



ARTICLE

Uncommon Carriage

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Abstract. As states have begun regulating the carriage of speech by “Big Tech” internet platforms, scholars, advocates, and policymakers have increasingly focused their attention on the law of common carriage. Legislators have invoked common carriage to defend social media regulations against First Amendment challenges, making arguments set to take center stage in the Supreme Court’s impending consideration of the *NetChoice* saga.

This Article challenges the coherence of common carriage as a field and its utility for assessing the constitutionality and policy wisdom of internet regulation. Evaluating the post-Civil War history of common carriage regimes in telecommunications law, this Article illustrates that conceptions of common carriage and its treatment by the courts vary significantly and are contingent on specific historical and technological circumstances. The Article observes that common carriage is an attractive nuisance for policymakers and judges. The doctrine distracts from difficult normative questions about the permissibility of government interventions into speech and the editorial discretion of internet platforms.

The Article disentangles talismanic invocations of “common carriage” by isolating three distinct issues: (1) the classification of “common carriers,” (2) the imposition of “common carriage” rules on those carriers, and (3) the First Amendment problems that flow from the imposition. Applying this novel three-part framework, this Article argues for a context-sensitive approach to internet regulations. This approach evaluates the designation of carriers, the imposition of rules, and the role of the First Amendment at a granular level to more robustly account for the complexity of contemporary internet platforms.

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Introduction

Policymakers, courts, and advocates have increasingly focused on regulating companies that operate social media, search, e-commerce, hosting, and other services that undergird modern internet use—the latest iteration of “information platforms,” broadly defined.¹ Once the subject of arcane debates among telecommunications and internet law scholars,² information platforms’ undeniable social salience in the internet age has thrust them into national political debates.³

Legislators have begun to enact laws barring internet platforms from “censoring,”⁴ or discriminating against, speech that flows across them, positioning the laws as “common carriage” regulations that supposedly escape typical First Amendment scrutiny applied to government regulation of editorial decisions.⁵ Now, the role of common carriage is all but certain to come to a head in the Supreme Court’s impending consideration of the *NetChoice* cases. Laws barring censorship by social media platforms in Texas⁶ and Florida⁷ have sharply divided the Fifth and Eleventh Circuits over

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1. See Blake E. Reid, *Internet Architecture and Disability*, 95 IND. L.J. 591, 622 & n.176 (2020) (surveying the literature on definitions of “information platforms” and related terms).
 2. See, e.g., Philip J. Weiser, *Law and Information Platforms*, 1 J. ON TELECOMMS. & HIGH TECH. L. 1, 1 (2002).
 3. See, e.g., Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH L. 191, 192 (2021).
 4. Though the term “censorship” is often used to describe actions taken by the government to suppress private speech, for example, 47 U.S.C. § 326 (barring the “censorship” of radio communications by the Federal Communications Commission), states have begun to explicitly invoke the term to refer to content moderation actions undertaken by private platforms. See S.B. 7072, 27th Leg., 1st Reg. Sess. (Fla. 2021) (defining “censor”); H.B. 20, 87th Leg., 2d Called Sess. (Tex. 2021) (same). For an early description of social media content moderation practices as censorship, see Marjorie Heins, *The Brave New World of Social Media Censorship*, 127 HARV. L. REV. F. 325, 325-26 (2014). Relatedly, Ganesh Sitaraman frames these laws as “deplatforming” laws. Ganesh Sitaraman, *Deplatforming*, 133 YALE L.J. (forthcoming) (manuscript at 6), <https://perma.cc/UU5X-PA4D>.
 5. See TEX. H.J., 87th Leg., 2d Called Sess., at S175 (Aug. 27, 2021) (statement of Rep. Briscoe Cain) (discussing Justice Thomas’s concurrence in *Biden v. Knight First Amendment Institute*, 141 S. Ct. 1220, 1223 (2021) (incorrectly referred to by an earlier case caption) on the validity of common carriage regulations under the First Amendment). See generally Ashutosh Bhagwat, *Why Social Media Platforms Are Not Common Carriers*, 2 J. FREE SPEECH L. 127, 129-30 (2022) (discussing the proliferation of social media common carriage laws).
 6. Tex. H.B. 20.
 7. Fla. S.B. 7072.

whether and to what extent the First Amendment permits states to limit the ability of social media platforms to moderate users' speech.⁸

The *NetChoice* opinions disagree about whether the state social media laws are common carriage laws permissible under the First Amendment.⁹ In *NetChoice v. Paxton*, Judge Oldham argued that the “[c]ommon carrier doctrine . . . reinforces . . . that [the Texas law] comports with the First Amendment,” while the Eleventh Circuit concludes in *NetChoice v. Moody* that social media platforms “aren’t common carriers.”¹⁰ The Supreme Court’s preliminary intervention in the *NetChoice* cases suggests significant appetite among the Justices to center common carriage in the cases’ ultimate resolution.¹¹

Alongside the *NetChoice* saga, a growing literature recognizes a historical tradition of common carriage regulation of speech platforms. Genevieve Lakier situates common carriage as part of a broader tradition of “non-First

8. Compare *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 445 (5th Cir. 2022), with *NetChoice, LLC v. Att’y Gen., Fla.*, 34 F.4th 1196, 1203, 1222 (11th Cir. 2022) [hereinafter *NetChoice, LLC v. Moody*]. Ashley Moody is the current Attorney General of Florida.

9. Compare *Paxton*, 49 F.4th at 469 (“Given the firm rooting of common carrier regulation in our Nation’s constitutional tradition, any interpretation of the First Amendment that would make [the Texas law] facially unconstitutional would be highly incongruous. Common carrier doctrine thus reinforces our conclusion that [the Texas law] comports with the First Amendment.”), with *Moody*, 34 F.4th at 1222 (“[B]ecause social-media platforms exercise—and have historically exercised—inherently expressive editorial judgment, they aren’t common carriers, and a state law can’t force them to act as such unless it survives First Amendment scrutiny.”). In *Paxton*, Judge Oldham also specifically criticized the Eleventh Circuit’s treatment of the common carrier issue. 49 F.4th at 493-94. The significance of Judge Oldham’s extensive common carriage discussion to the three-judge *Paxton* panel’s opinion is complex; Judge Oldham’s opinion was joined by Judge Jones in concurrence *except* for the common carriage discussion, which Judge Jones did not reject but concluded was unnecessary to address. *Id.* at 495 n.1 (Jones, J., concurring). Judge Southwick summarily disagreed with, but did not significantly analyze, Judge Oldham’s common carriage discussions. *Id.* at 505 (Southwick, J., concurring in part and dissenting in part). For further discussion, see Part IIC below.

10. *Paxton*, 49 F.4th at 469; *Moody*, 34 F.4th at 1222.

11. See *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1716-18 (2022) (Alito, J., dissenting from grant of application to vacate stay) (acknowledging, in an opinion joined by Justices Thomas and Gorsuch, Texas’s “argu[ment] that the [Texas] law applies to only those entities that possess some measure of common carrier-like market power and that this power gives them an ‘opportunity to shut out [disfavored] speakers.’” (third alteration in original) (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 577 (1995))). In August 2023, the Solicitor General filed briefs urging the Court to take up the cases. Makena Kelly, *The Biden Administration Urges the Supreme Court to Take Up Content Moderation Cases*, VERGE (Aug. 14, 2023, 1:51 PM PDT), <https://perma.cc/W82D-MBUN>. In September 2023, the Court granted cert, consistent with the Solicitor General’s recommendations. *NetChoice, LLC v. Paxton*, No. 22-555, 2023 WL 6319650, at *1 (Sept. 29, 2023) (mem.); *Moody v. NetChoice, LLC*, No. 22-277, 2023 WL 631654, at *1 (Sept. 29, 2023) (mem.).

Amendment law of freedom of speech” intended to check platforms’ gatekeeping power with nonconstitutional limits mimicking the First Amendment’s limits on governmental power.¹² Adam Candeub and Eugene Volokh have more aggressively invoked common carriage law as a justification for limitations on internet platforms’ ability to moderate users’ speech.¹³

This Article takes a contrary view, extending critiques by other scholars to question the threshold notion of a coherent body of common carriage law.¹⁴ Examining the complex history of telecommunications-era “common carriage” laws, this Article illustrates that common carriage is simplistically invoked to confer unwarranted legitimacy upon laws regulating speech platforms.

More pointedly, this Article posits that there is no such thing as a broadly applicable law of common carriage, nor is there any coherent body of First Amendment law consistently approving or disapproving of common carriage laws for information platforms. The allegedly constituent parts of common carriage—and its close cousin, “quasi-common carriage”¹⁵—come from disparate regimes in telecommunications law. These regimes governed broadcast television and radio, cable TV, internet access, newspapers, and other media in specific technological and social contexts that shaped their development by regulators and their treatment by the courts—and, in some cases, differed radically from the context of contemporary social media platforms.

Considered in historical context, common carriage law yields little more than disparate and contestable points of analogy. It affords only basic rudiments for diagnosing and solving policy problems on information platforms and offers limited utility for assessing the First Amendment

12. Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2302-03, 2302 n.12, 2316, 2371 (2021) (citing Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 107 (1995); and TIM WU, BROOKINGS INST., IS FILTERING CENSORSHIP? THE SECOND FREE SPEECH TRADITION 2 (2010), <https://perma.cc/AC7Y-GB7N>).

13. See, e.g., Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J.L. & TECH. 391, 432-33 (2020); Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 381-82 (2021). More modestly, James Speta has called for “[c]ommon carrier solutions [to] be targeted at the infrastructure that enables platforms to be built and to reach consumers.” James B. Speta, Professor of L., Nw. Univ. Pritzker Sch. of L., *The Past’s Lessons for Today: Can Common Carrier Principles Make for a Better Internet?*, Robert F. Boden Lecture at Marquette University Law School 3 (Sept. 22, 2022), <https://perma.cc/EVT5-3CUV>.

14. See, e.g., 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, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463, 465-75 (2021) [hereinafter Yoo, *The First Amendment*].

15. See *infra* Part II.B.3.

dimensions of regulatory regimes for internet platforms.¹⁶ More problematically, it cannot solve the fundamentally normative political debates about the permissible degree and correct mode of government oversight of speech regulation by internet platforms.¹⁷

This Article does not aim to resolve the debates over the substantial consequences to democracy that may arise from attempts, however well-conceived or needed, to regulate internet platforms' vast economic and social power. Rather, it seeks to disabuse policymakers, advocates, and judges of the notion that "common carriage" provides easy answers.

More specifically, this Article begins from Christopher Yoo's premise that the "historical nature of [common carriage] arguments . . . makes their validity turn largely on the provenance of . . . doctrinal questions" about the nature of common carriage.¹⁸ In other words, the utility of deploying common carriage law as a justification for regulating modern social media platforms demands nuanced understanding of common carriage doctrine. Building from that premise, this Article argues that if courts are going to answer consequential questions about internet regulation based on common carriage law, the body of law must actually exist and cohere to some meaningful degree.

Stripping away the thin veneer of analogical folk-law historicism frequently found in contemporary invocations of common carriage reveals that it is little more than a jurisprudential attractive nuisance, distracting both from the inconsistent history and core normative issues implicated by internet policy and First Amendment debates.¹⁹ Expanding on Yoo's critiques, this Article disentangles what is often posited as a coherent singular body of "common carriage" law into three discrete concepts: (1) common carrier *classification*—the designation of a platform as a "common carrier";²⁰ (2) common carriage *rules*—requirements to "carry" or bans on discrimination

16. See, e.g., Ashutosh Bhagwat, *Technology, Analogies, and Legal Reasoning*, MARQ. LAW., Summer 2023, at 12, <https://perma.cc/E2A5-HEGZ> (critiquing the analogy between social media platforms and bookstores for the purpose of applying common carriage law).

17. See Bruce E. Boyden, *Confronting the Wavicles of Mass Media*, MARQ. LAW., Summer 2023, <https://perma.cc/E2A5-HEGZ>, at 26 ("The widespread anger at how platforms manage the content on their services . . . has more to do with a clash of long-standing social and legal norms that has bedeviled internet law and policy since the beginning.").

18. Yoo, *The First Amendment*, *supra* note 14, at 465.

19. See, e.g., *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 478-79 (5th Cir. 2022) (rejecting the notion "that in the long technological march from ferries and bakeries, to barges and gristmills, to steamboats and stagecoaches, to railroads and grain elevators, to water and gas lines, to telegraph and telephone lines, to social media platforms—that social media marks the point where the underlying technology is finally so complicated that the government may no longer regulate it to prevent invidious discrimination").

20. See *infra* Part II.A.

against speech or speakers;²¹ and (3) First Amendment *limitations* on applying common carriage rules to common carriers.²²

The wide range of classificatory approaches, rule schemes, and First Amendment doctrines at issue casts doubt on the utility of “common carriage” as a dispositive lens for evaluating the policy and constitutional dimensions of internet platform regulation. Indeed, the talismanic invocation of “common carriers” or “common carriage” often reduces to little more than an expression of contestable policy or political preferences.

Part I begins with a brief history of internet platforms and the arrival of common carriage law to internet policy debates. Part II highlights the incoherence of common carriage law, using the three-part framework to assess common carrier designations, common carriage rules, and the First Amendment limitations on common carriage regimes. This discussion underscores that a unitary notion of common carriage law does not provide a coherent basis for assessing the policy and constitutional viability of internet platform regulation. Part III applies the three-part framework to articulate a context-sensitive approach to more rigorously developing and assessing regulatory regimes for internet platforms.

I. The Rise and Fall of the Application Layer and the Reintroduction of Common Carriage Law

Understanding the role of common carriage in United States internet regulation requires unpacking two legal histories: the recent history of the internet itself (“internet law”) and the longer history of post-Civil War information platforms (“telecom law”). This Part begins with internet law to unpack how the age-old concept of common carriage has reemerged in contemporary legal debates. Part II returns to the “telecom law” version to illustrate the incoherence of “common carriage.”

A. Layered Internet Platform Regulation: Neutrality for Networks, *Laissez Faire* for Applications

To understand what a profound change the imposition of common carriage regimes on social media platforms would represent, it is important to understand the deliberate architectural and policy decisions that gave rise to these platforms and their power to moderate the content of their users. To address the innovation-stifling AT&T-controlled phone system, the technical architects of the internet crafted a layered “stack” design, with multiple

21. See *infra* Part II.B; cf. Sitaraman, *supra* note 4, at 3 (discussing “deplatforming” laws).

22. See *infra* Part II.C.

physical networks communicating with each other over the common Internet Protocol (IP).²³ This layered design makes it possible to access the internet from a variety of physical networks, whether via a wired connection through a local cable or phone company, a wireless cellular connection, a WiFi hotspot at a coffee shop, or even a satellite.²⁴

The internet's base physical and protocol layers thereby create a platform for new applications to be deployed and used without the permission of any network operator—i.e., an internet service provider (ISP).²⁵ The basic “end-to-end” concept of internet pioneers Jerome Saltzer, David Reed, and David Clark was clear: The internet's new “application layer”²⁶ would allow connection between the designers of innovative new services and users without the permission of ISPs. Doing so, as least the theory went, would unleash a flurry of new services, transcending the limited capabilities of the phone networks to include what we think of as today's application-layer internet platforms: the web, email, social media, search engines, streaming media, hosting services, and more.²⁷

This layered approach had significant consequences for policy. As the commercial internet grew, debates swirled about the ability of ISPs to use their gatekeeping power—the “terminating access monopoly” over each of their users²⁸—to discriminate against applications, content, and devices. As a result, regulators, advocates, and scholars called for new policies.²⁹ These debates

23. See generally J. H. Saltzer, D. P. Reed & D. D. Clark, *End-to-End Arguments in System Design*, 2 ACM TRANSACTIONS ON COMPUT. SYS. 277 (1984) (describing the “end-to-end” principle underlying the stack architecture); Reid, *supra* note 1, at 609-13 (describing the layered architecture of the internet in detail and citing literature).

24. Cf. David Waitzman, Network Working Grp., Internet Eng'g Task Force, RFC 1149, A Standard for the Transmission of IP Datagrams on Avian Carriers 1-2 (1990), <https://perma.cc/4F88-7B8R>.

25. See Reid, *supra* note 1, at 609-13 (providing an overview of the internet's layered stack and associated principles).

26. See, e.g., Timothy Wu, Essay, *Application-Centered Internet Analysis*, 85 VA. L. REV. 1163, 1192 (1999).

27. Reid, *supra* note 1, at 609.

28. See, e.g., Jonathan E. Nuechterlein & Christopher S. Yoo, *A Market-Oriented Analysis of the “Terminating Access Monopoly” Concept*, 14 COLO. TECH. L.J. 21, 21-22, 22 nn.1-4 (2015) (collecting examples of policymakers deploying the term).

29. Many of these developments unfolded at the University of Colorado's Silicon Flatirons Center and were chronicled in early volumes of its *Journal on Telecommunications and High Technology Law*, including Tim Wu's coinage of the term “network neutrality.” Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMMS. & HIGH TECH. L. 141, 141-42 (2003); see Philip J. Weiser, *Introduction: A Regulatory Regime for the Internet Age*, 3 J. ON TELECOMMS. & HIGH TECH. L. 1, 1-4 (2004); Philip J. Weiser, *Rewriting the Telecom Act: An Introduction*, 4 J. ON TELECOMMS. & HIGH TECH. L. 1, 1-3 (2005). Another key early moment was then-FCC Chairman Michael Powell's famous “Four
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transformed into the ongoing, cyclical fight over “net neutrality” rules that ban ISPs from discriminating—first the subject of failed enforcement by the Federal Communications Commission (FCC),³⁰ then promulgated in rules³¹ that were defeated on appeal,³² reasserted,³³ upheld,³⁴ repealed,³⁵ and are now poised to be reintroduced yet again by the FCC.³⁶

At the application layer, however, laissez-faire treatment of the internet’s new web, email, social media, search, video, hosting, and other services not only arose by default, but was encouraged by Congress. Section 230 of the Communications Act, added by the Communications Decency Act,³⁷ set a default presumption at the dawn of the commercial internet that information platforms built atop ISPs could unilaterally decide whether, how, and to what extent to carry and moderate speech.³⁸ Section 230 rosily concluded that “[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation,”³⁹ and declared

Freedoms” speech in 2004. Michael K. Powell, Essay, *Preserving Internet Freedom: Guiding Principles for the Industry*, 3 J. ON TELECOMMS. & HIGH TECH. L. 5, 11-12 (2004).

30. Comcast Corp. v. FCC, 600 F.3d 642, 661 (D.C. Cir. 2010) (rejecting the FCC’s adjudication of a complaint against Comcast over its network management practices for the Commission’s “fail[ure] to tie its assertion of . . . authority over Comcast’s Internet service to any ‘statutorily mandated responsibility’ [sic]” (quoting Am. Libr. Ass’n v. FCC, 406 F.3d 689, 692 (D.C. Cir. 2005))).
31. Preserving the Open Internet, 25 FCC Rcd. 17905, para. 1 (2010) [hereinafter 2010 Open Internet Order].
32. Verizon v. FCC, 740 F.3d 623, 628 (D.C. Cir. 2014).
33. Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, paras. 5-6 (2015) [hereinafter 2015 Open Internet Order].
34. U.S. Telecom Ass’n v. FCC, 825 F.3d 674, 689 (D.C. Cir. 2016).
35. Restoring Internet Freedom, 33 FCC Rcd. 311, para. 2 (2018). The 2018 Restoring Internet Freedom order was upheld in part and remanded for further proceedings in *Mozilla Corp. v. FCC*, 940 F.3d 1, 18 (D.C. Cir. 2019), and addressed in Restoring Internet Freedom, 35 FCC Rcd. 12328, paras. 1-2 (2020).
36. Safeguarding and Securing the Open Internet, 88 Fed. Reg. 76048, 76048-49 (proposed Nov. 3, 2023) (to be codified in scattered sections of 47 C.F.R.).
37. Communications Decency Act, Pub. L. No. 104-104, sec. 409, § 230, 110 Stat. 133, 137-39 (1996) (codified as amended at 47 U.S.C. § 230). For a detailed discussion of Section 230’s complex etymology, see *Section 230 of . . . What?*, BLAKE E. REID (Sept. 4, 2020), <https://perma.cc/JB5U-DYSX> (describing the controversy over Section 230’s etymology).
38. See generally JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* (2019) (explaining the basic operation of Section 230). Among other exceptions, Section 230 notably carves out from this regime liability for violations of intellectual property law. 47 U.S.C. § 230(e)(2). The Digital Millennium Copyright Act of 1998 added a more complex notice-and-takedown regime for accusations of copyright infringement. 17 U.S.C. § 512.
39. 47 U.S.C. § 230(a)(4).

that U.S. policy was “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”⁴⁰

Most critically, Section 230 immunized application-layer platforms, including social media services,⁴¹ from liability for most decisions to take down *and* leave up content,⁴² thereby opening the door to content- and viewpoint-based discrimination by platforms. Meanwhile, the remaining provisions of the Communications Decency Act, which sought to regulate the proliferation of obscene and indecent content online, were invalidated by the Supreme Court as a violation of the First Amendment in *Reno v. ACLU*.⁴³

B. The Rise of “Big Tech” and the “Techlash”

How did common carriage laws that bar internet platforms from discriminating against speech or speakers enter a legal scene dominated by a statute that affirmatively allows and encourages platforms to moderate their users’ content? The answer begins with a marked shift in the culture and political salience of the platforms.

In the twenty-five years since Section 230 and *Reno* established the application layer as a laboratory for internet technology and unleashed an era of techno-utopianism,⁴⁴ political and popular cynicism about tech companies has taken root.⁴⁵ The founded-in-a-garage-or-dorm-room search engine

40. 47 U.S.C. § 230(b)(2). See generally *Section 230 as Telecom Law*, BLAKE E. REID (June 23, 2020), <https://perma.cc/4E7A-KXGU> (providing an overview of the FCC’s evolving perspectives on Section 230’s policy provisions).

41. Formally, Section 230 applies to “interactive computer services,” 47 U.S.C. §§ 230(c)(1)-(2), defined to include “any information service”—a term of art in the Communications Act used to refer to essentially unregulated, non-common carriers, see Part II.A.2 below, and “access software providers” like AOL, Prodigy, and CompuServe, see 47 U.S.C. §§ 230(f)(3)-(4).

42. Though these functions might appear nominally divided between Section 230(c)(1)’s bar on treating interactive computer services as the “publisher or speaker” of content, and Section 230(c)(2)(A)’s bar on liability for restricting access or availability of material, courts typically (but not always) have addressed both functions. 47 U.S.C. § 230(c)(1)-(2); see Adam Candeub, *Reading Section 230 As Written*, 1 J. FREE SPEECH L. 139, 148 (2021) (chronicling and protesting this interpretation).

43. 521 U.S. 844, 849 (1997).

44. See, e.g., John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. (Feb. 8, 1996), <https://perma.cc/SW66-L8B5>.

45. See, e.g., Jeff Kosseff, *First Amendment Protection for Online Platforms*, 35 COMPUT. L. & SEC. REV. 199, 199-200 (2019) (describing the increase in criticism of social media platforms associated with efforts to reform Section 230); Jeff Kosseff, *The Gradual Erosion of the Law that Shaped the Internet: Section 230’s Evolution over Two Decades*, 18 COLUM. SCI. & TECH. L. REV. 1, 22 (2016) (describing the “gradual erosion” of Section 230’s protections by the courts). Though a full account of early critiques of internet
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(Google), social media (Facebook), and e-commerce (Amazon) startups of the 1990s and 2000s metastasized into dominant multinational conglomerates, often pejoratively labeled “Big Tech.”⁴⁶ In what some have called the “techlash,” Big Tech increasingly has faced calls for regulation to a degree historically reserved for popularly reviled incumbent telephone and cable companies and ISPs.⁴⁷ As Mark Lemley summarizes: “Everyone wants tech companies to do (or not do) something, and they want government to require it.”⁴⁸

It is no surprise that the “techlash” has focused in part on Section 230, the immunity provisions of which have become a general-purpose scapegoat for problems with the platforms, including accusations of bias against conservative speech and speakers.⁴⁹ During Donald Trump’s presidency, conservative lawmakers in Washington advanced a litany of proposals to repeal or narrow Section 230.⁵⁰ Spurred by his contentious relationship with Twitter, President Trump issued an executive order seeking to reform Section 230,⁵¹ requiring the National Telecommunications and Information Administration to petition the FCC to issue regulations narrowing the scope of Section 230.⁵² These efforts culminated in part in the Supreme Court’s intertwined decisions in *Gonzalez v. Google LLC*⁵³ and *Twitter, Inc. v. Taamneh*,⁵⁴

platforms is beyond the scope of this Article, one notable intervention was Danielle Citron’s *Cyber Civil Rights*, which argued that the broad interpretation of Section 230 by courts had “prevented the courts from exploring what standard of care ought to apply to ISPs and website operators.” Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 116-17 (2009).

46. See Kean Birch & Kelly Bronson, *Big Tech*, 31 SCL. AS CULTURE 1, 1 (2022).

47. See, e.g., *id.*

48. Mark A. Lemley, *The Contradictions of Platform Regulation*, 1 J. FREE SPEECH L. 303, 305 (2021).

49. See Eric Goldman, *Dear President Biden: You Should Save, Not Revoke, Section 230*, 77 BULL. ATOMIC SCIENTISTS 36, 36 (2021) (“Section 230 has emerged as a top target of the broader techlash movement.”).

50. See Meghan Anand, Kiran Jeevanjee, Daniel Johnson, Quinta Jurecic, Brian Lim, Irene Ly, Matt Perault, Etta Reed, Jenna Ruddock, Tim Schmeling, Niharika Vattikonda, Brady Worthington, Noelle Wilson & Joyce Zhou, *All the Ways Congress Wants to Change Section 230*, SLATE (Mar. 23, 2021, 5:45 AM), <https://perma.cc/K2QV-3VDV> (chronicling a range of efforts to remove platforms’ protections under Section 230); see also Goldman & Miers, *supra* note 3, at 192-93, 193 nn.5-6 (2021) (chronicling additional proposals).

51. Exec. Order No. 13925, 85 Fed. Reg. 34079, 34081 (2020).

52. Douglas Kinkoph, Nat’l Telecomms. & Info. Admin., U.S. Dep’t of Com., Petition for Rulemaking of the Nat’l Telecomms. & Info. Admin., at 3 (July 27, 2020).

53. 143 S. Ct. 1191 (2023) (per curiam).

54. 143 S. Ct. 1206 (2023).

in which the Court considered significantly narrowing Section 230's immunity provisions but ultimately punted.⁵⁵

Beyond the reform of Section 230, the “techlash” has spurred interest in the long American tradition of regulating information platforms. This interest is particularly strong among conservative policymakers searching for historical analogies to their contemporary efforts to limit perceived discrimination by platforms.⁵⁶ Indeed, following Trump's 2020 loss, conservatives sought to directly impose common carriage regulations on platforms. In 2021, legislatures in Texas and Florida enacted “anti-censorship” regimes with specific “common carriage” language that overtly sought to limit platforms' ability to moderate users and their speech.⁵⁷ *Paxton* and *Moody* are now

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55. See Isaac Chotiner, *Two Supreme Court Cases that Could Break the Internet*, NEW YORKER (Jan. 25, 2023), <https://perma.cc/NV2Y-EEXH>; Adi Robertson, *Supreme Court Rules Against Reexamining Section 230*, VERGE (May 18, 2023, 8:08 AM PDT), <https://perma.cc/4FXD-YA4N>; *Gonzalez*, 143 S. Ct. at 1192; see also *Gonzalez*, *Taamneh*, and *Section 230's Interpretive Debt*, BLAKE E. REID (Feb. 23, 2023), <https://perma.cc/N25Q-F4E9> (discussing the anxiety that materialized among the Justices during the *Gonzalez* and *Taamneh* oral arguments about the consequences of disrupting Section 230). As I note in forthcoming work, however, there is a possibility that interpretation of Section 230 may materialize in the Court's consideration of the *NetChoice* cases. Blake E. Reid, *Section 230's Debts*, FIRST AMEND. L. REV. (forthcoming) (manuscript at 11-24) (on file with author).
56. See, e.g., Cristiano Lima, *How The GOP Assault on Social Media Flipped Net Neutrality on Its Head*, WASH. POST: TECH. 202 (May 19, 2022, 9:05 AM EDT), <https://perma.cc/8Q68-SSVW>; Harold Feld, *My Insanely Long Field Guide to Common Carriage, Public Utility, Public Forum—And Why the Differences Matter*, WETMACHINE (Sept. 5, 2017, 7:53 AM), <https://perma.cc/V4EA-BTGR>.
57. H.B. 20, 87th Leg., 2d Called Sess. § 1(3)-(4) (Tex. 2021) (“[S]ocial media platforms function as common carriers . . .”); S.B. 7072, 27th Leg., 1st Reg. Sess. § 1(6) (Fla. 2021) (“Social media platforms . . . should be treated similarly to common carriers.”); see Tex. H.B. 20 § 7 (amending TEX. BUS. & COM. CODE § 143A.002 to broadly prohibit social platforms from “censor[ing] a user, a user’s expression, or a user’s ability to receive the expression of another person based on,” among other things, “the viewpoint of the user or another person” or “the viewpoint represented in the user’s expression or another person’s expression”); Fla. S.B. 7072 § 2 (adding FLA. STAT. § 106.072(2), which broadly bars social media platforms from “willfully deplatform[ing] a candidate for office”); *id.* § 4 (adding FLA. STAT. §§ 501.2041(2)(h), (j), which bar social media platforms from “apply[ing] or us[ing] post-prioritization or shadow banning algorithms for content and material posted by or about” a candidate for office or “tak[ing] any action to censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast”). See generally *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 445-46 (5th Cir. 2022) (providing a more detailed synopsis of H.B. 20); *NetChoice, LLC v. Moody*, 34 F.4th 1196, 1205-06 (11th Cir. 2022) (providing a more detailed synopsis of S.B. 7072); Clay Calvert, *First Amendment Battles Over Anti-Deplatforming Statutes: Examining Miami Herald Publishing Co. v. Tornillo’s Relevance for Today’s Online Social Media Platform Cases*, 97 N.Y.U. L. REV. ONLINE 1, 2-4 (2022) (providing additional background on the Texas and Florida laws); Alan Z. Rozenshtein, *Silicon Valley’s Speech: Technology Giants and the Deregulatory First Amendment*, 1 J. FREE SPEECH L. 337, 366 (2021) (providing additional background on the Florida law).

following *Gonzalez* and *Taamneh* to the Supreme Court.⁵⁸ The state regimes at issue go beyond stripping platform immunity under Section 230 and directly regulate platforms' ability to moderate content.

C. The Conservative Embrace of Common Carriage

In one sense, the resurgent conservative interest in channeling common carriage nondiscrimination regimes rhymes with historical tradition. Indeed, as the next Part explains, American legislators and regulators have variously attempted to impose carriage regimes on nearly every major information platform in the country's history, including the telegraph, newspaper, broadcast television and radio, cable television, and ISPs.⁵⁹

On the other hand, the embrace of common carriage law and an antidiscrimination stance marks a sharp turn from traditional conservative opposition to government regulation of information platforms on economic and libertarian grounds.⁶⁰ This turn is not merely political. It finds roots in a quietly growing literature encouraging legislatures and courts to embrace common carriage and its cousins.⁶¹

The conservative turn toward common carriage departs sharply from longstanding Reagan-era orthodoxy opposing nondiscrimination regulation of information platforms, including the fairness doctrine in broadcast television and radio,⁶² the must-carry rules for cable television,⁶³ and network neutrality mandates for ISPs.⁶⁴ Even early Trump-era conservative internet policy focused primarily on deregulation. Arguments about anti-conservative bias by social media platforms like Facebook and Twitter were raised not to justify common carriage mandates, but to justify repealing Obama-era net neutrality

58. *See supra* note 11.

59. *See infra* Part II.

60. *See Lima, supra* note 56.

61. *See Candeub, supra* note 13, at 433; Volokh, *supra* note 13, at 382-84.

62. *See* John Shu, *Fairness Doctrine*, FEDERALIST SOC'Y (Apr. 13, 2009), <https://perma.cc/F7AT-Y3YL>.

63. For example, President George H. W. Bush vetoed the Cable Television Consumer Protection and Competition Act of 1992, which contained the must-carry rules, complaining that the bill "requir[ed] cable companies to bear the costs of meeting major new federally imposed regulatory requirements" and took "certain key business decisions away from cable operators and put[] them in the hands of the Federal Government." *Message to the Senate Returning Without Approval the Cable Television Consumer Protection and Competition Act of 1992*, 2 PUB. PAPERS 1751 (Oct. 3, 1992), <https://perma.cc/K3MA-SY5N>.

64. *See, e.g.,* Ajit Pai, *Halloween Treats*, MEDIUM (Oct. 5, 2020), <https://perma.cc/E98W-SNE8>.

regulations.⁶⁵ These arguments emphasized that concerns over ISPs' ability to block and throttle internet traffic paled in comparison to the power social media platforms held to "censor" speakers and speech.⁶⁶

It is surprising, then, that conservative interest in common carriage and antidiscrimination has evolved into a formal, positive policy agenda. This agenda seeks to compel private platforms to host a body of content that the platforms and their users might object to—including "hate speech, harassment, election disinformation, or even spam."⁶⁷ Quarters of the conservative political establishment have deemed the removal of speech a form of private "censorship,"⁶⁸ a term typically reserved for government interventions.⁶⁹

As Corbin Barthold, a lawyer for the libertarian think tank TechFreedom, characterizes the moment, "[c]onservatives have soured . . . on corporate free speech," and common carriage is a leading "intellectual[]" approach to address "woke corporate speech writ large."⁷⁰ Barthold argues that the invocation of common carriage is part of a broader conservative project to aggressively loosen the First Amendment and address conservative culture-war issues such as punishing flag burning and other expressions of anti-American sentiment and relaxing heightened standards for defamation against public figures.⁷¹

Harold Feld, a lawyer for the liberal think tank Public Knowledge, agrees, noting that "conservatives are once again discovering the value of common carriage and government prohibition on any sort of interference with conduits of speech."⁷² As the argument goes, "if companies retain the right to exert editorial control based on content, they will get pressured by the market and government to use that editorial discretion to censor 'harmful' speech"—i.e., conservative speech.⁷³ More pointedly, Feld contends that "[t]he most active proponents of using government regulation to prevent private censorship on

65. See Lima, *supra* note 56.

66. See *id.*

67. Anupam Chander et al., An Open Letter from Internet Law Scholars to the United States Congress 1 (2022), <https://perma.cc/9QCJ-T38T>; see also Blake E. Reid, *The Conservative Bias Panic Comes for Gmail's Spam Detection*, LAWFARE (Nov. 9, 2022, 10:16 AM), <https://perma.cc/6N5W-PCZ7> (discussing a lawsuit against Google by the Republican National Committee over Gmail's spam filters).

68. See Exec. Order No. 13925, 85 Fed. Reg. 34079, 34079 (2020) ("Online platforms are engaging in selective censorship that is harming our national discourse.").

69. E.g., 47 U.S.C. § 326 (barring the "censorship" of radio communications by the FCC).

70. Corbin Barthold, *The Right's New Legal Crusade Against Corporate Free Speech*, BULWARK (Nov. 30, 2021), <https://perma.cc/J7MN-4EPE>.

71. See *id.* (citing Josh Hammer, Essay, *Common Good Originalism: Our Tradition and Our Path Forward*, 44 HARV. J.L. & PUB. POL'Y 917, 945-47 (2021)).

72. Feld, *supra* note 56.

73. *Id.*

the conservative side are . . . treating common carrier regulation as a form of revenge” against perceived anti-conservative bias.⁷⁴

The turn toward common carriage has also been fueled by a growing literature discussing it and an array of related concepts, including quasi-common carriage law, public utility law, public accommodations law, and others.⁷⁵ Ganesh Sitaraman more broadly situates these concepts under the “history and theory of deplatforming.”⁷⁶

The centuries-old canon of U.S. information platform law includes a wealth of deeply developed, highly technocratic, and heavily litigated regulatory regimes.⁷⁷ This often leaves prior regimes cloaked in inscrutable technical and legal complexity. As Phil Weiser observed over two decades ago, information platform law—even then, just after the dawn of the commercial internet—“defie[d] easy categorization, as it stray[ed] across legal spheres . . . into non-legal disciplines.”⁷⁸ More pointedly, information platform law required consideration of complex “principles of engineering and economics” as “technological convergence—i.e., the provision of identical services through different technologies . . . blur[red] the boundaries between the various segments of the [legacy] information industries.”⁷⁹ While invoking prior regimes analogically to claim credence for contemporary proposals is easy, thoroughly assessing the merits of such claims has typically been limited to narrow circles of legal, technical, economic, and historical expertise.

Another reason for the rise of common carriage is that U.S. information platform regulations have always developed in the shadow of constitutional law—namely, the First Amendment. Indeed, as the next Part explains, a large body of Supreme Court case law has assessed in detail the constitutionality of various carriage regimes.⁸⁰ The prohibition on the abridgement of speech—and its extrapolation to editorial discretion of the type performed by information platforms—means that any new regulation of internet platforms must avoid crashing on the shoals of a long line of First Amendment jurisprudence to survive judicial review.

The ability to plausibly divine historical comparisons and context around carriage regimes can imbue new legislative proposals with a sense of constitutional, technocratic, and political credibility that insulates them from

74. *Id.*

75. See Volokh, *supra* note 13, at 379-83, 381 n.9; Feld, *supra* note 56; see also *infra* Conclusion.

76. Sitaraman, *supra* note 4, at 5.

77. See Weiser, *supra* note 2, at 1.

78. *Id.*

79. *Id.* at 1-2.

80. See *infra* Part II.C.

challenge. Broadly conceived, the field of common carriage law provides a buffet of analogies and justifications for the full range of policy interventions that policymakers are considering for internet platforms. Thus, the search for historical points of comparison for new internet information platform agendas is not a purely academic exercise. Common carriage arguments command power.

Adam Candeub and Eugene Volokh have made perhaps the most aggressive cases for extending common carriage mandates to application-layer platforms. Candeub compares net neutrality advocates' concerns over the gatekeeping power of ISPs to concerns over the lack of competitive neutrality of search engines and social media platforms, drawing a historical justification for intervention.⁸¹ Candeub's arguments have become a cornerstone for Trump- and post-Trump-era conservative common carriage policy, and Candeub has been described as one of the "intellectual centers" of the conservative common carriage project.⁸²

Building on Candeub's efforts, Volokh argues that the "rise of massively influential social media platforms—and their growing willingness to exclude certain material that can be central to political debates . . . can justify requiring the platforms not to discriminate based on viewpoint."⁸³ Volokh addresses First Amendment issues with common carriage, arguing that there is "[n]o First Amendment right not to host" another's speech.⁸⁴

Candeub's and Volokh's work on common carriage has proven influential on the courts, particularly the conservative wing of the Supreme Court. In *Biden v. Knight First Amendment Institute*, for instance, the Court issued a short per curiam opinion dismissing as moot a tangentially related case about Trump blocking users' Twitter accounts because Trump was no longer President and had been removed from the platform.⁸⁵ In a winding concurrence, Justice

81. Candeub, *supra* note 13, at 393-95; *see also* Adam Candeub, *Social Media Platforms or Publishers? Rethinking Section 230*, AM. CONSERVATIVE (June 21, 2019, 12:01 AM), <https://perma.cc/XN4M-CA8W>.

82. Lima, *supra* note 56. Candeub also played a more direct role on carriage issues for the Trump administration as a deputy assistant secretary at the National Telecommunications and Information Administration. *See* Cristiano Lima, *NTIA Hires Lawyer Who Filed 'Censorship' Suits Against Twitter*, POLITICO PRO (May 1, 2020, 2:34 PM EDT), <https://perma.cc/6N96-3A69>. He later became the acting leader of the Administration. *See* Cristiano Lima, Leah Nysten & Daniel Lippman, *Appointee Who Led Trump's Tech Crackdown Tapped for Top DOJ Role*, POLITICO (Dec. 13, 2020, 5:45 PM EST), <https://perma.cc/B9H3-NXYF>. Once there, Candeub reportedly "played a central role in carrying out" President Trump's executive order targeting social media platforms." *Id.*

83. Volokh, *supra* note 13, at 377.

84. *Id.* at 416; *see also* Eugene Volokh, *Does the First Amendment Prohibit All Platform Regulation?*, MARQ. LAW., Summer 2023, at 16, <https://perma.cc/E2A5-HEGZ>.

85. *See* 141 S. Ct. 1220, 1221 (2021) (mem.).

Thomas compared Trump’s and Twitter’s powers of control over speech, claiming that Trump had only “blocked several people from interacting with his messages,” but that Twitter had “barr[ed] all Twitter users from interacting with his messages” by removing him from the platform.⁸⁶ Justice Thomas made an unexpected case for “doctrines that limit the right of a private [internet] company to exclude,” favorably and repeatedly citing Candeub’s claim that “there is clear historical precedent for regulating . . . communications networks . . . as traditional common carriers.”⁸⁷

In turn, a Texas legislator referenced Justice Thomas’s *Knight* concurrence at the kickoff of debate over H.B. 20.⁸⁸ When litigation over H.B. 20 commenced, Candeub was retained by Texas to file an expert report on the history of common carriage.⁸⁹ As litigation over S.B. 7072 proceeded, Florida likewise cited Candeub and Volokh, as well as Justice Thomas’s *Knight* concurrence, as central to its historical arguments for treating social media platforms as common carriers.⁹⁰

Though Florida’s bill was largely struck down by the Eleventh Circuit on First Amendment grounds,⁹¹ the Fifth Circuit (without explanation) stayed an injunction against the Texas law.⁹² The stay followed oral argument featuring extensive debate about the nature of common carriage law and its application to

86. *Id.* at 1221 (Thomas, J., concurring).

87. *Id.* at 1222-23, 1226 (citing Candeub, *supra* note 13, at 398-405). Justice Thomas’s *Knight* concurrence followed a similarly unexpected and tangential concurrence in *Malwarebytes v. Enigma Software Group USA, LLC*, where he argued for narrowing Section 230’s protection of internet platforms’ decision to remove content. 141 S. Ct. 13, 16-18 (2020) (Thomas, J., respecting the denial of certiorari). Candeub later seized on Justice Thomas’s *Malwarebytes* opinion to advance the argument that Section 230 did not cover the moderation of hate speech, disinformation, or incitement. Candeub, *supra* note 42, at 141 & n.5 (citing *Malwarebytes*, 141 S. Ct. at 16). With Volokh, Candeub also argued that Section 230 would not preempt an (at that point) hypothetical state law barring discrimination by platforms based on viewpoint. Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. § 230(c)(2)*, 1 J. FREE SPEECH L. 175, 176-77 (2021).

88. TEX. H.J., 87th Leg., 2d Called Sess., at S175 (Aug. 27, 2021) (statement of Rep. Briscoe Cain).

89. *See* NetChoice v. Paxton, 573 F. Supp. 3d 1092, 1101-02 (W.D. Tex. 2021) (declining to rely on Candeub’s report amid objections from the platforms that it was simply a “second legal brief” on Texas’s behalf).

90. Opening Brief of Appellants at 16, 34-37, NetChoice, LLC v. Moody, 34 F.4th 1196 (11th Cir. 2022) (No. 21-12355), 2021 WL 4105353 (citing Candeub & Volokh, *supra* note 87, at 180-86; and Candeub, *supra* note 13, at 399).

91. *Moody*, 34 F.4th at 1227 (11th Cir. 2022) (holding a substantial likelihood that S.B. 7072’s content moderation provisions could not survive strict or even intermediate scrutiny but holding that its separate disclosure provisions were not substantially likely to be unconstitutional).

92. NetChoice, L.L.C. v. Paxton, No. 21-51178, 2022 WL 1537249, at *1 (5th Cir. May 11, 2022).

social media platforms.⁹³ The Supreme Court vacated the stay,⁹⁴ but Justice Alito, joined by Justices Thomas and Gorsuch, issued a lengthy dissent urging the Court’s review of the law and its First Amendment implications.⁹⁵ Though Justice Alito contended that the Florida law was “novel,”⁹⁶ he proceeded through a litany of historical examples where carriage mandates had been sustained, citing Volokh in support.⁹⁷ And when the Fifth Circuit then upheld the Texas law in *Paxton*, Judge Oldham’s lengthy aside on common carriage mirrored many of Candeb’s and Volokh’s arguments,⁹⁸ as the next Part details.

* * *

This recent history underscores the enormous political stakes of scholarly debates, pending legislation, and judicial proposals that invoke common carriage. As with contemporary battles over gun rights,⁹⁹ abortion rights,¹⁰⁰ and the administrative state¹⁰¹—rooted in debates about history and its role¹⁰²—battles over common carriage’s history are being thrust into the

93. See Oral Argument, *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439 (5th Cir. 2022) (No. 21-51178), <https://perma.cc/85PH-GL4C>; Ben Brody, *A Judge Was Sure Twitter Isn’t a Website. Now Tech Law Could Get Messy*, *PROTOCOL* (May 10, 2022), <https://perma.cc/74DV-ULEE>.

94. *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1715-16 (2022) (mem.).

95. *Id.* at 1716-18 (Alito, J., dissenting from grant of application to vacate stay).

96. *Id.* at 1716. Presumably, this was for the purpose of invoking the Court’s doctrine against the vacation of a stay. See *id.*

97. *Id.* at 1717 (citing Volokh, *supra* note 13).

98. *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 469-80 (5th Cir. 2022).

99. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2130 (2022) (declaring that “reliance on history to inform the meaning of constitutional text—especially text meant to codify a *pre-existing* right—is, in our view, more legitimate, and more administrable, than asking judges to ‘make difficult empirical judgments’ about ‘the costs and benefits’ of laws abridging such a right (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 790-91 (2010))).

100. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2248-54 (2022) (purporting to chronicle the historical treatment of the notion of a right to abortion).

101. *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022) (purporting to find support for the “major questions” doctrine from an array of historical cases “from all corners of the administrative state”).

102. See, e.g., Brooke Gladstone & Timothy Zick, *Bruen and the Distorted History of Gun Regulation*, *ON MEDIA* (July 1, 2022), <https://perma.cc/KW4H-F955> (discussing *Bruen*); Lauren Moxley Beatty, *The Resurrection of State Nullification—and the Degradation of Constitutional Rights: SB8 and the Blueprint for State Copycat Laws*, 111 *GEO. L.J. ONLINE* 18, 19-20 (2022) (discussing *Dobbs*); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 *VA. L. REV.* 1009, 1065 (2023) (discussing politicization in the context of the “major questions” doctrine); see also Tejas N. Narechania, *Symmetry and (Network) Neutrality*, 119 *MICH. L. REV. ONLINE* 46, 47 (2020) (discussing the symmetry problems of the major questions doctrine in the context of net neutrality).

spotlight as conservatives aim to significantly reorient the relationship between private behavior of internet platforms and public oversight.¹⁰³

While conservative priorities are driving the conversation, they are not the only ones at stake. As Lakier outlines, the liberal project to redistribute speech rights—both in information platform contexts and beyond—is likewise contingent on the Supreme Court’s reconciliation of the history of common carriage with its permissive approach to the First Amendment.¹⁰⁴ The fate of net neutrality¹⁰⁵ and the ability to transmit controversial material—such as advertising around abortion and gun safety¹⁰⁶—also hangs in the balance as policymakers and courts assess carriage regimes.¹⁰⁷

II. The Incoherence of Common Carriage Law

The previous Part illustrated the consequential contemporary political backdrop of “common carriage” law, but this Article has yet to attempt to describe the term. This is because, despite the apparent political and judicial appetite for theories of common carriage, there is no consensus as to the

103. See, e.g., Tim Wu, *Liberals and Conservatives Are Both Totally Wrong About Platform Immunity*, MEDIUM (Dec. 3, 2020), <https://perma.cc/R43J-9GAU> (“What conservatives really seem to want, meanwhile, is something more like a version of the ‘fairness doctrine’ adapted for social media. . . . [T]hey want the platforms to adopt a different kind of content moderation policy, one where the platform would aim to be scrupulously fair in permitting all sides to say what they want, without being labeled ‘hate speech’ or ‘misinformation.’”).

104. Lakier, *supra* note 12, at 2371-81.

105. See *infra* Part II.B.2. Of course, net neutrality is occasionally endorsed (or nearly so) by conservatives concerned about ISP censorship. See, e.g., Emily Baxter & Aseem Mehta, *God in the Machine: The Role of Religion in Net Neutrality Debates*, RELIGION & POLS. (Feb. 24, 2015), <https://perma.cc/UZ39-M394>.

106. See, e.g., Ashley Belanger, *Lawmakers Tell Facebook to Stop Deleting Abortion Posts for No Reason*, ARS TECHNICA (July 12, 2022, 9:40 AM), <https://perma.cc/3T4E-JKDH>; @dsc (Senate Democrats), X (July 25, 2022, 1:48 PM), <https://perma.cc/AC8A-AYRR> (“BREAKING: @Hulu is REJECTING our ads calling out GOP attacks on abortion access and gun safety. Their shady policies amount to outrageous political censorship.”); Evan Greer & Lia Holland, *Section 230 Is a Last Line of Defense for Abortion Speech Online*, WIRED (June 29, 2022, 12:49 PM), <https://perma.cc/TV2L-NBK6>; Ashton Lattimore, *Laws Targeting Free Speech About Abortion Would Put Journalists in the Line of Fire*, PRISM (June 22, 2022), <https://perma.cc/C6DF-9RYG>; Adi Robertson, *Social Networks Won’t Be Able to Stay Neutral on Abortion*, VERGE (July 1, 2022, 12:47 PM PDT), <https://perma.cc/6SLJ-B85F>; Adi Robertson, *YouTube Says It Will Remove ‘Unsafe’ DIY Abortion Guides*, VERGE (July 21, 2022, 2:14 PM PDT), <https://perma.cc/AFN7-CWK3>; Adi Robertson, *The Brewing Fight to Keep Abortion Info Online*, VERGE (June 25, 2022, 6:30 AM PDT), <https://perma.cc/2LTY-ZQG9>.

107. Cf. Sitaraman, *supra* note 4, at 7-28 (attempting to knit together a historical framework).

contours of common carriage law—or whether common carriage represents a discrete concept.

Some scholars have begun to observe the slippery quality of common carriage law. As Yoo has noted, common carriage is a “concept which . . . somewhat frustratingly many people have attempted to define and to mine for the history . . . without any great coalescence,”¹⁰⁸ and for which a coherent definition has “long proven elusive.”¹⁰⁹ Lakier likewise notes the prevalence of “a belief that [common carriage law] represents something much clearer, more distinct, and more unchanging than it [actually] does.”¹¹⁰

Notwithstanding this budding skepticism, one typical effort to impose coherence is to derive a common lineage from the laws that have historically been described as “common carriage.” For example, TechFreedom lawyer Ari Cohn traces the genesis of the contemporary understanding of common carriage in the United States back to regulation of economic discrimination by railroads under the Interstate Commerce Commission (ICC) in the late nineteenth century, a framework later extended to the telegraph in 1910 under the Mann-Elkins Act.¹¹¹ Cohn then turns to the common carriage regime for the telephone, swapping the FCC for the ICC under the Communications Act of 1934.¹¹² Cohn concludes the arc with the regimes for cable television under the carriage rules of the Cable Acts of 1984¹¹³ and 1992¹¹⁴ and access to the internet in the net neutrality debates of the twenty-first century.¹¹⁵ James Speta, among many others, traces common carriage law even further back to nondiscrimination requirements in English common law,¹¹⁶ which Candeub and others peg as beginning in the sixteenth- and seventeenth-century law of

108. TechFreedom, *2022 Policy Summit: Common Carriage, Social Media, Broadband & the First Amendment*, YOUTUBE, at 09:27 (July 22, 2022), <https://perma.cc/HHM5-M4MX>.

109. Yoo, *The First Amendment*, *supra* note 14, at 465.

110. TechFreedom, *supra* note 108, at 13:37.

111. Pub. L. No. 61-218, § 7, 36 Stat. 539, 544-45 (1910) (codified as amended in scattered sections of 49 U.S.C.); *see id.*, at 01:20-02:36. For more detailed discussion of this and related regimes, see Part II.A.2 below.

112. TechFreedom, *supra* note 108, at 02:30-03:05; *see* Pub. L. No. 73-416, § 202(a), 48 Stat. 1064, 1070 (codified at 47 U.S.C. § 202(a)) (prohibiting “unjust or unreasonable application”).

113. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended in scattered sections of 47 U.S.C.).

114. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.).

115. TechFreedom, *supra* note 108, at 03:05-04:16.

116. James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM’NS. L.J. 225, 251-52 (2002).

“public callings.”¹¹⁷ Judge Oldham’s common carriage discussion in *Paxton* likewise begins with the fifteenth-century law of ferries.¹¹⁸

However, as this Part explains, the notion of a singular historical concept of common carriage law begins to disintegrate upon closer examination. Even at the most general level of abstraction, the basic idea that common carriage laws can be historically aligned must acknowledge that the constituent parts are a series of discrete efforts to regulate a range of industries through distinct statutory regimes for telegraphs, telephone, radio, cable television, and internet access, each crafted for a unique historical context with particular cultural, social, and technological themes.¹¹⁹

More problematically, the invocation of a coherent body of common carriage law conflates at least three discrete inquiries. The first considers the *classificatory scope of common carriers*—that is, the entities that are the subject of common carriage regimes.¹²⁰ A second line of inquiry concerns the *nature of common carriage rules*: the specific regulatory interventions applied to common carriers, which require those entities to varying degrees to carry goods, passengers, or speech.¹²¹ A third field of study investigates the *First Amendment constraints* on the application of common carriage rules to common carriers (and relatedly, the preemption of common carriage regimes by Section 230).¹²²

This Part addresses each of these inquiries in turn, demonstrating that even a high-level examination of the post-Civil War telecom carriage canon casts doubt on the notion that common carriage law consistently describes a coherent scope of covered carriers, body of carriage rules, or First Amendment doctrine.

A. The Incoherence of “Common Carriers”

One line of inquiry in common carriage debates focuses on determining whether an entity should be classified as a common carrier.¹²³ But further

117. Candeub, *supra* note 13, at 401-03; Sitaraman, *supra* note 4, at 7-10.

118. *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 469-70 (5th Cir. 2022).

119. This Article’s analysis is limited to the post-Civil War era of U.S. telecommunications law because if coherence is to be found, it should be demonstrable in the treatment of the historical American information platforms that bear at least some degree of technological and social similarity to the contemporary internet platforms at issue today.

120. *See infra* Part II.A.

121. *See infra* Part II.B.

122. *See infra* Part II.C.

123. Daniel Deacon has analyzed a similar but subtly different question—determining what it means to “treat” an entity as a common carrier for the purposes of skirting the Communications Act’s limitations on treating certain kinds of entities as “common carriers.” *See* Daniel T. Deacon, Essay, *Common Carrier Essentialism and the Emerging Common Law of Internet Regulation*, 67 ADMIN. L. REV. 133, 154 (2015).

examination reveals a lack of coherence around common carriers as a category, especially as applied to application-layer platforms. Neither the pliable “characteristic” approach commonly invoked to assess common carrier status nor the post-Civil War trend toward industry-specific statutory common carrier designations in telecommunications and information industries provide a persuasive basis for a unified theory of common carriers. Neither of these approaches provide a particularly useful framework for assessing whether application-layer internet platforms are common carriers as a descriptive matter. The exercise of classifying an entity as a common carrier generally represents little more than a declaration of an intent to regulate the entity.

1. Characteristic classification

As Yoo chronicles, a typical approach to common carriage designation—and the one invoked by Justice Thomas in *Knight* and Judge Oldham in *Paxton*—analyzes the characteristics of a firm to determine whether it can be designated as a common carrier.¹²⁴ More specifically, this approach analyzes “the types of considerations that have historically been used to define common carriers,” including whether a firm (1) is affected with the public interest, (2) is part of the transportation or communications industries, (3) “holds itself out” as serving the public, or (4) possesses market power.¹²⁵ As the Eleventh Circuit notes in *Moody*, this analysis focuses on whether “platforms are *already* common carriers.”¹²⁶

Yoo’s critique of the characteristic approach is compelling.¹²⁷ Nevertheless, characteristic classification is so predominant in scholarly and judicial treatments of common carrier law that it is worth examining in the context of social media platforms. The Texas social media law, for example, specifically tracks the characteristic approach.¹²⁸ Judge Oldham treats

124. Yoo, *The First Amendment*, *supra* note 14, at 465-66 (citing *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1222-23 (2021) (Thomas, J., concurring)); *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 473 (5th Cir. 2022). See generally John Bergmayer, *What Makes a Common Carrier, and What Doesn't*, PUB. KNOWLEDGE (Jan. 14, 2021), <https://perma.cc/LH3T-ZNV4> (offering another account the characteristics of common carriers).

125. Yoo, *The First Amendment*, *supra* note 14, at 465-66; see also *Paxton*, 49 F.4th at 473, 476 (tagging each of the four characteristics). The fifth item in Yoo’s taxonomy of Justice Thomas’s considerations, the presence of a quid pro quo, or in Candeub’s terms, a “regulatory deal,” strikes me as different in kind from the others and warrants separate discussion in Part II.C below. See Yoo, *The First Amendment*, *supra* note 14, at 472-73; Candeub, *supra* note 13, at 397, 407.

126. See *NetChoice, LLC v. Moody*, 34 F.4th 1196, 1220 (11th Cir. 2022).

127. Yoo, *The First Amendment*, *supra* note 14, at 465-66; accord Candeub, *supra* note 13, at 405.

128. H.B. 20, 87th Leg., 2d Called Sess. § 1(3)-(4) (Tex. 2021) (invoking both the “affected with a public interest” characteristic by stating “social media platforms . . . are affected with a public interest” and the “regulatory deal” characteristic by stating “social media platforms . . . are affected with a public interest”).

footnote continued on next page

Texas's arguments in *Paxton* favorably, waxing about the “centrality of [social media] [p]latforms to public discourse” and their “central role in American economic life.”¹²⁹

Industry- and Firm-Based Classification. One traditional consideration—being “affected with the public interest”¹³⁰—attempts to characterize some aspect of an industry’s or firm’s relationship with the public.¹³¹ As Yoo observes, however, being “affected with the public interest” is so general and unbounded a principle as to be effectively unlimited.¹³² Accordingly, it has been discredited by the Court (including Justice Thomas) and scholars on all sides of common carriage debates as indeterminate and a plausible characteristic of nearly any economic enterprise.¹³³

A narrower version of the affectation consideration queries whether a firm is a part of the transportation or communications industry—domains in which common carriage law historically applied and where the “public interest” might be especially salient.¹³⁴ Judge Oldham again makes much of the consideration in *Paxton*, noting that “[t]he whole purpose of a social media platform . . . is to ‘enable[] users to communicate with other users.’”¹³⁵

As Yoo notes, however, this consideration is not dispositive in the full view of history; the Supreme Court has rejected and policymakers have rescinded the application of common carriage law in a variety of transportation and communications contexts.¹³⁶ These contexts include the deregulation of airlines, railroads, and trucking in the latter part of the twentieth century and the Supreme Court’s refusal—later codified in statute—to designate broadcasters and cable companies as common carriers, leaving the transportation-or-communications consideration vulnerable to

public interest” and the economic power characteristic by stating “social media platforms with the largest number of users are common carriers by virtue of their market dominance”).

129. *Paxton*, 49 F.4th at 475-76.

130. Yoo, *The First Amendment*, *supra* note 14, at 468 (citing *Munn v. Illinois*, 94 U.S. 113, 126, 127, 129-30 (1876); and *id.* at 139, 150, 152 (Field, J., dissenting)).

131. *See* Tex. H.B. 20 § 1(3).

132. Yoo, *The First Amendment*, *supra* note 14, at 468-69.

133. *Id.*

134. *Id.* at 469-70.

135. *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 473-74 (5th Cir. 2022) (third alteration in original) (quoting TEX. BUS. & COM. CODE § 120.001(1)).

136. Yoo, *The First Amendment*, *supra* note 14, at 471 & n.48. Yoo arguably sweeps a bit too far here, as the Supreme Court has been willing to uphold various kinds of *quasi*-carriage regimes in the context of broadcast and cable despite the formal prohibition on common carrier designation in the Communications Act. *See infra* Part II.B.3.

overinclusion.¹³⁷ As Yoo also notes, this form of raw categorization provides little insight as to its animating principles and thus provides little guidance on how application-layer platforms might be properly analogized to parts of the communications industry.¹³⁸

The industry-specific consideration is also susceptible to underinclusion. For example, Judge Oldham notes in *Paxton* that social media platforms are “no different than Verizon or AT&T” with respect to their status as “communication firms.”¹³⁹ But ISPs like Verizon and AT&T, as well as various other communications firms including email services and news, entertainment, and sports outlets, are specifically exempted from the Texas law.¹⁴⁰ Following the FCC’s retraction of net neutrality rules in 2017, these entities also are exempt from the FCC’s common carriage rules, at least for the ISP portions of their businesses.¹⁴¹

Behavioral Classification. Another popular characteristic—whether a firm “holds out” as providing service to all consumers—affords a more specific way of characterizing a firm’s relationship with the public.¹⁴² But, as Yoo observes, this definition suffers greatly from “the ease with which it can be evaded.”¹⁴³ Expanding on Yoo’s observation, there are at least two modes of evasion: contractual and definitional.

The contractual mode of evasion looks to the terms on which a service is offered. For example, social media platforms typically require users to accept terms of use which specify rules governing what content can be posted.¹⁴⁴ From Judge Oldham’s perspective, these terms are consistent with “holding out” to serve the public because the platforms “apply the same terms and conditions to all existing and prospective users.”¹⁴⁵ But the Eleventh Circuit disagreed, noting that, because these terms prohibit users from transmitting content that violates the platforms’ rules, the platforms make “‘individualized’

137. Yoo, *The First Amendment*, *supra* note 14, at 471 & n.48.

138. *Id.* at 470 (citing Susan P. Crawford, *Transporting Communications*, 89 B.U. L. REV. 871, 884-85, 915 (2009)).

139. *Paxton*, 49 F.4th at 473-74.

140. H.B. 20, 87th Leg., 2d Called Sess. § 2 (Tex. 2021) (adding TEX. BUS. & COM. CODE § 120.001(1)).

141. *See infra* Parts II.A.2, II.B.2.

142. Yoo, *The First Amendment*, *supra* note 14, at 473-75. This consideration nevertheless finds some support in the telecom context in *National Ass’n of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976).

143. Yoo, *The First Amendment*, *supra* note 14, at 475.

144. *See NetChoice, LLC v. Moody*, 34 F.4th 1196, 1220 (11th Cir. 2022); *Paxton*, 49 F.4th at 474.

145. *Paxton*, 49 F.4th at 474.

content- and viewpoint-based decisions about whether to publish particular messages or users.”¹⁴⁶

The definitional mode of evasion, on the other hand, tautologically reduces common carrier *status* to compliance with common carrier *rules*. Under the holding-out rationale, a firm can escape *classification* as a common carrier by engaging in discrimination, even though engaging in discrimination violates the common carriage ban on discrimination.

To illustrate further: If a firm holds itself out as providing service to the entire public and is thus a common carrier, the firm inherently *does not discriminate* and the common carriage obligation not to discriminate is inherently satisfied. But if the same firm chooses to discriminate, that choice inherently means that the firm does not hold itself out to the public and thus is not a common carrier. In turn, the common carriage requirement no longer applies to prohibit the carrier from discriminating.¹⁴⁷ Thus, the inherent tautology in assessing common carrier status on the basis of holding out arguably makes it a useless construct for enforcing common carriage rules. A firm is only a common carrier if it voluntarily follows common carriage rules; it is never a common carrier if it violates common carriage rules.

By way of example, Judge Oldham’s analysis in *Paxton* falls victim to this rules-status tautology. Judge Oldham rejects the social media platforms’ arguments that they do not hold out to the public because they engage in individualized content moderation.¹⁴⁸ But Judge Oldham slips in the course of a single paragraph from assessing status (discussing whether platforms can be regulated *as* common carriers because they hold out to the public) to rules (declaring that the platforms cannot “avoid common carrier *obligations* by violating those same obligations”).¹⁴⁹ In Oldham’s analysis, common carrier status and common carriage rules are one and the same. Oldham inadvertently

146. *Moody*, 34 F.4th at 1220 (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979)).

147. Invoking the concept of “common carrier essentialism,” Deacon backs into this issue from a different starting point, querying whether a regulation might treat a platform as a “common carrier” in violation of the Communications Act by “identifying[ing] the definition or essence of a common carrier, and then determin[ing] whether the regulation in question forces the provider to conform to that definition.” Deacon, *supra* note 123, at 154. Deacon alternatively proposes that courts could “identify a set of obligations, derived from positive law, that are traditionally applied to entities the law deems common carriers”—an approach he describes as a “positivist theory of common carrier status.” *Id.*

148. *Paxton*, 49 F.4th at 474.

149. *Id.* (emphasis added). The Eleventh Circuit, by contrast, addresses both the rules and status questions. See *Moody*, 34 F.4th at 1220-21 (“[W]e confess some uncertainty whether [Florida] means to argue (a) that platforms are *already* common carriers, and so possess no (or only minimal) First Amendment rights, or (b) that the State can, by dint of ordinary legislation, *make* them common carriers, thereby abrogating any First Amendment rights that they currently possess. Whatever [Florida]’s position, we are unpersuaded.”).

concedes that there is no difference between the characteristics of a regulated carrier and the behavior that results from the application of the regulation.

The rules-status tautology also led to controversy around the FCC's 2015 imposition of net neutrality rules, which prevented ISPs from discriminating against particular applications or content.¹⁵⁰ The Obama-era FCC focused its rules on ISPs that "provide[d] the capability to transmit data to and receive data from *all or substantially all Internet endpoints*," which it described as "the ability to go anywhere (lawful) on the Internet."¹⁵¹ Shortly after the release of the rules, at least one commenter observed that ISPs could escape the "all or substantially all" language and thus evade status as a regulated ISP, simply by blocking a significant number of internet services.¹⁵²

This dynamic took further hold in the D.C. Circuit as the net neutrality rules went up on appeal. Concurring on a per curiam denial of en banc rehearing of the D.C. Circuit's decision to uphold the rules, Judge Srinivasan responded to arguments that the rules violated the First Amendment by interfering with the editorial discretion of ISPs. Judge Srinivasan seemed to endorse the status-rules loophole, explaining that the net neutrality rules "[d]id not apply to an ISP holding itself out as providing something other than a neutral, indiscriminate pathway—i.e., an ISP making sufficiently clear to potential customers that it provides a filtered service involving the ISP's exercise of 'editorial intervention.'"¹⁵³ Then-Judge Kavanaugh dissented that, under this logic, ISPs "may comply with the net neutrality rule[s] if they want to comply, but can choose not to comply if they do not want to comply."¹⁵⁴ In his view, the majority's common carriage doctrine reduces to a "simple prohibition against false advertising."¹⁵⁵

150. This puzzle also arose in pre-1996 Act cases interpreting the scope of the Communications Act's common carriage provisions. Compare *Nat'l Ass'n of Regul. Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) ("It is not necessary that a carrier be required to serve all indiscriminately; it is enough that its practice is, in fact, to do so."), with *Nat'l Ass'n of Regul. Util. Comm'rs v. FCC*, 533 F.2d 601, 609 (D.C. Cir. 1976) ("[P]rice discrimination in favor of . . . [some] users presents no obstacle to the conclusion that a common carrier activity is involved.").

151. *2015 Open Internet Order*, 30 FCC Rcd. 5601, paras. 25, 27 (emphasis added).

152. Jon M. Peha, *The Network Neutrality Battles that Will Follow Reclassification*, 12 I/S: J.L. & POL'Y FOR INFO. SOC'Y 11, 23 (2015). Rather than "common carrier," the *2015 Open Internet Order* and associated rules generally use the term "broadband Internet access service" (BIAS). *2015 Open Internet Order*, 30 FCC Rcd. 5601, para. 25 & n.27. For further discussion of the complex role of common carrier terminology in the context of net neutrality and the Telecommunications Act of 1996, see *id.* paras. 41-42.

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

154. *Id.* at 429 n.8 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

155. *Id.*

In defense of the “holding out” conception as a viable approach to common carriage, it is noteworthy that no ISP had been willing to go on record to indicate actual interest in offering a “curated” internet access service. Judge Srinivasan implied that doing so would both anger an ISP’s customers, who expect to be able to reach any internet service, and take an ISP outside of safe harbor provisions afforded non-discriminating ISPs under copyright law.¹⁵⁶ The FCC’s inclusion of ISPs that provided access to *substantially* all internet endpoints also left important practical wiggle room. Under the “substantially all” doctrine, the FCC could distinguish between (1) a hypothetical broadly curated ISP that provided access to only a limited set of family-friendly websites and (2) a mainstream ISP that provided open access to essentially everything on the internet but engaged in nominal economic discrimination on the fringes. For mainstream ISPs, the FCC could then treat zero-rating deals and vertical preferencing as unlawful discrimination without writing ISPs out of the scope of the rules. The FCC also could have applied exit regulations under Section 214(a) of the Communications Act, preventing ISPs from deviating from a commitment to provide non-curated internet access without seeking the FCC’s permission to exit the sector.¹⁵⁷ In other words, there are reasons to expect that some kinds of platforms, such as ISPs, may face constraints that keep them within the realm of “holding out,” generously defined.

“Holding out” might also sweep in various infrastructural providers including: virtual private networks; browsers; transit providers; the nameservers, registrars, and registries that comprise the domain name system (DNS); content delivery networks; proxy servers; Distributed Denial of Service (DDoS) prevention services; hosting platforms; and payment processors.¹⁵⁸ For

156. See *id.* at 390 (citing 17 U.S.C. § 512; and *Recording Indus. Ass’n of Am., Inc. v. Verizon Internet Servs.*, 351 F.3d 1229, 1233, 1237 (D.C. Cir. 2003)).

157. See 47 U.S.C. § 214(a). The FCC was so nonplussed by this concern that it exercised forbearance from Section 214 (along with numerous other provisions) on the grounds that they were unnecessary under Section 10 of the Communications Act, *2015 Open Internet Order*, 30 FCC Rcd. 5601, para. 458, which requires the FCC to forbear from applying rules that it determines, among other things, are not necessary to prevent unjust or unreasonable discrimination, see 47 U.S.C. § 160(a)(1).

158. See generally Jenna Ruddock & Justin Sherman, *Widening the Lens on Content Moderation*, at 5-7 (Joint PIJIP/TLS Rsch. Paper Series No. 69, 2021) (providing a taxonomy of infrastructural providers); Corrine Cath & Jenna Ruddock, *One Year After the Storming of the US Capitol, What Have We Learned About Content Moderation Through Internet Infrastructure?*, TECH POL’Y PRESS (Jan. 6, 2022), <https://perma.cc/NA7R-FHMU> (discussing the role of infrastructural providers in content moderation); *Platform Policy for Networks, Infrastructure, and Applications*, SILICON FLATIRONS CTR. (Apr. 14, 2021), <https://perma.cc/DQW2-G9D2> (discussing policy considerations for infrastructural providers); Corynne McSherry & Jillian C. York, *The Internet Is Not Facebook: Why Infrastructure Providers Should Stay Out of Content Policing*, ELEC. FRONTIER FOUND. (Oct. 13, 2022), <https://perma.cc/SU2T-G6JK> (arguing against content moderation by infrastructural providers).

example, Matthew Prince, CEO of infrastructure provider Cloudflare, publicly agonized about the company's decisions to deplatform the Daily Stormer after the neo-Nazi website apparently claimed that, in Prince's words, Cloudflare "secretly supporte[d] . . . their ideology"¹⁵⁹ and the internet forum 8chan, which increasingly had hosted hateful manifestos from mass shooters.¹⁶⁰ Prince demonstrates how infrastructural platform operators may feel uneasy about asserting editorial control over their users or their users' speech, noting Cloudflare's view that "cyberattacks not only should not be used for silencing vulnerable groups, but are not the appropriate mechanism for addressing problematic content online."¹⁶¹ Indeed, some providers may prefer a general approach of serving everyone on equal terms.¹⁶² One Ohio court also recently endorsed the "holding out" rationale as the keystone of Ohio's common carriage regime, sustaining a state claim seeking common carrier treatment of Google Search.¹⁶³ Similar questions about "holding out" have arisen in the Republican National Committee's lawsuit attempting to apply California's telegraph-era common carriage statute to Google's use of spam filters in Gmail.¹⁶⁴

Yoo may sweep too broadly in suggesting that the "holding out" characteristic is trivial for firms to evade in every context.¹⁶⁵ Nevertheless, he is correct that "holding out" is unavailing as a general principle for designation of common carriers because platforms have many ways to evade its scope.

159. Matthew Prince, *Why We Terminated Daily Stormer*, CLOUDFLARE (Aug. 16, 2017), <https://perma.cc/M5KG-Q5RB>.

160. See Matthew Prince, *Terminating Service for 8Chan*, CLOUDFLARE (Aug. 4, 2019), <https://perma.cc/HE59-89NV>.

161. Matthew Prince & Alissa Starzak, *Cloudflare's Abuse Policies & Approach*, CLOUDFLARE (Aug. 31, 2022), <https://perma.cc/6Q3M-6VE8>. Cloudflare articulated a new policy of nondiscrimination in its provision of DDoS and other security services, *see id.*, but shortly thereafter reversed course in one specific instance following a public pressure campaign against its hosting of Kiwifarms, *see* Matthew Prince, *Blocking Kiwifarms*, CLOUDFLARE (Sept. 3, 2022), <https://perma.cc/4AGC-ZTHP>, a site home to mob harassment efforts that in some cases sought to "drive their targets to suicide," Joseph Menn & Taylor Lorenz, *Under Pressure, Security Firm Cloudflare Drops Kiwi Farms Website*, WASH. POST (updated Sept. 3, 2022, 7:36 PM EDT), <https://perma.cc/4NEA-Q93U>.

162. Volokh acknowledges, but dismisses, this form of associational argument on account of the role of economic power. *See* Volokh, *supra* note 13, at 384-85.

163. Ohio *ex rel.* Yost v. Google LLC, No. 21-CV-H-06-0274, 2022 WL 1818648, at *3-4 (Ohio C.P. May 24, 2022). *But see* Eric Goldman, *Is Google's Search Engine a "Common Carrier"?* (*Seriously???*)—Ohio *Ex Rel* Yost v. Google, TECH. & MKTG. L. BLOG (May 26, 2022), <https://perma.cc/DA8S-7LPR>.

164. Republican Nat'l Comm. v. Google, Inc., No. 22-cv-01904, 2023 WL 5487311, at *9 (E.D. Cal. Aug. 24, 2023). *See generally* Reid, *supra* note 67 (describing the lawsuit and its common carriage intersection in detail).

165. *See* Yoo, *The First Amendment*, *supra* note 14, at 475 & n.74 (citing Thomas B. Nachbar, *The Public Network*, 17 *COMMLAW CONSPPECTUS* 67, 93 (2008)).

Economic Classification. The presence of monopoly power and related competition considerations are equally popular criteria for determining whether a firm is a common carrier.¹⁶⁶ This consideration focuses on the need to compel a firm to serve all comers when it has no competitors.¹⁶⁷ In Yoo’s view, the presence of natural monopoly characteristics “may well represent the most coherent theoretical justification for common carriage regulation,”¹⁶⁸ at least in the vein of neoclassical economics.

The consideration of monopoly power in assessing common carrier status receives bipartisan support. For example, both Republican- and Democrat-led FCCs have cited to the presence or absence of market power as relevant to their decisions to impose common carrier status.¹⁶⁹ And New Brandeisian progressives have joined conservatives in condemning the market power of application-layer platforms,¹⁷⁰ proposing proto-antitrust legislation that bans economic discrimination and self-preferencing by dominant providers.¹⁷¹ Candeub likewise cites the presence of monopoly or market power—including government-granted monopolies such as intellectual property and entry/licensing regimes—as justification for imposing common carriage rules on application-layer platforms.¹⁷²

While monopoly power provides a compelling policy justification for imposing common carriage rules,¹⁷³ monopoly power fares poorly as a basis for assessing whether a firm is a common carrier. As Yoo notes, non-monopoly firms in the transportation contexts routinely have been treated as common carriers.¹⁷⁴ Likewise, firms holding effective monopolies or oligopolies in

166. See Yoo, *The First Amendment*, *supra* note 14, at 466-68.

167. This notion of common carriers rhymes to some degree with the notions of essential facilities and a duty to deal in antitrust law. See Erik Hovenkamp, *The Antitrust Duty to Deal in the Age of Big Tech*, 131 YALE L.J. 1483, 1487 (2022).

168. See Yoo, *The First Amendment*, *supra* note 14, at 467.

169. *Id.* at 467-68.

170. See MAJORITY STAFF OF H. SUBCOMM. ON ANTITRUST, COM. & ADMIN. L. OF H. COMM. ON THE JUDICIARY, 117TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS, H.R. Doc. No. 116-25, at 370-71 (2022) [hereinafter HOUSE ANTITRUST FINAL REPORT].

171. *E.g.*, American Innovation and Choice Online Act, S. 2992, 117th Cong. (2021); Open App Markets Act, S. 2710, 117th Cong. (2021). Other bills stemming from the House Antitrust Report included the Merger Filing Fee Modernization Act, the Platform Competition and Opportunity Act, the Ending Platform Monopolies Act, and the Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act. See Press Release, Rep. Joe Neguse, Neguse-Buck Bipartisan Antitrust Enforcement Legislation to Be Marked Up in the House Judiciary Committee (June 22, 2021), <https://perma.cc/P3LS-G5VW>.

172. Candeub, *supra* note 13, at 398, 401.

173. Critiques of this complex issue are possible but beyond the scope of this Article.

174. Yoo, *The First Amendment*, *supra* note 14, at 467.

numerous sectors—including pharmacies, managed healthcare providers, office supply stores, eyeglass sellers, airlines, alcohol distributors, and candymakers¹⁷⁵—are not treated as common carriers. The notion that monopolists are common carriers (or conversely, that common carriers are monopolists) does not hold as a descriptive matter.¹⁷⁶

2. Statutory classification

Though characteristic classification dominates much discussion of the scope of common carriers, at least since the late nineteenth century, the designation of common carriers has shifted in practice toward a litany of sectoral statutes that divine their scope from specific, *sui generis* boundaries imposed by Congress and state legislatures. As Harold Feld puts it, “the law could [simply] require you . . . to act as a common carrier.”¹⁷⁷ As the Eleventh Circuit notes in *Moody*, some legislative approaches can be understood as efforts to “make” platforms into common carriers by way of positive statutory designation.¹⁷⁸

The Interstate Commerce Act (ICA) of 1887, for example, referenced “common carriers,” but applied only to those carriers that specifically transported passengers or property interstate by railroad and/or water.¹⁷⁹ The Hepburn Act of 1906 extended the scope of common carriers under the ICA to oil and certain other pipeline operators.¹⁸⁰ The Hepburn Act also enumerated specific coverage of additional railroad facilities including switches, spurs, tracks, terminal facilities, and various vehicles and storage facilities associated

175. See *Monopoly by the Numbers*, OPEN MKTS. INST., <https://perma.cc/W4RC-DQ5B> (archived Oct. 11, 2023).

176. Judge Oldham makes a more radical “monopoly” argument in *Paxton*, declaring that each social media platform “has an effective monopoly over its particular niche of online discourse.” *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 476 (5th Cir. 2022). However true or meaningful it may be that, in Judge Oldham’s leading example, “effectively monetiz[ing] . . . carpet cleaning instructional videos” requires “access to YouTube,” see *id.*, this mode of analysis treats literally any associative context capable of hosting discourse among two or more people, from churches to coffee shops to niche online forums, as a “monopoly” amenable to common carrier treatment. Judge Oldham offers no obvious limiting principle, and one of the scholarly articles that Judge Oldham cites articulates an elaborate eight-part framework for assessing platform market power that Judge Oldham does not even attempt to deploy. See Kenneth A. Bamberger & Orly Lobel, *Platform Market Power*, 32 BERKELEY TECH. L.J. 1051, 1054-55 (2017), cited by *Paxton*, 49 F.4th at 476 n.29.

177. See Feld, *supra* note 56.

178. See *NetChoice, LLC v. Moody*, 34 F.4th 1196, 1220 (11th Cir. 2022).

179. See Pub. L. No. 49-41, § 1, 24 Stat. 379, 379 (codified as amended in scattered sections of 49 U.S.C.).

180. See Pub. L. No. 59-337, § 1, 34 Stat. 584, 584 (codified as amended in scattered sections of 49 U.S.C.).

with transportation.¹⁸¹ The Mann-Elkins Act of 1910 further amended the ICA to specifically cover wired and wireless telegraph and telephone companies with interstate operations as common carriers.¹⁸²

After the Radio Act of 1912 first situated a licensing regime for radio communications within the Department of Commerce,¹⁸³ the Communications Act of 1934 shifted that authority to the newly created FCC.¹⁸⁴ The 1934 Act defined “common carriers” somewhat more expansively than the ICA and its amendments. However, the 1934 Act was still restricted to the communications sector, covering entities that “engaged . . . in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy,” and explicitly excluding radio broadcasters.¹⁸⁵

As uses of the telephone system evolved over the next several decades, the FCC began to struggle with the convergence of telephone lines and computer services. In the 1960s, the FCC initiated efforts to define the boundaries between regulated common carriers and unregulated computer services—a process which came to be known as the Computer Inquiries.¹⁸⁶ The FCC refined its common carrier regime with highly specific and technical refinements that effectively limited its coverage to the basic functions of telephone service.¹⁸⁷

181. *See id.*

182. *See* Pub. L. No. 61-218, § 7, 36 Stat. 539, 544-45 (1910) (codified as amended in scattered sections of 49 U.S.C.). Though the Mann-Elkins Act was the first law to formally treat telegraph companies as “common carriers” under the jurisdiction of the ICC, a range of eighteenth- and nineteenth-century federal and state laws had imposed various carriage duties on the telegraph companies (and before them, the Post Office). *See* Lakier, *supra* note 12, at 2309-25.

183. *See* Pub. L. No. 62-264, § 1, 37 Stat. 302, 302 (repealed 1927). The licensing regime later shifted to the Federal Radio Communication under the Radio Act of 1927. *See* Pub. L. No. 69-632, § 3, 44 Stat. 1162, 1162 (repealed 1934).

184. Pub. L. No. 73-416, § 1, 48 Stat. 1064, 1064 (codified as amended at 47 U.S.C. § 151).

185. *See* Pub. L. No. 73-416, § 3(h), 48 Stat. 1064, 1066 (codified as amended at 47 U.S.C. § 153(11)).

186. *See generally* Robert Cannon, *The Legacy of the Federal Communications Commission’s Computer Inquiries*, 55 FED. COMM’NS L.J. 167 (2003) (chronicling the history and legacy of the Computer Inquiries).

187. The first Computer Inquiry separated unregulated, non-common-carrier data processing services from regulated common carrier communications services. Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, 28 F.C.C. 2d 267, paras. 11-12 (1971). The Commission made explicit in the first Computer Inquiry that it was not commenting on whether data processing services *could* be treated as common carriers, only that it was not proposing to regulate data processing services. *Id.* para. 4. The second Computer Inquiry created a more familiar modern definition of “basic” common carrier services for transmitting voice and data and “enhanced” services that rode atop basic services, applying computer processing to the data being transmitted. Amendment of Section

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The Department of Justice’s modified final judgment in the antitrust lawsuit against AT&T distinguished between “telecommunications services” and “information services,”¹⁸⁸ loosely tracking the “basic” and “enhanced” categories of the second Computer Inquiry. Congress then codified those categories in the Telecommunications Act of 1996.¹⁸⁹ Consistent with the FCC’s earlier efforts, Congress maintained this highly technical distinction even in the Communications Act’s nominally open-ended definition of “common carriers.”¹⁹⁰

The rise of the internet, however, disrupted these categories. In 2004, the Supreme Court concluded in *National Cable & Telecommunications Ass’n v. Brand X* that the 1996 Act’s definitions were ambiguous when it came to coverage of ISPs as common carriers (“telecommunications services,” in the Communications Act’s parlance).¹⁹¹ Following *Brand X*, successive FCC administrations classified and declassified ISPs as common carriers as part of the battle over net neutrality rules.¹⁹²

While the classification of ISPs continues to be debated, the prospect of the FCC designating internet services as “common carriers” has not seriously extended beyond ISPs and network infrastructure providers.¹⁹³ While the Commission has also variously regulated voice over internet protocol (VoIP) services and text messaging services as analogs to the legacy telephone network, it has either not classified them,¹⁹⁴ declassified and deregulated

64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), 77 F.C.C. 2d 384, para. 5 (1980). The Commission maintained the same structure in the third Computer Inquiry. Amendment of Sections 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry), 104 F.C.C. 2d 958, para. 4 (1986).

188. *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 229 (D.D.C. 1982).

189. Pub. L. No. 104-104, § 3(a)(2), 110 Stat. 56, 58-60 (codified as amended at 47 U.S.C. § 153) (adding to Section 3 of the Communications Act of 1934 definitions for “information service,” “telecommunications,” “telecommunications carrier,” and “telecommunications service”).

190. *But see Nat’l Ass’n of Regul. Util. Comm’rs v. FCC*, 525 F.2d 630, 640 (D.C. Cir. 1976) (describing the Communications Act’s definition of “common carrier” as “sufficiently indefinite as to invite recourse to the common law of carriers to construe the Act”).

191. *See* 545 U.S. 967, 989 (2005).

192. *See supra* notes 30-36 and accompanying text.

193. *See* 2015 Open Internet Order, 30 FCC Rcd. 5601, paras. 376-378 (discussing the distinction between ISPs-as-common-carriers and other information services not treated as common carriage by the FCC). *But see* Safeguarding and Securing the Open Internet, FCC-23-83, at 148, 149 (2023) (dissenting statement of Comm’r Nathan Simington) (“The FCC hasn’t really addressed whether internet companies that aren’t ISPs could still be ‘common carriers’ under . . . Title II [of the Communications Act]. If they can, that should be the first place we go to protect free speech and consumer choice.”).

194. *See* Rob Frieden, *The Rise of Quasi-Common Carriers and Conduit Convergence*, 9 I/S: J.L. & POL’Y FOR INFO. SOC’Y 471, 488 (2014).

them,¹⁹⁵ or reached them through new regulatory categories not oriented around common carriage.¹⁹⁶ In *Moody*, the Eleventh Circuit read the Communications Act’s split between regulated, low-in-the-stack common carriers and unregulated higher-in-the-stack information services in tandem with Section 230.¹⁹⁷ Congress’s “recognition and protection of social-media platforms’ ability to discriminate among messages—disseminating some but not others—is strong evidence that they are not common carriers.”¹⁹⁸

Finally, Lakier and other scholars have identified and labeled a set of “quasi-common carriers”—non-common-carrier media companies subject to some limits on their ability to discriminate.¹⁹⁹ But as a classificatory matter, these *sui generis* regimes, like common carriage, have applied to specific industries, including newspapers,²⁰⁰ television and radio broadcasters,²⁰¹ and cable companies.²⁰² The presence of a recognized range of quasi-common carriers further undermines the coherence of the common carrier classification.

195. Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service, 33 FCC Rcd. 12075, para. 2 (2018).

196. One example is the advanced communications services accessibility regime for people with disabilities added by the Twenty-First Century Communications and Video Accessibility Act of 2010. Pub. L. No. 111-260, § 101, 124 Stat. 2751, 2752 (codified as amended at 47 U.S.C. § 153(1)) (defining “advanced communications services” to include interconnected and non-interconnected VoIP services, electronic messaging services, and interoperable video conferencing services); see 47 U.S.C. § 617. See generally Reid, *supra* note 1, at 627-28, 635, 644-45 (reviewing the FCC’s advanced communications services rules). The FCC recently clarified the coverage of contemporary video conferencing services as advanced communications services. See Access to Video Conferencing, FCC File No. 23-50, paras. 2-3, 28 (June 12, 2023), <https://perma.cc/QT7W-M4GF>.

197. See *NetChoice, LLC v. Moody*, 34 F.4th 1196, 1220-21 (11th Cir. 2022).

198. *Id.* This conclusion also casts doubt on Candeub’s “regulatory deal” thesis. See *infra* Part II.C. Relatedly, Section 230’s classificatory talisman—the “interactive computer service”—covers social media application-layer platforms as *information services*. See 47 U.S.C. § 230(f)(2). Information services are the *antithesis* of common carriers—a class of entities which the FCC is explicitly forbidden by the Communications Act to treat as common carriers. See *Verizon v. FCC*, 740 F.3d 623, 650-59 (D.C. Cir. 2014).

199. See Lakier, *supra* note 12, at 2317-19; Brent Skorup & Joseph Kane, *The FCC and Quasi-Common Carriage: A Case Study of Agency Survival*, 18 MINN. J.L. SCI. & TECH. 631, 649-50 (2017); Frieden, *supra* note 194, at 480; see also *infra* Part II.B.3 (discussing quasi-common carriers in more detail).

200. See FLA. STAT. § 104.38 (1971) (referring to “newspapers” without need for further elaboration); see also *Mia Herald Publ’g. Co. v. Tornillo*, 418 U.S. 241, 243, 254-58 (1974) (holding that FLA. STAT. § 104.38 violates the First Amendment’s guarantee of a free press).

201. See 47 U.S.C. § 153(6) (defining “broadcast station” to mean “a radio station equipped to engage in broadcasting”); *id.* § 153(7) (defining “broadcasting” to mean “the dissemination of radio communications intended to be received by the public”).

202. See 47 U.S.C. § 522(6) (defining “cable service” to mean, in relevant part, “the one-way transmission to subscribers of . . . video programming”); *id.* § 522(7) (defining “cable system” to mean, in relevant part, “a facility[] consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is

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In short, the typical designation of information platforms as “common carriers” is a highly technocratic and sectoral exercise, the boundaries of which are imposed by Congress and implemented by relatively conservative expert agencies. As a result, application-layer platforms have thus far never been recognized as common carriers.

Against this backdrop, it should be no surprise that Texas and Florida resort to new statutory approaches to treat social media and other application-layer platforms as common carriers. Perhaps channeling Justice Thomas’s recent invocation of the longstanding proposition that “[i]f a word is obviously transplanted from another legal source, . . . it brings the old soil with it,”²⁰³ the Florida and Texas laws similarly declare, with no obvious effect, that “social media platforms” either “function as common carriers” (Texas)²⁰⁴ or “should be treated similarly to common carriers” (Florida).²⁰⁵ But both states quickly dig out of the “old soil” of common carrier law and create sui generis statutory regimes with idiosyncratic scopes.²⁰⁶ The Texas social media law defines covered “social media platform[s]” to include large “Internet website[s]” and “application[s]” that allow users to create accounts and communicate with each other,²⁰⁷ sweeping in a sizable proportion of the application layer. By contrast, the Florida law’s definition begins with a substantial chunk of Section 230’s “interactive computer services” definition: “any information service, system, . . . or access software provider that . . . [p]rovides or enables computer access by multiple users to a computer server.”²⁰⁸ The Florida law also singles out “Internet search engine[s]” and more broadly includes “an[y] Internet platform or . . . social media site,” but restricts its coverage to platforms with \$100 million in annual gross revenue or 100 million monthly users.²⁰⁹

designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community”). Some marginal ambiguities in the definition of “cable system” and its corresponding copyright law provision arose many decades later in the saga of Aereo, the failed tiny-individual-antenna startup. See Joe Mullin, *Aereo: Hey, We’re a Cable Company After All!*, ARS TECHNICA (July 10, 2014, 8:00 AM), <https://perma.cc/9CSQ-KU44>.

203. *Stokeling v. United States*, 139 S. Ct. 544, 551 (2019) (quoting *Hall v. Hall*, 138 S. Ct. 1118, 1128 (2018)); see Edward Lee, *Moderating Content Moderation: A Framework for Nonpartisanship in Online Governance*, 70 AM. U. L. REV. 913, 965 (2021).

204. H.B. 20, 87th Leg., 2d Called Sess. § 1(3) (Tex. 2021).

205. S.B. 7072, 27th Leg., 1st Reg. Sess. § 1(6) (Fla. 2021).

206. For a potentially contrary example in Ohio’s case against Google, see note 163 above and accompanying text.

207. Tex. H.B. 20 § 2 (adding TEX. BUS. & COM. CODE § 120.001(1)).

208. Fla. S.B. 7072 § 4 (adding FLA. STAT. § 501.2041(g)).

209. See *id.*

Florida’s definition also invokes the Communications Act’s “information services” category.²¹⁰

3. A classificatory journey with a First Amendment destination

Given that contemporary common carrier laws designate the scope of covered platforms by statutory declaration, it is unclear that any universal regulatory consequences flow from the classification of a platform as a common carrier in new legislation. Indeed, as the next Subpart details, most common carrier statutes also include their own “common carriage” rules that diverge from the common law.²¹¹

As the Eleventh Circuit notes in *Moody*, the main goal of the common carrier classification is typically not to borrow the substance of any regulatory regime, but rather to summon common carrier-specific First Amendment considerations.²¹² Indeed, in a recent article, Volokh seemingly abandons any classificatory effort, noting that he “do[es]n’t want to claim that platforms are ‘common carriers’ under existing law, or are precisely identical to common carriers.”²¹³ Rather, Volokh resolves First Amendment questions by analogizing information platforms to common carriers and quasi-common carriers.²¹⁴ While this Article takes up these First Amendment considerations

210. See *id.* Both laws fail to contend with the Communications Act’s bar on treating information services as common carriers. See *supra* note 198. But cf. *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 477 & n.32 (5th Cir. 2022) (“clarifying that certain provisions should not ‘be construed to treat interactive computer services as common carriers’” (quoting 47 U.S.C. § 223(e)(6))).

211. See *infra* Part II.B. Though Judge Oldham includes an aside on common law common carriage remedies in *Paxton*, 49 F.4th at 469-70, he focuses his actual analysis on the rules in Texas statute, see *id.* at 473-80. However, there may be limited contexts in which a “common carrier” designation is being assessed that formally relies on this characteristic approach to impose common law remedies. See, e.g., *Ohio ex rel. Yost v. Google LLC*, No. 21-CV-H-06-0274, 2022 WL 1818648, at *3-4 (Ohio C.P. May 24, 2022) (assessing the application of Ohio common carrier law to Google search based in part on whether Google “hold[s] out . . . to serve the public”). See generally Harold Feld, *Ohio Lawsuit to Declare Google a Common Carrier Not Obviously Stupid—But No Sure Deal Either*, WETMACHINE (June 9, 2021, 10:18 AM), <https://perma.cc/X8KX-6N6F> (providing more background and analysis of the Ohio case against Google). There may also be efforts to apply pre-internet state common carrier statutes to internet platforms. See Reid, *supra* note 67 (describing efforts to apply California’s common carriage law to email providers).

212. See *NetChoice, LLC v. Moody*, 34 F.4th 1196, 1220 (11th Cir. 2022).

213. Volokh, *supra* note 13, at 382. But see *id.* at 382-83 n.12 (pondering, in a lengthy footnote, the similarities between social media platforms and other common carriers).

214. See *id.* at 382-84.

below,²¹⁵ it is important to note here that some judges seem inclined to wield common carrier classification as cover for their First Amendment analyses.

One notable example of this dynamic is Justice Thomas's concurrence in *Knight*, which engages in a lengthy series of vague analogies that compare application-layer platforms to historical examples of common carriers and non-common carriers.²¹⁶ Though Justice Thomas's analogies are nominally directed toward classification, they wind toward the conclusion that common carrier status counsels against applying "heightened scrutiny" under the First Amendment.²¹⁷ Setting aside the merits and perils of Justice Thomas's analogical reasoning (which others have debated at length),²¹⁸ his approach is not intended to fit social media platforms into any common carrier regime that would warrant the imposition of carriage rules.²¹⁹ Justice Thomas laments that *Knight* "afford[ed] [the Court] no opportunity to confront" questions about the "extent to which [application-layer platform] power could lawfully be modified."²²⁰ Instead, Justice Thomas merely signals his belief that most application-layer platforms are sufficiently similar to his conception of common carriers to warrant disparate First Amendment treatment.²²¹

Justice Alito's dissent in *Paxton* likewise invokes the notion of classifying application-layer platforms as common carriers by making passing references

215. See *infra* Part II.C.

216. See *Biden v. Knight* First Amend. Inst., 141 S. Ct. 1220, 1224-25 (2021) (Thomas, J., concurring). Justice Thomas contends that platforms are similar to telephones, because both "lay information infrastructure"; dissimilar to newspapers, because newspapers do not "distribut[e] the speech of the broader public"; dissimilar to email, because control of the email protocol is not "highly concentrated" in a "small group of people"; similar to toll bridges and railroads, because using alternatives to Google, Facebook, and Twitter are like "swim[ming] the Charles River or hik[ing] the Oregon Trial" to a bridge-crosser or hiker. *Id.*

217. *Id.* at 1224.

218. See, e.g., Berin Szóka & Corbin Barthold, *Justice Thomas's Misguided Concurrence on Platform Regulation*, LAWFARE (Apr. 14, 2021, 10:30 AM), <https://perma.cc/JLA8-T9TD>; Sarah S. Seo, Note, *Failed Analogies: Justice Thomas's Concurrence in Biden v. Knight* First Amendment Institute, 32 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 1070, 1073-74 (2022). Compare Heather Whitney, *Search Engines, Social Media, and the Editorial Analogy*, KNIGHT FIRST AMEND. INST. (Feb. 27, 2018), <https://perma.cc/F2G4-V98X> (criticizing the use of analogies in these contexts), with Genevieve Lakier, *The Problem Isn't the Use of Analogies but the Analogies Courts Use*, KNIGHT FIRST AMEND. INST. (Feb. 26, 2018), <https://perma.cc/2RRH-C5WW> (responding to Heather Whitney's essay and arguing that "analogies play a vital role in free speech law"), and Victor Pickard, *The Great Reckoning*, KNIGHT FIRST AMEND. INST. (Feb. 24, 2022), <https://perma.cc/QT4-QZDB> (drawing "historical lessons" from media policy battles over broadcasters and publishers to apply to modern social media platforms).

219. See *supra* note 87 and accompanying text.

220. *Knight*, 141 S. Ct. at 1227 (Thomas, J., concurring).

221. See *infra* Part II.C.

to “hold[ing] . . . out” and economic power.²²² Like Volokh (whom he cites), Justice Alito draws analogies to common carriage and quasi-common carriage rules.²²³ But ultimately, Justice Alito appears most interested in invoking common carriage and quasi-common carriage classification to assess the First Amendment’s application to the Texas social media law.²²⁴

Finally, Judge Oldham’s lengthy effort to classify social media platforms as “common carriers” in *Paxton* seems aimed at bolstering, albeit obliquely, the Fifth Circuit’s First Amendment analysis.²²⁵ Judge Oldham seems particularly preoccupied with framing the social media platforms’ First Amendment arguments as more general “constitutional challenges” for the purpose of placing them in the company of historical challenges against nondiscrimination laws, which were raised “for the now-discredited purposes of imposing racial segregation and enforcing a *Lochner*-era conception of private property rights.”²²⁶ Ultimately, though, Judge Oldham channels the common carrier classification in service of the Fifth Circuit’s novel conclusion that the platforms are engaged in “censorship” unprotected by the First Amendment.²²⁷

B. The Incoherence of “Common Carriage”

However difficult it is to nail down a coherent scope of common carriers, the effort would be worthwhile if common carriers, despite their heterogeneity, were subject to a common set of rules. But further examination shows that there is also no consistent understanding of what treatment as a common carrier actually entails. That is, we likewise lack a coherent notion of *common carriage*.

Indeed, many of the judicial arguments focused on the First Amendment implications of common carrier classification implicitly concede the incoherence of common carriage by forgoing any discussion of whether particular regulations are common carrier rules.²²⁸ Nevertheless, Judge Oldham’s intervention in *Paxton*—rejecting social media platforms’ arguments that the complex provisions of the Texas social media law go behind

222. *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1717 (2022) (Alito, J., dissenting from grant of application to vacate stay).

223. *See id.* (citing Volokh, *supra* note 13).

224. *See id.* at 1716-17; *infra* Part II.C.

225. *See NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 473 (5th Cir. 2022).

226. *Id.* at 473, 479.

227. *Id.* at 479-80.

228. *See, e.g., NetChoice, LLC v. Moody*, 34 F.4th 1196, 1219 & n.17, 1220 (11th Cir. 2022) (assessing the categorization of social media platforms as “common carriers” and the First Amendment implications thereof but not discussing common carriage *rules*).

traditional notions of carriage²²⁹—warrants discussion. Judge Oldham declares that the Texas law “imposes ordinary common carrier nondiscrimination obligations, drafted to fit the particularities of the [p]latforms’ medium,” and that “we may not inter this venerable and centuries-old doctrine just because Twitter’s censorship tools are more sophisticated than Western Union’s.”²³⁰

Of course, there is a nominal relationship between most common carriage rules in that they tautologically encompass rules governing carriage—of goods, people, and speech or information. More broadly, as Lakier puts it, there are reasons to understand common carriage and quasi-common carriage rules as part of a broad tradition of non-First Amendment laws protecting freedom of speech.²³¹

But as this Subpart explains, even a cursory examination of actual post-Civil War common carriage and quasi-common carriage regimes for telecommunications services and information platforms demonstrates that what sort of carriage they require varies widely both as a matter of the technical affordances of individual platforms and as a matter of the normative commitments of legislatures and regulators. This Subpart starts with the telephone and telegraph, turns to network neutrality, and finishes with quasi-common carriage regimes for newspapers, broadcast, and cable. In revealing many conflicting points of comparison, it demonstrates that labeling a contemporary proposal to regulate application-layer platforms as a common carriage regime reduces to little more than an expression of a policy preference for the particular contours of the regime.

1. Telecommunications common carriage regulations

As Lakier chronicles, nineteenth-century telegraph laws imposed a range of nondiscrimination obligations on telegraph companies.²³² But these laws varied in the nondiscrimination provisions they applied. For example, the Telegraph Lines Act of 1888 had a general and broad nondiscrimination mandate, requiring telegraph companies to “operate their respective telegraph lines as to afford equal facilities to all, without discrimination in favor of or against any person, company, or corporation whatever.”²³³

By comparison, the original New York statute governing telegraph carriage focused on rooting discrimination out of the specific mechanics of telegram transmission, requiring telegraph companies to “transmit all

229. *Paxton*, 49 F.4th at 478-79.

230. *Id.*

231. See Lakier, *supra* note 12, at 2316-31.

232. *Id.* at 2320-25.

233. Telegraph Lines Act of 1888, ch. 772, § 2, 25 Stat. 382, 383 (codified at 47 U.S.C. § 10).

despatches [sic] in the order in which they are received.”²³⁴ The New York statute was not absolute, enabling telegraph companies to make special prioritization “arrangements . . . with the proprietors or publishers of newspapers” that allowed newspapers to jump the line “for the purpose of publication of intelligence of general and public interest.”²³⁵

Like the Telegraph Lines Act, the Interstate Commerce Act’s carriage mandate was quite general, declaring it “unlawful for any common carrier . . . to make or give any undue or unreasonable preference or advantage to any particular [entity], . . . or to subject any particular . . . [entity] to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.”²³⁶ The ICA also incorporated a prohibition on “unjust and unreasonable charge[s],” characterizing disparate charges for “like and contemporaneous service[s] in the transportation of a like kind of traffic” as “unjust discrimination.”²³⁷

But as the Supreme Court emphasized, the ICA did not apply to “all discriminations or preferences . . . only such as are unjust or unreasonable.”²³⁸ In the transportation context, for example, the Court made clear that (1) different classes of service (such as wholesale and retail) could be established, (2) discounts based on mileage could be applied, and (3) other nominally discriminatory arrangements could be recognized as “just discriminations and reasonable preferences.”²³⁹

In applying common carriage law to information platforms, the Communications Act incorporated a general prohibition qualified by similar limitations on “unjust or unreasonable discrimination” and “undue or unreasonable preference or advantage.”²⁴⁰ Again, as Lakier notes, “[w]hat counts as ‘unreasonable discrimination’ is not always clear.”²⁴¹ As the D.C. Circuit has explained, “[t]he generality of these terms—unfair, undue, unreasonable, unjust—opens a rather large area for the free play of agency

234. Act of April 12, 1848, ch. 265, 1848 NY Laws § 12, at 395. The New York statute also had a similar nondiscrimination mandate, requiring receipt and transmission of telegrams “from and for any individual . . . with impartiality and good faith.” *Id.* § 11, at 395.

235. *Id.* § 12, at 395.

236. Pub. L. No. 49-41, § 3, 24 Stat. 379, 380 (1887) (codified as amended in scattered sections of 49 U.S.C.).

237. *Id.* §§ 1-2, at 379-80.

238. *Interstate Com. Comm’n v. Balt. & Ohio R.R.*, 145 U.S. 263, 276 (1892).

239. *Id.* at 276-77.

240. Communications Act of 1934, Pub. L. No. 73-416, § 202(a), 48 Stat. 1064, 1070 (codified at 47 U.S.C. § 202(a)). The 1934 Act also included similar prohibitions on unjust or unreasonable charges. *Id.* § 201(b) (codified at 47 U.S.C. § 202(b)).

241. Lakier, *supra* note 12, at 2317 n.85.

discretion, limited of course by the familiar ‘arbitrary’ and ‘capricious’ standard in the Administrative Procedure Act.”²⁴²

The determination of unreasonable discrimination in the traditional telecommunications context has evolved into a three-part test. First, to constitute unreasonable discrimination, the service provided to two different users must be sufficiently “like.”²⁴³ This requirement gives the FCC substantial case-by-case discretion to recognize that firms can effectively discriminate between their users through the provision of materially different services.²⁴⁴ Second, to be unreasonably discriminatory, a “like” service must be provided to two different users under sufficiently “different terms and conditions.”²⁴⁵ This formulation preserves the possibility of discrimination through inconsistent application of the same vague terms and conditions. Third, a firm defending against an unreasonable discrimination claim may attempt to justify the disparate provision of a “like” service under different terms and conditions as “reasonable.”²⁴⁶

Although the parts of the test blur together and courts and the FCC have not been fastidious in applying it, the test has upheld various practices as not unreasonably discriminatory. Even the full denial of certain kinds of service is not unreasonably discriminatory in some circumstances, such as a phone company choosing to provide internet access services to some customers and not others,²⁴⁷ discriminating geographically between customers in different states,²⁴⁸ and discriminating by providing “customized package[s]” of services.²⁴⁹

The lack of clarity in the scope of unreasonable discrimination also arises in assessing the obligations of telecommunications companies with respect to illegal content. In 1940, the First Circuit recognized in *O’Brien v. Western Union Telegraph Co.* an implicit duty for telegraph companies to convey defamatory messages as part of their carriage obligations.²⁵⁰ But other courts have disagreed and held telegraph and telephone companies liable for *knowingly* transmitting

242. *Bell Atl. Tel. Cos. v. FCC*, 79 F.3d 1195, 1202 (D.C. Cir. 1996).

243. *Union Tel. Co. v. Qwest Corp.*, 495 F.3d 1187, 1195 (10th Cir. 2007) (citing *Panatronic USA v. AT&T Corp.*, 287 F.3d 840, 844 (9th Cir. 2002)).

244. *See Am. Broad. Cos. v. FCC*, 663 F.2d 133, 138-39 (D.C. Cir. 1980).

245. *Union Tel. Co.*, 495 F.3d at 1195.

246. *Id.*

247. *See Levine v. Bellsouth Corp.*, 302 F. Supp. 2d 1358, 1372 (S.D. Fla. 2004).

248. *Gen. Tel. Co. of the Sw. v. Robinson*, 132 F. Supp. 39, 44 (E.D. Ark. 1955).

249. *Competitive Telecomms. Ass’n v. FCC*, 998 F.2d 1058, 1060, 1064 (D.C. Cir. 1993).

250. *See* 113 F.2d 539, 542 (1st Cir. 1940); *see also Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1223 n.3 (2021) (Thomas, J., concurring) (citing *O’Brien* favorably); *Von Meysenbug v. W. Union Tel. Co.*, 54 F. Supp. 100, 101 (S.D. Fla. 1944) (same).

defamatory or otherwise illegal messages.²⁵¹ The scale of individual processing of telegraph dispatches—relatively small compared to messages processed en masse by social media platforms²⁵²—suggests that telegraph companies routinely had the opportunity to gain knowledge of illegality.

Because this knowledge standard was often satisfied to varying degrees and discrimination exercised as a result, courts had reason to draw somewhat finer distinctions when it came to the use of telecommunications by criminals or for illegal acts. In *Andrews v. Chesapeake & Potomac Telephone Co.*, the district court sought to draw a distinction between *unreasonable* discrimination against “person[s] of bad character” and *reasonable* discrimination against the *use of a service* “for criminal purposes.”²⁵³

On the other hand, courts widely recognized that telephone companies and wire services could terminate services used for illegal gambling and sometimes were required to do so under state or federal law.²⁵⁴ Some courts, conceptualizing common carrier telephone companies as public utilities,²⁵⁵ went further, contending that “the customer’s right to service . . . is conditioned upon his lawful use of the service” and that a carrier has the right or even the duty “to withdraw service to prevent illegal use of its facilities.”²⁵⁶

251. See, e.g., *Lesesne v. Willingham*, 83 F. Supp. 918, 924 (E.D.S.C. 1949); *W. Union Tel. Co. v. Lesesne*, 182 F.2d 135, 137 (4th Cir. 1950) (citing additional cases); *Lunney v. Prodigy Servs. Co.*, 683 N.Y.S.2d 557, 561 (N.Y. App. Div. 1998), *aff’d*, 723 N.E.2d 539 (N.Y. 1999) (same).

252. See generally Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1662-63 (2018) (characterizing platform moderation as a complex system of governance); Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV. 526, 536-38, 571 (2022) (characterizing content moderation as a “project of mass speech administration”).

253. 83 F. Supp. 966, 968 (D.D.C. 1949); see also *W. Union Tel. Co. v. Ferguson*, 57 Ind. 495, 498-99 (1877); cf. *People v. Brophy*, 120 P.2d 946, 952 (Cal. Dist. Ct. App. 1942) (questioning the authority of the California Attorney General to request the discontinuance of telephone service suspected of being used for illegal bookmaking); *Giordullo v. Cincinnati & Suburban Bell Tel. Co.*, 71 N.E.2d 858, 859 (Ohio C.P. 1946) (criticizing the telephone company for preemptively withholding telephone service at the behest of the police chief over suspicion of illegal gambling).

254. See *Palermo v. Bell Tel. Co. of Pa.*, 415 F.2d 298, 299 (3d Cir. 1969) (per curiam); *Cheyenne Sales, Ltd. v. W. Union Fin. Servs. Int’l*, 8 F. Supp. 2d 469, 474 (E.D. Pa. 1998) (“State and federal courts across the country have upheld a carrier’s termination of wire service upon notice from either a state or federal law enforcement official that a customer is using the service in furtherance of illegal gambling operations.” (citations omitted)); *id.* at 474 (“Moreover, we note that 18 U.S.C. § 1084(d) requires a carrier to ‘discontinue or refuse’ service without limitation to a customer upon notice from a federal, state, or local law enforcement agency.”); see also *Tel. News Sys., Inc. v. Ill. Bell Tel. Co.*, 220 F. Supp. 621, 635-36 (N.D. Ill. 1963), *aff’d*, 376 U.S. 782 (1964) (upholding the constitutionality of Section 1084(d)).

255. See *infra* Conclusion.

256. *Tel. News Sys., Inc.*, 220 F. Supp. at 632 (citations omitted); see also *Rubin v. Pa. Pub. Utils. Comm’n*, 177 A.2d 128, 131 (Pa. Super. Ct. 1962) (allowing preemptive discontinuance of

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When it comes to discrimination against classes of people, Lakier argues that “[t]here is no question” that at least some kinds of discrimination, including on the basis of protected classes such as race or gender, would be considered unreasonable.²⁵⁷ A well-known example supporting Lakier’s argument is the Alabama Supreme Court’s ruling against the telephone company in *Pike v. Southern Bell Telephone & Telegraph Co.* for denying phone service to May Pike based on a pretextual allegation that Louis Pike “operat[ed] a negro beer joint.”²⁵⁸ On the other hand, the courts have authorized the FCC’s categorical pricing discrimination in the provision of telephone services to press users.²⁵⁹

The FCC’s application of nondiscrimination rules also splintered over the attachment of *devices* to the telephone network. As part of AT&T’s iron-fisted control of the network, it sought to exercise gatekeeping control over any device that might be connected to the network. In the 1950s, AT&T sought and received an FCC ruling that the Hush-A-Phone—a simple rubber cup attached to a telephone, meant to protect a telephone user’s voice from carrying to others in the room—was “deleterious to the telephone system and injure[d] the service rendered by it” and that it would “not [be] unjust and unreasonable to forbid the use of Hush-A-Phone.”²⁶⁰ After a skeptical D.C. Circuit reversed,²⁶¹ the FCC proceeded to strike down AT&T’s ban of the Carterfone—a proto-wireless phone that could be connected to a landline—as unjust and unreasonable,²⁶² leading to the adoption of the Part 68 rules that would allow “foreign attachments” to the network so long as they did not cause harm.²⁶³

phone service based on the phone company’s “reasonabl[e] certain[ty]” that it would be used in the conduct of an illegal operation or business).

257. Lakier, *supra* note 12, at 2317 n.85.

258. 81 So. 2d 254, 258 (Ala. 1955). *But cf.* *Lopez v. N.J. Bell Tel. Co.*, 240 A.2d 670, 672, 675-76 (N.J. 1968) (determining that allegations of gambling activity that rose to the level of probable cause were enough for the state police and attorney general to arrange for discontinuance of phone service).

259. *Associated Press v. FCC*, 452 F.2d 1290, 1301-02 (D.C. Cir. 1971). In the transportation context, Volokh identifies *Mitchell v. United States*, 313 U.S. 80, 94-95 (1941), as standing for the proposition that common carriage rules barred race-based discrimination. Volokh, *supra* note 13, at 379 n.4; *see also* *Henderson v. United States*, 339 U.S. 816, 823-24 (1950) (same).

260. *Hush-A-Phone Corp. v. United States*, 238 F.2d 266, 268-69 (D.C. Cir. 1956).

261. *Id.* at 269.

262. *Use of the Carterfone Device in Message Toll Tel. Serv.*, 13 F.C.C.2d 420, 423 (1968).

263. *Proposals for New or Revised Classes of Interstate & Foreign Message Toll Tel. Serv. (MTS) & Wide Area Tel. Serv. (WATS)*, 56 F.C.C.2d 593, 613, 623 (1975); *see* 2015 Open Internet Order, 30 FCC Rcd., para. 61 & n.57 (providing background).

2. Network neutrality

These varying contours of unreasonable discrimination also can be found in more modern contexts, such as the carriage rules and customs that bind ISPs popularly known as “net neutrality.”²⁶⁴ In a 2004 speech, then-chairman of the FCC Michael Powell articulated what came to be known as the “Four Freedoms” to which internet users would be entitled: (1) freedom to access content; (2) freedom to use applications; (3) freedom to attach personal devices; and (4) freedom to obtain service plan information.²⁶⁵

After a decade of intense regulatory and judicial battles, Powell’s Four Freedoms wound their way into the FCC’s 2015 net neutrality rules, where the FCC articulated an elaborate framework for applying the Communications Act’s bar on discrimination to ISPs,²⁶⁶ banning blocking,²⁶⁷ throttling,²⁶⁸ and paid prioritization.²⁶⁹ The 2015 rules also included a more generalized prohibition on “unreasonably interfer[ing] with or unreasonably disadvantag[ing]” application-layer services from being made available and their “users’ ability to select, access, and use . . . the lawful Internet content, applications, services, or devices of their choice.”²⁷⁰

The neutrality rules track some similar mechanics from prior telecommunications regimes but also introduce several novel features. Tracking the telegraph and telephone regimes’ mixed treatment of discrimination against unlawful transmission and content, the FCC’s prohibitions on blocking and throttling are limited to discrimination against *lawful* content, applications, and services.²⁷¹ As the FCC highlighted, ISPs retained wide latitude to stop unlawful transmissions by network users, such as those associated with child sexual abuse material or copyright infringement.²⁷²

264. See, e.g., Daniel A. Lyons, *Net Neutrality and Nondiscrimination Norms in Telecommunications*, 54 ARIZ. L. REV. 1029, 1031 (2012) (criticizing net neutrality rules as “impos[ing] greater obligations on broadband providers than the law ever imposed on telephone companies”).

265. See Powell, *supra* note 29, at 11-12.

266. The 2015 net neutrality rules represent in part an implementation of the Communications Act’s common carrier jurisdiction, but also of various other parts of the Act. In 2010, the FCC primarily grounded its authority for ISP nondiscrimination (net neutrality) rules in Section 706(a) of the Telecommunications Act of 1996. See 2010 Open Internet Order, 25 FCC Rcd. 17905, para. 122.

267. 2015 Open Internet Order, 30 FCC Rcd. 5601, para. 15.

268. *Id.* para. 16.

269. *Id.* para. 18.

270. *Id.* para. 21.

271. *Id.* paras. 15-16.

272. *Id.* para. 113. The FCC highlighted that this carveout was relatively broad and covered “reasonable efforts” to limit both lawful transfers of *unlawful content* and inherently *unlawful transfers* themselves. *Id.* paras. 299, 304-05.

To harmonize its regime with other laws, the Commission also permitted non-neutral prioritization of certain applications, content, services, and users as necessary to “serve the needs of law enforcement and the needs of emergency communications and public safety, national, and homeland security authorities.”²⁷³ Channeling and expanding on the *Carterfone* ruling, the Part 68 rules, and the Computer Inquiries, the net neutrality rules also recognized that ISPs could block “harmful” devices from connecting to the network.²⁷⁴

More generally, the FCC moved away from the hyper-technical management of network operations by carving out any discrimination deemed “reasonable network management” from its bans on blocking, throttling, disadvantaging, and any other unreasonable interference.²⁷⁵ Again, the FCC struggled to pin down the difference between reasonable and unreasonable discrimination. The FCC noted the inherently complex technical operation of internet-connected networks,²⁷⁶ which makes distinguishing between legitimate traffic management and illegitimate discriminatory practices difficult in some cases. The FCC refused to adopt a detailed definition of “reasonable network management” and instead articulated a complex case-by-case approach.²⁷⁷

The FCC’s restriction of the net neutrality rules to ISPs allowing access to and from “all or substantially all Internet endpoints” raised at least the hypothetical prospect of “curated” ISPs.²⁷⁸ By virtue of engaging in a sufficient amount of discriminatory blocking, curated ISPs were thus not common carriers and were exempt from the common carriage requirements of the net neutrality rules.²⁷⁹ Neither the FCC nor the ISPs delineated precisely how much or what kind of discrimination might suffice to place an ISP beyond the FCC’s common carrier regime and thus render its discrimination immune from the common carriage rules.²⁸⁰

273. *Id.* paras. 300-03.

274. *See id.* para. 105 & n. 240.

275. *Id.* paras. 32-34.

276. *See id.* para. 96.

277. *Id.* paras. 215-24. As Candeub acknowledges in this context, “[d]efining non-discrimination is not simple.” Candeub, *supra* note 13, at 430 (citing Adam Candeub & Daniel McCartney, *Law and the Open Internet*, 64 FED. COMM’NS L.J. 493, 496 (2012)).

278. 2015 Open Internet Order, 30 FCC Rcd., para. 187; *see supra* notes 144-52 and accompanying text.

279. *See* Brent Skorup, *Here’s Why the Obama FCC Internet Regulations Don’t Protect Net Neutrality*, TECH. LIBERATION FRONT (July 12, 2017), <https://perma.cc/8NZH-4HXJ>.

280. *See supra* Part II.A.1. Isolated examples to the contrary occasionally arise, such as an Idaho ISP that blocked Twitter and Facebook to protest the deplatforming of Donald Trump. Karl Bode, *ISP Blocks Twitter and Facebook to Protest Anti-Trump ‘Censorship’*, VICE: MOTHERBOARD (Jan. 11, 2021, 10:29 PM), <https://perma.cc/9SX5-FHEQ>.

Counterintuitively, under the net neutrality rules, aggressive, editorial, and intentional discrimination might be more permissible than marginal economic discrimination such as zero-rating. This is because while *more* discrimination might violate common carriage *rules*, *enough* discrimination might defeat common carrier *classification*. These insights are critical when evaluating the application of common carriage rules to application-layer platforms, a topic revisited below.²⁸¹

3. Quasi-common carriage

Moving beyond standard common carriage regimes into the quasi-common carriage regimes discussed above reveals an even more colorful and disparate array of carriage rules. Though the conflation of this tradition with the narrower common carriage tradition is contestable, even a brief examination of quasi-common carriage—as with the examination of quasi-common carriers—challenges the notion of coherent carriage obligations that can be separated from the technical affordances of particular platforms.

Newspaper Right-to-Reply. Newspapers are not typically considered part of the quasi-common carrier canon because the Supreme Court cast a prototypical newspaper carriage regime aside as unconstitutional in *Miami Herald Publishing Co. v. Tornillo*.²⁸² However, the regime is worth examining because it illustrates how carriage can work differently given the unique technical affordances of a platform. In *Tornillo*, a relatively simple, one-paragraph 1971 Florida statute was triggered if a newspaper “in its columns, assail[ed] the personal character,” “charge[d] . . . with malfeasance or misfeasance in office,” “otherwise attack[ed] [the] official record” of any candidate for office, or “g[ave] to another free space” for any of the same.²⁸³ If triggered, the statute required the newspaper, at the candidate’s request, to “immediately publish free of cost any reply [the candidate] may make . . . in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to.”²⁸⁴

Again, a few novel aspects of the Florida right-to-reply statute are worth noting: First, the Florida statute’s carriage obligation was not automatically operative, but triggered only upon the newspaper’s decision to speak itself or to allow another speaker to do so freely.²⁸⁵ Next, the nature of the triggering

281. See *infra* Part II.B.4.

282. 418 U.S. 241, 258 (1974). The statute was ruled unconstitutional by a lower court in the only case prior to its being struck down by the Supreme Court. *Id.* at 247 n.7.

283. FLA. STAT. § 104.38 (1971).

284. *Id.*

285. See *id.*

speech was circumscribed to direct criticism of the user whose speech would be required to be carried; a speaker had no general right to demand carriage from a newspaper.²⁸⁶ Once triggered, the carriage obligation, in contrast to those of the phone and telegraph regimes, foreclosed any charge for the speaker's reply.²⁸⁷ Finally, the carriage obligation also required the speech to be *responsive* (a reply) and *proportional* (of similar conspicuousness and length as the triggering speech).²⁸⁸

Broadcast Television and Radio. Perhaps the most similar regime to the Florida right-to-reply statute—though one of far greater complexity—was the FCC's regulation of radio and television broadcasters under the Communications Act. As Yoo makes clear,²⁸⁹ the Communications Act of 1934 nominally prevented the FCC from regulating radio and television broadcasters as common carriers.²⁹⁰

However, Title III of the Act gave the Commission broad powers to implement carriage-like regulations of broadcasters. Title III generally allowed the Commission to “[p]rescribe the nature of the service to be rendered by each class of licensed stations,”²⁹¹ and to distribute and renew licenses based on a broad determination of whether doing so would serve the “public interest, convenience, or necessity.”²⁹² This effectively gave the Commission the authority to bless broadcast television and radio services as a sector.

More specifically, the Commission was assigned a variety of specific powers, starting with the authority to regulate “chain broadcasting,”²⁹³ under which it promulgated a variety of regulations restructuring the carriage relationships between licensed broadcast stations and the networks.²⁹⁴ Perhaps even more notable was the Supreme Court's surprisingly broad characterization of the Commission's role in managing the broadcast ecosystem in *National Broadcasting Co. v. United States (NBC)* in 1943:

[W]e are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act

286. *See id.*

287. *See id.*

288. *See id.*

289. Yoo, *The First Amendment*, *supra* note 14, at 471 n.48.

290. *See* Pub. L. No. 73-416, § 3(h), 48 Stat. 1064, 1066 (codified as amended at 47 U.S.C. § 153(11)).

291. *Id.* § 303(b), 48 Stat. at 1082 (codified at 47 U.S.C. § 303(b)).

292. *Id.* § 309(a), 48 Stat. at 1085 (codified as amended at 47 U.S.C. § 309(a)).

293. *Id.* § 303(i), 48 Stat. at 1082 (codified at 47 U.S.C. § 303(i)).

294. *See Nat'l Broad. Co. v. United States*, 319 U.S. 190, 198-209 (1943).

does not restrict the Commission merely to supervision of the traffic. *It puts upon the Commission the burden of determining the composition of that traffic.*²⁹⁵

NBC laid a foundation for the Commission to establish a wide array of carriage rules for broadcasters. As Lakier notes, Section 315 of the 1934 Act, much like the later Florida right-to-reply statute, required a broadcaster to afford “equal opportunities” for airtime to all competing candidates if it chose to offer airtime to one candidate.²⁹⁶ The Commission later expanded the provision to limit the rates for nonpolitical advertising and eventually to limit amounts to the lowest charged to any candidate in the vicinity of an election.²⁹⁷ Section 315 also forbade broadcasters from “censor[ing]” any content of a political candidate.²⁹⁸ Section 315 far exceeded the Florida right-to-reply statute’s modest responsive carriage obligations and all but affirmatively required television broadcasters to open up their airwaves to political messaging.

No discussion of FCC carriage rules would be complete without mention of the (in)famous Fairness Doctrine.²⁹⁹ As Victor Pickard describes, the Doctrine is the “most maligned and misunderstood . . . media policy ever enacted in the United States.”³⁰⁰ Motivated by concerns that broadcasters would use scarce frequencies only for self-serving purposes,³⁰¹ the FCC denied broadcast licenses to applicants who sought to broadcast material that did not serve the general public.³⁰²

295. *Id.* at 215-16 (emphasis added).

296. Communications Act of 1934, Pub. L. No. 73-416, § 315, 48 Stat. 1064, 1088; *see* Lakier, *supra* note 12, at 2317-18. Section 315’s coverage was later narrowed to avoid newscasts, interviews, documentaries, and on-the-spot coverage of candidates triggering the rule. *See* Communications Act Amendments of 1959, Pub. L. No. 86-274, § 1, 73 Stat. 557, 557 (codified at 47 U.S.C. § 315(a)).

297. *See* Communications Act Amendments of 1952, Pub. L. No. 86-274, § 11, 66 Stat. 711, 717 (codified as amended at 47 U.S.C. § 315(a)); Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 103, 86 Stat. 3, 4 (1972) (codified as amended at 47 U.S.C. § 315(b)).

298. Communications Act of 1934, Pub. L. No. 73-416, § 315, 48 Stat. 1064, 1088 (codified as amended at 47 U.S.C. § 315(a)).

299. For more comprehensive overviews of the fairness doctrine’s contours, *see* generally Victor Pickard, *The Strange Life and Death of the Fairness Doctrine: Tracing the Decline of Positive Freedoms in American Policy Discourse*, 12 INT’L J. COMM’N 3434 (2018); Thomas J. Houser, *The Fairness Doctrine—An Historical Perspective*, 47 NOTRE DAME LAW. 550 (1972); and Jerome A. Barron, *The Federal Communications Commission’s Fairness Doctrine: An Evaluation*, 30 GEO. WASH. L. REV. 1 (1961).

300. Victor Pickard, *The Fairness Doctrine Won’t Solve Our Problems—But It Can Foster Needed Debate*, WASH. POST (Feb. 4, 2021, 6:00 AM EST), <https://perma.cc/N66C-GGNP>.

301. *See* Houser, *supra* note 299, at 554-55 (describing the pre-FCC evolution of the Fairness Doctrine); *KFKB Broad. Ass’n v. Fed. Radio Comm’n*, 47 F.2d 670, 672 (D.C. Cir. 1931).

302. For example, the Doctrine forbade broadcasting solely oriented toward an applicant’s personal religious beliefs. *Young People’s Ass’n for the Propagation of the Gospel*, 6 F.C.C. 178, 181 (1938).

Though the FCC left broadcasters substantial discretion to choose radio guests,³⁰³ the Doctrine eventually evolved into what the Commission began to frame as a carriage obligation: “to provide full and equal opportunity for the presentation to the public of all sides of public issues[,] . . . presenting all sides of important public questions, fairly, objectively and without bias” under the Title III “public interest” standard.³⁰⁴ After gradually laying a foundation across a series of license proceedings for individual stations,³⁰⁵ the FCC formalized the Doctrine in 1949 and established an affirmative duty for broadcasters “generally to encourage and implement the broadcast of all sides of controversial public issues . . . over and beyond their obligation to make available on demand opportunities for the expression of opposing views.”³⁰⁶

The FCC eventually adopted a more specific personal attack rule that required licensees to send a script, tape, or summary of any “attack . . . made upon the honesty, character, integrity or like personal qualities of an identified person or group” within one week and provide a reasonable opportunity to respond.³⁰⁷ After this version of the Fairness Doctrine was upheld by the Supreme Court in *Red Lion Broadcasting Co. v. FCC*,³⁰⁸ various efforts were made to restrict and revitalize the Doctrine by the FCC and Congress,³⁰⁹ and the FCC formally repealed it in 2011.³¹⁰

Though the personal attack rule partially resembles the carriage requirements of the right-to-reply statute in *Tornillo*, the obligation to cover all sides of controversial issues is one of the most difficult-to-characterize carriage regimes of American law. Indeed, the Doctrine was so confusing that many broadcasters themselves did not know how to apply it, particularly in the two decades following the FCC’s 1949 *Editorializing by Broadcast Licensees* report.³¹¹

303. See Houser, *supra* note 299, at 556.

304. *Mayflower Broad. Corp.*, 8 F.C.C. 333, 340 (1940).

305. See Houser, *supra* note 299, at 556-58.

306. *Editorializing by Broad. Licensees*, 13 F.C.C. 1246, 1251 (1949).

307. 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679 (1969) (covering attacks made as part of “the presentation of views on a controversial issue of public importance,” excluding bona fide newscasts, interviews, documentaries, and on-the-spot coverage of candidates); see *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 373-75 (1969); Houser, *supra* note 299, at 561.

308. 395 U.S. at 400-01; see also *CBS, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 110-11 (1973).

309. See generally KATHLEEN ANN RUANE, CONG. RSCH. SERV., R40009, FAIRNESS DOCTRINE: HISTORY AND CONSTITUTIONAL ISSUES 4-8 (2011) (cataloging various efforts to overturn and repeal the Fairness Doctrine).

310. Amendment of Parts 1, 73 and 76 of the Commission’s Rules, 26 FCC Rcd. 11422, paras. 3-4 (2011).

311. See Houser, *supra* note 299, at 559, 560-61 & n.80. On the other hand, Pickard offers a defense of the Doctrine as having “encouraged sensitivity toward programming biases and provided local communities an important tool with which to hold broadcasters accountable.” Pickard, *supra* note 299, at 1.

The Doctrine’s expansive and confusing boundaries create a wide range of points of analogy for contemporary carriage laws.

Cable Television. One last quasi-common carriage regime is cable television’s must-carry rules—yet another significant variant of the carriage canon.³¹² In the 1940s, “community antenna” systems developed to retransmit content via large community antennas connected by cable to houses in mountainous and remote areas that could not easily receive broadcast signals.³¹³ The FCC successfully sought to regulate the new cable industry by exercising ancillary jurisdiction rooted in its authority over television broadcasters.³¹⁴ On a similar track with the Fairness Doctrine’s goal of shaping the content on broadcast radio and television, one of the FCC’s cable regulations sought to require cable systems with 3,500 or more subscribers to develop the capacity to deliver twenty channels. Another objective was to make access channels available to public, educational, local government, and leased users based on demand.³¹⁵

In *FCC v. Midwest Video Corp.*, the Supreme Court concluded that requiring cable companies to open up their limited channel capacity on a nondiscriminatory basis was “plainly” a common carriage obligation that the FCC lacked the authority to impose on broadcasters or cable companies.³¹⁶ However, Congress restored the regime in the 1984 Cable Act, vesting the FCC and local franchising authorities with power to require a limited number of commercial and noncommercial access channels.³¹⁷ In the 1992 Cable Act, Congress went further, compelling cable operators to reserve some of their channel capacity to retransmit local broadcast stations via an elaborate framework that hinged on their channel capacity and subscriber base.³¹⁸

312. See generally Sari Mazzurco, *Internet Intermediary “Must Carry” Rules*, MARQ. LAW., Summer 2023, at 15, <https://perma.cc/E2A5-HEGZ> (comparing must-carry rules to common carriage regulation of social media platforms).

313. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 627 (1994) (*Turner I*).

314. *United States v. Sw. Cable Co.*, 392 U.S. 157, 177-78 (1968).

315. Amendment of Part 76 of the Commission’s Rules & Regulations Concerning the Cable Television Channel Capacity & Access Channel Requirements of Section 76.251, 59 F.C.C.2d 294, paras. 8, 40, 64 (1976).

316. 440 U.S. 689, 701-02 (1979). The Court’s conflation of common carrier status and common carriage rule calls to mind the rules-status tautology dynamic of the Title II classification of ISPs and net neutrality discussed above in Part II.A.1.

317. See Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2779, 2780-85 (codified as amended in scattered sections of 47 U.S.C.). See generally Robert F. Copple, *Cable Television and the Allocation of Regulatory Power: A Study of Governmental Demarcation and Roles*, 44 FED. COMM’NS. L.J. 1 (1991) (further detailing the 1984 Cable Act).

318. See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 4-5, 106 Stat. 1460, 1471-81 (codified as amended at 47 U.S.C. §§ 534-535). These provisions were scrutinized by the Supreme Court in *Turner I*, 512 U.S. at 626-27 (majority opinion); *id.* at 665-68 (plurality opinion), and ultimately upheld in *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 185 (1997) (*Turner II*).

4. Application-layer rules as common carriage rules

The history of common carriage reveals a wide range of possible government interventions into the decisions of platforms to carry or discriminate against users and content. Carriage rules are context sensitive, differing across distinct types of carriers to account for varying technological affordances. Carriage rules also are highly variable, even within a category of carriers, to accommodate a spectrum of policy goals.

Given these wide-ranging possibilities, it is nearly impossible to extrapolate from historical examples what a canonically correct carriage regime would be for application-layer internet platforms. The platforms vary widely in terms of their functionality and relationship to discrimination. Search engines, for example, are designed specifically to discriminate among pieces of content in terms of relevance.³¹⁹ Social media platforms have content moderation operations around multimedia speech and speakers that are so vast and complex that they have been compared to governance mechanisms of countries.³²⁰ Many more types of platforms exist, such as (1) electronic retail platforms whose moderation decisions also implicate physical goods,³²¹ (2) operating systems and application stores whose moderation decisions implicate software code,³²² and (3) new artificial intelligence platforms already navigating significant trust and safety issues.³²³

So, what are the possible contours of a common carriage regime for application-layer platforms? Following the formula “regulate *X* with *Y*,” where *X* is every application-layer platform and *Y* is every historical carriage or quasi-carriage regime, yields endless possibilities. Should Google be compelled, like a telegraph company, to deliver search results in some kind of rote order? Should Facebook be required, like a telephone company, to deliver all posts to all users? Or should its “many-to-many broadcast model”³²⁴ counsel toward a neo-Fairness Doctrine that requires exposing Facebook users to all sides of

319. See James Grimmelman, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 58 (2007) (noting an argument that “a search engine’s rankings are merely a claim about the engine’s subjective assessment of pages’ relevance to particular users’ queries”). *But cf.* Candeub, *supra* note 13, at 430, 431 & n.155 (describing the complexity of assessing discrimination in search results).

320. See Klonick, *supra* note 252, at 1599; Douek, *supra* note 252, at 538 & n.41.

321. See Lina M. Khan, Note, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 756 (2017).

322. See Ruddock & Sherman, *supra* note 158, at 7; Christoph Busch, *Regulating the Expanding Content Moderation Universe: A European Perspective on Infrastructure Moderation*, 27 UCLA J.L. & TECH. 32, 43-44 (2022).

323. See Billy Perrigo, *OpenAI Used Kenyan Workers on Less than \$2 per Hour to Make ChatGPT Less Toxic*, TIME (Jan. 18, 2023, 7:00 AM EST), <https://perma.cc/L2KA-VWJ6>.

324. Kate Klonick, *Speech Platforms—The Many-to-Many Broadcast Model*, MARQ. LAW., Summer 2023, at 11, <https://perma.cc/E2A5-HEGZ> (capitalization altered).

controversial issues of public import?³²⁵ Should Amazon be forced to carry listings for dangerous or illegal goods? Should Apple be obliged to preinstall known malware or apps that promote hate speech on every iPhone?

Rather than dwell on these possibilities, it is worth focusing on some of the proposals actually on the table. For example, Candeub calls for a “generalized nondiscrimination requirement of the sort already seen in network neutrality,” which Candeub argues “could apply not simply to broadband internet access but also to search and social media.”³²⁶

Unfortunately, Candeub’s approach of analogically deriving a rule highlights the extrapolation problem arising from applying a highly technical rule designed for one type of platform to another. Candeub selects a rule designed for ISPs, the conceptual application of which is hopelessly unclear in the context of social media and search platforms.

As a threshold matter, the FCC designed the general conduct rule not as a standalone provision but as a catchall intended to prevent creative workarounds to its more specific bans on blocking, throttling, and paid prioritization.³²⁷ Would a general conduct rule for social media and search platforms be accompanied by sweeping bans on blocking, throttling, and paid prioritization?

If so, what would those bans mean in the context of search and social media? Does a search engine “block” a result only by removing it from results altogether? Or is burying it sufficiently far down in a list that the typical user never reaches it constitute a block? Or is that throttling? Does a social media platform “throttle” by “amplifying” one user’s content to a greater degree than another?³²⁸ Would social media companies be barred from blocking any lawful content, no matter how awful?³²⁹ Beyond that, how would Candeub’s rule apply the FCC’s elaborate seven-factor test, specifically crafted with ISPs in mind?³³⁰

325. See April Glaser, *Bring Back the Golden Age of Broadcast Regulation: Especially for YouTube and Facebook*, SLATE (June 6, 2019, 9:34 PM), <https://perma.cc/LRK7-6RS4> (“Politicians who are thinking now about what to do about the mess that social media has become might find inspiration in policies that guided broadcast technology for decades . . .”).

326. Candeub, *supra* note 13, at 429-30.

327. See *supra* Part II.B.2.

328. See generally Daphne Keller, *Amplification and Its Discontents*, KNIGHT FIRST AMEND. INST. (June 8, 2021), <https://perma.cc/GAN8-9GGW> (providing background on the concept of amplification).

329. Brief Amicus Curiae in Support of Applicants by TechFreedom at 2, *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715 (2022) (No. 21A720) (describing disturbing content such as “posts that glorify terrorism, celebrate the Third Reich, encourage teen anorexia or cutting, depict children in sexually suggestive poses and settings, depict cruelty to animals, use racial slurs, and much more”). See generally Daphne Keller, *Lawful but Awful? Control over Legal Speech by Platforms, Governments, and Internet Users*, UNIV. CHI. L. REV. ONLINE ARCHIVE (June 28, 2022), <https://perma.cc/BP8F-D8Y3> (describing the concept of “lawful-but-awful” speech).

330. See 2015 Open Internet Order, 30 FCC Rcd. 5601, paras. 138-45.

Candeub does not say. Rather, he simply declares that “this would be [a] generalized antidiscrimination requirement” that “concededly . . . present[s] real challenges.”³³¹ According to Candeub, “discrimination on reasonable technical grounds” would be “perfectly acceptable,” as would discrimination for any “valid business or technical reason.”³³² But Candeub provides little elaboration on what the contours of these reasons might be, instead noting that an administrative agency would need to examine search algorithms for “fairness,” and that “simple de-platforming”—presumably, the act of kicking a user off a service—would be decided by unspecified “civil rights and employment law[s].”³³³ As for social media platforms’ moderation practices, Candeub suggests that “they can be analyzed under a reasonable justification standard” with contours likewise unspecified.³³⁴

While Candeub’s proposal is so vague and underdeveloped that it is difficult to evaluate its merits, Justice Thomas’s *Knight* concurrence includes essentially no proposal at all. Instead, Justice Thomas cryptically defines common carriage laws as any “that restrict the platform’s right to exclude.”³³⁵ The extent and nature of such restrictions are left to the imagination.³³⁶

Turning to state-level initiatives, the Texas social media law seemingly takes a different approach than Candeub’s proposal. The Texas law, at its core, prohibits “censorship”—inscrutably defined to include any action to “block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression”—of “a user, a user’s expression, or a user’s ability to receive the expression of another person based on . . . the viewpoint of the user or another person [or] the viewpoint represented in the user’s expression or another person’s expression.”³³⁷ Volokh likewise focuses on banning viewpoint discrimination in the context of social media platforms.³³⁸ But critics quickly pointed out that nearly every moderation action performed by a social media platform (or relevance

331. Candeub, *supra* note 13, at 430.

332. *Id.*

333. *Id.* at 431.

334. *Id.*

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

336. It is also worth noting in this context Ganesh Sitaraman’s proposal of an “American tradition of reasonable deplatforming.” Sitaraman, *supra* note 4, at 28 (capitalization altered). Though Sitaraman sees more coherence than I do, he taxonomizes a wide range of variables in the operation of and motivations for “deplatforming” provisions that vary in part on the specific approach to “deplatforming.” *See id.* at 29-33, 42-45.

337. H.B. 20, 87th Leg., 2d Called Sess. § 7 (Tex. 2021) (adding TEX. BUS. & COM. CODE §§ 143A.001(1), 143A.002(a)(1)-(2)).

338. Volokh, *supra* note 13, at 381.

determination performed by search engine) could nominally be framed as censorship or viewpoint discrimination.³³⁹

Practicalities aside, it is unclear what historical carriage regime Texas's prohibition is designed to replicate. It is not obvious that any historic carriage or quasi-carriage regime has ever focused specifically on barring viewpoint discrimination, which sits somewhere between more general nondiscrimination bans like those imposed on telecommunications services and more content-focused regimes such as newspaper right-to-reply and the broadcast Fairness Doctrine. No traditional information platform—whether telegraph, telephone, or internet—has enabled the kinds of many-to-many communications that occur on social media platforms. Yet the blunt ban on viewpoint discrimination is also not as narrowly targeted as a right-to-reply or equal-time requirement, nor as holistically aimed at shaping a media ecosystem as the Fairness Doctrine. As Justice Alito notes, the Texas law is “novel, as are [the platforms'] business models”³⁴⁰—and so is the law's position in the canon of carriage law.

The complex carriage provisions of the Florida social media law take a somewhat narrower approach. The Eleventh Circuit in *Moody* describes them as banning (1) candidate deplatforming; (2) post-prioritization or shadow banning algorithms for posts by or about candidates; and (3) content-based censoring, deplatforming, or shadow banning of “journalistic enterprises.”³⁴¹ The provisions also require the consistent application of censorship, deplatforming, and shadow banning standards.³⁴² As with the Texas law, it is difficult to align these provisions with any specific historical regime. The candidate deplatforming ban could be conceived as a distant cousin to the broadcast equal-time doctrine—but with an affirmative obligation to allow all candidates to speak. The “journalistic enterprise” provisions seem vaguely reminiscent of the must-carry provisions for cable television, but for all journalistic endeavors (above a certain size) and not just a few channels. The “posts about candidates” and consistency requirements appear to be novel constructions that reflect a set of policy goals crafted for unique affordances of social media platforms.

* * *

As with the scope of “common carriers,” legal scholars, policymakers, and courts again appear to lack any meaningful consensus on limiting principles

339. Mike Masnick, *Just How Incredibly Fucked Up Is Texas' Social Media Content Moderation Law?*, TECHDIRT (May 12, 2022, 9:30 AM), <https://perma.cc/MZ97-XC3D>.

340. *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1716 (2022) (Alito, J., dissenting from grant of application to vacate stay).

341. *NetChoice, LLC v. Moody*, 34 F.4th 1196, 1206 (11th Cir. 2022) (citations omitted).

342. *Id.*

for a coherent body of common carriage or quasi-common carriage rules. At most, there is a general sense that common carriage rules limit a platform's ability to discriminate against certain speech or users. Given the wide range of historical approaches and platforms to which they apply, it is no surprise that scholars and legislatures have crafted carriage regimes for application-layer platforms that vary widely in their requirements and lack any dispositive points of historical comparison.

C. The Incoherent First Amendment Law of Common Carriage

The incoherence of common carriers and common carriage concededly stands against the reality that the First Amendment can and must be applied to common carriage regimes. As this Subpart discusses, courts can and have drawn arguably coherent principles for applying the First Amendment to regulation of the broad range of platforms.³⁴³ And the justifications for classifying common carriers as such or imposing common carriage regulations may well be relevant to the First Amendment analysis.

But Justice Thomas's free-floating *Knight* concurrence notwithstanding, courts do not and cannot apply the First Amendment in the abstract. They apply the First Amendment to specific carriage regimes for specific classes of carriers. As the foregoing analysis shows, the carriers and carriage at issue vary widely. Thus, we should expect courts' analyses of the First Amendment issues to vary as well. As the Supreme Court stated in *Red Lion*, "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."³⁴⁴ And indeed they do, as technical, social, historical, and regulatory contexts change.³⁴⁵

Telephone and Telegraph. As Yoo describes, it is relatively difficult to locate First Amendment treatment of carriage regulations imposed on legacy communications common carriers because the case that the phone and

343. Lakier notes that "there is at least a strong suggestion in the cases that there is a constitutional meaning to being a common carrier, that it really matters for the First Amendment doctrine." TechFreedom, *supra* note 108, at 32:30.

344. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969).

345. In 2003, Yoo mounted a detailed argument to the contrary, focusing on the demise of the First Amendment carveouts justifying broadcast regulation in *Red Lion*, 395 U.S. at 399-401 (scarcity), and in *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978) (pervasiveness and accessibility). Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 248-49 (2003); see also Lakier, *supra* note 12, at 2372 n.366 (surveying additional literature). When presented with the opportunity to narrow *Pacifica*, the Supreme Court declined to do so in *FCC v. Fox Television Stations, Inc.* 567 U.S. 239, 258 (2012). Only Justice Ginsburg expressed interest in revisiting *Pacifica*, confirming the precedent's durability. *Id.* at 259 (Ginsburg, J., concurring in the judgment).

telegraph companies have First Amendment rights to discriminate is so weak that they seldom have found the temerity to assert them.³⁴⁶

Broadcast. In *NBC*, the Supreme Court took a sweeping view of the First Amendment latitude available for regulating broadcasters.³⁴⁷ The Court articulated what became known as the scarcity doctrine to justify relatively intrusive carriage measures.³⁴⁸ The Court doubled down in *Red Lion*, noting that the scarcity of the right to broadcast without interference justified the Fairness Doctrine's interventions into the broadcast ecosystem.³⁴⁹ The Court declared "[t]here is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all."³⁵⁰

Newspapers. Shortly after *Red Lion*, the Supreme Court struck down the comparatively modest Florida right-to-reply statute in *Tornillo*, concluding that the relative scarcity of space in a newspaper counseled in favor of applying the First Amendment.³⁵¹

Cable Television. In *Turner I*, the Court split the difference, determining that the must-carry rules discussed above were content-neutral and subject to intermediate scrutiny,³⁵² later upholding them as satisfying that scrutiny in *Turner II*.³⁵³

ISPs. Despite the common statutory lineage of telephone common carriage obligations and net neutrality, the First Amendment rights of ISPs have been bitterly disputed.³⁵⁴ In *United States Telecom Ass'n v. FCC*, the D.C. Circuit

346. See Yoo, *The First Amendment*, *supra* note 14, at 480-81 (citing cases and treatises); see also *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 741 (D.C. Cir. 2016) ("[T]he [carriage] rules impose . . . the kind of nondiscrimination and equal access obligations that courts have never considered to raise a First Amendment concern . . ."). Angela Campbell offers a detailed hypothetical treatment of the First Amendment rights of phone companies, concluding that "[r]equiring a telephone company to operate on a common-carrier basis probably does not violate its First Amendment rights." Angela J. Campbell, *Publish or Carriage: Approaches to Analyzing the First Amendment Rights of Telephone Companies*, 70 N.C.L. REV. 1071, 1145 (1992).

347. See *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 226-27 (1943).

348. See *id.* at 226 ("Unlike other modes of expression, radio inherently is not available to all. . . . Because it cannot be used by all, some who wish to use it must be denied."); see also *supra* Part II.B.3.

349. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388-92 (1969).

350. *Id.* at 392. The Court has never seen fit to formally revisit the validity of *NBC* or *Red Lion*. See *supra* note 345.

351. *Mia. Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256-58 (1974). But cf. *Calvert*, *supra* note 57, at 13-14 (noting the absence of a strict scrutiny analysis in *Tornillo*).

352. *Turner I*, 512 U.S. 622, 661-62 (1994).

353. *Turner II*, 520 U.S. 180, 224-25 (1997).

354. A First Amendment challenge was initially asserted against the FCC's 2010 rules, but the D.C. Circuit demurred after overturning the rules on other grounds. *Verizon v. FCC*, 740 F.3d 623, 634, 659 (D.C. Cir. 2014).

upheld the net neutrality rules over ISPs' contentions about the First Amendment, concluding that ISPs did not, as a factual matter, exercise editorial discretion.³⁵⁵ Yet this conclusion became the focus of the aforementioned debate between Judge Srinivasan and then-Judge Kavanaugh in separate opinions on the denial of en banc rehearing.³⁵⁶

To varying degrees and in different directions, Yoo, Lakier, and Volokh all try to salvage the notion of a First Amendment law of common carriage. But each of their endeavors only further undermines the notion by importing lines of First Amendment case law that do not involve common carriers or common carriage.

Yoo, who argues that common carriers should have strong First Amendment rights, rests on a line of First Amendment cases that he concedes have nothing to do with carriage regulations or the First Amendment rights of carriers to exclude or discriminate.³⁵⁷

Lakier, whose broader project argues that the First Amendment should be more overtly interpreted to accommodate rights-redistributive regulations, also imports First Amendment case law involving non-carrier shopping malls. Lakier supports her theory with a much wider range of non-carrier and non-carriage laws, including postal and worker speech protection laws.³⁵⁸

And Volokh, who makes the most aggressive case that carriage rules on application-layer internet platforms can be sustained under the First Amendment, bases his conclusion “chiefly on the strength of three precedents”—two of which involve non-carrier shopping malls and law schools—and variously cites nearly a dozen other non-carriage or non-carrier cases.³⁵⁹

None of this is to say that Yoo or Volokh are necessarily *wrong* about how courts might ultimately resolve the application of the First Amendment to application-layer platforms or regulatory regimes thereof, or to opine on the right way to resolve these cases. Nor is this a normative critique of Lakier's compelling project to reenvision the First Amendment. But it is telling that even in the leading theories that center “common carriers” and “common carriage” as holding some special significance for the First Amendment, the authors feel compelled to depart from the bounds of carrier and carriage doctrine—in some cases, quite significantly—to explain what's going on.

355. 825 F.3d 674, 743-44 (D.C. Cir. 2016).

356. See *supra* Part II.A.1.

357. Yoo, *The First Amendment*, *supra* note 14, at 482-84.

358. Lakier, *supra* note 12, at 2309-16, 2331-42, 2365-69, 2374-75.

359. Volokh, *supra* note 13, at 415-37 (including cases involving non-common carriage antitrust and compelled speech claims and non-common (or quasi-common) carrier shopping malls, government employees, students, license plates, parades, campaigners, antiabortion clinics, and schools).

The scholars' concessions to the messy practical inconsistencies of the common carriage canon likewise take root in contemporary First Amendment jurisprudence. In evaluating the Florida social media law in *Moody*, the Eleventh Circuit marched through what it called the "editorial-judgement cases"—*Tornillo* and *Turner*, adding in *Pacific Gas & Electric Co. v. California Public Utilities Commission*³⁶⁰ and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*³⁶¹—and distinguished Florida's Volokh-style arguments about *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), and *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*, 547 U.S. 47 (2006).³⁶² The Eleventh Circuit rejected the notion of common carriage's significance, concluding that "even [laws] bearing the terminology of 'common carri[age]' . . . should be assessed under the same standards that apply to other laws burdening First-Amendment-protected activity."³⁶³ The Eleventh Circuit seemingly sought to lay a foundation for Supreme Court review, citing then-Judge Kavanaugh's scathing dissent from the denial of rehearing en banc against the net neutrality rules in *United States Telecom Ass'n v. FCC* and Justice Thomas's pre-*Knight* contention in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC* that "[l]abeling [a regulatory regime as] a common carrier scheme has no real First Amendment consequences."³⁶⁴

The Western District of Texas took a similar approach to Texas's social media law in the first round of *Paxton*. Marshaling *Tornillo*, *PG&E*, and *Hurley* while engaging more seriously with the notion of common carriage's significance, the Western District concluded that "social media platforms are not common carriers."³⁶⁵ Even Justice Alito's dissent from the vacation of stay in *Paxton* followed a similar line of reasoning, retreating from the realm of common carriage formalism to contrast *Hurley* and *Tornillo* against *Pruneyard* and *Turner*.³⁶⁶

360. 475 U.S. 1 (1986) (plurality opinion) (finding compelled speech in a case about utility bills).

361. 515 U.S. 557 (1995) (finding compelled speech in a case about parades).

362. *NetChoice, LLC v. Moody*, 34 F.4th 1196, 1210-12, 1215-19 (11th Cir. 2022).

363. *Id.* at 1221 (alteration in original).

364. *Id.* (quoting *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 825 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part)); *see id.* (citing *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1321-22 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) ("[T]he Government cannot compel video programming distributors to operate like 'dumb pipes' or 'common carriers' that exercise no editorial control."); and *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 434 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc) ("Can the Government really force Facebook and Google . . . to operate as common carriers?") (alteration in original)).

365. *NetChoice, LLC v. Paxton*, 573 F. Supp. 3d 1092, 1107 (W.D. Tex. 2021).

366. *See NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1716-17 (2022) (Alito, J., dissenting from grant of application to vacate stay).

It may be tempting to recognize the Fifth Circuit’s decision in *Paxton* to uphold the Texas social media law as a departure from the traditional role of common carriage’s meaning in “telecom law” First Amendment cases.³⁶⁷ However, Judge Oldham’s extensive common carriage discussion is not part of the majority opinion.³⁶⁸ The most radical parts of the Fifth Circuit’s 2-1 majority holding do not address common carriage issues—and much of the analysis looks not so different, at least in form, from the Eleventh Circuit’s contextual treatment.

One extreme part of the Fifth Circuit’s holding in *Paxton* is its implication that the Supreme Court’s post-Civil War First Amendment doctrine *does not apply at all*. The Fifth Circuit chastises the social media platforms for “focus[ing] their attention on Supreme Court doctrine” instead of attending to the “original public meaning” of the First Amendment.³⁶⁹ It is curious, then, that the Fifth Circuit effectively excises from its First Amendment analysis any of the post-Civil War jurisprudence upon which Judge Oldham’s common carriage analysis relies.

Another part of the Fifth Circuit’s holding is its implication that the First Amendment itself does not apply. According to the Fifth Circuit, an original public meaning analysis reveals that the platforms engage in wholly unprotected “censorship,” not speech, when they moderate the content of their users.³⁷⁰ The dubious merits of that argument aside, it is unclear what work Judge Oldham’s characteristic common carriage analysis would perform, absent a valid threshold argument that the underlying regulation implicated the First Amendment.³⁷¹

On the other hand, woven into the Fifth Circuit’s conclusions is a lengthy effort to channel, analogize, and distinguish a wide range of Supreme Court precedent, separate and apart from Judge Oldham’s common carriage analysis. Across nearly twenty pages of analysis, the Fifth Circuit cites to a familiar group of cases—*Tornillo*, *Pruneyard*, *PG&E*, *Hurley*, *FAIR*, and *Turner*, among others—drawing distinctions and applying scrutiny.³⁷² Aside from its results,

367. *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 494 (5th Cir. 2022).

368. *See id.* at 444 n.*, 469-80, 493-94.

369. *Id.* at 452-54.

370. *Id.* at 450-54.

371. In defense, Judge Oldham summons a circular argument that the platforms’ supposed common carrier characteristics of holding out to the public and social and economic roles in facilitating other people’s speech mean that they do not speak. *See id.* at 479-80. It is unclear why these characteristics are significant when Judge Oldham’s own censorship-not-speech analysis for the majority focuses not on the characteristics of the platforms, but on the act of “eliminat[ing] speech.” *Id.* at 455.

372. *Id.* at 455-65, 480-85, 490-94.

there is little to distinguish its mode of analysis from that deployed by the Eleventh Circuit.

What significance does Judge Oldham’s common carriage analysis hold, then? It is telling that Judge Oldham scarcely grapples with the First Amendment consequences of the Texas legislature’s efforts to frame its social media law as a common carriage law. Indeed, the only significant connection to the First Amendment is a bumbling attempt to address then-Judge Kavanaugh’s argument in *USTA* that the FCC’s common carriage regulations for ISPs violated the First Amendment.³⁷³

* * *

It is worth revisiting Candeub’s “regulatory deal” argument, which mentions the First Amendment only in passing but implies that common carriage regimes can be framed as acceptable under the First Amendment through the lens of a deal between a platform and the government.³⁷⁴ The regulatory deal thesis rhymes with Yoo’s discussion of the conferral of common carriage status in exchange for immunity from liability, the assignment of exclusive franchises, and other protections against competitors.³⁷⁵

Candeub cites as a leading example the Kingsbury Agreement, an out-of-court settlement between AT&T and the government in which AT&T settled an antitrust suit in exchange for committing to interconnect small telephone networks to its own.³⁷⁶ Candeub also highlights the historical exchange between cable companies and localities, with favored access to easements and rights-of-way and exclusive franchises exchanged for public access and carriage obligations.³⁷⁷ Candeub likewise notes the similar exchange between broadcasters and the government trading licenses to broadcast in exchange for compliance with various interventions to shape their content.³⁷⁸

Candeub’s invocation of net neutrality as a “deal” is not compelling. He suggests that the FCC is “tolerat[ing] the market power of the broadband providers” in exchange for their nondiscrimination,³⁷⁹ despite the FCC’s reliance on the explicitly procompetitive premise of Section 706 of the

373. See *id.* at 477 (citing *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 418 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc)).

374. See Candeub, *supra* note 13, at 397; see also Yoo, *The First Amendment*, *supra* note 14, at 472-73 (discussing the related notion of a “quid pro quo” in common carriage law).

375. See Yoo, *The First Amendment*, *supra* note 14, at 472 & n.54 (cataloging cases and literature).

376. See Candeub, *supra* note 13, at 411.

377. See *id.* at 417.

378. See *id.* at 417-18.

379. *Id.* at 416.

Telecommunications Act of 1996 to craft the net neutrality rules.³⁸⁰ As Yoo observes, Congress has long since outlawed the grant of exclusive franchises to both telecommunications services and cable providers, and more generally, common carriage status is routinely assigned irrespective of a firm's monopoly status.³⁸¹

More problematic, though, is Candeub's choice, like Judge Oldham's, not to explicitly address common carriage's supposed significance for the First Amendment. It cannot be the case that the government simply can frame a carriage obligation as a "deal" and thereby avoid First Amendment scrutiny altogether on the grounds that a newly regulated platform implicitly has assented by continuing to provide the service. Yoo argues that the Supreme Court has established that quid pro quo arrangements must be "spelled out" in licenses and franchises, not inferred *ex post*.³⁸² Yet, for example, the FCC forbore from applying the Communications Act's entry regulations on ISPs in its 2015 network neutrality rules, thereby imposing carriage rules without a corresponding licensing requirement.³⁸³ Moreover, carriage obligations imposed on broadcast licensees and cable franchisees have routinely been challenged by licensees and franchisees under the First Amendment, and their arguments are rarely, if ever, resolved by merely contending that they have waived them by accepting a license or franchise.³⁸⁴

Candeub's framing of Section 230 "as a common carriage-type deal" presents a different problem: that the government provides immunity in exchange for requiring "nothing . . . at all" from the platforms.³⁸⁵ There is little doubt that Section 230 provides additional incentives to internet platforms in the form of immunity for their moderation decisions.³⁸⁶ But again, it is dubious that this conferral of immunity could be framed as a deal to obviate the application of the First Amendment if, as Candeub suggests, Section 230 was later supplemented with a carriage obligation.³⁸⁷ Platforms have been eligible

380. See 2015 Open Internet Order, 30 FCC Rcd. 5601, paras. 76, 282.

381. See Yoo, *The First Amendment*, *supra* note 14, at 473.

382. *Id.*

383. See 2015 Open Internet Order, 30 FCC Rcd. 5601, para. 493.

384. See, e.g., *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969) (acknowledging that "broadcasting is clearly a medium affected by a First Amendment interest" despite the licensed nature of broadcasting); *Turner I*, 512 U.S. 622, 636 (1994) (citing *Leathers v. Medlock*, 499 U.S. 439, 444 (1991)) ("There can be no disagreement on an initial premise: Cable programmers and cable operators . . . are entitled to the protection of the speech and press provisions of the First Amendment.").

385. Candeub, *supra* note 13, at 418.

386. See generally Eric Goldman, *Why Section 230 Is Better than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33, 34 & n.7 (2019) (surveying and critiquing literature to the contrary).

387. Candeub, *supra* note 13, at 429-33.

for Section 230 for more than twenty-five years, with no licensing or franchising requirement and no countervailing obligation. Moreover, Section 230's protections overlap to some degree *with the First Amendment*.³⁸⁸

The National Telecommunications and Information Administration's filings to the FCC on Section 230 refine Candeub's thesis to a slightly sharper point: Section 230(c)(2)(A) should be read narrowly to immunize only a limited class of moderation decisions, thereby forcing platforms to choose between broadly carrying most content *or* losing immunity under Section 230 for their moderation decisions.³⁸⁹ This approach would relegate Section 230(c)(2)(A)'s reference to "otherwise objectionable" to a gap filler for the preceding terms—"lewd, lascivious, filthy, excessively violent, harassing"³⁹⁰—thereby narrowing the scope of "good faith" moderation immunized under Section 230(c)(2)(A). The National Telecommunications and Information Administration's reply comments implied that platforms would no longer remain immune under Section 230(c)(2)(A) for "removing, for example, the accounts of self-proclaimed Nazis engaged in 'otherwise objectionable hate speech.'"³⁹¹

Setting aside the critiques of the arguments in comments before the FCC,³⁹² it remains unclear, even if adopted by courts, how reinterpreting Section 230 as Candeub suggests would transform Section 230 into a carriage law. Reinterpreting Section 230 might well transform it into a content-based (and potentially unconstitutional) incentive for platforms to moderate only certain types of content and carry others. And narrowing the scope of Section 230's broad immunity no doubt would affect platform behavior if upheld over an inevitable First Amendment challenge. But no amount of narrowing Section 230's immunity could transform it into an actual carriage mandate.³⁹³ And any subsequent carriage obligation, such as the Texas or Florida social media laws, still would be subject to independent First Amendment scrutiny regardless of the contours of Section 230.

388. See generally Note, *Section 230 as First Amendment Rule*, 131 HARV. L. REV. 2027 (2018) (arguing that the substance of Section 230's rule is required by the First Amendment).

389. See Kinkoph, *supra* note 52, at 31-38 (interpreting "otherwise objectionable"); *id.* at 38-40 (interpreting "good faith"); Reply Comments of National Telecommunications and Information Administration at 23-26, Section 230 of the Commc'ns Act of 1934, RM No. 11862 (Sept. 17, 2020) [hereinafter *NTIA Section 230 Reply Comments*]. See generally Candeub & Volokh, *supra* note 87, at 178-86 (providing additional details on the proposed interpretation).

390. 47 U.S.C. § 230(c)(2)(A).

391. *NTIA Section 230 Reply Comments*, *supra* note 389, at 26.

392. See generally *id.* (citing opposing comments).

393. See *So You Want to Reform Section 230*, BLAKE E. REID (Jan. 28, 2021), <https://perma.cc/8RHT-FBWD> ("The absence of Section 230 protection for an act or omission doesn't alone make that act or omission illegal.").

III. A Context-Sensitive Approach to Platform Regulation

Though the challenge of regulating application-layer platforms is a fundamentally normative and political one, the three-part framework outlined in Part II provides a helpful approach for thinking through the challenges of application-layer platform regulation. First, policymakers should assess in a granular fashion the scope of entities they wish to regulate by identifying common problems across those entities instead of trying to analogize those entities to historical examples of common carriers. Second, policymakers should turn to rules that are tailored to those problems and those entities instead of trying to analogize to historical examples of common carriage rules. Third, policymakers and courts should evaluate the viability of the rules under the appropriate level of First Amendment scrutiny.

A. Context-Sensitive Classification and Problem Diagnosis

Much of the recent scholarship, public policy, and jurisprudence surrounding common carriage has contemplated applying the same rules to entities regardless of their position in the internet's layer stack.³⁹⁴ But the foregoing analysis demonstrates that the common carriage tradition is marked by a diverse set of distinct classifications, with different rules in each context. As Annemarie Bridy and John Blevins have explained, a diverse classificatory approach sensitive to an entity's layer finds support in the broader internet policymaking tradition.³⁹⁵ Both Bridy and Blevins have emphasized the importance—both as a matter of the internet's technical architecture and as a matter of its legal history—of the difference between policy targeted at the network and physical layers and policy targeted at the application and content layers.³⁹⁶ In my view, an even more granular approach that addresses the multifarious problems that occur at all four layers of the stack—physical, network, application, and content—is warranted, even in service of chasing an overarching antidiscrimination goal.³⁹⁷ This is, in part, because the same problem can materialize in different ways at different layers of the stack.³⁹⁸

394. See, e.g., David McCabe, *One Idea for Regulating Google and Facebook's Control over Content*, AXIOS (Aug. 18, 2017), <https://perma.cc/GYX6-JFCG>; Lima, *supra* note 56; Frank Pasquale, *Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power*, 17 THEORETICAL INQUIRIES L. 487, 497-503 (2016).

395. See Annemarie Bridy, *Remediating Social Media: A Layer-Conscious Approach*, 24 B.U. J. SCI. & TECH. L. 193, 205 (2018); John Blevins, *The New Scarcity: A First Amendment Framework for Regulating Access to Digital Media Platforms*, 79 TENN. L. REV. 353, 355-57 (2012).

396. Bridy, *supra* note 395, at 201-13; Blevins, *supra* note 395, at 359-61.

397. See generally Reid, *supra* note 1, at 608-13 (reviewing the internet's layered stack); Reid, *supra* note 393 (urging a granular approach in the context of Section 230).

398. Cf. Kevin Werbach, *A Layered Model for Internet Policy*, 1 J. TELECOMMS. & HIGH TECH. L. 37, 38 (2002) (“[T]he best place to start is with the technical architecture of the Internet
footnote continued on next page”)

In reality, debates at the intersection of discrimination and carriage invoke fraught issues, including controversial speech from across political, social, and cultural spectra. Technocratic debates about telecommunications law cannot avoid the real-world consequences of policy decisions for the digital society that platforms underpin. A debate about carriers or carriage may in fact be a proxy for a broader social, political, and cultural battle, the participants of which are actually wrestling over the exercise of political power. Telecommunications and internet law experts, then, perhaps ought to acknowledge that debating the nature of carriers or carriage is not the only, or necessarily the best, way to address these broader issues.

Moreover, the common carriage tradition should lead us to recognize that there may be significant problems with platforms beyond issues of discrimination. For example, an examination of Title II of the Communications Act reveals a wide range of problems surrounding basic telecommunications services, ranging from unreasonable rates,³⁹⁹ transparency,⁴⁰⁰ mergers, consolidation, and vertical integration,⁴⁰¹ user privacy and competitive abuse of data,⁴⁰² harassment and abuse,⁴⁰³ accessibility for people with disabilities,⁴⁰⁴ spam,⁴⁰⁵ surveillance,⁴⁰⁶ cross-platform interconnection,⁴⁰⁷ universal service,⁴⁰⁸ reliability,⁴⁰⁹ and many more. In diagnosing problems across categories of platforms, policymakers and scholars should endeavor to identify and assess social issues beyond discrimination and consider whether they should be addressed in tandem with nondiscrimination rules.⁴¹⁰

itself, which differs in important ways from that of traditional telecommunications and broadcast networks.”).

399. See 47 U.S.C. § 201. See generally Tejas N. Narechania, *Convergence and a Case for Broadband Rate Regulation*, 37 BERKELEY TECH. L.J. 339, 340-45 (2022) (providing background on historical and contemporary rate regulation issues).

400. See 47 U.S.C. § 219.

401. See 47 U.S.C. §§ 221, 271, 272.

402. See 47 U.S.C. § 222.

403. See 47 U.S.C. § 223.

404. See 47 U.S.C. §§ 225, 255.

405. See 47 U.S.C. § 227.

406. See 47 U.S.C. § 229.

407. See 47 U.S.C. §§ 251, 256; cf. Howard Shelanski, *Toward More Direct Platform Interoperability*, MARQ. LAW., Summer 2023, at 21, <https://perma.cc/E2A5-HEGZ> (discussing interconnection and interoperability in the context of common carriage regimes).

408. 47 U.S.C. § 254.

409. 47 U.S.C. § 262.

410. Of course, just as they have for common carriage, scholars, advocates, and policymakers may make cases for more general, layer-neutral rules for other problems. Cf. Margot E. Kaminski, *The Case for Data Privacy Rights (or, Please, a Little Optimism)*, 97 *footnote continued on next page*

Even considering a seemingly trivial example of discrimination demonstrates the complex implications of carrier designation and carriage mandates and why applying them at a more granular level is critical. Consider how hypothetical discrimination against dog owners might materialize at different layers of the stack:

- *Physical Layer.* A local monopoly ISP refuses to provide internet access service to anyone with a city dog license.
- *Network Layer.* The same ISP blocks social media platforms dedicated to dog content.
- *Application Layer.* Facebook blocks all content related to dogs, while Twitter/X blocks prominent dog-related accounts like WeRateDogs.⁴¹¹
- *Content Layer.* A cat-loving Twitter/X user adds the word “dog” to their filter list and selectively blocks other users they know have dogs.

Of course, more granularity can be added to this basic approach. For example, policymakers, courts, and scholars might complicate the application layer to consider contexts in addition to general-purpose social media platforms:

- *Search Engines.* Google Search ranks cat-related content ahead of dog-related content in searches for “pets.”
- *Video Hosting.* YouTube and TikTok systematically promote cat-related videos over dog-related videos when selecting the next video to autoplay.
- *Online Retail.* Amazon displays ads for cat-related products in searches for dog-related products and refuses to carry dog food, while Craigslist and eBay bar postings for the sale or auction of used dog toys.
- *App Stores.* Apple and Google systemically delay approval for dog-related applications for iOS and Android devices, pretextually subjecting them to additional scrutiny for privacy and security problems.
- *Online Newspapers.* The *New York Times* refuses to publish dog-related human-interest stories, bars dog-related editorials, and removes dog-related comments from its comments section.
- *Community-Generated Encyclopedias.* Wikipedia editors refuse to permit the creation of a specific page for Toto from *The Wizard of Oz* on the grounds that dogs are not sufficiently noteworthy to warrant their own pages.
- *Limited-Purpose Social Networks.* A discussion forum dedicated to cat owners routinely bans users for posting pictures of their dogs.⁴¹²

NOTRE DAME L. REV. REFLECTION 385, 386 (2022) (making the case for generalized, individual data privacy rights).

411. See WeRateDogs (@dog_rates), X, <https://perma.cc/DEZ5-AXD7> (archived Oct. 20, 2023).

412. Policymakers and scholars might likewise delve into the increasingly posited “infrastructure” layer that sits between the network and application layers, providing nonnetwork, non-user-facing functionality used by both network and application platforms. See *supra* note 158 and accompanying text; see also Speta, *supra* note 13, at 3. But see Eric Goldman, *Common Carriage and Capitalism’s Invisible Hand*, MARQ. LAW., footnote continued on next page

- *Content Delivery Networks and Caching.* A server deployed at an interconnection point at the edge of an ISP's network refuses to store local copies of dog movies like *Marley and Me*, leading to slowdowns because those users must stream the movie from geographically distant servers.
- *DDoS Prevention.* Cloudflare refuses to provide its services to a dog discussion forum, allowing nefarious cat-loving hackers to launch a denial-of-service attack that knocks the forum offline indefinitely.
- *Web Hosting.* After the forum finds a new canine-friendly DDoS prevention service, Amazon kicks the forum off Amazon Web Services, forcing it to search for a new hosting provider.
- *DNS.* The Internet Corporation for Assigned Names and Numbers (ICANN) refuses to allow use of the .dog top-level domain, while registrar GoDaddy refuses to register other dog-related domain names.
- *Payment Processors.* Visa refuses to process payments for purchases of dog treats and other dog-related items from sites like pets.com.

Policymakers could construct further hypotheticals related to devices, internet browsers, and the like, further analyze platforms in terms of their constituent parts,⁴¹³ or even broaden the technology stack to include electricity, water, housing, and food. Specifics aside, the general idea is that a vast range of problems can materialize in different contexts, even with regard to a single antidiscrimination agenda.

Competing constituencies might disagree about the extent of the problems or whether they are problems at all, whether normatively or empirically. For example, an ISP refusing service on political grounds to all dog owners might present a quite serious social policy problem, disenfranchising many people from using the internet altogether, while an individual user blocking dog-related content on Twitter/X arguably presents no social policy problem at all.

Between the extreme positions that stakeholders might raise, policymakers would do well to debate the nature and extent of these problems. From a policy perspective, we might incorporate some of the characteristic considerations historically applied to common carriers. For example, the economic power present in each context might matter significantly: A dog owner facing discrimination by an ISP might well have no viable alternatives to access the internet, while a dog owner facing discrimination from a cat discussion forum can simply go to a dog discussion forum (or create their own). Likewise, some of the specific technical characteristics of a platform might

Summer 2023, at 25, <https://perma.cc/E2A5-HEGZ> (critiquing the coherence of the concept of infrastructure).

413. See Tejas N. Narechania, *The Stack in the Machine*, MARQ. LAW., Summer 2023, at 22, <https://perma.cc/E2A5-HEGZ>.

weigh in favor or against designation and help refine problem diagnosis⁴¹⁴—as would broader policy considerations.⁴¹⁵

Even in this trivial context, some of these problem-diagnosis debates are sure to be divisive. Some cat owners might well think that dogs are smelly, bark too much, and bite people and thus have no place on the internet. Some cat owners might have such strong convictions that their beliefs extend beyond the internet to a broader social agenda of barring dog ownership. Some dog owners might hold a strongly contrary view.

In consideration of the politically and normatively fraught nature of these debates, policymakers might channel the common carriage tradition by endeavoring to develop a detailed, technocratic record to support new legislative or regulatory proposals. Past approaches have included conducting extensive congressional hearings with parades of subject matter experts and affected communities, as happened in the lead up to the 1992 Cable Act,⁴¹⁶ the House’s recent antitrust hearings,⁴¹⁷ and extensive multistakeholder, agency-led development, such as the development of the Fairness Doctrine.⁴¹⁸ These hearings might lead us to unexpected consensus on the existence and nature of a discriminatory problem—or illustrate that our perspectives are more fractured than we thought. By contrast, ham-fisted consideration of these issues by nonexpert judges may lead to unpredictable and misinformed problem diagnoses.⁴¹⁹

B. Context-Sensitive Carriage Rules

If policymakers can arrive at a coherent consensus about an underlying social problem with some class of internet entities, they might then turn to developing rules. Just as the problems vary contextually by category of platform, solutions to those problems may need to vary quite widely. Returning to the dog owner example, if policymakers are convinced that dog-related discrimination is a problem worth addressing to the fullest extent possible, the rules to solve that problem might vary based on the technical affordances of each platform:

- *ISPs.* Policymakers might conclude at the physical layer that ISPs should and must serve everyone, dog owners included, through the deployment of

414. See Yoo, *Common Carriage’s Domain*, *supra* note 14, at 1007-25.

415. See, e.g., Frank Pasquale, *Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries*, 104 N.W. U. L. REV. 105, 107-10 (2010).

416. See *Turner I*, 512 U.S. 622, 632 (1994) (describing the years of hearings Congress undertook “on the structure and operation of the cable television industry”).

417. See HOUSE ANTITRUST FINAL REPORT, *supra* note 170.

418. See *supra* Part II.B.3.

419. See *supra* note 93 and accompanying text.

facilities and impose a universal service mandate. Policymakers might likewise conclude at the network layer that ISPs cannot discriminate against dog-related applications or content and impose a strict nondiscrimination regime.

- *Infrastructural Services.* Policymakers might bar content delivery and caching services from discriminating on the basis of dog-related content but might allow them to discriminate on the basis of popularity, only hosting the most popular videos (even if they are of cats).
- *Search Engines.* Shifting to specific application-layer contexts, policymakers might ban search engines, which are explicitly designed to discriminate on the basis of relevance, from affirmatively downranking dog content. This ban might apply where dog-related content is objectively relevant to user queries like “best dog leash.” However, it might include an exception permitting search engines to omit dog-related content where it is irrelevant to a query, such as with searches for “best fish tank.”
- *Online Retail.* Policymakers might require Amazon to display relevant listings in response to dog-related queries, as with search engines. But they might also compel Amazon to maintain business relationships with vendors of dog-related goods, while allowing for slower delivery of heavy dog-related items, such as fifty-pound bags of dog food, that require slower ground transportation.
- *Social Media Platforms.* Policymakers might ban general-purpose social media platforms from explicitly blocking dog-related content or removing accounts of dog owners. The ban might, however, allow more subtle and nuanced rules about how dog-related content could be treated by algorithms that determine how content is surfaced to individual users on their feeds.
- *Online Newspapers.* Policymakers might compel the *New York Times* to occasionally cover dog-related human-interest stories and make space for dog-related editorial columns, particularly if they provide the opportunity for cat owners to publish columns.
- *User Mandates.* Shifting to the content layer, policymakers might forbid users from using tools to filter out dog-related web and social media content.

Various constituencies would undoubtedly object to each of these mandates on distinct grounds. ISPs might complain about the expense of serving dog owners in rural areas or their desire to engage in lucrative zero-rating schemes to capitalize on the prioritized delivery of cat videos. Infrastructural platforms might insist that they do not want to lend the imprimatur of their businesses to dog-related services. Search engines might contend they should be able to highlight anti-dog ownership content from organizations like PETA as relevant responses to queries about dog leashes. Online retail platforms might contend that selling dog food contributes to environmental problems that are contrary to their corporate social responsibility initiatives. Social media platforms might argue that dog owners frequently post content that impugns cat owners, making their platforms inhospitable. Online newspapers might contend that dogs just aren’t

sufficiently important to warrant regular coverage. Individual users might contend that they just don't care about dogs.

Of course, as with problem diagnoses, these proposed solutions would have normative and political valences and could be debated through a wide range of technocratic lenses. The First Amendment would certainly be implicated, and policymakers would have to attend to constitutional issues to ensure their chosen policies could survive if enacted into law.

C. A Context-Sensitive First Amendment

Fortunately, a commitment to context sensitivity makes resolving First Amendment problems somewhat easier—or at least presents them more squarely. Though the First Amendment implicates the interests of individual users of platforms (both in their capacity as speakers and as listeners) and of the platforms themselves (in exercising editorial discretion), a simple starting point would be to interrogate more narrowly the editorial interests of platforms themselves.⁴²⁰ Recent Supreme Court jurisprudence casts doubt on the notion that most platforms serve as state actors that are directly subject to the First Amendment.⁴²¹

The question, then, as Ashutosh Bhagwat frames it, is whether platforms have editorial rights that are cognizable under the First Amendment.⁴²² As Bhagwat explains, “editorial rights can take a range of different forms, and can be interfered with in a variety of ways.”⁴²³ In the context of carriage and nondiscrimination, Bhagwat characterizes the “right to exclude information that the government would mandate” as a “negative editorial right[.]” that implicates a platform’s interest in conveying an overarching expressive message through its curatorial decisions.⁴²⁴ Bhagwat further observes that the right is not binary—i.e., not merely the right to exclude—but encompasses both “*how* to present [content] and what content to emphasize,” including the proactive surfacing of content to all or certain users versus making it available “only to active searchers.”⁴²⁵ The Eleventh Circuit’s treatment of “expressive conduct” cases in *Moody* supports Bhagwat’s framing.⁴²⁶

420. See Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. FREE SPEECH L. 97, 111-13 (2021).

421. See *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019).

422. Bhagwat, *supra* note 420, at 99.

423. *Id.* at 104.

424. *Id.* at 102.

425. *Id.* at 103.

426. 34 F.4th 1196, 1212 (11th Cir. 2022).

Different platforms have different editorial rights that might be infringed to varying degrees by similar rules—and courts should not shy away from that reality. For example, courts should be skeptical of a large, publicly traded ISP, whose primary goal is to make money by serving as many users as possible, asserting a cognizably expressive message in refusing to serve dog owners. Courts might likewise reject the idea that forced provision of access to social media platforms for dog owners would convey the platforms’ editorial imprimatur to content posted by dog owners, any more than any of the other wide range of (sometimes lurid and violent) internet services and content that its users access. At the top of the layer stack, by contrast, courts should object to requiring cat-loving internet users to consume dog-related content in which they are personally disinterested—if individuals cannot serve as their own editors, then courts have lost the First Amendment plot altogether. Moving incrementally down the stack, there are examples, such as dedicated discussion forums for cat owners, Wikipedia articles on cats, or online newspaper editorial columns, where platform operators could easily make the case that allowing dog content is antithetical to their editorial goals.

The strokes of the First Amendment get more complicated between these extremes. Are infrastructural providers capable of making expressive decisions not to carry? Jack Balkin says no (with the exception of refusing to carry illegal content).⁴²⁷ Yet, some providers like Cloudflare disagree—or do they?⁴²⁸ Search results, which make nonbinary decisions about how to rank content in terms of relevance, pose a maze of additional, thorny questions.⁴²⁹ Can courts find editorial messages in the complex, difficult-to-characterize operations of social media platforms,⁴³⁰ which sometimes offer vague commitments to political neutrality in congressional hearings⁴³¹ but pursue fiery defenses of their editorial rights in litigation?⁴³²

427. See Jack M. Balkin, *How to Regulate (and Not Regulate) Social Media*, 1 J. FREE SPEECH L. 71, 73-74 (2021).

428. See *supra* Parts II.A.1-.2; *supra* notes 159-61 and accompanying text.

429. See generally Grimmelmann, *supra* note 319 (outlining the complex dimensions of search engine operation).

430. Klonick, *supra* note 252, at 1601-03; Douek, *supra* note 252, at 528-34; see also Kyle Langvardt, *Can the First Amendment Scale?*, 1 J. FREE SPEECH L. 273, 292-96 (2021).

431. See, e.g., Lee, *supra* note 203, at 919-20.

432. See, e.g., Complaint for Declaratory and Injunctive Relief at 28, *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082 (N.D. Fla. 2021) (No. 21-cv-00220), 2021 WL 2176255 (“Content moderation . . . goes to the heart of [a platform’s] editorial judgment, just as it does when a newspaper like the *Miami Herald* decides whether to publish a letter to the editor.”).

Conclusion

This Article stops short of providing all the answers to the complex questions of regulating internet platforms. Moreover, scholars and courts have begun to move past carriage arguments to search for other answers. Scholars and courts have increasingly focused on public accommodations law,⁴³³ public utility law,⁴³⁴ public forum law,⁴³⁵ and, as Jack Balkin conceptualizes it, the law of the “public sphere,”⁴³⁶ or as Ganesh Sitaraman conceptualizes it, the law of “deplatforming.”⁴³⁷

While a full treatment of all these areas of law is beyond the scope of this Article, its call for caution around common carriage should raise similar flags for these other areas as well. As Feld observes, “common carriage” and “public utility” law—and, I would add, “public accommodations” and “public forum” law—are not wholly overlapping concepts.⁴³⁸ But these areas of law are equally amenable to the three-part framework this Article sets out for common carriage. Similar questions around the scope of public accommodations, public utilities, and public forums are likely to arise.⁴³⁹ As with common carriage, we should expect to see wide divergences within and across these bodies of law, both historically and as we attempt to apply them to information platforms.

More immediately, this Article provides three useful contributions to the brewing discourse around common carriage. First, it underscores that the talismanic invocation of “common carriers” and “common carriage” cannot neatly or accurately summarize the nuanced historical canon of U.S. common carriage regulation of information platforms. Second, it provides a three-part framework—separately considering the designation of platforms as carriers, the

433. See, e.g., *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1223-26 (2021) (Thomas, J., concurring); Yoo, *The First Amendment*, *supra* note 14, at 475-78 (surveying cases and literature); Volokh, *supra* note 13, at 383-84 & nn.15-17, 385-86 & nn.25-27 (same).

434. See, e.g., *Knight*, 141 S. Ct. at 1224 (Thomas, J., concurring) (referring to a “communications utility”); Volokh, *supra* note 13, at 382 n.12; Feld, *supra* note 56; K. SABEEL RAHMAN & ZEPHYR TEACHOUT, KNIGHT FIRST AMEND. INST., FROM PRIVATE BADS TO PUBLIC GOODS: ADAPTING PUBLIC UTILITY REGULATION FOR INFORMATIONAL INFRASTRUCTURE 5-8 (2020), <https://perma.cc/8NNE-98DW>; Evelyn Atkinson, *Telegraph Torts: The Lost Lineage of the Public Service Corporation*, 121 MICH. L. REV. 1365, 1407-14 (2023).

435. See, e.g., *Knight*, 141 S. Ct. at 1225 (Thomas, J., concurring); *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1717 (2022) (Alito, J., dissenting from grant of application to vacate stay); Feld, *supra* note 56; Volokh, *supra* note 13, at 416-17.

436. Balkin, *supra* note 427, at 72-73.

437. See Sitaraman, *supra* note 4, at 1.

438. See Feld, *supra* note 56.

439. By way of brief example from my work on disability law, there is a significant circuit split regarding the extent to which websites and applications can be cognized as places of public accommodation. See Reid, *supra* note 1, at 597-99 (discussing the circuit split).

imposition of carriage rules, and the evaluation of First Amendment limitations—that helps evaluate existing regimes. Finally, it demonstrates how that three-part framework can be used to develop new context-sensitive regimes that reflect the complex technical, social, and cultural features of the internet and how they interact with our evolving understanding of the First Amendment.