



THE FIRST AMENDMENT, COMMON CARRIERS,
AND PUBLIC ACCOMMODATIONS:
NET NEUTRALITY, DIGITAL PLATFORMS, AND PRIVACY

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Recent prominent judicial opinions have assumed that common carriers have few to no First Amendment rights and that calling an actor a common carrier or public accommodation could justify limiting its right to exclude and mandating that it provide nondiscriminatory access. A review of the history reveals that the underlying law is richer than these simple statements would suggest. The principles for determining what constitutes a common carrier or a public accommodation and the level of First Amendment protection both turn on whether the actor holds itself out as serving all members of the public or whether it asserts editorial discretion over whom to carry or host. This gives putative common carriers and public accommodations substantial control over their First Amendment status. The jurisprudence on privacy regulation, quasi-common carriers, non-common carriage services, and public accommodations confirms that the First Amendment protections they enjoy are substantial.

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INTRODUCTION

In recent years, prominent judges have placed increasing focus on the precise extent of common carriers' First Amendment rights. For example, the topic figured prominently in the debate over network neutrality, making an appearance in the D.C. Circuit's decision upholding the Federal Communications Commis-

sion's (FCC's) 2015 Open Internet Order¹ and in the exchange between the authors of that opinion and then-Judge Kavanaugh when the court denied the petitions for rehearing en banc.² More recently, Justice Thomas's opinion in *Biden v. Knight First Amendment Inst.* suggests that social media platforms such as Twitter could be considered common carriers or public accommodations, two types of entities that have historically been subject to greater limits on their right to exclude.³

The mode of analysis suggested by Justice Thomas naturally raises two sets of questions. First, when does the law permit an actor to be categorized as a common carrier or a public accommodation? Second, what are the First Amendment implications of placing an actor into one of those categories? The historical nature of the arguments advanced by the D.C. Circuit and Justice Thomas makes their validity turn largely on the provenance of these doctrinal questions.

I. WHAT CONSTITUTES COMMON CARRIERS AND PUBLIC ACCOMMODATIONS?

The necessary first step in the analysis is determining when the law regards an entity as a common carrier or public accommodation. Although neither category is susceptible to easy definition, the principles governing each end up being remarkably similar.

A. *Common Carriage*

The definition of a common carrier has long proven elusive.⁴ Justice Thomas's opinion in *Knight* provides a representative list of the types of considerations that have historically been used to define common carriers: market power, whether an industry is "affected with the public interest," whether the entity regulated is part of the transportation or communications industry, whether it receives countervailing benefits from the government, and whether the actor holds itself out as

¹ U.S. Telecom Ass'n v. FCC (*USTA*), 825 F.3d 674, 739–44 (D.C. Cir. 2016).

² Compare *id.* at 388–93 (D.C. Cir. 2017) (Srinivasan, J., joined by Tatel, J., concurring in the denial of the petition for rehearing en banc), with *id.* at 426–35 (Kavanaugh, J., dissenting from the denial of the petition for rehearing en banc).

³ 141 S. Ct. 1220, 1222–23 (2021) (Thomas, J., concurring) (agreeing with the decision to grant the petition for certiorari and remand the case with instructions to dismiss it as moot).

⁴ For an earlier exploration of these themes, see Christopher S. Yoo, *Common Carriage's Domain*, 35 YALE J. ON REG. 991, 994–97 (2018); Christopher S. Yoo, *Is There a Role for Common Carriage in an Internet-Based World?*, 51 HOUS. L. REV. 545, 552–63 (2013) [Yoo, *Role for Common Carriage*].

providing service to all.⁵ As Justice Thomas concedes, many of these definitions remain unsatisfactory.⁶

1. Monopoly power

One of the most frequently asserted definitions of common carriers turns on the presence of monopoly power. The *USTA* majority rejected this proposition⁷ while Justice Thomas's *Knight* opinion⁸ and the dissents in the D.C. Circuit decisions regarding the 2010 and 2015 Open Internet Orders⁹ accepted it. Scholars have long disputed whether common carriage depends on the possession of monopoly power. Although some commentators have asserted that natural monopoly constitutes the defining characteristic of common carriers, other scholars have found monopoly power not to be an essential aspect of common carriage.¹⁰

The history of how monopoly power entered the discourse of common carriage is documented admirably by Joseph Singer, who points out that historically the presence or absence of monopoly power played no role in determining whether an actor was a common carrier.¹¹ Instead, the monopoly theory was the brainchild of Bruce Wyman, who articulated it in a 1904 *Harvard Law Review* article attempting to reconcile the long history of restrictive regulation of common carriers with the emerging *Lochnerian* vision of freedom of contract and inviolable property rights in an attempt to stave off progressive calls for comprehensive regulation of all businesses.¹² Monopoly theory made a more comfortable fit with the

⁵ *Knight First Amendment Inst.*, 141 S. Ct. at 1222–23 (Thomas, J., concurring).

⁶ *Id.* at 1223, 1225.

⁷ *USTA*, 825 F.3d at 708.

⁸ *Knight First Amendment Inst.*, 141 S. Ct. at 1222, 1224 (Thomas, J., concurring).

⁹ *USTA*, 825 F.3d at 744–54 (Williams, J., concurring in part and dissenting in part); *Verizon v. FCC*, 740 F.3d 623, 663–66 (D.C. Cir. 2014) (Silberman, J., concurring in part and dissenting in part).

¹⁰ For interesting overviews of this debate, see Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 *YALE J.L. & TECH.* 391, 404–05 (2020); Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 *COLUM. L. REV.* 1323, 1332–34 (1998); James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 *FED. COMM. L.J.* 225, 255–58 (2002).

¹¹ Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 *NW. U. L. REV.* 1283, 1309, 1319–20, 1409 (1996).

¹² Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 *HARV.*

emerging classical conception of property than did holding out theory.¹³ Despite the validity of Burdick's and Adler's arguments that common carriage had historically never depended on monopoly power,¹⁴ the consonance of Wyman's views with the classical vision and with the emerging racial politics supporting broader rights to exclude,¹⁵ later bolstered by the emerging economic concept of natural monopoly,¹⁶ led his views to emerge as more influential.

Natural monopoly may well represent the most coherent theoretical justification for common carriage regulation. But Justice Thomas's argument is primarily historical, and viewed purely as a matter of history, the claim that common carrier status does not depend on monopoly appears to have the better of the argument. For example, railroads serving long-haul routes on which multiple providers competed for business were still regarded as common carriers notwithstanding the fact that they faced competition, as did cabs, inns, and trucks.¹⁷ This conclusion is reinforced by the fact that none of the standard judicial definitions of common carriage depend on the presence of market power.¹⁸

That said, the FCC has sometimes considered whether a firm "has sufficient market power to warrant regulatory treatment as a common carrier,"¹⁹ a conclusion endorsed by the dissenting opinions in the judicial decisions reviewing both

L. REV. 217, 232–40 (1904); see also Singer, *supra* note 11, at 1403–04, 1407.

¹³ *Id.* at 1410.

¹⁴ Edward A. Adler, *Business Jurisprudence*, 28 HARV. L. REV. 135, 148 (1914); Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 COLUM. L. REV. 514, 518–25 (1911).

¹⁵ Singer, *supra* note 11, at 1300, 1409–10.

¹⁶ On the emergence of natural monopoly as the justification for public utility regulation, see Manuela Mosca, *On the Origins of the Concept of Natural Monopoly: Economics of Scale and Competition*, 15 EUR. J. HIST. ECON. THOUGHT 317, 337–39 (2008).

¹⁷ See HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836–1937, at 131–48 (1991); Kearney & Merrill, *supra* note 10, at 1388–89; Thomas B. Nachbar, *The Public Network*, 17 COMMLAW CONSPECTUS 67, 96–100 (2008); Speta, *supra* note 10, at 259.

¹⁸ See, e.g., Nat'l Ass'n of Reg. Util. Comm'rs v. FCC (*NARUC II*), 533 F.2d 601, 608 (D.C. Cir. 1976); Nat'l Ass'n of Reg. Util. Comm'rs v. FCC (*NARUC I*), 525 F.2d 630, 641, 642 (D.C. Cir. 1976).

¹⁹ *V.I. Tel. Corp. v. FCC*, 198 F.3d 921, 925 (D.C. Cir. 1999) (internal quotation marks omitted) (evaluating an FCC order considering market power when applying the definition of common carriage).

the 2010 and 2015 Open Internet Orders.²⁰ The FCC also relied on the absence of market power in the 2018 Restoring Internet Freedom Order when reversing course and ruling that last-mile ISPs do not represent common carriers.²¹ This suggests that market power may have some role to play notwithstanding the historical evidence to the contrary.

2. Industries affected with a public interest

The Supreme Court has sometimes suggested that whether a company is a common carrier depends on whether it is “affected with a public interest,” using the language commonly associated with *Munn v. Illinois*.²² Those who invoke it overlook the fact that the Court abandoned it in *Nebbia v. New York*,²³ a conclusion the Court reinforced in the context of regulated industries in *Jackson v. Metropolitan Edison Co.*²⁴

A moment’s reflection makes all too clear the reasons why the Court “discarded”²⁵ this line of jurisprudence. As an initial matter, this doctrine is properly understood as a *Lochner*-era construct used to justify limited derogations from the strict freedom of contract and control of property that the Four Horsemen invoked to strike down a wide range of economic regulation.²⁶ The death of substantive due process protection as a strong limit on economic regulation eliminated the need for this doctrine and discredited it at the same time.²⁷

On a more practical level, the test has long been recognized as indeterminate. The *Munn* majority indicated that the category included industries such as ferries,

²⁰ See *supra* notes 9 and accompanying text

²¹ *Mozilla v. FCC*, 940 F.3d 1, 57–58 (D.C. Cir. 2019).

²² 94 U.S. 113, 126, 127, 129, 130, 139, 150, 152 (1876).

²³ 291 U.S. 502, 536 (1934).

²⁴ 419 U.S. 345, 353 (1974) (quoting *Nebbia*, 291 U.S. at 536).

²⁵ *Olsen v. Nebraska ex rel. W. Reference & Bond Ass’n*, 313 U.S. 236, 245 (1941).

²⁶ See, e.g., Barry Cushman, *Small Differences?*, 55 ARK. L. REV. 1097, 1100–01, 1100 n.12 (2002) (arguing that the Four Horsemen were more permissive of labor regulations for “businesses affected with a public interest” and “interstate common carriers”).

²⁷ Yoo, *Role for Common Carriage*, *supra* note 4, at 556; Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 333 (2003); Daniel F. Spulber & Christopher S. Yoo, *Mandating Access to Telecom and the Internet: The Hidden Side of Trinko*, 107 COLUM. L. REV. 1822, 1882–83 (2007).

wharves, warehouses, taverns, inns, mills, bridges, and turnpike roads.²⁸ This in turn prompted a complaint from Justice Field that it could as easily have included industries as diverse as housing, textile manufacturing, the construction of machinery, and the printing of books.²⁹ Subsequent decisions included such various fields as banking, fire insurance, and the wholesale marketing of ice.³⁰

The indeterminacy prompted grand judicial attempts³¹ and treatise-length analyses trying to synthesize the various factors into a coherent system.³² Finally, the *Nebbia* Court recognized that “there is no closed class or category of businesses affected with a public interest.”³³ *Jackson* reiterated this conclusion, holding that the concept of “affected with a public interest” was “not susceptible of definition, and form[ed] an unsatisfactory test.”³⁴ It thus comes as no surprise that Justice Thomas dismissed this concept as “hardly helpful, for most things can be described as ‘of public interest.’”³⁵ Commentators sympathetic to expanding regulation in this space have similarly noted the concept’s shortcomings and sought to justify common carriage on other grounds.³⁶

3. Transportation and communications

Justice Thomas further noted that “whatever may be said of other industries, there is clear historical precedent for regulating transportation and communications networks in a similar manner as traditional common carriers.”³⁷ Scholars

²⁸ *Munn*, 94 U.S. at 126–30.

²⁹ *Id.* at 140–41 (Field, J., dissenting).

³⁰ Yoo, *Role for Common Carriage*, *supra* note 4, at 556 (citing cases).

³¹ *Chas. Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522, 535 (1923).

³² FORD P. HALL, *THE CONCEPT OF A BUSINESS AFFECTED WITH A PUBLIC INTEREST* (1940).

³³ *Nebbia*, 291 U.S. at 536.

³⁴ *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974) (quoting *Nebbia*, 291 U.S. at 536).

³⁵ *Biden v. Knight First Amendment Inst.*, 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring).

³⁶ See, e.g., Adam Candeub, *Network Interconnection and Takings*, 54 SYRACUSE L. REV. 369, 382–83 (2004); Candeub, *supra* note 10, at 405; Susan Crawford, *First Amendment Common Sense*, 127 HARV. L. REV. 2343, 2366–68 (2014); Nachbar, *supra* note 17, at 79–81; Kevin Werbach, *The Network Utility*, 60 DUKE L.J. 1761, 1790–91 (2011).

³⁷ *Knight*, 141 S. Ct. at 1223.

have raised similar arguments in the past.³⁸

Such simple descriptive categories raise important conceptual questions even when they are descriptively accurate. As Susan Crawford notes, “But the mere existence of a long history of state involvement with transport does not necessarily tell us what the principled *basis* of that involvement is. Highways have ‘always been governmental affairs,’ but scholars have not been able to determine why.”³⁹

Perhaps the most eloquent statement of the importance of going beyond the superficial contours of a rule and understanding its theoretical foundations comes from Holmes’s *The Path of the Law*, in which he recounts the story of a Vermont justice of the peace who ruled in favor of a farmer who broke another farmer’s butter churn because “he had looked through the statutes and could find nothing about churns,” a problem Holmes saw being replicated “under the head of Railroads or Telegraphs.”⁴⁰ Simply gathering principles “under an arbitrary title which is thought likely to appeal to the practical mind” provides little purchase “to discern the true basis for prophecy.”⁴¹

The proper approach to understanding the law begins with “discover[ing] from history how it has come to be what it is,” but then proceeds with “consider[ing] the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price.”⁴² The problem posed with simply accepting the historical contours is that “[w]e have too little theory in the law rather than too much.”⁴³ Understanding the underlying principles is what guides the application of law to new situations and technologies. Relying on tradition without such an understanding devolves into a

³⁸ See Susan P. Crawford, *Transporting Communications*, 89 B.U. L. REV. 871, 885, 915 (2009); Nachbar, *supra* note 17, at 103–09; Speta, *supra* note 10, at 252–53, 255, 257; Richard S. Whitt, *Evolving Broadband Policy: Taking Adaptive Stances to Foster Optimal Internet Platforms*, 17 COMM.LAW CONSP. 417, 491–92 (2009); Tim Wu, *Why Have a Telecommunications Law? Anti-Discrimination Norms in Communications*, 5 J. ON TELECOMM. & HIGH TECH. L. 15, 30–31 (2006).

³⁹ Crawford, *supra* note 38, at 884.

⁴⁰ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 474–75 (1897).

⁴¹ *Id.* at 475.

⁴² *Id.* at 476.

⁴³ *Id.*

thin Burkean conservatism⁴⁴ deserving of Holmes’s classic retort, “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”⁴⁵ Measured by this standard, Crawford’s attempt to infer from the history of common carriage a vague “instinct” to subject providers of transport to nondiscrimination obligations⁴⁶ ultimately proves unsatisfactory.

A brief examination of the transportation and communication industries reveals numerous difficulties with relying on transportation and communications as the measure of common carriage. Regarding transportation, Joseph Kearney and Thomas Merrill note, “By the 1970s, this consensus [supporting nondiscrimination mandates for transportation] was crumbling,” led by the deregulation of the airlines, followed by railroads and trucking, and capped by the abolition of the iconic Interstate Commerce Commission.⁴⁷ For mass media communications, the Supreme Court has refused to apply common carriage regulation to broadcast and cable television even though both are forms of communications.⁴⁸ Even with respect to telephony, criticism of common carriage has led regulators to cut back on its scope since the 1970s⁴⁹ and to create numerous premium and special access tariffs that fall outside of common carriage.⁵⁰ The emergence of new technologies has caused increasing pressure on the supposed distinction between mass media and common carriage.⁵¹ The Internet has caused it to collapse entirely, as the

⁴⁴ EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (Frank M. Turner ed., Yale 2003) (1790).

⁴⁵ Holmes, *supra* note 40, at 469.

⁴⁶ Crawford, *supra* note 38, at 915–16.

⁴⁷ Kearney & Merrill, *supra* note 10, at 1335–37.

⁴⁸ See, e.g., CBS v. Democratic Nat’l Comm., 412 U.S. 94, 105–06, 110, 116 (1973) (broadcasting); FCC v. Midwest Video Corp., 440 U.S. 689, 700–02, 706–09 (1979) (cable). Congress has enacted statutes barring treating broadcasters and cable operators as common carriers. 47 U.S.C. §§ 153(11) (broadcasting), 541(c) (cable).

⁴⁹ Yoo, *supra* note 4, at 551–52, 583–601; Kearney & Merrill, *supra* note 10, at 1335, 1337–39.

⁵⁰ See, e.g., Ajit Pai, *The Story of the FCC’s Net Neutrality Decision and Why It Won’t Stand Up in Court*, 67 FED. COMM. L.J. 147, 158 n.64 (2015) (providing examples). As we shall see, the omission of premium services from common carriage played a key role in the First Amendment treatment of dial-a-porn. See *infra* note 186 and accompanying text.

⁵¹ For an observation of this phenomenon during the early years of convergence, see Howard A. Shelanski, *The Bending Line Between Conventional “Broadcast” and Wireless “Carriage,”* 97 COLUM. L. REV. 1048 (1997).

same medium can now transmit any form of communications.

The example animating Justice Thomas's concurrence vividly illustrates the difficulties in applying this rationale to boundary cases and emerging technologies. Social media companies are communications firms in some generalized way, but they arguably host content in much the same way as traditional publishers, more than they transmit content in the manner of traditional telecommunications firms. Terms such as "transportation" or "communications" provide little help in determining whether social media constitute common carriage. In the words of Adam Candeub offered in an article cited prominently by Justice Thomas, "It is a fair riposte to these ideas that they are descriptive at too general a level and fail to provide a convincing rule of decision."⁵²

4. Quid pro quo

Justice Thomas suggests that common carriage status may be a quid pro quo for "special government favors" such as "immunity from certain types of suits" or franchises and other regulations that protect the company from competition.⁵³ Courts and commentators have sometimes offered similar views.⁵⁴

Such explanations are generally unconvincing. Consider immunity from defamation suits. Such a quid pro quo is unnecessary for content that the government requires a firm to carry because of the simple unfairness of holding it liable

⁵² Candeub, *supra* note 10, at 405. He illustrates his point by asking, "How involved in transportation or communications must an industry be before it becomes a common carrier. Why private car services but not Uber? Why wireline phones but not wireless? Teasing out common carriage law's definitional criteria may be, in the end, desultory." *Id.*

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

⁵⁴ On limitation of liability, see, e.g., *W. Union Tel. Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 571 (1921); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC (NARUC I)*, 525 F.2d 630, 641-42 (D.C. Cir. 1976); Candeub, *supra* note 10, at 395, 403, 406, 412; Rob Frieden, *Schizophrenia Among Carriers: How Common and Private Carriers Trade Places*, 3 MICH. TELECOMM. & TECH. L. REV. 19, 19 (1997). On monopoly, see, e.g., J. GREGORY SIDAK & DANIEL F. SPULBER, *DEREGULATORY TAKINGS AND THE REGULATORY CONTRACT: THE COMPETITIVE TRANSFORMATION OF NETWORK INDUSTRIES IN THE UNITED STATES* 125 (1997); RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 168 n.15 (1985); B. Zorina Khan, *Antitrust and Innovation Before the Sherman Act*, 77 ANTITRUST L.J. 757, 780-81 (2011).

for content that the government says it cannot refuse.⁵⁵

Any quid pro quo for alleged monopoly status is undercut by the fact that common carriage status applies without regard to whether the firm has market power, as noted above.⁵⁶ And far from protecting monopoly status, modern communications statutes affirmatively forbid licensing authorities from issuing exclusive franchises.⁵⁷ The supposed quid pro quo associated with franchises is belied by the fact that the company at issue in the leading case on common carriage obligations, *Munn v. Illinois*,⁵⁸ was not operating under a license or franchise.⁵⁹ In fact, the Supreme Court selected that case specifically because the entity involved was a partnership that was not operating under a state corporate charter.⁶⁰

In any event, the Supreme Court has clearly established that any such quid pro quo must be spelled out in the license or franchise itself rather than being imposed after the fact.⁶¹ Indeed, the cable industry never acceded to common carriage regulation, instead agreeing to a complex bargain of franchise fees, coverage obligations, access mandates, and other requirements that contained only limited nondiscrimination requirements.⁶²

5. Holding out

Another most widely accepted definition of common carriage turns on whether a company holds itself out as serving the entire public.⁶³ Indeed, the lead-

⁵⁵ *Farmers Educ. & Coop. Union of Am. v. WDAY, Inc.*, 360 U.S. 525, 535 (1959). See generally PETER W. HUBER ET AL., *FEDERAL TELECOMMUNICATIONS LAW* § 14.6.7, at 1308 (2d ed. 1999).

⁵⁶ See *supra* Part I.A.1.

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

⁵⁸ 94 U.S. 113 (1876).

⁵⁹ Herbert Hovenkamp, *The Takings Clause and Improvident Regulatory Bargains*, 108 *YALE L.J.* 801, 813 (1999).

⁶⁰ *Id.* at 813–14.

⁶¹ For the classic statement, see *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 546 (1837). For a more modern statement, see *United States v. Winstar Corp.*, 518 U.S. 839 (1996).

⁶² See, e.g., 47 U.S.C. §§ 531 (public, educational, and governmental access), 532 (leased access), 534 (must carry), 542 (franchise fees), 543 (rate regulation), 548 (program access).

⁶³ For the seminal statement of this argument, see Burdick, *supra* note 14, at 518–25. For a modern restatement, see Singer, *supra* note 11, at 1304–21.

ing case on what constitutes common carriage treats holding oneself out as offering services to the public, as opposed to making individualized business decisions about services, as the crux of what makes a firm a common carrier.⁶⁴ As the D.C. Circuit stated in a different decision, “[T]he sine qua non of a common carrier is the obligation to accept applicants on a non-content oriented basis.”⁶⁵

The D.C. Circuit’s network neutrality jurisprudence reconfirmed this understanding. For example, the decision overturning the Obama Administration’s 2010 Open Internet Order described the “requirement of holding oneself out to serve the public indiscriminately” as the “basic characteristic” of common carriage.⁶⁶

That court followed a slightly different course when evaluating the 2015 Open Internet Order, resolving the issue on statutory rather than common law grounds.⁶⁷ The Communications Act explicitly provides that “[a] telecommunications carrier shall be treated as a common carrier . . . to the extent that it is engaged in providing telecommunications services,”⁶⁸ and wireless providers are subject to common carriage only if they fit the definition of “commercial mobile service” instead of “private mobile service.”⁶⁹ The Supreme Court had already determined that the definition of telecommunications service is ambiguous and thus entitled to deference under *Chevron*.⁷⁰ The D.C. Circuit held that the FCC’s revised interpretation of telecommunications statute ruling that last-mile broad-

⁶⁴ Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC (*NARUC I*), 525 F.2d 630, 641 (D.C. Cir. 1976).

⁶⁵ Nat’l Ass’n of Broad. v. FCC, 740 F.2d 1190, 1203 (D.C. Cir. 1984).

⁶⁶ Verizon v. FCC, 740 F.3d 623, 651 (D.C. Cir. 2014) (quoting *NARUC I*, 525 F.2d at 642).

⁶⁷ U.S. Telecom Ass’n v. FCC, 825 F.3d 674, 710–11 (D.C. Cir. 2016).

⁶⁸ 47 U.S.C. § 153(51).

⁶⁹ *Id.* § 332(c)(1)(A), (2).

⁷⁰ Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 989–97 (2005). Then-Judge Kavanaugh noted that the Supreme Court has sometimes refused to accord *Chevron* deference to “major agency rules of great economic and political significance.” U.S. Telecom Ass’n v. FCC (*USTA*), 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc); *accord id.* at 402–03 (Brown, J., dissenting from denial of rehearing en banc) (noting the Supreme Court’s refusal to apply *Chevron* to “‘major question[s]’ of deep economic and political significance”). The Supreme Court’s *Brand X* decision makes this position difficult to maintain with respect to the definition of telecommunications service.

band service, which the 2015 Order termed *broadband Internet access service* (“BIAS”), was sufficiently reasonable to justify upholding reclassifying BIAS providers as common carriers.⁷¹ For the communications laws, the difference between the common law and statutory definitions is largely nominal: The statute defines telecommunications service as telecommunications offered “for a fee directly *to the public*, or to such classes of users as to be effectively available directly *to the public*.”⁷² The definition of commercial mobile service takes an almost identical approach.⁷³

Holding out thus appears to be the most widely accepted common law definition of common carriage that courts apply in the absence of a specific statutory definition. The problem is the ease with which it can be evaded. Companies can avoid being treated as common carriers simply by defining their services as not being available to the entire public. This makes holding out, in the words of Thomas Nachbar, “a conspicuously empty” definition of common carriage.⁷⁴ In addition, it appears to be a necessary but not sufficient condition under modern communications law. Telecommunications offered to the public become non-common carriage services known as *information services* when they are combined with advanced functions such as storage or computer processing.⁷⁵

B. *Public Accommodations*

Public accommodations represent the second type of business identified by Justice Thomas whose right to exclude may be limited by the government.⁷⁶ That category, which he acknowledges is related to common carriage, “applies to companies that hold themselves out to the public but do not ‘carry’ freight, passengers, or communications”⁷⁷ or “provide[] ‘lodging, food, entertainment, or other

⁷¹ *USTA*, 825 F.3d at 701–04, 710–11.

⁷² 47 U.S.C. §§ 153(51) (emphasis added).

⁷³ *Id.* § 332(d)(1) (defining commercial mobile service to be “any mobile service . . . that is provided for profit and makes interconnected service available (A) *to the public* or (B) to such classes of eligible users as to be effectively available *to a substantial portion of the public*”) (emphasis added).

⁷⁴ Nachbar, *supra* note 17, at 93.

⁷⁵ 47 U.S.C. § 153(24).

⁷⁶ *Biden v. Knight First Amendment Inst.*, 141 S. Ct. 1220, 1223, 1225–26 (2021) (Thomas, J., concurring).

⁷⁷ *Id.* at 1223.

services to the public . . . in general.”⁷⁸ He acknowledges that “no party has identified any public accommodation restriction that applies” to social media.⁷⁹

1. The common law definition before the Civil War

The historical pedigree of the scope of public accommodations is somewhat more complicated than this proffered synthesis implies. Legal authorities generally acknowledge that the common law definition of public accommodation before the Civil War explicitly included innkeepers and common carriers.⁸⁰ Beyond these clear categories lay some ambiguity. These decisions typically relied on the English decision in *Lane v. Cotton*, which also includes smiths.⁸¹ Although some have suggested that it also included places of entertainment, members of the U.S. Supreme Court and the Massachusetts Supreme Judicial Court thought otherwise.⁸²

As Joseph Singer notes in his painstaking review of the history of public accommodations, beyond these clear statements with respect to innkeepers and common carriers, these early cases did not address the status of other types of businesses and offered no general principles delineating what types of entities were properly considered public accommodations.⁸³ The case law and leading treatises of the day, including Blackstone, Kent, and Story, among others, did not explicitly limit public accommodations to these two categories.⁸⁴ He also reviews and rejects rationales based on the fact that entities held licenses or franchises from the state,⁸⁵ were monopolies,⁸⁶ constituted a “public employment,”⁸⁷ or were

⁷⁸ *Id.* at 1225 (quoting BLACK’S LAW DICTIONARY 20 (11th ed. 2019)).

⁷⁹ *Id.* at 1226.

⁸⁰ *Bell v. Maryland*, 378 U.S. 226, 298 (1964) (Goldberg, J., concurring); *Lombard v. Louisiana*, 373 U.S. 267, 279 (1963) (Douglas, J., concurring); Singer, *supra* note 11, at 1290–93; *see also* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000) (concluding that at common law, public accommodations included inns and trains).

⁸¹ *See* *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 571 (1995) (citing *Lane v. Cotton* (1701), 88 Eng. Rep. 1458, 1464–65, 17 Mod. Rep. 472 (K.B.) (Holt, C.J.)); *Romer v. Evans*, 517 U.S. 620, 627 (1996) (quoting this language from *Hurley*).

⁸² *Lombard*, 373 U.S. at 279 (Douglas, J., concurring) (concluding that public accommodation did not include restaurants and “other places of amusement and resort”); *McCrea v. Marsh*, 78 Mass. (12 Gray) 211 (1858).

⁸³ Singer, *supra* note 11, at 1294, 1298, 1348.

⁸⁴ *Id.* at 1308–15, 1324.

⁸⁵ *Id.* at 1293, 1306, 1318–21, 1328–29.

necessities of travel⁸⁸ as overinclusive or inconsistent with the caselaw. The most plausible explanation and the one on which U.S. courts relied most often, in Singer's opinion, turned on whether the business held itself out as serving the public.⁸⁹

2. Statutory and judicial development following the Civil War

The scope of what constitutes a public accommodation began to narrow following the Civil War. Although many states initially passed statutes requiring places of public accommodation to serve the public without regard to race, many courts found that separate-but-equal arrangements satisfied this mandate, and Southern states largely repealed these statutes following the end of Reconstruction.⁹⁰ Many states, led by Massachusetts, clearly established that the right of access did not apply to places of entertainment.⁹¹ State courts began interpreting the concept of public accommodation narrowly, applying it only to places explicitly listed in civil rights statutes.⁹² Other states abolished the right of access altogether and replacing it with a general right to exclude.⁹³

The effect was to crystallize the understanding that the duties placed on public accommodations extended only to innkeepers and common carriers and not to other businesses.⁹⁴ The U.S. Supreme Court effectively condoned this understanding,⁹⁵ striking down state public accommodations laws as an unconstitutional burden on interstate commerce,⁹⁶ holding federal public accommodations legislation to be outside the scope of the Thirteenth Amendment,⁹⁷ and notoriously upholding the constitutionality of a state statute requiring separate-but-equal service

⁸⁶ *Id.* at 1293, 1319, 1329.

⁸⁷ *Id.* at 1322, 1330.

⁸⁸ *Id.* at 1322, 1329–30.

⁸⁹ *Id.* at 1292, 1294, 1298, 1315–18, 1331.

⁹⁰ *Id.* at 1299, 1352–86.

⁹¹ *Id.* at 1390–92, 1339–40, 1344, 1390 (citing, *inter alia*, *Bowlin v. Lyon*, 25 N.W. 766 (Iowa 1885); *McCrea v. Marsh*, 78 Mass. (12 Gray) 211 (1858)).

⁹² *Id.* at 1394–95.

⁹³ *Id.* at 1386–88, 1390.

⁹⁴ *Id.* at 1390.

⁹⁵ *Id.* at 1395–1401.

⁹⁶ *Hall v. DeCuir*, 95 U.S. 485 (1877).

⁹⁷ *The Civil Rights Cases*, 109 U.S. 3 (1883).

on railways.⁹⁸

The jurisprudence of the *Lochner* era reinforced the idea that businesses had a default right to exclude absent a statutory prohibition to the contrary.⁹⁹ That said, rights of access imposed on innkeepers and common carriers represented a powerful challenge to the classical conception of property, which presumes that owners are free to use their property as they see fit.¹⁰⁰ Revisionist commentators led by Bruce Wyman attempted to reconcile the limitations on the right to exclude imposed on public accommodations law with the property rights and freedom of contract underlying classical legal thought by reviving the franchise, monopoly, public function, and necessity theories of public accommodations.¹⁰¹ Singer succinctly points out that such rationales have no historical support and are inconsistent with the shape of the doctrine.¹⁰² For example, the fact that the right to access was imposed on innkeepers and common carriers in large cities that faced competition and not imposed on other types of providers in small cities that faced no competition suggests monopoly power was not the central principle animating public accommodations law.¹⁰³ Similarly, during the post-Civil War era, the state required most trades—not just innkeepers and common carriers—to obtain a license or permit from the government, making the need for a franchise overinclusive.¹⁰⁴

3. Modern statutes

Since the decline of the classical vision of law, public accommodations law has been dominated by statutes. Most notably, the Civil Rights Act of 1964 and the Americans with Disabilities Act provide defined lists of locales that constitute public accommodations.¹⁰⁵ At the same time, many states and municipalities have

⁹⁸ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁹⁹ Singer, *supra* note 11, at 1300, 1395, 1401–03.

¹⁰⁰ *Id.* at 1346.

¹⁰¹ *Id.* at 1392, 1404–06, 1409–10.

¹⁰² *Id.* at 1408–10.

¹⁰³ *Id.* at 1408.

¹⁰⁴ *Id.*

¹⁰⁵ 42 U.S.C. § 2000a(b)(1)-(3) (including inns, restaurants, gas stations, and places of entertainment); 42 U.S.C. § 12181 (including common carriers, innkeepers, restaurants, places of entertainment, retail stores, offices of physicians and lawyers, laundromats, barber shops, funeral par-

enacted public accommodations statutes,¹⁰⁶ while others have enacted legislation authorizing public accommodations to exclude customers at will.¹⁰⁷

Throughout this period, judicial decisions addressing these laws have generally proceeded from the premise that only innkeepers and common carriers have duties to serve the public.¹⁰⁸ These courts have strengthened this presumption by drawing a negative inference from the fact that new statutes tend to include explicit language enumerating the precise types of locales that constitute public accommodations.¹⁰⁹ Attempts to invoke the monopoly, franchise, and right to travel theories were no more convincing than during prior eras.¹¹⁰

C. Summation

Although Justice Thomas treats common carriage and public accommodations as distinct concepts, their contours are so similar that the distinction yields few insights. As an initial matter, the fact that common carriers are one of two types of entities universally accepted as constituting public accommodations means that the latter concept is completely inclusive of the former. In addition, Justice Thomas agrees with the historically sound conclusions that neither category turns on whether the entity in question possesses market power and that whether an industry is affected with the public interest provides little insight into differentiating common carriers from non-common carriers.¹¹¹

lors, hospitals, insurance agents, and schools).

¹⁰⁶ These enactments formed the basis for many high-profile civil rights cases. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 139 S. Ct. 1719, 1725 (2018); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 645 (2000); *Romer v. Evans*, 517 U.S. 620, 624 (1996); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 561 (1995); *N.Y. State Club Ass'n v. City of N.Y.*, 487 U.S. 1, 4–5 (1988); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 615 (1984).

¹⁰⁷ Singer, *supra* note 11, at 1438.

¹⁰⁸ *Id.* at 1439, 1441–43 (citing *Alpaugh v. Wolverton*, 36 S.E.2d 906, 908 (Va. 1946); *Uston v. Airport Casino, Inc.*, 564 F.2d 1216, 1217 (9th Cir. 1977); *Madden v. Queens Cty. Jockey Club, Inc.*, 72 N.E.2d 697, 698 (N.Y. 1947), with *Uston v. Resorts Int'l Hotel, Inc.*, 445 A.2d 370, 375 (N.J. 1982), serving as a sole counterexample); *accord Hurley*, 515 U.S. at 571; *Romer*, 517 U.S. at 627; *Bell v. Maryland*, 378 U.S. 226, 298 (1964) (Goldberg, J., concurring); *Lombard v. Louisiana*, 373 U.S. 267, 279 (1963) (Douglas, J., concurring).

¹⁰⁹ Singer, *supra* note 11, at 1441, 1443–44.

¹¹⁰ *Id.* at 1441, 1443–46.

¹¹¹ *Id.* at 1223, 1225 (Thomas, J., concurring).

As a historical matter, the most restrictive interpretation is that public accommodations include only innkeepers and common carriers. Scholars looking for a more conceptual foundation have synthesized a test that is remarkably similar to one developed for common carriers: whether the firm holds itself out as providing service to all members of the public or whether they make individualized business decisions about who to serve. This definition necessarily excludes any services over which providers wish to exert business judgment over who to carry.

Whatever the propriety of that synthesis, the common law definition of public accommodation has become even more restrictive over time. The modern view holds that any expansion beyond the traditional categories of innkeepers and common carriers requires the enactment of positive law. This includes statutory definitions that explicitly refer to common carriage¹¹² or ad hoc access regimes often dubbed quasi-common carriage, which are discussed below.¹¹³

II. WHAT FIRST AMENDMENT PROTECTIONS DO COMMON CARRIERS AND PUBLIC ACCOMMODATIONS ENJOY?

Determining that an entity may or not be a common carrier or public accommodation does not end the inquiry. The government's ability to impose greater restrictions on digital platforms depends on the extent to which the platforms are protected by the First Amendment. Justice Thomas's concurrence proceeds from the assumption, again based largely on history, that neither category enjoys much constitutional protection against being required to carry other people's speech. But a closer examination reveals that the law provides greater protection than he suggests.

A. Common Carriage

Although the Supreme Court has never clearly articulated the level of First Amendment protection accorded common carriers, it has hinted that the level is relatively low.¹¹⁴ For example, in *FCC v. League of Women Voters of California*, the Court noted, “*Unlike common carriers*, broadcasters are entitled under the First

¹¹² See *supra* notes 68–69 and accompanying text.

¹¹³ See *infra* Part II.A.2.

¹¹⁴ See HUBER ET AL., *supra* note 55, § 14.6.1, at 1279 (noting that the Supreme Court “has made noises” that “carriers . . . have not been thought of as deserving much First Amendment protection at all,” although it “has never expressly so ruled”).

Amendment to exercise the widest journalistic freedom consistent with their public duties.”¹¹⁵ The plurality opinion in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC* similarly noted that cable operators’ “speech interests” in leased access channels are “relatively weak because [the companies] act less like editors, such as newspapers or television broadcasters, than like common carriers, such as telephone companies.”¹¹⁶

These discussions have led treatise writers to conclude that common carriers receive a lower level of First Amendment protection than other forms of communication.¹¹⁷ Consistent with this, the D.C. Circuit’s 2016 decision upholding the FCC’s Open Internet Order observed that “[c]ommon carriers have long been subject to nondiscrimination and equal access obligations akin to those imposed by the rules without raising any First Amendment question.”¹¹⁸ It similarly noted that “[e]qual access obligations” of the kind associated with common carriage “have long been imposed on telephone companies . . . without raising any First Amendment issue,” citing the language from *Denver* and *League of Women Voters* quoted above as support.¹¹⁹

Saying that common carriers enjoy less First Amendment protection than other forms of communication does not provide clear guidance as to the precise level of protection they do receive. A review of the judicial decisions reveals that common carriers do enjoy some degree of First Amendment protection with re-

¹¹⁵ 468 U.S. 364, 378 (1984) (emphasis added and alteration and internal quotation marks omitted).

¹¹⁶ 518 U.S. 727, 739 (1996) (plurality opinion) (emphasis added).

¹¹⁷ See, e.g., HUBER ET AL., *supra* note 55, § 6.4.1, at 1279 (describing “a First Amendment triad” in which common carriers receive less protection than print publishers and broadcasters); ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 2, 105–06 (1983) (describing a “trifurcated communications system” of print, common carriage, and broadcasting in which the First Amendment for common carriers “had simply disappeared” or been “disregarded”); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1004 (2d ed. 1988) (noting how “[t]he Constitution’s promise of free speech has eroded” for common carriers); HARVEY L. ZUCKERMAN ET AL., *MODERN COMMUNICATIONS LAW* 187 (1999) (observing that common carriers “receive the lowest level of First Amendment protection”).

¹¹⁸ *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674, 740 (D.C. Cir. 2016).

¹¹⁹ *Id.* at 740–41; *accord id.* at 741 (further noting that the net neutrality rules “impose on broadband providers the kind of nondiscrimination and equal access obligations that courts have never considered to raise a First Amendment concern”).

spect to information generated by their common carriage services as well as by the non-common-carriage services that they may choose to provide. This Part will also offer thoughts on the ad hoc quasi-common carriage regimes often enacted by Congress.

I will offer one initial observation: As with the definition of common carriage, economic power or the presence of absence of monopoly power does not justify according an actor a lesser degree of First Amendment protection.¹²⁰ As Justice Douglas noted in *CBS, Inc. v. Democratic National Committee*, the fact that even though “[s]ome newspapers in our history have exerted a powerful—and some have thought—a harmful interest on the public mind,” government intervention to compensate for any such adverse effects “would be the greater of two evils.”¹²¹ A majority of the Court embraced these principles in *Miami Herald Publishing Co. v. Tornillo*, which overturned a state statute designed to foster greater balance in the political discourse as an impermissible infringement of the newspaper’s free speech rights despite the growing prevalence of one-newspaper towns.¹²²

1. Privacy

The Supreme Court’s landmark decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission* established that the First Amendment protects the commercial speech of public utilities even when they are monopolies.¹²³ The Tenth Circuit applied this framework to common carriers in *U.S. West, Inc. v. FCC* when it invalidated the FCC’s initial rules implementing the newly enacted privacy provisions of the Telecommunications Act of 1996 by requiring opt-in consent before telecommunications companies could use customer proprietary network information (“CPNI”).¹²⁴

The *U.S. West* court proceeded to apply the traditional framework announced

¹²⁰ For earlier discussions, see Christopher S. Yoo, *Technologies of Control and the Future of the First Amendment*, 53 WM. & MARY L. REV. 747, 761–67 (2011) [hereinafter Yoo, *Technologies of Control*]; Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697, 717–51 (2010) [hereinafter Yoo, *Myth of the Internet*].

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

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

¹²³ 447 U.S. 557, 566–68 (1980).

¹²⁴ 182 F.3d 1224 (10th Cir. 1999).

in *Central Hudson* for protecting commercial speech.¹²⁵ Assuming *arguendo* that the regulation was backed by substantial state interests,¹²⁶ the court concluded that the FCC had failed to demonstrate that the regulation directly and materially advanced those interests and that opt-out consent represented a less restrictive means for accomplishing its goals.¹²⁷

Later decisions confirmed the extent to which the First Amendment protects the commercial speech of common carriers. Courts invoked commercial speech doctrine to strike down state statutes imposing requirements similar to those invalidated in *U.S. West*.¹²⁸ The D.C. Circuit also upheld the FCC's revised CPNI rules after the agency decided to require only opt-out consent and to allow sharing of information with joint venture partners and independent contractors that were marketing communications-related services, so long as the disclosed information is protected by confidentiality agreements.¹²⁹ The court's applying the *Central Hudson* test to uphold the revised rules confirms that the First Amendment presumptively protects the commercial speech of common carriers, even though the new rules passed the scrutiny applicable to commercial speech.

The idea that the First Amendment protects providers' use of the data they collect received the imprimatur of the Supreme Court in *Sorrell v. IMS Health Inc.*, in which the Court invalidated a state statute restricting the sale, disclosure, and use of data identifying individual doctors' prescribing practices.¹³⁰ In so doing, the Court held open the possibility that the use of data may receive even greater protection. Concluding that heightened scrutiny was appropriate, the Court found that the statute failed regardless of whether the test for commercial speech or a more restrictive test was applied.¹³¹

Together, these decisions belie any suggestion that common carriers enjoy little-to-no protection under the First Amendment. Although these decisions did not address the constitutionality of limiting common carriers' right to exclude,

¹²⁵ *Id.* at 1233.

¹²⁶ *Id.* at 1235–37.

¹²⁷ *Id.* at 1237–39.

¹²⁸ *Verizon Northwest, Inc. v. Showalter*, 282 F. Supp. 2d 1187 (W.D. Wash. 2003).

¹²⁹ *Nat'l Cable & Telecomms. Ass'n v. FCC*, 555 F.3d 996 (D.C. Cir. 2009).

¹³⁰ 564 U.S. 552 (2011).

¹³¹ *Id.* at 563–74.

they did confirm the existence of free speech rights with respect to collateral aspects of providing such service.

2. Quasi-common carriers

In addition to entities regarded as common carriers at common law, Congress has explicitly authorized subjecting telecommunications services to common carriage regulation¹³² while specifically prohibiting the imposition of such duties on broadcasting and cable.¹³³ Notwithstanding these restrictions, Congress and the FCC have imposed a wide variety of ad hoc nondiscrimination obligations on communications providers without using the historical term “common carrier.”¹³⁴ Often called quasi-common carriage duties, examples include obligations placed on broadcasters to provide reasonable access and equal time to all candidates for federal office¹³⁵ and the now defunct Fairness Doctrine,¹³⁶ as well as the must-carry, leased access, and “public, educational, and governmental” (PEG) access requirements imposed on cable operators.¹³⁷

As Genevieve Lakier notes, the First Amendment has never been interpreted to require either the government or private media companies to provide quasi-common carrier access.¹³⁸ Thus, absent a revolution in state action doctrine, any such interpretation would turn on its head the conception of the First Amendment as a constraint on the government’s ability to influence individuals’ speech choices.¹³⁹ That means the key question is whether the government’s imposition

¹³² See 47 U.S.C. § 153(51) (limiting common carriage regulation to telecommunications carriers providing telecommunications services); 332(c)(1)(A) (limiting common carriage regulation to commercial mobile services, defined in § 332(d)(1)).

¹³³ See *supra* note 48 and accompanying text.

¹³⁴ See Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2316–18, 2324–29 (2021); Brent Skorup & Joseph Kane, *The FCC and Quasi-Common Carriage: A Case Study of Agency Survival*, 18 MINN. J.L. SCI. & TECH. 631, 647–61 (2017).

¹³⁵ 47 U.S.C. §§ 312(a)(7) (reasonable access), 315(a) (equal access).

¹³⁶ See *Radio-Television News Dirs. Ass’n v. FCC*, 229 F.3d 269 (D.C. Cir. 2000) (overturning the last vestiges of the Fairness Doctrine).

¹³⁷ *Id.* §§ 531 (public, educational, and governmental access), 532 (leased access), 534 (must carry).

¹³⁸ Lakier, *supra* note 134, at 2318; see *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 122–23, 126, 128–31 (1973); *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 681 (1998).

¹³⁹ This is not to say that Lakier supports this outcome. She follows Tim Wu in arguing for a

of such obligations impermissibly burdens private actors' free speech rights.

To date, the Supreme Court has sustained the constitutionality of quasi-common carriage duties imposed on the broadcasting and cable industries based on rationales that do not generalize to other forms of communication.¹⁴⁰ The Court upheld the broadcast access requirements based on the scarcity doctrine,¹⁴¹ which the Court has recognized does not apply to cable and the Internet¹⁴² and from which the Court appears to be distancing itself even with respect to broadcasting.¹⁴³

The Supreme Court offered its most complete articulation of the framework for analyzing such questions in *Turner Broadcasting System, Inc. v. FCC*, which addressed the constitutionality of the must carry provisions of the 1992 Cable Act requiring cable operators to offer free channel capacity to all full-power local television stations operating in their service area.¹⁴⁴ The Court began by acknowledging that cable operators exercise editorial discretion over their channels.¹⁴⁵ In addition, "laws that single out the press, or certain elements thereof, for special treatment pose a particular danger of abuse by the State and so are always subject to at least some degree of heightened First Amendment scrutiny."¹⁴⁶

"second free speech tradition" that embraces nondiscriminatory access to communications media. *Id.* at 2319 (citing TIM WU, BROOKINGS INST., IS FILTERING CENSORSHIP? THE SECOND FREE SPEECH TRADITION 2 (2010), <https://www.brookings.edu/research/is-filtering-censorship-the-second-free-speech-tradition>). This position has the support of scholars such as POOL, *supra* note 117, at 106. Lakier acknowledges that "[u]nder current state action rules such a conclusion would be unimaginable." Lakier, *supra* note 134, at 2318; *accord*, e.g., *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019). For my thoughts on calls to revise the state action doctrine, see Yoo, *supra* note 27, at 331–34.

¹⁴⁰ For my initial discussion of the death of the technology specific approach to the First Amendment, see Yoo, *supra* note 27, at 266–92.

¹⁴¹ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386–89 (1969) (offering the classic statement of the scarcity rationale to uphold the Fairness Doctrine); *CBS, Inc. v. FCC*, 453 U.S. 367, 395–96 (1981) (relying on *Red Lion* to uphold the constitutionality of 47 U.S.C. § 312(a)(7)).

¹⁴² *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (Internet); *Turner Broad. Sys., Inc. v. FCC* 512 U.S. 622, 637–39 (1994) (cable); see also *infra* notes 147, 242–246 and accompanying text.

¹⁴³ Yoo, *supra* note 27, at 290–92.

¹⁴⁴ 512 U.S. 622 (1994).

¹⁴⁵ *Id.* at 636.

¹⁴⁶ *Id.* at 640–41 (citation and internal quotation marks omitted).

In terms of the precise level of scrutiny to be applied, the *Turner* Court rejected arguments that the lower First Amendment standard governing broadcasting should also apply to cable.¹⁴⁷ At the same time, it declined to accord cable the stronger level of protection accorded to newspapers.¹⁴⁸ In support of both conclusions, the Court specified that it was the “special physical characteristics” and “fundamental technological difference[s]”—not “market dysfunction,” “economic characteristics,” or local monopoly power—that determined the level of scrutiny that would be applied, citing among other things its prior decision in *Tornillo*.¹⁴⁹ Specifically, cable television is not subject to the “physical limitations of the electromagnetic spectrum” applicable to broadcasting.¹⁵⁰ At the same time, “the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber’s home.”¹⁵¹ The former justified applying stronger scrutiny than that applied to broadcasting. The latter justified subjecting structural, content-neutral regulation to intermediate rather than strict scrutiny. Moreover, as in *PruneYard*, viewers were unlikely to attribute the views expressed to the property owner.¹⁵²

The emergence of competition from direct broadcast satellite providers (“DBS”) (such as DirecTV and the Dish Network), multichannel video provided by telephone companies (through Verizon’s FIOS and AT&T’s U-verse services),¹⁵³ and new over-the-top services (such as Netflix, Hulu, Sling, Disney+, HBO+, and Peacock) have undercut the bottleneck rationale with respect to cable television. And as discussed in greater detail below, courts have rejected it with respect to broadband as well.¹⁵⁴

¹⁴⁷ *Id.* at 637–39.

¹⁴⁸ *Id.* at 655–56.

¹⁴⁹ *Id.* at 639–40 (citing *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 248–58 (1974)), 656 (comparing cable operators to “a daily newspaper . . . [that] may enjoy monopoly status in a given locale).

¹⁵⁰ *Id.* at 639.

¹⁵¹ *Id.* at 656.

¹⁵² *Id.* at 655–56 (citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980)).

¹⁵³ Yoo, *Technologies of Control*, *supra* note 120, at 765–66.

¹⁵⁴ See *infra* notes 233–235 and accompanying text.

The D.C. Circuit decision upholding the constitutionality of the 2015 Open Internet Order relied on a different aspect of *Turner* to avoid engaging in an extended First Amendment analysis: the distinction between common carriage services and services over which the network exercises editorial discretion.¹⁵⁵ Unlike the newspaper in *Tornillo* or the cable companies in *Turner*, “the exercise of editorial discretion is entirely absent with respect to broadband providers subject to the Order,” which act as “neutral, indiscriminate platforms for transmission of speech of any and all users,” playing a role “analogous to that of telephone companies.”¹⁵⁶ Thus, “[t]hose obligations affect a common carrier’s neutral transmission of *others’* speech, not a carrier’s communication of its own message.”¹⁵⁷ The decision also analogized to *PruneYard* and *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)* on grounds that viewers were unlikely to regard the carried content as “reflect[ing the] broadband providers’ editorial judgment or viewpoint.”¹⁵⁸

The situation would be quite different if the broadband provider served as more than a mere pass through. The court acknowledged that broadband providers enjoy full First Amendment protection should they decide to provide their own content.¹⁵⁹ And it noted that the First Amendment might also be implicated should a broadband provider decide to filter the content accessible through its network.¹⁶⁰ The FCC’s representation that such conduct fell outside of the 2015

¹⁵⁵ U.S. Telecom Ass’n v. FCC, 825 F.3d 674, 742–43 (D.C. Cir. 2016). Note that technically that decision involved a statute that explicitly invoked common carriage rather than establish a quasi-common carriage regime. See *supra* notes 68–69 and accompanying text. The opinion’s insights into the proper application of *Turner* remain germane for both common carriers and quasi-common carriers.

¹⁵⁶ *USTA*, 825 F.3d at 743.

¹⁵⁷ *Id.* at 740.

¹⁵⁸ *Id.* at 743 (citing *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 63–65 (2006); and *PruneYard*, 447 U.S. at 86–88).

¹⁵⁹ *Id.* at 741–42 (“Of course, insofar as a broadband provider might offer its own *content*—such as a news or weather site—separate from its internet access service, the provider would receive the same protection under the First Amendment as other producers of internet content.”).

¹⁶⁰ *Id.* at 743 (“If a broadband provider nonetheless were to *choose* to exercise editorial discretion—for instance, by picking a limited set of websites to carry and offering that service as a curated internet experience—it might then qualify as a First Amendment speaker.”).

Order obviated the need for the court to consider that possibility further.¹⁶¹

The two members of the panel majority advanced the same reasoning in their concurrence in the denial of rehearing en banc responding to then-Judge Kavanaugh's dissent from the same order.¹⁶² According to the panel majority's concurrence, "[t]he key to understanding why" the net neutrality rule complies with the First Amendment "lies in perceiving when a broadband provider falls within the rule's coverage."¹⁶³ It applies only to broadband Internet service providers ("ISPs") that "represent that their services allow Internet end users to access all or substantially all content on the Internet, *without alteration, blocking, or editorial intervention.*"¹⁶⁴ As such, "the net neutrality rule applies only to 'those broadband providers that hold themselves out as neutral, indiscriminate conduits for transmission of speech of any and all users.'"¹⁶⁵ The net neutrality mandate simply "requires the ISP to abide by its representation and honor its customers' ensuing expectations."¹⁶⁶ The concurrence again distinguished *Turner* on the grounds that the cable operators at issue in that case engaged in editorial discretion over the content they carry, whereas "ISPs subject to the net neutrality rule represent that they do not."¹⁶⁷

At the same time, the 2015 Order "specifies that an ISP remains 'free to offer 'edited' services' without becoming subject to the rule's requirements."¹⁶⁸ Thus, ISPs that choose to offer a "curated experience," such as one limited to family friendly websites, or to "filter[] . . . content into fast (and slow) lanes based on the ISP's commercial interest," would fall outside the net neutrality rules so long as

¹⁶¹ *Id.*

¹⁶² *U.S. Telecom Ass'n v. FCC (USTA)*, 855 F.3d 381, 426–35 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of the petition for rehearing en banc).

¹⁶³ *Id.* at 388 (Srinivasan, J., joined by Tatel, J., concurring in the denial of the petition for rehearing en banc).

¹⁶⁴ *Id.* (quoting Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, 5869 ¶ 549 (2015) [hereinafter 2015 Open Internet Order]).

¹⁶⁵ *Id.* at 389 (quoting *USTA*, 825 F.3d at 743).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 391.

¹⁶⁸ *Id.* at 389 (quoting 2015 Open Internet Order, *supra* note 164, at 5872 ¶ 556).

the ISP clearly disclosed its intentions to do so.¹⁶⁹ The fact that no ISP had yet expressed interest in doing so made it unnecessary for the panel to further analyze that possibility.¹⁷⁰

The D.C. Circuit thus placed potentially dispositive weight on the distinction between providers that hold themselves out as serving the public indiscriminately and those exercising editorial discretion over the content they carry. The former may be treated as common carriers for First Amendment purposes and be forced to carry speech only if doing so does not affect their own expression or force them to become associated with ideas with which they disagree. The court implicitly followed its prior decision striking down the 2010 Open Internet Order, which accepted that common carriage duties could apply to edge providers as well as residential customers.¹⁷¹ In so doing, it ignored the precedent that common carriage duties apply only to consumers and do not apply to competitors or other service providers.¹⁷²

The D.C. Circuit's reliance on the common carrier status of the ISPs necessarily gave it no opportunity to opine on how the First Amendment applies to quasi-common carriers. Thus, unless the Supreme Court revisits the state action doctrine or its decisions holding that the justifications for applying a lower First Amendment standard to broadcast and cable regulation are inapplicable to the Internet, the precedents applying the First Amendment to quasi-common carriage are unlikely to change the constitutional analysis.

3. Non-common-carriage services

An additional nuance arises from the fact that firms are increasingly providing both common carriage and non-common-carriage services. On the one hand, firms that previously provided only content have become more involved in networking, with Google initiating its fiber project in Kansas City and other metropolitan areas, Google and Microsoft building networks covering the United States, and Google, Facebook, Microsoft, and Amazon becoming the largest constructors

¹⁶⁹ *Id.* at 389–90.

¹⁷⁰ *Id.* at 390.

¹⁷¹ *Verizon v. FCC*, 740 F.3d 623, 653 (D.C. Cir. 2014).

¹⁷² *The Express Package Cases*, 117 U.S. 1 (1885); HUBER ET AL., *supra* note 55, § 1.3.1, at 13–16, § 5.1.1, 407–08.

of undersea cables in recent years.¹⁷³ On the other hand, ISPs have begun offering more content, demonstrated eloquently by Comcast's acquisition of NBC Universal, AT&T's acquisition of Time Warner, and Verizon's acquisitions of Yahoo! and America Online. The latter two examples may be unraveling, as did News Corp.'s acquisition of DirecTV, but similar transactions may still emerge in the future.

Courts have made clear that common carriage regulation is determined on an activity-by-activity basis rather than an entity basis. For example, in *FTC v. AT&T Mobility LLC*, the Ninth Circuit confronted whether AT&T was a "common carrier" exempted from FTC jurisdiction.¹⁷⁴ The Ninth Circuit held that "common carrier" is an activity-based category, so that an entity is a common carrier "only to the extent that [it] is engaging in common-carrier services."¹⁷⁵ The activity-based framework reflects the obvious: in the twenty-first century, "[a] phone company is no longer just a phone company."¹⁷⁶ An entity therefore bears the special burdens and earns the special privileges of common carriers only when it is acting as a common carrier.

In reaching its decision, the Ninth Circuit in *AT&T Mobility* explored the common-law backdrop of the Federal Trade Commission Act. The court observed that activity-based distinctions originated in the Nineteenth Century, if not earlier.¹⁷⁷ What is obvious now was obvious then, too: A business can undertake different enterprises, and they need not all be common carriage. A common carrier could operate an amusement park in 1912 just as one can today, but the provision of shipping services on the Great Lakes bears little logical or legal connection to the bookkeeping for the merry-go-round fares.¹⁷⁸ So, the Ninth Circuit noted, courts employed an activity-based framework for common carriers and continued

¹⁷³ Christopher S. Yoo, *Paul Baran, Network Theory, and the Past, Present, and Future of the Internet*, 17 COLO. TECH. L.J. 161, 181–82 (2018).

¹⁷⁴ 883 F.3d 848, 850 (9th Cir. 2018).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 851.

¹⁷⁷ *Id.* at 858.

¹⁷⁸ *Id.* at 859 (citing *Interstate Com. Comm'n v. Goodrich Transit Co.*, 224 U.S. 194, 205 (1912)).

to do so throughout the 20th century.¹⁷⁹ Although the Ninth Circuit drew this conclusion in the context of the FTC Act, it noted that five circuits came to the same conclusion under the communications statute.¹⁸⁰

This conclusion should come as no surprise. The mere fact that Google initiated a residential broadband system in Kansas City should not convert all aspects of Google's operations into common carriage. Two lines of authority—one on dial-a-porn and the other on the now-defunct cable-telco cross-ownership ban—confirm that common carriers enjoy substantial First Amendment rights with respect to non-common carriage services.¹⁸¹

a. Dial-a-porn

Dial-a-porn providers charge users who dial premium-rate telephone numbers (using prefixes such as 900 or 976) higher than normal rates to access prerecorded, sexually suggestive messages. In 1983, Congress responded to the growth of this practice by legislation criminalizing the use of a telephone to provide any obscene or indecent communications to a minor and directed the FCC to issue implementing regulations.¹⁸²

As the constitutionality of the FCC's efforts was being litigated,¹⁸³ a number of courts upheld local telephone companies' exercise of independent business judgment not to carry dial-a-porn.¹⁸⁴ For example, in a decision focusing primarily on

¹⁷⁹ *Id.* at 859–61.

¹⁸⁰ *Id.* at 860–61 (citing *McDonnell Douglas Corp. v. Gen. Tel. Co. of Cal.*, 594 F.2d 720, 724–25 n.3 (9th Cir. 1979); *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1005 (9th Cir. 2010) (quoting *Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994)); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC (NARUC II)*, 533 F.2d 601, 608 (D.C. Cir. 1976); *Comput. & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198, 209 n.59 (D.C. Cir. 1982); *Eagleview Techs., Inc. v. MDS Assocs.*, 190 F.3d 1195, 1197 (11th Cir. 1999) (per curiam); *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 58–59 (2d Cir. 2006)).

¹⁸¹ For my initial discussion of these cases, see Yoo, *Myth of the Internet*, *supra* note 120, at 751–57.

¹⁸² Federal Communications Commission Authorization Act of 1983, Pub. L. No. 98-214, § 8, 97 Stat. 1467, 1470.

¹⁸³ See the history recounted in *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 120–23 (1989).

¹⁸⁴ See *Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1297 (9th Cir. 1987); *Carlin Commc'n, Inc. v. S. Bell Tel. & Tel. Co.*, 802 F.2d 1352, 1361 (11th Cir. 1986); *Network Commc'ns v. Mich. Bell Tel. Co.*, 703 F. Supp. 1267, 1275 (E.D. Mich. 1989).

state action, the Eleventh Circuit held that the decision not to carry dial-a-porn did not violate the First Amendment, reasoning that as “[a] private business,” Southern Bell “is free to choose the content of messages with which its name and reputation will be associated.”¹⁸⁵ In so holding, the court emphasized that the premium-rate service used for dial-a-porn “is not part of Southern Bell’s function as a common carrier and therefore is not subject to the requirements regarding equal access that apply to telecommunications services offered by Southern Bell as a common carrier.”¹⁸⁶

The Ninth Circuit similarly held that the initial termination of a dial-a-porn provider done at the behest of a deputy county attorney constituted state action and violated the First Amendment, but a subsequent policy against carrying dial-a-porn unilaterally imposed by a telephone company did not.¹⁸⁷ Decisions whether or not to carry pornography are not for the state to make: “[I]t is a thing that *private parties alone*—newspapers, television networks, publishers, and so on—may do.”¹⁸⁸

Justice Scalia’s concurrence in *Sable* endorsed this conclusion. While agreeing with the decision to apply strict scrutiny to strike down as unduly restrictive the federal statute restricting access to indecent telephone messages, he noted that “while we hold the Constitution prevents Congress from banning indecent speech in this fashion, we do not hold that the Constitution requires public utilities to carry it.”¹⁸⁹

Congress responded by enacting legislation limiting dial-a-porn to subscribers who had previously requested access to it in writing.¹⁹⁰ In upholding this revision, the Ninth Circuit reiterated that “[c]arriers are private companies” that are “free under the Constitution to terminate service to dial-a-porn operators altogether.”¹⁹¹

¹⁸⁵ *S. Bell*, 802 F.2d at 1361.

¹⁸⁶ *Id.* at 1361 n.5. My initial analysis of these cases failed to emphasize this point. Yoo, *Myth of the Internet*, *supra* note 120, at 754.

¹⁸⁷ *Mountain States*, 827 F.2d at 1295–97.

¹⁸⁸ *Id.* at 1297.

¹⁸⁹ *Sable*, 492 U.S. at 133 (Scalia, J., concurring).

¹⁹⁰ 47 U.S.C. § 223(c)(1) (enacted in November 1989).

¹⁹¹ *Info. Providers’ Coal. for Def. of First Amendment v. FCC*, 928 F.2d 866, 877 (9th Cir.

b. The cable-telco cross-ownership rule

The line of cases overturning the FCC's then-extant rule prohibiting telephone companies from offering cable television services further confirms that the First Amendment protects non-common carriage services provided by common carriers. The FCC imposed this rule in 1970, justified by the need to promote competition in the burgeoning cable television industry,¹⁹² and Congress codified it in 1984.¹⁹³

In a series of cases, courts uniformly followed *Turner Broadcasting System, Inc. v. FCC*¹⁹⁴ to invalidate this restriction as insufficiently narrowly tailored.¹⁹⁵ Two months after the Supreme Court heard oral argument on these cases on December 6, 1995, Congress rendered them moot by repealing the cable-telco cross-ownership ban as part of the Telecommunications Act of 1996¹⁹⁶ with the support of both the FCC and Department of Justice Antitrust Division.¹⁹⁷ The fact that the Supreme Court did not reach the merits of this argument takes nothing away from the uniform conclusion that the First Amendment protects common carriers' right to provide services over which they exercise editorial discretion.

Together, the cases on quasi-common-carriers and non-common-carriage services both support according strong First Amendment protection to services over which common carriers exercise editorial discretion. These cases embrace

1991).

¹⁹² Application of Telephone Cos. for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems, Final Report and Order, 21 F.C.C.2d 307, 325 ¶ 49 (1970), *aff'd sub nom.* Gen. Tel. Co. of Sw. v. United States, 449 F.2d 846 (5th Cir. 1971).

¹⁹³ Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2779, 2785 (previously codified at 47 U.S.C. § 533(b) (1994)).

¹⁹⁴ 512 U.S. 622 (1994).

¹⁹⁵ See *US West, Inc. v. United States*, 48 F.3d 1092, 1098 (9th Cir. 1994), *vacated and remanded for consideration of mootness*, 516 U.S. 1155 (1996); *Chesapeake & Potomac Tel. Co. of Va. v. United States*, 42 F.3d 181, 190 (4th Cir. 1994), *vacated and remanded for consideration of mootness*, 516 U.S. 415 (1996); *S. New England Tel. Co. v. United States*, 886 F. Supp. 211, 217 (D. Conn. 1995); *NYNEX Corp. v. United States*, No. Civ. 93-323-P-C, 1994 WL 779761, at *2 (D. Me. Dec. 8, 1994); *BellSouth Corp. v. United States*, 868 F. Supp. 1335, 1339 (N.D. Ala. 1994); *Ameritech Corp. v. United States*, 867 F. Supp. 721, 728 (N.D. Ill. 1994).

¹⁹⁶ Telecommunications Act of 1996, Pub. L. No. 104-104, § 302(b), 110 Stat. 56, 124 (repealing 47 U.S.C. § 533).

¹⁹⁷ See *U.S. West*, 48 F.3d at 1097; *Chesapeake & Potomac*, 42 F.3d at 187–88.

the idea that common carriers have the First Amendment right to offer these services. When they choose to do so, they enjoy the same level of First Amendment protection as newspapers, broadcasters, and publishers, absent some unique physical characteristic (not an economic characteristic) that inherently limits service to a single provider. As Justice Thomas observed, “Common carriers are private entities and may, consistent with the First Amendment, exercise editorial discretion in the absence of a specific statutory prohibition.”¹⁹⁸

B. Public accommodations

In addition, Justice Thomas suggests that laws prohibiting discrimination in public accommodations serve as a precedent for restricting the speech of private companies. This argument ignores the fact that the Supreme Court’s First Amendment jurisprudence on public accommodations limits the government’s ability to mandate access rather than authorizing more stringent regulation.

Two recent cases lay out the extent to which the First Amendment protects public accommodations. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, the Supreme Court held that applying a state statute prohibiting discrimination based on sexual orientation in any place of public accommodations to force parade organizers to allow a gay, lesbian, and bisexual organization to participate as a parade unit violated the First Amendment.¹⁹⁹ Parades and the decisions about which groups are permitted to participate in them are inherently expressive.²⁰⁰ Thus, relying on public accommodations law to require the inclusion of a particular group effectively compelled the parade organizer to make a statement that it would have preferred not to make.²⁰¹ Audiences were likely to perceive the inclusion of the organization in the parade as carrying an expressive message.²⁰² This distinguished *Hurley* from *PruneYard* and *Turner*, in which the decision to carry particular content was not perceived as implying endorsement of the messages contained therein.²⁰³ The Court also noted language in its expressive

¹⁹⁸ *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 825 (1996) (Thomas, J., concurring in judgment in part and dissenting in part).

¹⁹⁹ 515 U.S. 557 (1995).

²⁰⁰ *Id.* at 569–70.

²⁰¹ *Id.* at 573.

²⁰² *Id.* at 575–77.

²⁰³ *Id.* at 575–78.

association decisions recognizing that the state laws at issue in those cases preserved clubs' ability to control the messages with which they are associated by permitting them to exclude members who espouse views with which they disagreed.²⁰⁴

The Supreme Court drew a similar conclusion in *Boy Scouts of America v. Dale*, which held that application of a state public accommodations statute preventing the Boy Scouts from revoking the membership of an adult leader who was "an avowed homosexual and gay rights activist" violated the First Amendment.²⁰⁵ The Court concluded that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."²⁰⁶ Under *Hurley* and the associational freedom cases, requiring the inclusion of some speech was permissible only if doing so "would not materially interfere with the ideas that the organization sought to express"²⁰⁷ and did not impose a "'serious burden' on the organization's rights of expressive association."²⁰⁸ In this case, forcing the Boy Scouts to accept a leader from a particular group would force it to convey a message that it did not want to send and would thus violate the First Amendment.²⁰⁹

The Court further developed its expressive association jurisprudence in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*, which rejected law schools' challenge to the Solomon Amendment's requirement that educational institutions receiving federal funds give military recruiters the same access given to other recruiters.²¹⁰ The Court reasoned that the amendment "neither limits what law schools may say nor requires them to say anything,"²¹¹ and the

²⁰⁴ *Hurley*, 515 U.S. at 579–81 (citing *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988); and *Roberts v. U.S. Jaycees*, 468 U.S. 609, 627 (1984)).

²⁰⁵ 530 U.S. 640, 644 (2000).

²⁰⁶ *Id.* at 648 (citing *N.Y. State Club Ass'n*, 487 U.S. at 13).

²⁰⁷ *Id.* at 658 (citing *Roberts*, 468 U.S. at 626, and *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987)).

²⁰⁸ *Id.* at 658 (citing *Hurley*, *Roberts*, *Duarte*, and *New York State Club Ass'n*).

²⁰⁹ *Id.* at 653.

²¹⁰ 547 U.S. 47 (2006).

²¹¹ *Id.* at 60.

affected conduct is not “inherently expressive.”²¹² Moreover, as in *PruneYard*, others were unlikely to interpret granting recruiters access as an endorsement of the recruiters’ views.²¹³

The teaching of these cases is clear: The government may mandate access to public accommodations only when doing so does not interfere with their expressive activity or force them to associate themselves with a message with which they disagree. Note that the fact that the state statutes at issue in *Hurley* and *Dale* declared the respondents to be public accommodations played no role in the constitutional analysis. It was the effect on the respondents’ speech that mattered, although the test essentially overlapped with the common law rule for determining what constitutes a public accommodation.

C. Summation

The precedents on common carriage and public accommodations lead to the same conclusion. Mandating access does not violate the First Amendment if the mandate does not interfere with the ability of the entity forced to grant access to express itself and if others are unlikely to interpret carriage of that content as an endorsement of the messages contained therein.

In addition, judicial precedents establish two frameworks for determining the appropriate level of First Amendment protection for common carriers and public accommodations. On the one hand, entities that hold themselves out as not making individualized business decisions about to serve are regarded as common carriers or public accommodations. At the same time, firms are regarded as First Amendment speakers if they exercise editorial discretion over the speech they carry or if others will regard that carriage as an endorsement of the content being carried. This justifies why mandatory access requirements imposed on common carriers and public accommodations are widely regarded as constitutional. The commercial speech/privacy cases also suggest a potential First Amendment right to use information derived from providing that service.

On the other hand, entities that opt to exercise editorial discretion over some services are neither common carriers nor public accommodations with respect to those services. Instead, they are speakers with respect to those services and as such are entitled to First Amendment protection, and *Turner*’s rationale for imposing

²¹² *Id.* at 66.

²¹³ *Id.* at 65 (citing *PruneYard*, 447 U.S. at 88); *accord id.* at 69.

intermediate rather than strict scrutiny logically does not apply.

The D.C. Circuit's acknowledgement of an ISP's First Amendment right to offer services that curate or filter access to content raises a conundrum. Among other things, the 2010 and 2015 Open Internet Orders adopted bright-line rules prohibiting the blocking of any content, application, or service.²¹⁴ The D.C. Circuit's reasoning suggests that prohibiting blocking raises serious First Amendment issues. The court avoided the question by noting that the restrictions apply only to BIAS and that services that curate or filter content fall outside the rules. But allowing ISPs to avoid the rule simply by stating that they are blocking certain services would effectively render the no-blocking rule a nullity that is as easy to evade as the definition of common carriage as holding out.²¹⁵ Alternatively, any approach that gives the no-blocking rule any bite at all will necessarily find the First Amendment not so easy to sidestep.

III. WHAT ARE THE IMPLICATIONS FOR NET NEUTRALITY, DIGITAL PLATFORMS AND PRIVACY?

The jurisprudence on common carriers and public accommodations indicates that editorial discretion plays two key roles. First, the exercise of that discretion means that the entity is not holding itself out as serving the public, which takes it outside the definitions of common carriage and public accommodations. Second, even if it is regarded as a common carrier or public accommodation, the exercise of editorial discretion entitles it to the First Amendment.

If an entity holds itself out as simply passing through speech created by others and is not perceived as endorsing the messages contained therein, it is a common carrier or public accommodation and not a speaker for First Amendment purposes. Conversely, the First Amendment gives firms the right to offer services over which they exercise editorial discretion even if they possess monopoly power. If they do exercise editorial discretion, they are not considered common carriers or public accommodations with respect to those services, and those services fall outside the justification for according lower levels of First Amendment protection.

This synthesis has significant implications for three high-profile issues currently confronting communications policy. The first is net neutrality. The second is the regulation of the speech of digital platforms. The third is the regulation of

²¹⁴ 2015 Open Internet Order, *supra* note 164, at 5607–08 ¶¶ 14–19.

²¹⁵ See *supra* note 74 and accompanying text.

online privacy.

A. *Specialized Services Under Net Neutrality*

The D.C. Circuit's analysis of the First Amendment issues raised by the 2015 Open Internet Order focused entirely on the provisions mandating nondiscrimination in what the Order called *broadband Internet access service* (BIAS).²¹⁶ The Order defined BIAS as mass-market retail services that provide the capability to exchange data with all or substantially all Internet endpoints.²¹⁷

The facial nature of the challenge to the rule precluded the court from considering the constitutionality of a separate type of service regulated under net neutrality that the 2010 Order called *specialized service*²¹⁸ and that the 2015 Order redefined as *non-BIAS service*.²¹⁹ Specialized services share capacity with BIAS but do not reach large parts of the Internet and are application specific.²²⁰ They are

²¹⁶ The 2015 Order adopted bright-line rules prohibiting blocking, throttling, and paid prioritization and a general-conduct rule prohibiting unreasonable interference or disadvantage. 2015 Open Internet Order, *supra* note 164, at 5607–08 ¶¶ 14–19. This terminology was heavily influenced by the fate of the 2010 Open Internet Order, which relied primarily on the FCC's Title I authority to adopt blocking and nondiscrimination rules. Preserving the Open Internet, Report and Order, 25 FCC Rcd. 17905, 17906 ¶ 1, 17941–51 ¶¶ 62–79, 17968–72 ¶¶ 117–123 (2010) [2010 Open Internet Order]. The D.C. Circuit invalidated the 2010 Order because the FCC had authority to mandate nondiscrimination only for Title II services, not Title I services. *Verizon v. FCC*, 740 F.3d 623, 650–59 (D.C. Cir. 2014). The 2015 Order responded by reclassifying BIAS as a Title II service, 2015 Open Internet Order, *supra* note 164, at 5726–27 ¶ 289, 5729–30 ¶ 295, but also justified its rules under Title I as a hedge against potential judicial invalidation, *id.* at 5725–26 ¶ 288, 5728–29 ¶ 294. Because the *Verizon* court clearly held that “nondiscrimination” requirements exceeded the FCC's authority under Title I, the FCC assiduously avoided using that term in the 2015 Order in case its attempt to reclassify BIAS as a Title II service failed. The use of the terms throttling, paid prioritization, and unreasonable interference/disadvantage are best regarded as attempts to mandate nondiscrimination without actually using that term.

²¹⁷ *Id.* at 5682 ¶ 187.

²¹⁸ 2010 Open Internet Order, *supra* note 216, at 17965–66 ¶¶ 112–114.

²¹⁹ 2015 Open Internet Order, *supra* note 164, at 5696–99 ¶¶ 207–213. This new moniker contains an unfortunate redundancy. If the acronym is expanded, *non-BIAS service* is properly read as *non-broadband Internet access service service*. The European Union has followed the 2010 Order and refers to such services as *specialised services*. Christopher S. Yoo & Jesse Lambert, *5G and Net Neutrality*, in *THE FUTURE OF THE INTERNET – INNOVATION, INTEGRATION AND SUSTAINABILITY* 221, 232 (Guenter Knieps & Volcker Stocker eds., 2019).

²²⁰ 2015 Open Internet Order, *supra* note 148, at 5696 ¶ 207, 5697 ¶ 209.

also likely to involve enhanced quality of service that exceeds that of the traditional best-efforts Internet.²²¹ Examples include Voice over Internet Protocol, e-readers, heart monitors, energy consumption sensors, automobile telematics, and educational applications and content.²²²

The FCC was concerned that ISPs would use widespread adoption of specialized services either to evade the network neutrality rules or to divert resources away from the traditional best-efforts Internet.²²³ As a result, it promised to monitor the development of specialized services and intervene on a case-by-case basis as necessary.²²⁴

Courts that have considered the constitutionality of restrictions on broadband providers have uniformly concluded that ISPs possess significantly less bottleneck control than did cable operators at the time *Turner* was decided.²²⁵ Although the technological environment has evolved away from the dial-up access that characterized the Internet when those courts rendered those decisions, a vigorous competition for broadband customers has since emerged between cable and telephone companies.²²⁶ In addition, recent surveys indicate that consumers are increasingly opting for mobile broadband as the best solution for Internet access.²²⁷

²²¹ Preserving the Open Internet, Report and Order, Notice of Proposed Rulemaking, 24 FCC Rcd. 13064, 13116–17 ¶ 150 (2009) [hereinafter 2009 Open Internet NPRM].

²²² 2015 Open Internet Order, *supra* note 148, at 5696–97 ¶ 208. The Notice of Proposed Rulemaking that led to the 2010 Open Internet Order also cited proprietary multichannel video, telemedicine, smart grid, and eLearning as potential examples of applications supported by specialized services. 2009 Open Internet NPRM, *supra* note 221, at 13116–17 ¶ 150.

²²³ 2015 Open Internet Order, *supra* note 148, at 5697 ¶ 210, 5698–99 ¶ 212; 2010 Open Internet Order, *supra* note 216, at 17965–66 ¶¶ 112–114.

²²⁴ 2015 Open Internet Order, *supra* note 148, at 5697 ¶ 210, 5698–99 ¶ 212; 2010 Open Internet Order, *supra* note 216, at 17965–66 ¶¶ 113–114.

²²⁵ Comcast Cablevision of Broward Cty., Inc. v. Broward Cty., 124 F. Supp. 2d 685, 696 (S.D. Fla. 2000); Cyber Promotions, Inc. v. Am. Online, Inc, 948 F. Supp. 436, 455 (S.D. Pa. 1996). As noted earlier, cable operators now face significantly greater competition than at the time *Turner* was decided. See *supra* note 153 and accompanying text.

²²⁶ U.S. Telecom Ass'n v. FCC, 290 F.3d 415, 429 (D.C. Cir. 2002) (noting the emergence of competition in last-mile broadband between cable modem and telephone-based digital subscriber line services).

²²⁷ A recent Pew Research Center study reports that of the 77% of Americans that do not have a high-speed Internet subscription at home, 45% say that their smartphone is sufficient for their

Consider, for example, the decision in *Comcast Cablevision of Broward County, Inc. v. Broward County*, in which the Southern District of Florida held that an ordinance requiring cable broadband providers to give other ISPs nondiscriminatory access to their transport services violated the First Amendment.²²⁸ The court began by observing that the fact that “[c]able operators control no bottleneck monopoly over access to the Internet” took the case outside the reasoning of *Turner* and instead brought it within the ambit of *Tornillo*.²²⁹ The court concluded that strict scrutiny was the appropriate First Amendment standard.²³⁰ Out of an abundance of caution, it nonetheless applied intermediate scrutiny, concluding that the lack of monopoly power rendered the harm “the ordinance is purported to address . . . non-existent.”²³¹ As support, the court cited FCC reports monitoring the growing competition among cable modem service, digital subscriber lines, fiber to the home, satellite, and radio broadband.²³² Finding that the county had “proffered no substantial evidence demonstrating that actual harm exists,” the court concluded that the ordinance was based on nothing more than “the mere assertion of a dysfunction or failure in a speech market” that was “not sufficient to shield a speech regulation from the First Amendment” and held that the ordinance failed even the lower, intermediate scrutiny standard.²³³

The lines of authority discussed above confirm that ISPs have the First Amendment right to deploy specialized services that limit access or give preferential treatment to specific content for editorial or commercial reasons.²³⁴ The fact

needs. Pew Research Ctr., *Mobile Technology and Home Broadband 2021* (June 3, 2021), <https://www.pewresearch.org/internet/2021/06/03/mobile-technology-and-home-broadband-2021/>. This implies that 35% of Americans believe that a mobile broadband connection represents an adequate substitute for fixed-line service.

²²⁸ *Comcast Cablevision of Broward Cty.*, 124 F. Supp. 2d at 698.

²²⁹ *Id.* at 696.

²³⁰ *Id.* at 697.

²³¹ *Id.* at 698.

²³² *Id.* (citing *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report, 14 FCC Rcd. 2398, 2423 ¶ 48, 2425–26 ¶ 52 (1999)).

²³³ *Id.* (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640 (1994)).

²³⁴ See *supra* notes 168–169 and accompanying text.

that ISPs offering specialized services are exercising discretion over them takes them outside the deferential standard applied to common carriers and subjects them to heightened scrutiny.²³⁵ The existence of multiple last-mile broadband options, along with the increasing reliance on mobile broadband as a substitute for fixed-line service making the industry ever more competitive, distinguishes BIAS from the unique physical characteristics that justified not subjecting structural regulation of cable operators to strict scrutiny in *Turner*.²³⁶

Strict scrutiny requires that the restriction must not burden speech of a particular content and must not compel the regulated entity to appear to endorse ideas with which it disagrees.²³⁷ Even under intermediate scrutiny, the restriction must be unrelated to the suppression of speech, and the incidental restriction on speech must be no greater than essential to furthering an important or substantial government interest.²³⁸ It remains possible that limiting an ISP's ability to deploy specialized services or requiring that it devote more resources to the traditional Internet may impermissibly burden its ability to offer the curated or filtered access that the D.C. Circuit has recognized that the First Amendment entitles it to offer.

B. *Digital Platforms*

The extent to which the First Amendment permits government regulation of digital platforms presents another controversial topic. For example, then-Judge Kavanaugh's dissent from the denial of rehearing en banc in the review of the 2015 Open Internet Order suggested that the panel majority's approach would permit "regulat[ion of] the editorial decisions of Facebook and Google, of MSNBC and Fox, of NYTimes.com and WSJ.com, of YouTube and Twitter," asking rhetorically, "Can the Government really force Facebook and Google and all of those other entities to operate as common carriers? Can the Government really impose forced-carriage or equal-access obligations on YouTube and Twitter? If the Government's theory in this case were accepted, then the answers would be yes."²³⁹

²³⁵ See *supra* Part II.A.3.

²³⁶ See *supra* notes 229–233 and accompanying text.

²³⁷ *Turner*, 512 U.S. at 644–56.

²³⁸ *Id.* at 662.

²³⁹ U.S. Telecom Ass'n v. FCC (*USTA*), 855 F.3d 381, 433 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of the petition for rehearing en banc).

The concurrence authored by members of the panel majority disagreed, pointing out that “web platforms such as Facebook, Google, Twitter, and YouTube, or a widely used commercial marketplace such as Amazon . . . are not considered common carriers that hold themselves out as affording neutral, indiscriminate access to their platform without any editorial filtering.”²⁴⁰ The concurrence concedes that an entity subject to such regulation could avoid it simply by clarifying that it is exercising discretion over the content it carries.²⁴¹

The Supreme Court’s decision in *Reno v. ACLU* left little doubt that Internet content providers benefit from strong First Amendment protection.²⁴² Although the Court could have simply followed *Sable*’s reasoning that content restrictions are impermissible when accessing content requires affirmative steps and when viable age verification systems exist,²⁴³ the Court offered a more expansive defense of Internet speakers’ free speech rights. It began by rejecting calls to extend the lower level First Amendment protection applied to broadcasting to the Internet speech for the simple reason that the volume of online content is not constrained by physical scarcity.²⁴⁴ Quite the contrary, “the content on the Internet is as diverse as human thought.”²⁴⁵ In addition, it not only encompasses traditional services such as print, audio, video, and still images; it also enables new forms of communication such as real-time dialogue, chat rooms, web pages, mail exploders, and newsgroups, the reach of which allows “any person . . . [to] become a town crier” or “a pamphleteer” to an extent previously impossible.²⁴⁶ The Court thus found “no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.”²⁴⁷

The recent district court decision in *NetChoice LLC v. Moody* addressed the

²⁴⁰ *Id.* at 392 (Srinivasan, J., joined by Tatel, J., concurring in the denial of the petition for rehearing en banc).

²⁴¹ *Id.*

²⁴² 521 U.S. 844 (1997).

²⁴³ *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 127–29 (1989). *Reno* did invoke these rationales. 521 U.S. at 867, 870.

²⁴⁴ *Reno*, 521 U.S. at 870.

²⁴⁵ *Id.* (quoting the district decision under review).

²⁴⁶ *Id.*

²⁴⁷ *Id.*

constitutionality of regulating digital platforms when it enjoined a Florida statute that barred large social media providers from removing or deprioritizing content posted by any qualified candidates for office or by journalistic enterprises.²⁴⁸ The court began by noting that “[a]lthough a primary function of social-media providers is to receive content from users and in turn to make the content available to other uses, the providers routinely manage the content.”²⁴⁹ Indeed, the legislative record was replete with statements by state officials acknowledging that social media providers exercise editorial judgment, mostly consisting of complaints that they have exercised that judgment in an ideologically biased manner.²⁵⁰

Moreover, the possibility that “one or a few powerful entities have gained a monopoly in the marketplace of ideas” does not increase “state authority to regulate speech.”²⁵¹ *Tornillo* teaches that “the concentration of market power among large social-media providers does not change the governing First Amendment principles.”²⁵² Thus, Justice Thomas’s characterization of Google as a gatekeeper²⁵³ does little to advance the First Amendment analysis.

The district court then addressed the state’s claim that “social-media providers are more like common carriers” that simply “transport[] information from one person not another.”²⁵⁴ The court found some truth to that argument, noting that social media sites exercise less editorial discretion than newspapers and post over 99% of their material without reviewing it.²⁵⁵ At the same time, *Hurley* and other precedents established “that a private party that creates or uses its editorial judgment to select content for publication cannot be required by the government to also publish other content in the same manner.”²⁵⁶

The speech affected by the statute clearly consisted of the latter type. Indeed,

²⁴⁸ No. 4:21cv220-RH-MAF, 2021 WL 2690876 (N.D. Fla. June 30, 2021).

²⁴⁹ *Id.* at *7.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.* (citing *Tornillo*).

²⁵³ *Biden v. Knight First Amendment Inst.*, 141 S. Ct. 1220, 1224–25 (2021) (Thomas, J., concurring).

²⁵⁴ *NetChoice*, 2021 WL 2690876, at *8.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

the statute was “concerned . . . primarily with the most ideologically sensitive cases,” which “are the very cases on which the platforms are most likely to exercise editorial judgment,” in contrast to “the routine posting of material without incident.”²⁵⁷ In short, “[t]he State’s announced purpose of balancing the discussion—reining in the ideology of the large social-media providers—is precisely the kind of state action held unconstitutional in *Tornillo*.”²⁵⁸ Moreover, not only did the statute force social media companies to alter their own speech; in contrast to *FAIR* and *PruneYard*, it created serious risks of having speech with which such companies disagreed attributed to them.²⁵⁹

The court thus accorded social media sites full First Amendment protection.²⁶⁰ The court regarded the statute’s focus on deplatforming of candidates and material posted “by or about a candidate” to be “about as content-based as it gets.”²⁶¹ In addition, the factual record, headlined by statements by the governor and lieutenant governor, clearly indicated “that the actual motivation for this legislation was hostility to the social media platform’s perceived liberal viewpoint.”²⁶² Both the content-based and viewpoint-based nature of the restrictions subjected the statute to strict and not intermediate scrutiny, as did the limitation of the statute to large entities and journalistic enterprises.²⁶³

The statute came “nowhere close” to surviving strict scrutiny, and “the State has advanced no argument suggesting” that it could.²⁶⁴ Supreme Court precedent dictates that leveling the speech playing field is not a legitimate state interest, and the statute was not narrowly tailored.²⁶⁵ Though the content-based and viewpoint-based nature of the restrictions made strict scrutiny the appropriate standard, the statute was insufficiently narrowly tailored and designed to achieve any govern-

²⁵⁷ *Id.* at *9.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* at *9–*10.

²⁶¹ *Id.* at *10.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.* at *11.

²⁶⁵ *Id.*

ment interest to survive even intermediate scrutiny.²⁶⁶

These precedents dim the prospects of any attempt to invoke common carriage or public accommodations law to correct perceived ideological imbalances on social media. The example illustrates the problems with alternative definitions of common carriage. As noted above, whether an actor holds an economic monopoly is irrelevant to the First Amendment analysis.²⁶⁷ Regarding transportation and communication as defining categories, any definition of communication broad enough to include social media would also encompass actors such as newspapers that clearly enjoy full First Amendment protection.

Social media also have not been historically engaged in transportation, and the networks they are starting to build are proprietary and not open to the public.²⁶⁸ Nor have social media sites received franchises or licenses from the government that form the basis of a quid pro quo. One searches in vain for any suggestion that social media providers obtained the immunity provided by the Communications Decency Act²⁶⁹ in exchange for classification as a common carrier or public accommodation.²⁷⁰ Any deal implicit in that statute must be internal to the statute itself.²⁷¹

In the end, the common carriage status of social media companies turns on whether they hold themselves out as serving all members of the public without making individualized business decisions, and their First Amendment treatment depends on whether they exercise editorial discretion over the content carried on their sites. They almost certainly do both, but with respect to the content that lies at the heart of the debates over deplatforming, they generally do exercise significant editorial discretion and are increasingly being held accountable for the content they convey.²⁷² Absent a major change in business practices, social media

²⁶⁶ *Id.*

²⁶⁷ See *supra* notes 120–123, 150, 229–233, 251–253, and accompanying text.

²⁶⁸ See *supra* note 173 and accompanying text.

²⁶⁹ 47 U.S.C. § 230.

²⁷⁰ See *supra* notes 61–62 and accompanying text.

²⁷¹ Candeub, *supra* note 10, at 421–22 (arguing that the Communications Decency Act represents a “clear deal” in which Internet platforms host content in return for lower immunity analogous to the liability arrangement for common carriers).

²⁷² *Id.* at 430 (“Social media is all about, at some level, discrimination. The platforms curate

companies exercise too much discretion over the content they host to be regarded as common carriers or public accommodations.

C. Privacy

The Tenth Circuit’s decision in *U.S. West* confirms that the First Amendment protects common carriers’ right to use consumer data they collect.²⁷³ Indeed, this right may extend far beyond common carriers. As the *Sorrell* Court held in striking down a Vermont statute prohibiting certain actors from selling, disclosing, or using records of individual physicians’ prescribing practices for marketing purposes, “the creation and dissemination of information are speech within the meaning of the First Amendment,”²⁷⁴ quoting language from *Bartnicki v. Vopper* acknowledging that “if the acts of ‘disclosing’ and ‘publishing’ information do not constitute speech, it is hard to imagine what does fall within that category.”²⁷⁵

Moreover, the fact that the statute restricts specified actors’ ability to disseminate prescriber-identifying information made it both content-based and speaker-based, which justified subjecting it to heightened scrutiny.²⁷⁶ The state’s attempt to characterize the restriction it imposed as mere commercial regulation ignored the fact that the restriction did not simply impose “an incidental burden on protected expression”; it imposed “a burden based on the content of speech and the identity of the speaker.”²⁷⁷ Ordinarily that fact alone would be sufficient to subject the statute to strict scrutiny.²⁷⁸ The fact that the statute failed even the lower standard applicable to commercial speech obviated the need for the Court to address the state’s arguments about the proper First Amendment standard.²⁷⁹

A district court applied this framework to privacy regulation imposed on ISPs in *ACA Connects – America’s Communications Ass’n v. Frey*.²⁸⁰ That court fol-

media that will interest you . . .”).

²⁷³ See *supra* Part II.A.1.

²⁷⁴ *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011).

²⁷⁵ *Id.* (quoting *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001)).

²⁷⁶ *Id.* at 563–66.

²⁷⁷ *Id.* at 567; *accord id.* (noting that the statute “does not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers”).

²⁷⁸ *Id.* at 571.

²⁷⁹ *Id.*

²⁸⁰ 471 F. Supp. 3d 318 (D. Me. 2020).

lowed *Sorrell* in holding that ISPs' use of customer data for marketing purposes was protected by the First Amendment.²⁸¹ Perhaps influenced by *Sorrell*'s reluctance to offer a definitive statement of the proper level of scrutiny, the court chose to apply the lower standard governing restrictions of commercial speech.²⁸² The court found that the pleadings, viewed in the light most favorable to the nonmoving party, did not provide a sufficient factual basis for resolving the fact-intensive inquiries required by *Central Hudson* on a motion to dismiss.²⁸³

The *ACA Connects* court clearly recognized that ISPs' use of consumer data for marketing purposes enjoys First Amendment protection. Indeed, the fact that the statute restricts a single type of actor (providers of broadband Internet access service) from using, disclosing, selling, or permitting access to a particular type of data (customer personal information) would seem to bring it squarely within the ambit of *Sorrell*.²⁸⁴ Moreover, the Tenth Circuit's decision in *U.S. West* suggests that opt-in consent may represent a less intrusive option that would render the statute's reliance on opt-out consent insufficiently narrowly tailored to survive constitutional scrutiny.²⁸⁵ The fact that the record was not yet well enough developed to finally resolve the merits of the case does nothing to weaken these conclusions. These cases may well have implications beyond ISPs. *Sorrell* implies that all actors may enjoy significant constitutional rights in the data created when they provide services, although the exact contours of these rights remain unclear.

IV. CONCLUSION

Jurisprudence of common carriage and public accommodations tells an amazingly consistent story. In both lines of cases, the touchstones are whether the firm makes individualized business decisions over what content to carry and whether it exercises editorial discretion over the content it carries or hosts. If the answer to both inquiries is yes, the firm cannot be regarded as a common carrier or public accommodation and enjoys broad First Amendment protection. The government

²⁸¹ *Id.* at 327.

²⁸² *Id.*

²⁸³ *Id.* at 327–29.

²⁸⁴ See ME. REV. STAT. ANN. tit. 35-A, § 9301(2) (2010) (imposing obligations on “provider[s]”); *id.* § 9301(1)(D) (defining “provider” as a person who provides broadband Internet access service”).

²⁸⁵ See *supra* Part II.A.1.

cannot impose any access obligations that burden its speech or force it to associate itself with a message with which it disagrees.

Even firms that hold themselves out as serving the public enjoy some First Amendment rights. They can avoid common carriage or public accommodations status simply by asserting editorial discretion over the services they provide. They can also add non-common-carrier services that enjoy full First Amendment protection. And they can assert the right to sell, disclose, and use the data generated by their activities.

Together, these conclusions suggest that little is gained by simply declaring an actor to be a common carrier or public accommodations. Both in terms of defining the scope of the constitutional categories and in determining the degree of First Amendment protection, the key is whether the actor asserts individualized business and editorial judgment over the content it carries. The mere attempt to attach a label without more accomplishes little.