# TECH PLATFORMS AND THE COMMON LAW OF CARRIERS

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ABSTRACT

*Ever since Justice Clarence Thomas observed in a concurrence that tech platforms like Twitter were analogous to common carriers, there has been increasing interest in the possibility of regulating them under common carrier principles. Most of the conversation has centered on potential legislation, not on applying the common law's common carrier obligations to big tech. Indeed, when Ohio sued Google under the common law's common carrier principles, commentators called the lawsuit "bizarre."*

*In this Article, we argue that far from being "bizarre," tech platforms are and should be subject to liability at common law for violating the duties of common carriers. After describing the core substantive elements of the common law of carriers—equal access rules, just and reasonable pricing, and reasonable deplatforming—we then show how it applies to operating systems, online marketplaces, search, social media, and virtual reality and the metaverse.*

*Among other things, this analysis demonstrates that common carriage applies across multiple domains and is most clearly applicable in business-to-business contexts. With respect to social media, we conclude that while common carriage principles apply, they allow for reasonable deplatforming—which may cut against what we suspect are the motivations of some proponents of regulation. And we argue that the common law of carriers could offer an opportunity to prevent a Wild West in new and emerging platforms, like the metaverse. In light of this analysis, the real puzzle is why there are so few suits against tech platforms under the common law of carriers.*

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## INTRODUCTION

In April 2021, Justice Clarence Thomas observed in a concurrence that tech platforms like Twitter were analogous to common carriers and could potentially be regulated as such.[1] A few months later, the State of Ohio sued Google, arguing that the court should treat the search giant as a common carrier or public utility under state common law, subject it to common law nondiscrimination principles in its search business, and prohibit it from preferencing its own services and links

1. Biden v. Knight First Amend. Inst. at Colum. Univ., 141 S. Ct. 1220, 1224 (2021) (mem.) (Thomas, J., concurring).

over other search results.[2] Commentators immediately claimed that the suit was "unusual,"[3] "bizarre," and "nonsensical."[4]

Since that time, so far as we have been able to find, there have been no other common law actions brought against Google under common carrier principles[5]—and none against the other big tech platforms, Amazon, Facebook (Meta), X (formerly Twitter), Microsoft, and Apple.[6] And although scholars and policymakers—prior to Justice Thomas's suggestion—frequently discussed whether to regulate tech platforms as common carriers or public utilities, most of those conversations focused either on possible legislation, not on the existing common law,[7] or on how "common carrier" or "public utility"

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2. Complaint for Declaratory Judgment and Injunctive Relief at 3, 5, 11, State *ex rel.* Yost v. Google LLC, No. 21-CV-H-06-0274, 2021 WL 2333652 (Ohio C.P. Del. Cnty. June 8, 2021) [hereinafter Complaint].

3. Jon Brodkin, *Spurred by Clarence Thomas, Ohio AG Wants Google Declared a Public Utility*, ARS TECHNICA (June 8, 2021, 6:30 PM), https://arstechnica.com/tech-policy/2021/06/spurred-by-clarence-thomas-ohio-ag-wants-google-declared-a-public-utility [https://perma.cc/VKU6-YHLG].

4. Mike Masnick, *Ohio Files Bizarre and Nonsensical Lawsuit Against Google, Claiming It's a Common Carrier; But What Does That Even Mean?*, TECHDIRT (June 8, 2021, 12:03 PM), https://www.techdirt.com/2021/06/08/ohio-files-bizarre-nonsensical-lawsuit-against-google-claiming-common-carrier-what-does-that-even-mean [https://perma.cc/Z3VX-ZMYE].

5. Google, in its response to Ohio, references other cases it is involved in that mention public utilities or common carriers, but these are actually not relevant to considering the applicability of the common law. *D'Agostino v. Appliances Buy Phone, Inc.*, No. A-2005-13T1, 2015 WL 10434721 (N.J. Super. Ct. App. Div. Mar. 8, 2016) (unpublished opinion), is an unpublished case making a single conclusory statement that "Google is not a public utility or common carrier," with no discussion or analysis of any kind. *Id.* at *18. *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622 (D. Del. 2007), involved the claim that Google was a "public calling." *Id.* at 634. The court analyzed a 1963 case involving a Black customer who was refused service at a restaurant within a hotel, and it concluded that the state common law of innkeepers did not apply to restaurants. *Id. Kinderstart.com LLC v. Google, Inc.*, No. C 06-2057 JF (RS), 2006 WL 3246596 (N.D. Cal. July 13, 2006), is another unpublished opinion in which the claim was whether Google was a common carrier under the Communications Act—not under the common law. *Id.* at *10.

6. In order to show this negative, we searched on the Westlaw database for all cases in which the tech platform's name was within the same sentence as each of the following terms: common carrier, public utility, and common law.

7. *See generally* Peter Swire, *Should the Leading Online Tech Companies Be Regulated as Public Utilities?*, LAWFARE (Aug. 2, 2017, 9:00 AM), https://www.lawfaremedia.org/article/should-leading-online-tech-companies-be-regulated-public-utilities [https://perma.cc/5ZHC-Q793] (focusing on the regulation of tech companies as monopolies from an administrative or legislative standpoint); K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621 (2018) [hereinafter Rahman, *The New Utilities*] (same); K. Sabeel Rahman, *Regulating Informational Infrastructure: Internet Platforms as the New Public Utilities*, 2 GEO. L. TECH. REV. 234 (2018) (same); Elizabeth Warren, *Here's How We Can Break Up Big Tech*, MEDIUM (Mar. 8, 2019), https://medium.com/@teamwa

status might interact with First Amendment protections.[8] Recent federal court cases have also analyzed whether social media platforms are common carriers, but in the context of constitutional challenges to state legislation in Texas and Florida.[9] In short, there has been surprisingly little discussion of whether and how the common law of carriers itself applies to tech platforms.

In this Article, we argue that far from being bizarre or nonsensical, tech platforms are and should be subject to liability at common law for violating the duties of common carriers. Traditionally, common carrier duties have been imposed on providers of *infrastructural* resources—resources that are critical inputs into other productive activities and that often exhibit natural monopoly or oligopoly characteristics, network effects, or "virtual" monopoly power at the point of sale.[10] It takes no great leap of imagination to see that some of the core business

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rren/heres-how-we-can-break-up-big-tech-9ad9e0da324c [https://perma.cc/RAL9-BGU5] (same); GANESH SITARAMAN, GREAT DEMOCRACY INITIATIVE, REGULATING TECH PLATFORMS: A BLUEPRINT FOR REFORM (2018) (same); Ending Platform Monopolies Act, H.R. 3825, 117th Cong. (2021) (same); American Innovation and Choice Online Act, S. 2992, 117th Cong. (2021) (same).

8. And this has largely been in a single symposium, contemporaneous with Justice Thomas's opinion. *See, e.g.*, Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463, 463 (2021); Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 382 & n.12 (2021) ("I also don't want to claim that platforms are 'common carriers' under existing law . . . ."); Jack M. Balkin, *How To Regulate (and Not Regulate) Social Media*, 1 J. FREE SPEECH L. 71, 71 (2021); *see also* James B. Speta, *The Past's Lessons for Today: Can Common-Carrier Principles Make for a Better Internet?*, 106 MARQ. L. REV. 741, 742–43 (2023) (proposing that regulation of internet platforms as common carriers impacts the "speech experience" they can provide); Ashutosh Bhagwat, *Why Social Media Platforms Are Not Common Carriers*, 2 J. FREE SPEECH L. 127, 127 (2022); Adam Thierer, *The Perils of Classifying Social Media Platforms as Public Utilities*, 21 COMMLAW CONSPECTUS 249, 251 (2013). An older account, focused on search engines, is Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1149 (2008). Bracha and Pasquale also address First Amendment issues, and they mention the idea of regulating under the common law but in passing. *Id.* at 1209 ("The question, then, is whether a regulatory framework, either by statute or under the common law, could be crafted . . . .").

9. *See* NetChoice, LLC v. Att'y Gen., 34 F.4th 1196, 1221–22 (11th Cir. 2022) (holding that a Florida law was unconstitutional for classifying internet and social media platforms as common carriers under the First and Fourteenth Amendments, under the Commerce Clause, and as preempted by federal law); NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 494 (5th Cir. 2022) (holding that a Texas state law classifying social media platforms did not violate the First Amendment).

10. Indeed, common carriage did not merely apply to entities that "carry" or transport goods. *See infra* Part I.A. In that sense, "common carrier" is something of a misnomer. The "common law of platforms," or "common law of networks, platforms, and utilities," would be a more accurate term.

lines of the dominant tech platforms fall squarely into this legal category, which is, indeed, why many commentators and policymakers have suggested regulating them in this manner.[11]

The real question, the truly "bizarre" puzzle, is not why Ohio brought suit against Google, but why there are *so few* common law cases against tech platforms under common carrier principles. The answer, we suspect, is twofold. First, the common law of carriers has largely been forgotten in this age of statutes. With the rise of the administrative state and sectoral regulation in transportation, energy, telecommunications, and banking in the late nineteenth and early twentieth centuries, there was simply not much need to invoke the common law system to regulate networks, platforms, and utilities ("NPUs").[12] Indeed, even though debates on net neutrality (which embodies a classic common carrier principle) were prominent in the early 2000s, they were largely debates about the Federal Communications Commission's *statutory* powers under the Communications Act.[13] This oversight seems to have overlapped with a post–New Deal framing of the common law's substantive content as invariably laissez-faire and nonregulatory—even though, as we show, the common law of carriers offered (and still offers) a set of prescriptive regulations.

The second phenomenon is that, in our age of formalism, common law reasoning and methods can trip up even some scholars and lawyers. Both Google's response to Ohio's complaint and some of the scholarly literature discussing common carriers and public utilities typify our formalist era. Rather than reasoning analogically, Google's lawyers

11. *See supra* note 7 and accompanying text.

12. *See infra* Part I.D.1.

13. This is not to say that scholars did not revisit the common law of common carriage. But they did largely to inform the Communications Act. The ultimate test was how to implement neutrality under the statute—not independently under the common law. *See, e.g.*, Christopher S. Yoo, *Is There a Role for Common Carriage in an Internet-Based World?*, 51 HOUS. L. REV. 545, 545–46 (2013) (observing that people want to apply common carriage to tech companies but that definitions are difficult and unworkable and that there are problems with the substantive rules of common carriage); Daniel T. Deacon, *Common Carrier Essentialism and the Emerging Common Law of Internet Regulation*, 67 ADMIN. L. REV. 133, 134–35, 177–78 (2015) (predicting that the FCC's rule-based approach toward regulating internet providers will adapt into a more standard common law approach); Thomas B. Nachbar, *The Public Network*, 17 COMMLAW CONSPECTUS 67, 138–39 (2008) (advocating for FCC regulation of internet providers to utilize a "user neutrality standard" to encourage nondiscriminatory access); *see also* Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141, 142 (2003) (assessing three different types of regulatory regimes for broadband providers in the network neutrality debates).

read common law opinions as if they are analyzing statutory text, and scholars seem perplexed when they cannot identify some singular criterion that will define what is or is not a common carrier for all time, in all places, and in all contexts.[14] This formalistic impulse too often leads to the conclusion that the enterprise is futile. Interestingly, Justice Thomas's concurrence does not channel this modern mood.

Substantively, the common law of carriers features a number of elements that are relevant to tech platforms' businesses. We outline the three most relevant ones in Part I—equal access mandates, just and reasonable pricing, and deplatforming exceptions—by digging into the historical cases and treatises to give texture to these rules and their application. Equal access mandates, also referred to as nondiscrimination rules, prevent innkeepers, common carriers, and public utilities from excluding or discriminating against particular members of the public. Before sectoral regulatory legislation supplanted the common law in the major common carrier and public utility industries, this principle was standardly applied in cases of self-preferencing (in which the carrier discriminates in favor of itself) and at least some states went further in mandating structural separations between different lines of business.[15] It was also closely tied to the second principle, just and reasonable pricing—which prevented discrimination based on price. The third principle, critical for contemporary debates, is that there were also exceptions to the rule that common carriers must take all comers, which one of us has called "reasonable deplatforming."[16] Common carriers were allowed to exclude a user in order to maintain quality and provision of the service or when a user might harm others.

In Part II, we argue that tech platforms are straightforwardly common carriers (from the standpoint of the relevant common law) and that many of the alleged harms caused by tech platforms are precisely the kinds of harms that warrant action under the common law's regulatory principles. In separate sections, we walk through different business lines in the tech sector—operating systems, online marketplaces, search, social media, and virtual reality. Our application of common carriage to tech platforms yields three potentially startling conclusions.

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14. *See infra* Part I.

15. *See infra* Part I.B.1.

16. Ganesh Sitaraman, *Deplatforming*, 133 YALE L.J. 497, 531 (2023) [hereinfter Sitaraman, *Deplatforming*].

First, the most obvious situations in which the common law of carriers applies are business-to-business relationships where tech platforms exclude competitors, self-preference their own products, engage in particularized value extraction, or create an unlevel playing field among users. These were the core problems that the common law's common carrier principles addressed, and the context is readily translatable to that of operating systems and online marketplaces.[17] Regarding operating systems, we observe that common law claims could very well have been brought against Microsoft's actions in the 1980s and 1990s, when the Department of Justice partially succeeded in imposing some similar obligations through (time-limited) antitrust consent decrees.[18] More recently, attention has turned to Apple's App Store and the Google Play Store, which serve as app gatekeepers to mobile operating systems, and we discuss what types of behaviors run afoul of the common law.[19] With respect to e-commerce marketplaces, like Amazon Marketplace, and digital advertising exchanges, like Google's AdExchange, we note that both have been criticized for self-preferencing private-label goods and services over those of third-party competitors.[20] Self-preferencing is also the central allegation in *Ohio ex rel. Yost v. Google LLC*[21] about the company's search engine.[22] We also offer a response to the claim that any kind of platform curation necessarily means discrimination. It does not. As we show, that claim mistakenly characterizes the service requested. The more critical issue for both Ohio and Google, or for other firms in self-preferencing cases, is determining which of the firm's vertically integrated products are distinct lines of business.[23]

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17. *See infra* Part II.A–.B.

18. *See infra* Part II.A.

19. *Id.*

20. The Department of Justice recently filed an antitrust lawsuit against Alphabet, Inc., Google's parent company, seeking to force a divestiture of its AdExchange. *See* Miles Kruppa & Dave Michaels, *DOJ Sues Google, Seeking To Break Up Online Advertising Business*, WALL ST. J. (Jan. 24, 2023, 4:59 PM), https://www.wsj.com/articles/u-s-sues-google-for-alleged-antitrust-violations-in-its-ad-tech-business-11674582792 [https://perma.cc/KX4A-6DVN]. Regarding Amazon, see Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 985–94 (2019) [hereinafter Khan, *Separation*].

21. State *ex rel.* Yost v. Google LLC, No. 21-CV-H-06-0274, 2022 WL 1818648 (Ohio C.P. Del. Cnty. May 24, 2022).

22. *See infra* Part II.C.

23. *Id.*

Second, for all the attention that Justice Thomas's concurrence and the prospect of regulating social media platforms have gotten, the common law of carriers may be at once more applicable to social media yet less impactful than proponents might expect. Although social media platforms can be readily analogized to other common carriers, the common law offered a robust set of exceptions from the duty to take all comers.[24] Common carriers could exclude individuals from service, even if they were not presently engaged in disruptive actions. Twitter's policies on suspending accounts, prior to billionaire Elon Musk's takeover of the platform, actually aligned reasonably well with the common law rules on permissible exclusion from common carriers.[25] With respect to deplatforming, the common law may not be as radical a change as some advocates want. At the same time, for the common law to be workable in this area, Congress would most likely have to reform § 230 of the Communications Act, which displaces state law in important ways.

Third, and finally, we briefly look to the future and observe that lawyers, judges, scholars, and policymakers should not be afraid to conclude that coming developments in virtual reality ("VR"), the metaverse, or other future technologies give rise to common carriage obligations.[26] While the metaverse might seem like a frontier technological system, we offer that much of its infrastructure parallels the business lines discussed in this Article, and that with respect to certain practices in those arenas, the common law is readily translatable. It is possible, as a result, that common law actions in the VR and metaverse arenas could help develop that technology in a manner that differs from the "move fast and break things"[27] approach that defined how the big tech platforms developed over the last two decades.

Overall, then, this Article seeks to make two major contributions. First, we offer what we believe is the first treatment of how the common law's common carrier principles generally apply to tech platforms, including in domains that have not been discussed before (marketplaces, operating systems, and VR and the metaverse). Second

24. *See infra* Part II.D.

25. *Id.*

26. *See infra* Part II.E.

27. JONATHAN TAPLIN, MOVE FAST AND BREAK THINGS: HOW FACEBOOK, GOOGLE, AND AMAZON CORNERED CULTURE AND UNDERMINED DEMOCRACY (2017).

and more broadly, we contribute to an emerging literature applying a public utility model to tech platforms. Scholars in this vein have made the general claim that this framework can apply to tech platforms[28] and have started to apply specific tools from the body of statutory law to these platforms.[29] We recover the relevant tools from the common law and show how they apply. Along the way, we make a number of more specific contributions: we offer a common law–inspired method for identifying common carriers that differs from the essentialist approach that is common in the literature, show that business-to-business allegations are the most straightforward under the common law, critique the view that curation is inherently discrimination, and show that common carriage would still allow for (reasonable) deplatforming.

A brief caveat is also in order. The body of law governing NPUs[30] has gone by many names over the years, including the law of common carriers and innkeepers,[31] the law of public service corporations,[32] public utilities regulation,[33] and regulated industries law.[34] For simplicity, throughout the Article, we use the terms "platform," "common carrier," "public utility," and "infrastructure industry" interchangeably.[35]

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28. *See* Rahman, *The New Utilities*, *supra* note 7, at 1622.

29. *See generally* Khan, *Separation*, *supra* note 20 (describing structural separation across public utility sectors and applying it to tech platforms); Ganesh Sitaraman, *The Regulation of Foreign Platforms*, 74 STAN. L. REV. 1073 (2022) (describing restrictions on foreign ownership across public utility sectors and applying it to tech platforms); Sitaraman, *Deplatforming*, *supra* note 16 (describing how deplatforming rules exist in the common law and across networks, platforms, and utilities, and applying lessons to tech platforms); Morgan Ricks, What Neutrality Mandates Do (Dec. 14, 2023) (unpublished manuscript) (on file with authors) (describing neutrality mandates across public utility sectors and applying them to tech platforms).

30. *See* MORGAN RICKS, GANESH SITARAMAN, SHELLEY WELTON & LEV MENAND, NETWORKS, PLATFORMS, AND UTILITIES: LAW AND POLICY (2022) (outlining statutes, regulations, and case law that apply to NPUs across different U.S. industries).

31. *See* CHARLES K. BURDICK, CASES ON THE LAW OF PUBLIC SERVICE, INCLUDING THE LAW PECULIAR TO COMMON CARRIERS AND INNKEEPERS (2d ed. 1924).

32. 1 BRUCE WYMAN, THE SPECIAL LAW GOVERNING PUBLIC SERVICE CORPORATIONS AND ALL OTHERS ENGAGED IN PUBLIC EMPLOYMENT 111 (1911) [hereinafter WYMAN, THE SPECIAL LAW].

33. *See* FRANCIS X. WELCH, CASES AND TEXT ON PUBLIC UTILITY REGULATION (1961).

34. *See* RICHARD J. PIERCE, JR. & ERNEST GELLHORN, REGULATED INDUSTRIES IN A NUTSHELL (1999).

35. *Cf.* Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 COLUM. L. REV. 514, 515 n.9 (1911) ("This term 'Public Service Company' is not entirely satisfactory, but it is difficult to find a substitute which is not unwieldy.").

## I. UNDERSTANDING THE COMMON LAW OF CARRIERS

In this Part, we describe the common law of carriers. We start with a discussion of what counted as a "carrier" under the common law. Perhaps most importantly for a conversation about tech platforms, new technologies were never exempt from such a designation, nor was the designation confined to enterprises that literally "carried" things for customers. We then provide an extensive description of the central tools of the law of NPUs—equal access mandates, nondiscriminatory pricing, and what one of us has called "reasonable deplatforming"—and show that they were all part of the common law. We conclude this Part by offering two reasons why we suspect the common law has not been a major feature of debates over tech platforms: a general forgetting about the common law of carriers in an age of statutes, and difficulties with defining the common law's contours in an era of formalism. This Part serves as a foundation for considering the applicability of common law tools to tech platforms.

### *A. What Counts as a "Carrier" at Common Law?*

In 1881, only five years after Alexander Graham Bell made his historic first telephone call, a Louisville, Kentucky, court was confronted with the question of whether the common law of carriers applied to telephone service.[36] The case involved a telephone company that entered the horse-drawn taxi business and proceeded to disconnect phone service to a competing horse-drawn taxi business in town. The telephone company claimed it was not required to serve "a competitor in same business with itself."[37] The court concluded otherwise. Citing cases about railroads and stagecoaches, it concluded that telephone service was "governed by the principles of the law of common carriers" and ordered the telephone company to serve the plaintiff.[38] "The law must adapt itself to the new subjects that are brought within the range of judicial action," the court said.[39] "And

36. Louisville Transfer Co. v. Am. Dist. Tel. Co., 1 Ky. L.J. 144, 145 (Ch. Ct. Louisville 1881).

37. *Id.*

38. *Id.*

39. *Id.* at 146.

Courts must reason by analogy from things that are settled, in order to establish principles to govern things that are unsettled."[40]

As the Louisville case illustrates, historically, the sheer novelty of a service was no impediment to its being treated as a carrier at common law.[41] Telephone service providers were at the bleeding edge of technological innovation when the case was decided. "[S]o-called common carriers [are] a hybrid institution which is at once more comprehensive and more important than its dullish nomenclature suggests," writes Professor Richard Epstein.[42] "[R]ailroads, gas and power companies[,] telegraphs, telephones, and all modern forms of telecommunications are charter members of the list."[43] Just as important, the case law reveals that it has never mattered whether the business in question actually "carries" things. On the contrary, the common law's carrier principles have been applied not only to literal carriers but also to stationary businesses like warehouses, inns, wharves, mills, and cotton gins.[44] Indeed, the seminal decision establishing the constitutionality of public utility–style regulation for businesses "affected with a public interest"—in which the Supreme

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40. *Id.* (citation omitted). In *State ex rel. Webster v. Nebraska Telephone Co.*, 22 N.W. 237 (Neb. 1885), the Nebraska Supreme Court applied the common law of carriers to a telephone company and noted:

> The principles established and declared by the courts . . . are not confined to the instrumentalities of commerce, nor to the particular kind of service known or in use at the time when these principles were enunciated, "but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances . . . ."

*Id.* at 239 (quoting Pensacola Tel. Co. v. W. Union Tel. Co., 96 U.S. 1, 9 (1877)).

41. *Cf.* Haugen v. Albina Light & Water Co., 28 P. 244, 246–47 (Or. 1891) (water service); Bailey v. Fayette Gas-Fuel Co., 44 A. 251, 252 (Pa. 1899) (gas service); N.Y. & Chi. Grain & Stock Exch. v. Bd. of Trade, 19 N.E. 855, 859 (Ill. 1889) (market data service); W. Union Tel. Co. v. Call Publ'g Co., 181 U.S. 92, 99–100 (1901) (telegraph service); *see also* YOUNG B. SMITH, NOEL T. DOWLING & ROBERT L. HALE, CASES ON THE LAW OF PUBLIC UTILITIES 5 (Warren A. Seavey ed., 2d ed. 1936) ("Whether new types of businesses which resemble the historical common carriers will be deemed common carriers by the courts seems to depend upon the initiative which the particular court is willing to exercise."); *id.* ("Courts have, upon their own initiative, declared cotton gins and tobacco warehouses affected with the incidents of a 'common' calling; as to newspapers, news services, and furnishers of grain quotations, decisions conflict." (footnotes omitted)).

42. RICHARD A. EPSTEIN, PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD 279 (1998).

43. *Id.*

44. *See, e.g.*, Allnutt v. Inglis (1810) 104 Eng. Rep. 206, 207–08 (KB) (warehouse); White's Case (1586) 2 Dyer 343, 343–44 (inn); Bolt v. Stennet (1800) 101 Eng. Rep. 1572, 1572–73 (wharf); Tallassee Oil & Fertilizer Co. v. Holloway, 76 So. 434, 435 (Ala. 1917) (cotton gin).

Court observed that "[c]ommon carriers exercise a sort of public office, and have duties to perform in which the public is interested"—involved not a literal carrier but rather a grain warehouse.[45]

What distinguishes enterprises that courts have deemed subject to common carrier duties at common law from other types of enterprise? Historically, the focus was on firms that held themselves out as open to the public.[46] Indeed, in the leading constitutional case in this sector, *Munn v. Illinois*,[47] the test was not one of pure monopoly. Rather, the Supreme Court observed that grain elevators were businesses "affected with a public interest."[48] The Court said that it "has been accepted without objection as an essential element in the law of property" for hundreds of years that "[p]roperty does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large."[49] Thus, when a person undertakes such an activity, "he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good."[50]

Analysts have also suggested that the appropriate focus is on firms that are natural monopolies,[51] virtual or functional monopolies,[52] or

45. Munn v. Illinois, 94 U.S. 113, 126–30 (1876) (citing Matthew Hale, *De Portibus Maris*, *in* 1 HARGRAVE LAW TRACTS 45, 78 (1787)).

46. *See* Burdick, *supra* note 35, at 515 ("The features which at early common law distinguished those engaged in public or common callings (the original public service companies) from those who were not so engaged, were the peculiar general duties laid upon the persons engaged in common callings to serve all applicants . . . ."(footnote omitted)). *See generally* Joseph William Singer, *No Right To Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996) (examining the duties common carriers historically owed to Black Americans).

47. Munn v. Illinois, 94 U.S. 113 (1876).

48. *Id.* at 126 (quoting Hale, *supra* note 45, at 78).

49. *Id.*

50. *Id.*

51. *See* Paul L. Joskow, *Regulation of Natural Monopoly*, *in* 2 HANDBOOK OF LAW AND ECONOMICS 1227 (A. Mitchell Polinsky & Steven Shavell eds., 2007). For the argument against regulation, see Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 553 (1969).

52. *See* WYMAN, THE SPECIAL LAW, *supra* note 32, at 100–34 (observing that firms could effectively be monopolies in context, even if not natural monopolies under economic theory). The scope of inclusion under a "virtual monopoly" theory could potentially extend quite broadly, for example, to sectors with labor shortages. Indeed, some have argued that this was the origin of the public service obligation. *See generally* Norman F. Arterburn, *The Origin and First Test of Public Callings*, 75 U. PA. L. REV. 411 (1927) (arguing that labor shortages after the Black Death motivated the duty to serve).

beneficiaries from eminent domain.[53] The Federal Communications Commission undertook a study of this question in 1981, with a view toward informing its interpretation of the common carrier provisions of the Communications Act of 1934.[54] While acknowledging some inconsistency in the case law, the agency observed that "only certain essential occupations were common callings, and that the duty to serve was imposed to protect the public against actual or virtual monopolies in those occupations."[55] For example, "carriers, innkeepers, and smiths . . . were trades upon which the traveler depended, and there might well be only one such tradesman in a given medieval English village."[56] Epstein likewise concludes that the common law of carriers has applied primarily to both legal and de facto monopolies and oligopolies, as well as to virtual monopolies that operate in a given location[57]—contexts in which "[t]he dangers of extraction are evident."[58] Whether due to scale economies, network effects,[59] or virtual monopoly at the point of sale,[60]

53. *See* CHARLES M. HAAR & DANIEL WM. FESSLER, THE WRONG SIDE OF THE TRACKS: A REVOLUTIONARY REDISCOVERY OF THE COMMON LAW TRADITION OF FAIRNESS IN THE STRUGGLE AGAINST INEQUALITY 200 (1986) (describing how common carriers are often those to whom the government chooses "to delegate some of those functions necessary for the public good").

54. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064, Title II ("Common Carriers").

55. *In re* Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, 84 F.C.C.2d 445, 521 (1981).

56. *Id.* Smiths were necessary for travel because they shoed horses. *See* William J. Novak, *The Public Utility Idea and the Origins of Modern Business Regulation*, *in* CORPORATIONS AND AMERICAN DEMOCRACY 139, 145 (Naomi R. Lamoreaux & William J. Novak eds., 2017) (citing 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765–1769, at 164 (Univ. of Chi. Press 1979)).

57. EPSTEIN, *supra* note 42, at 284–85; *see also* Jim Rossi, *The Common Law "Duty To Serve" and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring*, 51 VAND. L. REV. 1233, 1244–48 (1998) (reviewing the common law antecedents to public utilities' "duty to serve").

58. EPSTEIN, *supra* note 42, at 281.

59. Network effects exist when the value of a service increases for all users as more people use it. *See* Bruno Jullien, Alessandro Pavan & Marc Rysman, *Two-Sided Markets, Pricing, and Network Effects*, *in* 4 HANDBOOK OF INDUSTRIAL ORGANIZATION 485, 488 (Kate Ho, Ali Hortaçsu & Alessandro Lizzeri eds., 2021) ("As a product with network effects diffuses into the market, it becomes more valuable and drives further adoption.").

60. Innkeepers may often have been "virtual" monopolies in this sense. *See, e.g.*, Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156, 159 (1904) [hereinafter Wyman, *The Law of the Public Callings*] ("When the weary traveller reaches the wayside inn in the gathering dusk, if the host turn him away what shall he do? Go on to the next inn? It is miles away, and the roads are infested with robbers."); EPSTEIN, *supra* note 42, at 282 ("Often an operator of one of these facilities was the sole party engaged in the

the markets in which these firms operate are not conducive to robust competition, affording them considerable power over at least some of their users, at least some of the time.

To be crystal clear, courts did not confine the law of common carriers to contexts in which there was only one provider available; literal monopoly conditions were never a prerequisite. As Epstein points out, in one classic case involving a licensed warehouse, the court noted that Parliament's licensing additional warehouses would not necessarily solve the public's problem—the "right of the public," the court noted, might still be "narrowed and restricted" under oligopoly conditions.[61] Our review of the case law and secondary literature uncovers no instances in which a court exempted a defendant from common carrier obligations due to a showing that the plaintiff in fact had other options. Indeed, some scholars have observed that the law of common carriers was not limited to businesses that exercised substantial economic power.[62] Our claim is not that falling within this class of industries has ever been a *necessary* condition for the common law of carriers to apply, but rather that it appears to have been sufficient. As we will see in Part II, modern tech platforms fit comfortably within this category.[63]

### *B. What the Common Law of Carriers Requires*

What does the common law require of carriers? While much of the historical literature has focused on the heightened duties of care that apply to common carriers,[64] we focus on three obligations that regulate their dealings with customers—equal access rules, just and reasonable pricing duties, and deplatforming principles.

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recognized line of business in a given location or along a particular route: there was only one inn on a highway, which in turn was served by one carrier.").

61. EPSTEIN, *supra* note 42, at 285 (quoting Allnutt v. Inglis (1810) 104 Eng. Rep. 206, 211 (KB)).

62. *See* Nachbar, *supra* note 13, at 97 (noting that "the common law duties of innkeepers and common carriers remain today, even though hoteliers, bus line operators, and cab drivers face significant competition"); Singer, *supra* note 46, at 1292 (noting that while the local monopoly perspective "is not entirely wrong," the historical record shows "it is not entirely right either").

63. *See, e.g.*, WYMAN, THE SPECIAL LAW, *supra* note 32, at 101–34 (describing what he calls "virtual" monopolies).

64. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 180 (1923) (extending the rules of bailees to common carriers). For a discussion of the duty of care, bailments, and property, and their application to cloud infrastructure, see Danielle D'Onfro, *The New Bailments*, 97 WASH. L. REV. 97, 126 (2022) ("For all of the newness of cloud storage, it is still storage.").

1. *Equal Access.* Equal access mandates, sometimes called nondiscrimination rules or the obligation to "serve all comers," have existed in the common law since at least the thirteenth century.[65] Courts in the Middle Ages required a range of businesses to serve all comers neutrally, including ferries,[66] gristmills,[67] horseshoeing blacksmiths,[68] and inns,[69] although they were sometimes less than clear as to the nature of the obligation. In the seventeenth century, the equal access mandate became an established principle in the leading case of *Jackson v. Rogers*.[70] The court held that an action could be brought against a common carrier who refused to transport a customer's goods if it had "convenience to carry the same" and observed that such an action would also lie "against an inn-keeper for refusing [a] guest, or a smith on the road who refuses to shoe my horse."[71] This principle—access to all comers—was closely tied to the principle of charging just and reasonable prices, discussed below; exclusion is tantamount to charging a prohibitively high price.

The principle that common carriers had to be neutral with respect to access was perhaps most sharply delineated in cases in which the platform company denied access to their competitors—precisely because platform companies could argue that they were a single firm and merely preferencing their own property. Thus, in the Louisville telephone case described earlier, the court found that the company was "engaged in two distinct employments" and the telephone company was "bound to serve the general public, including [the] plaintiff, on

65. For informative discussions, see HAAR & FESSLER, *supra* note 53; Rossi, *supra* note 57.

66. Action on the Case, Y.B. 22 Edw. III, pl. 41 (1348).

67. Trespass on the Case with Regard to Certain Mills, Y.B. 22 Hen. VI, f. 14, pl. 23 (1444) (cited in HAAR & FESSLER, *supra* note 53, at 72).

68. *See* Wyman, *The Law of the Public Callings*, *supra* note 60, at 158 (citing "an Anonymous note in 1450" (footnote omitted)).

69. *See* White's Case (1586) 2 Dyer 343, 343 ("If clothiers in Term come to a common inn in London, and stay for a week or more, if they are robbed they shall have their action.").

70. Jackson v. Rogers, 2 Show. K.B. 327 (1683).

71. *Id.* at 327–28. For other helpful descriptions of the principle, see JOSEPH STORY, COMMENTARIES OF THE LAW OF BAILMENTS, WITH ILLUSTRATIONS FROM THE CIVIL AND THE FOREIGN LAW 321 § 495 (2d ed. 1840) (noting that a common carrier "undertake[s] to carry goods for persons generally; and he must hold himself out as ready to engage in the transportation of goods for hire, as a business, not as a casual occupation *pro hac vice*" (footnote omitted)); WILLIAM BLACKSTONE, 3 COMMENTARIES 165 (explaining that for one who "hangs out a sign and opens his house for travellers, it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages, if he without good reason refuses to admit a traveler" (footnote omitted)).

reasonable terms, with impartiality."[72] In another case, a New York court found that a telephone company was a "distinct and separate business" from its messenger operations and that it could not deny telephone service to a rival messenger.[73]

Exceptions to equal access rules were limited in scope. One famous set of cases involved railroads' relationship to express companies, which were also common carriers and relied on railroads to operate.[74] When railroads began entering the express business or setting up exclusive relationships with an express company, they also started denying service to other express companies. In the *Express Cases*,[75] the Supreme Court held that railroads did *not* need to serve express companies on equal terms. But it is worth noting how narrow its opinion was and, even still, how much of an outlier it was. The Court justified its decision on the ground that express companies required special accommodations from railroads.[76] State courts around the country, though, had repeatedly held in favor of excluded express companies. The Pennsylvania Supreme Court said that railroads "must operate on all alike" and "exclusive privileges . . . [are] against law and void."[77] The high court in Maine concluded that "[t]he very definition of a common carrier excludes the idea of the right to grant monopolies or to give special and unequal preferences."[78] New Hampshire's Supreme Court held that "undue or unreasonable preference or advantage . . . is a cause of action at common law."[79]

Despite the Supreme Court's decision in the *Express Cases*, courts continued to impose equal access requirements on firms in a range of contexts. When a Maryland telephone company arranged for its customers to send messages through Western Union, a rival telegraph wanted the same deal. The court ordered the telephone company to treat the other telegraph company on similar footing to Western

72. Louisville Transfer Co. v. Am. Dist. Tel. Co., 1 Ky. L.J. 144, 145 (Ch. Ct. Louisville 1881).

73. People *ex rel.* Postal Cable Tel. Co. v. Hudson River Tel. Co., 19 Abb. N. Cas. 466, 480 (N.Y. Sup. Ct. 1887).

74. S. Express Co. v. Memphis, Etc., R.R., 8 F. 799, 802 (E.D. Ark. 1881) ("[T]he nature of the express business makes special facilities for its transaction necessary . . . .").

75. Express Cases, 117 U.S. 1 (1886).

76. *Id.* at 23–26.

77. Sandford v. R.R. Co., 24 Pa. 378, 383 (1855).

78. New England Express Co. v. Me. Cent. R.R. Co., 57 Me. 188, 196 (1869).

79. McDuffee v. Portland & Rochester R.R. Co., 52 N.H. 430, 459 (1873).

Union: "The law requires [it] to be impartial, and to serve all alike . . . ."[80]

Indeed, in some cases, courts even mandated structural separations—prohibitions on a firm owning or operating another line of business—designed to prevent conflicts of interest.[81] In a particularly notable case, a grain warehouser was also trading in the underlying commodities that he stored, and he charged higher prices to third-party companies for storing grain.[82] The Illinois Supreme Court looked to the common law and held that the warehouse had a "duty to the public as an impartial holder of the grain of the different proprietors" and that this common law duty prohibited proprietary trading.[83] As a remedy, the court ordered the warehouser to exit the trading business altogether.[84] Less than a decade later, the U.S. Supreme Court suggested that a structural separation might rise to the level of a common law obligation.[85] A railroad company transported and sold its own coal in competition with third-party coal companies.[86] The Supreme Court found against the railroad under the Interstate Commerce Act, so it did not reach the common law issue. But it recognized that the railroad's commodity business might be questionable under the common law:

> [W]e shall not direct our attention to expressly determining whether the assertion by a carrier of a right to deal in the products which it transports would not be so repugnant to the general duty resting on the carrier as to cause the exertion of the power to deal in the products which it transports to be unlawful, *irrespective of statutory restrictions*.[87]

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80. Chesapeake & Potomac Tel. Co. v. Balt. & Ohio Tel. Co., 7 A. 809, 811 (Md. 1886); *see also* Del. & A. Tel. & Tel. Co. v. Delaware, 50 F. 677, 680 (3d Cir. 1892) ("We do not regard the *Express Cases* . . . as applicable here. On the facts they are distinguishable from this case; and the exception which they establish to the general rules governing common carriers is not likely to be enlarged.").

81. For a discussion, with application to tech platforms, see generally Khan, *Separation*, *supra* note 20.

82. Cent. Elevator Co. v. People, 174 Ill. 203, 256 (1898).

83. *Id.*

84. *See id.* at 255, 257 (affirming the lower court's permanent injunction).

85. N.Y., New Haven & Hartford R.R. Co. v. Interstate Com. Comm'n, 200 U.S. 361, 390 (1906).

86. *Id.* at 362.

87. *Id.* at 390 (emphasis added).

Congress addressed the issue two years later, prohibiting railroads from having commodities businesses in the Hepburn Act and rendering further developments along these lines unnecessary.[88] But scholars and the Supreme Court continued to cite the original Illinois case, recognizing that the common law could extend to per se illegality of operating multiple business lines that create a conflict of interest.[89]

2. *Just and Reasonable Prices.* The history of what constitutes a "just price" is long and winding, ranging from the Medieval era to early twentieth-century public utility regulations.[90] In an era before public utility commissions regulated rates based on a fair return on capital, common law judges defined "just and reasonable prices" based on typical charges for other uses or what a company publicly reported as its prices. Writing in the early nineteenth century, Chancellor James Kent said that "if they have the requisite convenience to carry, and are offered a reasonable or customary price," then common carriers have an obligation to carry users.[91] As one treatise described the rule, the "tender of [the carrier's] *usual*, or of a reasonable compensation, obliges him to carry."[92] Inequality of rates, in turn, was sometimes seen as evidence of a price being unreasonable.[93]

Interestingly, as one of us has found, the common law of reasonable prices seems to have changed around 1850 in response to the challenge of the railroads.[94] Prior to 1850, the common law on price discrimination appears to have been largely focused on preventing extraction: upward deviations from the standard price.[95] After 1850,

88. Hepburn Act of 1906, Pub. L. No. 59–337, 34 Stat. 584, 585.

89. *See, e.g.*, Bruce Wyman, *Business Policies Inconsistent with Public Employment*, 20 HARV. L. REV. 511, 530 (1907); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 227 (1947).

90. William Boyd, *Just Price, Public Utility, and the Long History of Economic Regulation in America*, 35 YALE J. ON REGUL. 721, 726 (2018).

91. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 465 (1827) (emphasis added).

92. 1 THEOPHILUS PARSONS, LAW OF CONTRACTS 649 (1853) (alteration in original).

93. *See* Johnson v. Pensacola & Perdido R.R. Co., 16 Fla. 623, 664 (1878) ("[T]he fact that he charges less for one than for another is only evidence to show that a particular charge is unreasonable; nothing more."); JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS § 508 (9th ed. 1878); WYMAN, THE SPECIAL LAW, *supra* note 32, at § 1243 (noting that courts held discrimination as evidence of unreasonable rates); Menacho v. Ward, 27 F. 529, 533–34 (S.D.N.Y 1886) (holding that customers could not be charged a higher rate on account of their maintaining business relations with a rival carrier).

94. Ricks, *supra* note 29, at 8–9.

95. Some authorities articulated only a weaker "no-block" rule without explicitly mentioning price. *See* Lane v. Cotton (1701) 88 Eng. Rep. 1458, 1464–65 (KB) (Lord Holt,

treatises and courts increasingly began to reframe the rule as equal treatment, preventing both extraction (upward deviations) and preferences (downward deviations).[96] With more and more common law cases, particularly focused on the railroads, judges first articulated in dicta[97] and then ruled outright[98] that the common law required equal treatment. In one case, a railroad charged one Tennessee steamboat company more than another. The court found that "systematic[]" preferences violated the common law.[99] A different court held that the common law barred railroads from giving volume discounts.[100] This equal treatment rule soon applied to telegraph, telephone, gas, and water companies.[101] The Indiana Supreme Court even held that a gas company had to treat new customers akin to older customers, despite

dissenting) ("If an innkeeper refuse to entertain a guest where his house is not full, an action will lie against him[], and so against a carrier, if his horses be not loaded, and he refuse to take a packet proper to be sent by a carrier."); 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 164–65 (1765) ("[A]n action on the case will lie against [an innkeeper] for damages, if he without good reason refuses to admit a traveler."); Rex v. Ivens (1835) 173 Eng. Rep. 94, 96 (NP) (holding that an innkeeper must admit a traveler at midnight). But it seems likely that a reasonable-price constraint of some sort was implicit.

96. *See* PARSONS, *supra* note 92, at 649; TOMPSON CHITTY & LEOFRIC TEMPLE, A PRACTICAL TREATISE ON THE LAW OF CARRIERS OF GOODS AND PASSENGERS BY LAND, INLAND NAVIGATION, AND IN SHIPS 173 (1857) ("At common law a carrier was bound to charge the same price to all persons alike for the same class of goods carried under similar circumstances.").

97. *See, e.g.*, Sandford v. R.R. Co., 24 Pa. 378, 383 (1855) (stating in dicta that railroad policies "must operate on all alike").

98. Messenger v. Pa. R.R. Co., 37 N.J.L. 531, 532, 537, 534, 535 (1874) (holding that a railroad was liable at common law for offering preferential treatment to certain hog shippers over others; "a service for the public necessarily implies equal treatment in its performance"; and a common carrier may not "make unequal preferences"); McCoy v. Cincinnati, Indianapolis, St. Louis & Chi. R.R. Co., 13 F. 3, 10 (S.D. Ohio 1890) (disallowing railroad preferences extended to certain stockyards); Samuels v. Louisville & N.R. Co., 31 F. 57, 58, 61 (N.D. Alabama 1887); Cook v. Chicago Ry., 81 Iowa 551, 562–63 (1890) (holding that no privilege, preferences, or unjust discriminations are allowed, as a matter of common law). *But see Johnson*, 16 Fla. At 672 (holding that the common law does not require equality of charge but a reasonable charge).

99. *See Samuels*, 31 F. at 58, 61.

100. Hays & Co. v. Pa. Co., 12 F. 309, 313–14 (N.D. Ohio 1882).

101. State *ex rel.* Webster v. Neb. Tel. Co., 17 Neb. 126, 135, 22 N.W. 237, 239 (Neb. 1885) (holding that, as a matter of common law, the telephone company "must supply all alike, who are alike situated, and not discriminate in favor of nor against any"); State *ex rel.* Wood v. Consumers' Gas Tr. Co., 61 N.E. 674, 677 (Ind. 1901) ("[N]o statute has been deemed necessary to aid the courts in holding that, when a person or company has undertaken to supply a demand which is affected with a public interest, it must supply all alike who are like situated, and not discriminate in favor of nor against any."); Griffin v. Goldsboro Water Co., 122 N.C. 206, 209 (1898) ("There must be equality of rights to all and special privileges to none.").

the fact that extending service could lead to shortfalls in supply.[102] As befits the common law, the equal treatment rule was not adopted uniformly all at once.[103] An 1880 treatise said there was a "difference of opinion upon the question."[104] But by 1892, the Supreme Court could claim in a railroad case that "the weight of authority in this country was in favor of an equality of charge to all persons for similar services" under the common law.[105]

3. *No Unreasonable Deplatforming.* The common law of carriers was pragmatic. Despite their general obligation to take all comers neutrally, innkeepers and common carriers were not required to serve customers under a range of scenarios, including if customers harmed the quality and provision of service or if a customer might harm another user. In a recent article, one of us calls this set of rules "reasonable deplatforming" and shows that these rules have been remarkably stable and consistent across both the common law and sectoral regulations in transportation, energy, banking, and communications.[106]

One set of exceptions to the duty to serve sought to ensure service quality and provision. Exclusion was thus permissible when there were capacity constraints or if the user refused to pay a reasonable price. English courts[107] and American commentators concurred on this point. As Justice Joseph Story noted in his *Commentary on the Law of Bailments*, "[a]n innkeeper is bound . . . to take in all travelers and wayfaring persons, and to entertain them, *if he can accommodate them*, *for a reasonable compensation*; and he must guard their goods with

102. *State ex rel. Wood*, 61 N.E. at 677 (Ind. 1901) (claiming to apply a principle that was "not new" but "as old as the common law itself").

103. *See e.g.*, Johnson v. Pensacola & Perdido R.R. Co., 16 Fla. 623, 672 (1878) (holding that the common law does not require equality of charge but a reasonable charge).

104. ROBERT HUTCHINSON, A TREATISE ON THE LAW OF CARRIERS § 302 n.1 (1880).

105. Interstate Com. Comm'n v. Balt. & Ohio R.R. Co., 145 U.S. 263, 276 (1892).

106. Sitaraman, *Deplatforming*, *supra* note 16, at 497.

107. *See* Lane v. Cotton (1701) 88 Eng. Rep. 1458, 1464–65 (KB) ("If an innkeeper refuses to entertain a guest where his house is not full, an action will lie against him[], and so against a carrier, if his horses be not loaded, and he refuse to take a packet proper to be sent by a carrier."); *id.* at 1464 (noting that the innkeeper "is bound to receive all manner of people into his house till it be full"). For a later English statement on the same point, see FREDERICK CHARLES MONCREIFF, THE LIABILITY OF INNKEEPERS 19 (1874) ("But if his house is full, he is justified in refusing guests.").

proper diligence."[108] Common carriers were under a similar obligation. They had a duty to "receive and carry all goods offered for transportation," but there was an exception if "his coach [wa]s full."[109]

Innkeepers and common carriers were also excused from their duty to take all comers when the person or item could harm other customers or their establishment. Thus Story observed that common carriers could refuse to carry goods if they "[we]re of a nature, that will at the time expose them to extraordinary danger or to popular rage," and innkeepers had to take "uncommon care" in protecting the goods and baggage of their guests.[110] Story himself had occasion to opine on the matter in a set of jury instructions he issued while riding circuit in 1835. In a case in which a steamboat company refused passage to a carriage operator who sought to drum up business on the steamboat from disembarking passengers, Story elaborated on the rule. The steamboat was "bound" to take the passenger "if he had suitable accommodations, and there was no reasonable objection to the character or conduct of the plaintiff."[111] But the carrier could refuse passengers who, among other things, "refuse to obey the reasonable regulations of the boat, or who are guilty of gross and vulgar habits of conduct; or who make disturbances on board, or whose characters are doubtful or dissolute or suspicious; and, a fortiori, whose characters are unequivocally bad."[112] Past conduct could also lead to future exclusion:

> Suppose a known or suspected thief were to come on board; would they not have a right to refuse him a passage? Might they not justly act upon the presumption, that his object was unlawful? . . . I think they might, upon the just presumption of what his conduct would be.[113]

Over and over again, courts came to the same conclusion. In an 1837 case, an innkeeper forbade a stagecoach driver from coming back

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108. JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS, WITH ILLUSTRATIONS FROM THE CIVIL AND THE FOREIGN LAW, § 476, at 311 (1st ed. 1832) (emphasis added); *see also id.* at § 470, at 307 ("[A]n innkeeper is not, if he has suitable room, at liberty to refuse to receive a guest, who is ready and able to pay him a suitable compensation.").

109. *Id.* at § 508, at 328.

110. *Id.* at § 508, at 328, § 470, at 306.

111. Jencks v. Coleman, 13 F. Cas. 442, 443 (C.C.D. R.I. 1835).

112. *Id.*

113. *Id.* at 444; *see also* Pearson v. Duane, 71 U.S. 605, 613–14 (1866) (referencing the English case of *Coppin v. Braithwaite*, 8 Jur. 875 (Exch. 1845), in which a ship captain refused service to a reported "pickpocket and associate of what was called the 'swell mob'").

to the inn after he was involved in "[f]requent altercations."[114] The driver returned, got into another fight, and was thrown out.[115] The court observed that an innkeeper "cannot prohibit persons who come under that character, in a proper manner, and at suitable times, from entering, so long as he has the means of accommodation for them."[116] But, the court said,

> he is not obliged to make his house a common receptacle for all comers, whatever may be their character or condition .... He is indictable if he usually harbor thieves, and he is answerable for the safe keeping of the goods of his guests and is not bound to admit one whose notorious character as a thief furnishes good reason to suppose that he will purloin the goods of his guests, or his own.[117]

As the last phrase suggests, the conduct could have happened in the past: the innkeeper need not "wait until an affray is begun before he interpose, but may exclude common brawlers, and any one who comes with intent to commit an assault or make an affray."[118]

Two years later, the New Hampshire Supreme Court reiterated the rule: "It is well settled, that so long as a common carrier has convenient room, he is bound to receive and carry all goods which are offered for transportation, of the sort he is accustomed to carry, if they are brought at a reasonable time, and in a suitable condition."[119] The court also noted,

> Like innkeepers, carriers of passengers are not bound to receive all comers. The character of the applicant, or his condition at the time, may furnish just grounds for his exclusion. And his object at the time may furnish a sufficient excuse for a refusal; as, if it be to commit an assault upon another passenger, or to injure the business of the proprietors.[120]

In another case, a railroad depot operator excluded an innkeeper after a history of harassing disembarking passengers.[121] The depot had the "authority to make reasonable and suitable regulations" for people

114. Markham v. Brown, 8 N.H. 523, 524 (1837).
115. *Id.* at 524.
116. *Id.* at 528.
117. *Id.* at 528–29 (citations omitted).
118. *Id.* at 529.
119. Bennett v. Dutton, 10 N.H. 481, 486 (Sup. Ct. Judicature 1839).
120. *Id.* at 486–87 (citations omitted).
121. Commonwealth v. Power, 48 Mass. 596, 597 (1844).

using its building, in part to "ensure the safety and promote the comfort of passengers,"[122] and this authority then extended to excluding "from [it]s premises all disorderly persons, and all persons not conforming to regulations necessary and proper to secure such quiet and good order."[123] Revocation of the license to enter the premises was reasonable after "actual or constructive notice" of such regulation.[124]

By the early twentieth century, courts had addressed these exceptions so frequently that Harvard Law School professor Bruce Wyman could categorize the permissible and impermissible reasons for breach. Wyman showed that it was not sufficient grounds to exclude if a person was merely "[d]isagreeable," "[u]nmannerly," engaging in "[s]light misbehavior," or was deemed "[i]mmoral" or "[u]ndesirable."[125]

Wyman noted that a court found for a woman "in bloomers," who had been denied service at an inn because the innkeepers objected to her mode of dress.[126] In the 1880 case *Brown v. Memphis & Corinth Railroad*,[127] railroad employees kicked a Black woman out of the ladies' car because they said she was a "notorious and public courtesan."[128] The judge told the jury that so long as "unchaste women" were conducting themselves in "unobjectionable" ways, a common carrier could not exclude them.[129] "The carrier is bound to carry good, bad, and indifferent, and has nothing to do with the morals of his passengers, if their behavior be proper while travelling."[130] Classifications based on personal views of morality were unreasonable.

It is also worth noting, perhaps surprisingly, that courts and commentators denied that carriers could exclude based on race. Edward Lillie Pierce's 1857 treatise observed that railroads could not deny service "on account of personal dislike, their occupation, condition in life, *complexion, race, nativity,* political or ecclesiastical

122. *Id.* at 600.
123. *Id.* at 601.
124. *Id.* at 603.
125. WYMAN, THE SPECIAL LAW, *supra* note 32, at 465–69.
126. *Id.* at 467.
127. Brown v. Memphis & C.R. Co., 5 F. 499 (C.C.W.D. Tenn. 1880).
128. *Id.* at 500.
129. *Id.* at 501.
130. *Id.*

relations."[131] At least some courts agreed. Two years later, an Ohio court found for a multiracial woman who was denied city rail service due to "her complexion."[132] After the Civil War, as Joseph Singer has shown in his detailed history, practices varied across the country and over time.[133] Federal and state legislation enacted after the war imposed a duty to serve regardless of race, though some states interpreted them to allow for segregation.[134] After the end of Reconstruction, some states eliminated altogether the special legal duties that the law had imposed on providers of public accommodations (including for white people), and many states ultimately mandated segregation.[135]

Wyman also addressed the temporal question. The easy cases for refusing service involved "present misconduct."[136] Past misconduct—Wyman offered the examples of suspected thieves, habitual drunks, and notorious gamblers—could also justify exclusion. But past misconduct had to be related to the present service: a habitual drunk who was, at the time of service, sober could not be excluded.[137] Still, "if the past misconduct has been so long continued that it makes only too probable a repetition of it, notwithstanding protests of reformation there may perhaps be a refusal to give the service which will present the opportunity."[138]

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131. EDWARD LILLIE PIERCE, A TREATISE ON AMERICAN RAILROAD LAW 489 (1857) (emphasis added).

132. State v. Kimber, 3 Ohio Dec. Reprint 197, 198 (Ct. C.P. 1859).

133. *See generally* Singer, *supra* note 46, at 1348–1411. *See also id.* at 1352 ("Both law and custom varied wildly from state to state, and even from locality to locality.").

134. *Id.* at 1299.

135. *Id.* at 1299, 1390.

136. WYMAN, THE SPECIAL LAW, *supra* note 32, at 521.

137. *Id.* at 521–22.

138. *Id.* at 522 (footnote omitted). In one case, the Iowa Supreme Court upheld the telephone company's denial of access to phone service because the user had repeatedly used vulgar and indecent language over the phone, including disrupting others' phone service and interfering in their conversations. He had been warned but continued the behavior. As the court noted:

> A single patron by meddling and discourtesy might deprive his neighbors of the benefits of a convenient invention, and destroy the value of the property devoted to the public service. This power to regulate is essential in order to enable the defendant to perform such service, and is clearly to be implied from the nature of the enterprise. But it ought never to be arbitrarily exercised. Reasonable caution must be taken lest injustice be done. Some allowance is to be made for the infirmities of human nature . . . . So that, when rules to guide patrons have not been promulgated in advance, it is not unreasonable that any patron misusing his privileges be duly warned thereof by the telephone company, and given an opportunity to mend his ways, before being finally

### *C. Public Policy Rationales*

Far from being laissez-faire, the common law of carriers was a prescriptive regulatory system that imposed significant restrictions on carrier conduct. Common carriers were required by law to serve all comers and could not exclude competitors. They were required by law to charge just and reasonable rates, and eventually to offer equal treatment, not just nonextractive prices. And while they could exclude users in some cases, the exclusions had to be reasonable, and courts regularly found that some were impermissible.

Why did courts adopt these rules? What was the logic of common carriage obligations? Judges and commentators primarily argued that the rules would promote commerce and prevent the abuse of power. English jurist Edward Coke, for example, observed that "outragious tols" to access marketplaces restrained commerce.[139] Ensuring access to marketplaces would, in turn, facilitate more commercial activity: "very many did refrain[] from the coming to faires and markets to the hindrance of the [C]ommonwealth; for it hath ever been the policy and wisdom[] of this realm that faires and markets, and especially the markets, be well furnished and frequented."[140] Warehouses were licensed "for the benefit of trade in general," noted one 1810 case—a purpose that would be undermined if licensed warehouses could charge what they pleased.[141] The New Jersey Supreme Court observed, in a case in which a railroad preferenced hog shippers, that discriminatory pricing creates harm "not only to the individual affected, but it reaches out, disturbing trade most seriously."[142] Telephones, the Maryland high court observed, "are important instruments of commerce, . . . indispensable to the commercial and business public."[143]

Courts also sought to prevent abuses of power. They were particularly worried that carriers could extract value out of dependent businesses, thereby harming the businesses—and commerce more broadly. Wyman thus wrote that "[t]he traveller would be at the mercy

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> deprived of this most convenient means of business and social communication. Such was the course pursued by defendant . . . .

Huffman v. Marcy Mut. Tel. Co., 121 N.W. 1033, 1034 (Iowa 1909).

139. EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND CONTAINING THE EXPOSITION OF MANY ANCIENT AND OTHER STATUTES 219 (1797).

140. *Id.*

141. Allnutt v. Inglis (1810) 104 Eng. Rep. 206, 212 (KB).

142. Messenger v. Pa. R.R. Co., 37 N.J.L. 531, 535 (1874).

143. Chesapeake Tel. v. Balt. Tel., 7 A. 809, 811 (Md. 1886).

of the innkeeper, who might practise upon him any extortion, for the guest would submit to anything almost, rather than be put out into the night."[144] Other courts also referred to "extortion" or similar phenomena.[145] Courts further sought to ensure a level commercial playing field, worrying about the consequences of common carrier favoritism. One court observed that allowing railroad preferences would "promote unfair advantages amongst the people and foster monopolies."[146] The North Carolina Supreme Court expressed these fears well in a case in which a water company engaged in discriminatory pricing:

> [If carriers] could at will favor certain individuals with low rates[,] and charge others exorbitantly high[,] or refuse service altogether, the business interests and the domestic comfort of every man would be at their mercy. They could kill the business of one and make alive that of another and instead of being a public agency created to promote the public comfort in welfare these corporations would be the masters of the cities they were established to serve. A few wealthy men might combine and, by threatening to establish competition, procure very low rates which the company might recoup by raising the price to others [not] financially able to resist—the very class which most needs the protection of the law . . . .[147]

Cases on vertical integration across business lines focused on the danger of a firm gaining too much power.[148] As one English case observed of a railroad that had entered the coal business,

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144. Wyman, *The Law of the Public Callings*, *supra* note 60, at 159; *see also* DELOS F. WILCOX, MUNICIPAL FRANCHISES 74 (1910) ("In the gas or electric light and power business, one man may have his chance for profit wiped out by discrimination in rates.").

145. *See e.g.*, S. Express Co. v. Memphis R.R., 8 F. 799, 803 (E.D. Ark. 1881) (disallowing "extortion" in a vertical interconnection case); Johnson v. Pensacola & Perdido R.R. Co., 16 Fla. 623, 668 (1878) (holding that the rule was designed to "protect[] the individual from extortion"); Griffin v. Goldsboro Water Co., 122 N.C. 206, 208 (1898), (holding that the doctrine serves "to protect the public against the exaction of oppressive [charges]").

146. *Messenger*, 37 N.J.L. at 535.

147. *Griffin*, 122 N.C. at 209.

148. Although some economists and legal scholars have taken a benign view of vertical integration by monopolists, *see, e.g.*, ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 225–45 (1978; 1993 reprint), other scholars have increasingly highlighted its dangers, particularly in platform markets, *see, e.g.*, Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1963 (2018); Khan, *Separation*, *supra* note 20, at 1024–35. On the problems with single monopoly profit theory, see Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 400–01 (2009). In 2023, the federal antitrust agencies released draft merger guidelines that would

> [T]here is great danger that they may . . . get into their hands the entire business in the coal of all that district of country . . . If they can do that with regard to coal, what is to prevent their doing it with regard to every species of agricultural produce all along the line? . . . I do not know where it is to stop, if the argument on the part of the company is to prevail.[149]

In a telephone-messenger case, a New York court worried that if it did not impose common carriage obligations,

> [it] could result in great injustice to the public. A livery stable, provision store, meat market, and other classes of business could be added in the course of time, and by amending their rules so as to include each new business in the same manner as the messenger service is now attempted to be protected, a monopoly could be created at the expense of tradesmen and merchants and to the detriment of the public generally.[150]

In the grain warehousing case described above, in which the Illinois Supreme Court imposed a structural separation, the court observed that the warehousemen had been "enabled to crush out, and have nearly crushed out, competition" and "buil[t] up a monopoly" in the grain trade, against public policy.[151] Likewise, the court that heard the Tennessee steamboat case said that if the railroad could favor one steamboat company over another, "then any discrimination, however great and oppressive, can be made; and practically the defendant can say who may and who may not serve the public."[152] In an express company case, the Pennsylvania Supreme Court went further, noting that a railroad with the power to discriminate "might make even religion and politics the tests in the distribution of its favors. Such a power in a railroad corporation might produce evils of the most alarming character. The rights of the people are not subject to any such corporate control."[153]

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reinvigorate vertical merger enforcement. U.S. DEP'T OF JUST. & FTC, MERGER GUIDELINES (Draft 2023). *See* John Kwoka, *Revising the Merger Guidelines To Return Antitrust to a Sound Economic and Legal Foundation*, PROMARKET (Sept. 27, 2023), https://www.promarket.org/2023/09/27/revising-the-merger-guidelines-to-return-antitrust-to-a-sound-economic-and-legal-foundation [https://perma.cc/MJZ9-57PG].

149. Att'y Gen. v. Great N. Ry. Co., 29 L.J. Ch. 794, 799 (1860).

150. People *ex rel.* Postal Tel. v. Hudson River Tel., 10 N.Y. St. Rep. 282, 285–86 (1887).

151. Cent. Elevator Co. v. People, 174 Ill. 203, 256 (1898).

152. Samuels v. Louisville & N.R. Co., 31 F. 57, 59 (N.D. Alabama 1887).

153. Sandford v. R.R. Co., 24 Pa. 378, 383 (1855).

In short, common law courts imposed common carriage obligations because they understood that economic power could itself harm commerce and that the regulation of NPUs could enhance commerce by ensuring a level playing field for third-party businesses.

### *D. Explaining the Common Law's Quiescence*

As we shall see in the next Part, common carriage principles seem ready-made for tech platforms—and they would address some of tech platforms' alleged abuses. But then why have there been so few cases under the common law of carriers? We offer two hypotheses.

1. *Forgetting the Common Law in an Age of Statutes.* First, some lawyers and scholars may have simply forgotten aspects of the common law. As Judge Guido Calabresi has observed, we live in an "age of statutes," in which "we have gone from a legal system dominated by the common law, divined by courts, to one in which statutes, enacted by legislatures, have become the primary source of law."[154] At the federal level, the shift was long underway by the time of the New Deal, as Gilded Age and Progressive Era congresses passed comprehensive statutes to govern NPUs.[155] Statutes not only established antitrust regimes,[156] but they addressed particular sectors—communications,

154. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982).

155. *See generally* WILLIAM J. NOVAK, NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE 259–71 (2022) (showing the long history of federal regulation before the New Deal and arguing that the New Deal state is a "myth"). Consider also the remarks of Harlan Fiske Stone, commenting on a person looking out at the legal landscape in 1936:

> He would find new types of procedure, and an administrative system, growing by leaps and bounds, in which nonjudicial officers determine rights by methods quasi-judicial, and enforce them often without resort to the courts. He would observe a vast system of statutory rights and liabilities in large measure founded upon the idea, new to English law, that the basis of liability is not the fault of a wrongdoer, but such method of distributing the burden of loss as accepted social policy dictates. He would have to take account of a novel, complex and ever changing system of taxation, reaching out to touch directly or indirectly every individual, of new devices for the public control of business enterprise, and of others for arranging its management under a system where ownership and management have tended to become more and more distinct.

Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 4–5 (1936).

156. Sherman Antitrust Act of 1890, Pub. L. No. 51-647, 26 Stat. 209 (codified as 15 U.S.C. § 1); Clayton Antitrust Act of 1914, Pub. L. No. 63-212, 38 Stat. 730 (codified as 15 U.S.C. § 12); Federal Trade Commission Act of 1914, Pub. L. No. 63-203, 38 Stat. 717 (codified as 15 U.S.C. § 45).

including the telegraph,[157] radio,[158] and telephone[159]; transportation, including railroads,[160] maritime shipping,[161] and airlines[162]; energy, including electricity transmission[163] and natural gas pipelines[164]; money and payments[165]; and financial market infrastructure, including commodities exchanges[166] and securities exchanges.[167] In other words, the network, platform, and utility technologies of the late nineteenth and early twentieth centuries were governed by pervasive statutory systems of economic governance and regulation.

The success of the Progressive and New Deal–era legislative system, we suspect, had the consequence of shifting the perceived baseline of legal thinking from the common law to statutes—at least with respect to complex NPUs. More than a half-century later, when the tech platforms emerged, people had lived in a statutory world for so long—and one in which comparatively few new infrastructural sectors emerged[168]—that they forgot how the baseline of the common law of carriers applies to new infrastructural technologies and industries.

The decline of the common law of carriers was also a function of other legal developments. Lawyers came to see the common law not as the "discovery" of law but as the making of law, raising questions about the legitimacy of judicial policymaking.[169] Skepticism of common law adjudication increased,[170] a trend which, as we discuss in the next Part, overlapped with a rise in formalist interpretation. Downsides of case-

157. National Telegraph Act of 1866, Pub. L. No. 39-230, 14 Stat. 221.

158. Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162.

159. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064–66.

160. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379.

161. Shipping Act of 1916, Pub. L. No. 64-260, 39 Stat. 728.

162. Civil Aeronautics Act of 1938, Pub. L. No. 75-706, 52 Stat. 973.

163. Federal Water Power Act, Pub. L. No. 66-280, 41 Stat. 1063 (1920); Public Utility Act of 1935, Pub. L. No. 74-333, 49 Stat. 838.

164. Natural Gas Act of 1938, Pub. L. No. 75-688, 52 Stat. 821.

165. Federal Reserve Act of 1913, Pub. L. No. 63-43, 38 Stat. 251.

166. Grain Futures Act, Pub. L. No. 67-331, 42 Stat. 998 (1922); Commodity Exchange Act of 1936, Pub. L. No. 74-675, 49 Stat. 1491.

167. Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881.

168. *Cf.* ROBERT J. GORDON, THE FALL AND RISE OF AMERICAN GROWTH 1–3 (2017) (arguing that the most important industrial innovations were in the Gilded Age and Progressive Era, and that growth in the late twentieth and early twenty-first centuries is declining because there have not been new innovative technologies of that scale and scope since).

169. Frederick Schauer, *The Failure of the Common Law*, 36 ARIZ. ST. L.J. 765, 775 (2004).

170. *Id.* at 777.

by-case lawmaking compared to prospective legislative action also became clearer.[171] With the end of federal courts creating a "general" federal common law after the *Erie* case,[172] common law developments would have to take place in the state courts—perhaps making them less likely to be observed or considered by many academics.

Two related ideological shifts likely contributed as well. On the right, scholars attacked public utility regulation in favor of a laissez-faire model. Among other things, they argued that such regimes were the result of interest group capture and that private contracting was a better solution than regulation.[173] Despite the debunking of the histories underlying these claims years later,[174] the field of regulated industries largely collapsed.[175] The coincident rise of neoliberal economic thinking[176]—with its emphasis on deregulation, liberalization, privatization, and austerity[177]—helped establish *nonregulation* as the normative economic baseline.

On the center-left, perhaps surprisingly, laissez-faire also became the baseline. Early liberal historians sought to characterize the New Deal as a decisive break from the "old order" that preceded it.[178] By the late 1980s and 1990s, legal scholars framed the New Deal as a transformational moment. Professor Cass Sunstein comments on the relationship between the New Deal and the common law directly. He

171. *Id.* at 777–79.

172. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

173. *See generally* George J. Stigler & Claire Friedland, *What Can Regulators Regulate? The Case of Electricity*, 5 J.L. & ECON 1 (1962) (arguing that public regulation of electric utility companies is economically ineffective); Harold Demsetz, *Why Regulate Utilities?*, 11 J.L. & ECON 55 (1968) (asserting that public regulation of utility companies cannot be justified on traditional economic theories, such as the theory of natural monopoly); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL. J. ECON. & MGMT. SCI. 3 (1971) (contending that governmental market regulation is ineffective because it is susceptible to capture by interest groups).

174. George L. Priest, *The Origins of Utility Regulation and the "Theories of Regulation" Debate*, 36 J.L. & ECON. 289, 294 (1993).

175. Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1329 (1998).

176. *See generally* DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2005); MANFRED B. STEGER & RAVI K. ROY, NEOLIBERALISM: A VERY SHORT INTRODUCTION (2010); ANGUS BURGIN, THE GREAT PERSUASION: REINVENTING FREE MARKETS SINCE THE DEPRESSION (2012); QUINN SLOBODIAN, GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM (2018); GARY GERSTLE, THE RISE AND FALL OF THE NEOLIBERAL ORDER (2022).

177. For this formulation, see GANESH SITARAMAN, THE GREAT DEMOCRACY 16 (2019).

178. *See generally* ARTHUR M. SCHLESINGER, JR., THE AGE OF ROOSEVELT: THE CRISIS OF THE OLD ORDER, 1919–1937 (1957).

observes that the New Deal system was built on the realist view that the common law baseline was not neutral.[179] But he also characterizes the common law baseline as "laissez faire."[180] After the New Deal, he argues, "a broad interpretive norm in favor of private ordering can no longer be sustained."[181] The New Deal system is better than the common law because it "recognizes that private autonomy is a product of legal controls and that modern regulation often promotes both economic welfare and distributive justice."[182] In other words, center-left liberals like Sunstein characterize the common law as laissez-faire, in contrast to the New Deal, their preferred—and statutorily created—regulatory regime. This framing separates the "good" new days of the New Deal from the "bad" old days of laissez-faire and *Lochner*.[183] By the mid-1990s, scholar Bruce Ackerman's epic *We the People* placed the New Deal "constitutional moment" alongside the Founding and Reconstruction.[184] What was lost in the story of New Deal discontinuity is that the common law of carriers was not laissez-faire. In fact, it was a prescriptive regulatory regime that offered surprising continuity with Progressive and New Deal–era statutes governing NPUs.[185]

As a result of this combination of factors—shifts in understanding the formation of common law, the absence of new infrastructural industries and sectors, and an overlapping ideological consensus on the nonregulatory baseline (normative on the right, descriptive on the left)—the practice of the common law was "in rapid retreat" by the end of the twentieth century.[186] But the common law nonetheless remains the baseline in the American legal system. While the common law of carriers may have entered a period of suspended animation around the turn of the twentieth century, it has not expired.[187]

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179. Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 508 (1987).

180. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 408–10, 444 (1989).

181. *Id.* at 444.

182. *Id.*

183. Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 873–75 (1987).

184. *See generally* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1993); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998).

185. For recent historical scholarship showing the continuity and criticizing the "myth of the New Deal state," see NOVAK, *supra* note 155.

186. Schauer, *supra* note 169, at 765.

187. *See* Time Warner Entertainment v. Carteret-Craven, 506 F.3d 304 (2007) (implicitly acknowledging that the common law of carriers remains operative, though declining to apply it to

2. *Defining the Common Law in an Age of Formalism.* A second explanation for the absence of common law cases against tech platforms is the difficulty of defining the common law in an age of formalism. The common law, as Professor Fred Schauer has noted, is "uncommonly puzzling."[188] It is not stated in any single, canonical place; the universe of possible sources is vast.[189] It is created by courts and applied retroactively in the very cases the court is hearing.[190] And common law courts do "not merely make new law when there is no existing law"; their power "extends to modifying or replacing what had previously been thought to be the governing rule when applying that rule would generate a malignant result in the case at hand."[191] More challenging still, courts make such revisions based on "moral, economic, social, and political" factors.[192]

These elements run contrary to the spirit of modern formalism, which is perhaps best captured through the rise of textualism. Justice Antonin Scalia's case for textualism offers a sharp critique of the common law method, holding that it is contrary to modern government by giving judges too large and discretionary a role.[193] Scalia preferred the formalism that comes with textualism because he believed text was more democratic. Importantly, he embraced formalism explicitly.

> Of all the criticisms leveled against textualism, the most mindless is that it is 'formalistic.' The answer to that is, of course it's formalistic! The rule of law is about form. . . . Long live formalism. It is what makes a government a government of laws and not of men.[194]

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activities "ancillary" to a carrier's core activities); *cf.* James Steven Rogers, *The New Old Law of Electronic Money*, 58 SMU L. REV. 1253, 1309 (2005) (arguing that while the common law governing circulating bank notes entered a state of "suspended animation" in the 1860s, "if the system of circulating notes were to develop again, one assumes that the old law should continue to apply").

188. Frederick Schauer, *Is the Common Law Law?*, 77 CALIF. L. REV. 455, 455 (1989), (reviewing MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW (1988)).

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 456.

193. *See generally* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997). For a discussion of these principles, see generally Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529 (1997).

194. Scalia, *supra* note 193, at 25 (emphasis omitted).

Despite challenges to textualism and revisions and compromises in the theory,[195] by the early twenty-first century, Justice Scalia's textualist position was dominant across the political spectrum. As Justice Elena Kagan observed in 2015, "[W]e are all textualists now."[196]

This formalist spirit infuses recent attempts to delineate the boundaries of the common law of carriers. In its motion to dismiss Ohio's lawsuit, for example, Google repeatedly takes a formalistic approach to applying the common law. In arguing that it is not a common carrier, Google surprisingly begins with the term itself. "Google . . . carries nothing," the tech giant argues, because it "does not transport [user] queries anywhere."[197] Rather, the internet service provider transports data.[198] Google says that its search results are not "common" because it "inherently discriminates in favor of what Google believes will be helpful information for users."[199] Google also says it is not a public utility because online search "is not [a function] that has ever been deemed the type of 'essential service' that Ohio or anyone else has regulated as a public utility—such as electricity, gas, water, or garbage disposal."[200] We shall return to these substantive arguments in Part II.C, but it is worth observing that they sound in the register of formalistic statutory interpretation—not the common law method. It is not clear why Google thinks its designation as a common carrier under the common law turns on the definition of each of those words. That is simply not how common law reasoning works.

Many scholars have likewise puzzled over finding a definition for common carriers. Rather than analogizing under the common law method, they seem to seek a single silver bullet that will define for all time, all places, and all contexts what is and isn't a common carrier. Contemporary scholars often review the history of the various tests

195. Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1848–58 (2016).

196. Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg [https://perma.cc/7TUH-VW6M].

197. Motion of Defendant Google LLC To Dismiss Plaintiff the State of Ohio's Complaint at 2, State *ex rel.* Yost v. Google LLC, No. 21-CV-H-06-0274 (Ohio C.P. Del. Cnty. Aug. 13, 2021) [hereinafter Motion To Dismiss].

198. *Id.* at 7.

199. *Id.* at 2.

200. *Id.*

that others have used[201]: market power,[202] natural monopoly,[203] whether the firm holds itself out to the public,[204] and whether there was a deal for immunity or public rights of way.[205] The conclusion is, invariably, that none of these tests can explain every possible case.[206] Critics claim that definitions are circular and confusing,[207] that it is "far from clear what comprises the essence of a common carrier,"[208] and that there is no "coherent rationale for determining which industries should be subject to common carriage."[209] On some level, this scholarly quest for such a definition is itself evidence of the formalist impulse for certainty.[210]

The predictable failure of this quest may also contribute to why courts, lawyers, and scholars have had trouble classifying tech platforms as common carriers. The common law of carriage emerged, of course, from the common law method—not from a mechanical test or formula. Common law reasoning is more functional. It involves "discover[ing] from history how [the law] has come to be what it is," and then "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."[211] Judges' decisions "will rightly depend upon the relative weights of the social

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201. Recent reviews of this type include Bhagwat, *supra* note 8, at 132–37; Yoo, *supra* note 8, at 465–73; and Nachbar, *supra* note 13, at 79–109.

202. *See* Wyman, *The Law of Public Callings*, *supra* note 60.

203. *See* Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548 (1968).

204. *See* Burdick, *supra* note 35.

205. *See* Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J.L. & TECH. 391 (2020).

206. For a brief and sharp summary, see Christopher S. Yoo, *Common Carriage's Domain*, 34 YALE J. ON REGUL. 991, 994–97 (2018).

207. Adam Theirer, *The Perils of Classifying Social Media Platforms as Public Utilities*, 21 COMMLAW CONSPECTUS 249, 266 (2013).

208. Daniel T. Deacon, *Common Carriage Essentialism and the Emerging Common Law of Internet Regulation*, 67 ADMIN. L. REV. 133, 134 (2015); *see also* Blake E. Reid, *Uncommon Carriage*, 76 STAN. L. REV. (forthcoming 2024) (manuscript at 16, 31) https://papers.ssrn.com/abstract=4181948 [https://perma.cc/KL63-T8AZ] (calling common carriage "incoheren[t]").

209. Christopher S. Yoo, *Is There a Role for Common Carriage in an Internet-Based World?*, 51 HOUS. L. REV. 545, 545 (2013).

210. *Cf.* DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 1–9 (2002) (showing how difficult it is to establish a single foundational constitutional theory and instead defending a more pragmatic, multifaceted common law method).

211. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1897).

and economic advantages which will finally turn the scales of judgment in favor of one rule rather than another."[212] "[N]arrow and pedantic views" arrest "the progress of the common law and obscure[] our vision of its vital and essential qualities."[213] The ultimate genius of the common law, as Justice Oliver Wendell Holmes Jr. observed, is that it changes as social conditions change.[214] The skill involved in the common law method, as any first-year law student knows, is *not* a robotic one that involves searching for dictionary definitions. It is "the ability to extract from particular facts the necessary and sufficient general elements, apply those generalities to other particular facts and show a correspondence."[215] This is not to say that a formalist judge could not rigidly apply the common law in a manner that undermines its benefits; this was the complaint of legal realists, including Holmes.[216] But in our modern era of formalism, the issue is not rigid application of the common law of carriers, but *any* application.

In this sense, a better approach would be to consider the variety of economic, political, and social features of common carriers in history in order to determine whether tech platforms in general or their particular business lines and behaviors warrant regulation under the common law.[217] These factors could include, among other things, whether the firm holds itself out to the public (which was a traditional driver of the duty to serve[218]); its importance to the public, the economy, and society; whether the resource is a means to other

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212. Stone, *supra* note 155, at 20. Stone also stated,

> In ascertaining whether challenged action is reasonable, the traditional common-law technique does not rule out but requires some inquiry into the social and economic data to which it is to be applied. Whether action is reasonable or not must always depend upon the particular facts and circumstances in which it is taken.

*Id.* at 24.

213. *Id.* at 26.

214. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1–38 (Little Brown & Co. 1990) (1881).

215. Robert E. Scott & George G. Triantis, *What Do Lawyers Contribute to Law and Economics?*, 38 YALE J. ON REGUL. 707, 721 (2021).

216. *See, e.g.*, Holmes, *supra* note 211, at 469 ("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.").

217. A notable scholarly exception to the formalist mood is Balkin, *supra* note 8. But Balkin's approach is to look at some of the *goals* of public utility regulation, not the *features* of public utility enterprises. Still, Balkin agrees that public utility approaches can work lower in the stack, for infrastructural goods. He just doesn't think they should apply to social media. *See, e.g.*, *id.* at 74.

218. For a discussion, see Singer, *supra* note 46 (discussing the duty to serve).

productive ends; whether it is a service; whether it has increasing returns to scale on the supply or demand sides (network effects); whether it is a "functional" monopoly or has market power (rather than the narrower natural monopoly criteria); and how much interconnection matters.[219] But again, as Holmes advises, the exercise is not mechanical. It is analogic.

Justice Thomas's concurrence in *Biden v. Knight First Amendment Institute at Columbia University*[220] illustrates the common law method, as applied to tech platforms, far better than Google or many scholars do. After canvassing the different historical arguments for common carriage that scholars have identified,[221] Thomas does not claim that any of them perfectly encapsulates the meaning of common carriage or is the sole factor for determining applicability to tech platforms. Rather, he assesses tech platforms along all of the features that were historically relevant. He suggests that tech platforms hold themselves out to the public, even though they do not connect people physically.[222] He notes their market shares and discusses network effects.[223] He rebuts counter arguments. And he then takes the same approach to the analogy between tech platforms and public accommodations.[224] Throughout, he does not engage in "narrow and pedantic" reasoning.[225] Perhaps most sharply, to the argument that there are alternatives to the big tech platforms, Thomas responds,

> A person always could choose to avoid the toll bridge or train and instead swim the Charles River or hike the Oregon Trail. But in assessing whether a company exercises substantial market power, what matters is whether the alternatives are comparable. For many of today's digital platforms, nothing is.[226]

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219. We take this set of criteria from our new casebook in the "regulated industries" field. *See* RICKS, SITARAMAN, WELTON & MENAND, *supra* note 30, at 8–10.

220. Biden v. Knight First Amend. Inst. at Colum. Univ., 141 S. Ct. 1220 (2021) (mem.) (Thomas, J., concurring).

221. *See id.* at 1222–23.

222. *See id.* at 1224.

223. *See id.*

224. *Id.*

225. Stone, *supra* note 155, at 26 (noting the "narrow and pedantic views which have at times retarded the progress of the common law and obscured our vision of its vital and essential qualities").

226. *Knight First Amend. Inst.*, 141 S. Ct. at 1225 (Thomas, J., concurring).

Thomas's use of the common law method thus leads him to conclude that tech platforms could be regulated under common carriage principles.

* * *

To sum up: While the common law and its method of reasoning might be in disuse due to contemporary lawyers and scholars living in an era of statutes and formalist interpretation, its substantive rules are still operative. Those rules include the substantive rules of carriage, including equal access, just and reasonable prices, and rules for reasonable deplatforming. As we shall see in the next Part, these rules are readily applicable to tech platforms.

## II. APPLYING THE LAW OF COMMON CARRIERS TO TECH PLATFORMS

In this Part, we analyze how the common law's common carriage principles apply to tech platforms. We first consider operating systems and online marketplaces, which have not been a subject of scholarly discussion regarding common law obligations. We then turn to search and social media. We conclude with a discussion of the applicability of the common law to emerging virtual reality, metaverse, and other frontier technologies. Throughout this discussion, it becomes clear that business-to-business relationships present the most straightforward parallels to common law cases. We show that the "curation is discrimination" argument makes little sense. And we argue that, with respect to social media platforms, deplatforming would be permissible even under common carriage rules.

### *A. Operating Systems*

Operating systems are software programs that control a computer's basic operations, including processor usage and memory allocation. They provide a platform for other computer programs, or "applications," that run on the computer. For example, to play a computer game involves turning on the hardware and interfacing with an operating system to select the game. The operating system then makes available the services and hardware resources that the game needs in order to run.

Operating system markets are highly concentrated. In the desktop segment, the two companies that emerged as market leaders in the

early 1980s (just after the industry's inception)—Microsoft and Apple—still dominate, with a combined market share of 90 percent.[227] The mobile device operating system market is even more concentrated: it has featured two market leaders since inception—Google's Android and Apple's iOS—with a combined market share today of 99 percent.[228]

High concentration in operating systems markets is generally attributed to network effects. Applications developers prefer to write software programs for operating systems with lots of users, and users prefer operating systems for which lots of applications are available. Fragmentation in operating system markets would be costly for both applications developers and end users. For example, as a new game designer, it is much cheaper to program a game to work on one or two operating systems (for instance, Microsoft and Apple iOS; or for mobile, Android and iOS) than on a large number of them. If the market instead had fifteen competitors with similar market shares, the production cost for businesses to access the market would be much higher. End users likewise benefit from concentration. Users want to be able to access the maximum number of applications via their hardware and operating system. A computer that can run only one-fifteenth of the possible applications is not as valuable as one that can run all of them. As Bill Gates of Microsoft has explained:

> The world of operating systems becomes more and more homogeneous over time. Today something like 85 percent of the computers on the planet run the same operating system. There's sort

227. *See Desktop Operating System Market Share Worldwide*, STATCOUNTER GLOBAL STATS, https://gs.statcounter.com/os-market-share/desktop/worldwide [https://perma.cc/GYF6-3UD4]. For a helpful animation, showing this point in recent years, see Sjoerd Tilmans, *Animated: Most Popular Desktop Operating Systems Since 2003*, VISUAL CAPITALIST (June 23, 2023), https://www.visualcapitalist.com/cp/most-popular-desktop-operating-systems [https://perma.cc/KB5G-54NJ].

228. *See Mobile Operating System Market Share Worldwide*, STATCOUNTER GLOBAL STATS, https://gs.statcounter.com/os-market-share/mobile/worldwide [https://perma.cc/HM5R-73WL]; Petroc Taylor, *Global Market Share Held by the Leading Smartphone Operating Systems in Sales to End Users From 1st Quarter 2009 to 2nd Quarter 2018*, STATISTA (July 27, 2022), https://www.statista.com/statistics/266136 [https://perma.cc/NN7Y-EEBM]; Petroc Taylor, *Market Share of Mobile Operating Systems in the United Kingdom (UK) from 2010 to 2022*, STATISTA (Feb. 21, 2023), https://www.statista.com/statistics/487373 [https://perma.cc/H62P-FNBR]; Petroc Taylor, *Market Share of Mobile Operating Systems in North America from January 2018 to June 2023*, STATISTA (July 27, 2023), https://www.statista.com/statistics/1045192 [https://perma.cc/8C4Y-KSPE].

> of a positive feedback cycle here! If you get more applications, it gets more popular; if it gets more popular, it gets more applications.[229]

Because of this positive feedback loop, entering the operating system market is exceedingly difficult; industry observers refer to an "applications barrier to entry" in the market.[230] It is therefore unsurprising that operating system markets have tended toward highly stable oligopolies. And the resemblance between operating system operators and common carriers has not been lost on observers: the lead trial lawyer for the United States in its antitrust battle with Microsoft in the 1990s analogized Microsoft's operating system to a railroad terminal that the Supreme Court deemed an "essential facility" under the federal antitrust laws.[231] Likewise Epstein analyzes operating system issues under the "common carrier" heading.[232]

Operating system providers have exercised their power over dependent businesses—in particular, applications developers—in ways that are directly analogous to the practices that courts have condemned as violations of common carrier duties. The fiercest battle over the behaviors of operating systems centered on Microsoft's Windows operating system. Microsoft's rise to dominance in the 1980s and 1990s was characterized by a range of behaviors that were inconsistent with the common law's common carrier principles. Microsoft was (and still is) a vertically integrated platform company, offering both operating system software and a range of applications, such as word processor and spreadsheet programs. The company used its control over the Windows operating system to advantage its own applications in at least three ways. First, it gave its own applications developers more timely and complete access to its Windows releases than it gave to independent applications developers, conferring—in Gates's words—"a real advantage" on its in-house applications.[233] The company went

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229. Bill Gates, *Keynote Address* (May 19, 1996), *reprinted in* THE HARVARD CONFERENCE ON THE INTERNET & SOCIETY 27, 31 (O'Reilly & Associates eds., 1997).

230. *See, e.g.*, United States v. Microsoft Corp., 84 F. Supp. 2d 9, 19–22 (D.D.C. 1999) (describing the applications barrier to entry).

231. *See* KEN AULETTA, WORLD WAR 3.0: MICROSOFT AND ITS ENEMIES 128 (2001) (describing David Boies's comparison of Microsoft's practices to those of the railroad terminal in *United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383 (1912)).

232. *See* EPSTEIN, *supra* note 42, at 304–07.

233. Novell, Inc. v. Microsoft Corp., No. 2:04-CV-1045-JFM, 2012 WL 2913234, at *3 (D. Utah July 16, 2012) (quoting an internal email from Gates), *aff'd*, 731 F.3d 1064 (10th Cir. 2013) (Gorsuch, J.). The district court found that Microsoft had withdrawn certain APIs from

out of its way to deny such access to applications developers that it perceived as particularly threatening to its business.[234] This practice, combined with the bundling of Microsoft's Office suite with Windows, destroyed competing software offerings, like the word processing program WordPerfect and the spreadsheet program Lotus 1-2-3. Second, Microsoft required computer makers that licensed Windows to also license Microsoft applications, squeezing competing applications out of one of the most important distribution channels.[235] Third, Microsoft punished computer makers that featured non-Microsoft applications on their machines by threatening to withhold a Windows license (in the case of Compaq[236]) or providing late licenses, withholding technical and marketing support, and charging higher royalties (in the case of IBM[237]).

During the "Browser Wars" of the 1990s, Microsoft and Netscape battled for dominance over the computer internet browser market.[238] But Microsoft had an advantage. It integrated Microsoft's Internet Explorer with its Windows operating system—advantaging it over Netscape Navigator.[239] It also used all three of the tactics just described: it withheld technical information from Netscape,[240] required computer makers to take Internet Explorer with Windows while forbidding them to remove or obscure it,[241] and threatened to penalize computer makers

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independent software vendors in the run-up to its Windows 95 release—ostensibly to maintain the stability of the operating system—and that there was "sufficient evidence" for a jury to find that the withdrawal was "pretextual." *Id.* at *8. The court nonetheless concluded that Microsoft's self-preferencing did not violate the federal antitrust laws, noting among other things that "[i]t is well established that a monopolist generally has no duty to cooperate with its competitors." *Id.* at *9 (citations omitted).

234. *See* United States v. Microsoft Corp., 84 F. Supp. 2d 9, 33–34 (D.D.C. 1999) (finding that Microsoft withheld APIs and other technical information from Netscape that it provided to other independent software vendors); *id.* at 34–36 (noting that Microsoft threatened not to cooperate with Intel in making its next-generation chips compatible with Windows if Intel did not cease offering software that Microsoft perceived as threatening).

235. United States v. Microsoft Corp., 159 F.R.D. 318, 321 (D.D.C. 1995); United States v. Microsoft Corp., No. Civ. A. 94-1565, 1995 WL 505998, at *3 (D.D.C. Aug. 21, 1995) (prohibiting this practice).

236. AULETTA, *supra* note 231, at 7.

237. *Microsoft Corp.*, 84 F. Supp. 2d at 38–43.

238. *See generally* AULETTA, *supra* note 231 (discussing the competition between Microsoft and Netscape for the internet browser market).

239. *Microsoft Corp.*, 84 F. Supp. 2d at 48–58.

240. *See supra* note 234 and accompanying text.

241. *Microsoft Corp.*, 84 F. Supp. 2d at 69.

that pre-installed Netscape's browser.[242] In addition, Microsoft offered favorable treatment to third-party software vendors that agreed to use Internet Explorer as the default for any software they developed with hypertext-based user interfaces.[243] Microsoft also threatened to cancel Microsoft Office for Apple's Mac OS, which was used by 90 percent of Mac OS users who used office productivity applications, unless Apple agreed to distribute and promote Internet Explorer as opposed to Netscape's browser.[244] Although Netscape's browser had a dominant market share in the mid-1990s, by the end of the decade, Microsoft's browser was the clear market leader.[245]

The Department of Justice brought a landmark antitrust suit against Microsoft, centered on the company's tactics regarding Netscape. During the Microsoft trial, the CEO of Intuit testified that Microsoft was akin to a common carrier: Windows was a "choke point," access was "essential for computing," and computing was "like electricity and telephone service."[246] He even suggested adopting a "principle of operating system neutrality" that would require that "the operating system does not favor one competitive product over another."[247] Although the D.C. Circuit ultimately found that Microsoft had violated the antitrust laws, its holding hinged on the fact that Microsoft's conduct toward Netscape helped Microsoft *maintain* its operating system monopoly—because web browsers had the potential to disintermediate aspects of operating system software.[248]

In recent years, the debate over operating systems has focused more on mobile phones. In the mobile market, issues can arise in two ways. First, a mobile phone operating system (Google's Android or

242. *Id.* at 66–68.

243. *Id.* at 93.

244. *Id.* at 94–98.

245. *Compare* Rajiv Chandrasekaran & Elizabeth Corcoran, *Microsoft's Web Browser Overtakes Netscape's*, WASH. POST (Oct. 1, 1998), https://www.washingtonpost.com/archive/business/1998/10/01/microsofts-web-browser-overtakes-netscapes/385a60e8-3e7e-43b6-9700-8710f178278c [https://perma.cc/8JSW-JWNB] (noting that while Netscape had more than 80 percent market share in 1995, it had been overtaken by Microsoft by 1998), *with* Julia Angwin & Jared Sandberg, *Lawsuit Against Microsoft Is Netscape's Biggest Asset*, WALL ST. J. (Jan. 24, 2002, 2:25 PM), https://www.wsj.com/articles/SB1011900187241354440 [https://perma.cc/6EWB-R53F] (noting that Netscape had 8 percent market share, compared to 91 percent for Microsoft).

246. Abbot B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187, 1224 (1999) (quoting William H. Harris of Intuit).

247. *Id.*

248. United States v. Microsoft Corp., 253 F.3d 34, 78–80 (D.C. Cir. 2001).

Apple iOS) can come preloaded with proprietary applications that compete with third-party applications. These dynamics are akin to those in the Microsoft case. Second, rather than install applications via floppy disk or CD-ROM, as was the case in the 1990s, mobile applications are downloaded via the internet. Mobile operating systems enable downloading through their app stores—Google Play and the Apple App Store. The app stores function as the gatekeepers to their respective mobile operating systems. Unlike the computer operating systems of the 1990s, app stores are also e-commerce marketplaces with search features (two lines of business we discuss in detail in the next two sections). Users search for applications and then download them. If an app does not appear in the marketplace, users cannot download or purchase it. If an app appears below other competitor applications in search results, users are less likely to choose it.[249]

App stores thus have considerable power over access to the operating system and the device. They can deny service altogether, including to firms that seek access for competitor applications, or discriminate against competitor applications. App stores could self-preference via pricing or search ranking. To the extent that app stores engage in such practices—exclusion from the store, self-preferencing, price discrimination, or search discrimination—there is a strong case that the common law of carriers could provide a cause of action.[250]

Notably, the common law would not require app stores or operating systems to serve applications that would harm the operating

249. *See, e.g.*, Mark Glick, Greg Richards, Margarita Sapozhnikov & Paul Seabright, *How Does Ranking Affect User Choice in Online Search?*, 45 REV. INDUS. ORG. 99, 118–19 (2014) ("[W]hen a website appears in a high rank on a Search Engine Results Page it has a substantial and highly significant positive causal effect on the probability that a user will click on the website.").

250. Recent litigation against app stores has, however, not focused on these issues but rather on the high cost of app store fees. *See, e.g.*, Epic Games, Inc v. Apple Inc., 493 F. Supp. 3d 817 (N.D. Cal. 2021). As we have seen, the common law of carriers prohibited charging extractive fees and required carriers to offer "just and reasonable" prices. But we have not found cases in which common law courts prohibited *uniformly* high prices as unjust and unreasonable. The cases we have found involved discriminatory prices. By contrast, the administrative systems that emerged later to govern public utilities included cost-of-service rate regulation, which addressed the problem of monopoly pricing by creating an administrative apparatus that could investigate industry costs and directly set prices. It is possible that had the common law developed further, courts might have adjudicated whether uniformly high prices violated the principle of just and reasonable rates. Indeed, it is notable that many public utility statutory systems include provisions both requiring just and reasonable rates *and* banning undue preferences and discrimination.

system or other applications. If Apple, Google, or Microsoft believed that an application was insufficiently secure from viral infection or could result in the degradation of the operating system, the common law would permit them to establish prophylactic regulations to that effect, refuse service to applications that fail to comply with those regulations, and kick off applications that violate those terms. These are, simply, the modern version of the exception that common carriers can exclude those who might injure others or the platform itself.

### *B. Online Marketplaces*

"Marketplaces are centralized platforms where sellers and buyers come together to transact in goods, services, or assets."[251] The most prominent online marketplaces are e-commerce marketplaces (such as Amazon's Marketplace or Etsy) and digital advertising marketplaces (such as Google's advertising exchange). E-commerce marketplaces bring together buyers and sellers of goods. Marketplaces are a means to serve other productive ends. The value of the marketplace is in finding a buyer or seller, not in anything inherent that it does. Marketplaces thus connect people to each other, just like railroad terminals (people and train companies) or telephone switchboards (people to people).

Marketplaces also benefit from network effects.[252] Both buyers and sellers benefit when they can find each other. The more buyers and sellers, the more likely each will find what they are looking for efficiently. One of the efficiencies of scale in a marketplace is that buyers and sellers need to go only to one place to transact. Think of it this way: instead of visiting fifteen different vendor websites, you can go to Amazon.com and buy fifteen different items from the same place. Even if you are looking only for one item, scale is beneficial: to

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251. RICKS, SITARAMAN, WELTON & MENAND, *supra* note 30, at 1017.

252. *See, e.g.*, Juan Montero & Matthias Finger, *Regulating Digital Platforms as the New Network Industries*, 22 COMPETITION & REGUL. IN NETWORK INDUS. 111, 112 (2021) (describing digital platforms as an example of a network industry); Alec Stapp, *You Can't Understand Big Tech Without Understanding Network Effects. Here's a Road Map*, NISKANEN CTR. (Sept. 13, 2018), https://www.niskanencenter.org/you-cant-understand-big-tech-without-understanding-network-effects-heres-a-road-map [https://perma.cc/ENV6-WYNJ] (discussing marketplaces as having network effects); Feng Zhu & Marco Iansiti, *Why Some Platforms Thrive and Others Don't*, HARVARD BUS. REV. (Jan.–Feb. 2019), https://hbr.org/2019/01/why-some-platforms-thrive-and-others-dont [https://perma.cc/QV8E-H6X2] (discussing network effects in Amazon's marketplace).

comparison shop, you need only scroll down among choices—you do not need to visit multiple websites.

Unsurprisingly, the leading online marketplaces capture significant portions of the market. Amazon.com is the leading e-commerce marketplace, with more than 60 percent of online shopping beginning on its website.[253] Amazon also has 112 million Prime members in the United States (44 percent of the adult population) and 2.3 million sellers worldwide.[254] In comparison, the second largest marketplace, run by Walmart.com, has merely 54,000 sellers.[255] Because of Amazon's large amount of web traffic, sellers "find it necessary to use its site to draw buyers."[256] At the same time, these sellers also find themselves in competition with Amazon itself.[257]

In e-commerce, the most prominent allegations have been against Amazon for self-preferencing its own goods over third-party goods in its online marketplace. Amazon not only hosts the marketplace—in which users can search for goods—but also is a seller of goods itself through numerous private-label brands such as Amazon Basics. A customer searching Amazon.com for a mobile phone charger, for example, is likely to find chargers from multiple brands—including Amazon Basics. Amazon faces multiple allegations. First, some companies have said that Amazon collects data on their (successful) products and then manufactures and sells private label versions of the products in the marketplace.[258] Firms allege that Amazon has suspended accounts, claiming the goods were fraudulent, and asserted that to reactivate their accounts, the firms must divulge their manufacturers. These firms have then observed that Amazon releases private-label copycat products from the same exact manufacturers.[259] In one notable example, Amazon even created a "Wayfair Parity Team," which studied Wayfair furniture products and went to trade

253. MAJORITY STAFF OF THE SUBCOMM. ON ANTITRUST, COM. & ADMIN. L. OF THE COMM. ON THE JUDICIARY, 117TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS PART I 86 (Comm. Print 2020) [hereinafter HOUSE REPORT].

254. *Id.* at 87.

255. *Id.*

256. Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 780 (2017).

257. *See* Dana Mattioli, *How Amazon Wins: By Steamrolling Rivals and Partners*, WALL ST. J. (Dec. 22, 2020, 10:26 AM), https://www.wsj.com/articles/amazon-competition-shopify-wayfair-allbirds-antitrust-11608235127 [https://perma.cc/9KH3-AM5C] (explaining how a company sold itself because it could not compete with Amazon).

258. *Id.*

259. *Id.*

shows to identify their suppliers, "with the goal of eventually selling on Amazon 90% of furniture Wayfair offered."[260]

Second, firms have alleged that Amazon preferences its private-label goods over third-party sellers' goods when users search for items. This happens both via product placement in search results and through the "Buy Box." Higher search placement is more likely to lead to sales, so a product that is buried on page eight or ten might only rarely even be seen. By preferencing its private-label products, Amazon can capture more business—and push out third-party competitors. For each product a customer selects, it is possible that multiple sellers offer it for sale. The "Buy Box" features the default seller who will fulfill the customer's order, unless the customer actively chooses otherwise. Becoming the "Buy Box" choice can therefore be the difference between commercial success and failure. Reports suggest, however, that Amazon preferences itself in the "Buy Box," including in some cases by tying "Buy Box" status to whether a seller uses Amazon's fulfillment service.[261] In some cases, even if a seller has a lower price, it may not win the "Buy Box."[262] Amazon also allegedly self-preferences its private-label goods through its voice-activated speaker platform, Alexa.[263] A user asking Alexa to buy batteries is not offered a choice of Duracell or EverReady; Alexa simply defaults the Amazon Basics brand.[264]

Amazon's actions have been subject to investigations in Europe[265] and India,[266] and litigation in the United States.[267] But these efforts

260. *Id.*

261. *See* HOUSE REPORT, *supra* note 253, at 249, 250, 288 (explaining that Amazon's "Buy Box" favors Fulfillment by Amazon).

262. *Id.* at 289–90.

263. *Id.* at 311.

264. *Id.*

265. Press Release, European Commission, Antitrust: Commission Sends Statement of Objections to Amazon for the Use of Non-Public Independent Seller Data and Opens Investigation into Its E-Commerce Business Practices (Nov. 10, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077 [https://perma.cc/GD2X-DDCP].

266. Aditya Kalra, *Amazon Documents Reveal Company's Secret Strategy To Dodge India's Regulators*, REUTERS (Feb. 17, 2021, 12:00 PM), https://www.reuters.com/investigates/special-report/amazon-india-operation [https://perma.cc/2CAX-YXNM].

267. Katherine Anne Long, *Private Antitrust Suits Stack Up Against Amazon, Mirroring Federal Scrutiny*, SEATTLE TIMES (Aug. 2, 2021, 7:00 PM), https://www.seattletimes.com/business/amazon/private-antitrust-suits-stack-up-against-amazon-mirroring-federal-scrutiny [https://perma.cc/64A9-DG4G]; Complaint at 5, FTC v. Amazon.com, Inc., No. 2:23-cv-01495-JHC (W.D. Wash. Sept. 26, 2023) (announcing that the FTC and seventeen state attorneys general brought suit against Amazon for unfair methods of competition).

have not focused on the common law. Common law cases on common carriage, as we have seen, offer uncanny parallels to these practices. Indeed, self-preferencing was one of the central practices that equal access mandates targeted. Whether it was a telephone company denying access to a messenger or transportation company, or a grain warehouse preferencing grain it was trading—the common law condemned platforms that self-preferenced integrated business lines. Remedies included equal access mandates and—in the case of the grain warehouser—structural separation. These remedies were designed to facilitate the goals of the common law: they promote commerce and prevent extraction and oppression. When more businesses can buy and sell goods on a level playing field, enormous social and economic value is unlocked. For the platform to preference itself not only deprives the market of competition but reduces the incentive for firms to innovate for fear that any improvements will simply be expropriated.

The digital advertising marketplace is another example of an online marketplace that could be subject to litigation under the common law.[268] Companies advertise on both search pages (search advertising) and on standard webpages (display advertising).[269] The structure of the marketplace for digital advertising (called the "ad tech stack") involves an ad exchange, in which ads are bought and sold, and on each side of the exchange an ecosystem connecting publishers and advertisers. This ecosystem includes supply-side platforms, which would connect to publisher ad servers and ultimately back to the publisher, and demand-side platforms, which would connect to advertiser ad servers, and ultimately back to the advertiser.[270] During the late 2000s and 2010s, Google engaged in a series of acquisitions that gave it control of the ad exchange and the supply- and demand-side platforms.[271] A U.S. House of Representatives subcommittee report describes the consequences of this consolidation:

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268. For an extensive account of Google's dominance in advertising and the potential problems with its practices, see generally Dina Srinivasan, *Why Google Dominates Advertising Markets*, 24 STAN. TECH. L. REV. 55 (2020).

269. Companies also advertise on video, which we do not discuss here. For more on these types of digital advertising, see generally ORG. FOR ECON. COOP. & DEV. (OECD), COMPETITION IN DIGITAL ADVERTISING MARKETS (Oct. 21, 2020), http://www.oecd.org/daf/competition/competition-in-digital-advertising-markets-2020 [https://perma.cc/LXQ2-D7Q7].

270. *See id.* at 18–19 (discussing how supply-side platforms interconnect with demand-side platforms).

271. *See* HOUSE REPORT, *supra* note 253, at 208–09 (discussing Apple's acquisition strategy and its expected growth in the mobile ad market).

> With a sizable share in the ad exchange market, ad intermediary market, and as a leading supplier of ad space, Google simultaneously acts on behalf of publishers and advertisers, while also trading for itself—a set of conflicting interests that market participants say enable Google to favor itself and create significant information asymmetries from which Google benefits.[272]

As a result of these acquisitions, Google has more than 50 percent of the market, covering both search and display advertising.[273] For advertisers, Google's network is essential because of the scale of the search engine. When a user searches for a particular good or service, Google Search shows advertisements that might connect to the requested good or service. Importantly, Google not only determines which ads match the search term but also conducts the auction on its own ad exchange to determine which ad will win the bid to be displayed to the user.[274]

This dynamic had led to a variety of allegations of anticompetitive behavior. According to one lawsuit filed by Texas and other states, Google forced advertisers into using its advertising buying tool and bidding for ads via its exchange and "refused to route advertisers' bids to non-Google exchanges, even though those exchanges might have been selling identical ad space for lower prices."[275] Google also runs a display advertising service in which advertising is placed on websites. Here too there have been findings of anticompetitive behavior. The European Commission even fined Google 1.49 billion Euros for contract terms that prevented websites from showing advertisements from Google's rivals.[276] Commentators have observed that Google's dominance—and, as a result, its ability to engage in this conduct—is partly because the digital advertising exchange features barriers to entry that make competition unlikely, "including network effects, the

272. *Id.* at 207.

273. *Id.* at 206.

274. *See, e.g.*, OECD, *supra* note 269, at 13.

275. Complaint at 40–41, Texas v. Google LLC, No. 4:20-CV-957-SDJ (E.D. Tex., May 20, 2021), 2021 WL 2043184; *see also* Mathieu Rosemain, *Google To Change Global Advertising Practices in Landmark Advertising Deal*, REUTERS (June 7, 2021, 6:28 PM) (describing a settlement between French regulators and Google regarding Google's anticompetitive behavior between Google Ad Manager and Google AdX, including a fine and independent trustee to monitor the firm's behavior).

276. Press Release, European Commission, Antitrust, Commission Fines Google €1.49 Billion for Abusive Practices in Online Advertising (Mar. 1, 2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770 [https://perma.cc/S22N-LWZF].

need for large upfront capital investments, economies of scale, and the need for access to financing to handle cash-flow problems."[277]

### *C. Internet Search*

Search engines are indispensable utilities for navigating the internet, and for about two decades, one search engine has been so dominant that its name is a verb synonymous with searching the internet: "The overwhelmingly dominant provider of general online search is Google, which captures around 81% of all general search queries in the U.S. on desktop and 94% on mobile. Other search providers include Bing, which captures 6% of the market, Yahoo (3%), and DuckDuckGo (1%)."[278] Although some commentators predict that the rise of AI will challenge Google's dominant position—Google is worried, reportedly[279]—for now, Google's virtual monopoly remains intact.

Why hasn't the internet search industry seen more competition? Two subtle network effects may bear substantial responsibility. First, building an effective search engine requires crawling as much of the internet as possible—but "being crawled" is costly for webpage owners, so they block crawling by all but the most traffic-driving search engines. As the House Report explains:

> Today several major webpage owners block all but a select few crawlers, in part because being constantly crawled by a large number of bots can hike costs for owners and lead their webpages to crash. The one crawler that nearly all webpages will allow is Google's "Googlebot," as disappearing from Google's index would lead most webpages to suffer dramatic drops in traffic and revenue. Any new search engine crawler, by contrast, would likely be blocked by major webpage owners unless that search engine was driving significant traffic to webpages—which a search engine cannot do until it has crawled enough webpages.[280]

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277. Damien Geradin & Dimitrios Katsifis, *Google's (Forgotten) Monopoly – Ad Technology Services on the Open Web*, CONCURRENCES, no. 3-2019, Sept. 2019.

278. HOUSE REPORT, *supra* note 253, at 77.

279. *See* Nico Grant, *Google Calls In Help From Larry Page and Sergey Brin for A.I. Fight*, N.Y. TIMES (Feb. 23, 2003), https://www.nytimes.com/2023/01/20/technology/google-chatgpt-artificial-intelligence.html [https://perma.cc/8L8D-ACSU] ("The new A.I. technology has shaken Google out of its routine. Mr. Pichai declared a 'code red,' upending existing plans and jump-starting A.I. development.").

280. HOUSE REPORT, *supra* note 253, at 79.

As with the operating system market, there is a chicken-and-egg problem here: a search engine company must drive traffic to get webpage owners' consent to crawl, but it must get their consent to crawl to build a search engine capable of driving traffic.

The second network effect comes from so-called "click-and-query" data.[281] Search engine operators improve and refine their web indexes and search algorithms by observing the queries their engine receives and the resulting clicks. In short, the more a search engine is used, the better its operators can make it—a positive feedback loop. A prospective new entrant in the search market would be at a significant disadvantage to established operators. In a sense, Google's search algorithm can crowdsource based on clicks to improve the quality of organic search results.

Commentators routinely refer to Google as an infrastructural firm or utility,[282] and there have been complaints that Google has abused its dominance to extract value from dependent businesses and preference its own vertically integrated products—precisely the sorts of problems to which the common law of carriers is addressed. In 2021, Ohio sued Google under the common law of carriers, alleging that Google had preferenced its own products[283] in its search results over those of third parties.[284] Ohio seeks this designation because common carriage would come with a neutrality mandate—an obligation to deliver search results neutrally. The problem, Ohio says, is that Google preferences its own nonsearch services over those of third parties: "Google intentionally structures its Results Pages to prioritize Google products over organic search results[,] . . . even when the Google product would not be returned near the top of an organic search."[285] The value of appearing at the top of a search is high because people click on the top results more frequently than lower down results, and the value is even greater

281. HOUSE REPORT, *supra* note 253, at 80.

282. *See, e.g.*, Rahman, *The New Utilities*, *supra* note 7, at 1641, 1670 (arguing that Google and other tech platform businesses "compris[e] the basic *infrastructure* of modern society" and "increasingly operat[e] as foundational utilities for much of today's economy" (emphasis in original)); Josh Simons & Dipayan Ghosh, *Utilities for Democracy*, BROOKINGS INST. (Aug. 2020), https://www.brookings.edu/wp-content/uploads/2020/08/Simons-Ghosh_Utilities-for-Democracy_PDF.pdf [https://perma.cc/7M6Q-QAJD] ("We describe the two most powerful internet platforms, Facebook and Google, as new public utilities . . . .").

283. Product here does not mean a tangible good, of course. Google News, Flights, Maps, Shopping, and Reviews are all products.

284. Complaint, *supra* note 2, at 3.

285. *Id.* at 3–4.

on mobile devices due to their smaller screens. Ohio points out that "[a]s a result of Google's self-preferencing Results-page architecture, nearly two-thirds of all Google searches in 2020 were completed without the user leaving Google owned platforms."[286] Ohio requests an injunction barring Google from self-preferencing. Note that Ohio does not allege that Google has deprioritized Ohio's websites or manually removed them altogether from search results. Other firms have made such claims, however.[287] Those allegations, if true, would be easy cases under common law principles (absent some justification for deplatforming).

Google has responded to Ohio's allegations with a variety of arguments, starting with the claim that it is not a common carrier.[288] Citing Ohio case law observing that a common carrier is "one who undertakes to transport persons or property from place to place, for hire, and holds itself out to the public as ready and willing to serve the public indifferently,"[289] Google argues that it is neither "carrying" nor "common."[290] It does not transport persons, property, or content: ISPs carry the content, not Google.[291] And Google is not "hired" in the form of a contractual agreement to generate search results.[292] Yet, as explained above, literally "carrying" things has never been a relevant litmus test for the application of the common law's common carrier principles[293]; and the public policy rationales[294] that courts have cited for those principles do not turn in any obvious way on whether the service is supplied "for hire." More generally, Google's mode of argument reflects a category error of sorts, reading previous common

286. *Id.* at 4.

287. *See, e.g.*, Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568, at *2 (W.D. Okla. May 27, 2003) (claiming tortious interference); E-Ventures Worldwide, LLC v. Google, Inc., 188 F. Supp. 3d 1265, 1278 (M.D. Fla. 2016) (same). In addition, according to a House Report on digital markets, Google took content from Yelp and other third parties in order to build its own competitor products, and when Yelp requested that it remove Yelp's proprietary content, Google said the only way to do that was to remove Yelp altogether from Google Search. HOUSE REPORT, *supra* note 253, at 184.

288. Motion To Dismiss, *supra* note 197, at 6.

289. *Id.* (quoting Kinder Morgan Cochin LLC v. Simonson, 66 N.E. 3d 1176, 1182 (Ohio Ct. App. 2016)) (internal quotations omitted).

290. *Id.*

291. *Id.* at 7.

292. *See id.* (arguing that the plaintiff did not and could not allege that Google is "hired").

293. *See supra* Part I.A (explaining the principle's application to stationary businesses).

294. *See supra* Part I.B–.C (analyzing public policy rationales).

law cases as though they were statutes to be parsed. Instead, "[g]aps in the common law are filled by a process of reasoning by analogy, figuring out how a new problem is akin to, and different from, prior judicial determinations."[295] In other words, courts "apply old principles to new situations" on a case-by-case basis.[296] Ultimately, the Judge in *Ohio v. Google* did not fall into Google's formalistic trap and, among other things, instead found that payment was not dispositive for a designation as a common carrier.[297]

Google also argues that it is "nonsensical and absurd" to say that it could run a service that does not discriminate.[298] A search algorithm, on this view, inherently discriminates in choosing results based on relevance. While it is of course true that Google Search curates results, Google's stated aim is to offer the most relevant results to users.[299] Relevance requires distinguishing between items. But distinctions and discrimination are not the same thing. Nondiscrimination—treating like situations alike—would mean adhering to the relevance criterion. Delivering search results that preference its own services, to the disadvantage of other search results that are just as or more relevant, would constitute discrimination.[300]

To use a common law–era analogy: a railroad "curates" its service when it takes a passenger from Chicago to St. Louis—and in the process, it has "discriminated" against New York and every other city in the railroad network. A telephone company "curates" its service when it connects a mother to her son, and it simultaneously "discriminates" against every other person on the network, including

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295. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1218 (2001).

296. Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 407 (1908).

297. *See* State *ex rel.* Yost v. Google LLC, No. 21-CV-H-06-0274, 2022 WL 1818648, at*10 (Ohio C.P. Del. Cnty. May 24, 2022) ("[I]t appears more recent law has shifted from requiring a direct fee paid to the carrier.").

298. Motion To Dismiss, *supra* note 197, at 8–9; *see also* Gilad Edelman, *No, Facebook and Google Are Not Public Utilities*, WIRED (July 15, 2021), https://www.wired.com/story/no-facebook-google-not-public-utilities [https://perma.cc/UK3W-WV2P] (describing the argument as "sort of nonsensical").

299. Google claims that it "deliver[s] the most relevant and reliable information available" and notes that it "never provide[s] special treatment to advertisers in how [its] search algorithms rank [its] websites." *Our Approach to Search*, GOOGLE, https://www.google.com/search/howsearchworks/our-approach [https://perma.cc/W7BM-T2XN].

300. *See* Adrianne Jeffries & Leon Yin, *Google's Top Search Result? Surprise! It's Google*, THE MARKUP (July 28, 2020), https://themarkup.org/google-the-giant/2020/07/28/google-search-results-prioritize-google-products-over-competitors [https://perma.cc/C8KC-47ZX] (claiming that Google places its products above its competitors).

the mother's daughter, parents, and neighbors. But no one thinks of either of these distinctions as "discrimination." Why? Because the service requested is to connect the passenger to St. Louis, not New York; to connect the mother to the son, not the neighbor. Curation exists in all of these networks.

The trickier question—and the one on which Ohio, Google, and the courts should focus—is whether the self-preferenced service itself is part of Google's search business or whether it is a separate line of business. In the Louisville telephone case, for example, the court found that the transportation business was distinct from the telephone business, and that the telephone company had to be neutral in its provision of phone services. From a common law perspective, Google's stronger argument is that certain of its products are integrated with its search product. For example, Google might argue that its search product crawls web pages and shows their relevance. In the case of a website that *itself* collects information about products for sale, Google Search would invariably be crawling those pages. Google results for a search of "brown shoes" might therefore turn up items on those pages. The question, in this hypothetical, would be whether Google can create and preference its own "shopping" vertical that organizes these items alone, ahead of the original pages on which they appeared.[301] A common law court would need to engage with such a question in detail to assess the degree to which the product is integrated into the service. Note that such an argument, however, also clarifies that some Google products might be more easily characterized as independent of a search service, such that self-preferencing them in a search could violate a common law neutrality mandate.

### *D. Social Media*

Justice Thomas's concurrence in *Biden v. Knight First Amendment Institute at Columbia University*[302] put a spotlight on whether social media platforms can and should be considered common carriers or public accommodations. *Knight* involved individuals who had been blocked by then president Trump from his Twitter account. They

301. The EU General Court, for example, thought Google could not. *See* Javier Espinoza, *EU Wins €2.4bn Google Shopping Case*, FIN. TIMES (Nov. 10, 2021), https://www.ft.com/content/3e8e45e6-54b4-4b0f-8bda-69ab1389eabd [https://perma.cc/S3BS-RB7Y] (stating that the European General Court found that Google favors its own services).

302. Biden v. Knight First Amend. Inst. at Colum. Univ., 141 S. Ct. 1220 (2021) (mem.).

argued that the government (in this case, the president) denied them the right to see and hear official government communications.[303] By the time the case got to the Supreme Court, Trump was no longer president and, due to his role in the January 6 insurrection at the U.S. Capitol, Twitter had also permanently suspended his account.[304] Justice Thomas used the occasion to opine on the possibility of regulating social media platforms as common carriers.[305] The implication, as we have noted, was that social media companies might be restricted from deplatforming users.

Thomas was right in that social media platforms fit neatly within the historic category of common carriers. Social media companies are a classic example of firms that benefit from network effects: there would be no point to being on Facebook or Twitter if nobody else were on the platform. As Mark Zuckerberg once said, "I think that network effects shouldn't be underestimated with what we do."[306] Social media platforms have also become pervasive in modern life. While some believe that "unlike water and electricity, life can go on without Facebook or other social networking services,"[307] it is worth noting that life went on for many millennia without electricity or running water—but that does not stop people from understanding them as essential services for modern societies. Indeed, the leaders of the biggest social medial platforms see their aim as creating an essential service. In the early years of Facebook, Zuckerberg referred to his ambition as creating a "social utility."[308] Elon Musk seeks to make X (formerly Twitter) into an "everything app" that includes payments as well as communications.[309] Meanwhile, reputable business publications have

303. Knight First Amend. Inst. at Colum. Univ. v. Trump, 9928 F.3d 226, 230, 232 (2d Cir. 2019).

304. *Permanent Suspension of @realDonaldTrump*, TWITTER, https://blog.twitter.com/en_us/topics/company/2020/suspension [https://perma.cc/56J2-QE6Q].

305. *Knight First Amend. Inst.*, 141 S. Ct. at 1224 (Thomas, J., concurring).

306. Fred Vogelstein, *Network Effects and Global Domination: The Facebook Strategy*, WIRED (May 17, 2012), https://www.wired.com/2012/05/network-effects-and-global-domination-the-facebook-strategy [https://perma.cc/NPP6-TQYG].

307. Thierer, *supra* note 8, at 277.

308. Jessi Hempel, *How Facebook Is Taking Over Our Lives*, CNN MONEY (Mar. 11, 2009, 9:39 AM), https://money.cnn.com/2009/02/16/technology [https://perma.cc/5KAY-R7F4].

309. *See generally* Dan Milmo & Amy Hawkins, *'The Everything App': Why Elon Musk Wants X To Be a WeChat for the West*, THE GUARDIAN (July 29, 2023), https://www.theguardian.com/media/2023/jul/29/elon-musk-wechat-twitter-rebranding-everything-app-for-west [https://perma.cc/7RFB-XSGB] (stating that Musk wants to create an "everything app").

been advising companies for more than a decade on how to develop social media strategies—precisely because it is so critical to their business operations.[310]

Social media platforms, within their respective domains, also have significant power in the marketplace. Facebook's market position remains extraordinary. To use just one metric, as of March 2023, in the United States, Facebook dominated with 53.09 percent of all social media website visits, followed by 16.25 percent for Twitter, 13.85 percent for Instagram (also owned by Facebook's parent, Meta), and 12.77 percent for Pinterest.[311] But such comparisons obscure how unique these services are. X (Twitter), Instagram, and TikTok, for instance, are simply not substitutes. Observe, for example, the outcry when Instagram proposed moving in more of a TikTok-like direction.[312] Leading users, like the Kardashians, vociferously objected, recognizing that a shift from photos to video would undermine their business approach.[313] For publishers of news content, Facebook is an essential distribution mechanism: a change in its algorithm to deprioritize news links compared to video, for some outlets, has meant a 50 percent drop in traffic.[314] X (Twitter), under Elon Musk, has been found to be delaying access to news from sources that Musk dislikes—including from the *New York Times*, *Washington Post*, Substack, and

310. *See, e.g.*, H. James Wilson, P.J. Guinan, Salvatore Parise & Bruce D. Weinberg, *What's Your Social Media Strategy?*, HARV. BUS. REV. (July–Aug. 2011) (stating that "many companies" contemplate their social media strategies); Keith A. Quesenberry, *Social Media Is Too Important To Be Left to the Marketing Department*, HARV. BUS. REV. (Apr. 19, 2016), https://hbr.org/2016/04/social-media-is-too-important-to-be-left-to-the-marketing-department [https://perma.cc/26XP-F9GR] (suggesting a five-step plan for businesses regarding social media development).

311. *Leading Social Media Websites in the United States as of March 2023, Based on Share of Visits*, STATISTA (Apr. 2023), https://www.statista.com/statistics [https://perma.cc/GU7H-2SCW].

312. *See* Jonathan Vanian, *Instagram Rolling Back Changes After Kardashians Slammed the App for Being Like TikTok*, CNBC (July 28, 2022, 8:22 AM), https://www.cnbc.com/2022/07/28/instagram-rolling-back-changes-after-kardashians-tiktok-imitations-.html [https://perma.cc/3QEZ-TYGQ] (claiming that the Kardashians complained about Instagram's proposed change).

313. *See id.* (claiming that the Kardashians are dissatisfied by the switch from photo-sharing to video-sharing).

314. Thomas Germain, *Website Owners Say Traffic Is Plummeting After a Facebook Algorithm Change*, GIZMODO (June 18, 2023), https://gizmodo.com/facebook-traffic-down-algorithm-change-1850549012 [https://perma.cc/ANM7-EWF9].

the Reuters wire service.[315] In short, social media platforms are comfortably analogous to other carriers under the common law.

Other courts have recently had occasion to analyze whether social media platforms are common carriers. After Florida and Texas passed statutes regulating social media platforms, challenges to the laws were swift. In both cases, the circuit courts have not gotten the analysis entirely right.

In *NetChoice, LLC v. Attorney General, Florida*,[316] the Eleventh Circuit determined that social media platforms were not common carriers.[317] Florida passed a law treating social media platforms as such, imposing on them a range of content-moderation obligations.[318] The Eleventh Circuit was unclear on whether Florida argued that social media platforms were common carriers prior to the legislation (and thus possessed limited First Amendment rights) or whether state law could transform them into common carriers in spite of the First Amendment—but it rejected both positions.[319] Perhaps most importantly, the court thought "social-media platforms have never acted like common carriers."[320] Citing statutory definitions from the federal communications law context, it found that the terms of service by which platforms require users to abide meant they were not open to all members of the public.[321] This was simply incorrect. As we have seen, the common law of carriers included exceptions to serving all members of the public, and courts regularly permitted exclusion—and in some cases conditioned exclusion on—when a platform had pre-stated its terms of service.[322]

The Eleventh Circuit made other arguments as well. It observed that "Supreme Court precedent strongly suggests internet companies" are not common carriers.[323] Of course, in the common law context, this

315. Jeremy B. Merrill & Drew Harwell, *Elon Musk's X Is Throttling Traffic to News and Websites He Dislikes*, WASH. POST (Aug. 15, 2023), https://www.washingtonpost.com/technology/2023/08/15/twitter-x-links-delayed [https://perma.cc/ATL2-H5FX].

316. NetChoice, LLC v. Att'y Gen., 34 F.4th 1196 (11th Cir. 2022).

317. *Id.* at 1220.

318. *See id.* at 1206 (listing the numerous restrictions on social media censorship).

319. *Id.* at 1220–22.

320. *Id.* at 1220.

321. *Id.*

322. *See, e.g.*, Commonwealth v. Power, 48 Mass. 596 (1844) (finding that a railroad company that may exclude passengers is still a common carrier).

323. *NetChoice*, 34 F.4th at 1220.

"suggestion" should not be very persuasive given that, post-*Erie*, the Court does not make common law.[324] Finally, it argued that federal law distinguishes between "interactive computer services" and "common carriers or telecommunications services," and that Congress explicitly did not mean to treat interactive computer services as common carriers in the statute.[325] But even if Congress did not mean to treat interactive computer services as common carriers, that does not necessarily foreclose state law from so treating them. The court observed that § 230 of the Communications Decency Act grants tech platforms the "ability to restrict access to a plethora of material that they might consider 'objectionable.'"[326] This likely preempts state law—but only to the extent that it is inconsistent with § 230.[327] It is possible that state law might be consistent with § 230 or outside its scope. To the court's credit, it also observed that Florida's statute did not track the common law rules of common carriage, which regularly permitted exclusion for a range of reasons.[328]

In *NetChoice, L.L.C. v. Paxton*,[329] the Fifth Circuit heard a facial challenge to a Texas law that imposed nondiscrimination and disclosure rules on social media platforms, focused on ensuring viewpoint neutrality.[330] The Fifth Circuit upheld the law, holding that it did not violate the First Amendment rights of the platforms. The court held that the platforms were not speakers or publishers exercising editorial discretion but rather were acting as censors. The Texas law, according to the court, imposed content- and viewpoint-neutral obligations on the platforms. With respect to the common law,

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324. Not to mention that the cited cases were about cable operators, not social media platforms. *See id.*

325. *Id.* at 1220–21.

326. *Id.* at 1221 (quoting 47 U.S.C. § 230(c)(2)(a)).

327. *See* 47 U.S.C. § 230(e)(3) ("Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section.").

328. *NetChoice*, 34 F.4th at 1219 n.17.

329. NetChoice, L.L.C. v. Paxton, 27 F.4th 1119 (5th Cir. 2022).

330. The nondiscrimination provision—Section 7—of the law bars social media platforms from censoring "a user's expression . . . based on: (1) the viewpoint of the user or another person; (2) the viewpoint represented in the user's expression or another person's expression; or (3) a user's geographic location in this state or any part of this state." TEX. CIV. PRAC. & REM. § 143A.002(a). "Censor" is defined as "block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression." *Id.* § 143A.001(1). It also included exceptions for content moderation authorized by federal law, preventing sexual exploitation of children or sexual harassment, direct incitement of criminal activity, specific threats of violence, and unlawful expression. *Id.* § 143A.006.

the court observed that the Texas law was in line with common carriage obligations—and that the state had the power to impose such obligations by statute. The Fifth Circuit's reading of common carriage did not fall into some of the traps that the Eleventh Circuit did or that the platforms did in their arguments. The court observed that the platforms hold themselves out to the public without individualized bargaining and that generic terms of service do not change that fact.[331] It also rejected the platforms' formalistic claim that "carriage" requires the carrying of property.[332] However, the Fifth Circuit's opinion was incomplete in its discussion of the common carrier's right to exclude.[333] Common carriers have long been able to exclude for a wider set of reasons that Texas law allows. While this might not change the ultimate constitutional analysis, a reasonable right to exclude was a critical part of common carriage principles. The Fifth Circuit then found that § 230 supported its conclusion that Congress does not treat platforms as publishers when they host the content of their users and that the platforms had forfeited the claim that § 230 preempted the state law.

Even though § 230 is in place, it is worth considering the contours of what obligations and exceptions the common law of carriers might impose were it not. In determining how to apply common carrier principles to social media platforms, it is useful to distinguish between one-to-one digital communications services and what we call social media broadcasting services. One-to-one digital communications services directly connect individuals (or small groups) through effectively private channels. Examples of these messenger applications are iMessage, WhatsApp, Signal, Facebook Messenger, and direct messages on X (Twitter). For the most part, these applications are readily comparable to historical communications services from the nineteenth century. A text message between two people is not so different from a telegraph message or a telephone call. The digital communications service provides a mere channel of communication, just as the telegraph or telephone company did.

What we call social media broadcasting services is more complicated in that the service involves many-to-many communications. Facebook, Twitter, Instagram, and TikTok allow

331. *Paxton*, 49 F.4th at 469.

332. *Id.* at 478.

333. It only offered two examples: one on phone companies and obscene expression, and the other on exclusion of disorderly passengers on transportation carriers. *Id.* at 474. For a fuller discussion of these examples, see Sitaraman, *Deplatforming*, *supra* note 16, at 546–48, 559.

people to publish their thoughts, photos, or videos to the entire world. In a sense, they turn every person into a broadcaster. This is not only different from making a telephone call but also different from what newspapers or traditional broadcasters do. Newspaper and traditional broadcast services were engaged in one-to-many communications. As Professor Eugene Volokh has argued, for those services, limited time and space make editorial curation necessary, readers choose those media partly in order to *prevent* information overload, and a broadcast or newspaper is consumed as a coherent product.[334] Social media platforms, he observes, do not have all of these features, but curation is necessary for other reasons.[335]

Given the dissimilarities, it is helpful to recall the problems that the common law of carriers addressed in order to gain some traction on its relevance to social media broadcasting. First, the common law was deeply concerned with equal access in business-to-business relationships. While it is possible that components of social media platforms suffer from these problems,[336] the marquee debates have been about content moderation[337] and deplatforming.[338] These are questions of content exclusion rather than business-to-business discrimination—exclusion of particular materials on the platform and exclusion of users based on content.

If we accept that social media platforms have a common law obligation to "accept all comers" and to treat them neutrally, the question becomes: What are the exceptions to these rules? Or to put it differently, when do common carriers have a right to exclude?[339] As we

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334. Volokh, *supra* note 8, at 403–05.

335. Without curation, a platform would likely be consumed by spam and bots, rendering the service itself unusable. *Id.*

336. *See, e.g.*, Sara Fischer & Kristal Dixon, *Scoop: Over 200 Newspapers Quietly Sue Big Tech*, AXIOS (Dec. 7, 2021), https://www.axios.com/2021/12/07/1-local-newspapers-lawsuits-facebook-google [https://perma.cc/XM27-UNND].

337. *See, e.g.*, Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1601–02 (2018); Evelyn Douek, *Content Moderation as Administration*, 136 HARV. L. REV. 526, 532 (2022).

338. *See* Sitaraman, *Deplatforming*, *supra* note 16; Genevieve Lakier & Nelson Tebbe, *After the "Great Deplatforming": Reconsidering the Shape of the First Amendment*, LPEBLOG, (Mar. 1, 2021), https://lpeproject.org/blog/after-the-great-deplatforming-reconsidering-the-shape-of-the-first-amendment [https://perma.cc/WFG2-RSHT].

339. It is worth observing that this question cuts to profound issues of property theory. Some scholars have argued that the *sine qua non* of property is the right to exclude. Thomas W. Merrill, *Property and the Right To Exclude*, 77 NEB. L. REV. 730, 730 (1988). Merrill did not argue that the right to exclude was the *only* characteristic of property but did say it was foundational.

have seen, the common law retained a right to exclude when exclusion was based on a good reason, including service provision (payment of fees and capacity constraints) and the need to protect other customers or the service from harm. Common carriers could thus exclude materials or individuals and could even do so prophylactically based on their past conduct. Courts sometimes required some sort of notice prior to a prohibition—in the form of conduct regulations for access or a request to halt the offending behavior.

In the modern context, arguments for the exclusion of particular materials from social media broadcasting are comparatively more justifiable than excluding individuals completely. The Constitution allows for the regulation of a range of speech: obscene speech,[340] fraud,[341] incitement,[342] defamation,[343] fighting words,[344] true threats,[345] criminal conduct,[346] and child pornography.[347] A common law court could reasonably find that these permissible topics of speech regulation are analogous to dangerous materials or people at an inn or on a vehicle for transport. Indeed, these categories are related either to protecting individuals or policing the far extremes of community norms, factors that also inspired common law exceptions to the duty to serve all comers.

Excluding individuals, rather than particular activities, is the more challenging case because an individual can participate on a social media platform without engaging in harmful activities. Here, a common law court could take a range of approaches. The narrowest would be to simply prohibit the exclusion of individuals under the

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Thomas W. Merrill, *Property and the Right To Exclude II*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 1, 1 (2014). It is noteworthy that common carriage obligations at once remove the right to exclude—but also allow for exceptions. Whether the baseline is the rule to accept all comers or the right to exclude raises compelling questions at the nexus of property theory, the common law, and public law.

340. Miller v. California, 413 U.S. 15, 15 (1973).

341. Illinois *ex rel.* Madigan v. Telemarketing Assocs., 538 U.S. 600, 612 (2003).

342. Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (per curiam).

343. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 284 (1964).

344. Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942).

345. Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam); Virginia v. Black, 538 U.S. 343, 359 (2003).

346. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949); United States v. Williams, 553 U.S. 285, 297–98 (2007).

347. New York v. Ferber, 458 U.S. 747, 764 (1982).

"take all comers" principle and to read the exception to that principle narrowly. On this approach, only the individually offending social media posts could be excluded, not the person altogether. A court taking such an approach would, however, have to explain why the social media broadcasting context differs from that of other common carriers, because this approach runs contrary to the common law's well-developed set of exceptions that allowed for total exclusion of some users, particularly repeat offenders.

A second approach would be to generally require social media platforms to accept all comers but allow them to exclude repeat offenders. This approach also has roots in the common law. As we have seen, the known thief could be excluded from an inn or common carrier *prior* to travel. A pattern or practice of behavior was sufficient. Some tech platforms' practices follow this approach. Prior to billionaire Elon Musk's takeover of Twitter, the platform had a set of posted rules.[348] These rules explained that violence, terrorism, child sexual exploitation, harassment, hateful conduct, suicide, adult conduct, illegal activities, nonconsensual private information or nudity, platform manipulation, spam, interference in civic activities, impersonation, harm-causing manipulated media, and IP violations were impermissible.[349] Twitter also described its range of tools for enforcement, beginning with labeling tweets as "disputed or misleading" and limiting their visibility to requiring removal.[350] At the account level, Twitter could also place an account in read-only mode, verify ownership, or permanently suspend a user.[351] Twitter noted that account-level enforcement actions took place "if [it] determine[d] that a person ha[d] violated the Twitter Rules in a particularly egregious way, or ha[d] repeatedly violated them even after receiving notifications from [Twitter]."[352] These practices combined and tracked

348. TWITTER, *The Twitter Rules*, https://help.twitter.com/en/rules-and-policies/twitter-rules [https://web.archive.org/web/20220306011404/https://help.twitter.com/en/rules-and-policies/twitter-rules] (last visited Mar. 6, 2022).

349. *Id.*

350. TWITTER, *Our Range of Enforcement Options*, https://help.twitter.com/en/rules-and-policies/enforcement-options [https://web.archive.org/web/20220306021327/https://help.twitter.com/en/rules-and-policies/enforcement-options] (last visited Mar. 6, 2022).

351. *Id.*

352. *Id.*

the rules on a common carrier's right to exclude remarkably well.[353] Twitter pre-posted its conduct regulations, barred specific egregious behaviors, and enabled exclusion after repeat or extreme violations.

None of this is to speak to the desirability of these approaches but simply to their plausibility. The common law could evolve in a range of directions, each with their own tradeoffs. But what is clear is that under any of these approaches, if common carriage rules were applied to social media platforms, the rules would allow the platforms to exclude users so long as those exclusions are reasonable. To put a fine point on it, those who see common carriage as a way to prohibit social media companies from deplatforming users or content might find the legal tool less impactful than they would like—even though, as we have argued, social media platforms fit well within the common law category of carriers.

Finally, one of the central questions that has emerged in debates over the applicability of common carrier principles to social media platforms is whether the First Amendment applies. An account is beyond the scope of this Article, but a few observations are worth making. First, as scholars have noted, when social media platforms currently deplatform individuals, there are "no serious First Amendment questions because the social media companies [are] private actors to whom the First Amendment did not apply."[354] At the same time, there are arguments that legislatures or common law courts could impose obligations on social media platforms without running afoul of the First Amendment. The D.C. Circuit, for example, has held that common carrier obligations do not raise First Amendment problems.[355] And as we have seen, the Fifth Circuit has found that state legislation placing restrictions on platforms does not violate the First Amendment.[356] Given that the Supreme Court has shown a willingness

353. All tech platforms have policies on content moderation. For a discussion of this point with extensive evidence, see generally TARLETON GILLESPIE, CUSTODIANS OF THE INTERNET: PLATFORMS, CONTENT MODERATION, AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA (2018) (investigating how social media platforms control what users post online).

354. Lakier & Tebbe, *supra* note 338.

355. U.S. Telecomms. Ass'n v. FCC, 825 F.3d 674, 740 (D.C. Cir. 2016); *id.* at 741 ("[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.").

356. *Paxton*, 49 F.4th at 445.

to revisit and overturn precedents,[357] it is not entirely obvious how the Court would address First Amendment issues in this context.

### *E. Virtual Reality, the Metaverse, and Beyond*

One of the virtues of the common law method is that, with practice, it becomes easier to see how tried and true principles apply to new situations. Consider virtual reality and the so-called metaverse. The metaverse, as Facebook (Meta) founder Mark Zuckerberg has said, is "an embodied internet where you're in the experience, not just looking at it."[358] In practice, it is a "virtual space where people wearing [Augmented Reality ("AR") or Virtual Reality ("VR")] headsets can interact with each other's avatars, play games, have meetings, and so on." [359] But the metaverse can also be defined simply as the persistently operating worlds that are accessed through computers or game consoles.[360]

Virtual reality and the metaverse usually conjure up mental images from science fiction novels, like the worlds in *Ready Player One*[361] or *Snow Crash* (the book that coined the term metaverse).[362] But while the worlds of science fiction might seem unprecedented, their infrastructure is not. Consider how individuals will engage with the metaverse. There will be hardware (VR goggles, eyeglasses, computers, game consoles), operating systems running on the hardware, and applications.[363] The regulation of these components of

357. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2261 (2022) (explaining that "[t]here are occasions when past decisions should be overruled").

358. Shirin Ghaffary & Sara Morrison, *Can Facebook Monopolize the Metaverse?*, VOX (Feb. 16, 2022, 6:30 AM), https://www.vox.com/recode/22933851/meta-facebook-metaverse-antitrust-regulation [https://perma.cc/PJP5-DTDY]. For an excellent overview, see MATTHEW BALL, THE METAVERSE: AND HOW IT WILL REVOLUTIONIZE EVERYTHING (2022).

359. Ghaffary & Morrison, *supra* note 358.

360. Eric Ravenscraft, *What Is the Metaverse, Exactly?*, WIRED, (Nov. 25, 2021, 7:00 AM), https://www.wired.com/story/what-is-the-metaverse [https://perma.cc/GVC9-QSF3]; *see also* BALL, *supra* note 358 (providing a definition of the Metaverse, the challenges it entails and the impact it will bring).

361. ERNEST KLINE, READY PLAYER ONE (2011) depicts a fictional world in the 2040s where people turn to a virtual reality simulator, "OASIS," to escape their troubles in reality.

362. NEAL STEPHENSON, SNOW CRASH (1992) imagines a version of Los Angeles that endured an economic collapse and seceded from the United States, in which a young man collects information through hacking the Metaverse, a virtual reality successor of the Internet.

363. For a brief overview of this point, see Tim Bajarin, *The Four Major Players Battling To Own the Metaverse OS*, FORBES, (Nov. 18, 2022, 10:00 AM) https://www.forbes.com/sites/timajar

the metaverse/VR ecosystem is, in other words, similar to that of the rest of the tech platform ecosystem, even though questions about conduct *within* the metaverse might raise different issues.

Indeed, when it comes to the market structure of the metaverse, there are already fears that Facebook (renamed Meta to signal its strategic shift toward VR) is buying up hardware firms and applications as a way to create a vertically integrated and monopolized metaverse.[364] There are allegations that Meta has engaged in predatory pricing on VR headsets in order to gain dominance in that market.[365] And Meta already hosts an AR/VR app store, akin to the Apple app store on mobile or the Google Play store—and it has been accused of both excluding some third-party apps and copying others.[366] In other words, as futuristic as the technology behind and experience of VR and the metaverse might seem, some of the possibilities for abusive behavior readily align with those already witnessed in the real world of tech platforms, and they could find remedies in the common law of carriers for the same reasons. The applicability of common carriage law to these emergent technologies raises the optimistic possibility that these new industries might develop along a different pathway than the "move fast and break things" approach that defined the rise of tech platforms in the early 2000s.[367] It is also a reminder of the flexibility and adaptability of the common law.

## CONCLUSION

We may live in an age of statutes and formalism, but the common law remains the baseline in the American legal system. As we have shown, the common law of carriers was a capacious category that included a range of businesses from wharves and inns to railroads and ferries to the telegraph and telephone. Common law courts reasoned by analogy to determine what new technologies were carriers, and they

in/2022/11/18/the-four-major-players-battling-to-own-the-metaverse-os [https://perma.cc/YN7A-YGDA].

364. Ghaffary & Morrison, *supra* note 358; Casey Newton, *Meta's Real Antitrust Problems Are Only Beginning*, THE VERGE, (Jan. 12, 2022, 9:17 AM), https://www.theverge.com/22879623/meta-facebook-antitrust-problems-ftc-vr-virtual-reality [https://perma.cc/X6Z6-ANRZ].

365. Ghaffary & Morrison, *supra* note 358.

366. David McLaughlin, *Facebook Accused of Squeezing Rival Startups in Virtual Reality*, BLOOMBERG, (Dec. 3, 2020, 9:00 AM), https://www.bloomberg.com/news/articles/2020-12-03/facebook-accused-of-squeezing-rival-startups-in-virtual-reality [https://perma.cc/G67R-LV7L].

367. *See generally* TAPLIN, *supra* note 27.

did not hesitate to so designate them—and thus impose a range of duties and obligations upon them. These included equal access rules, just and reasonable pricing controls, and reasonable rights to exclude users.

Tech platforms—operating systems, online marketplaces, search, social media, and virtual reality and the metaverse—are subject to the common law of carriers. They share similar characteristics with historic common carriers, and they have allegedly engaged in anticompetitive practices that are precisely the kinds of behaviors that the common law of carriers sought to address. The truly bizarre thing is not that some people have proposed treating tech platforms as common carriers under the common law; it is that so few such actions have been brought against them.