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Press Release

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NEW PHOENIX CENTER STUDY EXAMINES REGULATORY IMPLICATIONS OF TREATING INTERNET PLATFORMS AS COMMON CARRIERS

Analysis reveals that calls for "common carrier" regulation are really a euphemism for broader "public utility" regulation

WASHINGTON, D.C. — The debate over how internet platforms moderate content has reached a fever pitch. To get around First Amendment concerns, some proponents of content moderation regulation argue that internet platforms should be regulated as "common carriers"—that is, internet platforms should be legally obligated to serve all comers without discrimination. As these proponents regularly point to communications law as an analytical template, it appears that the term "common carrier" has become a euphemism for full-blown public utility regulation complete with a dedicated regulator. However, proponents of common carrier regulation provide no details about how this regime would work. Viewing the question through a *regulatory*—as opposed to a First Amendment—lens, in a new paper released today entitled *Regulatory Implications of Turning Internet Platforms into Common Carriers,* Phoenix Center President Lawrence J. Spiwak offers a few insights on how to fill that analytical gap, and to ask if we will be happy with the inevitable consequences (intended and unintended) if we proceed down that road.

To provide context, Spiwak's paper begins with a brief overview of the legal origins of the "internet platforms are common carriers" argument as a strategy to overcome First Amendment concerns. Next, this paper reviews the prominent academic literature arguing for internet platforms to be treated as common carriers, which draws upon direct analogies to the communications industry. However, if communications regulation is to provide the analytical template for internet platform regulation, then a more accurate understanding of communications law is required. Following this discussion, Spiwak's paper reviews Justice Clarence Thomas's concurrence in *Biden v. Knight Foundation*, along with the two cases—one from the Eleventh Circuit and one from the Fifth Circuit—which, at the time of this writing, are pending *certiorari* before the Supreme Court and where the question of whether internet platforms may be treated as common carriers is at the heart of the dispute. The penultimate section of Spiwak's paper outlines some of the important—yet unaddressed—legal questions that will arise should the Supreme Court grant *certiorari* and rule that internet platforms are common carriers that could eventually be subject to some sort of public utility regulation.

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Spiwak concludes by noting that effort to treat internet platforms as public utilities is, at bottom, an attempt to take a framework designed to govern the *economic behavior* of the Old Ma Bell monopoly and use it to govern questions of *speech*—the only constant being that the government would act as the final arbiter of a firm's conduct. As such a regime has never been attempted before (probably because a regime designed to govern economic behavior was never intended to be used to regulate speech in the first instance), Spiwak argues that "implementing this new regime would effectively force us to cross the 'Regulatory Rubicon.'"

"Rather than regulate, perhaps there is a far cheaper and less intrusive solution for complaints about undue content moderation than massive government regulation—consumers can simply choose not to use social media platforms," says study author Phoenix Center President Lawrence J. Spiwak.

A full copy of PHOENIX CENTER POLICY PAPER NO. 60, *Regulatory Implications of Turning Internet Platforms into Common Carriers,* may be downloaded free from the Phoenix Center's web page at: https://phoenix-center.org/pcpp/PCPP60Final.pdf.

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