Common Carriage and the Digital World

The doctrine of common carriage, deeply rooted in the Anglo-American common law tradition, vests states with the power to impose non-discrimination obligations on industries such as social media. Emanating from early English courts, this doctrine compels private enterprises to provide certain services to the public impartially and without discrimination. Although originating in the context of ferries, common carriage has expanded throughout history to encompass many industries. Although the social media industry is at the vanguard of communication today, it fits well within the scope of this ancient doctrine.

As Justice Newton of the Court of Common Pleas explained, a common carrier is "required to maintain the ferry and to operate it and repair it for the convenience of the common people." *Trespass on the Case in Regard to Certain Mills*, Certain Mills, YB 22 Hen. VI, fol. 14 (C.P. 1444). By the time of the Founding, this principle had expanded under the common law, applying to "common callings" that included stagecoaches, barges, gristmills, and innkeepers. Blackstone, 1 Commentaries 64 (1765). As Blackstone put it, these businesses under the common carriage doctrine made an "implied promise to entertain all persons who travel that way." *Id*. Sir Matthew Hale expounded on this principle in his treatise *De Portibus Maris*, explaining the public interest associated with private wharves. According to Hale, if an individual built a single wharf within a port, it is necessarily "affected with a public interest" and therefore becomes obligated to serve the general public without partiality. *De Portibus Maris*, in a Collection of Tracts Relative to the Law of England 77- 78 (Francis Hargrave ed., 1787).

By the 19th century, the most important implication of this regulation came with the advent of the railroad industry. Crucial to transcontinental shipping in the context of emerging industrialization, railroads were often embroiled in discrimination later deemed by courts as violations of their duties as common carriers. *See* Charles Haar & Daniel Fessler, *The Wrong Side of the Tracks: A Revolutionary Rediscovery of the Common Law Tradition of Fairness in the Struggle Against Inequality* 109-40 (1986). Between controversy over rate differentials and 25 exclusive contracts, American courts did not yield in their enforcement of common carrier principles. *See*, generally: *Messenger v. Pa. R.R. Co.* 37 N.J.L. 531, 534 (1874); *New England Express Co. v. Me. Cent. R.R. Co.*, 57 Me. 188, 196 (1869).

Such regulation of common carriers did not stop with the railroad. The telegraph, invented in the 1830s to communicate rapidly over great distance, was the first communications industry subject to common carrier statutes in the United States. *See* Genevieve Lakier, T*he Non First Amendment Law of Freedom of Speech*, 134 Harv. L. Rev. 2299, 2320-24 (2021). Extensive concern about private manipulation of information and communication via telegraph resulted in state laws curtailing discrimination regarding which messages could be transmitted. For example New York enacted in 1848 a statute requiring telegraph to "receive d[i]spatches from and for . . . any individual, and on payment of their usual charges . . . [and] to transmit the same with impartiality and good faith." Act of April 12, 1848, ch. 265 § 11, 1848 N.Y. Laws 392, 395. While telegraph companies were most certainly engaged in a far more straightforward business than social media companies, this history further shows the Florida law's consistency with the common carrier tradition. The ubiquity of social media makes deplatforming and censorship

decisions so pressing for states to address, just as the ubiquity of the telegraph made partiality in its service so pressing in its time.

Today's social media platforms meet the historical common law standard to be classified as common carriers. Such platforms stand at the core of contemporary public discourse, acting as one of the most essential forums for civic engagement, cultural discourse, and economic life. The Supreme Court recognized this societal prominence in *Packingham v. North Carolina*, understanding that social media represents "the modern public square." 137 S. Ct. at 1737 (2017). Since *Packingham*, this importance has only grown and today, the case for considering social media as a common carrier is stronger than ever before.

The manner in which the law's challengers resist this classification fails to acknowledge the history of the doctrine. As previously discussed, common carrier regulation applied to ferries, railroads, and telegraphs—services provided to the public in a non-exclusive manner. Later history, however, shows that regulated enterprises do not need to forego selectivity to be covered by content-neutrality requirements. Indeed, historical common carriers have frequently enjoyed the freedom to screen some kind of speech, a principle ingrained both in federal statute and judicial precedent. The following examples are particularly demonstrative:

1. 47 U.S.C. § 223 – Obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications: This statute indicates that although common carriers such as telephone companies must maintain a neutral standard respecting what content they carry, it is permissible, and sometimes obligatory, for such companies to

restrict certain content. Section 27 233 shows how common carriers may filter content such as obscenity and harassment without running afoul of their nondiscrimination duty.

2. *Carlin Commc'ns, Inc. v. Mtn. States Tel. & Tel. Co*., 827 F.2d 1291 (9th Cir. 1987): This case demonstrates that while telephone companies are considered common carriers and therefore expected to treat all messages equally, such companies have the right to screen or refuse access to certain content.

Social media companies, as the Texas legislature found, "function as common carriers, are affected with a public interest, are central public forums for public debate, and have enjoyed governmental support in the United States." Texas H.B. No. 20, § 1(3). Furthermore, these "social media platforms with the largest number of users are common carriers by virtue of their market dominance." *Id*., § 1(4). Florida's legislature, too, determined social media platforms to be akin to "public utilities" that should be "treated similarly to common carriers." S.B. 7072 § 1(5), (6). While this Court is not bound by these legislative statements, the point still rings true.

Common carrier regulation is crucial to a free society where individuals are not under constant threat of censorship and discrimination, and social media companies should be treated no differently than traditional common carriers. Respondents argue that "social media marks the point where the underlying technology is finally so complicated that the government may no longer regulate it to prevent invidious discrimination" *Paxton*, 49 F.4th at 479. While the technology may change, "'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." *Brown v. Ent. Merch. Ass'n*, 564 U.S. 786, 790 (2011) (citing *Joseph Burstyn Inc. v.*

Wilson, 343 U.S. 495, 503 (1952)). Neither can the common carrier doctrine vary with the new and different communication medium of social media. These platforms fill today the role that railroads and telegraphs once did. If the latter was regulated under the common law as a common carrier, then so must social media be regulated as a common carrier.