast transmission, not the economic characteristics of

§ 501.2041(2)(b) (2022). 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. CIV. PRAC. & REM. CODE ANN. § 143A.002(a) (2021). 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 1196, 1221 (11th Cir. 2022), *cert. granted in part sub nom. Moody v. NetChoice, LLC*, 216 L. Ed. 2d 1313 (2023).

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. 1246 (1949); and cable access regimes such as must carry and access for public, educational, and governmental programming, 47 U.S.C. §§ 531, 534.

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. *Turner* confirmed an earlier D.C. Circuit decision which held 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 explained that “[l]abeling [a regulation governing cable television] a common carrier scheme has no real First Amendment consequences.”³⁷ This opinion then served as the principal authority for the Eleventh Circuit’s decision in *NetChoice*.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 are common carriers and which are not,⁴⁰ although commentators 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:

³³ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640 (1994); *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*, 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 *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).

³⁸ *See supra* notes 30–31 and accompanying text.

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 REGUL.* 991, 994–97 (2018) [hereinafter Yoo, *Common Carriage’s Domain*]; Christopher S. Yoo, *Is There a Role for Common Carriage in an Internet-Based World?*, 51 *HOUS. L. REV.* 545, 552–63 (2013) [hereinafter Yoo, *Role for Common Carriage*]; Yoo, *supra* note 13, at 465–75.

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.”).

- 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 these criteria⁴³ while also suggesting that common carriage status may be a quid pro quo for “special government favors.”⁴⁴

A. Invalid Rationales: Public Interest, Monopoly, Transportation, and Quid Pro Quo

The second factor identified by the Fifth Circuit can be broken into three components: (1) whether the firm is “affected with a public interest,” (2) whether it possesses monopoly power, and (3) whether it is in the transportation or communications industries. On closer inspection of how courts have analyzed these subfactors, none of them, 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 Andrew Oldham’s opinion in the Fifth Circuit’s *NetChoice* case noted,⁴⁶ the Supreme Court first advanced 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 failed to note the fact that the concept immediately

⁴² *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 471–73 (5th Cir. 2022) (opinion of Oldham, J.), *cert. granted in part*, 216 L. Ed. 2d 1313 (2023).

⁴³ *Biden v. Knight First Amend. 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 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 94 U.S. 113, 125–26, 130 (1876).

drew a steady stream of criticism⁴⁸ 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 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 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.

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 the fact that a newspaper was supposedly affected with a public interest justified preventing it from “arbitrarily refus[ing] to publish advertisements 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. These precedents also explain why the Eleventh Circuit held that public importance alone was not “sufficient reason[] to recharacterize a

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, 277 (1932).

⁴⁹ 291 U.S. 502, 536 (1934).

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

⁵¹ *Jackson v. Metro. Edison Co.*, 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 Amend. Inst.*, 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring).

⁵⁴ Susan P. Crawford, *Transporting Communications*, 89 B.U. L. REV. 871, 883–86 (2009); Nachbar, *supra* note 45, at 81; Kevin Werbach, *The Network Utility*, 69 DUKE L.J. 1761, 1790 (2011).

⁵⁵ *Chi. Joint Bd., Amalgamated Clothing Workers of Am. v. Chi. Trib. Co.*, 435 F.2d 470, 472, 478 (7th Cir. 1970).

private company as a common carrier.”⁵⁶ As the Court held in *New States Ice Co. v. Liebmann*, if the fact that a product or service was indispensable were sufficient to make it affected with a public interest, then the concept should logically include such critical needs as food, clothing, and shelter, items that the Court had clearly held as falling outside the category.⁵⁷

2. Monopoly Power

Both Justice Thomas and Judge Oldham suggested that 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 In contrast, 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

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

⁵⁶ *NetChoice, LLC v. Att’y Gen.*, 34 F.4th 1196, 1221 (11th Cir. 2022), *cert. granted in part sub nom.* *Moody v. NetChoice, LLC*, 216 L. Ed. 2d 1313 (2023).

⁵⁷ 285 U.S. 262, 277 (1932).

⁵⁸ *Knight*, 141 S. Ct. at 1222, 1224; *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 472, 476 (5th Cir. 2022) (opinion of Oldham, J.), *cert. granted in part*, 216 L. Ed. 2d 1313 (2023).

⁵⁹ *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1717 (2022) (Alito, J., joined by Thomas and Gorsuch, JJ., dissenting from grant of application to vacate stay) (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; *NetChoice, LLC v. Paxton*, 573 F. Supp. 3d 1092, 1106 (W.D. Tex. 2021), *vacated and remanded*, 49 F.4th 439 (5th Cir. 2022), *cert. granted in part*, 216 L. Ed. 2d 1313 (2023); *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1091 (N.D. Fla. 2021), *aff’d in part, vacated in part sub nom.* *NetChoice, LLC v. Att’y Gen.*, 34 F.4th 1196 (11th Cir. 2022), *cert. granted in part sub nom.*, 216 L. Ed. 2d 1313 (2023).

⁶¹ *Compare* *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674, 708 (D.C. Cir. 2016) (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); *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 418, 431–35 (D.C. Cir. 2017) (Kavanaugh, J., dissenting 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

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 included 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* 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 William Douglas stated 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 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 reflected the well-established state action doctrine, which holds that the First Amendment restrictions on interfering

Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1292–93, 1304–21, 1403–12 (1996).

⁶⁴ Edward A. Adler, *Business Jurisprudence*, 28 HARV. L. REV. 135, 148 (1914) (arguing that the attempt to base common carriage on monopoly “does not bear analysis”); Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 COLUM. L. REV. 514, 518–25 (1911) (contesting Wyman’s attempt to base common carriage on monopoly power); see also Nachbar, *supra* note 45, at 97 (noting that the “nondiscrimination restrictions” imposed by common carriage “have routinely been placed on service providers without market power.”); Wu, *supra* note 45, at 30–31 (noting that “the early definitions [of common carriage] had little to do with market power”); Singer, *supra* note 63, at 1309, 1319–20 (noting that neither Blackstone nor the antebellum cases based the duty to serve on monopoly); Yoo, *Common Carriage’s Domain*, *supra* note 40, at 995 (noting that “the fact that common carriage mandates have often been applied to firms that lacked monopoly power, such as taxis, inns, trucks, and long-haul railroad routes served by multiple providers” and that statutes define common carriage “without any reference to market power” contradict arguments that “monopoly represents the defining characteristic of common carriers.”).

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

⁶⁶ Biden v. Knight First Amend. Inst., 141 S. Ct. 1220, 1225 (2021) (Thomas, J., concurring).

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, 717–50 (2010) [hereinafter Yoo, *Myth of the Internet*].

⁶⁸ *CBS, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 152–53 (1973) (Douglas, J., concurring in the judgment).

⁶⁹ *Id.* at 153.

with speech apply only to the state, not private individuals.⁷⁰ In the words of Justice Sandra Day 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 companies as 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 newspaper⁷³ just five years after upholding a similar rule for broadcasters.⁷⁴ This was true even though newspapers had "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 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*. There, the court invalidated efforts to force an electric utility to include in its billing envelopes newsletters content with which it disagreed as a violation of the First Amendment.⁷⁷

⁷⁰ See *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1934 (2019) (providing the most recent reaffirmation of the state action doctrine).

⁷¹ *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 685 (1994) (O'Connor, J., joined by Scalia and Ginsburg, JJ., and joined by Thomas, J., in part, concurring in part and dissenting in part).

⁷² *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1221 (2021) (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, 243, 258–59 (1974).

⁷⁴ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 400–01 (1969).

⁷⁵ *Tornillo*, 418 U.S. at 249.

⁷⁶ *Id.* at 250–51.

⁷⁷ *Pac. Gas and Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 21 (1986).

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 of cable transmission, compounded by the increasing concentration of economic power in the cable industry," that justified upholding the statute.⁸⁴ In other words, the cable company's economic monopoly power alone did not affect its First Amendment rights; that factor became relevant only when combined with cable's distinctive physical characteristics at the time.

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 economic monopoly was insufficient to render a restriction on speech constitutional while creating a limited exception for cable operators because they possess exclusive physical control over the only connection into a subscriber's 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

⁷⁸ 512 U.S. 622, 656 (1994).

⁷⁹ *Id.* at 638.

⁸⁰ *Id.* at 637–39.

⁸¹ *Id.* at 656.

⁸² *Id.* at 653–54.

⁸³ *Id.* at 656.

⁸⁴ *Turner Broad. Sys. Inc., v. FCC*, 512 U.S. 622, 637–38 (1994).

⁸⁵ See, e.g., Ronald W. Adelman, *Turner Broadcasting and the Bottleneck Analogy: Are Cable Television Operators Gatekeepers of Speech?*, 49 SMU L. REV. 1549, 1554–59 (1996) (questioning whether cable operators "exercise gatekeeper control"); Laurence H. Winer, *The Red Lion of Cable, and Beyond? — Turner Broadcasting v. FCC*, 15 CARDOZO ARTS & ENT. L.J. 1, 48–50 (1997) (noting that if a newspaper cannot obstruct "readers access to other competing publications," then neither can a cable operator).

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. Social media companies do not exercise control over any physical connection, and their platforms do not give them any physical ability to prevent users from receiving content from other social media providers.

3. *Involvement in Transportation or Communication*

Justice Thomas and Judge Oldham suggest that the fact that social media are part of the larger communications industry can justify treating them as common carriers. 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 prefaced the criteria of whether a firm holds itself out as serving all comers or was affected with a public interest, with the phrase, “for transportation and communications firms.”⁸⁹ Numerous commentators have invoked the same consideration.⁹⁰

Nevertheless, industry classifications do not necessarily translate to legal categories. 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

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

⁸⁷ *NetChoice, LLC v. Att’y Gen.*, 34 F.4th 1196, 1222 (11th Cir. 2022), *cert. granted in part sub nom. Moody v. NetChoice, LLC*, 216 L. Ed. 2d 1313 (2023).

⁸⁸ *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring).

⁸⁹ *NetChoice L.L.C. v. Paxton*, 49 F.4th 439, 471 (5th Cir. 2022) (opinion of Oldham, J.), *cert. granted in part*, 216 L. Ed. 2d 1313 (2023) (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.

⁹¹ Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 474–75 (1897).

basis “to discern the true basis for prophecy.”⁹² Rather, 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 That is, instead of imputing common carrier status to all transportation or communication firms, the better course would be to analyze the reasons why these industries were historically regulated. From there, one can determine whether classifying a firm as a common carrier would be consistent or inconsistent with the historical purpose of the designation.

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*,⁹⁶ 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.⁹⁷

This observation is particularly compelling in light of the practice since the 1970s to lift nondiscrimination mandates from many transportation and communications industries.⁹⁸

Most importantly, it is hard to see why the mere fact that a firm operates in the transportation and communications industry would alter the First Amendment analysis. Indeed, were connection to the communications industry sufficient, there would be 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

⁹² *Id.* at 475.

⁹³ *Id.* at 476.

⁹⁴ *Id.*

⁹⁵ Crawford, *supra* note 54, at 884.

⁹⁶ *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1222 (2021) (Thomas, J., concurring).

⁹⁷ Candeub, *supra* note 12, at 405.

⁹⁸ Kearney & Merrill, *supra* note 62, at 1335–39 (describing the deregulation of airlines, railroads, trucking, broadcasting, cable television, and telephony).

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)⁹⁹ or “immunity from certain types of suits.”¹⁰⁰ Judge Oldham suggested that the immunity provided by Section 230 represented such a benefit.¹⁰¹ Commentators have offered similar views.¹⁰²

As an initial matter, quid pro quo is a questionable basis for common carriage as a historical matter. Historically, courts have routinely rejected arguments that the 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.¹⁰³ 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.¹⁰⁴ Furthermore, the landmark Supreme Court case *Charles River Bridge v. Warren Bridge* and its modern reaffirmation in *United States v. Winstar Corp.* make clear that any such quid pro quo must be explicitly spelled out at the time the supposed benefit is accepted.¹⁰⁵ As such, a quid pro quo arrangement cannot justify a statutory nondiscrimination mandate imposed after the fact. In any event, the fact that online platforms have received neither franchises nor the power of eminent domain renders this consideration irrelevant.¹⁰⁶

⁹⁹ Candeub, *supra* note 12, at 402-407.

¹⁰⁰ *Biden v. Knight* First Amend. Inst., 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring).

¹⁰¹ *NetChoice L.L.C. v. Paxton*, 49 F.4th 439, 471 (5th Cir. 2022) (opinion of Oldham, J.), *cert. granted*, 216 L. Ed. 2d 1313 (2023).

¹⁰² See, e.g., Candeub, *supra* note 12, at 395, 418–29, 432–33 (arguing that Section 230 represents a regulatory deal that justifies restricting online platforms’ latitude to exclude speakers); Volokh, *supra* note 12, at 454–60 (arguing that Section 230 immunity represents a government-granted benefit that justifies restricting online platforms’ speech).

¹⁰³ See Bhagwat, *supra* note 13, at 134 (noting that the Supreme Court has rejected treating cable operators and broadcast stations as common carriers even though they operate under franchises and licenses); Daniel F. Spulber & Christopher S. Yoo, *Access to Networks: Economic and Constitutional Connections*, 88 CORNELL L. REV. 885, 998 (2003) (citing cases recognizing that property acquired via eminent domain comes with full property rights and is not subject to limitation by the government).

¹⁰⁴ Herbert Hovenkamp, *The Takings Clause and Improvident Regulatory Bargains*, 108 YALE L.J. 801, 813–14 (1999).

¹⁰⁵ In *Charles River Bridge*, the Court held that a corporate charter conveyed only those benefits that are explicitly spelled out. 36 U.S. (11 Pet.) 420, 544 (1837). Conversely, in *Winstar*, the Court held that the government must honor specific promises not to impose additional restrictions after the fact. 518 U.S. 839 (1996).

¹⁰⁶ Bhagwat, *supra* note 13, at 140.

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.¹⁰⁷ 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.¹⁰⁸ 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.¹⁰⁹ In the absence of any overarching theory explaining the doctrine,¹¹⁰ courts have looked to particular factors when determining its scope. For example, such restrictions are less permissible when imposed on people that advocate against the government.¹¹¹ The fact that media often serve as an oppositional check against the government arguably places them in a similar position.

With respect to the benefits purportedly giving rise to the quid pro quo, the supposed benefits at issue in this context involve neither taxing nor 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, undercutting government's ability to use the grant of a legal monopoly as part of a quid pro quo.¹¹²

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*.¹¹³ 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, specifies, "Nothing in this section shall be construed to treat interactive computer services as common carriers or

¹⁰⁷ See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 563 (2012) (relying on the Spending Clause to uphold the imposition of restrictions that exceeded the federal government's authority under the Commerce Clause); *South Dakota v. Dole*, 483 U.S. 203, 209–11 (1987) (holding that the federal government may impose restrictions under the Spending Clause that it otherwise lacks the authority to impose).

¹⁰⁸ *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

¹⁰⁹ *Speiser v. Randall*, 357 U.S. 513, 515, 518–19 (1958).

¹¹⁰ See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 407 n.12 (1994) (Stevens, J., dissenting) (noting that "the 'unconstitutional conditions' doctrine has . . . suffered from notoriously inconsistent application").

¹¹¹ *United States v. Am. Librs. Ass'n*, 539 U.S. 194, 213 (2003) (citing *Legal Servs. Corp. v. Velasquez*, 531 U.S. 553 (2001)).

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

¹¹³ 47 U.S.C. § 230(c).

telecommunications carriers.”¹¹⁴ 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.¹¹⁵ Indeed, this criterion constitutes the central consideration in all leading judicial discussions of common carriage.¹¹⁶

Holding out thus amounts to little more than the requirement that the provider “abide by its representation and honor its customers’ ensuing expectations.”¹¹⁷ 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.¹¹⁸

Courts have recognized that social media platforms do not hold themselves out to all members of the public. As the Eleventh Circuit held, social media platforms “require users, as preconditions of access, to accept their terms of service.”¹¹⁹ 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

¹¹⁴ *NetChoice, LLC v. Att’y Gen.*, 34 F.4th 1196, 1220–21 (11th Cir. 2022), *cert. granted in part sub nom. Moody v. NetChoice, LLC*, 216 L. Ed. 2d 1313 (2023) (citing 47 U.S.C. § 223(e)(6)).

¹¹⁵ *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring); *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 471 (5th Cir. 2022) (opinion of Oldham, J.), *cert. granted in part*, 216 L. Ed. 2d 1313 (2023); *NetChoice, LLC v. Att’y Gen.*, 34 F.4th at 1220.

¹¹⁶ *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); *NARUC II*, 533 F.2d 601, 608 (D.C. Cir. 1976); *NARUC I*, 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.23 (5th Cir. 1993); *Flytenow, Inc. v. FAA*, 808 F.3d 882, 886–88 (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. 1953), *aff’d*, 204 F.2d 692 (3d Cir. 1953).

¹¹⁷ *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).

¹¹⁸ In the words of Thomas Nachbar, this makes holding out “a conspicuously empty” definition of common carriage. Nachbar, *supra* note 45, at 93.

¹¹⁹ *NetChoice, LLC v. Att’y Gen.*, 34 F.4th at 1220.

viewpoint-based decision about whether to publish particular messages or users.”¹²⁰

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 Brett Kavanaugh objected that classifying ISPs as common carriers impermissibly abridged their editorial discretion,¹²¹ 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.”¹²² The Open Internet Order did not implicate the First Amendment because it only purported to regulate services over which providers exercised no editorial discretion.¹²³ This discussion not only confirmed that social media companies do not satisfy the holding-out criterion for common carriage. It implicitly recognized that speech over which providers exercise editorial control, including the leading social media platforms, is protected by the First Amendment. If that were not the case, the fact that the Open Internet Order affected only speech over which providers exercised no editorial discretion would have been completely unresponsive. The clear negative implication of Judges Sri Srinivasan and David Tatel’s comment is that any attempt to regulate media’s freedom to decide what content to carry would raise serious First Amendment concerns.

The fact that the criticism of social media companies is largely driven by their decisions to de-platform content of which they disapprove 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. Another line of cases confirms that First Amendment protection for speech carried on a platform depends on whether observers will attribute the messages contained in that speech to the platform. For example, decisions such as *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.* and *Boy Scouts of America v. Dale* invalidated nondiscrimination mandates that forced platforms to carry messages with which they disagreed when those messages were likely to be attributed to the platform.¹²⁴ Conversely, decisions such as *Rumsfeld v. FAIR* and *PruneYard*

¹²⁰ *Id.* (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979)).

¹²¹ *U.S. Telecom Ass’n v. FCC*, 855 F.3d at 417–22 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

¹²² *Id.* at 392 (Srinivasan, J., joined by Tatel, J., concurring in the denial of the petition for rehearing en banc).

¹²³ *Id.* at 388–89.

¹²⁴ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 575–77 (1995); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648, 661 (2000).

Shopping Center v. Robins upheld laws requiring require entities to convey speech with which they disagreed because reasonable observers would not attribute that speech to those entities.¹²⁵ Together, these cases establish that laws requiring a provider to carry others' speech without exercising any control over it violate the First Amendment whenever others are likely to attribute the content of that speech to the provider. 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. Thus, when read together with *Hurley* and *Dale*, *FAIR* and *PruneYard* do not support imposing nondiscrimination mandates on social media, contrary to what some commentators have suggested.

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 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 [the provision of the Texas statute prohibiting ‘censorship’ based on a users’ viewpoint or geographic location] facially unconstitutional would be highly incongruous.”¹²⁶

The preceding sections showed how social media companies do not constitute common carriers, undercutting 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,¹²⁷

¹²⁵ *Rumsfeld v. F. for Acad. & Inst. Rts., Inc.*, 547 U.S. 47, 65 (2006); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 86–88 (1980).

¹²⁶ *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 469 (5th Cir. 2022) (opinion of Oldham, J.), *cert. granted*, 216 L. Ed. 2d 1313 (2023).

¹²⁷ *See Yoo*, *supra* note 13, at 480–82.

which has led scholars to note the paucity of judicial decisions exploring the relationship between common carriage and the First Amendment.¹²⁸ Indeed, the few indications that the Court has provided are contradictory. On the one hand, some Supreme Court dicta suggested that common carriers receive a level of First Amendment protection that is even lower than the standard applied to broadcasters.¹²⁹ 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.¹³⁰ A concurring opinion by Justice Thomas 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

¹²⁸ 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).

¹²⁹ 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”).

¹³⁰ *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 127 (1989).

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 1196, 1219 n.17 (11th Cir. 2022), cert. granted in part sub nom. *Moody v. NetChoice, LLC*, 216 L. Ed. 2d 1313 (2023) (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 do 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, (2) the use of customer data as commercial speech, and (3) the right of telephone companies to offer video content. Yoo, *supra* note 13, at 492–93, 507. 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.

Judge Oldham tried 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 attempted 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 *United States v. Carolene Products Co.* explained, 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. The hope is that linking these new statutory mandates imposed on social media companies with a well-established category such as common carriage would imbue these efforts with a degree of constitutional legitimacy. Unfortunately for these people, 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, particularly when the Supreme Court has not established the level of First Amendment protection given to that category.

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?

The simple answer to both questions is no. Social media companies 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

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

¹³⁶ 304 U.S. 144, 152 n.4 (1938).

with common carriage's supposed historical pedigree to avoid having to undertake the case-specific analysis demanded by the First Amendment's established principles.