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OFF THE RAILS:

GETTING COMMON CARRIER DOCTRINE BACK ON ITS TWIN TRACKS

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ABSTRACT

Modern common carrier doctrine lacks a coherent framework. Courts and scholars have called its parameters and justifications a mystery and proposed numerous theories for identifying a common carrier. Their attempts to establish a decisive rule suffer one of two problems. Some seek a singular solution where none exists. Others create a list of relevant factors, then treat the analysis as a balancing test. But the doctrine developed neither with a single rule nor according to a multi-factor balancing test. It evolved along two clear and separate tracks. The solution to the common carrier problem is to return the doctrine to these twin tracks. Before the Fourteenth Amendment was ratified, two distinct classes of business were subject to common carrier regulation. Each is identified by a different test, subject to a slightly different regulation regime, and regulated for a different reason. The two-track theory explains why the "holding out" standard developed for common carriers, and why it should only be used in limited contexts. It explains why companies "affected with a public interest" were historically regulated as common carriers, but only if the phrase is narrowly interpreted. And it explains how the "market power" test for common carriers came into being and why it should be discarded. The two-track theory also helps resolve recent questions about whether new technologies are common carriers. The most pressing question asks whether social media platforms should be included. They should not. The platforms fit neither historical test for a common carrier, and regulating them as common carriers would undermine the function that each track developed to serve. A new definition of "common carrier" that includes the platforms would further distort the historical meaning of the term and the historical purposes of the doctrine.

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I. INTRODUCTION

In a 2021 concurrence, Justice Clarence Thomas observed: "[O]ur legal system and its British predecessor have long subjected certain businesses, known as common carriers, to special regulations, including a general requirement to serve all comers."[1] Scholars and judges widely agree on that much. But underneath that claim lie significant confusion and controversy.

The confusion begins with how we identify a common carrier. For centuries, courts have distinguished common carriers from other private businesses and subjected them to certain public duties that can't be relinquished. But formalist[2] and functionalist[3] approaches alike have struggled to account for when and why a business becomes subject to these public duties. We lack a "convincing rule of decision" for which businesses qualify as common carriers (the formalist problem).[4] And we lack a common explanation for why those businesses have been subject to special regulation throughout history (the functionalist problem). Modern scholars attempting to explain the doctrine have conceded that it lacks "a coherent framework,"[5] calling its parameters and justifications a "mystery."[6] Judges have confessed that "a good deal of confusion results from the long and complicated history of th[e] concept."[7] And as Justice Thomas noted in that 2021 concurrence, "[j]ustifications for these regulations have varied."[8] Some courts and scholars justify regulating businesses as common carriers because of their "substantial market power," others because the businesses "hold [themselves] out as open to the public," and still others because the businesses have "rise[n] from private to be of public concern."[9] In short, we know that some businesses are

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[1] Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1222 (2021) (Thomas, J., concurring).

[2] "The core idea of formalism is that the law (constitutions, statutes, regulations, and precedent) provides rules and that these rules can, do, and should provide a public standard for what is lawful (or not)." Lawrence B. Solum, *Legal Theory Lexicon: Formalism & Instrumentalism*, LEGAL THEORY LEXICON (Aug. 12, 2012), [https://perma.cc/QTS2-QN88].

[3] "Why do legal rules have the form and content that they do, in fact, have? One answer to this question is based on the idea that the *function* of a rule can be part of a causal explanation of the content of the rule. . . . In other words, the content of the rule is explained (causally) by the function the rule serves." Lawrence B. Solum, *Legal Theory Lexicon: Functionalist Explanation in Legal Theory*, LEGAL THEORY LEXICON (June 10, 2007), [https://perma.cc/TM34-FPVY].

[4] Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, YALE J. L. & TECH. 391, 405 (2020).

[5] Christopher S. Yoo, *Common Carriage's Domain*, 35 YALE J. ON REG. 991, 994 (2018).

[6] Candeub, *supra* note 4, at 405.

[7] Nat'l Ass'n of Regul. Util. Comm'rs v. F.C.C., 525 F.2d 630, 640 (D.C. Cir. 1976).

[8] Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1222 (2021) (Thomas, J., concurring).

[9] *Id.* at 1222-23.

regulated as common carriers, but we have no consensus about how to identify them or why they are subject to different legal standards.

Modern technology has amplified the controversy. The *NetChoice* cases provide the most recent example—along with the most likely path for the Supreme Court to clarify common carrier doctrine. The *NetChoice* cases arose after Florida and Texas enacted laws that forbid large social media platforms from censoring user content or "deplatforming" users.[10] Both states claimed authority to regulate the platforms in this manner because of common carrier doctrine.[11]

Circuit courts reviewing the statutes split on the issue. In *NetChoice v. Attorney General*, Judge Kevin Newsom of the Eleventh Circuit held that the Florida law was unconstitutional, in part because "social media platforms are not—in the nature of things, so to speak—common carriers,"[12] nor can a state "force them to *become* common carriers."[13] Conversely, in *NetChoice v. Paxton*, the Fifth Circuit upheld the Texas law.[14] Judge Andrew Oldham, in a part of the opinion his colleagues declined to join, claimed that "common carrier doctrine . . . vests the Texas Legislature with the power to prevent the Platforms from discriminating against Texas users."[15] The Supreme Court took up the cases in *Moody v. NetChoice*.[16] But rather than deciding the cases on the merits, the Court remanded them for further proceedings because neither Court of Appeals had conducted a proper analysis of the facial challenges to the statute.[17] Though the majority opinion proceeded to discuss the lower courts' handling of the First Amendment issues in the cases,[18] the majority made no mention of common carriers. Noting the majority's "conspicuous failure to address" the common carrier argument, Justice Alito asserted that the argument "deserves serious treatment."[19] And Justice Thomas urged for "the common-carrier doctrine [to] continue to guide the lower courts' examination of the . . . claims on remand."[20]

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[10] 2021, Fla. Laws (S.B. 7072), §§ 4(b)-(c); 2021 Tex. Gen. Laws 3904 (H.B. 20), § 7.

[11] S.B. 7072, § 1(5)-(6) ("Social media platforms have become as important for conveying public opinion as public utilities are for supporting modern society. Social media platforms hold a unique place in preserving first amendment protections for all Floridians and should be treated similarly to common carriers."); H.B. 20, § 1(3)-(4) ("[S]ocial media platforms function as common carriers, are affected with a public interest, . . . and have enjoyed governmental support in the United States; and social media platforms with the largest number of users are common carriers by virtue of their market dominance.").

[12] NetChoice, LLC v. Att'y Gen., Fla. (*NetChoice I*), 34 F.4th 1196, 1220 (11th Cir. 2022).

[13] *Id.* at 1221.

[14] NetChoice, L.L.C. v. Paxton (*NetChoice II*), 49 F.4th 439, 445 (5th Cir. 2022).

[15] *Id.* at 448.

[16] 144 S. Ct. 2383 (2024).

[17] *Id.* at 2394.

[18] *Id.* at 2399-2408.

[19] *Id.* at 2438 (Alito, J., concurring in the judgment).

[20] *Id.* at 2413 (Thomas, J., concurring in the judgment).

Those courts will almost certainly assess again whether common carrier doctrine applies to social media platforms, and the Supreme Court will likely then have a second opportunity to clarify the doctrine.

Why common carrier doctrine matters. Regardless of whether social media platforms are common carriers, Judge Oldham's analysis of the doctrine's effect wasn't quite right. Common carrier doctrine wouldn't "vest" any "legislature with the power to prevent" discrimination by a common carrier. That would be unnecessary. Instead, that power is already vested in the courts. Common carriers are subject to a duty of nondiscrimination at common law, regardless of legislation.[21] If a common carrier denies someone indiscriminate service, that person has a cause of action in tort—no legislation required. Thus, if social media platforms were deemed common carriers, potential plaintiffs across the nation would have a cause of action against the platforms for any failure to serve the plaintiff on equal terms.

Common carrier analysis takes on special importance when free speech is implicated. The First Amendment's Free Speech Clause "constrains governmental actors and protects private actors."[22] The clause protects businesses that "engag[e] in expressive activity, including compiling and curating others' speech," from being forced "to accommodate messages [the business] would prefer to exclude"[23] and covers even those designated as "public accommodations" by statute.[24] But common carriers may not enjoy the same protections as wholly private actors and public accommodations.

Whether the First Amendment protects or constrains common carriers remains unclear.[25] Courts could take three approaches. First, because the common law ascribes public duties to common carriers, courts might conclude that these entities are *constrained* by the First Amendment like governmental actors, not *protected* by it like private actors and public accommodations. A second option: courts might decide that a common carrier's duty to serve all comers—including all speakers—supersedes its First Amendment protections when it "combines multifarious voices." Or finally, courts might decide that common carriers enjoy the same protections as public accommodations. The majority in *303 Creative* held that when a "public

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[21] *See infra* text accompanying notes 72 through 80, 94 through 98, 113 through 114, 134 through 136, and 143 through 144.

[22] NetChoice, LLC v. Att'y Gen., Fla. (*NetChoice I*), 34 F.4th 1196, 1203 (11th Cir. 2022) (quoting Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019)).

[23] *Moody*, 144 S. Ct. at 2401.

[24] 303 Creative LLC v. Elenis, 600 U.S. 570, 592 (2023).

[25] Though this article doesn't attempt to answer this question or discuss it at length, several cases cited throughout Part IV discuss the issue.

accommodations law and the Constitution collide," the Constitution "must prevail."[26] Similarly, courts might hold that when common carrier regulation and the Constitution collide, the Constitution must prevail.

Whether the First Amendment protects or constrains common carriers—and to what extent—merits an article of its own. Rather than attempting that analysis, this article will focus on the logically prior question: What is a common carrier? More particularly, because common carriers *might* belong to a class of businesses unprotected by the First Amendment, or even constrained by it, the analysis below will focus on how a common carrier would have been identified at the ratification of the Bill of Rights in 1791 and of the Fourteenth Amendment in 1868.[27] It will then consider how those understandings of common carriers should be applied today.

How common carrier doctrine became confused—a brief history. Much of our confusion about common carriers today stems from the doctrine's tortuous development. At first, common carriers and innkeepers were just two of several "public callings." If a business "held out" to serve the public generally, it was considered a public calling and treated according to a different legal standard. Over time, the common law evolved to hold only common carriers and innkeepers to a different standard. At common law, these two groups bore a strict duty of care and a duty to serve all who apply. Courts justified these requirements by highlighting travelers' and shippers' vulnerabilities and the corresponding opportunities for innkeepers and carriers to exploit them.

Then came a class of businesses referred to as quasi–common carriers. Public utilities are the classic example. Courts imposed on them similar duties as common carriers but with a different rationale. These quasi–common carriers had accepted government franchises—usually a legal monopoly or access to public property—so they could develop their infrastructure. Courts viewed this exchange as a regulatory bargain in which the private companies became "affected with a public interest."

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[26] *303 Creative*, 600 U.S. at 592.

[27] Though common carriers have been defined by statute, *see* 47 U.S.C. § 153(11), statutory definitions will not be considered here because of the related question about constitutional rights. If a common carrier enjoys fewer constitutional protections than another private business, then a legislature can't be permitted to define who is a "common carrier" by statute. Otherwise, statutory definitions of common carriers at common law would be a legislative backdoor to strip businesses of their constitutional rights. If a legislature already has the power to strip a business of these rights, it doesn't need to use common carrier doctrine. If it doesn't have the power to alter the business's rights in this way, it can't gain that power under the guise of defining a term. Congress may define terms however it chooses *within* a statutory scheme. Thus, 47 U.S.C. § 153(11) defines common carrier for that chapter of the U.S. Code. But the definition doesn't extend to common law applications.

In all, early common carrier doctrine developed along two separate but parallel tracks. Traditional common carriers emerged from the law of public callings. It applied to those who held out to safely deliver goods for the public or to provide hospitality or transit to traveling strangers. I'll refer to this group as "track one carriers." A similar pattern of regulation developed for private companies that became "affected with a public interest" when they used powers granted by the government. I'll refer to these as "track two carriers."

The two tracks converged in the nineteenth century. That convergence is a source of much of our modern confusion, but it also offers a valuable source for clarity. Railroads marked the beginning of the convergence. They comfortably fit on both tracks. They fit track one because they held out to carry goods and passengers. They fit track two because they developed their networks using government franchises of eminent domain power. Next came telegraphs and telephones. These also required eminent domain power to extend their networks. As a result, they clearly belonged among the other track two carriers. But early cases of mishandled telegraph messages raised questions about whether telegraphs should also be considered carriers of others' property—track one carriers. The Supreme Court ultimately said no. The telegraph cases were the first to clearly distinguish between the two tracks. With careful attention, they're among the most helpful for understanding common carriage doctrine. Without careful attention, they're among the most confusing.

Then came *Munn v. Illinois* in the late 19th century. Its holding and reasoning distorted the whole doctrine. In *Munn*, the Supreme Court tied common carrier regulation to the phrase "affected with a public interest," then interpreted the phrase to extend to all property devoted "to a use in which the public has an interest."[28]

With railroads and telegraphs, the twin tracks of common carrier doctrine began to converge and confuse. With *Munn*, the doctrine went off the rails entirely. Courts and scholars have spent the past century and a half trying to get back on track, but their efforts have been mired in confusion.

The solution to the common carrier problem is to return it to its twin tracks. As the history and analysis below will show, up to the time of the Fourteenth Amendment, two distinct classes of business were subject to common carrier regulation, although the regulation of the two classes differed slightly. The law had similar but distinct reasons for subjecting each class to special regulation. In both instances, the functional rationale explains the formal test. By attending to the law's historical form and function, we can overcome much of

[28] Munn v. Illinois, 94 U.S. 113, 126 (1876).

the modern confusion about which businesses should be subject to common carrier regulation.

Track one: traditional common carriers and innkeepers. Track one carriers can be identified by two elements: (1) holding out to serve the public generally and (2) carriage of people or physical goods. Similarly, innkeepers can be identified by two elements: (1) holding out and (2) providing hospitality to the traveling public. These businesses have been subject to heightened regulation for one primary purpose: to provide protection and security to people when they travel or ship goods.

Track two: businesses that make use of a public franchise. These businesses, often referred to as quasi–common carriers, are identified by their use of a government franchise—that is, their use of privileges that must be granted by the state. The most common form of this franchise power is the use of eminent domain and public rights-of-way, but franchises also include legal monopolies and use of public funding. Courts justify extra regulation of these businesses because of the regulatory bargain they entered—any business accepting a grant of the government's power becomes "affected with a public interest" and bears a duty to serve the public indiscriminately.

Returning common carrier doctrine to its twin tracks doesn't immediately resolve all questions about which businesses should be regulated as common carriers, but it does allow us to conduct the analysis with better purpose and clarity. With a clearer rule of decision, we're more likely to arrive at consistent results in several contemporary areas of confusion—from broadcast and cable networks to internet service providers (ISPs) to social media platforms.

Part I of this essay describes how both tracks of common carrier doctrine emerged and developed in the common law, parallel but distinct from one another. It then details a rule for identifying track one and track two common carriers. Part II shows how the twin tracks converged during a period of evolution and confusion, first due to the emergence of railroads and then telegraphs. Despite the early confusion these new technologies created, they also helped clarify important distinctions between track one and track two carriers. Part III shows how the *Munn v. Illinois* case distorted the whole enterprise with its new definition of "affected with a public interest." Finally, Part IV applies the framework proposed here to several recent controversies about common carrier regulation—controversies related to broadcast and cable networks, ISPs, and social media platforms.

II. HOW THE TWIN TRACKS EMERGED

As the common law developed into the mid-19th century, it came to identify two groups of private businesses subject to certain public duties: (1) common carriers and innkeepers, and (2) quasi-common carriers. The common carriers and innkeepers were originally part of a larger class of public callings, identified by their "holding out" to serve the public generally as a business. The quasi–common carriers were identified by their use of a government franchise. This Part details how these two groups came to be subject to special regulations and proposes a rule for identifying businesses that qualify today.

A. Track One: Holding Out

The common law originally designated common carriers as public callings, along with common surgeons, common tailors, common innkeepers, and others.[29] These were set apart because they held out to serve the public generally as a business.[30] Courts treated their holding out as an implied contract that obligated them to a duty of care and, at least in some cases, a duty to serve all.[31]

As tort law evolved, courts stopped applying these duties to other public callings but retained them for common carriers and innkeepers.[32] Judges explained the higher standards for common carriers and innkeepers by noting the unique vulnerabilities faced by travelers and shippers of goods, vulnerabilities that common carriers and innkeepers have unique opportunities to exploit.[33]

And so, common carrier doctrine evolved from the early common law of public callings. Its purpose: to provide extra protections for vulnerable travelers and their property. Its rule: those who hold out publicly to carry people or goods from place to place (common carriers) and those who hold out to provide hospitality to traveling strangers (innkeepers) obligate themselves both to a higher duty of care and to serve all who apply. This section details the development of the common law of public callings and how it evolved into common carrier doctrine.

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[29] *See* Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 COLUM. L. REV. 514, 616-19, 522 (1911).

[30] *Id.*

[31] *See infra* text accompanying notes 54 through 66.

[32] Though other vocations could be classed as "public accommodations," it is uncertain whether any businesses beyond common carriers and innkeepers were treated as public accommodations by the time the Fourteenth Amendment was ratified, and modern judicial opinions continue to apply the common law duty to serve only to innkeepers and common carriers. *See* Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463, 476-79 (2021).

[33] *See infra* text accompanying notes 67 through 88.

1. The early common law of public callings

The first important development in the law of public callings was the concept of assumps*it*, which imposed duties on anyone who made a promise to do something without a formal contract. The second important development, following from the first, was the recognition of "public callings" as undertakings that took on a *general assumpsit*, even if it was not express.

a) The development of assumpsit

In 1348, the King's Bench held a ferryman liable for a horse's death after the ferryman "overloaded his boat with other horses."[34] Sir John Baker describes it as "[t]he first known case in the superior courts where liability was imposed on someone who had embarked upon a task and performed it badly."[35] The case, commonly known as *The Humber Ferry Case*, marks an important turning point in the history of the common law—one that closed a gap between tort and contract.

The legal background of the case shows its importance. In the early English common law, a plaintiff could bring an action in the King's central courts on contract or on trespass. For breaches of contract, two kinds of contract could be enforced—"real" and "formal" ones.[36] Under a "real" contract, if two parties had agreed to a deal and one side had performed, the court could compel the other party to make payment.[37] If, instead, parties made an agreement in writing and under seal, they had a "formal" contract, often referred to as a "deed."[38] Courts enforced these by an action of covenant.[39] By contrast, actions on trespass supposed no agreement.[40] A tort plaintiff—rather than asserting a contractual right and seeking enforcement—would come before the court to complain of a wrong and seek damages.[41] But the royal courts would only hear trespass cases when the

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[34] Bukton v. Tounesende, *record at* KB 27/354, m. 85, *report at* 22 Liber Assissarum 94, pl. 41 (1348) (KB) (corrected from LI MS. Hale 116), *translated in* JOHN H. BAKER & S.F.C. MILSOM, SOURCES OF ENGLISH LEGAL HISTORY: PRIVATE LAW TO 1750, at 399 (2d ed., 2010); *alternative translation of record at* 82 SELDEN SOCIETY 66 (1965).

[35] JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 351 (5th ed. 2019).

[36] THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 635 (Little, Brown 5th ed. 1956) (1929).

[37] *Id.* at 633-34. This was known as an action of debt.

[38] *Id.* at 634-35.

[39] *Id.* at 634.

[40] The "original notion of a tort" considered only "an injury caused by an act of a stranger, in which the plaintiff did not in any way participate." J. B. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 3 (1888).

[41] BAKER, *supra* note 35, at 67.

wrong was committed *vi et armis* ("with force and arms") and *contra pacem regis* ("against the king's peace").[42] The *vi et armis* requirement made tort plaintiffs "justify the intervention of the royal courts by showing that the King had a special interest in the wrong," leaving all other tort cases to the local courts.[43]

Thus, a plaintiff could receive relief in the royal courts if he sought (1) enforcement of a "real" or "formal" contract or (2) damages due to a violent trespass. But for a non-violent trespass, his only recourse would have been to the local courts.[44] And since those courts "were generally forbidden to entertain suits for more than forty shillings without royal permission,"[45] a plaintiff seeking larger damages for a non-violent trespass would be out of luck. This began to change with *The Humber Ferry Case*.

The plaintiff in *The Humber Ferry Case* brought a bill of trespass before the King's Bench, complaining that the ferryman "had undertaken to carry his mare . . . across the River safe and sound" and then failed to take due care when he overloaded the ferry.[46] The defendant's counsel argued that the bill complained of no wrong (after all, the defendant had not forcibly killed the mare), and so the proper action on the case must be "by way of covenant rather than by way of trespass."[47] That is, according to the defense, the only complaint the plaintiff could bring was an action of covenant—that the defendant failed to transport the mare across the river as promised. But as both litigants surely knew, an action of covenant would have failed because they had no sealed contract for the transaction.[48] Without force, the court had no jurisdiction for a bill of trespass. Without a contract, the plaintiff had no action in covenant. Thus, according to the standards of the law at the time, the plaintiff had no recourse for a judgment from the King's Bench. But Justice Bakewell resolved the issue by holding that a trespass *had* occurred. It happened when the ferryman "overloaded [his] boat so that [the plaintiff's] mare perished."[49]

The Humber Ferry Case opened a new path into the royal courts. Plaintiffs could sue for damages when a "defendant 'took upon

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[42] *Id.* at 68.

[43] A. W. BRIAN SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 202 (1975).

[44] BAKER, *supra* note 35, at 68.

[45] *Id.*

[46] Bukton v. Tounesende, *record at* KB 27/354, m. 85, *report at* 22 Liber Assissarum 94, pl. 41 (1348) (KB) (corrected from LI MS. Hale 116), *translated in* SOURCES OF ENGLISH LEGAL HISTORY, *supra* note 34, at 399.

[47] *Id.*

[48] *See* BAKER, *supra* note 35, at 351.

[49] *Bukton v. Tounesende*. *translated in* SOURCES OF ENGLISH LEGAL HISTORY, *supra* note 34, at 399.

himself' (*assumpsit super se*) to do something, and then did it badly to the damage of the plaintiff."[50] In the years that followed, plaintiffs brought actions in assumpsit against surgeons, smiths, barbers, and carpenters who had injured the plaintiffs or their property by poor job performance.[51] A statement of the defendant's assumpsit was "for centuries . . . deemed essential in the count."[52]

b) The development of the public callings

A case relying on *assumpsit* usually required the plaintiff to show that the defendant had committed to a specific promise—an express special *assumpsit*—and then breached that promise.[53] Without the special promise, a person bore no "legal liability to use care" when others authorized him to deal with their property.[54] But in cases involving someone who carried out a public calling, courts didn't require this special promise.[55] Instead, courts treated the public nature of these professions as an implied general *assumpsit*.[56] If someone held out to perform a service as his business and for the public generally, then he was exercising a public (or common[57]) calling and was bound to perform with care.[58] The holding out was, in effect, the *assumpsit*.

Blackstone's Commentaries summarized the various common callings and their duties at the time:[59]

> There is also in law always an implied contract with a common inn-keeper, to secure his guest's goods in his inn; with a common carrier, or bargemaster, to be answerable for the

[50] BAKER, *supra* note 35 , at 350.

[51] Ames, *supra* note 40, at 2.

[52] *Id.*

[53] Burdick, *supra* note 29, at 516.

[54] Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156, 157 (1904).

[55] *See* Burdick, *supra* note 29 at 516.

[56] *Id.*

[57] Edward Adler suggests that "common" was used as a synonym for "business," distinguishing those who performed a duty on a special occasion from those who performed it commonly, as their business. Edward A. Adler, *Business Jurisprudence*, 28 HARV. L. REV. 135, 149 (1914). Thus, referring to these various businesses as "common callings" emphasizes that people were performing these services as their business, while referring to them as "public callings" emphasizes that people were holding out to serve the public with their services. The term "public common calling" may have most precisely identified all relevant elements of the legal category, but I don't find any occasions where this term was used. The later distinction between "common" and "private" carriers shows that "common" had effectively taken on the meaning of "public."

[58] Burdick, *supra* note 29, at 516.

[59] Burdick says that this list may represent the full extent of the professions considered common carriers at the time. *Id.* at 522.

> goods he carries; with a common farrier, that he shoes a horse well, without laming him; with a common taylor, or other workman, that he performs his business in a workmanlike manner; in which if they fail, an action on the case lies to recover damages for such breach of their general undertaking.[60]

Blackstone also noted the important distinction between those who offered this service as their common profession and those who didn't. If someone employed a person "whose common profession and business it [was] not," that person had no implied, general *assumpsit*, so "in order to charge him with damages, a special agreement [was] required."[61]

Finally, Blackstone added an important note about the duty to serve all:

> Also, if an inn-keeper, or other victualler, hangs out a sign and opens his house for travelers, 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.[62]

Note that Blackstone limited the scope of this duty to inn-keepers "or other victualler[s]." While some scholars have ascribed the duty to serve to everyone who performed a public calling in the early common law,[63] others argue that the duty applied only to innkeepers and victuallers.[64] Regardless of whether the duty to serve extended to all

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[60] 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 166 (Professional Books Ltd., 1982) (1809).

[61] *Id.* An oft-cited case from 1441 illustrates the point. In *Marshal's Case*, the court dismissed a plaintiff's suit against a horse surgeon because he had failed to show that the surgeon was in a common calling or had given an express *assumpsit*: "You have not shown that he is a common surgeon to cure such horses, and so, although he killed your horse by his medicines, you shall have no action against him without an *assumpsit*." Marshal's Case, Y.B. 19 Hen. 6, fol. 49, pl. 5 (1441) (Eng.) (opinion of Paston, J.), *reprinted in* C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 345, 345–47 (1949).

[62] BLACKSTONE, *supra* note 60, at 166.

[63] *See, e.g.*, Burdick, *supra* note 29, at 518-19; Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1309–10 (1996).

[64] *See* Thomas B. Nachbar, *The Public Network*, 17 COMMLAW CONSPECTUS 67, 92 (2008). Nachbar also discusses at length the 1701 English case *Lane v. Cotton*, in which Chief Justice Holt said that someone who "has made profession of a public employment . . . is bound to the utmost extent of that employment to serve the public." *Id.* at 82 (quoting Lane v. Cotton (1701) 88 Eng. Rep. 1458, 1465 (KB)). Nachbar argues that Holt mistakenly conflated the two duties of innkeepers—to serve all and to serve with care—without recognizing that the duty to serve doesn't apply every time the duty of care applies. *Id.* at 81-83.

public callings, some cases show evidence that it extended at least to common carriers as early as the 17th century.[65]

At this point, we can observe a variety of duties that the early common law imposed on different businesses. First, anyone professing a public calling—those who held out to undertake a particular service for the public—had assumed a duty of care in that undertaking. By contrast, those who undertook to perform their services according to private agreements were only liable according to the special agreements they had made. And among the public callings, at least some had assumed not just a duty of care to those they served, but a duty to serve all. How far this duty extended is unclear, but it appears to have extended at least to common carriers and innkeepers.

2. Continued application of the duty of public callings to common carriers and innkeepers

As the law continued to develop, courts gave special attention to common carriers and innkeepers and began to treat all other "public callings" like private businesses. We no longer distinguish "common tailors" or "common surgeons." Scholars attribute that change to economic and legal developments in the seventeenth and eighteenth centuries. The economy began to include many more people who held out to serve the public generally, so "public callings" became less exceptional.[66] At the same time, developments in tort liability made an *assumpsit* unnecessary for legal action,[67] so the "public calling" designation became less important for lawsuits.

While the legal category of "public calling" faded, common carriers and innkeepers remained bound to a different set of duties. The common law duty to serve "attached only to common carriers . . . and innkeepers" and died out (to the extent it ever existed) for the rest.[68] As well, the two groups bore a strict duty of care for

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[65] In 1694, an English court held a common carrier liable for refusing to carry goods, claiming that the duty is the same as to "an inn-keeper for refusing [a] guest, or a smith on the road who refuses to shoe my horse, being tendered satisfaction for the same." Jackson v. Rogers, (1694) 89 Eng. Rep. 968 (KB). Another case from the era suggested the same in dicta. *See* Lovett v. Hobbs, (1680) 89 Eng. Rep. 836, 837 (KB) (comparing a carrier's refusal to serve because he had no room to an innkeeper's refusal for the same reason).

[66] *See* Burdick, *supra* note 29, at 522.

[67] *See id.*; James C. Plunkett, *The Historical Foundations of the Duty of Care*, 41 MONASH U.L. REV. 716, 718 (2015) ("By the end of the 17th century, however, negligence was coming to be seen as the basis for an independent wrong in itself, based on the defendant's failure to take reasonable care.").

[68] *See* Burdick, *supra* note 29, at 523.

customers' goods, while other businesses were liable only for negligence under tort law.[69]

The tradition that required public callings to serve all comers lives on in public accommodations laws. State and municipal legislatures began enacting public accommodations laws in 1865, especially to ensure equal access for black citizens.[70] But these regulations applied only by statute, not at common law. The common law standard remained only for common carriers and innkeepers.

Why were common carriers and innkeepers held to a higher standard? Cases addressing their special duties highlight the unique vulnerabilities of travelers and shippers. As a matter of public policy, courts expressed concern about preventing travelers from being stranded. Additionally, they thought it necessary to afford special protections to those entrusting their goods to others during shipping.

a) Innkeepers

First, consider cases about innkeepers' duty to serve. In *Rex v. Ivens*, an innkeeper refused service to a man who arrived after midnight on a Sunday.[71] The court said the late hour was no reason to refuse service.[72] Judge Coleridge explained that inns were held to a different standard because of travelers' vulnerabilities:

> Why are inns established? For the reception of travellers, who are often very far distant from their own homes. Now, at what time is it most essential that travellers should not be denied admission into the inns? I should say when they are benighted, and when, from any casualty, or from the badness of the roads, they arrive at an inn at a very late hour. Indeed, in former times, when the roads were much worse, and were much infested with robbers, a late hour of the night was the time, of all others, at which the traveller most required to be received into an inn. I think, therefore, that if the traveller conducts himself properly, the innkeeper is bound to admit him, at whatever hour of the night he may arrive.[73]

In 1867, the Supreme Court of California affirmed the same rationale for innkeepers' heightened duties. Those duties "have their origin in considerations of public policy, and were designed mainly

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[69] *See id.*
[70] *See* Singer, *supra* note 63, at 1374.
[71] Rex v. Ivens, (1835) 173 Eng. Rep. 94, 95 (KB).
[72] *Id.* at 97. The court also looked past an allegation that the traveler had spoken rudely to the innkeeper's wife.
[73] *Id.*

for the protection and security of travellers and their property."[74] The court observed that when an innkeeper advertises his services to the public, it creates a sort of reliance interest for those whom "he induce[s] to believe he would [serve]."[75]

An exception proves the rule. In *Bonner v. Welborn*, the court held that a business that offered lodge and boarding for extended stays was not an inn.[76] The owner didn't offer lodging to "the wayfaring world" but "to persons who might resort to his healthful fountains and salubrious locality for a season."[77] The court explained that "inns and innkeepers have to do with the travelling public—strangers—and that for brief periods, and under circumstances which render it impossible for each customer to contract for the terms of his entertainment."[78] Because rentals and resorts expect people will make advance arrangements and stay for a season, they operate by a different set of rules than inns. As a result, the common law doesn't require them to serve indiscriminately.

Consistently, when courts have explained the reason for the innkeeper's special duty to serve, they've explained the duty according to a traveler's unique vulnerabilities and the innkeeper's unique offer to provide on-the-spot hospitality to travelers. To ensure that travelers don't end up stranded, if an inn holds itself out to provide hospitality to the traveling public, the common law requires the innkeeper to serve without discrimination.[79]

Courts imposed a second duty on innkeepers—a strict duty of care—again because of a public policy interest in protecting travelers but also because of inns' special role in safeguarding guests' property. An 1865 case decided by the New York Court of Appeals demonstrates both concerns. The court called innkeepers "insurer[s]" of guests' property "against loss."[80] It explained that this custom "had its origin in considerations of public policy" because of the public interest in providing safety to travelers and because

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[74] Pinkerton v. Woodward, 33 Cal. 557, 597 (1867).

[75] *Id.*

[76] 7 Ga. 296, 307 (1849).

[77] *Id.*

[78] *Id.*

[79] This reasoning would suggest that innkeepers should only be bound to serve when they hold a local monopoly. If other inns were present, a traveler wouldn't be stranded just by rejection from one. But there is no evidence that the law has ever distinguished between innkeepers with local competition and those without. A dictum in *Lane v. Cotton*, from 1701, suggests that inns with competition were still bound to serve. Lane v. Cotton, (1701) 88 Eng. Rep. 1458, 1468 (KB) ("[I]f there be several inns on the road, and yet if I go into one when I might go into another, and am robbed, or otherwise lose my goods there, the election I had of using that, or any other inn, shall not excuse the inn-keeper.").

[80] Hulett v. Swift, 33 N.Y. 571, 572 (1865).

travelers are "peculiarly exposed to depredation and fraud."[81] Seeing that innkeepers had "peculiar opportunities" to rob their guests, and that guests "would be without the means either of proving guilt or detecting it," the law imposed a heightened duty of care in these situations.[82]

An early case highlights the direct connection between the duty of care and the public policy concern for protecting travelers. In *Calye's Case*, before the King's Bench in 1584, the court stated that an innkeeper is not liable for the goods of "a neighbour, who is no traveller."[83] Thus, a local couldn't store his goods with an innkeeper, as if the inn were a warehouse, and receive automatic insurance for the goods. That only applied for travelers.

In all, the common law ascribed to innkeepers an ongoing duty to serve and a heightened duty of care because of their role in protecting travelers. The vulnerabilities of travelers and the peculiar opportunities of innkeepers to exploit those vulnerabilities prompted the distinction between innkeepers and other private businesses. Though we could list the ways that a surgeon offering his services to the public also encounters vulnerable and exploitable people—and the same even for a tailor or other workman—the common law didn't continue to ascribe the same duties to them. Instead, the courts treated travelers' vulnerabilities as sui generis.

b) Common carriers

Courts also held common carriers to a higher standard of care and a duty to serve at common law.[84] But most cases explain only the rationale for the heightened duty of care and merely assume the duty to serve.

As with innkeepers, courts imposed higher standards on common carriers because carriers temporarily took possession of others' goods for transportation, creating a unique vulnerability. *Lane v.*

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[81] *Id.*

[82] *Id.*

[83] (1584) 77 Eng. Rep. 520, 520 (KB).

[84] As with innkeepers, see *supra* note 79, common carriers' duty to serve all comers included reasonable exceptions. *See, e.g.*, Jencks v. Coleman, 13 F. Cas. 442, 443 (C.C.D.R.I. 1835) (Story, J.) ("The right of passengers to a passage on board of a steamboat is not an unlimited right. But it is subject to such reasonable regulations as the proprietors may prescribe, for the due accommodation of passengers and for the due arrangements of their business. The proprietors have not only this right, but the farther right to consult and provide for their own interests in the management of such boats, as a common incident to their right of property. They are not bound to admit passengers on board, who 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.").

Cotton demonstrates the principle from early on.[85] In that case, a postmaster was held liable for the loss of a letter containing eight government promissory notes.[86] Chief Justice Holt reasoned that carriers must be bound to a heightened duty of care because of the "opportunity . . . they have by the trust reposed in them to cheat all people" and the difficulty of proving the carrier's fault if this happened.[87] Holt explained that even a carrier who had been robbed along the road "should be answerable for all the goods he takes" because without that liability, the carrier could collude with robbers or "pretend a robbery or some other accident, without a possibility of remedy to the party."[88]

The U.S. Supreme Court followed the same principle. According to the Court's antebellum cases, the label of "carrier" attached to the one who took physical possession of property for delivery, and that carrier bore a heightened duty of care. For instance, in *Gracie v. Palmer*, the Court distinguished between someone who lends out his ship to a transporter of goods and someone who undertakes to transport the goods himself.[89] On both occasions, the Court said the carrier is the one who physically transports the goods.[90] In a later case, the Court again claimed that the "rule of the common law" holds common carriers and innkeepers alone to strict liability "for loss or injury" because they "have peculiar opportunities for embezzling the goods or for collusion with thieves."[91] And just as courts referred to innkeepers as insurers of guests' property, so too the Supreme Court said that "[a]t common law, a carrier by land [or by water] is in the nature of an insurer . . . and is liable for all losses."[92] And so, as insurers of goods, common carriers bore strict liability for safe custody, transport, and delivery.[93]

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[85] (1701) 88 Eng. Rep. 1458 (KB).
[86] *Id.* at 1458, 1469 (KB).
[87] *Id.* at 1463.
[88] *Id.*
[89] Gracie v. Palmer, 21 U.S. (8 Wheat.) 605, 633 (1823) ("In the former case, he parts with the possession [of the ship] to another, and that other becomes the carrier; in the latter, he retains the possession of the ship, although the hold may be the property of the charterer, and being subject to the liabilities, he retains the rights incident to the character of a common carrier.").
[90] *Id.* at 632-33.
[91] Primrose v. W. Union Tel. Co., 154 U.S. 1, 14 (1894).
[92] Propeller Niagara v. Cordes, 62 U.S. 7, 22-23 (1858).
[93] *Id.* at 27. Common carriers' strict liability for safe delivery may strike some as similar to the *Hadley* rule, but the two have distinctly different origins and functions. The *Hadley* rule derives from a landmark nineteenth-century English case, Hadley v. Baxendale (1854) 156 Eng. Rep. 145 (KB). That case addressed the recovery of damages for breach of contract. The rule limits contract-breach liability "to the ordinary level of losses, unless the promisee had informed the promisor otherwise." Lucian A. Bebchuk & Steven Shavell, *Information and the Scope of Liability for Breach of Contract: The Rule of* Hadley v. Baxendale, 7 J.L. ECON. & ORG. 284, 285

Two puzzles remain: why the common law held common carriers, and not other bailees, to a strict liability standard;[94] and why the common law continued to subject them to a duty to serve. Scholars have attempted several explanations for these two questions,[95] but no cases dealing with these duties offer a functional rationale. The best theory answers both questions together: common carriers were treated differently because of a particular concern for protecting transportation. Jurgen Basedow explains the theory by claiming the English aristocracy depended on "the availability and the safety of carriage for passengers and goods" and did not want to entrust transportation "to the arbitrary, profit-oriented decisions of those engaged in the industry."[96]

Another simpler theory is that these duties may have been imposed on common carriers merely because of their ongoing association with innkeepers in the travel and transportation industry.[97] When other common callings faded from discussion in the legal sphere and only common carriers and innkeepers remained, they began to be treated as a unit. As a result, common carriers took on the same duties as innkeepers, even if a carrier's refusal to deliver goods for someone wouldn't result in the same dangers as an innkeeper's

(1991). Thus, the Hadley rule is concerned with damages that result for breach of contract, which may extend far beyond damage to the property a carrier is delivering. The physical replacement cost for a damaged or lost crankshaft is hardly the greatest concern to someone who needs the crankshaft for a mill to operate. The *Hadley* rule can thus apply to delivery of intangible messages and physical goods alike because its concern is with damages that go *beyond* loss or damage to the thing being delivered. By contrast, strict liability for common carriers arises specifically with concern for loss or damage to the thing being delivered.

[94] Many nineteenth century cases considered whether a business was acting as a common carrier or as a warehouse when it stored goods before or after transit. *See* George Jarvis Thompson, *The Relation of Common Carrier of Goods and Shipper, and Its Incidents of Liability*, 38 HARV. L. REV. 28, 50 (1924). The distinction was important because common carriers were strictly liable for the goods they carried while warehouses bore only liability for negligence. *Id.* at 30-31. The distinction between the carriage and warehousing activities of the same company also demonstrates that common carriers are identified by the activity they are performing in the moment at issue. Thus, a company that performs duties of a common carrier would only be held liable as a common carrier *while* it is performing those duties.

[95] *See* Jurgen Basedow, *Common Carriers—Continuity and Disintegration in U.S. Transportation Law*, 13 TRANSP. L.J. 1, 7-8 (1983) (describing and assessing theories about why warehouses and common carriers were subject to different liability); Burdick, *supra* note 29, at 523 (suggesting and assessing theories about why the duty to serve continued to attach to common carriers).

[96] Basedow, *supra* note 95, at 8; *See also* Burdick, *supra* note 29, at 523 (noting that public policy sought to protect "the ever growing numbers of merchants and travellers . . . with whom carriers and innkeepers dealt primarily").

[97] *See* JAMES KENT, COMMENTARIES ON AMERICAN LAW 464-65 (New York, O. Halsted 1827) (stating that common carriers' duties are "founded on the same broad principles of policy and convenience which govern the case of innkeepers").

refusal to provide lodging. Whatever the reason, by the 19th century, common carriers' duty to serve was well established.[98]

Note that both duties of common carriers arose from the physical nature of the items they transported. Courts imposed strict liability on common carriers for damage to or loss of the tangible goods they carried as bailees. Similarly, the duty to serve stems from common carriers' role in the travel and transportation industry. Though the particular functional concerns giving rise to the two duties differ—the strict duty of care to protect against theft and deceit, the duty to serve to protect the public's access to transportation—they both emerged to protect the movement of physical goods.

3. The best standard for identifying traditional common carriers and innkeepers

The above shows that the early common law identified the public callings according to their "holding out." That standard remained when the law narrowed to apply its special standards only to common carriers and innkeepers. *Ingate v. Christie* represents the "holding out" standard well.[99] In that case, a merchant brought action against a lighterman for the loss of his figs after the lighter was run down by a steamer. The court asked whether the lighterman was a common carrier and could be thus held strictly liable for the goods.[100] It resolved the case with a simple definition, drawn from Justice Story's description of common carriers: "If a person holds himself out to carry goods for everyone as a business . . . he is a common carrier."[101]

Note that this short definition contains three elements—first, the element of holding out to serve the public, then two elements that describe *what* the person holds out to do and *in what capacity* he holds out to do it. Those three elements:

1. *Holding out to serve everyone.* A common carrier makes his services known to the public rather than only serving upon request. This element exempts those who carry only by special agreement. If someone carries after individualized bargaining, he

[98] *See* JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS § 508 (Boston, Charles C. Little & James Brown 1846) ("One of the duties of a common carrier is to receive and carry all goods offered for transportation upon receiving a suitable hire. This is the result of his public employment as a carrier; and by the custom of the realm, if he will not carry goods for a reasonable compensation, upon a tender of it, and a refusal of the goods, he will be liable to an action, unless there is a reasonable ground for the refusal.").

[99] (1850) 175 Eng. Rep. 463 (QB).

[100] *Id.* at 463.

[101] *Id.* at 464.

would not be a common carrier, but rather a private carrier with different privileges and duties.[102] But if someone advertises a standard service to the public, it is "an implied engagement" to provide those services to everyone.[103]

2. *Holding out to carry goods*. This distinguishes common carriers from the many other public callings—common surgeons, common tailors, and the like—who hold out to serve everyone as a business, but not by carrying goods for them. Later courts have noted that the definition expanded to cover carriers of goods *and of passengers* as people began to travel via carriers, a rarity in earlier times.[104]

   For innkeepers, *to entertain the traveling public* replaces the carriage element. This element identifies businesses that provide board or lodging to traveling strangers, distinguishing innkeepers from those who offer seasonal lodging to tenants.

3. *As a business*. This element exempts those who carry "as a casual occupation, *pro hac vice*."[105]

This careful definition excludes several close cousins to traditional common carriers. A simple table illustrates.

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[102] The logic of individualized bargaining flows from the distinctions between private and public callings in the early common law, as well as the ongoing distinctions between contract and common carriers. The distinction is between those who make special agreements of some kind or another (a special *assumpsit* in the early common law) and those who hold out generally to perform services with no special agreement.

[103] Blackstone uses this logic specifically for innkeepers who "hang out a sign," *see supra* note 62 and accompanying text, but it can extend to explain the "holding out" standard more broadly.

[104] *See, e.g.*, Anderson v. Fid. & Cas. Co. of N.Y., 228 N.Y. 475, 480-82 (1920).

[105] STORY, *supra* note 98, § 495.

Table 1: *Common carriers and their close cousins*

	Holds out to serve everyone (i.e., not by individualized bargaining)	Carries goods or passengers, or entertains traveling strangers	As a business
Common carriers	X	X	X
Innkeepers	X	X	X
Public Accommodations	X		X
Private carriers		X	X
"Benevolent" carriers[106]	X	X	
Rentals and Resorts	X		X

The three-part formal identification pairs well with how courts had come to understand the function of common carrier doctrine. By holding themselves out to serve the public, common carriers and innkeepers had established a kind of reliance interest for vulnerable travelers. An innkeeper who reneged on his public offer to provide lodging could leave a traveler stranded. And both carrier and innkeeper made it their business to take custodial possession of others' property, so they needed to be held to a higher standard of care for the property's safe return to the guest or safe delivery to its intended destination.

In sum, by the mid-19th century, the common law had a settled form for identifying common carriers and innkeepers and a consistent rationale for applying special duties to them. A common carrier holds out to carry goods for everyone (i.e., without individualized bargaining) as a business. And an innkeeper holds out to provide hospitality for everyone as a business. The common law imposed on those two businesses alone a higher duty of care and a duty to serve all comers. These special duties applied to them because of a concern for the peculiar vulnerabilities of travelers and those who ship goods, paired with the unique opportunities that carriers and innkeepers have to exploit those vulnerabilities.

[106] This is not a formally designated group. It might apply, though, to someone who offers to carry goods for others on a special occasion, but not as a business. Imagine someone traveling with a group who offers extra space in his car to carry luggage for anyone with a need. The law is careful not to hold him strictly liable as a common carrier.

B. Track Two: Invested with a Public Interest

As the common law developed, courts imposed common carrier-like duties on a second group of companies. These have been described as "public utilities" because most (but not all) are utilities companies or as "quasi–common carriers" because courts treat them in a similar manner as traditional common carriers. I'll refer to these as "track two" common carriers. They are a distinct group with a doctrine that developed on a parallel track to traditional common carriers and innkeepers (hereafter "track one" carriers).

Just as courts had justified the special duties of track one carriers because of their public nature (evolving out of the tradition of public callings), courts also justified the special duties imposed on track two carriers because they had taken on a public character. But the common law identified track two carriers as public companies for a different reason. These businesses took on special duties to the public because of their use of a government franchise, not because of their holding out.

The difference in each track's formal identification reflects the different function of the law in each case. While track one emerged due to a public policy concern for safe travel and transportation, track two was the result of a regulatory bargain. When private businesses accept and use public privileges bestowed on them by the government, their property becomes invested with a public interest. As a result, these track two carriers become subject to rate regulation and a duty of nondiscrimination. Put simply, if a business accepts a government franchise, it is a track two carrier.

As Charles Burdick explained a century ago, the franchise at issue here is a franchise "to do," not a mere franchise "to be."[107] The franchise "to do" grants private businesses "a right, privilege or power of public concern . . . reserved for public control and administration."[108] When a private company accepts this franchise, it becomes a "public agent[], acting under such conditions and regulations as the government may impose in the public interest, and for the public security."[109] The mere franchise "to be" doesn't carry the same duties because that franchise "does not convey any powers reserved to the state, as does the franchise to do."[110] The government franchises relevant to common carrier regulation have been granted in three forms: legal monopoly, eminent domain power or public rights-of-way, and public investment.

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[107] Burdick, *supra* note 29, at 616-17.
[108] *Id.*
[109] *Id.*
[110] *Id.* at 617.

1. Legal monopolies

The government occasionally grants exclusive rights to businesses and so makes them legal monopolies. Most grants of legal monopolies are due to high barriers to entry paired with public convenience or necessity. The Wisconsin Supreme Court explained the rationale in an antebellum case concerning a gas company, where it called monopolies "[o]dious . . . to the common law" and "still more repugnant to the genius and spirit of [America's] republican institutions."[111] Because monopolies were so disfavored, the court explained that they were "only to be tolerated on the occasion of great public convenience or necessity."[112] In those rare instances, the existence of such a monopoly "always impl[ies] a corresponding duty to the public to meet the convenience or necessity which tolerates their existence."[113]

The "occasion[s] of great public convenience or necessity" that compelled the government to create a monopoly usually involved public utilities. Because of the public need for resources like water and electricity, and because of the efficiencies required to develop essential infrastructure, governments granted businesses exclusive franchises to develop these utilities.[114] When the businesses accepted these franchises, they also took on the corresponding duty to serve the public.

Legal monopolies weren't confined only to utilities, though. The principal case involves a warehouse, not a public utility.[115] (This is evidence that track two is defined by a state grant of power, not by the industry association of the business.) In *Allnutt v. Inglis*, the royal court held that a warehouse with a legal monopoly may have its

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[111] Shepard v. Milwaukee Gas Light Co., 6 Wis. 539, 547 (1857).

[112] *Id.* Though the word "tolerated" could be read to suggest tolerance of a natural monopoly, rather than grant of a legal monopoly, the court used the term in context of a discussion about "exclusive right[s] conferred upon the company," *Id.* at 546, and a city's decision to "charter[]" a company with an "exclusive privilege," *Id.* at 547. Throughout, the opinion considers a legal monopoly, not a natural one, so "tolerate" here is best read to explain a government's active creation of a legal monopoly, not passive acceptance of a natural monopoly.

[113] *Id. See also* New Orleans Gaslight & Banking Co. v. Paulding, 12 Rob. 378, 380 (La. 1845) (holding that a gas company that had been granted "the sole and exclusive privilege of vending gas lights in the cities of New Orleans and Lafayette," was "bound under their charter to supply gas to all person who call for it").

[114] *See, e.g.*, 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, 1264-65 (1998) ("A firm is a natural monopoly if the entire market demand can be served at lower cost by a single firm than by two or more firms. The traditional public utility, regarded by most as a natural monopoly, possesses a high degree of horizontal monopoly, due to economies of scale or congestion or network economies, as well as a high degree of vertical integration of constituent services within a single firm.") (internal citations omitted).

[115] Allnutt v. Inglis, (1810) 104 Eng. Rep. 206 (KB).

prices regulated.[116] The court required the London Dock Company to charge reasonable rates for use of its warehouses because the "warehouses were invested with the monopoly of a public privilege."[117] Chief Judge Lord Ellenborough resolved the case on a single legal principle: If someone has "take[n] the benefit of [a] monopoly, he must as an equivalent perform the duty attached to it on reasonable terms."[118]

Ellenborough's extended analysis in the case illumines three aspects of that principle's meaning. First, a company automatically takes on a public duty when the government gives it an exclusive right to fulfill a public need. The Legislature at the time had authorized only the London Dock Company to warehouse imported wines.[119] Because people were not lawfully permitted to house their wines anywhere else, Ellenborough held that "the company's warehouses were invested with the monopoly of a public privilege" and so, the company was legally obligated to "take reasonable rates" when anyone wanted to use the warehouses to store wines.[120]

Second, a company's ongoing public duty lasts only as long as its legal monopoly. Ellenborough went on to note that the company might be released from its duty if the Crown were to extend the privilege of warehousing wines to other people and places, allowing customers to choose those other warehouses instead.[121] His analysis made clear that the warehouses were only required to charge reasonable rates because the law gave the public no other option.[122]

Third, a company that has received a legal monopoly is bound to continue using its property for that purpose so long as it retains the monopoly. Ellenborough came to this conclusion by asking whether the London Dock Company could avoid rate regulation if it stopped using its buildings to warehouse wine.[123] The question inverts the reasoning of the last point. There, Ellenborough made clear that a company no longer bears a public duty when the state revokes its legal monopoly. But what if the London Dock Company chose to cease exercising its legal monopoly by, for instance, using its warehouses for an entirely different purpose? In that instance, Ellenborough concluded that "as long as their warehouses are the only places which can be resorted to for this purpose, they are bound to let the

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[116] *Id.* at 206.
[117] *Id.* at 211.
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*

trade have the use of them for a reasonable hire and reward."[124] Once a company has accepted a legal monopoly, it may be bound to continue offering the same service if it is able.

A later case in Maine's Supreme Court concerning a log driving company (again not a public utility) followed the same reasoning used in *Allnutt v. Inglis*.[125] There, the court noted that the company's charter "conferred the privilege of driving, not a part . . . but 'all' the logs to be driven."[126] Because the company had received this exclusive "right to drive *all* the logs," its "acceptance was an undertaking to drive them *all*."[127]

Notice the court's reference to the company's "undertaking." This echoes the language of *assumpsit*. Just as the early public callings took on a general *assumpsit* because they held out to serve all, we could say that companies take on a general *assumpsit* when they accept a legal monopoly—the privilege to serve all.

As the early cases show, the government occasionally grants a legal monopoly to companies. When companies make use of that franchise, they assume the duty to serve the public indiscriminately and at a reasonable rate.

2. *Eminent domain and public rights-of-way*

Track two also includes all companies that use eminent domain power or public rights-of-way granted by the government. If a business uses a franchise to have access to public property, it takes on a duty to serve the public when it uses that property. The Takings Clause of the Fifth Amendment provides the basis for the requirement. It expects "private property [to] be taken for public use."[128] And even before the Fourteenth Amendment came in to apply the same requirement to states' use of eminent domain powers, most state constitutions had a similar provision.[129]

George Priest describes regulation under this category as a bargain in which "public utility companies voluntarily entered contracts subjecting themselves to regulation in order to gain authority to use public rights-of-way for laying gas and water pipes, stringing telephone and electric poles, burying electrical wires, and laying street railway."[130] In the early 19th century, the Massachusetts Supreme

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[124] *Id.*
[125] Weymouth v. Penobscot Log Driving Co., 71 Me. 29 (1880).
[126] *Id.* at 39.
[127] *Id.*
[128] U.S. CONST. amend. V.
[129] Burdick, *supra* note 29, at 617 n.3.
[130] George L. Priest, *The Origins of Utility Regulation and the "Theories of Regulation" Debate*, 36 J.L. & ECON. 289, 303 (1993).

Court applied this logic to explain why "the legislature had constitutional power" to authorize mill owners to take property to build a mill[131] and again to explain why the legislature could authorize a corporation to take private property to build an aqueduct.[132] The latter case upheld a bill that authorized taking of private property for an aqueduct, even though the bill didn't include an "express provision" that the aqueduct must "supply all families and persons who should apply for water, on reasonable terms."[133] The court held that no express provision was necessary because if the company refused to serve anyone, it "would be a plain abuse of their franchise."[134] "By accepting the act of incorporation," the court stated, the aqueduct company "undert[ook][135] to do all the public duties required by it."[136] According to the court's reasoning, a company automatically assumes a duty to serve all applicants on reasonable terms when it accepts rights to public property. The statute granting those rights inherently imposes the duty; it need not spell it out.

The nature of this regulatory bargain and the corresponding duty to serve is summed up well in *Haugen v. Albina Light & Water Co.*[137] The case concerns a water company that had received public rights-of-way to lay its pipes.[138] The company argued that it wasn't required to "furnish water" to plaintiffs who complained that they were being refused service, "but only, if it *shall* furnish water, that the charge . . . not exceed a certain sum."[139] Holding for the plaintiffs, the court explained that the regulatory bargain requires companies that use public property to serve the public at large. When utilities receive "the right to dig up the streets, and place therein pipes or mains for the purpose of conducting water for the supply of the city and its inhabitants," they are expected "to supply water to one and all, without distinction, whose property abuts upon the streets in which their pipes are laid."[140] The court considered the water company's "acceptance of the [franchise]" as its "assumed . . . obligation

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[131] Bos. & R. Milldam Corp. v. Newman, 29 Mass. 467, 475 (1832).
[132] Lumbard v. Stearns, 58 Mass. 60, 61 (1849).
[133] *Id.* at 62.
[134] *Id.*
[135] Note again the use of *assumpsit* language. The court here treated acceptance of an act of incorporation that authorized taking of private property as a general *assumpsit* to serve all.
[136] *Lumbard*, 58 Mass. at 62. *See also* Scudder v. Trenton Delaware Falls Co., 1 N.J. Eq. 694 (Ch. 1832). The plaintiff in that case contended that the legislature couldn't empower a private company to take his property without declaring that the canal it was constructing would be a public highway. *Id.* at 704. But the court said that no declaration was needed because the canal "must necessarily be" a public highway by virtue of the taking. *Id.* Because of the taking, the water "is public property, and is impressed with the right of servitude to the public." *Id.* at 705.
[137] 21 Or. 411 (1891).
[138] *Id.* at 412.
[139] *Id.* at 415 (emphasis added).
[140] *Id.* at 418-19.

of supplying the city and its inhabitants with water along the lines of the mains."[141]

3. Public funding

A third and final way that private businesses become invested with a public interest comes when they receive public funding. Courts have applied the same logic from eminent domain to these cases. For instance, in an 1869 case about a tax levied to fund a private railroad, the Nevada Supreme Court rejected the plaintiffs' charge that the tax was unconstitutional because it was a taking for private use.[142] The plaintiffs had argued that they couldn't be taxed to support the railroad because "the corporation [was] under no legal obligation to transport produce or passengers upon the road, and at a reasonable expense."[143] But the Court rejected this argument, holding that the railroad, as a franchisee, was obligated to serve all comers unless it had a reasonable excuse.[144] As a result, the investment of public funds, like the use of eminent domain, supported a public purpose and could be justified, even though the funds were invested in a private business.[145]

The U.S. Supreme Court took the same approach later in *Milheim v. Moffat Tunnel Improvement District*.[146] When Colorado levied a tax to construct a tunnel that would be owned and operated by a private business, the Court held that the tax was constitutional because it created a "public highway."[147] "The test of the public character of an improvement" is its public use, regardless of owner or operator.[148] And so, just as the government may grant eminent domain and public rights-of-way to private businesses that use the property for public purposes, so it may also provide public funding to support private businesses. But in those cases, the public investment entails a reciprocal duty for the business to serve the public.

4. The relationship of natural monopoly to track two carriers

Notice that none of the businesses described in this section became automatically subject to common carrier regulation because of

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[141] *Id.*
[142] Gibson v. Mason, 5 Nev. 283, 310 (1869).
[143] *Id.*
[144] *Id.*
[145] *Id.* at 309.
[146] 262 U.S. 710 (1923).
[147] *Id.* at 720.
[148] *Id.*

a natural monopoly. The conditions of natural monopoly may have led to a government franchise, which then led to common carrier regulation, but in each case, the company's acceptance of a franchise triggered the regulation. Its natural monopoly did not.

In this way, natural monopoly may be a secondary cause of common carrier regulation, but it is not a primary cause. Potential providers might not want to enter a market with high costs to entry if they aren't assured of sufficient business. In these cases, the state may grant a legal monopoly to create the market efficiencies necessary to induce a business to invest[149] or the state may directly finance the development. In addition, the large infrastructure networks required by many natural monopolies will often require use of public property. In these instances, the conditions of natural monopoly can lead to the offer of a government franchise. And when a private business accepts that offer, it accepts the commensurate duty to serve the public at a reasonable rate. But this is not the same as automatically subjecting a business to common carrier regulation merely because the state deems it a "natural monopoly."

5. Early confusion about track two carriers

Though antebellum courts generally imposed public duties on track two carriers, their difference from traditional (track one) common carriers occasionally created a point of confusion. For example, a New Jersey court held that a gas company was not required to supply gas to all buildings it could supply because that "is a duty peculiar to [innkeepers and common carriers]."[150] The state's highest court overruled that decision a few decades later, observing that the company's acceptance of "the right to occupy the public streets for the laying of its pipes," implied a duty to serve the public.[151] Without that corresponding duty, "the grant of eminent domain for such private purposes would be void."[152]

The New Jersey courts' turnabout shows the confusion that could arise when courts considered applying common carrier-like duties to businesses that weren't traditional common carriers. Though the designation of "*quasi* common carrier" helped to distinguish, courts could still be confused by the two categories of common

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[149] Jim Rossi calls medieval mills "perhaps the strongest analogy to the modern public utility" and describes the "mill-soke" obligation of medieval times as a type of legal monopoly. Rossi, *supra* note 114, at 1244. The mill-soke laws arose both to ensure access to a mill for all villagers and to give an assurance of demand to the lords who would have to invest the significant capital necessary for a mill's development. *Id.* at 1244-45.

[150] Paterson Gaslight Co. v. Brady, 27 N.J.L. 245, 246 (Sup. Ct. 1858).

[151] Olmsted v. Proprietors of Morris Aqueduct, 47 N.J.L. 311, 333 (1885).

[152] *Id.*

carriers and apply the wrong tests to them. This confusion would especially emerge with telegraph companies, discussed below.

C. Identifying and Regulating Track One and Track Two Carriers

Now that we've seen the development of both tracks, note three differences between track one and track two carriers—differences in their formal identification, their functional identification, and how they are regulated. Each difference is important for keeping the two tracks separate when courts try to identify and regulate track one and track two carriers.

First, the formal identifications of track one and track two carriers are different. Track one carriers are identified by two elements: "holding out" and either providing hospitality to travelers (innkeepers) or conveyance of goods or passengers (common carriers). Track two carriers are identified by a single element: acceptance of a government franchise.

Second, the justifications for regulating each group are the same at the highest level but with important functional differences. Both track one and track two carriers face increased regulation because of their "public" nature. But the two are "public" for different reasons. Track one carriers are "public" because of the unique public function they serve when they provide travelers a place to stay and a means of travel and when they take others' goods into their possession for delivery. Track two carriers are "public" because they have accepted a grant of power or resources that would have been unavailable to them without the government. They've entered a "regulatory bargain" to serve the public.

Third, the duties imposed on each track are similar but not identical, and they developed for different reasons. For both tracks, these duties reflect the public nature of the business.

Track one carriers bear a duty to serve all comers indiscriminately and a strict duty of care. The duty to serve grew out of a concern that travelers relied on innkeepers' public offer to provide hospitality when they traveled. The duty protects travelers from being stranded due to a host's capricious choice to turn someone away. The strict duty of care grew out of a concern for the vulnerability shippers and travelers face when someone else takes custody of their goods for delivery. In both cases, the law expected the carriers to do what they promised to do—provide safe hospitality and safe delivery.

Meanwhile, track two carriers have been historically subject to rate regulation and a duty to serve all. On this track, the duty arose because these carriers had engaged in a regulatory bargain. Because they accepted benefits that could only be provided by the

government—legal monopoly, access to public property, or public investment—they submitted to serving the whole public, and at a reasonable rate so that they wouldn't exploit their franchise. These businesses were not subject to a strict duty of care. As track two carriers, they didn't take others' property into their possession for safekeeping and safe delivery, so the duty wouldn't be expected to apply. Cases concerning telegraphs, discussed in Part II, were the first to challenge this idea.

Table 2: *Form, function, and regulation of track one and track two carriers*

	Formal Identification	Function	Regulation & its rationale
Track one	Holding out + providing hospitality to travelers (innkeepers) or providing safe delivery of property or passengers (common carriers).	Protection for travelers and shippers of goods who were exposed to unique vulnerabilities in travel and shipment.	Duty to serve all comers indiscriminately and strict duty of care. Rationale: fulfill promises of safe hospitality and safe delivery.
Track two	Acceptance of a government franchise.	Fulfillment of a franchisee's regulatory bargain to serve the public.	Duty to serve all comers indiscriminately and subject to rate regulation. Rationale: regulatory bargain subjects these carriers to serve the whole public at a reasonable rate.

III. CONVERGENCE, CONFUSION, AND CLARITY

Two nineteenth century developments may be the source of much of our modern confusion about common carriers. First, with the rise of railroads, the two tracks converged, blurring the lines between two classes that had been mostly distinct until that point. Then cases involving telegraphs led to confusion over which tests to apply, which duties to impose, and whether telegraphs "carried" in the same manner as track one carriers. Though the courts exhibited early confusion in these cases—their analyses ultimately help to confirm and refine the two-track theory of common carriers.

A. Convergence—Railroads

Railroads are the quintessential common carriers.[153] They travel on both of common carriage's twin tracks. Historically, railroads established themselves as track one carriers by holding out to provide safe delivery of passengers and goods. The nature of their business also made it almost essential for railroads to receive a government franchise to operate. They required public rights-of-way or eminent domain authority so that they could develop their networks. When they accepted those government franchises, they became track two carriers. Because railroads brought the two tracks together, they may also have blurred the distinction between the tracks.

From the start, railroads fit the definition of track one carriers and bore the related duties. The first commercial passenger and freight railroads in the United States opened in 1830.[154] Within twenty years, a major treatise on carriers would observe that proprietors of railroads "who hold themselves out as common carriers of passengers, are of course bound . . . to receive all who require a passage, so long as they have room, and they have no[] . . . legal excuses for a refusal."[155] The treatise also noted that railroads "accustomed to carry goods for all persons indifferently" were strictly liable for those goods as common carriers.[156] The Supreme Court affirmed this strict duty of care in 1860, holding that once a railroad company received goods for delivery, because it was a "common carrier for hire[]," it bore the duties of "[s]afe custody," "due transport[,] and right delivery."[157]

But most cases considering railroads' duties as common carriers focused on their nature as track two carriers. As early as 1831, a New York court held that railroads may receive and exercise eminent

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[153] The merger of the two tracks is most prominent with railroads, but it goes back further—to ferries. At common law, the word "ferry" didn't just refer to water travel but to "a franchise or right of ferry." State v. Freeholders of Hudson Cnty., 23 N.J.L. 206, 209 (Sup. Ct. 1851). As such, "the term implie[d] an exclusive right of conveyance [which could] only be set up by license from the crown." *Id.* Ferries both held out to provide transport and provided that transport according to an exclusive license and across property they didn't own. Like railroads, this made ferries track one *and* track two carriers from the beginning. I've chosen railroads as the example for the convergence of the two tracks because they have had more influence and significance in the development of common carrier law in America, but they are not the first or only instance where the two tracks converge.

[154] SARAH H. GORDON, PASSAGE TO UNION: HOW THE RAILROADS TRANSFORMED AMERICAN LIFE, 1829–1929, at 15 (1997).

[155] JOSEPH K. ANGELL, A TREATISE ON THE LAW OF CARRIERS OF GOODS AND PASSENGERS BY LAND AND WATER § 526 (1849).

[156] *Id.* at § 78. The treatise explained common carriers' duty of strict care as a result of their taking the role of an insurer. *Id*. at § 70.

[157] Powhatan Steamboat Co. v. Appomattox R. Co., 65 U.S. 247, 255 (1860).

domain power.[158] The plaintiffs in the case contended that the legislature's grant of eminent domain power was unconstitutional because it didn't specify that the railroad bore a duty to serve the public at a reasonable rate.[159] Without a provision that the railroad serve the public, the plaintiffs argued that the grant of eminent domain was a taking of private property that didn't ensure a public use.[160] The court dismissed those arguments because the railroad's "privilege of making a road and taking tolls thereon [was] a franchise."[161] As such, the railroad would be liable if it "should refuse to transport an individual, or his property, without any reasonable excuse, upon being paid the usual rate of fare."[162] Within a year of the first commercial railroads' openings in the U.S., courts were treating railroads as track two carriers. Legislation that gave them eminent domain authority or public rights-of-way didn't need to specify that they were obligated to serve indiscriminately. That obligation was inherent to the franchise.

Another antebellum case showed that it was railroads' acceptance of eminent domain authority that created their status as track two carriers. In *Sandford v. Catawissa*, the Pennsylvania Supreme Court, distinguished between railroads built on the proprietors' land from those built on others' land.[163] The Court explained that "[t]he legislature possesses no constitutional power to authorize the seizure of private property for private purposes."[164] Thus, the "benefits" of using any railroad that used public property "should be extended to all alike."[165] But this would not be the case if "a private railroad" were "constructed on the land of the proprietors."[166] In that situation, the public would have no more interest or control over the business than over "any other improvements which men make on their own lands."[167]

A later case directly linked railroads' acceptance of a franchise and their duty to charge fair rates to everyone. In *Messenger v. Pennsylvania Railroad Company*, the plaintiff alleged that the railway company violated this duty when it provided favorable rates for some companies and not others.[168] The court held for the plaintiffs because

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[158] Beekman v. Saratoga & S.R. Co., 3 Paige Ch. 45, 73 (N.Y. Ch. 1831).
[159] *Id.* at 74-75.
[160] *Id.* at 52.
[161] *Id.* at 75.
[162] *Id.*
[163] Sandford v. Catawissa, W. & E.R. Co., 24 Pa. 378 (1855).
[164] *Id.* at 380.
[165] *Id.* at 381.
[166] *Id.*
[167] *Id.*
[168] Messenger v. Pa. R.R. Co., 37 N.J.L. 531, 532 (1874).

"the grant of a franchise of building and using a public railway" includes "an implied condition that it is held as a *quasi* public trust for the benefit of all the public, and that the company possessed of the grant must exercise a perfect impartiality to all who seek the benefit of the trust."[169]

Thus, the two tracks of common carriers converged in railroads. By holding out to transport passengers and goods, they were track one carriers. By accepting a government franchise, they were track two carriers. This analysis shows that it would be possible, though unlikely, for a railroad to evade the status of a track one or track two carrier—or even both. Imagine a railroad built on land wholly owned by its proprietor with no use of a government franchise to access the land and no public investment. That railroad would not be a track two carrier. If the company offered its services only by individualized bargaining, not by holding out its services generally to the public, then it would not be a track one carrier, either. Because such a railroad wouldn't be exercising a public function, it would have no duty to serve indiscriminately. And because that railroad would agree to carry only by individualized bargaining, it would have no strict liability for the items it carried. That would be left to the individual bargains. This shows that railroads—along with all other carriers—are not identified as common carriers strictly because of their industry. Rather, nearly all railroads are common carriers because nearly all meet the formal and functional tests of track one and track two carriers.

B. Confusion—Telegraphs and Telephones

Telegraphs mark the first significant point of confusion between track one and track two carriers. Because telegraph companies required extensive wire networks, they were like utilities and railroads in their dependence on government franchises, so they could be easily identified as track two carriers. But the new technology forced courts to consider whether telegraphs were also track one carriers. Here, the difference in regulation became important. Only track one carriers—identified by their holding out to carry others' property—had historically been subject to a strict duty of care. The question before the courts: when telegraphs offered to deliver others' messages across their wires, were they "carrying" others' property and serving as insurers of it?

In all, courts' early treatments of telegraphs illustrate the important differences between track one and track two carriers—and

[169] *Id.* at 536.

also between track one carriers and public accommodations. Because track one carriers, track two carriers, and public accommodations all have a duty to serve without discrimination, early cases that considered that duty provided consistent results. But when courts and scholars asked if telegraph companies bore a strict duty of care, the analysis revealed confusion about how the common carrier tests and duties apply.

The analyses of telegraphs throughout this section will help us identify key differences between track one carriers, track two carriers, and public accommodations. I conclude the section by distinguishing between these three categories. A failure to distinguish between them has created much of the modern confusion about common carriers. The proper distinctions can resolve why a business might be *like* a traditional [track one] common carrier or might be regulated like a traditional common carrier, yet not *be* a traditional common carrier or subject to all of the same duties.

1. The duty to serve

Courts have consistently held that telegraph companies—and later, telephone companies—have a duty to serve without discrimination. In early cases involving telegraph companies, some courts analogized the companies' transmission of speech to other kinds of carriage and imposed a duty to serve on those grounds.[170] And many courts referred to telegraph and telephone companies as "common carriers of speech"[171] or "common carriers of messages,"[172] or "common carriers of news,"[173] even though some noted that the analogy "is not perfect."[174] But as Burdick notes, other jurisdictions based their justifications "more reasonably" in "the grant of the power of eminent domain or of the power to use streets and highways."[175]

The courts' different justifications for telegraph companies' duty to serve demonstrates the confusion about which common carrier test to apply to telegraphs. Some courts applied the track one test and

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[170] *See* Burdick, *supra* note 29, at 622 ("A telephonic system is simply a system for the transmission of intelligence and news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all.") (quoting Missouri ex rel. Baltimore & Ohio Tel. Co. v. Bell Tel. Co., 23 F. 539 (C.C.E.D. Mo. 1885)).

[171] *See, e.g.*, Am. Rapid Tel. Co. v. Connecticut Tel. Co., 49 Conn. 352, 374 (1881); Com. Union Tel. Co. v. New England Tel. & Tel. Co., 61 Vt. 241 (1888).

[172] *See, e.g.*, Abbott v. City of Duluth, 104 F. 833, 836 (C.C.D. Minn. 1900), *aff'd*, 117 F. 137 (8th Cir. 1902); Campbellsville Tel. Co. v. Lebanon, L. & L. Tel. Co., 118 Ky. 277 (1904).

[173] *See, e.g.*, Cent. Union Tel. Co. v. State ex rel. Falley, 118 Ind. 194 (1889); Haugen v. Albina Light & Water Co., 21 Or. 411, 423 (1891).

[174] *See, e.g.*, Aiken v. W. Union Tel. Co., 5 S.C. 358, 371 (1874); Marr v. W. Union Tel. Co., 85 Tenn. 529 (1887).

[175] Burdick, *supra* note 29, at 622.

concluded that telegraph companies had a duty to serve because they "carried" speech. Others avoided the strained analysis about whether speech could be carried and instead determined that telegraph companies were track two carriers because they exercised a government franchise.

The track two analysis is straightforward. Telegraph companies made the same implicit regulatory bargain as other utilities when they used public rights-of-way to run their lines.[176] By their use of a public franchise, they became invested with a public interest. For instance, in 1881, the New Jersey Supreme Court relied on the implicit regulatory bargain to uphold a law granting eminent domain power to a telegraph company.[177] The petitioners had charged that the law was unconstitutional because it authorized a taking for private use,[178] but the court held that the franchise of eminent domain power carried an implicit regulatory bargain requiring the telegraph company "to transmit all messages which may be offered."[179] Thus, a law granting a franchise of eminent domain power need not explicitly require a telegraph company to serve the public. Instead, "in accepting the benefits of this law, the recipient of them assumes the performance of this duty to the public."[180] Just as courts had required private water companies to serve the public indiscriminately after they used eminent domain power to extend their pipes,[181] so too courts required telegraphs to serve all applicants.

The South Carolina Supreme Court relied on the same logic when it held that a phone company was required to provide service as a common carrier. In *State v. Citizens' Telephone Company*, the defendant telephone company had denied service to the plaintiff after he broke his agreement to use their services exclusively.[182] The court observed that the phone company had "exercise[d] . . . its franchise conferred by its charter" to "erect[] its poles and str[i]ng its wires in and along the streets of [the] city, and thus had become at least a quasi common carrier of news."[183] Because of this status, the company was obligated to provide indiscriminate service to all who applied.[184] The court noted, though, that "a telephone company may

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[176] *See supra* notes 128 through 141 and accompanying text.

[177] Trenton & N.B. Tpk. Co. v. Am. & Eur. Com. News Co., 43 N.J.L. 381, 385 (Sup. Ct. 1881). See Burdick's discussion of the case at Burdick, *supra* note 29, at 622-23.

[178] *Id.* at 382.

[179] *Id.* at 384. The court cited two similar cases involving water companies, both referenced above: *Lumbard v. Stearns* and *Scudder v. Trenton Delaware Falls Co. See supra* notes 132 through 136 and accompanying text.

[180] *Id.* at 385.

[181] *See supra* notes 128 through 141 and accompanying text.

[182] State v. Citizens' Tel. Co., 39 S.E. 257, 258 (S.C. 1901).

[183] *Id.* at 262.

[184] *Id.*

not be, in every sense of the term, a common carrier of goods" and may not be subject to strict liability for the goods it carries.[185] To explain the difference, it quoted from a newly released edition of *The American and English Encyclopedia of Law* to explain a shift in the treatment of telegraphs as common carriers:

> It was at one time attempted to class telegraph companies as common carriers, but the view universally adopted now is that they can in nonsense be regarded as common carriers. *They are like common carriers in that they are bound to serve impartially all those applying to them*, but they are liable for improper transmissions of messages only upon proof of negligence.[186]

By referring to telegraph companies as "like common carriers" but without strict liability for what they transmitted, the encyclopedia and the court were recognizing the new challenge posed by telegraphs. Before the technology, courts could refer to public utilities as common carriers or *quasi* common carriers without confusion about their liability. They bore the same duty as track one carriers to serve all who applied. But now that a track two carrier might, for the first time, be held strictly liable for someone else's property, the courts had to distinguish more carefully.[187]

2. The strict duty of care

When courts had to consider whether a strict duty of care applied to telegraph companies, the analysis became more difficult. Some courts found an analogy between mail carriers and telegraphs and favored holding telegraphs to the same strict duty of care. But other

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[185] *Id.*

[186] *Id.* (quoting 6 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 261 (2d ed. 1896) (emphasis added by the court).

[187] As Justice Clarence Thomas has noted, in relation to their duty to serve, telegraphs have "historically received some protection from defamation suits." Biden v. Knight First Amend. Inst. At Columbia Univ., 141 S. Ct. 1220, 1223 n.3 (2021) (Thomas, J., concurring). He follows this by observing that "[b]y giving these companies special privileges, governments place them into a category distinct from other companies and closer to some functions, like the postal service, that the State has traditionally undertaken." *Id.* at 1223. If Justice Thomas's observation intends to suggest a causal link from government protections to common carrier status, it gets the causation backward. Telegraphs did not become common carriers because of this immunity. Rather, they received this immunity because of their status as common carriers, which required them to serve everyone equally. *See* O'Brien v. W. U. Tel. Co., 113 F.2d 539, 541 (1st Cir. 1940) ("The immunity of the telegraph company from liability to a defamed person when it transmits a libelous message must be broad enough to enable the company to render its public service efficiently and with dispatch."). Common carriers may need such immunities to function effectively, but this does not mean that the granting of such immunities can convert any business into a common carrier.

courts determined that telegraphs weren't track one carriers—they failed both the formal and functional tests—and so shouldn't bear the same liabilities. Ultimately, the latter view prevailed. At common law, telegraph companies are not strictly liable for errors in transmission.

This creates an important distinction between traditional common carriers and communications providers—one unnoticed by modern commentators. Unlike inns, wagons, ferries, and railroad companies, telegraph and telephone companies do not become insurers of the items they "carry." Thus, telegraphs and telephones are best considered track two carriers only. They bear the same duties to the public as all other businesses that have accepted a government franchise, but they don't serve as insurers of what they "carry." Because of this important distinction, modern definitions of common carriers are over-broad and incorrect when they treat "carriage" of communications just like carriage of goods.[188]

I'll first assess the best arguments for classing telegraphs with track one carriers and then show why those arguments failed under more scrutiny.

a) Why telegraphs could be track one carriers: Analogy to mail carriers

The best argument for holding telegraphs strictly liable for errors in message delivery is that they're analogous to mail carriers and should be held to the same standards. The first case on record to draw that analogy is *Parks v. Alta California Telegraph Company*.[189] There, the California Supreme Court held that a telegraph company was liable for damages after an accident delayed its delivery of a message.[190] The plaintiff sent a message to make a credit claim on assets of a bankrupt company,[191] but by the time the telegraph service delivered the message—23 hours later—other creditors had laid claim to all the assets.[192] Though there was no precedent for this kind of suit against a telegraph company, the court held that the governing law was "not new" but merely "old rules applied to new circumstances."[193] It analogized telegraphs to mail carriers, holding that "[t]here is no

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[188] For an example of recent courts applying this overbroad definition, see Cellco Partn. v. F.C.C., 700 F.3d 534, 545 (D.C. Cir. 2012) ("Borrowing from English common law traditions that imposed certain duties on individuals engaged in 'common callings,' such as innkeepers, ferrymen, and carriage drivers, American common law has long applied the concept of common carriage to transportation and communications enterprises.").

[189] Parks v. Alta Cal. Tel. Co., 13 Cal. 422 (1859).

[190] *Id.* at 424.

[191] *Id.*

[192] *Id.*

[193] *Id.*

difference" between "the legal obligation" for "carrying a message along a wire and carrying goods or a package along a route."[194] Theodore Dwight explained the same analogy a few years later:

> It would be urged that if there were no postal laws, and a person should for all the public carry letters containing intelligence, he would clearly be a common carrier; but as the letter is only a vehicle for the idea or information which it contains, and is only carried for the purpose of transferring information, why not hold, that an association which transports for all persons the information without the letter, is a common carrier?[195]

On the surface, these arguments by analogy sound persuasive. Why should a service that delivers messages by hand be treated differently than one that delivers via wire? But as courts had further occasion to consider the question, they applied formal and functional tests that illumined key differences between telegraphs and those who physically carry others' goods.[196]

b) Why telegraphs are not track one carriers: Failing the formal test

Recall the formal identification of track one carriers discussed above: "If a person holds himself out to carry goods for everyone as a business . . . he is a common carrier."[197] The court in *Breese v. U. S. Telegraph Company* highlighted the ways that a telegraph company fails that definition. The suit arose because the plaintiffs had sent by telegram an order to purchase $700 in gold, but an error in transmission caused $7,000 worth of gold to be purchased instead.[198] The plaintiffs had neither repeated nor insured their message—two options the telegraph company offered to avoid error.[199] For those who declined those options, the telegraph forms gave notice that the company's liability was limited.[200] But the plaintiffs argued that a

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[194] *Id.*

[195] T.W. Dwight, *The Law of Telegraphs and Telegrams*, 13 AM. L. REG. 193, 193-94 (1865).

[196] The proceeding analysis could draw into question why any carriers of messages—whether in physical form or not—should be considered track one carriers. Recall that in *Lane v. Cotton* a postmaster was held strictly liable after losing a letter. But he was not carrying mere information. He was carrying government promissory notes—tangible, valuable items that could be embezzled. *See supra* notes 86 through 88 and accompanying text. If a message is not of the sort that traditional property rights apply, we have cause to question whether it meets the formal and functional tests for track one carriers.

[197] Ingate v. Christie, (1850) 175 Eng. Rep. 463, 464.

[198] Breese v. U.S. Tel. Co., 45 Barb. 274, 274-75 (N.Y. Sup. Ct. 1866).

[199] *Id.* at 274.

[200] *Id.*

common carrier may not limit its liability by notice.[201] The court held for the telegraph company, calling it "little short of an absurdity" to call "the bearer of mere verbal messages" a common carrier.[202]

The court described at length the differences between a telegraph's transmissions and a common carrier's delivery to show that the two businesses take "radically" different forms:

> [T]he defendant is engaged [in] transmitting ideas only from one point to another, by means of electricity operating upon an extended and insulated wire, and giving them expression at the remote point of delivery, by certain mechanical sounds, or by marks, or signs, indented, which represent words or single letters of the alphabet[.] [This] is . . . radically and essentially different, not only in its nature and character, but in all its methods and agencies, from the business of transporting merchandize, and material substances, from place to place, by common carriers.[203]

As a result, the court refused to hold the telegraph company responsible, stating that the "peculiar and stringent rules" applied to common carriers could "have very little just and proper application" to telegraphs.[204]

c) Why telegraphs are not track one carriers: Failing the functional test

After the *Breese* court had detailed the formal differences between telegraphs and traditional common carriers, it concluded by observing the related functional distinction: telegraph companies can't embezzle what they carry. A common carrier "would have something which is, or might be, the subject of property, capable of being lost, stolen and wrongfully appropriated; while the [telegraph company] would have nothing in the nature of property which could be converted, or destroyed, or form the subject of larceny . . . ."[205]

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[201] *Id.* at 278.
[202] *Id.* at 293.
[203] *Id.* at 292.
[204] *Id.*
[205] *Id.* at 293. This does not mean that a telegraph couldn't be subject to liability for the damages resulting from its failure to properly deliver a message. See *supra* note 93 for the distinction between two categories of liability: (1) the strict liability imposed on common carriers for property damage or loss and (2) the liability for *resulting* damages when a delivery failes (i.e. damages that go beyond the inherent value of the damaged or lost property) under the Hadley rule. Observe that distinction in the Breese case. The plaintiff claimed a telegraph is a common carrier and thus may not limit its liability by notice. But the plaintiff was not seeking damages for the inherent value of the message that was being transmitted. Instead, it was seeking damages

By referring to theft and misappropriation, the court recalled the reason common carriers were originally subjected to a strict duty of care. The heightened duty was because of the carriers' peculiar opportunity to steal from customers without the customers' ability to prove the theft.[206] Because telegraphs have no equivalent opportunity, they shouldn't be subject to the same duty.

The South Carolina Supreme Court explicitly applied this functional logic in *Pinckney Brothers v. Western Union*.[207] The court contrasted telegraphs with traditional common carriers because telegraphs have "no inducement or possibility . . . to appropriate anything which may be entrusted to them, to their own benefit, at the sacrifice of their employer's interest."[208] Without this inducement, "there is no reason for holding [telegraphs] as insurers like common carriers."[209] The court proved the functional point by highlighting formal differences. "Common carriers transport goods . . . which are constantly in their possession" and "they should guard and protect these goods against all dangers," but "telegraph companies transmit ideas—intangible and fleeting things—which, when placed upon the wire, instantly escape from the hands of the operator."[210] In the end, like the *Breese* court, the *Pinckney Brothers* court said that "apply[ing] the rule of common carriers to these companies would . . . be extremely unjust."[211]

d) Why telegraphs are not track one carriers: The Supreme Court's conclusion in *Primrose* and Justice Thomas's interpretation in *Biden v. Knight*

The Supreme Court followed the formal and functional logic just described when it decided *Primrose v. Western Union Telegraph Company*.[212] Applying first the formal test for track one carriers, the Court held that telegraph companies "are not common carriers."[213] Though they "resemble railroad companies and other common carriers" because of their engagement in commerce and their "public employment," which binds them "to serve all customers alike,"[214] they "are

for the results of that message's garbled delivery. The Hadley rule could apply in such a case—and thus, the provider could limit its liability by notice. Common carrier rules of strict liability couldn't work in this case because the message had no inherent value. Its value was only in the effect it aimed to achieve (the purchase of a certain amount of gold).

[206] *See supra* notes 81 through 88 and accompanying text.

[207] Pinckney Bros. v. W. Union Tel. Co., 19 S.C. 71 (1883).

[208] *Id.* at 83.

[209] *Id.*

[210] *Id.* at 83-84.

[211] *Id.* at 84.

[212] 154 U.S. 1 (1894).

[213] *Id.* at 14.

[214] *Id*.

not subject to the same liabilities" as common carriers.[215] The key distinction between common carriers and telegraph companies: "telegraph companies are not bailees, in any sense."[216] Their customers entrust them with only "an order or message," which they do not "carr[y] in the form or characters in which it is received," but instead "translate[] and transmit[] through *different* symbols, by means of electricity."[217] Once the Court established these formal distinctions, it showed that telegraphs fail the functional test, too. The message they transmit "cannot be the subject of embezzlement," nor does it have any "intrinsic value."[218]

Since *Primrose* was decided 130 years ago, the standard has been consistent: businesses that transmit communications are not bound to insure what they transmit because they do not "carry" in the same sense as traditional [track one] common carriers. The Supreme Court cited *Primrose* eight times in the three decades after it was decided, always affirmatively. Then the case lay dormant for nearly a century until Justice Thomas returned to it in his *Biden v. Knight* concurrence.[219] His use of *Primrose* overlooks key distinctions important to our identification of common carriers today and so is worth further discussion.

Thomas cites *Primrose* to support the proposition that "there is clear historical precedent for regulating transportation and communications networks in a similar manner as traditional common carriers,"[220] but that broad representation of *Primrose* misses its meaning, almost to the point of contradicting it. Quoting from *Primrose*, Thomas argues that "telegraphs . . . because they 'resemble[d] railroad companies and other common carriers,' were 'bound to serve all customers alike, without discrimination.'"[221] But Thomas's edited quotation alters *Primrose*'s original meaning in two ways. First, by claiming that telegraphs were "bound to serve all" *because* they resembled common carriers, Thomas elides over the specific resemblance the *Primrose* Court named: telegraph companies and common carriers both exercise a public employment.[222] That is, the *Primrose*

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[215] *Id.* at 1101.

[216] *Id.* at 14.

[217] *Id.* (emphasis added).

[218] *Id.*

[219] Biden v. Knight First Amend. Inst. At Columbia Univ., 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring).

[220] *Id.*

[221] *Id.* (quoting *Primrose*, 154 U.S. at 14).

[222] Later in the *Primrose* opinion, the Court again states that those who "exercise[e] a public employment [must] serve all alike." *Primrose*, 154 U.S. at 22. The Court was following the precedent of *Budd v. New York*, 143 U.S. 517 (1892). *See Primrose*, 154 U.S. at 22 (citing *Budd* for the proposition that those "exercising a public employment" are bound "to serve all alike, without discrimination").

Court was showing that telegraphs are public accommodations.[223] They're bound to serve all not just because they resemble common carriers generally, but because they resemble common carriers *as public accommodations*. Second, Thomas's quotation overlooks the *Primrose* Court's point in drawing the analogy. The Court compared telegraphs with common carriers to set up the contrast that immediately followed: "But [telegraphs] are not common carriers."[224] Another way of stating the *Primrose* Court's meaning: Like common carriers, telegraphs are bound to serve all because they exercise a public employment, but this does not make them common carriers. Thomas's discussion of *Primrose* misses that meaning.

Next, in a footnote, Thomas mentions that "[the Supreme] Court has been inconsistent about whether telegraphs were common carriers" but claims that "the Court has consistently recognized that telegraphs were at least analogous enough to common carriers to be regulated similarly."[225] For the latter proposition, Thomas again cites to *Primrose*, but as I've just discussed, *Primrose* doesn't show that telegraphs are regulated like common carriers because they are "analogous enough." It shows that they have a duty to serve, like common carriers, because they are public accommodations. Put differently, telegraph companies are bound to serve all because of their actual status as public accommodations, not because of their likeness to traditional common carriers.

Thomas's claim that the Supreme Court has been inconsistent about telegraphs as common carriers can be easily resolved by the two-track theory. To support his claim, Thomas compares *Primrose* with *Moore v. New York Cotton Exchange*. In *Moore*, the Court claimed that a telegraph company, "[a]s a common carrier of messages for hire, . . . of course, is bound to carry for [all] alike."[226] Thomas interprets this as inconsistent with *Primrose*'s decision that telegraph companies are not common carriers. And he has a point if he's referring to consistent use of language. *Primrose* said telegraph companies are not common carriers; then *Moore* said they are. But in its actual analysis, the Court hasn't wavered. A telegraph company is bound to serve all, just as the *Moore* Court stated—whether because the company is a track two carrier, as discussed above,[227] or because it's a

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[223] As Thomas notes just two paragraphs later, public accommodations are "companies that hold themselves out to the public but do not 'carry' freight, passengers, or communications." *Primrose*, 154 U.S. at 14. Note that by including "communications" among the items that can be "carried," Thomas begs the question—the same question that the *Primrose* Court answered in the negative.

[224] *Primrose*, 154 U.S. at 14.

[225] *Id.* at 1223 n.2 (citing again to *Primrose* for the latter proposition).

[226] Moore v. New York Cotton Exch., 270 U.S. 593, 605 (1926).

[227] *See supra* notes 170 through 187 and accompanying text.

public accommodation, as the *Primrose* Court noted. But a telegraph company is not strictly liable as a "carrier" for the messages it sends. That hasn't been disputed since *Primrose*. The Court's language about telegraphs and common carriers has been inconsistent. Its analysis has not.

Precision could resolve the inconsistency in language. Using two-track terminology, the Court has a consistent position on telegraphs as common carriers: The typical telegraph company is not a track one carrier, but it is both a public accommodation and a track two carrier. As a result, typical telegraph companies (and their successor phone companies) are bound to serve all alike but are not strictly liable for the messages that run across their wires.

C. Clarity—Refining Common Carrier Definitions

Though the courts' early treatment of telegraphs began with confusion, those analyses result in clarity about the two tracks of common carrier doctrine. They help confirm and refine our analysis of common carriers in several important ways.

First, a track one carrier must be a bailee. It must be entrusted with goods that it would be capable of embezzling. Though telegraph companies bear a *resemblance* to traditional common carriers, several state courts and ultimately the Supreme Court held that they aren't common carriers because they don't have these features. The track one carrier test from *Ingate v. Christie* says "[i]f a person holds himself out to carry goods for everyone as a business . . . he is a [track one] common carrier."[228] The telegraph analysis helps define what it means to "carry goods." To "carry goods" means to transport *as a bailee*—to temporarily take possession of someone's property for the purpose of safe delivery.

Second, telegraph companies—and telecommunication companies more broadly—aren't track one carriers because they aren't bailees. This observation undermines any definition of common carriers that treats carriage of "communications" akin to carriage of freight or passengers.[229] Unless a communications provider takes custodial control of someone else's property for delivery, it is not acting as a track one carrier.[230]

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[228] *Id.* at 464.

[229] *See supra* note 223.

[230] This contradicts the definition provided in the Communications Act of 1934, which defines "common carriers" as carriers "in interstate or foreign communication by wire or radio." 47 U.S.C. § 153. Of course, Congress can provide its own definitions for words within statutes. But if a company's common carrier status at common law has constitutional implications, then Congress may not redefine the boundaries set by the common law. *See supra* note 27.

Third, and relatedly, a company is identified as a common carrier by its specific activity, not by its industry association. Courts decided (1) that telegraph and telephone companies are not track one carriers because they don't carry as bailees, (2) that they are track two carriers because of their acceptance of a government franchise, and (3) that they bear the responsibilities of public accommodations because they hold out to serve the public. None of these decisions relied on telegraph and telephone companies' general status as communications providers.

Fourth, the analysis of telegraph companies allows us to distinguish more carefully between three classes: track one carriers, track two carriers, and public accommodations. Much of today's confusion in identifying common carriers stems from the similarities between these three groups and the imprecise language that has been used to discuss them. For instance, when courts considered telegraph companies' duties, the courts noted how telegraphs are *like* common carriers[231] or are *quasi* common carriers.[232] Telegraph companies are like traditional [track one] common carriers because they engage in a public employment by holding out to serve the public generally. That makes them public accommodations. And they are *quasi* common carriers because of their status as track two carriers. But neither of these likenesses makes them track one carriers. A chart of the distinguishing characteristics of these three classes and their duties shows why the three are similar but why they are not the same.

Table 3: *Distinguishing track one carriers, track two carriers, and public accommodations*

	Identified by:			Duty:	
	Holding out	Carriage as a bailee	Government franchise	Serve all alike	Strict duty of care
Track one CC	X	X		X	X
Track two CC			X	X	
Public accommodations	X			X	

The chart shows why the two tracks of common carriers converged in railroads and became confused in telegraphs. The railroads check all three boxes for identification. When courts and scholars refer to them as common carriers, it may be because they hold out to carry goods for all or because they have accepted a government franchise. The telegraphs check the box to qualify as track two carriers—and so, they've properly been labeled "common carriers." But this brought confusion about why telegraph companies shouldn't be

[231] *See, e.g.*, *supra* note 186 and accompanying text.
[232] *See, e.g.*, *supra* note 183 and accompanying text.

strictly liable for customers' messages in transmission. And telegraphs check the box to be labeled as public accommodations. Because telegraphs are "common carriers" in one sense, this brought confusion about whether telegraphs' designation as common carriers has something to do with their holding out and their "carriage" of communication. It does not.

Railroads and telegraphs each complicated common carrier doctrine in their own way. Railroads most prominently brought the two tracks together, a convergence that may have blurred the lines between two distinct classes. Telegraphs demonstrated the confusion that results when a track two carrier or public accommodation could also be subject to the special liabilities imposed on track one carriers. But that confusion also helped to clarify the differences between track one carriers, on one hand, and public accommodations or track two carriers, on the other. Only bailees qualify as track one carriers. A business that holds out to serve the public but doesn't act as a bailee is a public accommodation. And one that accepts a government franchise is a track two carrier, regardless of its holding out or bailment.

If we were to stop here, the rules for identifying and regulating common carriers at common law would be clean and clear, even if new applications would continue to press their precise definitions. But the entire enterprise was distorted by *Munn v. Illinois*.

IV. DISTORTION—*MUNN V. ILLINOIS*

In *Munn v. Illinois*, the Supreme Court held that the state of Illinois could regulate grain elevators in the same manner as common carriers. But that decision had nothing to do with the definitions of track one and track two carriers developed to this point. Instead, the Court held that the grain elevators could be treated like common carriers because their business was "affected with a public interest."[233] The decision is unfortunate not because it permitted the regulation but because of its necessity, its reasoning, and its ongoing effect on common carrier analysis. The "affected with a public interest" doctrine articulated in *Munn* "is almost universally regarded as discredited."[234] In spite of that, it has continued to distort modern understandings of common carriers.

The *Munn* decision would have been unnecessary today. The state's authority to regulate grain elevators was only in question because of the different legal norms of the time. The case arose during

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[233] Munn v. Illinois, 94 U.S. 113, 130 (1876).

[234] Christopher S. Yoo, *Is There a Role for Common Carriage in an Internet-Based World?*, 51 HOUS. L. REV. 545, 554 (2013).

the early parts of what has become known as the *Lochner* era, when courts disfavored economic regulation of private business.[235] So to justify the state's regulation, the *Munn* majority sought to show that the grain elevators in question weren't wholly private. To do this, the Court analogized the elevators to common carriers, which "exercise a sort of public office."[236] Courts and scholars agree that the *Munn* majority's justifications would be unnecessary in the post-*Lochner* era.[237] For economic regulation decisions today, courts "substantially defer[] to the legislature[]."[238]

Munn also suffered from shoddy reasoning. In its effort to uphold Illinois's regulation in a *Lochner*-era paradigm, the majority relied on a flawed and overbroad reading of *Allnutt v. Inglis*[239] and Lord Hale's treatise on ports, *De Portibus Maris*.[240] Recall that in *Allnutt*, the royal court required the London Dock Company to charge reasonable rates at its warehouses because the company had been "invested with the monopoly of a public privilege."[241] The case is one of the earliest and most-cited examples of track two carrier regulation.[242] The *Munn* majority seized on a key line in *Allnutt*, which itself quotes from *De Portibus Maris*: "when private property is affected with a public interest it ceases to be *juris privati* only."[243] The Court then held that property "become[s] clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large."[244] By doing this, the Court ripped the

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[235] The period is marked by the *Lochner v. New York* holding that economic regulations violate substantive due process when they impair the freedom of contracting in private business. Lochner v. New York, 198 U.S. 45, 64 (1905), *overruled by* Day-Brite Lighting Inc. v. State of Mo., 342 U.S. 421 (1952), and *overruled by* Ferguson v. Skrupa, 372 U.S. 726 (1963), and *abrogated by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[236] *Munn*, 94 U.S. at 121.

[237] *See, e.g.*, Pub. Serv. Co. of New Mexico v. New Mexico Pub. Serv. Comm'n, 112 N.M. 379, 386 (1991) ("[T]he *Munn* public interest analysis has all but disappeared from the modern due process examination of economic regulation."); Yoo, *Is There a Role for Common Carriage in an Internet-Based World?*, *supra* note 234, at 556 ("The category of industries affected with a public interest is . . . best regarded as a Lochner-era concept whose relevance and legitimacy evaporated when the Court declined to subject economic regulation to invasive judicial review.").

[238] *Pub. Serv. Co. of New Mexico*, 112 N.M. at 386.

[239] Allnutt v. Inglis, (1810) 104 Eng. Rep. 206 (KB).

[240] Matthew Hale, *De Portibus Maris*, in FRANCIS HARGRAVE, COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND, FROM MANUSCRIPTS 45 (1787).

[241] *Allnutt*, 104 Eng. Rep. at 211.

[242] *See supra* notes 115 through 124 and accompanying text.

[243] *Munn*, 94 U.S. at 129 (quoting *Allnutt*, 104 Eng. Rep. at 542).

[244] *Id.* at 126.

phrase "affected with a public interest" from its context—a legal monopoly—and applied it with nearly limitless breadth.[245]

The majority came to this conclusion over the objections of Justice Field. His dissent discussed the facts of *Allnutt v. Inglis* at length to show that it stands for a much narrower proposition: "only where" a business enjoys "some privilege . . . bestow[ed] [by] the government" is it "affected with a public interest in any proper sense of the terms."[246] Field's conclusion endorsed the formal identification of track two carriers set forth throughout this essay: "It is the public privilege conferred with the use of the property which creates the public interest in it."[247] Unless a private company accepts a "public privilege" conferred by the government, that company is not "invested with a public interest" and is not a track two carrier.

Under the control of *Munn*, many courts abandoned the historical common carrier tests and resorted to a simplistic "public interest" analysis. For instance, the Nebraska Supreme Court held that a telephone company "has assumed the responsibilities of a common carrier of news"[248] when it "undertakes to supply a demand which is 'affected with a public interest.'"[249] Likewise, the Indiana Supreme Court cited *Munn* for its principal support when it held that "[t]he relations [a telephone company] has assumed towards the public make it a common carrier of news . . . and impose upon it certain well-defined obligations of a public character."[250] So too, the Maryland Supreme Court relied on *Munn* to compare telegraphs and telephones to railway companies, and common carriers generally,

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[245] The *Munn* majority also directly cited a section of *De Portibus Maris* that explains when a wharf may be regulated. A wharf may be regulated if it is "a public wharf, unto which all persons that come to that port must come . . . ." *Id.* at 127. Hale specifies two ways the wharf may end up with this monopoly. The first is via legal monopoly—"because they are the wharfs only licensed by the queen." *Id.* The second, on the surface, appears to provide a natural monopoly justification—"because there is no other wharf in that port." *Id.* But this interpretation is again the result of ripping the line from its context. As Justice Field's dissent notes, Hale's comments were about public wharves, not about wholly private property. *Munn*, 94 U.S. at 151 (Field, J., dissenting). Earlier in the treatise, Hale had already established that the king is the *prima facie* owner of the ports of the sea. *See* Matthew Hale, *De Jure Maris*, *in* HARGRAVE, *supra* note 240, at 17. And he had explained that the port "include[d] more than the bare place where the ships unlade." HALE, *De Portibus Maris*, *supra* note 240, at 46. It included also the "keys and wharfs and cranes and warehouses and houses of common receipt." *Id.* So when Hale discussed wharves and cranes in a port that had only one wharf, he was discussing property built on the king's *prima facie* property. He was not making a general pronouncement about wholly private property becoming public on a theory of market power. *See generally* Breck P. McAllister, *Lord Hale and Business Affected with a Public Interest*, 43 HARV. L. REV. 759 (1930) (discussing the meaning of "affected with a public interest" in the context of Hale's treatise).

[246] *Munn*, 94 U.S. at 152 (Field, J., dissenting).

[247] *Id.*

[248] State ex rel. Webster v. Nebraska Tel. Co., 17 Neb. 126 (1885).

[249] *Id.*

[250] Hockett v. State, 105 Ind. 250 (1886).

because "their service . . . has become indispensable to the commercial and business public."[251] *Munn* had turned the common carrier test into a judge's decision about a business's importance.

As Justice Thomas noted in his *Biden v. Knight* concurrence, the generic "public interest" analyses that spring from *Munn* are "hardly helpful, for most things can be described as 'of public interest.'"[252] Indeed, the Supreme Court abandoned the "public interest" definition nearly a century ago in *Nebbia v. New York*.[253] After an extended analysis of *Munn*, the Court held that "'affected with a public interest' is the equivalent of 'subject to the exercise of the police power'; and it is plain that nothing more was intended by the expression."[254] And so we're left with two options: we can say that all businesses subject to the exercise of the police power are common carriers, or we can separate the broad use of "affected with a public interest" from common carrier analysis altogether. The latter is the obvious choice.[255]

Sadly, though the Supreme Court long ago dispensed with *Munn* and the "public interest" line of cases it begat, those cases have continued to distort common carrier analysis. In a portion of his *NetChoice* opinion described as "a brief primer on the history of common carrier doctrine,"[256] Judge Andrew Oldham focused nearly half of his discussion (7 of 15 paragraphs) on *Munn* and its progeny, all as positive examples of the doctrine's development.[257] He used this

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[251] Chesapeake & P. Tel. Co. v. Baltimore & Ohio Tel. Co., 66 Md. 399 (1887).

[252] Biden v. Knight First Amend. Inst. At Columbia Univ., 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring).

[253] Nebbia v. People of New York, 291 U.S. 502 (1934).

[254] *Id.* at 533.

[255] It's important to note here that common carriers are still subject to different rules of rate regulation than other private businesses in the post-*Lochner* era, even though legislatures now have broad latitude to regulate private business. The Court in *Munn* used a common carrier-like rationale to justify the *legislature*'s authority to regulate grain elevators, but common carrier doctrine opens carriers to common law regulation by *courts*, not just to regulation by legislatures. And so, if we were to class all businesses "subject to the exercise of police power" with common carriers, we would be subjecting all of those businesses to rate regulation not just by legislatures, but by the courts.

Separation of powers explains why courts have had common law authority over common carrier rates. Consider a legislature that grants a franchise to a business—whether by legal monopoly or eminent domain power—but then doesn't regulate that business's rates. The business could charge such exorbitant rates as to exclude all but a few. In that case, the legislature could be accused of bestowing public property on private businesses that give no reciprocal public benefit. We avoid that problem because courts are authorized to require reasonable rates in these cases.

[256] NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 469 (5th Cir. 2022), *cert. granted in part sub nom.* Netchoice, LLC v. Paxton, 216 L. Ed. 2d 1313 (Sept. 29, 2023).

[257] *Id.* at 471-73. Starting with the paragraph that begins "Courts applied this . . .," paragraphs 1 and 3 rely on *Webster*, *see supra* notes 248 through 249 and accompanying text; paragraph 2 relies on a block quote from *Hockett*, *see supra* note 250; paragraphs 4-6 rely directly on *Munn*;

historical primer to establish that social media platforms are common carriers "because the Platforms . . . are affected with a public interest."[258] But the Supreme Court has not cited *Munn* for the proposition that a business "affected with a public interest" is a common carrier since *Nebbia* dispensed with that fallacy ninety years ago.

Munn's common carrier test belongs in the dustbin of history—or referenced only as an example of how common carrier doctrine went astray. This doesn't mean we should dispense with language about businesses "invested with a public interest." That language has a long history for identifying track two carriers. But it applies only to companies that accept the privilege of a monopoly or accept property bestowed by the government and thus become "invested with a public interest."[259]

V. COMMON CARRIERS BACK ON TRACK

Modern technology has posed new problems for common carrier regulation. Courts have struggled to properly identify common carriers and to determine how they may be regulated. In this section, I apply the track one and track two tests to consider whether four modern businesses—broadcasters, cable operators, ISPs, and social media platforms—should be classed with common carriers. If so, I discuss the regulatory implications.

Because companies in each of these industries may claim to be speaking when they exercise "editorial discretion," their First Amendment protections could be in question. If they're merely public accommodations but not common carriers, we know they enjoy full First Amendment protection when courts decide that they're speaking.[260] But if courts determine that the businesses are common carriers, we have no certainty about how that status affects their First Amendment protections.[261]

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and after a digression about *Lochner*-era treatments of traditional common carriers in paragraph 7, paragraph 8 again relies on application of "affected with a public interest" to various industries.

[258] *Id.* at 473.

[259] *See* Section I.B.

[260] *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 592 (2023) ("When a state public accommodations law and the Constitution collide, there can be no question which must prevail.").

[261] When the D.C. Circuit denied an en banc rehearing for a decision that upheld the 2015 Open Internet Order (known as the net neutrality rule), Judge Garland's concurrence suggested that internet service providers engaged in content curation could be protected by the First Amendment, even though they're common carriers. United States Telecom Ass'n v. Fed. Commc'ns Comm'n, 855 F.3d 381, 393 (D.C. Cir. 2017) (Garland, J., concurring in the denial of rehearing en banc). But the court didn't directly address the issue because it was considering only services that held out to provide "neutral and indiscriminate access to all internet content." *Id.* For a discussion of three ways courts could decide the First Amendment applies to common carriers, *see supra* notes 22 through 26 and accompanying text.

As we begin to assess these new technologies as common carriers, recall the two-track theory for how each is identified and regulated. The table now includes a column for First Amendment protection.

Table 4: *Identifying carriers and their First Amendment protections*

	Identified by:			**Duty:**		**Rights:**
	Holding out	Carriage as a bailee	Acceptance of a government franchise	Duty to serve all	Strict duty of care	Protected by the First Amendment
Track one carriers	X	X		X	X	?
Track two carriers			X	X		?
Public accommodations	X			X		X

A. Broadcast & Cable

The Supreme Court's landmark decisions in the *Turner Broadcasting Systems v. F.C.C.* cases considered whether Congress could require cable operators to carry local broadcast television stations.[262] Those cases didn't consider whether cable operators or broadcasters are common carriers. Instead, the Court conducted a First Amendment "intermediate scrutiny" analysis.[263] Even so, the cases provide a helpful starting point for the common carrier assessment.

We should first address a misunderstanding about common carriers in the *Turner* cases. They were mentioned only once in any of the opinions—in a partial concurrence from Justice O'Connor. She suggested that "Congress might . . . conceivably obligate cable operators to act as common carriers for some of their channels."[264] For support, she claimed "that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies."[265] But this misses the structure of the relationship.

[262] Turner Broad. Sys., Inc. v. F.C.C. (*Turner I*), 512 U.S. 622 (1994); Turner Broad. Sys., Inc. v. F.C.C. (*Turner II*), 520 U.S. 180 (1997).
[263] *Turner I*, 512 U.S. at 662; *Turner II*, 520 U.S. at 189.
[264] *Turner I*, 512 U.S. at 684 (O'Connor, J., concurring in part and dissenting in part).
[265] *Id.*

Congress has power to "demand that telephone companies operate as common carriers" only because telephone companies are, in fact, common carriers. More specifically, they're track two carriers. They developed their networks by accepting access to public property from the government, and so they have a reciprocal duty to serve the public on equal terms. In short, telephone companies are common carriers at common law, so Congress (and courts, regardless of Congress) can require them to operate as common carriers. But Congress can't obligate *any* business to operate as a common carrier, especially not if doing so would alter its constitutional rights.

What Justice O'Connor could have said: *Cable companies share the features that make telephone companies common carriers – they've accepted a public franchise of access to public property. For that reason, Congress and the courts can regulate them in the same manner as they regulate telephone companies.* But even if she had said this, common carrier regulation wouldn't reach the "must-carry" rules at issue in the *Turner* cases. The analysis that follows explains.

Neither broadcasters nor cable television providers qualify as track one carriers according to the tests provided above. But both are track two carriers and public accommodations. As track two carriers and public accommodations, they should be required to serve all comers on equal terms, but that wouldn't require them to follow "must-carry" rules like those discussed in the *Turner* cases.

First, apply the track one test. To meet this test, broadcasters and cable operators would have to hold out to safely deliver property as a bailee. Neither business meets that test. They send signals across airwaves and wires in a similar manner as telegraph and telephone companies. The Supreme Court's reasoning in *Primrose*, where it held that telegraph companies aren't track one carriers, applies nearly verbatim. Broadcasters and cable operators "are not bailees, in any sense."[266] The programs they transmit "cannot be the subject of embezzlement."[267] Thus, they "are not [track one] common carriers."[268] Though they "resemble railroad companies and other common carriers" because of their engagement in commerce and their "public employment," which binds them "to serve all customers alike,"[269] they "are not subject to the same liabilities" as track one carriers.[270]

Instead, broadcasters and cable operators can be classed with public accommodations. They hold out to serve the public generally

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[266] Primrose v. W. Union Tel. Co., 154 U.S. 1, 14 (1894).
[267] *Id.*
[268] *Id.*
[269] *Id.*
[270] *Id.*

but don't "carry" as bailees. This can subject them to a duty to serve if required by statute. I detail that duty below.

Next, apply the track two test. Cable companies are track two carriers for the same reason that water and telegraph companies are. All three require a government franchise of eminent domain or public rights-of-way to extend their networks.[271] When cable operators send a signal over the wires they've run across public property, they engage in common carrier activity in the same way that water, telegraph, and telephone companies do.

The analysis of broadcasters is more complicated, but it comes to the same conclusion. Like cable companies, broadcasters depend on "rights-of-way," but theirs are for intangible and invisible broadcast frequencies, not tangible public property. Even though broadcast frequencies differ from tangible property, the Supreme Court's analysis demonstrates why a license to broadcast across these frequencies should be considered equivalent to a public right-of-way. The number of available frequencies on the electromagnetic spectrum is scarce,[272] and each frequency requires exclusive control by a single broadcaster.[273] As a result, the government must "assign specific frequencies to particular broadcasters."[274] And so, just as government franchises grant water, telegraph, and cable companies access to property they don't own, the government also grants broadcasters access to radio frequencies they don't own. When broadcasters use these frequencies for their business, they act as track two carriers.

The functional logic that gave rise to track two carrier regulation justifies including broadcasters. When the broadcasters received access to a public resource, they made an implicit agreement to serve the public. Here, the scarcity of the airwaves is significant. Consider an alternative circumstance: if the government allocated a scarce public resource to private companies but didn't require them to serve all comers equally. In that case, some people could be prevented from accessing either the scarce public resource or the benefits that should flow to the public when someone else has received access instead. Physical scarcity creates this issue. Without scarcity, no one's access would be contingent on another's, and we might question whether the government should regulate access to the resource at all.[275]

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[271] *Turner II*, 520 U.S. at 227 (Breyer, J., concurring in part) ("[A] cable system [is] physically dependent upon the availability of space along city streets.").

[272] *Turner I*, 512 U.S. at 637 ("[T]here are more would-be broadcasters than frequencies available.").

[273] *Id.* ("[I]f two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another's signals, so that neither could be heard at all.").

[274] *Id.*

[275] We know this intuitively. Congress couldn't franchise to all companies the right to use the oxygen in the air as a ploy to subject all companies to the status of track two carriers.

Now consider *how* broadcasters and cable operators may be regulated as track two carriers. They must provide their services on equal terms to anyone willing to pay the reasonable fee they set. If they deny anyone equal access or subject anyone to unreasonable fees, that person could bring a common law claim against them. Imagine a cable operator charging such exorbitant fees that only the wealthiest could have access—or using its terms of service in a way to discriminate against a certain class of applicants. Both circumstances would provide a cause of action at common law.

But now consider the "must-carry" laws from the *Turner* cases. Those laws "require[d] cable television systems to devote a portion of their channels to the transmission of local broadcast television stations."[276] The "must-carry" laws didn't require cable companies to give equal service to all applicants. Instead, the laws required cable companies to give *favorable* service to one set of applicants—local broadcast stations. Even more, given that the local stations weren't paying customers, we should question whether those stations would benefit from the carriers' duty to serve at all. Common carrier doctrine ensures the public equal access to a track two carrier's services. Nothing in the doctrine's historical development shows that a track two carrier must provide equal opportunity to all potential suppliers. Common carriers provide equal access to paying *customers*, not to *suppliers*.[277] In sum, even though broadcasters and cable operators are track two carriers, their status doesn't justify the kind of "must-carry" provisions considered in the *Turner* cases.[278]

B. ISPs

Most federal cases about the status of internet service providers (ISPs) as common carriers have focused on whether they're common carriers according to the Communication Act.[279] There, Congress provided that a "telecommunications carrier" as defined by the act

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[276] *Turner I*, 512 U.S. at 626.

[277] When television networks pay cable companies to be included in the cable package, they could qualify as customers rather than suppliers. The "must-carry" laws would have aligned with common carrier doctrine if they had required the cable companies to allow local stations to participate by paying the same rate as other stations paid. But in that case, no law would have been necessary. Common carrier doctrine would have authorized courts to impose that obligation.

[278] This article makes no claim about whether the "must-carry" provisions might be otherwise constitutional, only that they can't be justified under common carrier doctrine.

[279] *See, e.g.*, United States Telecom Ass'n v. Fed. Commc'ns Comm'n, 825 F.3d 674, 711 (D.C. Cir. 2016) (upholding the FCC's reclassification of broadband Internet as a "telecommunications service" subject to common carrier regulation under the Communication Act); Mozilla Corp. v. Fed. Commc'ns Comm'n, 940 F.3d 1, 35 (D.C. Cir. 2019) (upholding the FCC's reclassification of broadband Internet as an "information service" not subject to common carrier regulation under the Communication Act).

"shall be treated as a common carrier *under this chapter* only to the extent that it is engaged in providing telecommunications services."[280] Because this article concerns the common law definition of common carriers, this section won't focus on Congress's definitions and courts' decisions about common carriers under the Communication Act.[281] Still, some of these cases are significant because they also refer to "the common law test for a per se common carrier obligation."[282] The D.C. Circuit summarized its understanding of the common law test in *Verizon v. F.C.C.* Notice how its definition relies exclusively on the "holding out" element:

> In *NARUC I*, we identified the basic characteristic that distinguishes common carriers from "private" carriers—i.e., entities that are not common carriers—as "the common law requirement of holding oneself out to serve the public indiscriminately." "A carrier will not be a common carrier," we further explained, "where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal." Similarly, in *NARUC II*, we concluded that "the primary *sine qua non* of common carrier status is a quasi-public character, which arises out of the undertaking to carry for all people indifferently."[283]

Likewise, when then-Judge Kavanaugh objected that common carrier regulation would prevent ISPs "from exercising editorial control over the content they transmit,"[284] Judges Srinivasan and Tatel used the "holding out" definition to respond. They justified the regulation because "the rule applies only to ISPs that represent themselves as neutral, indiscriminate conduits to internet content."[285]

According to the D.C. Circuit's logic in the above cases, only an ISP that "holds out" to serve indiscriminately can be required to serve indiscriminately. But this confuses track one and track two. The holding out standard would fail to identify any track two carriers. When the D.C. Circuit uses the standard as "the primary *sine qua non* of common carrier status," it's bound to come to the wrong conclusions. This is not because the "holding out" test has no value, as some have asserted, but because it's being used in the wrong context.

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[280] 47 U.S.C. § 153(51) (emphasis added).

[281] See *supra* note 27 for explanation about why this article focuses on common law definitions.

[282] *United States Telecom Ass'n*, 825 F.3d at 695.

[283] Verizon v. F.C.C., 740 F.3d 623, 651 (D.C. Cir. 2014) (cleaned up).

[284] United States Telecom Ass'n v. Fed. Commc'ns Comm'n, 855 F.3d 381, 418 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

[285] *Id.* at 392 (Garland, J., concurring in the denial of rehearing en banc).

1. Why the "holding out" test still works, but not for ISPs

The D.C. Circuit's "common law test" risks under-identification of common carriers. Because the D.C. Circuit's standard relies on whether a company "holds out" to "carry for all people indifferently," it provides an easy out. If a company doesn't want to be regulated as a common carrier, it must simply hold itself out as a *non*-neutral conduit or as *not* offering its services indiscriminately. The problem has led scholars to call the "holding out" justification "conspicuously empty"[286] and "eas[ily] . . . evaded."[287] However, the real problem isn't that the "holding out" test is empty, but that it's the improper common carrier test for this situation.

The "holding out" test functionally makes sense for innkeepers and carriers of goods, but it makes no functional sense for deciding whether an ISP is a common carrier. Recall that the historical function of track one carrier regulation was to protect vulnerable travelers and shippers of goods.[288] The "holding out" test is far from empty in these cases. As a matter of public policy, common law courts decided that travelers must receive indiscriminate hospitality and lodging at any place that holds itself out as serving the public (as distinguished from those that only provided a room by advance arrangement).[289] Without this protection, travelers risked being stranded. They had a reliance interest in the innkeeper's good faith.[290] Similarly, the "holding out" test required those who offered to carry others' goods to serve as insurers of those goods. This protected anyone who shipped something without a private contract. Without a contract, anyone who used "common" rather than "private" carriers was vulnerable to embezzlement.[291] But this kind of test doesn't fit for ISP customers. They aren't vulnerable to embezzlement like people who ship goods, nor are they vulnerable to being left stranded on the road as travelers may have been if an innkeeper turned them away.[292]

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[286] Thomas B. Nachbar, *The Public Network*, 17 COMMLAW CONSPECTUS 67, 93 (2008).

[287] Yoo, *The First Amendment, Common Carriers, and Public Accommodations*, *supra* note 32, at 475.

[288] *See* Burdick, *supra* note 29.

[289] *See supra* notes 72 through 80 and accompanying text.

[290] *See supra* note 76 and accompanying text.

[291] *See supra* notes 86 through 93 and accompanying text.

[292] Perhaps some would argue that in an information society, deprivation of Internet access is a vulnerability akin to a traveler being left stranded on the road. But this logic faces two problems. First, public policy arguments alone are insufficient. Even though public policy could have justified many other needs in the 19th century, common law courts confined track one carrier regulation to innkeepers and carriers of goods and passengers. Second, if courts are authorized to identify new businesses as common carriers on a public policy justification, we return to the *Munn* era and the "affected with a public interest" test. By doing so, we create an

If the "holding out" test were the proper test for ISPs as common carriers, then they could easily evade the status in a way that innkeepers couldn't, and their evasion would have different consequences than for private carriers of goods. Consider the difference with innkeepers first. Inns provided short-notice lodging to travelers and would have been unable to engage in advance, individualized bargaining. Instead, they had to advertise their services to the public—to traveling strangers. For inns to work as a business, innkeepers relied on doing business with the public without advance contracting, just as travelers relied on the inns to avoid being stranded. Thus, inns had to "hold out" to function, and courts decided that travelers should be able to rely on that as a promise of indiscriminate service. Because ISPs don't rely on the same short-notice bargaining for their business, they might feasibly opt for making private, advance agreements with customers. By the logic of the "holding out" standard, they could avoid common carrier status in a way that innkeepers couldn't.

Next, consider the difference between ISPs and carriers of goods. A delivery company can evade common carrier status by engaging only in individualized bargaining. It would be a private carrier instead. But acting as a private carrier doesn't allow a carrier to evade responsibility for the goods it carries. Instead, it shifts the decision about the carrier's liabilities to the private bargaining process.

Could ISPs operate like private carriers—offering only individualized contracts—and so choose which customers to serve and which to decline? If we apply the "holding out" test, we might say they could. But this is wrong. A private carrier can evade common carrier regulation, but an ISP shouldn't be able to. The reason is found not on track one but on track two. Many delivery companies aren't track two carriers.[293] ISPs are.

2. *Why ISPs are track two carriers and how they should be regulated*

The logic for ISPs as track two carriers is no different than the logic for cable companies and broadcasters.[294] When ISPs accept a

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ambiguous and open-ended test for which businesses may be subject to different common law duties—duties which may override those businesses' claims of constitutional rights. To go this far, courts would have to decide that their subjective public policy determinations are sufficient to override individuals' rights under the Constitution.

[293] The Maine log driving company that accepted a legal monopoly to drive all the logs in the area provides an exception. That company wasn't able to act as a private carrier and choose its customers. But the reason was its track two carrier status—it had accepted the franchise of a legal monopoly—not its track one carrier status. *See supra* notes 125 through 127 and accompanying text .

[294] *See supra* notes 271 through 275 and accompanying text.

public right-of-way to lay cable or a license to transmit across public radio frequencies, they accept access to public property.

Like all track two carriers, ISPs must serve the public indiscriminately in exchange for the public franchise they receive. But just as the "must-carry" provisions considered in the *Turner* cases fell outside the duties of a common carrier,[295] the "net neutrality" provisions considered by the D.C. Circuit also aren't justified by common carrier regulation. Once again, the track two carrier has a duty to provide indiscriminate access to its services. It doesn't have a duty to accept all suppliers indiscriminately nor to provide a service different from the one that it has chosen to provide.[296] By this standard, an ISP couldn't turn away a paying customer but could select which websites to provide access to.

The analysis changes in two situations. First, websites and streaming services become customers if ISPs charge them a fee for being included in the plan or for having their speed enhanced. In that case, ISPs would bear a duty to serve all websites indiscriminately. This wouldn't prevent ISPs from enhancing the speeds of some paying services, but the ISPs would have to offer that service equally to all comers. Second, if an ISP is the only one that has received a franchise in a certain area, it may not be allowed to alter its services by blocking access to some websites. This would be a situation akin to one Lord Ellenborough described in *Allnutt v. Inglis*.[297] He wondered whether the only company with a franchise to warehouse wines could choose to stop warehousing wines and devote its buildings to another purpose. He concluded that they could not. His words may apply equally for ISPs: "as long as [an internet service provider] [is] the only place[] which can be resorted to for [internet access], they are bound to let [customers] have the use of [their services]" for that purpose.[298] Once a company has received a franchise with a collateral duty to the public, it can't alter its business offerings in a way that would leave the public without service.

In short, the duty to serve doesn't require an ISP to transmit all websites to all customers at the same speed. Hotels can charge different rates for different rooms. Telephone companies can charge different rates for different distances. Cable operators can charge different rates for access to different packages—both for viewing customers and network providers. What none can do is provide the *same* service

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[295] *See supra* notes 276 through 278 and accompanying text.

[296] If a company's acceptance of a franchise was conditioned on an explicit agreement about the service the company would provide, that would create a different outcome. But then, it would be required to offer that particular service not because of its status as a common carrier but because of its contractual obligation according to the franchise.

[297] *See supra* notes 123 through 124 and accompanying text.

[298] *See supra* note 124 and accompanying text.

under different terms depending on the applicant—or deny service on reasonable terms to any applicant. So here, common carrier regulations wouldn't prevent ISPs from providing different speeds of service depending on what a subscriber or network provider is willing to pay. They must only ensure that all potential subscribers and streaming services have access to the same bargain.

C. Social Media Platforms

Social media platforms aren't common carriers according to the historical tests presented above. They plainly fail the track one test. They only pass the track two test if it's stretched beyond its historical bounds. The two most prominent decisions by federal courts on the subject have come to opposite conclusions, but both courts missed the mark in their analysis. In this section, I'll briefly explain how the 11th and 5th Circuits used faulty reasoning to decide whether social media platforms are common carriers, then I'll apply the track one and track two tests to show why the platforms fit neither.

1. How the 11th and 5th circuits erred

In the 11th Circuit's *NetChoice* case, Judge Kevin Newsom came to the right conclusion but with flawed reasoning. The court held that social media platforms aren't common carriers "for at least three reasons."[299] But none of those reasons answered the right question.

The first and third justifications Newsom supplied answered whether social media platforms are common carriers under chapter 47 of the U.S. Code, not whether they're common carriers at common law. Newsom first relied on a Supreme Court interpretation of the Communications Act of 1934 to decide that the platforms hadn't acted as common carriers "[i]n the communications context."[300] Then he cited the Telecommunications Act of 1996 to show that "Congress has distinguished internet companies from common carriers."[301]

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[299] NetChoice, LLC v. Att'y Gen., Fla. (*NetChoice I*), 34 F.4th 1196, 1220 (11th Cir. 2022), *cert. granted in part sub nom.* Moody v. Netchoice, LLC, 216 L. Ed. 2d 1313 (Sept. 29, 2023), and *cert. denied sub nom.* NetChoice, LLC v. Moody, 144 S. Ct. 69, 217 L. Ed. 2d 9 (2023).

[300] *Id.* (quoting FCC v. Midwest Video Corp., 440 U.S. 689, 701 (1979) (defining "common carrier" according to § 3(h) of the Communications Act of 1934)). The case Newsom referenced supports its definition by citing Nat'l Ass'n of Regul. Util. Comm'rs v. F.C.C., 525 F.2d 630 (D.C. Cir. 1976). And there, the definition derives from a common law analysis. *Id.* at 640. So it could be argued that, in a convoluted way, Newsom relies on the D.C. Circuit's interpretation of the common law meaning of "common carrier." Even if so, that interpretation has been discredited above. *See* Section IV.B.

[301] *Id.*

But Newsom was looking for answers in the wrong place. Chapter 47 of the U.S. Code says nothing about whether state legislatures and courts may regulate a business as a common carrier. The chapter is about FCC regulatory authority, not states' authority.[302] And the definitions of common carriers there apply only "[f]or purposes of [that] chapter."[303] They don't define common carriers at common law. Newsom provided a good discussion about whether the FCC may regulate social media platforms under the Communications Act of 1934 and the Telecommunications Act of 1996, but he failed to answer the common law question.[304]

Newsom's other rationale proved no more helpful. For that, he relied on the Supreme Court's First Amendment scrutiny in two cases that didn't mention common carriers in their majority opinions.[305] He used those cases to determine that social media platforms enjoy First Amendment speech protections.[306] Though the answer to that question is important, it isn't an answer to whether social media platforms are common carriers.[307]

By contrast, in a portion of his 5th Circuit *NetChoice* opinion that the other panelists declined to join, Judge Oldham rightly looked to the historical common law development. But then he got the history wrong and came to the wrong conclusion. Oldham provided three reasons for classifying social media platforms as common carriers: "[they] are communications firms, hold themselves out to serve the public without individualized bargaining, and are affected with a public interest."[308]

Oldham's reasoning on all three points engaged in the "historical amnesia" he accused the platforms of.[309] Because this article has already exposed the historical flaws in each of his arguments, they

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[302] 47 U.S.C. § 151 ("[T]he 'Federal Communications Commission' . . . shall execute and enforce the provisions of this chapter.").

[303] 47 U.S.C. § 153.

[304] The distinction matters especially for cases like the 11th Circuit's *NetChoice* case, where constitutional protections are being considered. Congress may define statutory terms as it chooses, but a statutory definition can't alter an entity's constitutional rights and duties. So chapter 47 defines whether the FCC may regulate social media platforms as common carriers *up to the point* that it does not alter their constitutional rights and responsibilities. *See supra* note 27.

[305] *NetChoice I*, 34 F.4th at 1220 (discussing Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622 (1994) and Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997)).

[306] *Id.*

[307] Perhaps the 11th Circuit presupposed that a common carrier isn't protected under the First Amendment, and so, if social media platforms are protected, they must not be common carriers. But this reasons backward without first establishing whether common carriers as a class are unprotected by the First Amendment.

[308] NetChoice, L.L.C. v. Paxton (*NetChoice II*), 49 F.4th 439, 473 (5th Cir. 2022), *cert. granted in part sub nom.* Netchoice, LLC v. Paxton, 216 L. Ed. 2d 1313 (Sept. 29, 2023).

[309] *See id.* at 474.

needn't be rehashed in full again here. Instead, I provide summary statements with citations back to the extended discussion on each point.

First, simply operating as a communications firm doesn't set a business apart as a common carrier.[310] Though most communications firms have historically been track two carriers due to their use of public property, they were common carriers for that reason, not because they "carried" communications.[311]

A company also isn't a common carrier just because it holds out to serve without individualized bargaining. That would make all public accommodations common carriers. To be a track one carrier, a business must hold out to serve *and* act as a bailee.[312] By itself, the element of holding out denotes only a public accommodation.[313]

Finally, the broad "affected with a public interest" standard was dismissed by the Supreme Court nearly a century ago, was dismissed again by Justice Thomas in 2021, and has no greater favor among scholars today.[314] None of Oldham's three standards for identifying a common carrier was specific enough or aligned with the historical development of the doctrine. As a result, he misidentified the platforms as common carriers.

Oldham's opinion also rejected two important counterarguments from the platforms—arguments that properly understood the doctrine's historical development. The platforms argued that they aren't common carriers because they aren't bailees (a track one argument) and because they haven't accepted a government franchise (a track two argument).

Against the platforms' track one argument, Oldham claimed that common carrier doctrine doesn't distinguish "between *literal* 'carriage' and the processing of data."[315] He called the distinction a "wooden metaphysical literalism"[316] that would make it impossible for telephones and telegraphs to "[]ever have been regulated as common carriers."[317] But his analysis ignored the historical rationale for regulating track one carriers differently—bailees' unique opportunity to embezzle others' goods.[318] That distinction shows why literal carriage historically led to a different regulatory regime. It's a key component of the doctrine, hardly a "wooden metaphysical

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[310] *See supra* notes 212 through 232 and accompanying text.
[311] *See* Section II.B.
[312] *See supra* notes 212 through 218 and accompanying text.
[313] *See* Section I.A, especially *supra* notes 69 through 71 and accompanying text.
[314] *See supra* notes 234 and 252 through 255 and accompanying text.
[315] *NetChoice II*, 49 F.4th at 478.
[316] *Id.*
[317] *Id.*
[318] *See supra* notes 86 through 88 and accompanying text.

literalism." Even more, Oldham missed that the Supreme Court drew this distinction in a case about telegraphs—holding that they are *not* traditional [track one] common carriers and thus aren't strictly liable for their transmissions.[319] That case is still good law. Because Oldham's discussion of telegraph cases focused solely on cases influenced by *Munn*,[320] he missed that courts historically distinguished between telegraphs and traditional common carriers.[321] He also missed that telegraphs and telephones *can* still be regulated as common carriers—but because of track two reasoning, which has nothing to do with holding out or physical carriage.[322]

Against the platforms' track two argument, Oldham called the franchise theory "obviously wrong."[323] But for support, he relied exclusively on the *Munn* distortion.[324] First, Oldham cited for support a portion of Lord Hale's *De Portibus Maris* quoted in *Munn*.[325] In that passage, Lord Hale states that if a port contains only one wharf, that wharf is "affected with a public interest" and bound to serve all.[326] Oldham used that line, along with a *Munn*-era case, to claim that "American courts . . . did not require a government-conferred monopoly."[327] But he misunderstood the meaning of *De Portibus Maris* in its context, just as the *Munn* majority did. Lord Hale was writing about property that belonged *prima facie* to the king, not about wholly private property.[328] That single line—ripped from its context in Hale's treatise on ports—doesn't do the heavy lifting the *Munn* majority and Oldham have needed it to do. Without it, they have no evidence of an earlier court imposing common carrier regulations on a business solely because of its market power.

Oldham was technically correct—American courts haven't always "require[d] a government-conferred monopoly" to impose common carrier regulation. But this is only so because of the *Munn* distortion, which came late in the development of common carrier doctrine and was properly dispensed with ninety years ago in

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[319] Primrose v. W. Union Tel. Co., 154 U.S. 1, 14 (1894). See *supra* notes 212 through 227 for the full discussion.

[320] *See supra* notes 256 through 257 and accompanying text.

[321] *See supra* notes 197 through 218 and accompanying text.

[322] *See supra* notes 176 through 186 and accompanying text.

[323] *NetChoice II*, 49 F.4th at 476.

[324] See Part III for the *Munn* distortion, generally. See *supra* notes 256 through 258 for Oldham's historical reliance on the *Munn* distortion.

[325] *NetChoice II*, 49 F.4th at 476.

[326] HALE, *De Portibus Maris*, *supra* note 240, at 77.

[327] *NetChoice II*, 49 F.4th at 476. The other *Munn*-era decision Oldham cited for support was *Webster v. Nebraska Tel. Co.*, 17 Neb. 126 (1885). See *supra* notes 248 through 249 for discussion of *Webster*.

[328] *See supra* note 245.

Nebbia.[329] Because "[t]he common carrier doctrine is a body of common law dating back long before our Founding,"[330] Oldham's analysis erred by picking a discredited post-14th Amendment case and its short line of successors to represent the whole field.

Finally, Oldham claimed that even if the franchise theory is correct, the platforms are common carriers because "the government *has* conferred a major benefit on the Platforms by enacting § 230."[331] This is the most plausible justification Oldham provided. I'll consider it in the track two analysis below.

2. *Applying the track one and track two tests to platforms*

The track one test for social media platforms is as straightforward as it was for cable operators, broadcasters, and ISPs.[332] They "are not bailees, in any sense,"[333] and the messages they transmit "cannot be the subject of embezzlement."[334] They fail the formal and functional tests for track one carriers. Even if digital transmissions did qualify—if telegraphs, broadcasters, and ISPs were all regulated as track one carriers—it still wouldn't be obvious that social media platforms should be included. Track one carriers have been historically regulated to ensure that they fulfill their promise of safe delivery.[335] But what "safe delivery" of messages do social media platforms promise? Because they don't guarantee that any particular users will see any particular post, even the basic element of guaranteed delivery seems lacking.[336]

If courts determine that social media platforms hold themselves out to serve the public, that would be sufficient to regulate them as public accommodations, but it's not enough to regulate them as track one carriers. For that, they would need to physically carry.[337]

The track two test is more complicated. Social media platforms haven't accepted a government franchise in any of the three forms that historically made a business into a common carrier.[338] They

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[329] *See supra* notes 253 through 254 and accompanying text.
[330] *NetChoice II*, 49 F.4th at 469.
[331] *Id.* at 477.
[332] *See supra* notes 256 through 260 and accompanying text (cable and broadcast) and notes 286 through 293 and accompanying text (ISPs).
[333] Primrose v. W. Union Tel. Co., 154 U.S. 1, 14 (1894).
[334] *Id.*
[335] *See supra* tbl.2 and surrounding text.
[336] This is already an exercise in imagination. But under these imagined conditions where a bailment doesn't matter, the platforms could be subject to regulation of their direct messaging functions but not their public posting functions. The direct messaging function includes some kind of promise of safe delivery; the public posting function doesn't.
[337] *See supra* tbl.3.
[338] *See* Section I.B.

haven't accepted a legal monopoly, access to public property, or public investment. The best arguments that social media platforms should still be classed with track two carriers extend the test in one of two ways. First, some observe that the large networks developed by social media platforms and other internet content providers are like the large physical networks of other track two carriers.[339] They argue that the resulting "network effects" create a natural monopoly or sufficient market dominance to justify common carrier regulation.[340] Second, others argue that the social media platforms have engaged in a regulatory bargain similar to other track two carriers because of the special liability protections they receive under 47 U.S.C. § 230. Though each justification has superficial merit, both break with the history and purposes of common carrier doctrine. The track two test shouldn't be extended to include them.

a) The network effects argument

The network effects argument gets the causal relationship wrong. It assumes that common carrier regulation developed "to protect consumers as perhaps a sort of early antitrust regulation to address natural monopoly."[341] But this isn't what the history of the doctrine reveals.[342] Instead, the history shows that companies were regulated as common carriers only after they had accepted the privilege of a *legal* monopoly[343] or had developed a local monopoly by using access to public property to develop a large physical network.[344] Natural monopoly conditions explain why governments were willing to grant some businesses a legal monopoly, even though monopolies were generally considered "odious" and "repugnant."[345] And those conditions may also explain why only one water or gas company may have received a franchise of eminent domain in a town. But in each instance, the company was regulated as a track two

[339] Biden v. Knight First Amend. Inst. At Columbia Univ., 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring) ("Similar to utilities, today's dominant digital platforms derive much of their value from network size.").

[340] *See, e.g.*, James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM. L.J. 225, 271-73 (2002); NetChoice, L.L.C. v. Paxton (*NetChoice II*), 49 F.4th 439, 484 (5th Cir. 2022), *cert. granted in part sub nom.* Netchoice, LLC v. Paxton, 216 L. Ed. 2d 1313 (Sept. 29, 2023) ("The same network effects that make the Platforms so useful to their users mean that Texas (or even a private competitor) is unlikely to be able to reproduce that network and create a similarly valuable communications medium.").

[341] Candeub, *supra* note 4, at 404.

[342] *See* Section I.B, and especially Section I.B.4.

[343] *See* Section I.B.1.

[344] *See* Section I.B.2.

[345] *See supra* notes 111 through 113 and accompanying text.

carrier because of its acceptance of a government franchise, not because it enjoyed a natural monopoly.[346]

In all, track two carriers and the government have been historically interdependent. Without the guarantee of a legal monopoly, some businesses may have been unwilling to make significant investments in infrastructure, so the government granted legal monopolies to induce investment.[347] And without access to public property, many of these businesses would have been unable to build out the physical networks that would ultimately benefit both the companies and the public, so the government authorized them to take or use public property.[348] But this is not the case with social media platforms. The government didn't induce them to develop their networks by granting them legal monopolies. Nor did it grant them access to public property. Unlike other track two carriers, the social media platforms haven't depended on the government to develop their networks. Without that dependence, the network effects argument is insufficient and ahistorical.

b) The Section 230 "regulatory bargain" argument

The regulatory bargain argument for social media platforms doesn't work. It argues that platforms must surrender their right to exclude because the government has given them certain legal immunities. Though the argument has some appeal on the surface, it fails for two reasons. First, like the network effects argument, it misconstrues the causal relationship between common carriers and the legal immunities they receive. Second, if we attempt to apply this standard more broadly, we see that it would be unconstitutional.

The argument. The case for regulating social media platforms according to a "regulatory bargain" refers to the legal immunity they receive under 47 U.S.C. § 230. That statute stipulates that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." As the argument goes, a "proper judicial understanding of section 230"[349] would see it "as a common carriage-type deal."[350]

Adam Candeub has made the strongest appeal for a broad understanding of the regulatory bargain that would bring in social media platforms. He describes "the entire regime of common carriage" as a bargain in which the government gives special legal benefits "in

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[346] *See* Section I.B.4.
[347] *See supra* note 149.
[348] *See* Section I.B.2.
[349] Candeub, *supra* note 4, at 433.
[350] *Id.* at 418.

return for the carrier refraining from using some market power to further some public good."[351] According to Candeub, the legal benefits typically included in the bargain are "protected monopolies, or . . . regulation of [others'] market entrance, rights of condemnation for rights of way, and immunity from certain types of suits."[352] Elsewhere, Candeub adds "protection from application of antitrust laws" as a qualifying legal benefit.[353] Applying his standard to social media platforms, Candeub argues that "common carriage requires networks [to] surrender their legal right to exclude users."[354] In exchange, "carriers gain certain legal immunities and continue to enjoy their market power."[355]

The historical errors of the argument. Candeub's understanding of the "regulatory bargain" doesn't work. It errs in its historical assessment of the doctrine because it fails to see important distinctions about when common carriers have received various legal benefits.

Candeub is correct that companies engage in a regulatory bargain when they accept a protected monopoly or access to public property. That bargain requires them to serve the public indiscriminately. I've detailed this at length above.[356] But Candeub introduces two new categories of qualifying legal benefit—immunity from antitrust laws and immunity from certain tort suits. Should the earlier discussion have included these among the government franchises that cause a private company to be "invested with a public interest"? No. Candeub conflates the franchises that *make* a track two carrier with the immunities often afforded to a track two carrier *because* it's a common carrier. Legal monopolies and access to public property belong to the former group; immunities from lawsuit belong to the latter group.

Historically, the relationship has developed as follows. A telephone company would receive access to public property to string its lines. It often also received the grant of a local monopoly to "secure[] the stabilization of business risk."[357] In exchange for that franchise, the government "was able to 'extract' from [the] telephone compan[y] the public interest obligation of service to all."[358] Then, "[i]n

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[351] *Id.* at 406.
[352] *Id.* at 402-03.
[353] *Id.* at 406.
[354] *Id.* at 401.
[355] *Id.*
[356] *See* Section I.B.
[357] *See* Rendi L. Mann-Stadt, *Limitation of Liability for Interruption of Service for Regulated Telephone Companies: An Outmoded Protection*, 1993 U. ILL. L. REV. 629, 630, 630 n.11 (1993) (quoting ROBERT B. HOROWITZ, THE IRONY OF REGULATORY REFORM 132 (1989)).
[358] *Id*. at 630-31 n.11 (quoting HOROWITZ, *supra* note 357 at 132). The suggestion here that the government had to "extract" this agreement from the telephone company is too strong. By receiving the franchise of a legal monopoly and access to public property, the telephone company would have been considered obligated to serve all. *See* Section I.B.

exchange [for the universal service requirement], many states also regulate[d] utility liability, limiting recovery of damages against utilities and thereby avoiding the imputation of such costs into customer rates."[359] This description of the regulatory exchange comes from one of Candeub's primary sources for the proposition that "common carriers . . . enjoyed (and enjoy to this day) immunity for liability [from certain tort claims]."[360] But Candeub fails to note the causal order. First, the companies became obligated to serve because of the public franchise—a legal monopoly or access to public property. Then, because of their duty to serve, they received legal immunities. Candeub's broadened regulatory bargain would require the opposite—that companies become obligated to serve because of the legal immunities they receive. This isn't how it works.

The same happens when Candeub lists immunity from antitrust laws as a cause for common carrier regulation. He cites a 1985 Supreme Court case for support. There, the Court held that ocean common carriers' "collective ratemaking activity is immune from Sherman liability."[361] But this doesn't show that the ocean carriers *became* common carriers due to the immunity. Instead, the next lines of the case explain that the immunity is because the legislatures of the states in question "expressly permit motor common carriers to submit collective rate proposals."[362] Once again, we see that the immunity was granted to common carriers; it didn't *make* them common carriers. Candeub's argument only works if he can show that immunity has historically led to common carrier regulation. But all he can show is the opposite—that common carrier regulation has frequently led to certain immunities. Immunities don't, *per se*, convert a private company into a common carrier.

Furthermore, Candeub conflates historical franchises granted to individual private corporations with immunities extended to entire industries. Historically, track two carriers gained competitive advantages when they received government franchises—access to public property, a legal monopoly, or public investment. These benefits were conferred on specific companies to the exclusion of other current or potential competitors. When a company received the right to lay water pipes or operate as a legal monopoly, it gained a private benefit to the detriment of other businesses. This differs from a blanket immunity like Section 230. Candeub's analysis overlooks the key distinction between government benefits granted to individual companies, which give them a competitive advantage (or even monopoly) in their field, and those conferred on entire industries, which aim

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[359] *Id.* at 630-31.
[360] Candeub, *supra* note 4, at 412.
[361] S. Motor Carriers Rate Conf., Inc. v. U.S., 471 U.S. 48, 65 (1985).
[362] *Id.*

to support the industry as a whole without favoring specific competitors.

The constitutional problem with the argument. Even if we ignore the historical problems with Candeub's expanded regulatory bargain, its constitutional implications also make it unworkable. It turns the "regulatory bargain" into a coercive arrangement that strips private businesses of any "bargaining" power.

According to Candeub's formula, a legislature can make a company into a common carrier by granting it a vague "legal benefit." But imagine Congress passing a law that would grant some variety of legal immunity to a class of businesses. Would this mean that Congress could convert any business into a common carrier simply by granting the legal immunity? If so, according to Candeub's version of the regulatory bargain, Congress could cause private businesses to "surrender their legal right[s]"[363] by passing a statute. If those legal rights involve constitutional rights, this can't be true. A statute that caused a company to "surrender" its constitutional rights would be, by definition, unconstitutional.[364]

Congress isn't required to provide the immunities it provides in Section 230. As a matter of public policy, it could decide to repeal or amend the law, or it could decide that the immunity should remain. What Congress can't do is convert a private business to a public one by statute, without the business's consent. It shouldn't be used to allow courts or legislatures to unilaterally re-class social media platforms as common carriers.

In sum, a proper account of history shows that social media platforms aren't common carriers at common law. Squint at the history and we may begin to think there's a case—either by trusting Judge Oldham's flawed analysis, overlooking the causal relationship in the "network effects" argument, or accepting Candeub's broadened definition of the "regulatory bargain." But once we look closer, we see that all the arguments for platforms as common carriers rely on a distorted view of history.

VI. CONCLUSION

The development of common carrier doctrine doesn't follow one clear path. It follows two. The first track emerged from the early "public callings" and then from a public policy concern for protecting travelers and shippers of goods. It continues to impose special duties on those who hold out to carry goods as a bailee or to host

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[363] Candeub, *supra* note 4, at 401.

[364] Some may argue that a statute like this could be upheld if it passed the appropriate level of scrutiny. For why this argument is irrelevant to the common carrier analysis, see *supra* note 27.

traveling strangers without individualized bargaining. The second track emerged as private businesses accepted franchises of government powers that allowed them to develop. That regulatory bargain entailed a corresponding duty to serve the public.

Once we see how the doctrine developed for these two different classes, and for two different reasons, it becomes easier to apply. To do that well, we can't be misled by the twists and turns of common carrier doctrine that followed. The emergence of railroads, which travel across both common carrier tracks, can cause us to overlook the distinctiveness of the two tracks. Even more, the early confusion and disagreements over telegraphs' status as common carriers can cause us to miss how a company may be a common carrier of one type but not of the other. Miss that distinction and we grasp for a vague test that will fit all track one and track two carriers—something like "market power" or a flexible definition of "carriage" or classification by broad industry association.

Finally, we need to dismiss the overbroad "affected with a public interest" standard used for common carriers in *Munn v. Illinois*. It continues to distort the doctrine today, even though the Supreme Court and most scholars rejected it long ago.

If we're able to maintain the distinctions between the two tracks—and if we're able to apply their formal rules and functional logic with clarity—many of today's controversies about common carriers come into focus. We should find that broadcasters, cable operators, and ISPs all three are properly classed as track two carriers. But we should see that the classification doesn't justify "must-carry" and "net neutrality" provisions like those the courts have considered in the past few decades. Most crucially at present, the analysis shows that social media platforms are not common carriers of either kind. Any appeal to count them as common carriers misunderstands the doctrine's historical development and distorts its purposes.