The Center for Growth and Opportunity at Utah State University

Is Common Carriage a Good Framework for Social Media Platforms?

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In April 2021, Supreme Court Justice Clarence Thomas took the unusual step of adding a concurring opinion on a simple procedural ruling in *Biden v. Knight First Amendment Institute*. The case was a holdover from the Trump Administration, which was being sued because President Trump's personal Twitter account blocked third-party accounts. When the Biden Administration came in and Trump was banned from Twitter, the case lost steam.

But Thomas went further. His extended opinion thought through what it would take to regulate platforms, stating that "there is a fair argument that some digital platforms are sufficiently akin to common carriers or places of accommodation to be regulated in this manner."[1] Justice Thomas seemed to be searching for state common carriage laws that could be used to target and subsequently regulate big tech companies.

Both Texas and Florida responded by passing bills categorizing platforms as common carriers and subjecting them to new content moderation regulations. Both of the laws are working their way through the courts. Lawmakers at the federal level, including Senator Roger Wicker (R-MS), Senator Bill Hagerty (R-TN), and Congressman Jim Banks (R-IN), have all drafted legislation to make social media platforms common carriers.[2] Thus it is natural to wonder, is common carrier regulation a good fit for such platforms?

As this brief will show, common carriage does not graft neatly onto online platforms. But it never really applied all that well to the telephone or telegraph industries either. Common carriage has wrongly been equated to price regulation when in reality it has actually been about equality of access. Rather than placing limitations on content moderation practices, mandating equality of access online would mean that sites are subject to a transparency requirement. Leaders who want to implement a common carriage law should really be pursuing only a transparency rule.

The Texas and Florida bills, because they aim to change content moderation practices, are true economic regulations. Changing moderation practices through regulation means that the government is seeking to change the quality of the product. There is already a name for this: price regulation. In other words, content moderation regulation *is* price regulation.

In the following three sections, we discuss the Texas and Florida bills and the First Amendment concerns they raise, we trace the origins of common carriage laws back to their roots in a public interest, and we explain why content moderation laws are actually price regulation.

The Texas and Florida Bills

Texas HB 20 was among the first self-styled common carrier bills.[3] Passed in 2021, the law prohibits social media platforms with more than 50 million users in the United States from censoring content on the basis of a user's viewpoint. The Texas bill asserts that social media companies are "common carriers by virtue of their market dominance," and it casts a wide net. Fifty million US users would mean that Facebook, Facebook Messenger, Instagram, TikTok, Twitter, iMessage, Pinterest, Snapchat, LinkedIn, WhatsApp, and Reddit would all be subject to regulation.[4]

All of the terms in the bill are defined loosely, but "censor" is among the broadest, including "any action taken to edit, alter, block, ban, delete, remove, deplatform, demonetize, de-boost, regulate, restrict, inhibit the publication or reproduction of, or deny equal access or visibility to expression, to suspend a right to post, remove, or post an addendum to any content or material posted by a user, or to otherwise discriminate against expression."

After the bill passed the legislature and was signed by the governor, trade associations representing social media companies challenged it in court.[5] The First Amendment is and will always be the biggest hurdle for those wanting to steer the content on platforms because state-mandated content practices seemingly violate the First Amendment rights of platforms to determine who and what can be on their sites. Indeed, because of the serious constitutional questions posed by the HB 20, even the preliminary injunction to keep the bill unenforced during its court review made its way to the Supreme Court.

Supreme Court Justice Alito wrote the order that kept the Texas bill unenforced, and in doing so gave a preview of what is likely to be litigated. As Alito noted, there is a complicated past that exists between common carriage and the First Amendment. "Under some circumstances, we [SCOTUS] have recognized the right of organizations to refuse to host the speech of others," yet at other times, these rights have been denied. Alito made clear that "it is not at all obvious how our existing precedents, which predate the age of the internet, should apply to large social media companies."[6]

Florida's SB 7072, more commonly called the Stop Social Media Censorship Act, is another incarnation of common carriage that runs against the First Amendment.[7] This bill protects political candidates who have been banned from online spaces because "social media platforms hold a unique place in preserving first amendment protections for all Floridians and should be treated similarly to common carriers." The bill stops social media companies from willfully deplatforming a candidate for office. In its fundamental essence, the bill is a kind of equal-time rule, which has a long pedigree in communication regulation.[8]

Equal-time rules currently apply to radio and television broadcast stations. These rules mandate that broadcasters must provide an equivalent opportunity of time to politicians from both sides. But newspapers famously do not have to grant equal time to candidates, according to *Miami Herald v. Tornillo*.[9] Justice Alito is right that there is inconsistency in the law. As it stands, broadcasters typically face more content regulation than newspapers.[10] They are regulated differently.

The source of that difference typically has been attributed to the scarcity rationale. As John Beresford of the FCC's Media Bureau explained in 2005, "The idea was that these traditional broadcasters should be regulated by the government because radio spectrum was scarce. This idea, still in effect today, became known as the Scarcity Rationale."[11] The scarcity rationale separated broadcasters from print media. Broadcasters could be regulated, which blatantly violated the First Amendment, because they were limited and scarce. Newspapers and magazines were not subject to this kind of scarcity.

Florida's common carrier law was also challenged and the decision by the 11th Circuit Court of Appeals suggests the platforms will be treated like newspapers. In 2022, the court asserted in a procedural rule that social media companies have never acted like common carriers. "It is substantially likely that social media companies—even the biggest ones—are 'private actors' whose rights the First Amendment protects."[12] Much as the trade association noted, the 11th Circuit thinks that content moderation decisions "constitute protected exercises of editorial judgment."

But the courts are not in agreement. While the 11th Circuit has granted social media companies broad First Amendment protection, the 5th Circuit, which includes Texas, has tended to exempt social media companies from this protection, setting up a showdown at the Supreme Court. These cases could set the terms for regulating social media. A brief legal history reveals the ideas underlying common carriage and why they are not a good fit for content regulation.

Common Carriage: A Very Short History

Common carriage is an idea whose origins can be traced back to 17th century England when Lord Chief Justice Hale began formalizing English common law. Hale's work, as legal scholar Phil Nichols would later write, helped to establish "two important aspects of a private business that serves a public interest."[13] There is an "infusion of *jus publicum*," or a public right, "into a private undertaking." In turn, the provider is given a "duty to perform the service in a manner that complies with public expectations."

Although it was first applied to transportation and lodging, the concept was stretched to include other occupations ranging from baking to surgery. By the mid-1800s, common callings in English law had transformed into the more modern understanding of common carriage.

In an 1857 publication summarizing the state of law, Thompson Chitty and Leofric Temple wrote:

> A common carrier is one who by ancient law held as it were a public office, and was bound to the public. To render a person liable as a common carrier, he must exercise the business of carrying as a public employment; and must undertake to carry goods for all persons indiscriminately; and hold himself out as ready to engage in the transportation of goods for hire as a business, and not as a casual occupation pro hac vice.[14]

In other words, common carriage was generally thought to be a kind of nondiscrimination law that mandated openness for certain kinds of professions. As Nichols explained, even back in the early 1800s, common carriage "was based solely on the nature of the carrier and not on the market positions of individual common carriers."[15] This stands in stark contrast to Texas HB 20, which defines online platforms as "common carriers by virtue of their market dominance." Market dominance does not make a common carrier, the nature of the work does.

Industrialization and the invention of the telegraph reshaped common carriage law. While communication technologies are now associated with the notion of common carriers, the application was not a natural fit at first. Everyone understood that common carriers actually carried something. So what exactly did telegraph services carry?

Beginning in the 1850s, the legal profession struggled with this question. Isaac F. Redfield, in another summary of the law written around this time, divided his work on common carriers into separate sections for traditional carriers and for the telegraph.[16] While they might not have been identical, he thought they had identical duties. In 1871 the Illinois Supreme Court agreed. After agonizing over what telegraphy carried, the court ruled that telegraph providers weren't technically common carriers, but they were so similar that they could be held to the same standards.[17]

As the century closed out, there was uncertainty how to apply the idea of common carriage to communications. Irving Browne, writing in the late 1800s, said that "there was at one time a disposition to hold these liable as common carriers, but the more recent

and better doctrine is that they are not common carriers, but only bailees, bound to a high degree of skill and diligence, analogous to that required of carriers of passengers."[18]

None of these ambiguities was resolved when lawmakers wrote federal legislation regulating communication, and the US Communications Act has never been fundamentally altered from its original construction in 1934.[19] So, common carriers are still defined today as they were when it was passed as "any person engaged as a common carrier for hire."

By happenstance, because it has never been altered, applying common carrier regulation to social media would mean that if the cases survived the courts, the Federal Communications Commission would receive authority over the services.[20] Nevertheless, the Communications Act forever muddied the waters by putting common carrier regulation alongside utility price regulation. The ideas were unduly twinned when they should be differentiated.

Content Moderation Regulation Is Really Just Price Regulation

It is critically important to distinguish common carriage from other related concepts. Legal scholar Eli Noam pointed out that common carriage often gets grouped along with "several other intertwined concepts that are frequently but inaccurately used as synonyms."[21] Common carriers do not have to be public utilities or regulated monopolies. Public buses are not utilities or monopolies, Noam pointed out, but they are common carriers in the same way that electric power is a public utility without being a common carrier.

The core of common carriage is a "guarantee that no customer seeking service upon reasonable demand, willing and able to pay the established price, however set, would be denied lawful use of the service or would otherwise be discriminated against."[22] Common carriage was always about mandating equality of access. Prices can be arbitrarily high, but so long as they are the same for everyone, common carriage has been met. Harold Feld, a legal expert at Public Knowledge, also underscored this point, telling CNN's Brian Fung that "'common carriage' is an economic regulation that is about making sure everybody gets the same product."[23] This means that for a set product with clearly defined qualities, the customer pays a clearly defined price.

To be fair, there are not explicit prices on social media platforms. The consumer does not have to pay to access the service as would be the case with traditional goods. But the lack of an explicit price does not mean these products do not have a price. Rather, prices should be understood more expansively, as the outcome of an entire market process.[24]

So prices include explicit prices as well as the qualities, quantities, and varieties of a product. A new phone with a better camera at the same price as last year has improved in product quality. A plastic soda bottle with slightly less liquid than a year before is a small product quantity decline. In the way that physicists think of space and time as really one phenomena, economists think of prices, quantities, and qualities as one phenomena.

The product that social media is selling is content. Social media users consume content, and in turn, platforms try to optimize the content that is served to them. The ordering of content, as nuanced as it is for every user, is the product quality for the service. Facebook's Newsfeed and TikTok's algorithm are moderated and curated products. They are the product qualities for a zero-priced good.

Therefore, if a state law seeks to change how social media sites moderate their content, it is mandating product qualities. In this way, Texas's effort to stop censorship of content based on the user's viewpoint would be a change in the kind of product that a platform like Facebook or Twitter offers. The same logic applies to the Florida law as well. Mandating a certain kind of product quality is not common carriage regulation. It is price regulation.

Nebraska's LB 621, the Social Media Fairness Act, echoes a less controversial part of the Texas and Florida bills by requiring that in the event that an account is disabled, suspended, or censored, "the dominant social media website must provide electronic notice to such individual or business user within thirty days after taking such action."[25] In a world where anyone can easily sign up for a profile for no explicit price, economic regulation that ensures everybody gets the same product would mean that sites have to disclose what content moderation looks like. Common carriage laws applied to platforms would mean transparency, not content moderation.

Conclusion

The history of common carriage shows that common carriage has never been about price regulation; rather, it is about consistent prices and equal treatment. In the digital context, content moderation practices are one of the qualities of the product, and as such, moderation should be thought of as one aspect of the price. If US states truly wanted to make social media sites into common carriers, they should be seeking transparency requirements instead of mandating specific content moderation practices. Regardless, defining platforms as common carriers does not overcome the largest hurdle the Texas and Florida bills face: the wall of the First Amendment.

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Endnotes

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