
The Common Carrier Privacy Model

Adam Candeub*

The Federal Communications Commission (“FCC”), in its landmark and controversial “network neutrality” 2015 Open Internet Order, prohibited internet service providers, such as Comcast and Verizon, from discriminating against non-affiliated content-providers. In doing so, the FCC relied upon the Communications Act of 1934’s section 201’s “common carrier” jurisdiction.

While section 201 gives the FCC vast power to curb anti-competitive network practices, section 201 also permits the FCC to regulate common carriers’ privacy policies. Specifically, section 201 allows imposition of the duty not to disclose the content of messages entrusted to carriers and gives individuals rights to recover upon breach.

This Article is the first modern examination of section 201 privacy obligations — which have been largely forgotten since the late nineteenth century. Recent court decisions have ruled that the FCC’s common carrier jurisdiction preempts the Federal Trade Commission’s (“FTC’s”) jurisdiction over internet firms, giving common carrier privacy sudden policy prominence.

Because common carrier privacy gives individuals the option to protect the confidentiality of messages and the right to recover damages upon breach, common carriage privacy contrasts with dominant top-down approaches to privacy, such as the Health Insurance Portability and Accountability Act (“HIPAA”) and the Fair Credit Reporting Act (“FCRA”), in which regulators determine what information receives protection and on what terms. Studies consistently show that consumers typically neither know nor appreciate their rights under these privacy regimes. In this way, forgotten common carrier privacy offers a new set of both practical and theoretical tools.

* Copyright © 2018 Adam Candeub. Professor of Law and Director of the Intellectual Property, Information and Communications Law Program, Michigan State University College of Law.

TABLE OF CONTENTS

| | |
|--|-----|
| INTRODUCTION | 807 |
| I. COMMON CARRIAGE LIABILITY & PRIVACY..... | 810 |
| A. <i>Negligent Errors in Transmission or Machine Operation</i> ... | 812 |
| B. <i>Willful Violations</i> | 815 |
| C. <i>The Duty to Not Disclose</i> | 815 |
| D. <i>The End of Common Carrier Common Law Liability</i> | 821 |
| II. COMMON CARRIAGE PRIVACY: SECTION 201'S STATUTORY AUTHORITY AND PRACTICAL RECOMMENDATIONS | 824 |
| A. <i>Section 201 and Common Carriage Privacy</i> | 824 |
| B. <i>The FCC's Power to Impose Common Carriage Privacy Not Only on Broadband Internet Access Services but on Edge Providers as Well</i> | 826 |
| III. A COMMON CARRIER PRIVACY REGIME: PRACTICAL CONSIDERATIONS | 836 |
| IV. COMMON CARRIAGE AND PRIVACY GOVERNANCE | 839 |
| A. <i>Dominant Privacy Governance Models</i> | 840 |
| B. <i>Common Carriage Privacy Governance</i> | 841 |
| C. <i>Expectations, Confidences, and Privacy</i> | 842 |
| V. SECTIONS 201 AND 222: THE NEED FOR A NEW PRIVACY MODEL? | 844 |
| CONCLUSION: BACK TO THE FUTURE? | 846 |

INTRODUCTION

The Federal Communications Commission's ("FCC's") 2015 Open Internet Order, one of the most controversial regulations in recent memory, exerted federal power, at least potentially, over the entire internet.¹ The order empowered the FCC to guarantee so-called "network neutrality" on the internet. Under this authority, the FCC can prohibit large broadband access providers like Comcast and Verizon from discriminating in favor of its own content and against content from non-affiliated internet providers, such as Netflix or Google.

The FCC received over 3.5 million comments from interested individuals and organizations, reflecting a groundswell of popular interest so great that it, in fact, crashed the agency's computers.² And, the Open Internet Order was probably the first rulemaking proceeding ever to receive commentary from late night comedians such as John Oliver,³ Jimmy Kimmel,⁴ and SNL's Sasheer Zamata.⁵

Quite apart from this public discussion, remarkable for an arcane regulatory matter, the 2015 Open Internet Order enacted a legal change that "network neutrality" advocates long had sought. For fifteen years, the FCC had classified internet service as an information

¹ See Protecting and Promoting the Open Internet, 30 F.C.C. Rcd. 5601 (2015) (report and declaratory order on remand), *aff'd sub nom.* U.S. Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016). The Order hedges on the precise parameters of its jurisdiction. While previous orders considered only consumer relations with their broadband providers, the Order now exerts jurisdiction over transit between broadband providers (i.e., the internet backbone) but the parameters of this jurisdiction are vague. *See id.* at 10-12 ("[C]ommercial arrangements for the exchange of traffic with a broadband Internet access provider are within the scope of Title II [which allows] . . . an appropriate vehicle for enforcement [involving] . . . some very large corporations, including companies like transit providers and Content Delivery Networks (CDNs), that act on behalf of smaller edge providers. But this Order does not apply the open Internet rules to interconnection.").

² See Stephanie Mlot, *Net Neutrality Public Comments Top 3M*, PC MAG. (Sept. 16, 2014, 9:55 AM), <http://www.pcmag.com/article2/0,2817,2468576,00.asp>.

³ See Marvin Ammori, *John Oliver's Hilarious Net Neutrality Piece Speaks the Truth*, SLATE (June 6, 2014, 3:17 PM), http://www.slate.com/articles/technology/future_tense/2014/06/john_oliver_s_net_neutrality_segment_speaks_the_truth.html; Amanda Holpuch, *John Oliver's Cheeky Net Neutrality Plea Crashes FCC Website*, GUARDIAN (June 3, 2014, 2:33 PM), <http://www.theguardian.com/technology/2014/jun/03/john-oliver-fcc-website-net-neutrality>.

⁴ Jimmy Kimmel Live, *People with Funny Names Arrested*, DAILY MOTION (Sept. 10, 2014), <http://www.dailymotion.com/video/x35o9e3>.

⁵ See *Saturday Night Live: Episode 14 Net Neutrality* (NBC television broadcast Feb. 28, 2015), <http://www.nbc.com/saturday-night-live/video/net-neutrality/2850291> (portraying Jennifer Owens).

service under its ancillary jurisdictional authority of Title I of the Communications Act of 1934.⁶ Network neutrality advocates sought classification under Title II, the Act's so-called "common carrier" jurisdictional authority.⁷

In reclassifying the internet regulatory authority from Title I to Title II, the FCC gained vast powers. It now can regulate internet service providers as "common carriers" pursuant to "common carriage." These terms refer to a sprawling set of common law duties that applies to "common carriers," a term that includes communications and transportation industries. Common carriage law, largely created in the nineteenth century, allows the government to set the rates and terms of conditions under which communications and transportation industries offer their services.⁸ Specifically, section 201 gives the FCC the power to ensure that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable."⁹ With this power, the FCC imposed significant "network neutrality" regulation.

While Title II regulatory powers can only be exercised over firms classified as *common carriers*, the statute is unclear as to what qualifies as a common carrier. The statutory definition is circular.¹⁰ When struggling to interpret the meaning of "common carrier," courts look to the historical meaning of common carriage for guidance. In this way, the Communications Act of 1934 incorporated the historical body of common carriage law — a set of rules that extends back to the sixteenth and seventeenth centuries.¹¹

⁶ See *infra* Section IV.B.

⁷ See *infra* Section IV.B.

⁸ Adam Candeub, *Network Interconnection and Takings*, 54 SYRACUSE L. REV. 369, 382 (2004).

⁹ Section 202, which the FCC will also enforce, makes it illegal "for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services . . . or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage." 47 U.S.C. § 202 (2018).

¹⁰ Under 47 U.S.C. § 153(h), a common carrier is defined as "any person engaged as a common carrier for hire . . ." 47 U.S.C. § 153(h) (2018).

¹¹ Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC (*NARUC II*), 533 F.2d 601, 608 (D.C. Cir. 1976) ("[T]he circularity uncertainty of the common carrier definitions set forth in the statute and regulations invite recourse to the common law of carriers."); Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 640 (D.C. Cir. 1976) ("For purposes of the Communications Act, a common carrier is 'any person engaged as a common carrier for hire . . .' The Commission's regulations offer a slightly more enlightening definition: 'any person engaged in rendering communication service for

And, there's the rub. When the FCC classified the internet as a common carrier to impose network neutrality anti-discrimination regulation, the agency gave itself the power to impose the *entire gamut* of common carriage rules. This set of rules is ancient and sprawling, and even accomplished communications lawyers do not know all its diverse features.¹² And, common carrier privacy obligations are among the most obscure. Common carrier privacy last received significant judicial attention in the 1930s,¹³ and the last scholarly analyses are even older.¹⁴

The law of common carrier privacy mostly arose in the telegraph industry.¹⁵ Telegrams were often carelessly delivered or delivery boys too curious or gossipy, and early telephone systems with switchboard operators also presented some privacy concerns.¹⁶ Courts imposed liability for breaches of confidences these messages contained — and gave individuals the opportunity to purchase additional protections for their confidential messages.

Common carrier law offers a radically different vision of privacy governance. Most privacy law is “hoard and control,” imposing global non-disclosure duties on entities such as government (Privacy Act of 1974)¹⁷, schools (FERPA),¹⁸ hospitals and healthcare providers (HIPAA),¹⁹ and credit bureaus (FCRA).²⁰ Regulation determines what information is protected and, typically, enforcement is left to agencies to impose penalties or negotiate settlements. And, studies continue to show consistently that these regimes fail to deliver privacy that most consumers care about or even understand.²¹ On the other hand, consumers drive common carriage privacy, giving individuals the

hire to the public.’ However, the concept of ‘the public’ is sufficiently indefinite as to invite recourse to the common law of carriers to construe the Act.” (citing 47 U.S.C. § 153(h) (1970); 47 C.F.R. § 21.1 (1974)); *see also* *Cellco P’ship v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012) (“[T]he Act’s definition of ‘common carrier’ is unsatisfyingly circular . . .”).

¹² Barbara A Cherry, *Misusing Network Neutrality to Eliminate Common Carriage Threatens Free Speech and the Postal System*, 33 N. KY. L. REV. 483, 500-03 (2006) (“The law of common carriage has and continues to be mischaracterized . . .”).

¹³ *See* *Hearst v. Black*, 87 F.2d 68, 70-71 (D.C. Cir. 1936).

¹⁴ *See infra* Section I.A.

¹⁵ *See infra* Section I.A.

¹⁶ *See infra* Section I.B.

¹⁷ The Privacy Act of 1974, 5 U.S.C. § 552a (2018).

¹⁸ Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2018).

¹⁹ Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936.

²⁰ The Fair Credit Reporting Act, 15 U.S.C. § 1681 (2018).

²¹ *See infra* notes 154–157.

choice to protect which messages and content they choose and enforce these preferences through tort law.

The Article proceeds as follows. First, Part I surveys the case law that establishes the common carrier duty to keep messages private. Part II examines the wisdom and technical practicability of applying nineteenth century privacy principles, developed primarily for telegraphs, to the modern internet age.

Part III shows how common carriage privacy's consumer-based, bottom-up design has distinct advantages over the dominant top-down "hoard and control" model. First, common carriage privacy allows individuals to choose what information is protected — as opposed to giving that power to regulators who may or may not capture individual preferences. Second, common carriage type privacy might possibly create an endowment effect. As behavioral economists have shown, people value those things that they already possess over those things they could potentially have. This effect could "ratchet-up" expectations for privacy, acting as a counterweight to the common notion that "privacy is dead."²²

Part IV looks to the FCC's section 222 privacy rules, which were adopted pursuant to the 2015 Open Internet Order and reflect a typical top-down privacy regulation. Facing severe opposition from the large broadband providers, Congress repealed these rules without anyone much noticing, suggesting that privacy regimes that fail to give individuals control will lack the popular support needed to survive special interest opposition.

I. COMMON CARRIAGE LIABILITY & PRIVACY

In a musty attic of telecommunications law, one finds common carriage liability. It consists of a special set of duties common law placed on common carriers, a category that included transportation, shipping, and communications industries. In general, common carriers faced far greater regulation than other businesses. Indeed, in the United States before the New Deal, the question of which industries counted as common carriers had great consequence. The Supreme Court placed common carriers and other industries "affected with a public interest" outside of its strict limits on federal regulatory

²² See Stephen Manes, *Full Disclosure: Private Lives? Not Ours!*, COMPUTERWORLD (May 1, 2000), https://www.computerworld.com.au/article/20046/full_disclosure_private_lives_ours. In a famous remark, Sun Microsystems Inc. CEO Scott McNealy declared that people "have zero privacy anyway" and should "[g]et over it." *Id.*

power proceeding from substantive due process and its restrictive interpretations of the Commerce Clause.²³

In addition to economic regulation, common law had long subjected carriers to special liability rules. Given the “public” nature of common carriers’ business, courts required a special “character and degree of care, diligence and skill commensurate with their undertaking.”²⁴ As part of this special liability, common carriers, such as telephone and telegraph companies, had a duty to deliver messages in good faith and a non-negligent manner.²⁵

Common carrier common law liability became obsolete with the emergence of state public service commissions, the creation of the Interstate Commerce Commission (“ICC”) and the Federal Communications Commission, and the development of so-called “filed tariff doctrine” as discussed *infra*.²⁶ Common carrier liability became a regulatory concern, not a matter for common law courts.

Nonetheless, the FCC retains its authority to regulate in all areas that common carriage liability covers. Therefore, section 201 allows the FCC to impose privacy requirements on common carriers. Indeed, it imposed privacy requirement on telegrams, via filed tariffs, well into the twentieth century.²⁷

This section analyzes common carriage privacy and its relationship to common carrier liability — the first analysis in nearly a century. The common carriage duty of transmission covered several different types of duties and liabilities. First, a carrier faced liability when a telegram or telephone operator negligently failed to be on duty as required or operate a machine correctly.²⁸ Second, courts imposed

²³ *Munn v. Illinois*, 94 U.S. 113, 126 (1876); see Candeub, *supra* note 8, at 382 (“Given the constitutional barriers in regulating business before the Supreme Court changed its mind about such matters in the 1930s, the limits of common carriage were of vital importance for an obvious reason: a common carrier could be regulated in ways in which a non-common carrier could not A tremendous amount of ink therefore was spilled in an attempt to demarcate the boundary between common carriers and non-common carriers during the late nineteenth century and early twentieth century.”).

²⁴ Tedson J. Meyers, *Liability Limitations in International Data Traffic: The Consequences of Deregulation*, 16 CASE W. RES. J. INT’L L. 203, 211 (1984).

²⁵ See BARBARA A. CHERRY, *THE CRISIS IN TELECOMMUNICATIONS CARRIER LIABILITY* 9-10 (1999).

²⁶ See *infra* Section I.D.

²⁷ See *infra* Section III.A.

²⁸ *Vinson v. S. Bell Tel. & Tel. Co.*, 66 So. 100, 104 (Ala. 1914) (liability for failed switchboard operator); *Jennings v. S.W. Bell Tel. Co.*, 307 S.W.2d 464, 467 (Mo. 1957) (“[T]hat an operator of the defendant was given all of this information and requested to make the connection with the fire department, but that the operator

carrier liability when a telephone or telegraph company employee willfully — even behaving outside his or her scope of employment — failed to connect a phone call or transmit a message.²⁹ Third, related to these two duties, carriers faced liability for revealing the contents of messages (i.e., common carriage privacy).

A. *Negligent Errors in Transmission or Machine Operation*

Telegraph companies and their users face the risk of error in transcription or copying. Under traditional common law, common carriers were liable for damages resulting from these errors.³⁰ These mistakes could result in large damages particularly if they involved erroneous business instructions. For instance, a telegraph company could transmit “buy seventy thousand pork bellies” rather than “buy seven thousand pork bellies,” a potentially expensive mistake. Under traditional common carrier liability, the telegram company would be liable for all resulting damages from the error (i.e., the thousands of dollars of unwanted pork bellies).³¹

In the late nineteenth century, carriers tried to contract out of this liability. Courts had to answer the question of whether telegraph companies could contract out of their traditional common carriage liability. In other words, courts had to decide whether common carriers could limit their liability or had to pay fully for the 63,000 extra pork bellies.³²

failed to do so.”); *Peterson v. Monroe Indep. Tel. Co.*, 182 N.W. 1017, 1018 (Neb. 1921) (“Telephone companies are under the duty of furnishing to their subscribers reasonably prompt and efficient service in the way of giving them connections with other subscribers, and they are liable for any pecuniary loss directly traceable to a breach of such duty as the proximate cause thereof.”); *Christenson & Arndt, Inc. v. Wis. Tel. Co.*, 58 N.W.2d 682, 684 (Wis. 1953) (“The extent of the undertaking by the defendant, whether the communication by the unnamed person was sufficient to inform the operator that the caller wanted to be connected with the fire department, whether there was unreasonable delay in making the connection or whether the caller hung up before the connection was completed, the extent of the unreasonable delay and whether it was a proximate cause, if proven, of the damages of the plaintiffs, and the extent of the damages attributable to any unreasonable delay proven, are all questions of fact . . .”).

²⁹ *Tex. Cent. Tel. Co. v. Owens*, 128 S.W. 926, 927 (Tex. Ct. App. 1910) (“[A]ppellant’s operator made no effort to get the doctor to the telephone, but that he, in fact, answered the call, pretending to be the doctor, and thereby deceived the plaintiff into believing that the doctor would make an immediate call upon, and relieve the sufferings of, his wife.”).

³⁰ *CHERRY*, *supra* note 25, at 10-15.

³¹ *Id.*

³² *See, e.g., Primrose v. W. Union Tel. Co.*, 154 U.S. 1, 14, 15-16 (1894)

Courts ended up allowing carriers to limit damages contractually but only under certain conditions — conditions that gave consumers considerable choice and flexibility. The Supreme Court ruled that while a telegraph company could contract out of liability for an erroneously telegraphed message, it could *not* so contract if the sender paid extra for a “repeated message.”³³ A “repeated message,” sometimes called an “insured message,” was sent twice. The telegrapher compared both transmissions for errors. Failure to properly deliver these messages would result in full (or at least much greater) liability. On the other hand, full liability did not attach to telegraphs sent the normal, “unrepeated” way. For these normal messages, a telegraph company’s liability was limited to the amount paid for transmission of the telegraph.

In this manner, courts gave telegraph and telephone companies more flexibility in liability compared to more traditional common carriers (i.e., shippers and railroads) which could not contract out of liability for mis-delivery. Here, the telegraph company could limit its liability to the amount paid to send the telegraph. On the other hand, common law courts required communications common carriers to at least offer to assume full liability using “repeated messages.”³⁴

This judicial response seems appropriate. The cargo that shippers or railroads carry presents obvious risks if damaged or mis-delivered. Carriers can easily inspect such cargo and often can estimate its market value. A cargo carrier could decide whether the damages presented too great a risk to justify accepting the load — or could

(examining the liability of telegraph companies for erroneous delivery).

³³ *Id.* at 15-16 (“Telegraph companies resemble railroad companies and other common carriers, in that they are instruments of commerce [T]he telegraph company has not undertaken to wholly exempt itself from liability for negligence; but only to require the sender of the message to have it repeated, and to pay half as much again as the usual price, in order to hold the company liable for mistakes or delays in transmitting or delivering or for not delivering a message, whether happening by negligence of its servants or otherwise.”). Interestingly, when the ICC took jurisdiction over interstate messages, it kept this rule. C. S. Potts, *Limitation of Liability in Interstate Telegraph Messages*, 1 TEX. L. REV. 336, 341 (1923) (“The soundness of the rules promulgated by the Interstate Commerce Commission, in refusing to allow public service concerns to contract against the negligence of themselves or their servants, and the success of these rules in bringing about a reasonable relation between the charges made and the liabilities assumed by the companies in the transmission of the different kinds of messages, together with the great convenience to the public in having uniform rules throughout the country, strongly suggest the wisdom of similar action by the several states with reference to intrastate messages.”); see also David C. Minnerman, Annotation, *Liability of Telephone Company for Mistakes in or Omissions from Its Directory*, 47 A.L.R.4th 882 (1986).

³⁴ See CHERRY, *supra* note 25, at 23-45.

obtain insurance. Further, if insurance were obtained, the cargo carrier could more easily estimate the amount of insurance to buy.

On the other hand, the damages from a written message are difficult to estimate. The resulting damages of failing to deliver the message “buy porkbellies” could be huge — and impossible for the carrier to determine. The carrier thus could not decide which messages were too “risky” to carry. Further, insurance would be difficult to obtain for mis-deliveries that presented such uncertain, hard-to-calculate risks.

The repeated message approach compromised consumer protection with the near unlimited liability that traditional common carriage imposed for the relatively small cost of a telegraph. In short, where damages are too difficult to calculate to allow a carrier to make an intelligent decision whether to accept a message or obtain insurance, damages must be limited. On the other hand, removal of all liability would not only be unfair to consumers, but may very well lead to suboptimal market results if the carriers had market power.

As law and economics scholars have recognized, there is a need to “prescribe effective rules in the bilateral-trade context where two parties are ‘stuck with each other.’ In these thin, illiquid markets, the presence of private information, which is not shared and therefore asymmetric, gives each party an incentive to misrepresent his or her bargaining offer and thereby render negotiations protracted and costly, if they succeed at all.”³⁵

Here, telegraph companies often exercised market power as only one telegraph company typically served a community even during the brief period of competitive telegraphy in the nineteenth century.³⁶ Users were “stuck” with that one telegraph company. And, state government set many of their rates.³⁷ This created a bargaining problem. Telegraph companies could give *no* protection — and customers would be stuck. Alternatively, if there were complete liability, individuals could game the system by not disclosing the true value of the information and then demanding windfall recoveries in the case of mis-delivered or improperly disclosed information.

³⁵ Steven J. Brams & Joshua R. Mitts, *Law and Mechanism Design: Procedures to Induce Honest Bargaining*, 68 N.Y.U. ANN. SURV. AM. L. 729, 734 (2013).

³⁶ Richard B. Du Boff, *Business Demand and the Development of the Telegraph in the United States, 1844–1860*, 54 BUS. HIST. REV. 459, 461 (1980).

³⁷ See Richard B. Du Boff, *The Rise of Communications Regulation: The Telegraph Industry, 1844–1880*, 34 J. COMM. 52, 63-65 (1984); Tomas Nonnenmacher, *Law, Emerging Technology, and Market Structure: The Development of the Telegraph Industry, 1838–1868*, 57 J. ECON. HIST. 488, 490 (1997); Tomas Nonnenmacher, *State Promotion and Regulation of the Telegraph Industry, 1845–1860*, 61 J. ECON. HIST. 19, 19-36 (2001).

B. Willful Violations

Given the large number of people who handled any given telegram (the operator, delivery boys, and other office employees), there was ample opportunity for willful delivery error. Apparently, the communications world of the late nineteenth and early twentieth centuries was not without nosey switchboard operators and gossipy, or even duplicitous, telegram delivery boys.³⁸

Courts have recognized carrier liability for this type of willful behavior by employees. In this context, courts have recognized that a telegraph company could be liable for emotional injury as well as any injuries resulting from mis-delivery.³⁹ Finally, a telegraph company could be liable for a willful delay or failure in delivery or transmission of a message, and aggrieved parties would have a remedy in tort.⁴⁰

C. The Duty to Not Disclose

Related to the duty not to mis-deliver messages either negligently or willfully, carriers also had the duty to keep messages secret. The duty encompassed both negligent and willful disclosures. An American legal commentator, citing an English case, described the duty.

It is alleged that the telegraph company turned over to a jealous husband a bunch of telegrams passing between his wife and certain friends of hers, and as a result of the information thus gained the husband has threatened to sue for a divorce. The wife thereupon has brought suit against the telegraph company for \$25,000 damages. Under the doctrine laid down with respect to banks in *Tournier v. National Provincial and Union Bank of England* (1924) 1 K.B. 461 the cause of action would seem to be well founded, the obligation of secrecy being as much implied in the contract of the sender of a telegram as in that of a bank depositor. The implication of such a duty is

³⁸ See generally GREGORY J. DOWNEY, *TELEGRAPH MESSENGER BOYS: LABOR, TECHNOLOGY, AND GEOGRAPHY, 1850–1950* (2002).

³⁹ *W. Union Tel. Co. v. Baker*, 140 F. 315, 317 (8th Cir. 1905); *W. Union Tel. Co. v. Cunningham*, 14 So. 579, 580-81 (Ala. 1893); *Paton v. Great Nw. Tel. Co.*, 170 N.W. 511, 512 (Minn. 1919); see also *Ark. & La. Ry. Co. v. Stroude*, 91 S.W. 18, 19 (Ark. 1905).

⁴⁰ See *W. Union Tel. Co. v. Merrill*, 39 So. 121, 123 (Ala. 1905); *W. Union Tel. Co. v. Hearn*, 161 S.W. 1025, 1026 (Ark. 1913); *W. Union Tel. Co. v. Bickerstaff*, 138 S.W. 997, 1000 (Ark. 1911); *W. Union Tel. Co. v. Elliott*, 115 S.W. 228, 229 (Ky. 1909); *Wood v. W. Union Tel. Co.*, 61 S.E. 653, 655 (N.C. 1908); *Bluefield Milling Co. v. W. Union Tel. Co.*, 139 S.E. 638, 639-40 (W. Va. 1927).

strengthened by the fact that in many states statutes forbid under penalty the disclosure to unauthorized persons of the contents of any telegram.⁴¹

This excerpt shows how courts widely acknowledged the right to privacy, or more precisely, the common carrier's duty not to disclose the contents of messages.⁴² Indeed, the United States Supreme Court acknowledged the duty as discussed *infra*.⁴³

⁴¹ *Privacy of Telegrams*, 28 L. NOTES (EDWARD THOMPSON CO.) 101, 104 (1924); see also 74 AM. JUR. 2D *Telecommunications* § 57 (2016) ("It is part of a telegraph company's undertaking with respect to the transmission and subsequent handling of a message that its contents must not be disclosed to any unauthorized person, and the company acts at its peril if it divulges the contents of a message without the consent of either the sender or the addressee and will be liable to the extent of actual damages.")

⁴² *Newfield v. Ryan*, 91 F.2d 700, 704 (5th Cir. 1937) ("One of those conditions is that telegraph companies are common carriers, subject to federal regulation and control, and that messages filed with them while protected from the prying of the merely curious, and from other unauthorized disclosures, are not protected from the demand of other lawful authority."); *W. Union Tel. Co. v. Aldridge*, 66 F.2d 26, 27 (9th Cir. 1933) ("The evidence is undisputed that when the young lady who disclosed the contents of the telegram was employed by the telegraph company she was informed of her duty to maintain inviolate the contents of telegraphic messages."); *W. Union Tel. Co. v. McLaurin*, 66 So. 739, 740-41 (Miss. 1914) ("It also appears that the messenger of the company at Selma disclosed the contents of the telegraphic correspondence . . . The telegraph company did . . . violate its public duties."); *Cock v. W. Union Tel. Co.*, 36 So. 392, 392 (Miss. 1904) ("Involved in every contract for the transmission of a telegraphic dispatch is an obligation on the part of the transmitting company to keep its contents secret from the world."); *In re Renville*, 61 N.Y.S. 549, 554 (N.Y. App. Div. 1899) ("No statute requires a telegraph company to communicate to the public dispatches which it has received from other individuals, to be transmitted to specified persons. On the contrary, such a communication is prohibited [by New York state statute]."); *Barnes v. Postal Tel.-Cable Co.*, 72 S.E. 78, 79 (N.C. 1911) ("It is a part of the undertaking of the telegraph company, with respect to the transmission and subsequent handling of the message, that its contents shall not be disclosed to any person whomsoever, without the consent of either the sender or addressee, and, if it does divulge the contents without being released from the obligation of secrecy, it acts at its peril."); see also *Hearst v. Black*, 87 F.2d 68, 71 (D.C. Cir. 1936) ("[I]f a Senate Committee were to attempt to force a telegraph company to produce telegrams not pertinent to the matters the committee was created to investigate, the company could be restrained at the instance of the sender of the telegrams . . ."); *Barnes v. W. Union Tel. Co.*, 120 F. 550, 553 (C.C.N.D. Ga. 1903) ("If a telegram has enough upon its face to show that it relates to the value of property offered for sale, it would seem sufficient to put the company on its guard against errors in transmission."); *W. Union Tel. Co. v. Bierhaus*, 36 N.E. 161, 162 (Ind. Ct. App. 1894) ("[T]he legislature of this state also passed an act prohibiting in express terms the disclosure of telegraphic messages, and giving a remedy in damages to the party injured to the extent of such injury, and making such company liable for failure or negligence in the performance of their duties generally."); *Hellams v. W. Union Tel. Co.*, 49 S.E. 12, 14 (S.C. 1904) ("We do not think that the law imposes upon

While a telegraph company employee's obligation not to disclose the contents of a telegraph is clear in principle, the applied legal rules become fuzzy. For instance, many court decisions examine and come to differing answers as to the level of malfeasance (negligence or willfulness), the required level of recovery, and whether punitive damages are available for disclosure of information.⁴⁴

There were also numerous limitations on the duty not to disclose, some of which modern minds might find quaint. For instance, courts tended not to allow recovery for disclosure of embarrassing facts that cast a shadow on the plaintiffs' moral character.⁴⁵ These courts reasoned that the immoral sender or receiver of a telegram contributed to the injury, and he or she bore contributory negligence for the damages caused.⁴⁶

While courts consistently have recognized the duty not to disclose telegraph messages, they have been less clear about its origin — as the quoted excerpt above suggests. Some courts have pointed to state statutes that set forth a duty not to disclose the contents of messages. Indeed, in the nineteenth and early twentieth centuries, several states, including New York,⁴⁷ Mississippi,⁴⁸ and Wisconsin,⁴⁹ had laws prohibiting the telegraph operators from disclosing the contents of telegraphs. These laws either created the duty — or formed the background for the imposition of the common law duty — not to disclose. Other courts point to an implied contractual provision, stemming from telegraph's and telephone's common carriage "public" calling, just like the other common law liabilities and obligations discussed in the previous section.⁵⁰

telegraph companies the duty to telephone a message, as that would seriously impair the confidential relations assumed in the delivery, receipt, and transmission of telegraphic communications.”).

⁴³ See *infra* Part I.C; see, e.g., *Moore v. N.Y. Cotton Exch.*, 270 U.S. 593, 605 (1926) (“As a common carrier of messages for hire, the telegraph company, of course, is bound to carry for alike. But it cannot be required—indeed, it is not permitted—to deliver messages to others than those designated by the sender.”).

⁴⁴ *Aldridge*, 66 F.2d at 27; *Cock*, 36 So. at 392; *Marlatt v. W. Union Tel. Co.*, 167 N.W. 263, 265 (Wis. 1918).

⁴⁵ See *Cock*, 36 So. at 393.

⁴⁶ *Id.*

⁴⁷ See *Renville*, 61 N.Y.S. at 553.

⁴⁸ See *Cock*, 36 So. at 392.

⁴⁹ See *Marlatt*, 167 N.W. at 264.

⁵⁰ *W. Union Tel. Co. v. McLaurin*, 66 So. 739, 741 (Miss. 1914); *Barnes v. Postal Tel.-Cable Co.*, 72 S.E. 78, 79 (N.C. 1911).

Yet, other courts simply assume the duty exists without specifying the duty's precise basis.⁵¹ For example, the Supreme Court's view emerged from cases involving confidentiality of stock exchange market quotations. Stock exchanges contracted with one telegraph company to carry prices and other information to subscribers. While the stock markets quite naturally only wanted to provide this information to their subscribers and the contracted telegraph company, competitor telegraph companies wanted access to this information. These cases pitted the common carriage principle of non-discrimination in customers — as well as the antitrust notions of monopolistic control of information — against the common carriage duty to keep messages secret.⁵²

Applying principles of common carriage non-discrimination, some courts ruled in these cases that it is “the duty of a telegraph company, which has engaged in the business of furnishing ticker service, to supply continuous quotations to all persons who desire them, and on the same terms exacted of others.”⁵³ The network neutrality advocates of their day, these courts answered in the negative to the “question [whether a stock market may], acting in concert or combination with the telegraph companies, build up a great system for the instantaneous and continuous indication of that market and its fluctuations . . . and then be allowed to discriminate between persons and parties, and, where all alike are willing to conform to reasonable rules and requirements, and pay for the information desired, say that one shall and another shall not have such information?”⁵⁴

⁵¹ *W. Union Tel. Co. v. Aldridge*, 66 F.2d 26, 27 (9th Cir. 1933).

⁵² See Recent Case, In re Renville et al., 61 *N. Y. SUP.* 549, 9 *YALE L.J.* 236, 236-37 (1900).

⁵³ *Telegraph Ticker Service*, 1 A.L.R. 1286 (1919).

⁵⁴ *N.Y. & Chi. Grain & Stock Exch. v. Bd. of Trade of Chi.*, 19 N.E. 855, 859 (Ill. 1889); see also *W. Union Tel. Co. v. State ex rel. Hammond Elevator Co.*, 76 N.E. 100, 104 (Ind. 1905) (“The law will not permit a telegraph company, under such circumstances, to enjoy a monopoly, and to misuse its franchise by supplying such quotations to some and refusing them to others who are equally able and willing to pay for them and to be governed by all reasonable rules and regulations.”); *Bryant v. W. Union Tel. Co.*, 17 F. 825, 830 (C.C.D. Ky. 1883) (“There must be, in performing public services, no unjust, unreasonable discrimination between persons It results from these principles that the Chicago Board of Trade, or any other similar association undertaking to serve the public with information, cannot lawfully single out one person or firm and unreasonably deny to them the information which it holds itself ready to furnish to all the rest of the business world.”); *Tucker v. W. Union Tel. Co.*, 158 N.Y.S. 959, 966 (N.Y. App. Div. 1915), *aff'd sub nom. Holland v. W. Union Tel. Co.*, 156 N.Y.S. 1127 (N.Y. App. Div. 1915), *aff'd sub nom. Tucker v. W. Union Tel. Co.*, 156 N.Y.S. 1148, 1148 (N.Y. App. Div. 1915) (“No question is raised,

Other courts took the opposite view. They considered stock price quote information proprietary, and neither stock markets nor the telegraph companies with which they worked had any duty to distribute the information. These courts reasoned that an exchange has no duty “to make public the quotations of prices . . . [and] may do with them as it pleases; serve one man and refuse another; and any person or corporation that it selects to distribute them.”⁵⁵

although it might be, as to whether or not the Telegraph Company has not gone outside of its corporate powers in paying large sums of money for news to be transmitted broadcast; but . . . it is urged that it cannot legally acquire property or rights in property to be utilized in such a way as to refuse equal facilities to all citizens [A]ssuming that the Telegraph Company has the right to make such purchase, it has not the right to do so unless it has also the right to dispose of it on equal terms to all who may legally require it.”)

⁵⁵ *Hunt v. N.Y. Cotton Exch.*, 205 U.S. 322, 338 (1907) (“The right was clearly defined to be, the right of the board of trade to keep the quotations to itself or communicate them to others. And this is also the right of the exchange in the case at bar. It can be violated not only by getting the quotations surreptitiously or ‘in some way not disclosed,’ or by getting them from a person forbidden to communicate them.”); *Bd. of Trade of Chi. v. Christie Grain & Stock Co.*, 198 U.S. 236, 252 (1905) (“Finally it is urged that the contracts with the telegraph companies violate the act of July 2, 1890, chap. 647 (26 Stat. at L. 209, U.S. Comp. Stat. 1901, p. 3200). The short answer is that the contracts are not relied on as a cause of action. They are stated simply to show that the only communication of its collected facts by the plaintiff is a confidential communication, and does not destroy the plaintiff’s rights.”); *Marine Grain & Stock Exch. v. W. Union Tel. Co.*, 22 F. 23, 25 (C.C.N.D. Ill. 1884) (“What it demands as a matter of right in the name of the public is instantaneous notice by telegraph of all change of prices on the board, which can only be wanted for the purpose of conducting the operations of the complainant outside the board. The people at large cannot, in the nature of things, have any more interest in the success of complainant’s business than in that of any other broker or commission dealer; and the demand by complainant that it shall be offered by the board the facilities for business which others only get through their membership of the board seems to me wholly unwarranted.”); *In re Renville*, 61 N.Y.S. 549, 554 (N.Y. App. Div. 1899) (“It may be conceded that the respondents are corporations charged with the performance of public duties, are under the control of the legislature, and may be compelled by mandamus to perform their obligations to the public. The obligation that they assume is to receive and transmit communications. No statute requires a telegraph company to communicate to the public dispatches which it has received from other individuals, to be transmitted to specified persons. On the contrary, such a communication is prohibited.”); *Wilson v. Commercial Tel. Co.*, 3 N.Y.S. 633, 635 (N.Y. App. Div. 1888) (“Independent of the contract, the right of the plaintiff to have these quotations through the medium of the telegram company cannot be maintained The obligation to admit to its floors all ticker companies could be no greater than the obligation of a railroad company to carry all express companies. But in the case cited the supreme court held that the railroads were not bound to carry all express companies, and on the same principle the stock exchange would be under no obligation to admit to its floor all ticker companies. Where would the line be drawn?”).

The Supreme Court, in *Moore v. New York Cotton Exchange*,⁵⁶ resolved this judicial conflict, relying upon common carriage privacy to conclude that financial exchanges and the telegraph companies have no duty to provide price information to all members of the public. In *Moore*, the New York Cotton Exchange contracted with the Western Union Telegraph Company for receiving and distributing market quotes and prices to such persons as the exchange approved. The Odd-Lot Exchange, which could not receive the market quotes, challenged this contract under the antitrust laws. In rejecting the claim, the Court stated: “As a common carrier of messages for hire, the telegraph company, of course, is bound to carry for alike. But it cannot be required — indeed, it is not permitted — to deliver messages to others than those designated by the sender.”⁵⁷

Courts relied upon common carriage privacy in areas outside of communications regulation. For instance, the D.C. Circuit case, *Hearst v. Black*,⁵⁸ involved telegraphs sent by William Randolph Hearst to members of Congress. A congressional investigatory committee and the FCC sought these telegraphs pursuant to their investigation of lobbying. They issued a subpoena duces tecum to telegraph companies to obtain the contents of these telegraphs. In finding the subpoenas to be unlawful, the court stated: “Telegraph messages do not lose their privacy and become public property when the sender communicates them confidentially to the telegraph company [T]his is so because of an almost universal recognition of the fact that the exposure of family confidences and business and official secrets would as to telegrams equally with letters, ‘be subversive of all the comforts of society.’”⁵⁹

⁵⁶ 270 U.S. 593, 601 (1926).

⁵⁷ *Id.* at 605.

⁵⁸ 87 F.2d 68, 68-69 (D.C. Cir. 1936); *see also id.* at 70 (“Telegraph messages do not lose their privacy and become public property when the sender communicates them confidentially to the telegraph company. Indeed, in many of the States their publication without authorization — except as a necessary incident in the due administration of justice — is a penal offense; and this is so because of an almost universal recognition of the fact that the exposure of family confidences and business and official secrets would as to telegrams equally with letters, ‘be subversive of all the comforts of society.’”).

⁵⁹ *Id.* It should be noted, however, that the court ruled that while it had authority to restrain a telegraph company from handing over the telegraphs, it lacked power to compel the Senate committee to return. *Id.* at 71. The Court in *Hearst* found: “[T]he universal rule, so far as we know it, is that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference.” *Id.*

D. *The End of Common Carrier Common Law Liability*

The growing administrative state absorbed common law common carrier liability. The process took several decades. Federal regulation of interstate communications began in 1910, when the Mann-Elkins Act placed interstate telephone and telegraph services under the supervision of the Interstate Commerce Commission.⁶⁰ The Act empowered the ICC to investigate rate complaints and, upon reaching a conclusion that rates were “unjust” or “unreasonable,” to declare those rates unlawful and suspend them.⁶¹ Western Union and other telegraph companies filed tariffs with the ICC that contained not only rates but also warranties for levels of service, including guarantees for telegraph privacy. These filed tariffs were presumed lawful.

Interpreting the Mann-Elkins Act, the Supreme Court, in *Western Union Tel. Co. v. Esteve Bros. & Co.*,⁶² adopted the so-called “filed tariff doctrine,” ruling that any tariff lawfully filed with the ICC could not be challenged in a common law court. Instead, if the ICC accepted the tariff, it was presumed lawful, and its terms bound all customers. The rates had to be challenged first at the ICC. In this way, regulation supplanted common law contract protections. Common law privacy became part of the terms and conditions of filed tariffs and became a matter of administrative law.

In *Esteve Brothers*, the Court reviewed a telegraph tariff of Western Union that it had filed with the ICC. That tariff limited the liability of unrepeat messages. Upholding the legality of tariff, the Court concluded that “the limitation of liability attached to the unrepeat cable rate is binding upon all who send messages to or from foreign countries until it is set aside as unreasonable by the Commission.”⁶³

These tariffs contained — and continued to contain throughout the twentieth century — liability provisions. Common law courts accepted these terms and conditions as valid, and consumers could not challenge tariffs in court. Only the administrative agency could review their validity.⁶⁴

⁶⁰ Commerce Court (Mann-Elkins) Act, ch. 309, § 7, 36 Stat. 544, 544-45 (1910) (amending the Interstate Commerce Act of 1887, ch. 104, sec. 1, 24 Stat. 379 (1887)) (provisions relating to telegraph, telephone, and cable companies repealed in 1934 with the passage of the Communications Act).

⁶¹ Kathleen B. Levitz, *Loosening the Ties that Bind: Regulating the Interexchange Services Market for the 1990s*, 2 FCC Rcd. 1495, 1495-96 (FCC Office of Plans & Policy, Working Paper No. 23, 1987).

⁶² 256 U.S. 566, 572 (1921).

⁶³ *Id.*

⁶⁴ *Id.*

The Communications Act of 1934 eliminated the ICC's authority over interstate wire communications and gave it to the newly formed Federal Communications Commission ("FCC").⁶⁵ Section 203 of the Communications Act of 1934 mandates that all common carriers file tariffs showing "all charges" for the "interstate and foreign wire or radio communications services" they provide, as well as "the classifications, practices, and regulations affecting such charges."⁶⁶ For many years, the "filed rate doctrine barred all actions to enforce payment arrangements other than those delineated in the tariff" for all interstate telecommunications services.⁶⁷

Western Union continued to file telegraph tariffs into the 1990s as well as for more esoteric communications like international data cables. These tariffs contained, to a greater degree than telephone tariffs, liability obligations for mis-deliveries.⁶⁸ There are, in fact, a few areas in which the FCC continues to require tariff filing.⁶⁹

On the other hand, the FCC (and Congress) have eliminated tariffing requirements for virtually every other telecommunications service. With the emergence of competitive long-distance firms in the 1980s such as MCI and Sprint, "the burden [of accepting and

⁶⁵ AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 404 (1999).

⁶⁶ 47 U.S.C. § 203(a) (2018).

⁶⁷ RICHARD E. WILEY ET AL., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 97.59 (4th ed. 2016).

⁶⁸ W. UNION TEL. CO. RECORDS, SERIES 13: OPERATING RECORDS, 1868-1970S, TARIFF BOOK 371 (1934) ("To guard against mistakes or delays, the sender of a message should order it repeated For this, one-half the unrepeated message rate is charged The company shall not be liable for mistakes or delays . . . arising from unavoidable interruption . . . beyond the sum of five thousand dollars, at which amount each message is deemed to be valued, unless a greater value is stated in writing by the sender . . . and an additional charge [is paid]"); W. UNION TEL. CO. RECORDS, SERIES 13: OPERATING RECORDS, 1868-1970S, CABLE TARIFF BOOK 3 (1942) ("In any event the Telegraph Company shall not be liable for damages for mistakes or delays in the transmission or delivery, or for the non-delivery, of any message, whether caused by the negligence of its servants or otherwise, beyond the actual loss, not exceeding in any event the sum of five thousand dollars, at which amount the sender of each message represents that the message is valued, unless a greater value is stated in writing by the sender thereof at the time the message is tendered for transmission, and unless the repeated-message rate is paid or agreed to be paid and an additional charge equal to one-tenth of one per cent of the amount by which such valuation shall exceed five thousand dollars."); W. UNION TEL. CO. RECORDS, SERIES 13: OPERATING RECORDS, 1868-1970S, TARIFF BOOK NO. 78, at 289 (1956) (same); W. UNION TEL. CO. RECORDS, SERIES 13: OPERATING RECORDS, 1868-1970S, TARIFF BOOK NO. 82, at 290 (1969) (same).

⁶⁹ See *Electronic Tariff Filing System (ETFS)*, FCC, <https://apps.fcc.gov/etfs/etfsHome.action> (last updated Nov. 2, 2015, 1:00 PM).

reviewing countless tariffs] proved too onerous for the FCC, and thus the Commission began its unrelenting campaign in favor of detariffing.”⁷⁰ The FCC began to eliminate the requirement that telephone companies file tariffs for long-distance and other telecommunications services in the 1990s.⁷¹ Rather, they could charge what they will. At first, the FCC attempted to deregulate by administrative fiat, but the courts rejected its efforts, ruling that the Communications Act required tariffs.⁷² In response, Congress passed section 160 to allow forbearance, *inter alia*, from the Act’s tariffing requirement.⁷³

Forbearing from the tariff requirements (i.e., detariffing), however, did not revive common law actions against common carriers. Rather, courts ruled that the FCC’s decision to de-tariff preempted federal and most state common law actions.⁷⁴ Courts viewed the decision *not* to regulate as a decision to impose minimal, even non-existent, regulation. This forbearance foreclosed federal and state common law action. The only recourse individuals now have against the “unjust” interstate telephone rates prohibited in section 201 is filing a complaint under section 208.⁷⁵ Of course, with the radical

⁷⁰ Charles H. Helein et al., *Detariffing and the Death of the Filed Tariff Doctrine: Deregulating in the “Self” Interest*, 54 FED. COMM. L.J. 281, 287 (2002).

⁷¹ Policy and Rules Concerning the Interstate Interexchange Marketplace, 14 FCC Rcd. 6004 (1999); Policy and Rules Concerning the Interstate Interexchange Marketplace, 12 FCC Rcd. 15,014 (1997); Policy and Rules Concerning the Interstate Interexchange Marketplace, 11 FCC Rcd. 20,730 (1996).

⁷² MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 220-34 (1994); MCI Telecomms. Corp. v. FCC, 765 F.2d 1186, 1188 (D.C. Cir. 1985).

⁷³ The FCC attempted to eliminate the requirements of section 203 during the 1980s, but the courts rejected the effort. Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1338 (1998) (“After experimenting in the early 1980s with making tariffs optional for non-dominant carriers, the FCC attempted in 1985 to prohibit non-dominant carriers from filing any tariffs for their services This mandatory detariffing was struck down by the D.C. Circuit as inconsistent with the Communications Act.”).

⁷⁴ Dreamscape Design, Inc. v. Affinity Network, Inc., 414 F.3d 665, 675 (7th Cir. 2005) (“[T]he FCA continues to provide federal remedies for customers seeking to challenge the justness and reasonableness of long-distance charges and practices.”); *Boomer v. AT&T Corp.*, 309 F.3d 404, 422-23 (7th Cir. 2002) (“[D]etariffing does not alter the fundamental design of the Communications Act, nor modify Congress’s objective of uniformity in terms and conditions for all localities.”); Christy C. Kunin, *Unilateral Tariff Exculpation in the Era of Competitive Telecommunications*, 41 CATH. U. L. REV. 907, 913-22 (1992).

⁷⁵ See 47 U.S.C. § 208(a) (2018) (“Any person, any body politic, or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the

transformation of electronic communications since the 1980s, market mechanisms no doubt keep carriers from abusing market power, at least of the sort that the old common carrier liability regime attempted to control. But, the power to regulate in these areas remains with the FCC under section 201, and it is to this power we now turn.

II. COMMON CARRIAGE PRIVACY: SECTION 201'S STATUTORY AUTHORITY AND PRACTICAL RECOMMENDATIONS

So far, the Article has shown that common carriage privacy existed in the nineteenth and early twentieth centuries. Applying common carriage privacy requirements to the internet today presents two main issues: what is the FCC's legal authority to mandate such privacy and what would such a regulatory requirement look like from a practical and technological perspective. This Part examines these questions.

First, section II.A shows that courts have consistently interpreted section 201 to give the FCC the power to impose *virtually all* traditional common carriage obligations. To determine what these obligations are, courts have looked to the historical understanding of common carriage. And, indeed, the FCC throughout the twentieth century has used section 201 to impose privacy obligations.

Second, section II.B concludes that the FCC could impose common carriage obligations not only on broadband internet access services ("BIASs"), which the 2015 Open Internet Order already has, but also on major "edge" operators, like Google or Facebook. While the latter have avoided FCC regulation under the 2015 Open Internet Order, the FCC could easily expand its authority under section 201 jurisdiction.

A. Section 201 and Common Carriage Privacy

The most unambiguous support for the FCC's power under section 201 to impose some sort of common carriage privacy requirements on common carriers is the fact that the FCC imposed liability for telegraph mis-delivery throughout the twentieth century. Its tariffs for telegraph companies continue to have liability provisions for mis-delivery,⁷⁶ and the FCC retained the power to regulate mis-delivery and impose liability well into the twentieth century.⁷⁷

provisions thereof, may apply to said Commission by petition . . .").

⁷⁶ See 74 AM. JUR. 2D *Telecommunications* § 88 (2017) ("[T]he liability of a telegraph company for a delay in delivery, nondelivery, or error in transmission of a telegram is limited by the company tariff filed with and approved by the Federal Communications Commission.").

⁷⁷ See *Lundgren v. W. Union Tel. Co.*, 132 F. Supp. 933, 933 (D. Or. 1955)

Beyond the proof of actual practice, the authority to impose privacy obligations is contained within the text of section 201. It gives the FCC the power to ensure “[a]ll charges, practices, classifications, and regulations for and in connection with [common carrier] communication service, shall be just and reasonable.”⁷⁸ This grant is, on its face, plenary — and courts have granted the FCC near complete regulatory authority. As the D.C. Circuit states, “the Commission has plenary authority to regulate interstate rates under § 201(b), including ‘practices . . . for and in connection with’ interstate calls.”⁷⁹

Given the 1934 Communications Act’s circular definition of common carrier,⁸⁰ courts have typically looked to the body of common carriage law to provide content to the statutory concept. And, of course, if you look to history, as did Part II, you will find that non-disclosure and privacy regulation was part of common carrier regulation for over a century. In short, section 201’s text and judicial

(“Plaintiff filed an action for damages against Western Union, claiming that by reason of the latter’s negligent failure to deliver a telegram by a particular time he has suffered damages in the sum of \$16,423.58 [S]enders of a message are bound as a matter of law by the tariff limitations of liability”); Hous. Auth. of Decatur v. W. Union Tel. Co., 183 S.E.2d 227, 229 (Ga. Ct. App. 1971), *aff’d sub nom.* Hous. Auth. of Decatur v. W. Union Tel. Co., 186 S.E.2d 100 (1971) (“Appellee’s motion for partial summary judgment, the granting of which is the subject of this appeal, is based upon Western Union Tariff FCC No. 176 filed with the Federal Communications Commission pursuant to Section 203(a) of the Federal Communications Act of 1934 The appellee’s liability is controlled by the tariff”); Crowley Indus. Bag Co. v. W. Union Co., 204 So.2d 725, 728 (La. Ct. App. 1967) (“By order effective July 13, 1921, the Interstate Commerce Commission established fixed limitations of liability for interstate wire and wireless messages in substantial sums, namely \$500.00 for unrepeated, and \$5,000.00 for repeated messages, and when the regulation of wire and wireless transmission service was transferred to the Federal Communications Commission, established by the Communications Act of 1934, this order was continued in effect.”); Komatz Const. Inc. v. W. Union Tel. Co., 186 N.W.2d 691, 694-95 (Minn. 1971) (“The limitation of liability for an unrepeated message [of a telegraph] became effective when defendant’s tariff was filed [with the FCC] under the above sections, and defendant by law must adhere to this limitation.”); *see also supra* note 68 and accompanying text.

⁷⁸ Section 202, which the FCC will also enforce, makes it illegal for any “common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services . . . any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.” 47 U.S.C. §§ 201-03 (2018).

⁷⁹ *Glob. Tel*Link v. FCC*, 866 F.3d 397, 415 (D.C. Cir. 2017).

⁸⁰ 47 U.S.C. § 153(h) (2018) (defining common carrier as “any person engaged as a common carrier for hire”); *see also* *Cellco P’ship v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012) (“[T]he Act’s definition of ‘common carrier’ is unsatisfyingly circular.”).

interpretation — and a century of practice — give the FCC the power to protect the confidentiality of communications.

B. The FCC's Power to Impose Common Carriage Privacy Not Only on Broadband Internet Access Services but on Edge Providers as Well

Even granted that section 201 gives the FCC to power to impose privacy protections, this power can only be exercised over “common carriers.” Therefore, to impose a regime of common carriage privacy, the FCC would have to expand 2015 Open Internet Order’s definition of common carrier from major broadband internet access providers (“BIASs”), such as Comcast, to so-called “edge providers,” such as Google and Facebook. The FCC could do this, and, indeed, already has walked a good deal down that road. Determining whether edge providers are covered by section 201 involves a statutory analysis that turns on whether they provide “communication services” and qualify as common carriers.

As the following section shows, the step from BIAS to edge provider is not hard. In Commissioner Ajit Pai’s dissent to the 2015 Open Internet Order, he lamented that “the FCC’s newfound control extends . . . from the last mile through the backbone.”⁸¹

To discuss FCC jurisdiction over BIASs and edge providers is a long slog, but the essential structure is this: the 1934 Communications Act’s Title II common carrier jurisdiction extends to “communication service” which included virtually all wire communications for most of the last century.⁸² The 1996 Telecommunications Act added two new statutory terms: “telecommunications service” and “information service” without specifying how they related to section 201’s communication service.⁸³ The FCC, as approved by the Supreme Court in the *Brand X* case,⁸⁴ ruled that only telecommunications services were subject to Title II common carriage but *not* information

⁸¹ Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5924-33 (2015).

⁸² 47 U.S.C. § 201(a)-(b) (2018) (“It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable.”).

⁸³ 47 U.S.C. § 251(a) (2018) (“Each telecommunications carrier has the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.”).

⁸⁴ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1003 (2005).

services.⁸⁵ Thus, Title II common carriage obligations, as set forth in section 201, turned on whether the service was a telecommunications or information service. The 2015 Open Internet Order changed the FCC's prior classification of broadband access from a Title I information service with no common carrier obligations to a Title II telecommunication service with common carrier obligations.

With that general structure in mind, one can follow the detailed argument showing that not only are BIASs subject to Title II but that edge providers, such as Facebook or Google, could be as well.

First, start with the text of the statute. Section 201 covers every "common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor."⁸⁶

The FCC typically has understood communication services as those that allow individuals to communicate (i.e., what a typical telephone or telegraph company does).⁸⁷ The FCC in the days prior to the Telecommunications Act of 1996, in the so-called *Computer Inquiries*, interpreted the term "communication service" in section 201 as including both "basic services" and "enhanced services."⁸⁸ "Basic services" referred to typical telephone communications while "enhanced services" included computer-assisted communication services, which initially meant large private data processing, voicemail, and private exchanges used by large corporations. The FCC decided *not* to regulate "enhanced services" under the full panoply of section 201 authority.⁸⁹ Significantly, email, messaging, and other internet-based communication were viewed as enhanced services.⁹⁰

⁸⁵ See *id.* at 974-76.

⁸⁶ 47 U.S.C. § 201(a) (2018).

⁸⁷ See *Computer Services and the Federal Regulation of Communications*, 116 U. PA. L. REV. 328, 338 (1967) ("[A] full communication service with respect to some messages — the facilities owned and leased by Bunker-Ramo constitute a mere conduit for these messages, the same type of service performed on a more general scale by the typical telephone or telegraph company [T]he service contemplated under Telequote IV more closely approximates the normal service of those communication 'common carriers' in existence when the Communications Act was passed.").

⁸⁸ Robert Cannon, *Where Internet Service Providers and Telephone Companies Compete: A Guide to the Computer Inquiries, Enhanced Service Providers and Information Service Providers*, 9 COMM.LAW CONSP. 49, 50 (2001) ("Basic telecommunications services fall under Title II of the Communications Act of 1934 as amended by the Telecommunications Act of 1996 (the 'Communications Act') and are subject to common carrier regulations and obligations. Enhanced services are not regulated under Title II; rather, they are effectively 'unregulated' by the Commission.").

⁸⁹ Susan P. Crawford, *Transporting Communications*, 89 B.U. L. REV. 871, 886

In an effort to deregulate local telecommunications, the Telecommunications Act of 1996 added several definitions to the Communications Act of 1934, specifically “telecommunications services” and “information services.”⁹¹ These terms’ turgid definitions proved quite intractable — and it was difficult to see how they interacted with section 201’s “communication service.” In other words, it was not clear in 1996 how voice-communications, fax, and dial-up internet access would be classified.⁹²

From a policy perspective, these definitions were, however, vital. The new competitive telephone companies needed access to the incumbent Bell network.⁹³ But, the incumbent Bell telephone

(2009) (“[B]asic services’ — again, the pure transport of unaltered messages — and ‘enhanced services’ like voicemail and data processing, and left non-discrimination obligations in place for basic services. Computer II allowed common carriers into the ‘enhanced services’ business for the first time, provided they met certain requirements and adhered to their common carrier obligations with respect to the ‘basic services’ they offered.”).

⁹⁰ Examples of services the Commission has treated as enhanced include voicemail, email, fax store-and-forward, interactive voice response, protocol processing, gateway, and audiotext information services. Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, 13 FCC Rcd. 6040 (1998); see Bell Operating Companies Joint Petition for Waiver of Computer II Rules, 10 FCC Rcd. 13758, 13765-13766, 13770-13774 (1995) (Appendix A RBOC CEI Plans and Amendments); see also Barbara Esbin, *Internet over Cable: Defining the Future in Terms of the Past*, 7 COMM.LAW CONSPECTUS 37, 60 (1999) (“The Commission further stated that although it recognized ‘the existence of a communications component’ and that ‘some enhanced services may do some of the same things that regulated communications services did in the past,’ there was also a ‘substantial data processing component’ in all of these enhanced services, over which the agency had never imposed a scheme of regulation.”).

⁹¹ “Information service” is defined as the “offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153(24) (2018). “Telecommunications service” is defined as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” 47 U.S.C. § 153(53) (2018).

⁹² Rob Frieden, *Déjà Vu All over Again: Questions and a Few Suggestions on How the FCC Can Lawfully Regulate Internet Access*, 67 FED. COMM. L.J. 325, 328 (2015) (“[C]ourts . . . defer to the expertise of a regulatory agency when its authorizing statute lacks clarity and the agency reasonably interprets those statutory ambiguities [in the 1996 Telecommunications Act.]”); John C. Roberts, *The Sources of Statutory Meaning: An Archaeological Case Study of the 1996 Telecommunications Act*, 53 SMU L. REV. 143, 173-74 (2000).

⁹³ Roberts, *supra* note 92, at 149 n.26.

companies, such as Verizon and AT&T, had to provide access to the new competitive telephone companies — only if they qualified as “telecommunications services,” not if they were “information services.”⁹⁴

In an effort to provide clarity to the distinction, the Federal Communications Commission ruled that “telecommunication services” and “information services” tracked, in significant ways, the prior regulatory distinction between “basic” and “enhanced services.”⁹⁵ At this time, information service meant, above all, dial-up internet access and internet communications, but also included voicemail, email, store and forward faxes, and other computer-enhanced uses of the telephone network.⁹⁶ Broadband only emerged as a mass offering in the mid- to late-1990s.

But, once broadband exploded in the late 1990s, pressure grew on the FCC to regulate the internet as a telecommunications service. This pressure came mainly from the competitive telephone companies that sought the interconnection privileges that Title II provided. The competitive telephone companies wanted interconnection in order to offer broadband services and compete with the incumbent phone companies like Verizon. If broadband were considered a telecommunication service, then it would fall under Title II and Verizon would have to connect its broadband services with its competitors’.

In 2002, to the dismay of the competitive telephone companies, the FCC in the so-called “cable modem decision,” ruled that broadband was like an enhanced service.⁹⁷ Therefore, it was an information

⁹⁴ See 47 U.S.C. § 251(a) (2018).

⁹⁵ See Christopher Libertelli, *Internet Telephony Architecture and Federal Access Charge Reform*, 2 B.U. J. SCI. & TECH. L. 13, 15 (1996) (“The term ‘enhanced service’ refers to services that ‘use the existing telephone network to deliver services other than basic transmission, such as voice mail, E-mail, voice store-and-forward, fax store-and-forward, data processing and gateways to on-line databases.’ Never well-defined, the ESP, or enhanced service provider, umbrella has expanded to include a wide array of commercial on-line services.”); J. Steven Rich, *Brand X and the Wireline Broadband Report and Order: The Beginning of the End of the Distinction Between Title I and Title II Services*, 58 FED. COMM. L.J. 221, 225 (2006) (“While the fundamental distinctions between enhanced services and basic services remained, these terms were replaced with information services and telecommunications services, respectively.”).

⁹⁶ Fed.-State Joint Board on Universal Service, 13 FCC Rcd. 11,501 (1998) (“An Internet access provider, in that respect, is not a novel entity incompatible with the classic distinction between basic and enhanced services, or the newer distinction between telecommunications and information services. In essential aspect, Internet access providers look like other enhanced — or information — service providers.”).

⁹⁷ See *Inquiry Concerning High-Speed Access to the Internet over Cable and*

service to be regulated under Title I and fell outside of Title II's common carriage communication service. Only regular phone service was to be regulated under Title II.

The Supreme Court, in the landmark *Brand X* decision, upheld the FCC's decision and the authority of the FCC to regulate broadband — or more precisely not to regulate — under Title I's ancillary authority.⁹⁸ As Justice Breyer pointed out, the FCC's decision to regulate under Title I was a reasonable exercise of agency discretion in statutory interpretation but just “barely.”⁹⁹ In any case, *Brand X* did not uphold any particular regulation of the internet. Rather, it upheld the FCC's jurisdiction to regulate and its decision largely to refrain from regulation at that time.

Brand X's reasoning went something like this: using the new 1996 Telecommunications Act's definition, the Court accepted the FCC's logic that a “telecommunication service” fell under Title II's sections 201 and 202's common carrier regulation, but an “information service” did not. A telecommunication service provided a *transmission service*; an information service, on the other hand, combined transmission with data and content. The Court concluded that a broadband service was an information service, outside of Title II common carrier regulation.¹⁰⁰

The year 2015 signaled a shift in broadband regulation. President Obama, himself, spoke directly to the issue — a highly unusual act given that the FCC is an independent agency.¹⁰¹ He urged the FCC to change course and regulate broadband under Title II.¹⁰² And, in 2015,

Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, 4822-23 (2002); see also *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 991 (2005) (affirming the FCC's original classification of Internet service as an “information service” regulated under Title I). About the same time, Tim Wu coined the term “network neutrality.” Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141, 142-43 (2003) (comparing the promotion of network neutrality to “the challenge of promoting fair evolutionary competition in any privately owned environment, whether a telephone network, operating system, or even a retail store”).

⁹⁸ *Brand X Internet Servs.*, 545 U.S. at 976.

⁹⁹ *Id.* at 1003 (Breyer, J., concurring).

¹⁰⁰ *Id.* at 986-90.

¹⁰¹ Randolph J. May, *Obama's Involvement Jeopardizes FCC's Net Neutrality Efforts*, HILL (Dec. 11, 2014, 6:30 AM), <http://thehill.com/blogs/pundits-blog/technology/226744-obamas-involvement-jeopardizes-fccs-net-neutrality-efforts>.

¹⁰² Brian Fung & Nancy Scola, *Obama's Call for An Open Internet Puts Him at Odds with Regulators*, WASH. POST (Nov. 11, 2014), <https://www.washingtonpost.com/news/the-switch/wp/2014/11/11/the-fcc-weighs-breaking-with-obama-over-the-future-of-the-internet>.

the FCC did so — passing the Promoting and Protecting the Open Internet Order which placed the internet under Title II jurisdiction (the 2015 Open Internet Order).¹⁰³ At the same time, the Senate confirmed three new judges on the D.C. Circuit. Their nominations moved this court, which hears most appeals from the FCC, significantly in a more pro-regulatory direction.¹⁰⁴ And, not surprisingly, the D.C. Circuit upheld the FCC's reclassification.¹⁰⁵

Thus, a thirteen-year regulatory odyssey takes a radically different turn — but returns to an expansive understanding of section 201. The 2015 Open Internet Order broadband internet access providers under Title II. Thus, the FCC can regulate broadband providers such as Verizon and AT&T.

The 2015 Open Internet Order justified its shift in a straightforward manner. The FCC stated that the “*Brand X* Court explicitly acknowledged that the Commission had previously classified the transmission service, which broadband providers offer, as a telecommunications service and that the Commission could return to that classification if it provided an adequate justification.”¹⁰⁶ And, the FCC provided this justification: “times and usage patterns have changed and it is clear that broadband providers are offering both consumers and edge providers straightforward transmission capabilities that the Communications Act defines as a ‘telecommunications service.’”¹⁰⁷

What has changed is, according to the FCC, in the early 2000s most people looked to their broadband provider as their primary source of content. Now, however:

consumers have considerable power to combine their mobile broadband connections with the device, operating systems, applications, Internet services, and content of their choice. Today, broadband Internet access service is fundamentally understood by customers as a transmission platform through

¹⁰³ Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5614 (2015).

¹⁰⁴ Jennifer Bendery, *Republicans Wrongly Accuse Obama of Court-Packing*, HUFFINGTON POST (Jul. 24, 2013, 3:27 PM), http://www.huffingtonpost.com/2013/07/24/obama-court-packing_n_3645515.html; Jeremy W. Peters, *Building Legacy, Obama Reshapes Appellate Bench*, N.Y. TIMES (Sept. 13, 2014), http://www.nytimes.com/2014/09/14/us/politics/building-legacy-obama-reshapes-appellate-bench.html?_r=0.

¹⁰⁵ U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 689 (D.C. Cir. 2016).

¹⁰⁶ Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5614 (2015).

¹⁰⁷ *Id.* at 5615.

which consumers can access third-party content, applications, and services of their choosing.¹⁰⁸

This reasoning is flimsy. While the D.C. Circuit, in fact, accepted that the “record contains extensive evidence that consumers perceive a standalone offering of transmission, separate from the offering of information services like email and cloud storage,”¹⁰⁹ it is not clear that consumers interact with broadband providers any differently now than they did fifteen years ago — when according to the FCC “the high-speed transmission used to provide [the information service] is a functionally integrated component of that service.”¹¹⁰ Indeed, there was email, chatrooms, and social media fifteen years ago — just like now. It is hard to see what has changed save the politics.

Even without taking issue with the FCC’s analysis, the statute and the FCC’s interpretation lead to the conclusion that edge providers could be regulated under Title II authority. The D.C. Circuit admitted as much when it stated that “even if the *Brand X* decision was only about the last mile, the Court focused on the nature of the functions broadband providers offered to end users, not the length of the transmission pathway, in holding that the ‘offering’ was ambiguous . . . and [could] be considered a telecommunications service.”¹¹¹

The analysis takes on two steps. First, do edge providers function as providers of “communications” services? Second, if so, are they “telecommunications services” under the FCC’s new definition?

Communications Services. Section 201 includes every “common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor.”¹¹² Thus, if an email provider, social media, or other edge provider were offering “communications services,” such provider would also have to be a “common carrier.” The starting place for any analysis is the Communications Act’s definition of “common carriage.” The Communications Act states: “The term “common carrier” or “carrier” means any person engaged as a common carrier for hire, in

¹⁰⁸ *Id.*

¹⁰⁹ *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674, 704-05 (D.C. Cir. 2016).

¹¹⁰ *Id.* at 692; *see also* Frieden, *supra* note 92 at 376 (“[In *Brand X*], [t]he Commission succeed in convincing a majority that it needed to ignore the telecommunications component to support a deregulatory regime. Now the Commission needs to convince an appellate court that the telecommunications component has become so important that it must be pulled from the deregulated safe harbor the FCC previously created.”).

¹¹¹ *U.S. Telecom Ass’n*, 825 F.3d at 702.

¹¹² 47 U.S.C. § 201(a) (2018).

interstate or foreign communication by wire or radio or interstate or foreign radio”¹¹³ The legislative history is not particularly helpful.¹¹⁴ Nor are the Commission’s regulations enlightening: “any person engaged in rendering communication service for hire to the public.”¹¹⁵

In light of this dearth of statutory directions, courts, for decades, have looked to the common law of common carriage to interpret the statutory terms. As a general rule, “court decisions adhere to the common law elements of common carrier.”¹¹⁶

While the law of common carriage is no cupcake of clarity, courts have identified certain features that define the regulatory parameters of section 201. First, the most commonly cited definition is likely found in *National Ass’n of Regulatory Utility Commissioners v. FCC*.¹¹⁷ There, the D.C. Circuit concluded that “the critical point is . . . [w]hat appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier ‘undertakes to carry for all people indifferently.’”¹¹⁸ The Supreme Court has adopted this

¹¹³ 47 U.S.C. § 153 (2018).

¹¹⁴ Phil Nichols, *Redefining ‘Common Carrier’: The FCC’s Attempt at Deregulation by Redefinition*, 1987 DUKE L.J. 501, 511 (“Although the legislative history of section 3(h) of the Communications Act is brief and does not expressly define common carrier, the Conference Report noted that ‘the definition does not include any person if not a common carrier in the ordinary sense of the term.’”).

¹¹⁵ 47 C.F.R. § 21.12 (2017).

¹¹⁶ *Cellco P’ship v. FCC*, 700 F.3d 534, 545 (D.C. Cir. 2012) (“American common law has long applied the concept of common carriage to transportation and communications enterprises.”); *Time Warner Telecoms., Inc. v. FCC*, 507 F.3d 205, 210 n.5 (3d Cir. 2007) (“The Court of Appeals for the D.C. Circuit has explained that the common carrier doctrine emerged out of common law rules.”); Nichols, *supra* note 114, at 512. Courts and the Commission have therefore resorted to the common law to come up with a satisfactory definition. See *FCC v. Midwest Video Corp. (Midwest Video II)*, 440 U.S. 689, 701 n.10 (1979); Henry H. Perritt, Jr., *Access to the National Information Infrastructure*, 30 WAKE FOREST L. REV. 51, 67 (1995) (“Statutory common carrier obligations are derived, with little change, from common law common carrier obligations.”).

¹¹⁷ 525 F.2d 630, 641 (D.C. Cir. 1976).

¹¹⁸ *Id.* (citing *Semon v. Royal Indemnity Co.*, 279 F.2d 737, 739 (5th Cir. 1960)); *Home Ins. Co. v. Riddell*, 252 F.2d 1, 3 (5th Cir. 1958); see, e.g., *Ciaccio v. New Orleans Pub. Belt R.R.*, 285 F. Supp. 373, 375 (E.D. La. 1968); *State ex rel. Fatzer v. Sinclair Pipe Line Co.*, 304 P.2d 930, 941 (Kan. 1957); *State ex rel. Utils. Comm’n v. Gulf Atl. Towing Corp.*, 110 S.E.2d 886, 889 (N.C. 1959); see also *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 929 (D.C. Cir. 1999) (“While the Commission acknowledged that common carriers’ customers need not be ‘end users’ and that ‘[c]ommon carrier services include services offered to other carriers,’ it emphasized that ‘a carrier may be a common carrier if it holds itself out to service indifferently all potential users,’ and that ‘a carrier will not be a common carrier where its practice is to

formulation — a common carrier makes a public offering on the same terms to all.¹¹⁹ Thus, providing a communication offering to all customers could qualify as a common carriage. Email services or Facebook communications would qualify under this definition.

Further, courts allow the FCC flexibility because they recognize “the evolving meaning of common carriage and courts’ efforts to pin down the essence of common carriage in the midst of changing technology and the evolving regulatory landscape.”¹²⁰ Courts have given, therefore, the “Commission . . . significant latitude to determine the bounds of common carriage in particular cases.”¹²¹ And allowed the Commission to “make individualized decisions, in particular cases, whether and on what terms to deal.”¹²² Courts would likely then allow the FCC to tailor its requirements to the current technological landscape.

Last, the FCC could rely on other tests, beyond the “public offerings” test, to determine that large edge providers are common carriers. At other times, the FCC has flirted with different definitions. For instance, it once connected common carriage with market power.¹²³ And, some legal scholars have interpreted common carriage as essentially an early attempt to regulate market power.¹²⁴ There are, of course, older common law tests such as whether a firm’s operations were “affected with the public interest,”¹²⁵ and modern scholars have examined the roots of common carriage in transportation and other network industries.¹²⁶

make individualized decisions in particular cases whether and on what terms to serve.”).

¹¹⁹ *Midwest Video II*, 440 U.S. at 701 (“[M]akes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing.”); *Verizon v. FCC*, 740 F.3d 623, 651 (D.C. Cir. 2014) (reaffirming the *NARUC II* definition of common carriage).

¹²⁰ *Cellco P’ship*, 700 F.3d at 546.

¹²¹ *Id.* at 547.

¹²² *Midwest Video II*, 440 U.S. at 701 (quoting Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC, 525 F.2d 630, 641 (D.C. Cir. 1976)); *U.S. Telecom Ass’n v. FCC*, 295 F.3d 1326, 1329, 1332-33 (D.C. Cir. 2002); *Virgin Islands*, 198 F.3d at 925.

¹²³ Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations, 84 F.C.C.2d 445, 447-48 (Jan. 16, 1981).

¹²⁴ *Id.* at 521.

¹²⁵ Daniel T. Deacon, *Common Carrier Essentialism and the Emerging Common Law of Internet Regulation*, 67 ADMIN. L. REV. 133, 162 (2015).

¹²⁶ See Thomas B. Nachbar, *The Public Network*, 17 COMMLAW CONSPICUOUS 67, 103 (2008) (arguing that common carriage is related to general physical transport and communications).

Under any of these tests, however, the dominant edge providers, like Facebook or Google, would qualify. First, the major social media companies make public offerings. They offer their communications services to the general public under the uniform terms. Notice there is no requirement in the statute that these offerings be for a fee. Rather, they must simply be offered. Plus, social media services are not “for free”; they work on in-kind payments in which consumers trade their personal information for electronic services.

Second, the major social media platforms and large email providers, such as Facebook or Google, no doubt exercise market power to some degree. The large market share of social network platforms, while not dispositive, strongly suggests market power. And, after all, Google faces interminable antitrust scrutiny in Europe.¹²⁷ Further, the test for common carriage market power is far less demanding than under current antitrust standards.¹²⁸ Apparent bargaining power and large market share seem enough according to the best contemporary commentators. Common carrier classification nowhere demands the precise measurements of deadweight loss that modern antitrust demands.¹²⁹

Last, the major social media platforms seem “affected with the public interest.” This test identifies industries in communications and transportation that many actors in the economy rely upon, such as railroads, telegraphs, and ferries.¹³⁰ Given the central role of the dominant social media platforms in today’s world in communications, business, and personal life, they would satisfy this test.

Telecommunications Service. Even if fringe providers were common carriers, they would still have to be telecommunications service providers, not information service providers, in order to come under Title II jurisdiction. And, under the test in the 2015 Open Internet Order, that should not be too difficult.

¹²⁷ Adam Candeb, *Behavioral Economics, Internet Search, and Antitrust*, 9 *IS: J.L. & POL’Y INFO. SOC’Y* 407, 407-09 (2014) (“Google’s domination of online search in Europe and the United States has attracted antitrust scrutiny.”).

¹²⁸ See Tim Wu, *Why Have a Telecommunications Law? Anti-Discrimination Norms in Communications*, 5 *J. TELECOMMUNICATIONS & HIGH TECH. L.* 15, 30-31 (2006) (“A key to understanding common carriage is that the early definitions had little to do with market power In other words, it is the role the carrier plays in the economy that necessitates duties of common carriage, not necessarily the potential for abuse of market power.”).

¹²⁹ See *id.* at 31 (“[I]t is the role the carrier plays in the economy that necessitates duties of common carriage, not necessarily the potential for abuse of market power.”).

¹³⁰ See Nachbar, *supra* note 126, at 81 (“It is easy to dismiss these cases for their failure to define how or why a business becomes ‘affected with a public interest.’”).

As affirmed by the D.C. Circuit, the FCC essentially adopted the test that telecommunications services provide transmission services. Well, obviously the major edge providers do precisely that. Facebook, Google, and others transmit messages. While they do other things as well, consumers rely upon their role as transmitters, not providers of additional content. Facebook and Google are viewed not only as providing particular services, but as connecting people to other services and other people.

III. A COMMON CARRIER PRIVACY REGIME: PRACTICAL CONSIDERATIONS

So far, the Article has argued that the FCC has the power to impose some sort of common carriage privacy regime on large social media platforms and large internet communications platforms — and there might be some need to do so. It sketched out what common carrier privacy meant in the nineteenth century. This section examines what a twenty-first century common carriage privacy regime might look like.

A first, straightforward application of section 201 common carrier privacy duties and obligations would be to broadband providers — and presumably any email or message-sending services. These duties and obligations would require them to keep secret any emails or messages entrusted to them. This seems an overwhelming regulatory approach, especially because most major email services are provided for free. Such a requirement might lead email providers to stop offering free email. Moreover, virtually anyone with a server could be an email provider — thus the parameters of this requirement could be a little tricky to define.

A more realistic common carriage internet privacy regime would simply require the major social media platforms and communication service providers to offer a “private” service. Just like the telegraph companies were required to offer repeated messages, the major social media platforms would have a legal, contractual obligation to keep these “private service” messages secret. Just as with repeated telegraph messages, today’s email and social media providers would be liable for mis-delivery and breaches of confidentiality — but damages would be limited to the price of the service. This approach follows the nineteenth and early twentieth century precedents discussed *infra*.

There are both technical and economic limitations to this approach. Most important, any one internet communications provider does not control the entire network. There are frequent handoffs between and among internet actors. Consider a Google email that travels to a university email — or an AT&T instant message that travels to a T-

Mobile network — or better yet a Wi-Fi enabled smartphone. Thus, carriers would probably be responsible for private communication breaches that occurred within their own network. In other words, they would be liable if individuals hacked into your email inbox — but not if your messages were intercepted while you were connected to Starbucks's Wi-Fi.

The most obvious objection to this plan is that the market could find — indeed already has found — such solutions. After all, numerous firms offer encrypted email.¹³¹ However, that is where the justification of common carriage comes into play. Part of the justification for regulating common carriers was their market position. Due to barriers of entry (both economic and legal), most communities in the nineteenth century had only one telegraph company, telephone company, or railroad.¹³² This dominant market share gave these firms the market power to limit consumer choice — and justified regulation.

Here, Facebook, Google, and other major social network platforms provide a multitude of services to keep people within their network. For someone who uses a Google calendar, Google Docs, and other Google services — logging out and using another type of email can, in fact, be a major inconvenience. Similarly, the coordination of all of one's activity on one online platform makes using a separate, protected email burdensome. For many people, the immediate value of simply using their Gmail account exceeds the potential possibility of privacy violations at some unspecified time in the future. Habit reinforces the tendency to use other services and renders changing one's daily routine more difficult.¹³³ Thus, as some have argued, individuals in an online environment may, for behavioral reasons, incorrectly discount the value they place on privacy.¹³⁴ Requiring Google to offer, for an extra price, a private offering would solve this problem — as private

¹³¹ Larry Greenemeier, *Protecting Your Privates: 5 Techniques for Maintaining Web Confidentiality*, SCI. AM. (Sept. 3, 2013), <https://www.scientificamerican.com/article/protecting-your-privates>.

¹³² See Candeub, *supra* note 8, at 383 (“Bruce Wyman stated in his definitive treatise on common carriage, ‘[i]n all of the business to be discussed in these chapters, competition, although from a legal point of view possible, is from the economic point of view improbable . . . virtual monopoly will henceforth prevail.’”) (citing 1 BRUCE WYMAN, PUBLIC SERVICE CORPORATIONS § 36, at 30 (1911)).

¹³³ Candeub, *supra* note 127, at 409 (“[S]earching the internet is quite taxing cognitively — it is a pain in the neck. Consumers’ desire to decrease these cognitive costs may lead people to adopt hard-to-change habitual behaviors when using the internet.”).

¹³⁴ *See id.*

communication would be as easy to use as communications now open to Google's prying eyes.

There are recent precedents for common carriage type privacy. The Federal Trade Commission's ("FTC's") ill-fated "Do-Not-Track Regulations" show that common carriage type regulation can be implemented.¹³⁵ Further, its failure, due to the FTC's lack of authority, suggests that section 201's blanket grant of power to the FCC could be successful.

In 2008, the Federal Trade Commission initiated a study of the practice of internet browsers of placing software or tokens on users' computers, which allow browsers to monitor what sites users visit on the internet and what they do there.¹³⁶ This practice, known generally as behavioral advertising, allows firms to acquire profiles of internet users which are valuable to marketers because they allow more targeted advertising.¹³⁷

In 2010 the Federal Trade Commission issued a report analyzing the data it had collected and recommending that a "Do Not Track" option be available to internet users.¹³⁸ Do Not Track allows users' Web browser to send a single HTTP header to the server with which it is communicating and tell the server that the user does *not* wish to be tracked.¹³⁹

Do Not Track has failed to provide privacy protections because it was largely voluntary. The FTC lacks authority to mandate its use. Not surprisingly, major websites like Google and Facebook ignore Do Not Track requests.¹⁴⁰ The self-regulation has not borne fruit.¹⁴¹ Of course,

¹³⁵ See *Do Not Track*, FTC, <https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy/do-not-track> (last visited Sept. 29, 2017) [hereinafter FTC, *Do Not Track*]; see also Fred B. Campbell, Jr., Opinion, *The Slow Death of 'Do Not Track'*, N.Y. TIMES, Dec. 26, 2014, at A17 (describing how gradually most internet firms opted out of Do Not Track programs despite initially signaling support); *Do Not Track*, ELECTRONIC FREEDOM FOUND., <https://www.eff.org/issues/do-not-track> (last visited Sept. 29, 2017).

¹³⁶ FTC, STAFF REPORT: SELF-REGULATORY PRINCIPLES FOR ONLINE BEHAVIORAL ADVERTISING 10, 32 (2009), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-staff-report-self-regulatory-principles-online-behavioral-advertising/p085400behavareport.pdf>.

¹³⁷ See FTC, *Do Not Track*, *supra* note 135.

¹³⁸ Alicia Shelton, *A Reasonable Expectation of Privacy Online: "Do Not Track" Legislation*, 45 U. BALT. L.F. 35, 53 (2014).

¹³⁹ Geoff Duncan, *Why Do Not Track May Not Protect Anybody's Privacy*, DIGITAL TRENDS (June 9, 2012, 11:00 AM), <https://www.digitaltrends.com/computing/why-do-not-track-may-not-protect-anybodys-privacy>.

¹⁴⁰ Rebecca Lipman, *Online Privacy and the Invisible Market for Our Data*, 120 PENN ST. L. REV. 777, 798 (2016).

section 201 could allow the FCC to impose a comprehensive privacy regime, which the FTC could not.

IV. COMMON CARRIAGE AND PRIVACY GOVERNANCE

Defining the goals of privacy is not controversial — at least in broad strokes. The foundation of information privacy protection is “informational self-determination” or “the claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others.”¹⁴²

On the other hand, legal scholars generally agree that “[p]rivacy governance is at a crossroads.”¹⁴³ Whatever the goals of privacy, its mechanisms remain controversial. Though privacy governance aims to protect individuals, individuals in both EU and United States governance regimes play a remarkably small role. Rather, both regimes employ what this Article terms a centralized “hoard and control” model in which the government defines certain types of protected information, finds entities that hoard this information, and controls what they can do with it. Individuals neither decide what is private nor have a role in enforcing privacy.

Similarly, the so-called “new privacy regime,” with its collaboration between government, the private sector, and privacy advocates, also seems to lack direct individual control. Rather, the stakeholders — government, industry, and professional privacy advocates — define what people should consider private and how it should be protected.

Common carriage, on the other hand, presents a different concept of privacy governance. First, it does not depend upon what government decides is protected information. Rather, it is as Neil Richards and Daniel Solove would point out, confidence-based. It protects information that individuals choose to protect.¹⁴⁴ Second, it does not

¹⁴¹ Gregory James Evans, Comment, *Regulating Data Practices: How State Laws can Shore Up the FTC’s Authority to Regulate Data Breaches, Privacy, and More*, 67 ADMIN. L. REV. 187, 208 (2015) (“Emblematic of the national effort, after years of deliberations, the industry working group tasked with standardizing a ‘Do Not Track’ option for Internet browsers appears to be going nowhere.”).

¹⁴² Kenneth A. Bamberger & Deirdre K. Mulligan, *Privacy in Europe: Initial Data on Governance Choices and Corporate Practices*, 81 GEO. WASH. L. REV. 1529, 1539 (2013).

¹⁴³ *Id.* at 1532 (citing Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 15, 1983, ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 65, 1984 (Ger.), translated in 5 HUM. RTS. L.J. 94, 97-101 (1984)); ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (1967).

¹⁴⁴ See Neil M. Richards & Daniel J. Solove, *Privacy’s Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 133 (2007) (“[A]s the preceding discussion suggests, a significant body of Anglo-American law protecting personal information

depend upon regulation for its protection; rather contract plays a major role. Third, common carriage privacy does not depend upon government enforcement. It gives individuals that power.

A. *Dominant Privacy Governance Models*

In the European Union, which boasts a far more comprehensive privacy regulation than the United States, privacy governance is described as “omnibus protections reflecting a commitment to self-determination enforced uniformly by a dedicated privacy agency.”¹⁴⁵

Unpacking this definition, there is one standard of “omnibus protection” enforced by regulators. These protections are memorialized in Fair Information Practice Principles (“FIPPS”), which are generalized principles that provide guidance to particular regulatory decisions.¹⁴⁶ Virtually all entities that hold personal information — from banks and hospitals to schools and religious organizations — are covered by these principles.

The European Union privacy governance model includes uniform enforcement by a dedicated privacy agency.¹⁴⁷ While, of course, regulators are responsive at some level to the citizens they serve, regulators also respond to government and special interests. And, although individuals are the objects of privacy protections, they have little direct role in enforcement.

The United States model presents an alternate privacy governance structure.¹⁴⁸ Instead of having one dominant regulatory agency enforcing a unitary regime on all elements of society, the United States includes “specific, sectoral activities, such as credit reporting, health care, and electronic commerce.”⁵⁴ Rather than the EU’s data protection directive that covers all entities that collect, process, disseminate, and store personal information, the United States relies on a patchwork of numerous statutes and regulations that covers specific types of information and specific industries.¹⁴⁹

In addition to the EU and U.S. models, a so-called “new privacy governance” has emerged. As Julie Cohen describes the term: “The

from disclosure through confidentiality existed long before Warren and Brandeis published their article.”). Richards’ work on confidence-based privacy has been pivotal in expanding my views about the potential of common carriage privacy.

¹⁴⁵ Bamberger & Mulligan, *supra* note 142, at 1541.

¹⁴⁶ *Id.* at 1540.

¹⁴⁷ *Id.* at 1541-42.

¹⁴⁸ Fred H. Cate, *The Changing Face of Privacy Protection in the European Union and the United States*, 33 *IND. L. REV.* 173, 179 (1999).

¹⁴⁹ Bamberger & Mulligan, *supra* note 142, at 1542.

Federal Trade Commission in particular has taken a leading role in shaping the new privacy governance, convening roundtables of ‘stakeholders’ to identify best practices in personal information processing and exerting its enforcement authority principally via consent decrees negotiated with firms like Google and Facebook.”¹⁵⁰

The FTC process involves lawsuits because the FTC lacks rulemaking authority in most areas. These lawsuits typically end with consent decrees.¹⁵¹ In addition, FTC guidance often emerges from its enforcement framework and forms the basis of industry best practices.¹⁵² Privacy advocacy groups then can use these best practices to work towards wider privacy protection.

B. Common Carriage Privacy Governance

The dominant forms of privacy governance — United States, EU, or the “new” privacy governance — have certain features that common carriage privacy challenges. First, notice the dominant privacy governance regimes do not enforce individualized preferences for privacy. The regulator chooses the ideal level of privacy and then enforces it. This is true of both U.S. and EU models. The only difference is that, in the United States, multiple agencies and bodies set different levels of privacy for various types of information.

¹⁵⁰ Julie E. Cohen, *What Privacy is For*, 126 HARV. L. REV. 1904, 1928 (2013).

¹⁵¹ Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 585, 610 (2014) (“Since the late 1990s, the . . . FTC . . . has been enforcing companies’ privacy policies through its authority to police unfair and deceptive trade practices. The FTC has also been enforcing several privacy statutes and the Safe Harbor Agreement that enables companies to transfer data between the United States and the European Union. Despite over fifteen years of FTC enforcement, there are hardly any judicial decisions to show for it. The cases have nearly all resulted in settlement agreements.”).

¹⁵² Alexander E. Reicher & Yan Fang, *FTC Privacy and Data Security Enforcement and Guidance Under Section 5*, 25 COMPETITION: J. ANTITRUST UCL & PRIVACY SEC. ST. B. CAL. 89, 91 (2016) (“[I]n addition to enforcement, the Commission has issued a number of reports and guides for businesses on privacy and data security topics. These guidance documents, written by FTC staff and occasionally approved by the FTC’s commissioners, outline how to comply with various privacy laws or present the Commission’s view of industry best practices.”); Andrew Serwin, *The Federal Trade Commission and Privacy: Defining Enforcement and Encouraging the Adoption of Best Practices*, 48 SAN DIEGO L. REV. 809, 812 (2011) (“[A]lthough some companies have voluntarily taken steps to improve privacy and adopt best practices, not all companies have. In light of this, the report proposes a new framework for companies in order to further encourage the development of best practices and self-regulation and to guide Congress. It also places the FTC’s prior privacy enforcement efforts in two categories — the ‘notice-and-choice’ and ‘harm-based’ models.”).

Similarly, the “new privacy governance” also keeps privacy levels out of individual control. While the negotiation table may include people outside of government agencies, the table is still limited to a small slice of society. The interests of government, industry, and, yes, even privacy advocacy groups, are not necessarily the same as consumers. It is far from clear that their interests would produce similar judgments about the value of privacy.

Indeed, it would be surprising if their interests did. Privacy is an individual and idiosyncratic value. Certainly, any one standard will leave large numbers of people with either too much or too little privacy. The common carrier privacy model, however, allows people to pick the level they want for a particular message — and pay for it if they so wish. This shift places perhaps the most important decision in privacy governance — what gets protected — away from the bureaucrat and into the hands of the consumer.

C. *Expectations, Confidences, and Privacy*

Common carriage privacy creates expectations in small bits of information (i.e., confidences). This mechanism differs from the current privacy regimes that aim to create systems or regimes of privacy that guarantee certain minimums of privacy — as well as balance privacy against societal needs.¹⁵³

Under current regimes, however, people seem indifferent to their disappearing privacy. People seem more eager to share more about their lives than ever — and there is an ever-growing sense that there is little that people can do to keep information private. Empirical research shows that individuals are willing to trade personal information for relatively small inducements, and individuals are often unwilling to adopt even the most basic of online privacy protections.¹⁵⁴

At the same time, behavioral economics of privacy indicates that peoples’ preferences are highly contextual. Unable to calculate the possible long-term, cumulative costs of revealing information, individuals often follow heuristics, which are generally not very privacy protecting.¹⁵⁵

¹⁵³ See DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 195-97 (2008).

¹⁵⁴ Alessandro Acquisti & Jens Grossklags, *Privacy and Rationality in Individual Decision Making*, 3 ECON. INFO. SEC. 26, 26-33 (2005).

¹⁵⁵ Andrew Gambino et al., *User Disbelief in Privacy Paradox: Heuristics that Determine Disclosure*, 2016 CHI CONF. EXTENDED ABSTRACTS 2837, 2837-43; Douglas J. Sylvester & Sharon Lohr, *Counting on Confidentiality: Legal and Statistical Approaches*

The heuristic that likely most damages privacy is hyperbolic discounting, the technical term for undervaluing future gratification in favor of immediate pleasure.¹⁵⁶ A hyperbolic discounter values the immediate advantage of revealing information online (i.e., a Facebook account or online purchase) without considering the long-term, sometimes speculative harm of firms collecting information dossiers.¹⁵⁷

Common carriage privacy could introduce a behavioral tendency for privacy that might counter the tendency to reveal. And, this pro-privacy tendency would be the so-called “endowment effect.” The endowment effect “stands for the principal that people tend to value goods more when they own them than when they do not. Move a person from a city house to a country house and, lo and behold, he is quite likely to prefer the country house more than he did when he resided in the city.”¹⁵⁸

Say that one has “bought” common law privacy by selecting to use, for a fee, Google’s “private” email service. The endowment effect would suggest that one would value the email’s privacy more than if one simply used Google’s free Gmail service. In other words, if one paid for common carriage privacy, one would “feel” its deprivation.

In this way, the endowment effect, in which paid confidences could develop, might counteract the behavioral tendencies to undervalue privacy. And, indeed, there already is empirical evidence that endowment effects can positively affect privacy.¹⁵⁹

to *Federal Privacy Law After the USA Patriot Act*, 2005 WIS. L. REV. 1033, 1090 (“We argue that a better explanation for the United States’ privacy waves is that individuals are subject to numerous cognitive biases and heuristics that aid, often inconsistently, in the identification and perception of potential risks and harms.”).

¹⁵⁶ Katherine J. Strandburg, *Social Norms, Self Control, and Privacy in the Online World*, in *PRIVACY AND TECHNOLOGIES OF IDENTITY: A CROSS-DISCIPLINARY CONVERSATION* 31, 39 (Katherine J. Strandburg & Daniela Stan Raicu eds., 2006); Yoan Hermstrüwer & Stephan Dickert, *Sharing Is Daring: An Experiment on Consent, Chilling Effects and a Salient Privacy Nudge*, 51 INT’L REV. L. & ECON. 38, 40 (2017) (“Models of bounded willpower suggest that people are likely to hyperbolically discount the (often intangible) costs of privacy losses and opt for the immediate gratification associated with consent.” (citations omitted)).

¹⁵⁷ Alessandro Acquisti & Jens Grossklags, *Privacy Attitudes and Privacy Behavior: Losses, Gains, and Hyperbolic Discounting*, in 12 *ECONOMICS OF INFORMATION SECURITY* 165, 176 (L. Jean Camp & Stephen Lewis eds., 2013); Alessandro Acquisti, *Nudging Privacy: The Behavioral Economics of Personal Information*, 7 *IEEE SEC. & PRIVACY* 82, 82-85 (2009).

¹⁵⁸ Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 *NW. U. L. REV.* 1227, 1228 (2003).

¹⁵⁹ See, e.g., Alessandro Acquisti et al., *What Is Privacy Worth*, 42 *J. LEGAL STUD.* 249 (2013) (discussing how individuals assign value to protection of their personal

V. SECTIONS 201 AND 222: THE NEED FOR A NEW PRIVACY MODEL?

The Communications Act's only explicit privacy requirements can be found in section 222, the provision concerning customer proprietary network information ("CPNI"). Passed as part of the Telecommunications Act of 1996, and codified as section 222 of the Communications Act, this provision places requirements on telecommunications carriers (i.e., the old-fashioned telephone companies) to protect CPNI.¹⁶⁰

As the FCC states, "practically speaking, CPNI includes information such as the phone numbers called by a consumer; the frequency, duration, and timing of such calls; and any services purchased by the consumer, such as call waiting."¹⁶¹ In short, the information is limited to metadata of phone calls. The CPNI regime is a typical "hoard and control" model — with the telephone companies as hoarders and the FCC limiting what can be done with the information.

On February 26, 1998, the Commission released the CPNI Order that set forth regulations implementing section 222.¹⁶² The FCC amended these rules a few times afterward.¹⁶³ The rules create an opt-in regime under which telecommunications carriers must obtain a customer's knowing consent before using or disclosing his or her CPNI to a third-party.¹⁶⁴

The 2015 Open Internet Order, as discussed above, greatly expanded the FCC's jurisdiction, reclassifying large swathes of the internet as Title II and subjecting much of the internet to section 222. In the Order, the FCC made clear that it regulates — and subjects to

data).

¹⁶⁰ Telecommunications Act of 1996, § 702, 47 U.S.C. § 222 (2018). Section 605 governs the secrecy of electronic communications but has played little role in the development of privacy. See Lauritz S. Helland, *Section 705(a) in the Modern Communications World: A Response to Di Geronimo*, 40 FED. COMM. L.J. 115, 116-17 (1988) ("[O]ne of the wordiest provisions in the Communications Act has sailed the seas for more than three-quarters of a century without any significant attempt . . . to explain its purpose or intended effect.").

¹⁶¹ Telecommunications Carriers' Use of Customer Proprietary Network Information & Other Customer Information, 21 FCC Rcd. 9990, 9991 (Aug. 30, 2006).

¹⁶² Implementation of the Non-Accounting Safeguards of Sections 271 and 272, 13 FCC Rcd. 8061 (Feb. 26, 1998).

¹⁶³ See, e.g., Review of Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, 17 FCC Rcd. 14,860 (July 25, 2002) (discussing the interpretation of the regulations in section 222).

¹⁶⁴ Petition for Rulemaking to Enhance Security and Authentication Standards, 21 FCC Rcd. 1782, 1784-85 (Feb. 14, 2006).

section 222 — all broadband internet access services. As discussed, *supra*, this category includes most traditional telephone and cable companies which now dominate broadband access markets, such as Verizon or Comcast, but not edge providers such as Google or Facebook.

Pursuant to the 2015 Open Internet Order’s jurisdictional expansion, the FCC issued its first set of privacy rules that expanded the existing definition of CPNI.¹⁶⁵ Under the rules, the data coming under CPNI protections now include information relating to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, such as Broadband Service Plans, Geo-location, MAC Addresses and Other Device Identifiers, IP Addresses and Domain Name Information, Traffic Statistics, Port Information, Application Headers, Application Usage, Application Payload, and Customer Premises Equipment and Device Information.¹⁶⁶

In addition to expanding CPNI, the FCC created fairly complex systems of opt-ins that BIASs must obtain before collecting any CPNI. It requires explicit permission before using or distributing any CPNI.¹⁶⁷ It also created a complaint process for aggrieved consumers. The FCC was empowered to collect fines against BIASs, but the rules created no individual causes of actions.¹⁶⁸

These rules created a furor. They placed BIASs at a significant disadvantage in marketing because Facebook and Google and other edge providers will, under these rules, still be able to collect and control CPNI. Indeed, the rules create an unexplainable regulatory inequality that will likely not protect privacy.¹⁶⁹ Customer proprietary information is not truly “protected” if Google, Ebay, Apple, and every

¹⁶⁵ Protecting the Privacy of Customers of Telecommunications Services, 31 FCC Rcd. 13,911, 13,928-29 (Oct. 27, 2016).

¹⁶⁶ *Id.* at 13,930-31.

¹⁶⁷ *Id.* at 13,977-14,007.

¹⁶⁸ *Id.* at 14,039-40.

¹⁶⁹ Rosemary C. Harold, *The FCC Forgot Something in Piecing Together Its Complex Proposal for Broadband Privacy Regulation: Consumers*, 17 FEDERALIST SOC’Y REV. 62, 63 (2016) (“[T]he FCC proposal would require ISPs and their affiliates to pepper consumers with frequent opt-in consent requests covering all sorts of data, whether sensitive or not. Edge providers, on the other hand, need only abide by the FTC’s more flexible approach — which calls for opt-in consent simply when the information concerns facts that most consumers would consider sensitive and therefore in need of additional safeguards.”).

other edge provider can collect it, but every BIAS must go through the expense and trouble of complying with section 222.

Of course, the BIASs are not the powers one wishes to offend in Washington, D.C. Verizon and AT&T have among the largest and oldest lobbying apparatus in the country.¹⁷⁰ And, the CPNI broadband rules were among the handful of regulations that Congress repealed under the new Trump administration.¹⁷¹

What is interesting is that after all the sound and fury that drove the promulgation of the 2015 Open Internet Order, Congress repealed the privacy rules — and no one noticed. Even John Oliver failed to mention their repeal. This Article suggests that the privacy rules' failure to garner any popular support — or even awareness — stems from the weakness of the typical “hoard and control” model. The CPNI involved information which most people did not even realize was being collected. The rules failed to give effective personal remedies — and failed to give people the power to define and control what information they sought to keep private.

CONCLUSION: BACK TO THE FUTURE?

The return of common carriage privacy may be upon us. A recent decision by the Ninth Circuit Court of Appeals ruled that “the common carrier exemption in section 5 of the FTC Act carves out a group of entities based on their status as common carriers. Those entities are not covered by section 5 even as to non-common carrier activities.”¹⁷² Thus, in light of the network neutrality ruling, most internet firms were deemed “common carriage,” and the FTC's jurisdiction was stripped away. Thus, the only agency that can protect internet privacy is the FCC. Its nineteenth century common carriage power may return.

But, beyond its new-found policy prominence, common carriage privacy presents a different model of privacy. Its emphasis on individual enforcement and contract challenges the assumptions of current privacy governance and points to new approaches to online privacy. It suggests that to the degree people care about privacy

¹⁷⁰ See *Top Spenders*, OPEN SECRETS, <https://www.opensecrets.org/lobby/top.php?indexType=s&showYear=2017> (last visited Sept. 29, 2017).

¹⁷¹ Ernesto Falcon, *Actually, Congress Did Undermine Our Internet Privacy Rights*, ELECTRONIC FRONTIER FOUND. (May 4, 2017), <https://www EFF.ORG/deeplinks/2017/05/congress-repealing-our-internet-privacy-rights-meant-congress-repealed-internet>.

¹⁷² *FTC v. AT&T Mobility LLC*, 835 F.3d 993, 1003 (9th Cir. 2016).

depends in crucial ways on their ability to define what information remains private and collect damages for breaches of confidence.