

"Uncommon Carriers" Abstract and Genesis Description

Abstract: Since the 1600s, legal experts have defined common carriers as commercial services with important private and public roles, requiring government regulation to ensure equal treatment of customers. Today, the Federal Communications Commission (FCC) regulates some—but not all—Internet service providers as common carriers, a legal classification that ensures net neutrality, an important protection for Internet content companies and consumers. However, the FCC has struggled to enforce net neutrality, because the FCC’s poor classification decisions have conflicted with the FCC’s statutorily mandated powers. First, this paper examines the quirky historical development of common carrier status. Second, this paper argues that Congress’s circular language in the Communications Act of 1934 has been the greatest obstacle to the successful enforcement of net neutrality. To prevent future regulatory struggles over this vital consumer protection, this paper concludes that two solutions offer the best long-term hope for securing net neutrality: a legislative update of the common carrier classification in the Communications Act of 1934 and/or a First Amendment legal campaign against content blocking and discrimination on the Internet.

Genesis Description: As a fourth-year political science major at Grinnell College, I have developed an academic interest in the intersection of politics, law, and technology. After the *Verizon* case in 2014, I wrote several blog posts about the net neutrality debate, and in my research, I discovered many interesting facts about the term “common carrier,” which plays an important role in the legal discussion. Given my experience writing a MAP paper with Prof. H. Wayne Moyer on the writ of *habeas corpus*, I decided to expand the scope of my common carrier research and write a paper proposing a long-term solution to the FCC’s failed attempts to enforce net neutrality. This paper is the culmination of my research, including recent developments regarding the FCC’s classification of telecommunications companies.

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Uncommon Carriers: The Effective Regulation of Net Neutrality

Experts in the telecommunications industry frequently use the term “dumb pipe” to describe the infrastructure connecting Internet service providers to their customers or end users. Most broadband Internet networks do not examine and differentiate between customer data, making the networks “dumb” about the content they are delivering. However, in January 2014, the United States Court of Appeals for the District of Columbia Circuit permitted Internet service providers to give their networks a brain. Judge David S. Tatel’s opinion in *Verizon v. Federal Communications Commission*¹ gutted the Federal Communications Commission’s (FCC) Open Internet Report and Order of 2010, crippling the regulatory regime protecting the “dumb pipe” network.

While a “dumb pipe” network may initially sound inefficient and unappealing, the customers of Internet service providers actually benefit from networks that cannot examine content. The operation of smart networks capable of discrimination places a burden on content companies—known in industry parlance as edge providers—because Internet service companies could charge edge providers a fee for faster access to end users. For example, Verizon charged Netflix an undisclosed sum for a faster network connection in April 2014 following the *Verizon* ruling.² Content discrimination also places a burden on consumers, because Internet service providers could choose which Internet content is viewable on the network, limiting the accessibility of public information. For these reasons, United States Senator Ed Markey of

¹ *Verizon v. Federal Communications Commission*, No. 11-1355 (D.C. Cir. 2014).

² Sam Gustin, “Netflix Pays Verizon in Streaming Deal, Following Comcast Pact,” *Time*, April 28, 2014.

Massachusetts aptly equated the practice of content discrimination to “putting tollbooths on the Internet superhighway.”³

The Open Internet Report and Order of 2010 was not the first time the FCC attempted to enforce protections against content discrimination, popularly known as “net neutrality.” Tim Wu, the Columbia University Law School professor who coined the term,⁴ concisely summarizes net neutrality’s economic and consumer benefits: “A maximally useful public information network aspires to treat all content, sites, and platforms equally. This allows the network to carry every form of information and support every kind of application.”⁵ Early Internet service providers—typically telephone companies—provided this equal treatment under Article II of the Communications Act of 1934,⁶ which empowered the FCC to ensure that startups, like AOL, could grow without forfeiting large amounts of revenue to telecommunications companies.⁷

However, as Internet service providers’ capabilities evolved in complexity, the FCC’s regulatory regimes weakened. Vague legal definitions and contradictory classifications constrained the Commission. Since the early 2000s, federal courts consistently opposed the FCC’s attempts to regulate net neutrality for Internet service providers, including Judge Tatel in the 2010 case *Comcast Corp. v. FCC*,⁸ because the FCC’s classifications of telecommunications companies conflicted with the Commission’s statutorily mandated powers.⁹ Specifically, the FCC did not apply the “common carrier” classification to all Internet service provider companies, which hindered its ability to justify net neutrality protections.

³ Ed Markey, “The Importance of Net Neutrality,” *Politico*, March 22, 2010.

⁴ Brian Fung, “‘A FEMA-level Fail’: The Law Professor Who Coined ‘Net Neutrality’ Lashes Out at the FCC’s Legal Strategy,” *The Washington Post*, January 14, 2014.

⁵ Tim Wu, “Network Neutrality FAQ,” timwu.org, Accessed February 10, 2014.

⁶ Communications Act of 1934, 47 U.S.C. 202 (1934).

⁷ Tom Wheeler, “This is How We Will Ensure Net Neutrality,” *Wired*, February 4, 2015.

⁸ *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

⁹ *Verizon v. Federal Communications Commission*, No. 11-1355 (D.C. Cir. 2014).

In February 2015, FCC chairman Tom Wheeler announced a proposal to reclassify cable broadband Internet providers as common carriers,¹⁰ but the intricate statutory constructions that have hampered the successful enforcement of net neutrality remain in effect. Given the innovative capacity of telecommunications companies and Silicon Valley entrepreneurs, Internet service providers have the potential to rapidly develop new network technologies in the future,¹¹ dodging further net neutrality regulation and complicating what has already been a difficult legal struggle. This paper examines the quirky historical development of common carrier status and explains the FCC's failure to enforce net neutrality for Internet service providers. Then, this paper argues that Congress's circular language in the Communications Act of 1934 has been the greatest obstacle to the successful enforcement of net neutrality. Finally, to prevent future regulatory struggles over this vital consumer protection, this paper concludes that two solutions offer the best long-term hope for securing net neutrality: a legislative update of the common carrier classification in the Communications Act of 1934 and or a First Amendment lawsuit against content blocking and discrimination on the Internet.

I. From Taxicabs to Rollercoasters: The History of Common Carriers

Many American legal concepts originated in English legislation and court decisions from before America's founding, making the United States one of around 80 common law countries. In common law, a common carrier is a person or company that "guarantees that no customer seeking service upon reasonable demand, willing and able to pay the established price, however

¹⁰ Steve Lohr, "In Net Neutrality Push, F.C.C. Is Expected to Propose Regulating Internet Service as a Utility," *New York Times*, February 2, 2015.

¹¹ For example, AT&T's sponsored data and T-Mobile's Music Freedom plans defy easy Article II classification. Mobile Internet access will grow quickly over the next decade, and telecommunications firms will continue to develop products that push the bounds of Article II.

set, [will] be denied lawful use of the service or [will] otherwise be discriminated against.”¹² At the start of its legal usage, the common carrier classification frequently applied to transportation companies, but the Communications Act of 1934 formally extended that definition to include companies transmitting information via wire or radio.¹³ To understand this change and how the common carrier classification should relate to Internet networks, this section first traces the history of common carriers to the formational work of Sir Matthew Hale, the Lord Chief Justice of England during the 1600s. Next, this section examines the application of common carrier status to new technologies, including the railroad and telegraph, from the 1800s to the early 1900s. Finally, this section assesses how this history influenced Congress’s shortsighted decision to broadly define common carrier status in the Communications Act of 1934.

The English concept of a “common calling”—in existence since at least the 15th century¹⁴—laid the foundation for Lord Hale’s formational writings. Professor James B. Speta of the Northwestern University School of Law explains that this concept “created actions that required those engaged in serving the public to, in fact, serve the entire public with reasonable care.”¹⁵ Common calling’s principle of equal service informed Lord Hale’s “A Treatise Relative to the Maritime Law of England,”¹⁶ which was published in 1670. In this treatise, Lord Hale establishes that the ports of England are subject to three legal concerns: “*jus privatum* (proprietary rights), *jus publicum* (the common interest), and *jus regium* (the prerogative of the

¹² Eli M. Noam, “Beyond Liberalization II: The Impending Doom of Common Carriage,” *Telecommunications Policy* 18, no. 6 (1994): 436.

¹³ Communications Act of 1934, 47 U.S.C. 153 § 3 (1934).

¹⁴ James B. Speta, “A Common Carrier Approach to Internet Interconnection,” *Federal Communications Law Journal* 54, no. 2 (2001): 254.

¹⁵ *Ibid.*

¹⁶ Matthew Hale, “A Treatise Relative to the Maritime Law of England, In Three Parts,” in *Collection of Tracts*, ed. F. Hargrave, (Dublin: n.p., 1787), 72.

King).¹⁷ Because the government's goal is the advancement of the common interest, private businesses that serve important public roles can be subject to state regulation. Lord Hale lists several examples of justifiable rules for commercial ports, which characterize this public role:

1. They ought to be free and open for subjects and foreigners, to come and go with their merchandise [...].
2. There ought to be no new tolls or charges imposed upon them without sufficient warrant, nor the old [tolls] enhanced [...].
3. They ought to be preserved from impediments and nuisances, that may hinder or annoy the access or adobe or recess of ships, and vessels, and seamen, or the [unloading and reloading] of goods.¹⁸

Lord Hale's rules were not just narrowly applied to commercial ports. Regulations concerning equal customer treatment, tolls and charges, and ease of use—all of which advance citizens' common interest—concern most companies serving the public.

Today, the diversity of companies considered to be common carriers reflects the breadth of Lord Hale's vision. Businesses operating everything from taxicabs¹⁹ to rollercoasters²⁰ are regulated as common carriers. American lawyers and authors Thompson Chitty and Leofric Temple promulgated Hale's broad definition of common carriage during the early 1800s with their book *A Practical Treatise on the Law of Carriers of Goods and Passengers*. To Chitty and Temple, a common carrier “must exercise the business of carrying as a ‘public employment,’ and must undertake to carry goods for all persons indiscriminately; and hold [...] out as ready to engage in the transportation of goods, [...] and not as a casual occupation *pro hac vice* [for a

¹⁷ Note, “Redefining ‘Common Carrier’: The FCC’s Attempt at Deregulation by Redefinition,” *Duke Law Journal* 501 (1987): 506.

¹⁸ *Ibid.*, 507.

¹⁹ Edwin R. Keedy, “Is a Taxicab a Common Carrier?” *University of Pennsylvania Law Review and American Law Register* 66, no. 1/2 (Dec., 1917): 71-73.

²⁰ *Gomez v. Superior Court (Walt Disney Co.)*, 35 Cal. 4th 1125 (2005).

particular occasion].”²¹ Chitty and Temple’s broad definition of common carrier status encouraged American courts to apply equal treatment regulations to new transportation technologies, most importantly the railroad and steamboat industries.

Later in the century, state legislatures began regulating another new technology with *jus privatum*, *jus publicum*, and *jus regium* criteria: the telegraph. In 1848, New York’s legislature passed a bill requiring telegraph companies to provide non-discriminatory service, and Massachusetts and Illinois created state regulatory boards to impose similar standards.²² Common carriers were traditionally transportation companies, but the telegraph was legally similar, because telegraph companies transported information instead of goods or people and served an important public and private interest. Before Congress drafted statutes to determine the status of this new method of communication, the Supreme Court decided to echo these states and apply federal common carrier duties to telegraph companies in the 1901 case *Western Union Telegraph v. Call Publishing*.²³ This case is significant, because it exemplified how common carrier obligations could be determined with or without legislative authorization; the federal judicial system could apply these regulations efficiently and effectively to new telecommunications technologies. The *Harvard Law Review* published a note highlighting this topic in 1901: “Whatever may be the scientific distinction between the telephone and telegraph, [...] it is well settled that the legal status of companies organized for the purpose of transmitting intelligence by their means is the same.”²⁴ At the start of the 20th century, the judiciary had

²¹ Thompson Chitty and Leofric Temple, *A Practical Treatise on the Law of Carriers of Goods and Passengers*, (Philadelphia: T. & J. W. Johnson, 1857), 53.

²² Noam, “Beyond Liberalization II,” 437.

²³ *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U.S. 92, 98 (1901).

²⁴ Note, “Telephone and Telegraph Companies as Common Carriers,” *Harvard Law Review* 15, no. 4 (Dec., 1901): 309.

supplemented the legislature as the classifier of common carrier status for the telecommunications industry.

The judiciary's increased role helps explain Congress's "terse and somewhat circular definition"²⁵ of common carrier in the Communications Act of 1934, which also created the Federal Communications Commission.²⁶ The act says, "The term 'common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio [...]."²⁷ Without the context of the term's history, this definition is weak, lacking descriptive features beyond commerciality and the form of information transmission. For example, the Communications Act's definition pales in comparison with Chitty and Temple's detailed clarification of common carrier status. Article II of the act—the heart of the legislation—is simply titled "Common Carriers" and contains many references to this circular definition.²⁸

While this definition's ambiguity is obvious today, members of Congress did not believe that the term required extensive explanation. Congress was well aware of the Supreme Court's *Western Union* decision, and "in Congressional debates leading to the 1934 Act, assurances were given that 'common carriage' was well understood and needed little explanation."²⁹ American state legislatures and courts had expanded Lord Hale's original regulations for ports to include new services, and Congress assumed that the categorization would be consistently updated as technology progressed. In hindsight, Congress should have been clearer. Congress granted strong

²⁵ "Redefining 'Common Carrier,'" 501.

²⁶ The 1910 Mann-Elkins Act also decreed that telephone and telegraph companies should be considered common carriers. However, Mann-Elkins was not as sweeping as the Communications Act, and because it was written before the creation of the Federal Communications Commission, it does not carry the same legal weight.

²⁷ Communications Act of 1934, 47 U.S.C. 153 § 3 (1934).

²⁸ *Ibid.*, 47 U.S.C. 201.

²⁹ Noam, "Beyond Liberalization II," 437.

powers to the FCC, including the ability to classify companies as common carriers, but Congress could not have predicted the technological and legal complexities of the Internet, which have hindered effective enforcement of net neutrality, given the circular definition provided in the Communications Act. Additionally, when given the opportunity to amend the Communications Act's definition in 1996, Congress's attempt to clarify the FCC's regulatory regime instead resulted in greater inconsistency.

II. Failure to Communicate: The FCC's Failed Net Neutrality Enforcement Policies

In the Internet's early years, computer users connected to telephone companies' networks to access the Internet. Telephone companies, which the FCC already classified as common carriers, were not controversial targets for net neutrality regulation. Net neutrality requires equal treatment of all customers and information, two qualities that were solidified in telephone networks during the first half of the 20th century. However, other companies began exploring alternative Internet delivery methods beyond telephone lines.³⁰ By 1980, Congress had mandated no specific criteria for determining if all Internet service providers should be considered common carriers, so the FCC developed a "bright-line test" to classify these companies.³¹ With its Article II authority, the Commission wrote the *Computer II* regulatory regime, which differentiated between "basic" and "enhanced" services.³² The FCC only considered companies in the basic category to be common carriers. This section explains how and why the FCC did not consistently apply the basic category to new Internet service provider technologies, which culminated in

³⁰ Tom Wheeler, "This is How We Will Ensure Net Neutrality," *Wired*, February 4, 2015.

³¹ Second Computer Inquiry, Final Decision, 77 FCC2d 384 (1980).

³² *Ibid.*

lawsuits against the FCC's increasingly "arbitrary"³³ designations of telecommunications companies and deterred the FCC's attempts to enforce net neutrality.

Under the *Computer II* regime, enhanced services needed to "act on the format, content, code, protocol or similar aspects of a subscriber's transmitted information; provide the subscriber additional [...] information; or involve subscriber interaction with stored information."³⁴ In other words, basic services simply moved information, while enhanced services interpreted and/or altered information. Dial-up Internet service providers, like AT&T,³⁵ were part of the basic category. Their networks functioned as a delivery system with no impact on the information being delivered—a relatively simple regulatory distinction. However, in 1996, Congress added another layer of definitions to the regulatory regime, complicating the FCC's decision-making process instead of providing a stronger definition of common carrier for the future.

The Telecommunications Act of 1996 retired the basic category. To replace it, the legislation inserted the term "telecommunications carrier" into the FCC's regulatory scheme. The Telecommunications Act also titled enhanced Internet companies "information-service providers."³⁶ The FCC haphazardly applied these redefinitions to new technologies, like digital subscriber lines (DSL) and cable broadband providers because of the ambiguity of these terms' meanings, especially when combined with the Communications Act's weak definition of common carrier status. The FCC's categorization process for Internet service providers upended

³³ Jacob Gershman, "FCC Firms Up Legal Grounds for Net Neutrality," *Wall Street Journal*, February 8, 2015.

³⁴ Sharon K. Black, *Telecommunications Law in the Internet Age*, (San Francisco: Morgan Kaufmann Publishers, 2001), 186.

³⁵ *Verizon v. Federal Communications Commission*, No. 11-1355 (D.C. Cir. 2014).

³⁶ Nilay Patel, "The Wrong Words: How the FCC Lost Neutrality and Could Kill the Internet," *The Verge*, January 15, 2014.

the historical evolution of the common carrier designation, which previously included more precise legislative or judicial input regarding specific technologies.

The FCC subjected DSL providers to common carrier regulations, but the FCC classified cable broadband providers as information-service providers, voiding common carrier responsibilities for cable firms. The National Cable & Telecommunications Association, which represents the political interests of firms that control over 90% of the cable market,³⁷ claims that the FCC made this decision to avoid net neutrality regulations for cable broadband providers “to encourage innovation and investment in private infrastructure and preclude unnecessary government intervention,”³⁸ even though cable broadband’s functionality closely resembled DSL. The ambiguity of the Communications Act’s common carrier definition provided legislative cover for the FCC’s decision.

Edge providers, recognizing net neutrality’s precarious position, fought against this categorization and advocated for greater FCC regulation of cable broadband providers. In 2005, the United States Supreme Court heard the case *National Cable & Telecommunications Association v. Brand X Internet Services*, which challenged the FCC’s information-service classification for cable broadband providers. The Court upheld the Commission’s decision to not classify cable broadband providers as common carriers, because the legislative framework for the FCC’s regulations was ambiguous and the FCC’s interpretation of its powers was reasonable.³⁹ With this ruling, the Supreme Court solidified the FCC’s unsystematic application

³⁷ Jim Puzzanghera, “Former FCC Chairman Michael Powell Named to Lead Cable TV’s Top Lobbying Group,” *Los Angeles Times*, March 15, 2011.

³⁸ “Why It’s a Good Thing that Broadband Isn’t a Common Carrier,” *NCTA*, January 27, 2014, <https://www.ncta.com/platform/public-policy/why-its-a-good-thing-that-broadband-isnt-a-common-carrier/>.

³⁹ *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967 (2005).

of the 1996 Telecommunications Act. The FCC's failure to classify cable broadband providers as common carriers haunted the Commission's later efforts to enforce net neutrality.

In the decade after the *Brand X* decision, the FCC made two attempts to impose anti-blocking and anti-discrimination regulations on cable providers, which controlled over 50% of America's broadband Internet market in 2013,⁴⁰ without reclassifying these companies as common carriers. First, the FCC ordered Comcast and other cable broadband providers to cease blocking Internet traffic to peer-to-peer file sharing sites in 2008, which violated the anti-blocking principle of net neutrality. The FCC justified its order by citing its ancillary jurisdiction⁴¹ in the Communications Act of 1934.⁴² However, Judge Tatel and the DC Circuit ruled in the 2010 case *Comcast Corp. v. FCC* that, while the Commission possessed authority to issue net neutrality orders concerning the performance of its statutory duties, the FCC could not impose *per se* common carrier regulations on companies the FCC itself had classified as information-service providers, which were not common carriers.⁴³ In other words, the FCC could not regulate a category of companies that the FCC had decided it could not regulate.

Subsequently, the FCC issued the Open Internet Report and Order of 2010, which similarly attempted to enforce net neutrality without reclassifying cable broadband providers. The Open Internet Report and Order of 2010 provided two rules to prevent content discrimination on networks: "Fixed broadband providers may not block lawful content, applications, services, or non-harmful devices, [... and they] may not unreasonably discriminate

⁴⁰ "Broadband Internet Penetration Deepens in US; Cable is King," *IHS Technology*, December 9, 2013, <https://technology.ihs.com/468148/>

⁴¹ Ancillary jurisdiction grants courts and or regulatory bodies the power to decide matters not explicitly within their legislated authority, if that decision substantially impacts the performance of explicit responsibilities.

⁴² *In re Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 F.C.C.R. 13028 (2008).

⁴³ *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

in transmitting lawful network traffic.”⁴⁴ In the 2014 case *Verizon v. Federal Communications Commission*, the DC Circuit heard another complaint from the telecommunications industry addressing the authority of the FCC to issue this Open Internet Report and Order. Judge Tatel’s opinion in this case also confirmed that the FCC possessed the necessary authority to issue rules promoting net neutrality, but Tatel again stressed that these rules could not be applied to companies classified as information-service providers, because the FCC did not consider this category of companies to be common carriers, echoing parts of the 2010 *Comcast* decision.

The FCC’s insistence on regulating net neutrality without reclassifying cable broadband providers frustrated legal and industry commentators. In an interview with the *Washington Post*, Tim Wu—the Columbia University Law School professor who coined the term net neutrality—offered a stringent opinion of the FCC’s defense of its regulations in the *Verizon* case: “The FCC’s legal strategy put it in the position of arguing that its rules are not common carrier rules when the two components of the regulation—anti-blocking and anti-discrimination—have been at the center of common carrier regulation since medieval times [...].”⁴⁵ Some explanations for the FCC’s perplexing, decade-long legal strategy focused on the Commission’s close ties to America’s telecommunications giants, which could gain new revenue from relaxed regulations on their treatment of edge providers and end users. For example, former FCC Chair Michael Powell, the son of former Secretary of State Colin Powell, is the current president of the National Cable & Telecommunications Association,⁴⁶ which maintained a lobbying budget of at least \$13

⁴⁴ Open Internet Report and Order, 10-201 F.C.C. 17905 (2010).

⁴⁵ Fung, “A FEMA-level fail,” *The Washington Post*.

⁴⁶ The NCTA includes companies like Comcast and Time Warner. Many companies contribute to the NCTA while simultaneously maintaining their own lobbying budgets. For example, Comcast’s own annual lobbying budget exceeds \$10 million.

million in 2013.⁴⁷ Tom Wheeler, the current FCC Chair, served as president of the NCTA between 1979 and 1984. Despite this revolving door's lucrative personal incentives, Wheeler announced on February 4, 2015 that the FCC would vote to reclassify cable broadband providers as common carriers, at the behest of President Barack Obama,⁴⁸ who appointed Wheeler to the FCC, and approximately 4 million concerned citizens, who contacted the FCC to advocate in favor of net neutrality.⁴⁹

III. Acknowledging the Uncommon Features of Common Carriage on the Internet

The FCC will vote on Wheeler's reclassification proposal on February 26, 2015.⁵⁰ The proposal is almost certain to receive approval from a majority of the Commissioners.⁵¹ By reclassifying cable broadband providers under Title II of the Communications Act, the FCC will be able to enforce net neutrality in the short-term without contradicting its own common carrier categorization system. Wheeler's proposal also reclassifies mobile Internet providers as common carriers, ensuring that one of the frontiers of Internet-access technology will retain a dumb pipe network. Wheeler explained the FCC's about-face in a column for *Wired* magazine:

Broadband network operators have an understandable motivation to manage their network to maximize their business interests. But their actions may not always be optimal for network users. The Congress gave the FCC broad authority to update its rules to reflect changes in technology and marketplace behavior in a way that

⁴⁷ Allan Holmes, "Network Neutrality Debate may be Headed Back to FCC: Broadband Providers would Meet Challenge with Powerful Lobbying Corps," *The Center for Public Integrity*, January 15, 2014.

⁴⁸ The White House is forbidden from exerting excessive influence over independent agencies. Republican senators and congressman have questioned whether Obama or his staff exceeded their authority by publicly advocating for net neutrality.

⁴⁹ Elise Hu, "FCC Chairman Wheeler Backs Regulating Internet As Public Utility," *National Public Radio*, February 4, 2015.

⁵⁰ Since submission of this paper, the FCC voted to approval the proposal.

⁵¹ Noah Bierman and Evan Halper, "GOP, Tech Industry Mostly Out of Step Over Net Neutrality Issue," *Los Angeles Times*, February 12, 2015.

protects consumers. Over the years, the Commission has used this authority to the public's great benefit. [...] That is why I am proposing that the FCC use its Title II authority to implement and enforce open Internet protections.⁵²

To illustrate the importance of this reclassification, Wheeler cites his own experience as the president of a 1980s telecommunications startup, NABU, which delivered high-speed Internet to end users over cable networks. Wheeler claims that his company suffered from lack of FCC net neutrality regulations over cable broadband, resulting in his company's bankruptcy. He hopes that the Article II reclassification will prevent similar outcomes for other firms in the future.⁵³

While Wheeler's proposal certainly achieves that goal in the short-term, it fails to fully acknowledge the lessons from the past decade of abortive net neutrality efforts. Judge Tatel and his colleagues on the DC Circuit have twice explained that Congress's lax definition of common carrier status allows the FCC to not apply common carrier regulations on some Internet service providers, if these Internet service providers are able to convince a majority of FCC Commissioners that their companies should be classified as information-service providers. This section proposes two solutions to this problem, adhering to the historical development of common carrier status and guaranteeing strong FCC regulations for all Internet service providers. First, Congress should legislate a new definition of common carrier, providing a precise framework for FCC classification of Internet service providers. If Congress displays insurmountable deadlock on this legislation—as is often the case—net neutrality advocates should reframe their legal challenges against flawed FCC classifications to focus on the First Amendment. Together, these solutions offer the best hope for creating durable federal protections for net neutrality.

⁵² Tom Wheeler, "This is How We Will Ensure Net Neutrality," *Wired*, February 4, 2015.

⁵³ *Ibid.*

The 1934 Communications Act's circular definition of a common carrier—"The term 'common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio [...]"⁵⁴—is the root of the FCC's regulatory fumbles. Close to a century after the Communications Act's passage, this term has lost proper contextualization, and its ambiguity has granted the FCC great interpretative powers, allowed by the Supreme Court but not envisioned by Congress. A newly legislated definition should contain several features. First, the definition should reaffirm the important public and private role of Internet service providers in the United States, echoing Lord Hale's original legal formulation for English ports during the 1600s. Second, the definition should stress that all information carried by telecommunications companies on networks connected to the Internet cannot be blocked or discriminated against for commercial purposes.⁵⁵ Third, the definition should contain a provision concerning the definition's unambiguous applicability to future technologies, so that the FCC cannot skirt its authority by interpreting the definition to be out-of-date when considering new technology.

While the telecommunications industry's lobbying prowess has contributed to a lack of legislative action, recent upticks in national attention on net neutrality—comedian John Oliver's HBO program featured a segment on net neutrality in June that may have crashed the FCC's website⁵⁶—have propelled both the Democratic and Republican Parties to consider new legislation similar to the changes proposed above. The most recent Republican draft, a

⁵⁴ Communications Act of 1934, 47 U.S.C. 153 § 3 (1934).

⁵⁵ Some discriminatory practices are often required for network maintenance and management. Because these practices encourage greater long-term network efficiency, they should be encouraged, not outlawed. Commercial discrimination is distinct, because it encourages unequal treatment of information, based on the economic power of the originator or end user, regardless of network capacity.

⁵⁶ Soraya Nadia McDonald, "John Oliver's Net Neutrality Rant May Have Caused FCC Site Crash," *Washington Post*, June 4, 2014.

preemptive strike against Wheeler’s FCC reclassifications, strongly defines cable broadband and other Internet service providers as common carriers. However, as a concession to telecommunications companies, the proposed Republican legislation also revokes many of the FCC’s regulatory powers for price controls, weakening the agency’s consumer protection abilities for the future.⁵⁷ Democrats and Internet activists have largely rejected the Republican proposal for this reason. Without even greater amounts of public political pressure, Congress is unlikely to legislate a new definition for common carrier status anytime soon, forcing net neutrality advocates to consider fallback options.

If Congress does not legislate a new definition of common carrier status, and if telecommunications companies dodge another round of FCC regulation, the best option for advancing net neutrality is to contest content blocking and discrimination’s free speech effects through application of the First Amendment. The most recent Supreme Court decisions regarding telecommunications regulations have primarily concerned the authority of the FCC, which is far more ambiguous than the well-defined free speech rights within the Bill of Rights. In the 1979 case *FCC v. Midwest Video Corp.*, the Supreme Court decided, “A common carrier service in the communications context is one that makes 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 [... footnotes omitted].”⁵⁸ This public offering to communicate information—the foundation of a telecommunications company’s common carrier status—demands more than a recognition of its public and private role as a information transportation service; it also is a direct contributor to the free flow of

⁵⁷ Brian Fung, “The GOP’s Plan to Legislate Net Neutrality is Here. And Internet Activists Already Hate It,” *Washington Post*, January 16, 2015.

⁵⁸ *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979).

information within an open, democratic society. Blockage or discrimination against certain forms of speech, at the behest of corporations for commercial purpose, contradicts the implications of this vital American right, as explained by George Washington University Law School Professor Dawn C. Nunziato: “Decisions regarding what speech is allowed—and what speech is censored—should not be committed solely to the dictates of the dominant private entities that control expression on the Internet. A fundamental rethinking of the meaning of the First Amendment’s protections [...] is therefore in order.”⁵⁹ By encouraging the judiciary to consider the role of common carriers in free speech rights, instead of considering the FCC’s ambiguous regulatory authority, net neutrality advocates can reframe the debate around common carriers away from Congress’s circular definition and instead refocus on the actual common law function of common carriers: to provide equal treatment for all customers, a vitally important public and private duty for the maintenance of America’s political system when intertwined with communications.

IV. Conclusion

Since the 1600s, legal experts have defined common carriers as transportation services with important private and public roles, requiring government regulation to ensure equal treatment of customers. Today, the Federal Communications Commission [FCC] regulates some—but not all—Internet service providers as common carriers, which ensures net neutrality, an important protection for Internet content companies and consumers, because Internet service providers transport information on their networks. However, the FCC has struggled to enforce

⁵⁹ Dawn C. Nunziato, “Net Neutrality, Free Speech, and Democracy in the Internet Age,” in *Net Neutrality, Free Speech, and Democracy in the Internet Age*, Stanford Law Books (Paolo Alto: n.p., 2009).

net neutrality, because poor classification decisions have conflicted with the FCC's statutorily mandated powers. First, this paper examined the historical development of common carrier status, which contextualizes the legal role of transportation and telecommunications companies. Second, this paper argued that Congress's circular language in the Communications Act of 1934 has been the greatest obstacle to the successful enforcement of net neutrality. To prevent future regulatory struggles over this vital consumer protection, this paper concludes that two solutions offer the best long-term hope for securing net neutrality: a legislative update of the common carrier classification in the Communications Act of 1934 and a First Amendment legal campaign against content blocking and discrimination on the Internet. Together, these solutions honor the history of this important term, and properly expand its meaning to acknowledge the uncommon features of common carriers on the Internet.