Telegraph Torts: The Lost Lineage of the Public Service Corporation

Evelyn Atkinson

Tulane University Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Legal History Commons, Public Law and Legal Theory Commons, and the Torts Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mlr/vol121/iss8/3

https://doi.org/10.36644/mlr.121.8.telegraph

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
At the turn of the twentieth century, state courts were roiled by claims against telegraph corporations for mental anguish resulting from the failure to deliver telegrams involving the death or injury of a family member. Although these “telegraph cases” at first may seem a bizarre outlier, they in fact reveal an important and understudied moment of transformation in the nature of the relationship between the corporation and the public: the role of affective relations in the development of the category of the public utility corporation. Even as powerful corporations were recast as private, rights-bearing, profit-making market actors in constitutional law, a significant minority of rural state courts deviated from the common law to impose liability for mental anguish on negligent telegraph corporations. They did so on the basis that telegraph companies bore a duty to protect the emotional wellbeing and family connections of their customers. In this, courts gave voice to the popular view, voiced by telegraph users and promoted by the companies themselves, of the telegraph corporation as a faithful servant of individual families and communities. In so doing, they embedded the historical and popular perception of the corporation as “servant” into the definition of “public service.”

This Article exposes the private law of the public service corporation and the noneconomic dimension of the legal category of “public utility.” Current scholarship has focused on how turn-of-the-century jurists developed the category of “public utility” or “public service” corporation to justify state economic regulations that would otherwise infringe on corporations’ newfound constitutional rights. The telegraph cases reveal a concurrent and complementary development in tort law: the imposition of affective responsibilities on certain corporations as well. Illuminating this doctrine offers an example of how the public utility category could be mobilized to protect the emotional as well as economic wellbeing of the public today.

* Charles E. Lugenbuhl Associate Professor of Law, Tulane University Law School. Many thanks to Ajay Mehrotra, John Goldberg, Barbara Welke, William Novak, K. Sabeel Rahman, Ganesh Sitaraman, Jonathan Levy, Naama Maor, Lael Weinberger, Emily Prifogle, Emily Stolzenberg, Jane Manners, and the editorial team at the Michigan Law Review for their suggestions and comments. Thank you also to the participants in the American Society for Legal History’s Doctoral Colloquium (2014).
INTRODUCTION

On February 27, 1887, William Reese sent an urgent message to his brother-in-law, who lived fifteen miles away in Crawfordsville, Indiana: “My wife is very ill; not expected to live.”¹ The telegram was not delivered for more than twenty days, long after Mrs. Reese had died.² Reese sued the Western Union Telegraph Company, alleging that, because of the absence of her brother from the bedside of his dying wife, he had “suffered great uneasiness, anguish,

---

².  Id.
and anxiety of mind.”\(^3\) The Supreme Court of Indiana concluded that the telegraph company could be liable for Reese’s mental anguish, as it had failed “to perform a duty which rests upon it as a servant of the public.”\(^4\)

William Reese was not alone. At the turn of the twentieth century, state courts were “flooded” with a “mass of litigation” against telegraph companies, alleging mental anguish resulting from a delayed telegram about the death or illness of a loved one.\(^5\) These “telegraph cases” resulted in a “battle of the jurisdictions,”\(^6\) with the doctrine accepted in many rural state courts but rejected in more urban locales. The Supreme Court of Texas was the first to permit recovery as a matter of common law, in 1881;\(^7\) by 1924, eleven states allowed recovery, either by common law or statute, and fourteen did not.\(^8\) The debate

3. Id. at 164.
4. Id. at 166.
5. Note, The Recovery for Mental Anguish in the Telegraph Cases, 2 VA. L. REV. 457, 457 (1915). A Westlaw search reveals over 800 cases brought between 1881 and 1944. This Article examines 100 cases, including those most often cited in legal treatises and others that ensure geographical and temporal diversity. This search primarily reveals state supreme court cases and a few federal district court cases. It is likely that even more cases were brought in the lower courts that were either settled or not appealed.
7. So Rellev. W. Union Tel. Co., 55 Tex. 308 (1881). The Indiana Supreme Court allowed recovery in the case of a death telegram in 1875, but did so under a state statute requiring companies to transmit messages “with impartiality and good faith.” W. Union Tel. Co. v. Hamilton, 50 Ind. 181, 183 (1875). See infra Section II.D for a discussion of state statutes.
was “hotly waged” in courts, legislatures, and local newspapers, with the result that the law was in a “deplorably chaotic condition.” As one legal scholar lamented, “it is doubtful whether there is any subject upon which the cases are so positively opposed to each other.”

In upholding mental anguish suits, many rural state courts in the South and Middle West deviated from the common law rule that “[m]ental pain or anxiety the law cannot value.” Although claims for emotional distress were sometimes permitted when accompanied by physical harm, no physical injury resulted from a delayed telegram. Yet in the telegraph cases, a significant minority of rural courts held that mental anguish alone could be the basis of a suit. Neither gender, class, nor race appeared to matter. Jurists justified this deviation from the common law on the basis of the unique status of the telegraph company as a public service corporation—a public utility—with a heightened responsibility to facilitate its patrons’ emotional wellbeing in times of family crisis.


9. Oscar A. Ecke, Legislative Redress for Mental Anguish in Telegraph Cases, 7 AM. LAW. 240, 240 (1899); Note, supra note 5, at 462; see also Sumner Kenner, Mental Disturbances and the Consequences Thereof as Elements of Damages, 60 CENT. L.J. 205, 206 (1905) (remarking that the question was “the subject of much controversy and judicial elucidation”).


12. During the late nineteenth century, claims brought against railroad and other transportation companies for “fright” resulting from witnessing a horrific accident were beginning to be accepted where the fright had caused some sort of physical response, such as a miscarriage. See the cases discussed in BARBARA YOUNG WELKE, RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865–1920, at 203 (2001) and Martha Chamallas with Linda K. Kerber, Women, Mothers, and the Law of Fright: A History, 88 MICH. L. REV. 814, 814 (1990). But see Mitchell v. Rochester Ry. Co., 45 N.E. 354 (N.Y. 1896) (denying recovery to a pregnant woman who suffered a miscarriage as a result of fright).

13. Modern-day torts scholars have recognized the influence of the telegraph cases on the tort of Negligent Infliction of Emotional Distress (NIED). See JOHN C.P. GOLDBERG, LESLIE C. KENDRICK, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 831 (5th ed. 2021); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 47 cmt. b (Am. L. Inst. 2010); Dan B. Dobbs, Undertakings and Special Relationships in Claims for Negligent Infliction of Emotional Distress, 50 ARIZ. L. REV. 49, 56 (2008). For cases invoking the telegraph cases to support a cause of action for emotional distress, see, for example, Miranda v. Said, 836 N.W.2d 8, 22 (Iowa 2013), for an extensive discussion of telegraph cases to support recognition of an emotional distress claim in a legal malpractice suit; Larsen v. Banner Health Systems, 81 P.3d 196, 203 (Wyo. 2003), for citations of telegraph cases in support of allowing an emotional distress claim regarding babies switched at birth); Hardin v. Obstetrical & Gynecological Associates P.A., 527 S.W.3d 424, 444 (Tex. App. 2017); and Johnson
The burst of suits for mental anguish against telegraph corporations in the late nineteenth and early twentieth century may seem like an esoteric outlier in the history of American law. These cases appeared in a brief period in which the telegraph was vitally important in American society, and ceased as the telephone replaced the telegraph.\textsuperscript{14} Although jurists of the time fiercely debated the telegraph cases, their origin and importance to the history of the administrative state and corporate responsibility have remained unexplored.\textsuperscript{15} This Article argues that the telegraph cases are not a “blip on the screen” but the key to an important and understudied moment of transformation in the nature of the relationship between the corporation and the public: the role of affective responsibilities in the development of the public utility corporation.\textsuperscript{16} Even as powerful corporations were recast as private, rights-bearing, profit-making market actors in constitutional law, some, like telegraph companies, retained a popular and legal identity as servants of individual customers, their families, and their communities.\textsuperscript{17}

These telegraph cases challenge us to rethink the relationship of private law and regulation. In response to the outpouring of telegraph cases, state legislatures debated and even codified specific causes of action for emotional harm against telegraph companies. In these instances, popular demand for

\textsuperscript{v. State}, 334 N.E.2d 590, 592 (N.Y. 1975), for citations of telegraph cases holding hospitals liable for emotional distress.

\textsuperscript{14} The last reported telegraph case appears to have been \textit{Western Union Telegraph Co. v. Standridge}, 183 S.W.2d 602 (Ark. 1944).

\textsuperscript{15} Although the history of the telegraph has become a distinct area of study, little scholarship has been done on the sociolegal context of lawsuits involving telegraphs and almost none on the mental anguish cases, with the exception of Brenton J. Malin, \textit{Failed Transmissions and Broken Hearts: The Telegraph, Communications Law, and the Emotional Responsibilities of New Technology}, 17 \textit{MEDIA HIST.} 331 (2011), which explores the telegraph cases from the perspective of emotional connections to new technology. For examples of recent historical scholarship on the telegraph, see Richard R. John, \textit{Network Nation: Inventing American Telecommunications} (2010); Joshua D. Wolff, \textit{Western Union and the Creation of the American Corporate Order}, 1845–1893 (2013); David Hochfelder, \textit{The Telegraph in America, 1832–1920} (2012); Menahem Blondheim, \textit{News over the Wires} (1994); and Tom Standage, \textit{The Victorian Internet} (Bloomsbury USA 2d ed. 2014) (1998).

\textsuperscript{16} Exposing the centrality of tort claims for mental anguish to the development of the public utility concept also supports claims by torts scholars such as Martha Chamallas, who argue that emotional harm has been unduly marginalized in legal scholarship. Martha Chamallas, \textit{Removing Emotional Harm from the Core of Tort Law}, 54 \textit{VAND. L. REV.} 751, 752–53 (2001).

corporate accountability, expressed through creative tort suits, ultimately convinced state legislatures that a public regulatory regime was valuable and necessary. Furthermore, this regulation of a unique public service corporation was justified not just on the basis of the public’s economic welfare, but on their emotional and mental wellbeing. This development highlights the power individual private lawsuits can have in advancing new theories of corporate liability, which may have strategic potential for corporate regulation today.

This Article uncovers the lost lineage of the telegraph tort cases. Part I illuminates the social context in which the cases occurred. It reveals that plaintiffs who brought mental anguish lawsuits for the failure to deliver a telegram about the death or illness of a loved one viewed the telegraph corporation not as a disinterested, profit-oriented monopoly corporation, but as an intimate member of their household and community. The widespread belief that the telegraph company was the “servant” both of individual families and of the community at large informed the public expectation that the company owed a special duty to its users to care for the wellbeing of their families in times of crisis. In so doing, they drew on the traditional common law conception of the corporation as having heightened responsibilities to the public. This Article also reveals that telegraph corporations themselves promoted this expectation of an affective relationship of servitude between the companies and their patrons through industry publications, promotional materials, and the behavior of telegraph agents.

Part II discusses the prevalence of rural state courts willing to impose this heightened duty of care on telegraph corporations, even though allowing suits for pure mental anguish violated the common law rule that nonphysical and noneconomic harms were not legally cognizable injuries. These judges overrode the common law on the basis that the telegraph company was a “servant of the public” that bore a responsibility to protect the public’s family connections and mental health. This legal formulation of the unique duty of service of telegraph corporations drew from two common law concepts: the traditional vision of the corporation as the “child” or “servant” of the public, and the domestic law of master-servant. For these judges, the public “service” that telegraph companies provided was to function as the “servants” of individual families. In categorizing telegraph companies as public service corporations, rural courts imported the affective, hierarchical relation of master and servant into the definition of public service.

Notably, even in courts that disavowed recovery for mental anguish, judges still largely agreed that telegraph corporations owed a heightened duty of care not to cause emotional injury to their customers in situations involving family crises. The point of disagreement was whether courts could deviate so significantly from the common law as to recognize a novel legal injury, or whether such changes were better left to state legislatures. This reluctance to innovate prompted several states to create a new statutory tort for mental anguish against telegraph corporations. These statutes were upheld against constitutional challenges on the basis that states had the power to regulate in the public health and welfare, including to protect the public’s mental health, as
well as the ability to more strictly oversee certain corporations that implicated the public interest.

Part III transitions to the present day, laying out the contemporary conversation over whether and how the “public utility” concept could be utilized to address new, pressing social problems, from climate change and social justice to violence and civil unrest. This question is particularly pertinent with regards to the responsibility of online platforms like Twitter, Instagram, and Facebook to monitor potentially harmful forms of content, such as that which promotes hate speech, violence, or negative body image. Justifying the extension of the public utility concept to these platforms has troubled legal scholars and policymakers because of the nonphysical and noneconomic nature of the harm.

The telegraph cases present a compelling instance in which noneconomic harm resulted not just in private liability but in state regulation as well. Understanding the telegraph cases, and the underlying vision of the corporation that they present, highlights that the imposition of affective duties of care on powerful corporations is not a novel approach. Although not completely analogous, the telegraph cases offer the possibility of a complimentary paradigm to our more limited modern-day understanding of the public utility corporation—one that links specific important services to heightened public responsibilities, and understands corporations as moral actors that are embedded in a web of social relations rather than as purely profit-driven market actors.

I. Recovering the History: The Public “Servant” Corporation

The following Part will explore the relationship between telegraph corporations and their patrons, including the social and geographic landscape in which interactions between telegraph agents and the public occurred. Within rural communities, users of the telegraphs shared a widespread perception, promoted by telegraph companies themselves, that the purpose of the telegraph corporation was to serve its patrons. Examining public expectations of the conduct of telegraph agents, as reflected in court testimony and popular culture, this Part then shows how in practice and in public discourse, rural customers saw the telegraph corporation as having a heightened responsibility to individual families to aid them in times of family crisis. Finally, it will highlight how telegraph companies and their agents encouraged this expectation through their public and internal communications, in which they overtly emphasized that as a public servant, the telegraph corporation bore the responsibility of caring for the families of its patrons.

18. Leon Green referred to this as the protection of “relational interests.” Leon Green, Relational Interests, 29 ILL. L. REV. 460, 462 (1934). The telegraphs suits support the work of scholars who assert the importance of the concept of duty in both the modern approach to tort law and in tort law’s historical development. See John C.P. Goldberg & Benjamin C. Zipursky, The Restatement (Third) and the Place of Duty in Negligence Law, 54 VAND. L. REV. 657, 662 (2001).
A. Gender, Geography, and Technological Dependence

The expression of intimacy with a monopoly that was much maligned during this period may seem surprising. Beginning in the mid-to-late nineteenth century, giant corporate entities, rather than local merchants, began to dominate business, making commercial relationships increasingly standardized, bureaucratized, and impersonal. Western Union was emblematic of this transformation. The rapid growth of Western Union was novel and frightening; the corporation became the first national industry monopoly in 1866 and, through a series of industry takeovers, continued to control the majority of the telegraph system well into the twentieth century. Americans feared that Western Union, the “octopus of the wires,” would use its immense power and wealth to corrupt the government and judiciary and “to befoul the public and to cheat its employes [sic].” The New York Herald in 1870 denounced the “grasping rapacity and unbridled tyranny” of the corporation, claiming that Western Union’s lobbyists were trying to “hoodwink” Congress to obtain even greater privileges. The New York Times criticized the corporation’s “methods of lawless disregard for the rights and interests of others and of the public.”

Yet as the telegraph cases show, both consumers and industry players viewed the telegraph corporation not as an indifferent, self-interested market actor, but as a part of the community. As both a public and family “servant,” it

19. One contemporary scholar of telecommunications explained that because “corporations of all kinds are very grasping, and are becoming too much of a monopoly, . . . and generally representatives of wealth, the majority of the people seem prejudiced against them.” S. WALTER JONES, A TREATISE ON THE LAW OF TELEGRAPH AND TELEPHONE COMPANIES 751 (2d ed. 1916) 547. Yet even as they criticized the big corporations that provided railroads and telegraphs, Americans had faith in the power of these new technologies. See JAMES W. CAREY, COMMUNICATION AS CULTURE: ESSAYS ON MEDIA AND SOCIETY 146 (rev. ed., 2008). Literature examining the telegraph in the context of public reverence of the “technological sublime” includes CAREY, supra, at 159; STANDAGE, supra note 15; DAVID E. NYE, AMERICAN TECHNOLOGICAL SUBLIME (1996); LEO MARX, THE MACHINE IN THE GARDEN (35th anniversary ed., 2000); TODD TIMMONS, SCIENCE AND TECHNOLOGY IN NINETEENTH-CENTURY AMERICA (2005); and HOCHFELDER, supra note 15, at 43.


21. See CAREY, supra note 19, at 155; WOLFF, supra note 15, at 3, 244, 283. The Western Union, which controlled 90% of the telegraph industry as of 1866, expanded from 2,250 telegraph offices in 1866 to 24,825 offices in 1910. See WOLFF, supra note 15, at 11; Richard R. John, Recasting the Information Infrastructure for the Industrial Age, in A NATION TRANSFORMED BY INFORMATION 55, 76 (Alfred D. Chandler, Jr. & James W. Cortada eds., 2000).

22. The Octopus of the Wires: What an Old Operator Knows About the Western Union and Its Mode of Managing Its Business, N.Y. TIMES, Aug. 3, 1883, at 3 [hereinafter Octopus of the Wires]; see also WOLFF, supra note 15, at 3; TIMMONS, supra note 19, at 51; HOCHFELDER, supra note 15, at 35.


24. Western Union Methods, N.Y. TIMES, July 14, 1885, at 4; see also WOLFF, supra note 15, at 265.
owed a duty to its patrons to protect their intimate family relations. Although the telegraph corporation may have been an “omniscient” monopoly, an “octopus of the wires” in the popular press, for these individual patrons the telegraph company was an intimate acquaintance, privy to the private drama of their family lives and embedded in the informal information networks of their communities. Americans embraced the telegraph because they saw it as a means of maintaining and creating what they feared they had lost in an increasingly impersonal, industrialized world—community and family connections. The combination of these conflicting perceptions of the telegraph company—as both an abstract, all-powerful monopoly controlling a vital technology, and as a sympathetic servant—underlay the plaintiffs’ expectations that when the telegraph company erred in delivering a death telegram, it had violated an important trust and should be held accountable.

This belief in the duty of servitude of telegraph corporations arose in part from the geographic variation in technological development among different regions of the United States. Reflecting this, the denial of recovery for mental anguish was called “the Northern rule,” while courts permitting recovery were said to follow “the Texas doctrine.” As territorial expansion and industrialization prompted many Americans to leave their rural hometowns in search of employment and better prospects, maintaining connections to distant family became a challenge. The telegraph cases involve family members living tens and sometimes hundreds of miles apart, connected only by the railroad and telegraph lines. The geographic isolation and technological underdevelop-

25. For alternative visions of the corporation and capitalism during this period, see, for example, GERALD BERK, ALTERNATIVE TRACKS: THE CONSTITUTION OF AMERICAN INDUSTRIAL ORDER, 1865–1917 (1994); CHARLES PERROW, ORGANIZING AMERICA: WEALTH, POWER, AND THE ORIGINS OF CORPORATE CAPITALISM (2002); and WILLIAM G. ROY, SOCIALIZING CAPITAL: THE RISE OF THE LARGE INDUSTRIAL CORPORATION IN AMERICA (1997).

26. See Octopus of the Wires, supra note 22, at 3; Western Union Methods, supra note 24, at 4; WOLFF, supra note 15, at 3; TIMMONS, supra note 19, at 51; HOCHEFELDER, supra note 15, at 35.


29. See WIEBE, supra note 20, at 12.

30. See, e.g., Chapman v. W. Union Tel. Co., 13 S.W. 880 (Ky. 1890) (20 miles); So Relle v. W. Union Tel. Co., 55 Tex. 308, 309 (1881) (55 miles); W. Union Tel. Co. v. Fisher, 54 S.W. 830 (Ky. 1900) (75 miles); West v. W. Union Tel. Co., 17 P. 807 (Kan. 1888) (100 miles); Gulf, Colo.
ment of the South and Middle West heightened their dependence on the telegraph and its counterpart, the railroad; small towns were often serviced by just one train that ran a few times a day, and a family member would have few other options for swift transportation if a delayed telegram caused him or her to miss the day’s last train. Because telegrams were not cheap, rural residents typically only utilized this technology in times of crisis. Although Western Union President Norvin Green estimated in 1890 that only 8% of telegrams sent dealt with social (as opposed to business) affairs, when “farmers and artisans” did send telegrams, it was usually “in [the] case of death.”

Similarly, whereas city dwellers benefited from free home delivery of mail, mail service in rural areas was sporadic and inefficient. Rural free delivery began to be implemented in some areas in 1891, but the U.S. Postmaster General acknowledged that it could not “be made universal in this country for many years to come” because of the cost of carrying letters through “immense sparsely settled areas.” One rural carrier’s route, for instance, was thirty-five miles long and served a thousand customers. Collection and delivery of mail in rural areas depended on local initiative; in one remote area, “a young man collects and delivers for people on a route between the post office and a store, and there the patrons of the post office employ a star route messenger to collect and deliver their mail, at a cost not exceeding five cents weekly.” Such informal systems of mail delivery were certainly not the most rapid or reliable. Because of this, communities in the South and Middle West depended heavily on their “faithful public servant,” the telegraph, to communicate with family members in times of crisis.

Inhabitants of rural communities felt a personal connection to telegraph employees. Plaintiffs in death telegram cases portrayed telegraph companies not as faceless bureaucracies, but as embodied in the person of their agents. Although telegraph operators themselves were often migrants who brought their unique technological skills to newly settled outposts, they were also

31. See John R. Stilgoe, Metropolitan Corridor: Railroads and the American Scene 193, 203 (1983); John, supra note 21, at 83.
32. So Relle, 55 Tex. at 313.
33. Postal Telegraphs: Statements of Dr. Norvin Green, President, Western Union Telegraph Company, to the Committee on Post Offices and Post Roads of the House of Representatives, Washington, D.C., February 28th, May 20th, and June 9th, 1890, at 19, 30 (n.p. n.d.); John, supra note 21, at 81–82. The actual number of social telegrams may well have been higher; Green was attempting to downplay the public’s social use of the telegraph to discourage Congress from forming a government-run telegraph system.
36. Cushing, supra note 34, at 1007.
among the most informed citizens of the town.  

Many small-town telegraph stations were located in railroad depots and run by station agents. These depots were the central source of news and often used as gathering places for social events and conversation. The station agent/telegraph operator was a familiar personage who served the crucial function of connecting the community with the outside world. The ideal station agent, explained one railway administrator, “desires to be, and is recognized to be, a real and beneficent force in the territory,” who “‘runs’ his station in the interest of the community as well as of the company.” He is “looked upon by the people of the territory . . . as a friend,” as well as “with wonder as possessing knowledge which separate[s] [him] from the rest of the crowd.”

The belief that operators were generally better informed than the average citizen contributed to the expectation that telegraph agents would have intimate knowledge of all the people and families within their locality. As one plaintiff explained, her husband’s uncle, whom she telegraphed after her husband “suddenly fell dead upon the street, . . . lived near Lakeside Cotton Mill, which is less than a mile” from the telegraph office, “and he had lived there two years, and was well known by the leading citizens of Burlington, such as the postmaster, hotel keeper, druggist, lawyers, merchants, and policemen,” and that furthermore “[t]here was a telephone line connecting the telegraph office and the Lakeside Cotton Mill, and [the uncle] was well known by the officers of the mill.” Another plaintiff, whose uncle had sent a telegram informing him that his father was dead, testified that although his family lived “seven or eight miles from Batesville,” where the telegraph office was, “he and his brother were in Batesville nearly every day, and were well known to the people living in Batesville, and had an aunt living there who was also well known, named Watson.”

C.B. Stuart, Jr., accusing the telegraph company of

---

40. TIMMONS, supra note 19, at 28, 51; JEPSEN, supra note 38, at 12; H. ROGER GRANT, RAILROADS AND THE AMERICAN PEOPLE 130 (2012); STILGOE, supra note 31, at 193. For the telegraph’s role in creating a nationwide news network, see generally BLONDHEIM, supra note 15.
41. STILGOE, supra note 31, at 198.
42. B.C. BURT, RAILWAY STATION SERVICE 287 (1911).
43. Id.
44. JEPSEN, supra note 38, at 38 (quoting telegraph operator Minnie Swan).
45. Scholars of rural America refer to this as “onymousness”—a lack of anonymity in rural communities due to overlapping social networks that connected individuals by only a few degrees of separation. Emily Prifogle, Winks, Whispers, and Prosecutorial Discretion in Rural Iowa, 1925–1928, 79 ANNALS IOWA 247, 248, 268 (2020).
failing to deliver a telegram communicating his brother’s illness, explained that he was

a practicing lawyer in Waco; that his office was in speaking distance of the [telegraph] office; and that he had his card in the Waco Examiner, a paper having a wide circulation in that city, and his sign as such lawyer was suspended over the pavement in front of his office, in full view of all persons passing.\footnote{48}

These plaintiffs expected telegraph agents to be aware of diverse sources of information, to conduct individualized inquiries that drew on informal social networks composed of local public figures, extended family, and acquaintances, and to utilize other communication avenues like the telephone and newspapers, in order to deliver their messages quickly.\footnote{49}

Gender also likely played heavily into popular expectations about telegraph operators’ behavior and responsibilities.\footnote{50} In the late nineteenth century, the “respectable” position of telegraph operator was open to enterprising women, and female telegraphers were a common sight, particularly in rural areas in the South and Middle West.\footnote{51} Telegraph literature of the time describes women telegraph operators as taking pains to make their offices “pleasant and cozy.”\footnote{52} A story from 1882 about a woman telegrapher describes the heroine’s office: “On the floor is a bit of pretty, fresh-looking carpet. The ugly, ink-stained counter, and the equally ugly desk on which the instruments stand, are neatly covered with green baize. At the window stands a mammoth geranium, perfectly gorgeous in its array of scarlet blossoms.”\footnote{53} The heroine even has a little canary whose “sweet voice answers cheerily back to the monotonous click, click” of the telegraph machine.\footnote{54} As one contemporary commentator on female telegraphers remarked, “When a message has been

\footnote{48.} Stuart v. W. Union Tel. Co., 18 S.W. 351, 352 (Tex. 1885).
\footnote{49.} The public perception of the near-omniscience of the telegraph operator exemplifies the reverence for the “technological sublime” that historians of technology have identified as pervading this period. See supra note 19.
\footnote{50.} Unfortunately, it is often difficult to glean from the cases whether the telegraph operator involved was male or female. Rather, courts focused on the duties and actions of the company, rather than the individual agent. For example, one Tennessee judge explained that familial love “should not be trifled with by indifferent, incompetent, or heartless operators in telegraph offices,” and it was up to the telegraph corporation to “do their duty in the selection of agents, (an easy matter]).” Wadsworth v. W. Union Tel. Co., 8 S.W. 574, 581 (1888) (Turney, J., concurring); see also Gulf, 59 Tex. at 548–49.
\footnote{53.} Id.
\footnote{54.} Id.
dispatched or received, the operator may, and often does, take up her knitting, crocheting, or sewing, passing pleasantly the interval until the arrival of the next message.\textsuperscript{55} Some telegraph offices in remote settlements were even located in the women’s homes, so women operators “could go about their usual housework in between answering the call of the telegraph.”\textsuperscript{56}

To complete the familial atmosphere, telegraph operators in the smaller offices sometimes brought their children to work with them, employing them as messengers and training them as assistant operators; for these families, telegraphy became a family tradition.\textsuperscript{57} One woman telegrapher in Utah reportedly “did the difficult work at this office with her baby, between three and six months old, in her lap whenever it was not sleeping.”\textsuperscript{58} Some female telegraph operators also offered emotional support in addition to technical skills. Operator Annie Johanson “went out of her way” to deliver messages herself, and “as they usually told of a death or some other tragedy, she would stay a few moments, and in her quiet, understanding way give strength to all who needed it.”\textsuperscript{59} The role of women telegraphers as caring presences during family tragedies accorded with cultural expectations about women as the primary observers of illness, death, and mourning in families.\textsuperscript{60} In towns where the telegraph office featured this type of homey environment inhabited by a solicitous, empathetic operator, customers felt comfortable confiding family troubles to telegraph operators and placing their trust in them.

It might seem surprising that plaintiffs would feel comfortable suing telegraph companies when they felt such an intimate connection with telegraph operators, since in smaller communities, personal relationships may discourage tort litigation.\textsuperscript{61} Yet here the telegraph operator had a double identity. On the one hand, he or she was a community member who, if not personally acquainted with the telegraph user, was likely separated by only a few degrees.\textsuperscript{62} On the other, the telegraph operator was not the defendant in the lawsuit, but simply the embodiment of the corporation. For plaintiffs in the mental anguish cases, their intimate relation with the telegraph operator was transposed onto the company itself. Nineteenth-century courts’ adaptive approach to negligence suits against corporations like the railroad created legal avenues for

\textsuperscript{55} JEPSEN, supra note 38, at 51 (quoting M.L. RAYNE, WHAT CAN A WOMAN DO: OR, HER POSITION IN THE BUSINESS AND LITERARY WORLD 140 (Detroit, F.B. Dickerson & Co. 1885)).

\textsuperscript{56} Miriam B. Murphy, The Telegraph Comes to Utah, in 8 BEEHIVE HISTORY 29, 30 (Miriam B. Murphy ed., 1982).

\textsuperscript{57} JEPSEN, supra note 38, at 76; The Story of Telegraphy, supra note 37, at 565–66.

\textsuperscript{58} The Story of Telegraphy, supra note 37, at 554.

\textsuperscript{59} Id. at 560.


\textsuperscript{62} See Prifogle, supra note 45, at 248.
plaintiffs to hold corporations liable for injury.\textsuperscript{63} The rise of contingency fee lawyering also made the court system more accessible to less wealthy plaintiffs than it had been before.\textsuperscript{64} The dual nature of the telegraph company as both a powerful monopoly embodied by a sympathetic agent, as well as the growing population of contingency fee lawyers and increasingly robust negligence law, likely encouraged plaintiffs to pursue litigation despite their personal connection to the telegraph officer.

Plaintiffs alleged that their personal relationship with telegraph agents created a special duty on the part of the corporation to provide expedient and individualized service in times of family crisis. One Alabama father, explaining that his dying child had asked for his grandmother but the Western Union had failed to deliver the message, explained that the telegraph operator “knew the sender and the sendee, and knew the relationship that existed between them, and knew that Walter, the person mentioned in the message, was the son of the plaintiff” and the recipient’s grandson.\textsuperscript{65} A Texas man, telegraphing his stepbrother that their father was dying, explained that “the company’s manager at Ft. Worth was well acquainted with the plaintiff, and knew where he resided and where he worked.”\textsuperscript{66} Elizabeth Cates, “a bride of a few weeks” whose husband had died and who was otherwise “alone and friendless and without any one to help her at Waco, Tex.,” tried desperately to get a message to her father, to no avail.\textsuperscript{67} She emphasized that the operator knew that appellee was in Batesville with a sick husband, that she was desirous to have her father with her, that he died, that she then was very desirous that her father should be reached at Houston so he could be with her at the funeral in Waco.\textsuperscript{68}

Similarly, J.I. Lavender, trying to reach his mother-in-law, told the Western Union operator in Jefferson, Texas “to rush the message, and informed him that Mrs. Howard was the mother of his wife, who was then in childbed, and that the presence of Mrs. Howard was needed, and to have the message promptly delivered, so Mrs. Howard could leave Henderson on the first train


\textsuperscript{64} Peter Karsten, \textit{Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, a History to 1940}, 47 \textit{DEPAUL L. REV.} 231, 231 (1998). Wealthy local lawyers were often unwilling or unable to sue corporations like the railroad as it was a common practice of railroads to keep them on retainer for just this purpose. William G. Thomas III, \textit{LAWYERING FOR THE RAILROAD: BUSINESS, LAW, AND POWER IN THE NEW SOUTH} 44 (1999).

\textsuperscript{65} W. Union Tel. Co. v. Crocker, 33 So. 45, 46 (Ala. 1902).


\textsuperscript{67} W. Union Tel. Co. v. Cates, 132 S.W. 92, 93 (Texas Civ. App. 1910).

\textsuperscript{68} \textit{Id.} at 94.
for Jefferson.” For these plaintiffs, their acquaintance with the telegraph operator and the operator’s knowledge of their family circumstances, geography, and even railroad timetables justified the expectation that the company owed them a personal duty to deliver the telegraphs swiftly.

B. The Telegraph as Empath: Performing an Affective Duty

This was not just the view of their patrons; telegraph corporations and their officers themselves embraced and promoted their unique responsibility to ensure family connectivity. As a publicity director for several telegraph companies explained, “Existing by the will of the public [telegraph corporations] are rightfully regarded as servants who must be flexible enough to meet demands of every nature and who must subserviell themselves to the wishes of the public.” The telegraph companies and their operatives acknowledged the primary importance of speedy delivery of telegrams. The Western Union internal handbook of rules emphasized, “The success of the business, and the credit of the Company largely depend upon the promptness with which the business is done, and no branch of it requires greater energy, care and promptitude, than the delivery of messages.”

Telegraph companies expected to engage in ad hoc, individualized searches for telegram recipients. Eugene Cole, the messenger boy for Western Union’s Raleigh, North Carolina telegraph office, explained in 1898 how he searched for one recipient. He testified that he did not know the address or residence of Mrs. Wortham; that he examined the city directory, and did not find it there; that he then went to the hotels in the city, and failed to find it on their registry, that he then went to the post office, where he was in the habit of going for such information, and found the general delivery window closed; that he saw a light in the office, but did not go to the back door to inquire for the address of Mrs. Wortham, but returned with the message, undelivered . . .

Indeed, courts expected this level of individualized inquiry, and more; the North Carolina Supreme Court held that the messenger boy ought to have knocked on the back door of the post office to inquire for Mrs. Wortham’s address, even though the post office was closed.

69. W. Union Tel. Co. v. Lavender, 40 S.W. 1035, 1035–36 (Tex. Civ. App. 1897). For similar reliance on railroad timetables to gauge the impact of a delayed telegram, see, for example, Western Union Telegraph Co. v. Gibson, 39 S.W. 198, 198 (Tex. Civ. App. 1896); and Western Union Telegraph Co. v. Griffin, 56 S.W. 744, 744 (Tex. 1900).

70. Evelyn Harris, The Relation of Rotary Principles to the Public Service Corporation, ROTARIAN, Feb. 1915, at 57, 58.

71. THE W. UNION Tel. Co., RULES, REGULATIONS, AND INSTRUCTIONS 40 (Cleveland, Sanford & Hayward 1866).


73. Id.; see also JONES, supra note 19, at 290 (“It is not enough to attempt a delivery at the office or place of business of the person addressed; especially when he, as well as his place of residence, is well known in the town where the message is received.”).
The duties of telegraph companies to care for the emotional well-being of their patrons was a common theme in telegraph literature, which burgeoned into its own genre in this period.\textsuperscript{74} A publication originally intended for “members of the telegraphic fraternity,” but that became popular among a wider readership, featured a series of poems, jokes, and stories about the important role telegraph operators played in communicating vital messages to family members.\textsuperscript{75} A telegraph operator, the editor declared, was “made a confid[a]nt of [sic] in so many important transactions” that “[w]hat with the responsibilities always resting on his shoulders” and “the fear of making some mistake that may prove of the most serious consequence,” there was “more of prose than poetry in the life of the translator of dots and dashes.”\textsuperscript{76} Operators joked about customers who finally dictated a message “after explaining all the whys and wherefores, and relating the family history for the past three generations.”\textsuperscript{77} The publication also featured the following poem emphasizing the involvement of operators with death telegrams:

Click! click! click! and the clattering tongue of brass

Seems alive as I listen and hear the signals pass . . . .

And yet another message is mournfully flashing by

As only the lightning travels or evil tidings fly;

Imagine the heart’s emotion as the sorrowful missive is read,

“A soul has returned to its Maker, your darling mother is dead.”\textsuperscript{78} “Death telegrams” were so common that they even became the subject of morbid humor. According to one joke, “a Massachusetts man recently telegraphed to his son: ‘I am dying; come immediately,’ which elicited the very sympathetic reply: ‘Cannot come. Let me know when you die.’ ”\textsuperscript{79} Whether in somber poems or jokes, the telegraph was popularly perceived as tool for keeping families connected during times of crisis.

One story in the volume illustrates the seriousness with which telegraph operators took their responsibilities to families in times of emergency. Written by James D. Reid, superintendent of several major telegraph companies, this

\textsuperscript{74} Jepsen, supra note 38, at 118. Kay Ann Yandell explains, “Though telegraph literature varies widely, it is usually written by and about telegraphers, but largely for nontelegraphers, often with the explicit goal of explaining to the uninitiate the mysteries of the telegraph.” Kay Ann Yandell, Divine Telegraphy: How Telecommunication Shaped Gender, Ethnicity, And Nation in Nineteenth-Century American Literature 28 (2004) (Ph.D. dissertation, Cornell University) (ProQuest).

\textsuperscript{75} Lightning Flashes, supra note 52.

\textsuperscript{76} W.J. Johnston, Some Curious Anecdotes of the Wire, in Lightning Flashes, supra note 52, at 7, 9.

\textsuperscript{77} Id. at 9.

\textsuperscript{78} By Telegraph, in Lightning Flashes, supra note 52, at 41.

\textsuperscript{79} Johnston, supra note 76, at 7; see also Errors of the Telegraph, N.Y. Times, Jan. 25, 1891, at 20 (discussing humorous telegraph flubs involving death messages).
story features a telegraph superintendent who realizes just before closing that
the office’s messenger has gone home without delivering a last, vital missive.80
The message reads, “Poor Mary will die to-night; she asks to see you. Come
quick.”81 Pausing in his narrative to inveigh against the absent messenger, the
“lazy hound who, to save himself from a tedious walk, had cheated a dying girl
of the solace of a brother’s affection,” the superintendent rushes to deliver the
message himself.82 The message was that of “an affectionate sister,” he sur-
mised, who, inspired by the power of the telegraph, conveyed her missive to
the telegraph office “with trembling hope,” where a “kind, attentive operator
received and sent it to me; it came in good season to secure to that dying girl
her heart’s desire.”83 Who would not “run like a mercury to deliver it”?84

After conveying the message to Mary’s brother, who hastens to the train
station, the superintendent telegraphs the office in Mary’s town that the
brother will arrive on the night train.85 It was the duty of a telegraph operator,
he opines, to “minister[] to the relief of human sorrow,” and such a responsi-
bility required “all the best services of my head and heart.”86 This included not
only delivering the telegraph, but ensuring that the sister knew the message
had been received and her brother was on the way. The story concludes when
many months later, the superintendent happens to cross paths with the
brother and a young lady—Mary, who did not die after all, because her
brother’s presence gave her the strength to live.87 The superintendent, em-
braced by the pair as a friend, exclaims how wonderful it is for the telegraph
to be “now the promising sustenance of so many families.”88

II. OVERTURNING COMMON LAW: THE AFFECTIVE DUTIES OF THE PUBLIC
UTILITY CORPORATION

The affective relations of the family informed not only public expectations
of the telegraph corporation’s responsibilities, but the law governing the tele-
graph corporation as well. Judges and legal scholars who supported allowing
mental anguish claims adopted the popular view of telegraph corporations as
servants of the public, whose primary purpose was to protect the affective ties
of individual families. Rather than approach the legal question of liability for

80. J.D. Reid, The Telegraph Dispatch: A Story of Telegraphy in the Early Days, in
LIGHTNING FLASHERS, supra note 52, at 103–04; see ROBERT LUTHER THOMPSON, WIRING A
CONTINENT: THE HISTORY OF THE TELEGRAPH INDUSTRY IN THE UNITED STATES, 1832–1866,
at 54, 118, 121 n.7 (1947).
81. Reid, supra note 80, at 104.
82. Id. at 105.
83. Id. at 104.
84. Id.
85. Id. at 108.
86. Id.
87. Id. at 109–12.
88. Id. at 110, 112.
mental anguish from the standpoint of Holmes’s “reasonable man,” many rural courts recognized the unique social expectations and norms surrounding the particular interaction between telegraph companies and their users as the basis for identifying a new legal wrong. In so doing, they deviated substantially from the common law, to the astonishment of the “older and more conservative States” of the East Coast.

This Part explores the legal reasoning rural courts employed in order to justify their divergence from the common law. The legal formulation of the unique duty of service of telegraph corporations was based on two common law concepts: the traditional vision of the corporation as the “child” or “servant” of the public, and the domestic relations law of master-servant. The first Section discusses the common law of corporations as public servants, and examines how courts in the telegraph cases drew from this preindustrial language of corporate servitude in discussing the duty of telegraph corporations. The second Section explores courts’ use of separate-spheres ideology and family exceptionalism to locate the telegraph corporation within the affective household, thereby distinguishing the telegraph “servant” from other arms-length economic actors and opening it up to new liabilities. In categorizing telegraph companies as both public and private servants, rural courts imported the affective household relation of master and servant into the definition of public service.

A. The Public Corporate Servant

Public perception of the duties of telegraph companies was significantly influenced by the fact that these companies—namely, Western Union and its subsidiaries—were corporations. Rural courts consistently invoked the older common law vision of the corporation as subordinate to the public.

In the early years of the republic, the corporation was conceived of as primarily a public service actor. Incorporation was the grant of certain privileges

89. Oliver Wendell Holmes, Jr. advocated for liability to be based on neutral laws of general applicability, a standard that did not examine the individual capacities or relationships of the parties but instead relied on an “external or objective” assessment of what would constitute appropriate conduct by “the average man, the man of ordinary intelligence and reasonable prudence.” OLIVER WENDELL HOLMES, JR., THE COMMON LAW 51 (Boston, Little, Brown, & Co. 1881). Even Holmes recognized that “special responsibility” in some cases is warranted with regards to “a particular class among those so designated, – for instance, to railroad, who may have a private individual at their mercy, or exercise a power too vast for the common welfare.” Oliver Wendell Holmes, Jr., Common Carriers and the Common Law, 13 AM. L. REV. 609, 630 (1879). For the argument that courts do take more specific norms and context into account, see JOHN C.P. GOLDBERG & BENJAMIN ZIPURSKY, RECOGNIZING WRONGS 232–59, 344–50 (2020). Dan B. Dobbs refers to the acknowledgment by courts that specific duties attach to specific relationships as the law of “undertakings,” situating the telegraph cases within this framework. Dobbs, supra note 13, at 56.

90. Francis Raymond Stark, Mental-Anguish Doctrine in Telegraph Cases, 7 L. NOTES 169, 171 (1903).
to a group of persons in order to effect a needed public service, such as building a road or a school. This public-private partnership in this period was essential to constructing necessary infrastructure and other public institutions. The public benefit of the corporation was paramount; if the corporation also happened to turn a profit, that was an added but not necessarily expected bonus. Incorporation, the first American corporate law treatise explained, was designed “to gain the union, contribution, and assistance of several persons for the successful promotion of some design of general utility,” while hopefully also providing for “the advantage of those who are members of it.” Any profits corporations like bridges or tollways did earn were often capped by the state or limited by a number of years, after which the corporation would revert to state ownership. The public, via their elected representatives, had the right to oversee and regulate the corporation in order to hold it to its central public purpose. As such, the corporation was regularly referred to as the “child” or “servant” of the state.

Throughout the nineteenth century, proponents of corporate regulation continued to invoke this conception of a hierarchical relationship between the public and the corporation, in which the corporation bore a special duty to serve the public welfare. Reflecting this view, even industrial mega-corporations like the railroads were regularly referred to as the child or servant of the state in political and popular discourse. The language of “public servant” that


94. ANGELL & AMES 1832, supra note 93, at 7–8.

95. See, for instance, the charter of Warren Bridge, granting the corporation the right to take tolls for twenty years or up to 5% of initial investment, after which the state would take ownership of the bridge. Special Report on Charlestown and Cambridge Bridges, in 1 DOCUMENTS OF THE CITY OF BOSTON FOR THE YEAR 1874, at 43, 46 (Boston, Rockwell & Churchill, City Printers, 1875).


97. Id. at 587.

98. Id. at 598.

99. Id.
jurists employed in the telegraph cases drew from this ongoing argument about the duties of corporations to serve the public.

Over the course of the nineteenth century, however, corporations increasingly challenged this traditional view of the corporation, asserting rights under the Federal Constitution to shield themselves from public oversight and control. Corporate lawyers argued for a new vision of the corporation as a constitutional-rights-bearing, private market actor, a view that gradually gained acceptance in the courts. Yet the ramifications of corporate constitutional rights for public safety and economic competition soon became clear. The “bitter experience” of an unregulated market increasingly convinced proponents of economic equity and industrial safety that “state control of the public service companies [was necessary], since it is recognized that that special situation requires a special law.” As a result, although federal courts extended Fourteenth Amendment rights to corporations in several cases in the late nineteenth century, they simultaneously permitted limited regulation of corporations that were “affected with a public interest.”

This concept of business “affected with a public interest” became the basis for the emerging legal category of public utility. The public utility construct was useful for several reasons. Firstly, the public utility category widened the net of industries subject to special state oversight beyond those traditionally

---

100. For representative cases involving corporate invocations of constitutional rights in different contexts, see Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819), involving the Contract Clause; Charles River Bridge v. Warren Bridge, 36 U.S. 420 (1837), also involving the Contract Clause; Peik v. Chicago & North-Western Railway Company, 94 U.S. 164 (1876), involving the Due Process Clause; County of San Mateo v. Southern Pacific R.R. (The Railroad Tax Cases), 13 F. 722 (C.C.D. Cal. 1882), involving the Equal Protection Clause; and Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181 (1888), also involving the Equal Protection Clause.

101. I discuss the extension of constitutional rights to corporations in Atkinson, supra note 96.


deemed “common carriers.” Under the age-old common law of common carriers, certain businesses, such as stagecoaches, ferries, inns, and others that “held [themselves] out to serve the public generally,” had unique duties to their customers that private individuals did not, on the basis of their provision of essential public functions. The primary duties of common carriers were to accept “all members of the public who should apply” for their services, “to serve them with care,” and to charge reasonable rates. Common carriers were also strictly liable for any injury done to the goods with which they were entrusted.

The new category of businesses “affected with a public interest” was more capacious than the narrower set of businesses considered common carriers. “Public service,” “public interest,” “quasi public,” or “public utility” corporations, turn-of-the-century jurists explicated, were similar to common carriers in that they exercised monopolies over a particular industry and provided essential public services, and were consequently subject to special duties and oversight. Yet the public service category encompassed industries beyond traditional common carriers, including energy, water, and telecommunications companies. Furthermore, while technically business “affected with a public interest” could include individual proprietorships or partnerships, the designation was mainly applied to monopolistic corporations, such as the railroad.

Expanding the scope of industries subject to heightened state oversight was particularly important during this period because of the Supreme Court’s

---

105. Charles K. Burdick, Origin of the Peculiar Duties of Public Service Companies: Part I, 11 COLUM. L. REV. 514, 515–16 (1911); Novak, supra note 104, at 144. For cases discussing the common carrier origins of public utilities, see Western Union Telegraph Co. v. Wood, 57 F. 471, 477–78 (5th Cir. 1893); Marr v. Western Union Telegraph Co., 3 S.W. 496, 498–99 (Tenn. 1887); and Glenn v. Western Union Telegraph Co., 58 S.E. 83, 88 (Ga. 1907).


107. MORRIS GRAY, A TREATISE ON COMMUNICATION BY TELEGRAPH 3 (Boston, Little, Brown & Co. 1885).


110. Five of the six Granger Cases, in which the “affected with a public interest” rule was articulated, dealt with railroad companies, while the sixth dealt with a partnership-run grain elevator. See Peik v. Chicago & Nw. Ry. Co., 94 U.S. 164 (1877); Chicago, Burlington, & Quincy R.R. Co. v. Iowa, 94 U.S. 155 (1877); Chi., Milwaukee, & St. Paul R.R. Co. v. Ackley, 94 U.S. 179 (1877); Winona & St. Peter R.R. Co. v. Blake, 94 U.S. 180 (1877); Stone v. Wisconsin, 94 U.S. 181 (1877); Munn v. Illinois, 94 U.S. 113, 130 (1877).
willingness to recognize robust constitutional rights of market actors, in der-
ogation of states’ ability to promulgate economic regulations.\textsuperscript{111} Under con-
temporary readings of the Fourteenth Amendment, states were con-
stitutionally prohibited from singling out specific industries or industry
actors for special treatment.\textsuperscript{112} Categorizing certain industries as “affected
with a public interest,” “quasi public,” or “public service” permitted such targeted
regulation when in the public interest.\textsuperscript{113}

The purpose of the “public interest” designation, in other words, was to
permit state oversight of a larger swath of industries beyond those recognized
by the common law of common carriers.\textsuperscript{114} This was particularly helpful with
regards to telegraph corporations, as the question of whether or not the tele-
graph was a common carrier induced much consternation among the judici-
ary.\textsuperscript{115} In this age where electricity still had a mystical quality, judges found it
hard to articulate exactly what it was that telegraphs carried. The Iowa Su-
preme Court, for instance, defining the telegraph as “a system of appliances
conducting the electric current or fluid,” mused that the telegraph corporation
was “[s]omewhat akin” to a common carrier, but different in that “the carrier
transports persons or goods, while the telegraph conveys intelligence.”\textsuperscript{116} Re-
latedly, jurists doubted whether the rule of strict liability that applied to com-
mon carriers could be imposed on telegraph corporations, as the art of
telegraphy was “so strange, wonderful and incomprehensible, that no ordinary
human care or skill could possibly suffice to control it perfectly,” and it was

\begin{itemize}

\item \textsuperscript{111} The quintessential case illustrating this conflict between constitutional rights and

\item \textsuperscript{112} This legal principle embodied a commitment to what were called “general laws,” as
opposed to “special legislation.” See Naomi R. Lamoreaux & John Joseph Wallis, \textit{Economic Crisis,
General Laws, and the Mid-Nineteenth-Century Transformation of American Political Economy},
41 J. Early Republic 403, 405 (2021). The definitive legal theorist on the constitutionality of
general versus special legislation was Thomas McIntyre Cooley, who wrote that “every one has
a right to demand that he be governed by general rules” and that any law that singled out a particular
group was unconstitutional. \textit{Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest
Upon The Legislative Power of the States of the American Union} 391–97 (Boston, Little, Brown, & Co. 1868).

\item \textsuperscript{113} Novak, \textit{supra} note 104, at 170, 172. Morton Horwitz emphasizes the felt need of late
nineteenth-century jurists to create bright-line classifications in pursuit of a widespread gen-
eralization and systemization of the legal system. \textit{Morton J. Horwitz, The Transformation of American Law,
1870–1960}, at 18 (1992). Creating the category of public utility was part of a
broader push to expand the state’s traditional “police powers” to protect the public welfare in

\item \textsuperscript{114} \textit{Adams, supra} note 109, at 254–55 (1918); \textit{Henry C. Adams, Relation of the State to
Industrial Action} 47–64 (Baltimore, Am. Econ. Ass’n 1887).

\item \textsuperscript{115} See, \textit{e.g.}, Beasley v. W. Union Tel. Co., 39 F. 181, 185 (C.C.W.D. Tex. 1889) ("[T]hough
in some essential particulars [telegraph companies] partake of the character of common carriers,
they are not strictly such . . . ." (quoting W. Union Tel. Co. v. Neill, 57 Tex. 283, 288 (1881)).

\item \textsuperscript{116} Mentzer v. W. Union Tel. Co., 62 N.W. 1, 3 (Iowa 1895).

\end{itemize}
“therefore unjust to hold telegraph companies bound by the strict rules which
govern common carriers.”117

Focusing on the “public interest” function of the telegraph was a useful
alternative means of justifying increased legislative and judicial oversight,
while avoiding the need to wedge this novel technology into an ancient com-
mon law category. A Tennessee judge, proposing that telegraph corpora-
tions should be, “as a rule, governed by the principles of law applicable to
common carriers,” took care to emphasize that “this must be understood as not restricting
courts to the literal definitions of the duties and liabilities of common car-
riers of persons or goods, but must be interpreted to meet the nature and
purposes of the creature.”118 As one treatise writer explained, because tele-
graph companies had become “an indispensable necessity, both commercially
and socially,” it could “easily be said that these companies are quasi-public
 corporations, or servants, conducting a quasi-public business, similar in many
respects to that of a common carrier.”119 The operation of a telegraph com-
pany, explained one jurist, “is undoubtedly of a public nature,” because it “un-
dertakes to serve the public generally.”120

The creation of the public service corporation category, therefore, circled
back to the original common law understanding of the corporation as a public
“servant.” Like the corporation of the early American Republic, quasi public
corporations provided important public services and were thus subject to spe-
cial oversight. As the telegraph cases show, this quasi public status entailed not
just special state regulation, but the imposition of unique common law duties
as well.

B. The Private Corporate Servant

The categorization of the telegraph “creature” as a public service entity
allowed not just increased state regulation, but the imposition of heightened
common law duties. A Tennessee court explained that telegraph companies
“are public servants, and held to a very high degree of diligence and a strict
discharge of duty.”121 The duties of telegraph companies differed from other

117. Benjamin F. Rex, Liability of Telegraph Companies for Fraud, Accident, Delay and Mistakes in the Transmission and Delivery of Messages, 32 Am. L. Reg. 281, 282 (1884). For similar concerns, see Francis Wharton, A Treatise on the Law of Negligence 590 (Philadelphia, Kay & Brother, 1878); O.W. Holmes, Jr., Common Carriers and the Common Law, 13 Am. L. Rev. 609, 629 (1879); Beasley, 39 F. at 183–86.
118. Wadsworth v. W. Union Tel. Co., 8 S.W. 574, 580 (Tenn. 1888) (Turney, C.J., concur-
ing).
120. Gray, supra note 107, at 6.
121. W. Union Tel. Co. v. Frith, 58 S.W. 118, 119 (Tenn. 1900); see also Green v. W. Union
Tel. Co., 49 S.E. 165, 167 (N.C. 1904) (“[T]here seems a material difference between an incidental
tort by an individual or a private corporation, and the breach by a quasi public corporation of a
public duty relating to the essential object of its creation.”).
corporations “affected with a public interest” in a major respect, however. With regard to public utilities like the railroad, the services provided were tangible and the harm economic. In contrast, the services provided by the telegraph were abstract and the harm emotional. As a South Carolina court explained, the function of the telegraph was to promote “the peace, comfort, and happiness of the thousands who rely on this means of communication in time of need or distress.” As such, the duty of the telegraph corporation was not just to communicate information, but “to serve the feelings of their customers” by ensuring that their customers “should be spared whatever pain and anguish such information, promptly conveyed, would prevent.”

This is where the common law of master and servant came in. Although other monopoly businesses like the railroad were referred to as “public service” or “public interest” entities during this period, when courts called the telegraph the “servant of the public,” it is clear from their discussions that they meant something different. To articulate the uniquely affective duties that telegraph companies, unlike other public service corporations, possessed, jurists drew on the hierarchical household relation of master and servant. As the Supreme Court of Tennessee declared, “The telegraph company is the servant, rather than the master, of its patrons.” Western Union, “this servant of the public,” should be liable for “the grief, disappointment, and injury to the feelings caused by the fault of the company.” The Indiana Supreme Court likewise concluded that Western Union, “a servant of the public,” was duty bound “to make a prompt and reasonable effort . . . to transmit and deliver a message informing a husband of the dangerous illness of his wife, the wife of her husband, the parent of the child, the child of the parent,” so as to prevent “great mental anguish suffered by the sender of the telegram, who may be the father, mother, husband, wife, or child.” As these jurists conceptualized it, the public service nature of the telegraph corporation was based on the intimate private service it provided; by serving individual families, they reasoned, telegraph corporations effected their public purpose. Or as the Supreme Court of Georgia put it, “in the exercise of a public employment they undertake for

122. Munn v. Illinois, 94 U.S. 113, 126 (1877) (quoting MATTHEW HALE, De Portibus Maris, in A TREATISE RELATIVE TO THE MARITIME LAW OF ENGLAND 45, 78 (n.p. 1787)).
124. Chapman v. W. Union Tel. Co., 15 S.E. 901, 904 (Ga. 1892); see also Gulf, Colo. & Santa Fe Ry. Co. v. Levy, 59 Tex. 563, 566 (1883) (denying recovery on the grounds that mental anguish is noncompensable but admitting the public service duty of the telegraph company); Glenn v. W. Union Tel. Co., 58 S.E. 83 (Ga. Ct. App. 1907) (recognizing the duty of the telegraph company and allowing recovery of nominal but not mental anguish damages).
127. Wadsworth, 8 S.W. at 577.
128. W. Union Tel. Co. v. Frith, 58 S.W. 118, 120 (Tenn. 1900); see also Cashion v. W. Union Tel. Co., 31 S.E. 493, 494 (N.C. 1898); Wadsworth, 8 S.W. at 577.
hire to serve the feelings of their customers.” The concept of servitude thus had a dual meaning: the public service telegraph companies performed was to be a private servant to individual families. As families were the bedrock of society, failure to protect the family unit undermined the public welfare writ large. These jurists thus imported the traditional common law concept of “servant” into the definition of “public service.”

This language of master and servant was not just rhetorical; it did legal work. The Anglo-American common law of the eighteenth and nineteenth centuries had included the relation of master and servant among what William Blackstone called the “private oeconomical relations,” referred to later as “domestic relations law.” At the time, “oeconomical” meant “of or relating to household management, or to the ordering of private affairs; domestic.”

Household relations, which also included husband-wife, parent-child, and guardian-ward, were hierarchical and affective, based on a reciprocal relationship of duty and care. A servant was one whose “principal duties are to attend to the personal wants or pleasures of the master or his household.” In common law, the term “servant” encompassed not only domestic help, but laborers for hire and agents such as lawyers as well.

The demise of the household unit of production and the rise of industrialization prompted the move of nonfamily members, namely servants, “out of the household” and into industrial production. Legal and political theorists

134. The household can be defined as a social, political, and economic unit structured via hierarchical relations of power that involve reciprocal obligations and duties, in which members, either voluntarily or under compulsion, contribute productive or reproductive labor, often according to their ascriptive statuses, like race, gender, class, or in this case, incorporation. See CAROLE SHAMMAS, A HISTORY OF HOUSEHOLD GOVERNMENT IN AMERICA 3 (2002); Nancy Fraser & Linda Gordon, A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State, 19 SIGNS 309, 312–15 (1994). The household patriarch and his dependents (wife, children, servants, and slaves) exercised reciprocal duties of care and obedience, respectively. Halley, supra note 131, at 8; ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR 56–59 (1991).
136. JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS 690 (Boston, Little, Brown, & Co. 1870) (“Not only cooks, butlers, and housemaids are thus brought within the scope of this relation, but farm-hands, plantation laborers, stewards, bailiffs, factors, family chaplains, and legal advisers.”).
137. Atkinson, supra note 133.
explained this transformation by proposing that the structure of developed societies progressed from the premodern household, governed by relations of status (domestic relations), to a competitive market-based economy governed by the contracts of free-willing, independent individuals. With the rise of free labor ideology and classical legal thought, relations between employers and employees were reconceptualized as “private” market relations, outside of government purview and governed instead by the contract formed between the parties.

As a result of the social restructuring prompted by industrialization, in conjunction with the focus on individual free will in American political and popular discourse, the term “servant” came to imply a degree of subordination unacceptable in a free society. By the late nineteenth century, the terms “master” and “servant” connoted a distinctly hierarchical, household-based relationship, not a contractual relationship. Although the terms were still employed in legal treatises to refer to employer-employee and principal-agent, jurists routinely criticized this terminology as a vestige of an archaic, undemocratic system. “The relation of master and servant,” treatise writer James Schouler complained, “presupposes two parties who stand on an unequal footing in their mutual dealings” and “bears the marks of social caste.” Acknowledging this anachronism, jurist Horace Gay Wood explained,

The word servant, in our legal nomenclature, has a broad significance, and embraces all persons of whatever rank or position who are in the employ, and subject to the direction and control of another in any department of labor or business. Indeed, it may, in most cases, be said to be synonymous with employee.

---

138. Id. at 212; Amy Dru Stanley, Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation, 75 J. AM. HIST. 471, 474 (1988). As Sir Henry Maine explained, the forms of Status taken notice of in the Law of Persons were derived from, and to some extent are still coloured by, the powers and privileges ancienly residing in the Family. If then we employ Status . . . to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been from Status to Contract.


141. STEINFELD, supra note 134, at 56–59, 64; CHRISTOPHER TOMLINS, FREEDOM BOUND 349, 356 (2010); Atkinson, supra note 133, at 208.

142. SCHOULER, supra note 136, at 689.

143. H. G. WOODS, A TREATISE ON THE LAW OF MASTER AND SERVANT 2 (San Francisco, Bancroft-Whitney Co. 2d ed. 1886) (1877); RALPH H. BLANCHARD, LIABILITY AND
Yet the discussion of the duties of telegraph corporations in these cases makes clear that when jurists used the word “servant,” they were not simply employing anachronistic terminology to signify contractual employees. Invoking a preindustrial relationship based on care and duty rather than an impersonal transaction in the capitalist marketplace, jurists distinguished telegraph corporations from other market actors, removing them from the world of contract and situating them within the affective relations of the household. In so doing, jurists created a bridge between claims involving familial relations in which damages for mental anguish were occasionally recognized, and claims against telegraph corporations.

C. Out of the Market, into the Household

Courts routinely emphasized that the relationship between telegraph company and patron was not governed merely by contract, taking pains to distinguish it from run-of-the-mill market transactions. They were adamant that the telegraph corporation was not just or even primarily a commercial actor, and the failure to deliver a death telegram no “mere breach of contract.”144 The relationship between telegraph company and patron, supporters of liability emphasized, was more akin to the domestic relations than the impersonal, contract-based interactions of the marketplace. Unlike “the antagonistic one of vendee and vendor” that normally existed in impersonal commercial transactions, one jurist explained, the relationship between the telegraph company and a customer was based on a “certain status.”145 This is apparent through the routine comparison of the patron-telegram relation to domestic relationships like husband-wife and parent-child. Opined one jurist, “I consider the contract which the telegraph company undertakes in such instances parallel to the contract of marriage,” as these contracts, unlike economic transactions, “have a direct relation to the feelings and sensibilities of the parties entering into the same.”146

The comparison to marriage situated the telegraph “servant” not in the impersonal market, but in the affective household. By equating the contract to transmit a telegram to the contract of marriage, these jurists made the conceptual leap from the classical legal system, of rules based on the principles of free will and contract, to the sequestered realm of domestic relations law in which status, not contract, determined rights and responsibilities.147 At the time,
marriage was considered a “Contract ending in Status”—the consent of the parties established the relationship, but the terms of the marriage relation were universal and determined by the state, not unique, individualized terms negotiated by the parties. As the Supreme Court explained,

When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the State, statutory or common, which defines and prescribes those rights, duties, and obligations.

Locating the telegraph-patron relationship within the household was an important strategic legal move. Although *damnum absque injuria* in almost every other respect, pure mental anguish claims were recognized in certain circumstances involving familial relations. Exceptions to the rule of no liability for emotional harm could be found in the common law of seduction; breach of promise to marry; or mishandling of a dead body, to name a few. Supporters of telegraph liability relied on these cases involving familial relations to point out that the law capably assessed emotional harm in other contexts. A dissenting judge in Indiana contended that while the general rule of no recovery for mental anguish might hold with regard to commercial contracts,

there is ingrafted upon the rule at least one well-recognized exception, namely, a man who enters into a marriage contract is presumed to know or contemplate that he is dealing with the affections and feelings of the woman whom he has agreed to marry, and, if he violates his contract, that she will be subject to humiliation, mortification, and mental anguish.

The Iowa Supreme Court similarly concluded that like the promise to marry, “[t]he contract relates almost wholly to the affections, and one is not

---

148. See 1 JOEL PRENTISS BISHOP, NEW COMMENTARIES ON MARRIAGE, DIVORCE AND SEPARATION 7 (Chicago, T.H. Flood & Co. 1891).

149. Maynard v. Hill, 125 U.S. 190, 211 (1888) (quoting Adams v. Palmer, 51 Me. 480, 483 (1863)).

150. Janet Halley & Kerry Rittich have called this “family law exceptionalism”—the idea that the family is a separate legal space governed by a different set of rules and standards than those of the impersonal market. Janet Halley & Kerry Rittich, Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism, 58 AM. J. COMPAR. L. 753 (2010).

151. The objection to the quantification of emotional damages in these cases echoes the resistance to monetizing human life in other tort cases, such as the accidental death or injury of a child. See VIVIANA ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN 210 (1994).

152. W. Union Tel. Co. v. Ferguson, 60 N.E. 1080, 1082 (Ind. 1901) (Jordan, J., dissenting).
allowed to so trifle with another’s feelings. He knows at the time he makes the contract that if he breaks it the other will suffer great mental pain,” just as the Western Union knew in this case that if the telegram “was not delivered within a reasonable time, plaintiff was likely to be greatly pained on account . . . of not knowing of the death of his mother until she was placed under the ground . . . .” 153 Another commentator argued that “[t]he most perfect analogy to the telegraph cases . . . is in the action for seduction.” 154 After all, if “a father’s feeling of shame at his daughters’ dishonor” can be assessed in “gold or silver,” why not “a father’s feeling of grief at not seeing the dead body of his daughter . . . ?” 155 While acknowledging that technically the injury in seduction was loss of services, courts insisted, “[i]n all these cases, the main element of damage, the real injury sustained, is the wound to the feelings; the loss of service upon which the actions are technically based being but a legal fiction, and more imaginary than real.” 156 Courts’ recognition of mental anguish claims resulting from the disruption of family ties in these cases, jurists argued, should hold in the telegraph cases as well. 157

Situating the telegraph cases within the domestic realm, where emotional distress was cognizable, also allowed for significantly higher damages awards than would have been available if sending a death telegram had been considered purely a market transaction. It was well-established that plaintiffs could recover monetary damages in cases where failure or delay in delivering a telegram resulted in economic loss. 158 Yet if only economic damages were available for a lost or delayed telegram, a mental anguish plaintiff could recover merely the cost of the message, just a few cents. 159 This was unacceptable, sympathetic jurists declared; it was “a parody on justice and an outrage to common sense to permit a telegraph company to escape with nominal damages in such a case, when in a case of a dispatch in which dollars and cents instead of human hearts are involved the injured party gets full reparation.” 160 To allow a telegraph company “to cancel all liability for a negligence that may have wrung the heartstrings of the citizen for whose service it was created, by simply refunding the 25 cents which it had received but never earned, would destroy all sense of responsibility,” a North Carolina judge concluded. 161 Such a rule

154. Wolf, supra note 6, at 752.
155. Id. at 784.
157. Courts that refused to allow recovery also engaged specifically with the example of marriage, contending that the marriage contract was “sui generis.” Int’l Ocean Tel. Co. v. Saunders, 14 So. 148, 151 (Fla. 1893); see also Russell v. W. Union Tel. Co., 19 N.W. 408, 409 (Dakota 1884); Butner v. W. Union Tel. Co., 37 P. 1087, 1090 (Okla. 1894).
158. Marr v. W. Union Tel. Co., 3 S.W. 496, 499 (Tenn. 1887); Wolf, supra note 6, at 736–37.
160. Ecke, supra note 9, at 242.
161. Cashion, 31 S.E. at 494.
was “too ultra material for even this material age,” admonished a Georgia court:

To our minds it is monstrous that you can recover damages if you sustain loss on your car load of oxen . . . but if you are summoned to the deathbed of your mother (whose dying blessing you would not exchange for all the cattle upon a thousand hills), and a telegraph company sees fit not to send or deliver the message which might have brought you to her side, you are completely helpless.\textsuperscript{162}

Death messages, summed up an Indiana court, “should be regarded as of more importance . . . than mere business messages, and in promptness of delivery should have preference over messages of the latter class.”\textsuperscript{163} As such, monetary damages were necessary “to impress upon [telegraph companies] the great importance of faithfully performing [their] duty to the public.”\textsuperscript{164} For these courts, permitting recovery for pecuniary but not emotional harm raised the spectre of a world devoid of meaningful connection and focused only on materialism and accumulation—a common critique of American culture at the time.\textsuperscript{165}

Highlighting their role as servant to the affective household, courts made clear that the telegraph company’s duty was to protect its customers’ family connections, not just to deliver messages about death or illness. They took for granted that telegraph corporations owed a duty to close family members but expressed concern about how far this duty extended to more distant relatives. Where the relation of the parties was clear from the words in the telegram or where the sender had made known the relationship to the operator, the telegraph company was presumed to be on notice that it had a heightened duty to relay the message quickly.\textsuperscript{166} As one court opined, “The tender ties of love and sympathy existing between husband and wife or parent and child are the common knowledge of the human race, as they are the holiest instincts of the human heart.”\textsuperscript{167} So too with grandparents, as the “tender and doting love of the

\begin{itemize}
\item \textsuperscript{162} Glenn v. W. Union Tel. Co., 58 S.E. 83, 86 (Ga. 1907).
\item \textsuperscript{163} Reese v. W. Union Tel. Co., 24 N.E. 163, 165 (Ind. 1890).
\item \textsuperscript{164} W. Union Tel. Co. v. Wood, 57 F. 471, 478 (5th Cir. 1893); see also Chapman v. W. Union Tel. Co., 13 S.W. 880, 881 (Ky. 1890).
\item \textsuperscript{165} See, e.g., McGerr, supra note 27, at 62; John Whiteclay Chambers II, The Tyranny of Change 56 (1992). Ironically, even as courts railed against materialism, those who allowed recovery required plaintiffs and juries to conceptualize emotional injury in precise material terms. As E.P. Thompson pointed out, nineteenth-century Anglo-American industrial society prioritized bringing order to the world by weighing, measuring, and partitioning everything—exactly what plaintiffs were forced to do to their mental anguish in order to succeed in the legal system. E.P. Thompson, Time, Work-Discipline, and Industrial Capitalism, 38 Past & Present 56, 96 (1967).
\item \textsuperscript{167} Cashion v. W. Tel. Co., 31 S.E. 493, 495 (N.C. 1898); see also Mentzer v. W. Union Tel. Co., 62 N.W. 1, 4 (Iowa 1895) (“No man is so depraved but that he yet remembers his mother.”).
\end{itemize}
grandmother for her grandchild, and the reciprocal, confiding love of the little child, is a matter of common knowledge.”

More distant relatives, however, had to prove that they were part of the affective household. An extended family member was required to show that “special relations of affection or friendship existed” between the recipient and the dying relative, “and that the telegraph company had notice of such special relations at the time it received the telegram.”169 For instance, the plaintiff in a North Carolina case successfully proved “that her husband ‘looked upon [his uncle] as a father, and, her own father being dead, she likewise was devoted to him, and regarded him as a father.’”170 In contrast, while “[a] brother’s love is sufficiently universal to raise the presumption” of emotional distress, it was “not so with a brother-in-law, who is often an indifferent stranger, and sometimes an unwelcome intruder, into the family circle.”171 Notably, where the company had no knowledge of the relationship, or where the relation was illicit, telegraph companies were not liable. For instance, the case of a Mr. Young from Newberne, North Carolina, was dropped after it was revealed that “Young had deserted his wife and committed bigamy, and that the woman who died was not his wife.”172 So too when a father had “abandoned his family, and, at the time the message was received, was living separate and apart from them.”173 These cases illustrate that the perceived duty of the telegraph company was to keep families connected; if close or legally recognized ties did not already exist or if the family members had broken their ties, the company was not responsible.

Importantly, the language of servitude does not appear in other cases involving the provision of intimate services regarding family members. For instance, in cases involving apothecaries, undertakers, and physicians—all “servants” under traditional common law—courts approached these cases using either a contractual and/or standard negligence framework. The Supreme Court of Ohio, for instance, described the duty of apothecaries in terms of the general standard of negligence applicable to all persons: the liability of one “who carelessly labels a deadly poison as a harmless medicine, and sends it so labeled into market,” arises “out of the duty which the law imposes upon him to avoid acts in their nature dangerous to the lives of others.”174 The Supreme Judicial Court of Massachusetts grounded the liability of apothecaries in the state’s general statutory tort providing a cause of action “for assault, battery,

171. Cashion, 31 S.E. at 495.
imprisonment, or other damage to the person.” Liability of undertakers who negligently performed a burial, or doctors who failed to use ordinary skill, arose out of contract. In the case of a negligent doctor, the Supreme Court of Oregon explained, “the basis of the action is a contract, but an action for the breach of such contract sounds in tort.” Even though the individuals in question—the local apothecary, undertaker, or physician—may have been well-known to the plaintiffs, the word “servant” does not appear, nor does any discussion of affective or familial relations between the parties. This doctrinal approach reflects the broader trend in contract and tort law during this period to reframe all market-based interpersonal relations as neutral and contractual, rather than individualized and relational. Erstwhile servants, skilled providers by this time had effectively moved out of the private household and into the public market. This distinction shows that the conceptual basis for the duty of telegraph corporations in the mental anguish cases arose not out of the family-related function performed, but out of the perceived identity of the telegraph corporation as a member of the household, with special duties of care based on status, not contract.

Strikingly, this vision of the telegraph company as the servant of individual families was so powerful that it transcended class, gender, and race, even in the Jim Crow South. As public service corporations, courts emphasized, telegraph companies were “bound to serve all people alike.” The customers in the telegraph cases were not only lawyers, merchants, and doctors, but also farmers, contractors, millworkers, mechanics, druggists, and travelling salesmen. They lived in towns and in the countryside. They were men and

176. Renihan v. Wright, 25 N.E. 822, 823 (Ind. 1890). Highlighting the impact of the telegraph cases on tort law generally, this case cited primarily to telegraph cases as precedent for considering mental anguish. Id. at 825; see also Wright v. Beardsley, 89 P. 172, 173 (Wash. 1907).
177. Coffey v. Nw. Hosp. Ass’n, 189 P. 407, 408 (Or. 1920). For courts that recognized “mental anguish” as a legally cognizable harm, it was not the cause of action itself, but a factor taken into account when determining damages. See Renihan, 25 N.E. at 825; Coffey, 189 P. at 408.
178. See generally HORWITZ, supra note 113, at 33 (discussing the tension between freedom to contract and government regulation).
179. Atkinson, supra note 133, at 212, 217.
180. This differs slightly from Dan B. Dobbs, who argues that duties can be understood as attaching to function performed; here the duty is specific to the status of the tortfeasor as well as to the undertaking. See Dobbs, supra note 13, at 56.
183. See So Relle, 55 Tex. at 308; W. Union Tel. Co. v. Watson, 33 So. 76, 76 (Miss. 1902).
women. They were Black Americans as well as White.\textsuperscript{184} For instance, G.M. Fisher, "a colored preacher," successfully sued Western Union in the Kentucky Supreme Court for delay in the delivery of a telegram informing him that his daughter was dying.\textsuperscript{185} A South Carolina jury awarded damages to Ada Brooks, "a Negro Woman," after Western Union failed to deliver a message announcing the death of her father.\textsuperscript{186} In Ada’s case, the local railroad agent and operator, Captain G.K. Williams, a White man and army officer, served as "an important witness" in her favor, travelling from afar to testify at trial.\textsuperscript{187} Even in the class- and race-stratified Jim Crow South, the telegraph corporation was believed to be the servant of all, and litigants from disempowered backgrounds could appeal to the law to enforce the company’s familial responsibilities.\textsuperscript{188} Similarly, while male plaintiffs alleging emotional distress in railroad injury cases were hampered by stereotypes of stoic masculinity, men appear to have had no trouble recovering for mental anguish in the telegraph cases.\textsuperscript{189} Regardless of the class, race, or gender of the injured party, courts and juries took seriously their claims that the telegraph company had breached its duty to protect their family connections and was liable for their mental anguish.\textsuperscript{190}

Notably, even many courts that ultimately adhered to the common law rule of no liability for mental anguish acknowledged the special nature and

\textsuperscript{184} This indicates that telegraph mental anguish suits for Black Americans were part of the constellation of "civil rights," the "rights of everyday use" that Black Americans claimed as integral to "exercising freedom." Dylan C. Penningroth, Everyday Use: A History of Civil Rights in Black Churches, 107 J. AM. HIST. 871, 872 (2021).

\textsuperscript{185} W. Union Tel. Co. v. Fisher, 54 S.W. 830, 830 (Ky. 1900). For other cases involving Black plaintiffs, see, for example, The Courts, FORT WORTH MORNING REG., Aug. 22, 1899, at 2; Court Has Adjourned, LEXINGTON DISPATCH, Feb. 22, 1911, at 16; Jonesville News Letter, UNION TIMES, Feb. 16, 1912, at 4; and Session of Court Is Short, LOG CABIN DEMOCRAT, Aug. 1, 1907.

\textsuperscript{186} Phases of Life in the Piedmont, SUNDAY STATE, July 26, 1903, at 9.

\textsuperscript{187} Id. For additional suits involving Black plaintiffs, see also Three Mental Anguish Suits, LAURENS ADVERTISER (Laurens, South Carolina), Dec. 7, 1904; and Mims vs. Telegraph Co., YORKVILLE ENQUIRER, Apr. 21, 1908, at 4.

\textsuperscript{188} Black and lower-class plaintiffs were likely able to bring suit despite their minority status because of the growing number of contingency fee lawyers, who took a percentage of the award if the plaintiff won and nothing if they lost. Peter Karsten, Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940, 47 DEPAUL L. REV. 231, 231 (1997). One lawyer, defending mental anguish suits in a Charlotte, North Carolina newspaper, expounded the virtues of contingency fee lawyers; but for them, "the gates of the temple of justice would be closed to all poor and impecunious litigants, no matter how meritorious their cause of action. Litigation would be a luxury for the well-to-do only." This would result in "a real corporation millennium," in which no corporation that injured poor people would ever be held accountable. Edmund Jones, Mental Anguish, CHARLOTTE DAILY OBSERVER, Feb. 9, 1902, at 17.

\textsuperscript{189} See Chamallas with Kerber, supra note 12, at 836, 850; WELKE, supra note 12, at 171.

\textsuperscript{190} The White community’s support of Black plaintiffs in telegraph cases stands in sharp contrast to emotional distress cases against railroads during this same period. WELKE, supra note 12, at 177–78. One reason for this difference is likely that railroad emotional distress claims arose in the context of railroad travel, which directly impacted White passengers, whereas the telegraph cases did not threaten Jim Crow segregation.
responsibilities of telegraph corporations. A Georgia court, denying recovery, conceded that as telegraph companies undertook to protect the familial connections of their patrons, they “therefore ought to pay for negligent non-performance or misperformance of this peculiar function.” A federal district court in Minnesota likewise sympathized that permitting recovery “is very much in consonance with the sentiment which must arise, to a large extent, in the breasts of all men,” but that such sentiment could not “carry away the better judgment of the court” with regards to common law precedent. If the common law was to be changed to allow mental anguish claims, these conservative jurists insisted, it was the province of the legislature and not the judiciary to do so. Although courts “should and do extend the application of the rules of the common law to the new conditions of advancing civilization,” an Indiana court reasoned, they could not “创造 a new principle unknown to the common law” — that was the “province of the legislative, not the judicial, department.” As the Supreme Court of Missouri concluded, “If, in the evolution of society and the law, this innovation should be deemed necessary, the legislature can be safely trusted to introduce it.” Although these courts acknowledged the demands for new duties arising out of a rapidly changing society, they felt powerless to veer so sharply from the strictures of the common law.

The sticking point, for these judges, was the calculation of damages. An irate North Carolinian, campaigning against the reelection of a state judge who had allowed recovery for mental anguish in telegraph cases, expressed it this way: “I want to know how much money for a given amount of anguish. Fifteen pounds of sugar for a dollar, bacon ten cents a pound, flour five dollars a barrel . . . how much per ang?” A Tennessee judge similarly argued that mental anguish was an injury so “[v]ague and shadowy [that] there is no possible standard by which such an injury can be justly compensated, or even approximately measured.” Doubting that the judicial branch had the power “to undertake to mete out compensation in money for the spiritually intangible,” the Supreme Court of Florida concluded that telegraph mental anguish claims presented “a class of cases where legislative action fixing some standard

191. But see W. Union Tel. Co. v. Ferguson, 60 N.E. 674, 677 (Ind. 1901) (“To be a law of equal justice and no discrimination, the mental-anguish doctrine should assert, as a broad general principle, that damages are recoverable, for mental distress alone, from every person whose negligent act causes that condition.”).
194. Ferguson, 60 N.E. at 675; see also Connell v. W. Union Tel. Co., 22 S.W. 345, 350 (Mo. 1893); Butner v. W. Union Tel. Co., 37 P. 1087, 1089 (Okla. 1894); Chapman, 15 S.E. at 904–05; Francis v. W. Union Tel. Co., 59 N.W. 1078, 1082 (Minn. 1894).)
195. Connell, 22 S.W. at 350; see also Butner, 37 P. at 1089; Chapman, 15 S.E. at 905; Francis, 59 N.W. at 1082; Ecke, supra note 9, at 241.
of recovery would be highly appropriate."\(^{198}\) “I am strongly of the opinion that there should be some practical remedy in this class of cases,” remarked a Minnesota judge, recommending that the legislature “provide for the recovery of damages for mental suffering in cases like this, and limit the amount of recovery to, say, two or three hundred dollars.”\(^{199}\)

### D. From Private to Public Law

Several state legislatures heeded these calls, creating specific statutory causes of action for mental anguish against telegraph corporations. Virginia passed the first such law in 1900, followed by South Carolina (1901), Arkansas (1903), Wisconsin (1907), Oklahoma (1917), and Florida (1920).\(^{200}\) Similar legislation was considered in North Carolina, Vermont, Minnesota, Georgia, Mississippi, Missouri, and, after the Virginia Supreme Court interpreted the statute narrowly, again in Virginia.\(^{201}\) In addition, Tennessee and Louisiana courts interpreted preexisting laws requiring telegraph companies to deliver all telegrams expeditiously to permit damages for mental anguish.\(^{202}\)

Supporters of mental anguish statutes argued that the public’s dependency on these corporations during family emergencies justified more robust state oversight than what was constitutionally allowed over purely “private” businesses.\(^{203}\) As a North Carolina legislator contended, the state supreme court “had practically asked for such legislation.”\(^{204}\) A Wisconsin state assemblyman claimed that the proposed mental anguish bill was “one of the most

\(^{198}\) Int’l Ocean Tel. Co. v. Saunders, 14 So. 148, 152 (Fla. 1893).

\(^{199}\) Francis, 59 N.W. at 1082 (Canty, J., concurring).


\(^{202}\) Wadsworth, 8 S.W. at 574; W. Union Tel. Co. v. Mellon, 33 S.W. 725, 726–27 (Tenn. 1896); Graham v. W. Union Tel. Co., 34 So. 91, 93 (La. 1903).

\(^{203}\) See BRUCE WYMAN, THE SPECIAL LAW GOVERNING PUBLIC SERVICE CORPORATIONS, at xi–xiv (1911); Charles K. Burdick, The Origin of the Peculiar Duties of Public Service Companies, 11 COLUM. L. REV. 743, 764 (1911); Green v. W. Union Tel. Co., 49 S.E. 165, 166 (N.C. 1904); Novak, supra note 104, at 143.

\(^{204}\) Tar Heel Lawmakers: London Mental Anguish Bill Discussed, supra note 201.
important measures” before the state legislature.\textsuperscript{205} One Arkansas state representative argued that “the bill sought to compel the telegraph companies to do only what their duty to the public requires.”\textsuperscript{206} A statute “imposing a penalty for neglect of duty” was necessary, one legal commentator explained, in order to “enforc[e] the telegraph company's obligations to the public.”\textsuperscript{207} Furthermore, another commentator noted that such a statute was fully within the scope of a state’s police power, as “all the courts agree that the legislature may pass such an act.”\textsuperscript{208}

Demands for state action to enforce the duties of telegraph companies aligned with the Progressive Era movement for state regulation of businesses more broadly.\textsuperscript{209} Economist Henry C. Adams, describing the state of American industry at the turn of the century, recognized that government oversight was necessary for a category of “public industries . . . which, from their nature, or because of the conditions under which they exist, are superior to the normal control of the free play of commercial forces.”\textsuperscript{210} As legal scholar Charles Burdick concluded, in his three-part text on the “peculiar duties of public service companies,” the common law alone was insufficient to “impose public service duties upon businesses simply because they are of importance to the public and are enjoying a virtual monopoly.”\textsuperscript{211} Rather, “The only legitimate method of controlling the service and charges of such business is by legislative regulation.”\textsuperscript{212} Influential torts scholar Bruce Wyman, noting that although legal theory had until recently “been permeated with the theory of laissez faire, . . . [t]here is now fortunately almost general assent to state control of the public service companies, since it is recognized that that special situation requires a special law.”\textsuperscript{213}

These statutes were the subject of longstanding contention. One Florida commentator complained in 1909, “At each recurring session of the Legislature, to my certain knowledge since 1901, some person has introduced the ‘mental anguish bill.’”\textsuperscript{214} After almost two decades of debate, the bill finally passed.\textsuperscript{215} A Wisconsin newspaper similarly joked that the “hoary old ‘mental anguish bill’ . . . has been before every Legislature for the past generation or

\begin{itemize}
  \item 205. See Cady Would Mulct Carrier for Delay, DAILY NW., Mar. 28, 1903, at 16.
  \item 207. Note, supra note 5, at 459.
  \item 208. Comment, supra note 10, at 354.
  \item 210. ADAMS, supra note 109, at 254–55.
  \item 211. Burdick, supra note 203, at 764.
  \item 212. Id.
  \item 213. Wyman, supra note 103, at 172.
  \item 214. Editorial, Hurry with the Ether, Cone., MORNING SUN (Tallahassee, Fla.), May 12, 1909, at 2.
\end{itemize}
Opponents of these bills echoed the concerns about quantifying mental injuries voiced in the state courts, while also warning that such bills were “dangerous to business interests” and would “afford opportunity for designing men [plaintiffs’ lawyers] to coin money out of the mental suffering of their neighbors.” Some telegraph operators also opposed these bills, viewing them as personal attacks rather than appropriate industry regulation; they contended that although the state’s intention “to discover and enforce more efficient service of all public utilities” was laudable, the effect of the law was to give a “gratuitous [sic] slap at a body of worthy men” and women who were simply “conscientiously trying to do their duty” to “give good service.”

Interestingly, such protests by telegraphers do not appear to have been made in response to individual lawsuits against telegraph corporations.

Just as with economic regulations, telegraph corporations challenged the constitutionality of mental anguish statutes. Invoking recent doctrine holding that corporations had the right to equal protection under the Fourteenth Amendment, these companies claimed that the laws were unconstitutional because they treated telegraph companies differently than other businesses. In dismissing these challenges, courts relied on the telegraph mental anguish cases to conclude that the telegraph was a public service corporation that bore a heightened duty of care. They concluded that telegraph companies’ monopoly power and provision of essential services, coupled with their power to impact the emotional health of their patrons, justified their categorization as distinct entities that the state could constitutionally regulate in the public interest. For instance, in response to Western Union’s claim that the South Carolina mental anguish statute unconstitutionally singled out telegraph corporations for discriminatory treatment, the state supreme court concluded

216. State Capital Chat, WAUSAU PILOT; Apr. 18, 1905, at 3.
217. Tar Heel Lawmakers: London Mental Anguish Bill Discussed, supra note 201, at 2 (“dangerous to business interests”); Hurry with the Ether, Cone, supra note 214 (criticizing qualifying mental injuries and the “opportunity . . . to coin money”).
218. Telegraphers Appeal to Solons, IOWA CNTY. DEMOCRAT (Mineral Point, Wis.), July 11, 1907, at 4.
219. See, e.g., A “Mental Anguish” Case, 24 Tel. AGE 339, 339 (1901) (noting that the telegraph company “is employing two of the strongest law firms in South Carolina to fight the case in the Supreme Court”); Simmons v. W. Union Tel. Co., 41 S.E. 521, 522 (S.C. 1902) (challenging the constitutionality of mental anguish statutes); Nitka v. W. Union Tel. Co., 135 N.W. 492, 493 (Wis. 1912) (same); Cnty. of San Mateo v. So. Pac. R.R. (The Railroad Tax Cases), 13 F. 722, 743–44 (C.C.D. Cal. 1882) (challenging economic regulations); Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 190 (1888) (same); see also Francis Raymond Stark, Mental-Anguish Doctrine in Telegraph Cases, 7 LAW NOTES 169, 171 (1903) (“Telegraph companies ask no privileges in the courts; they ask the equal protection of the laws. For negligence, let them suffer exactly as other companies, or individuals, would suffer for negligence.”).
220. E.g., Pembina, 125 U.S. at 188–89 (“The inhibition of the amendment that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Under the designation of person there is no doubt that a private corporation is included.”).
that because of “the thousands who rely on this means of communication in time of need or distress,” it was “surely within legislative power to constitute [telegraph corporations] a class by themselves, and insure the performance of duties so closely interwoven with the public welfare.”

The Wisconsin Supreme Court similarly held that as the telegraph “undertakes the public duty” to transmit messages “in all such matters requiring haste,” including “the transmission and delivery of messages relating to the affections, when such messages are urgent,” the legislature’s “imposition of special duties or special liabilities” was constitutional.

The mental anguish statutes and resulting constitutional challenges reveal that the movement for social control of businesses in the Progressive Era was concerned with the emotional as well as economic impacts of free market capitalism. Reflecting Progressive concerns about monopoly power, state judges created constitutional justifications for the exercise of state police power that included not just the legislature’s right to protect the economic and physical welfare of constituents but their emotional wellbeing as well. Decisions upholding economic regulation cited cases upholding mental anguish statutes and vice versa without distinguishing between the legislature’s ability to protect against emotional versus economic harm.

III. CONTEMPORARY CHALLENGES: THE MORAL ECONOMY OF PUBLIC UTILITY

Uncovering the role of the telegraph cases in constructing the concept of the public service corporation offers historical background for contemporary debates about the scope and flexibility of public utility regulation. The telegraph cases reveal a lost vision of a robust, multidimensional relationship between large corporations and the public. They illustrate that both private and public law regulation of certain industries have not been limited to protecting the public’s economic and physical welfare, but their noneconomic wellbeing as well. This Part first traces the history of the public utility from the time of the telegraph cases to the present day. It then addresses current scholarship on the meaning and history of the public utility concept, and its application to modern-day industries. Finally, it explores how the telegraph cases might illuminate approaches to these contemporary concerns.

221. Simmons, 41 S.E. at 523.


223. For example, several cases involving economic regulation cited the case upholding South Carolina’s mental anguish statute, Simmons v. Western Union, on the basis that the classification of certain “public purpose” activities was constitutional. See, e.g., McCutchen v. Atl. Coast Line R.R. Co., 61 S.E. 1108, 1109 (S.C. 1908); Johnson, Lylte & Co. v. Spartan Mills, 47 S.E. 695, 701–02 (S.C. 1904); Ware Shoals Mfg. Co. v. Jones, 58 S.E. 811, 814 (S.C. 1907).
A. A Brief History of the Public Utility Concept in the Twentieth Century

The origin and salience of the public utility concept has been a subject of increasing interest among scholars of regulatory law and policy. Public utility is a term subject to various definitions, but today is generally applied to businesses sharing these qualities: a) monopoly or near-monopoly control of a market, and consequent ability to excessively distort the market and oppress consumers; b) high barriers to entry, including prohibitive start-up costs; and c) provision of essential services on which the public depends. As discussed above, the category of the public utility (a business “affected with a public interest”) was originally formulated to be an exception to the laissez faire rule of state nonintervention in the market. It was also, notably, a broader category than the common law “common carrier,” primarily because it was not hampered by questions of what exactly the telegraph carried. Yet by the early twentieth century, the public utility umbrella had become so capacious that the exception had nearly swallowed the rule. Federal judges, influenced by the Progressive Era push for the “social control of business,” realized that unfettered monopoly power led to massive social inequalities that threatened social stability and also reduced the quality and reliability of the services provided. By the late 1930s, the federal judiciary accepted a wide range of government regulations as constitutional regardless of public utility status, cabined only by the requirement that they have a rational basis. This doctrinal shift cemented the constitutionality of the extensive regulatory regime of


225. See Novak, supra note 104, at 156 (quoting legal theorist Léon Duguit as saying: “Any activity that has to be governmentally regulated and controlled because it is indispensable to the realisation [sic] and development of social solidarity is a public service so long as it is of such a nature that it cannot be assured save by governmental intervention”); Goodwin, supra note 224, at 620, 623 (arguing that Twitter is a public utility, and identifying public dependence and monopolistic power as key features); Rahman, supra note 224, at 1641; Moeller, supra note 224, at 4 (describing public utilities as legal monopolies that provide essential services).

226. See supra text accompanying notes 114–120.


229. See Nebbia v. New York, 291 U.S. 502, 521, 525 (1934) (upholding a state public health regulation against a Fourteenth Amendment challenge on the basis that “the guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary, or capricious, and
the New Deal Era, which despite its limitations succeeded in reducing aspects of social and economic inequality through intensive government oversight of industry and markets. Since all rational economic regulation was now constitutional, the category of “public utility” as demarcating a unique set of business entities that were subject to stricter state oversight became less relevant.

The deregulatory push of the 1970s–1980s, however, motivated by a belief in the allocative efficiency of competitive markets, rolled back government oversight of industries, including even essential service monopolies like telecommunications, electric and natural gas utilities, airlines, and railroads. Subsequent recognition of new constitutional rights of business entities, including freedom of speech and freedom of religion, further insulated them from state regulation. In recent years, the harmful social, political, and economic impacts of deregulation, privatization, and the extension of constitutional rights to economic entities have prompted law and policy scholars to revisit the question of the optimal degree of government oversight of such industries, in order to promote broader social goals such as economic equity, environmental justice, election fairness, and corporate responsibility. As in the Progressive Era, this has led to renewed interest in the concept of the “public utility.”

that the means selected shall have a real and substantial relation to the object sought to be attained.”); West Coast Hotel v. Parrish, 300 U.S. 379, 389–91, 400 (1937) (holding that a state minimum wage law is constitutional under the Due Process Clause of the Fourteenth Amendment as a “regulation which is reasonable in relation to its subject and is adopted in the interests of the community”); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 44, 49 (1937) (holding that federal commerce regulations that are not “arbitrary or capricious” may be valid exercises of the commerce power); United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) (holding that a legislature need only articulate a rational basis for regulation to pass constitutional muster); Novak, supra note 104, at 143.


231. See Rossi & Ricks, supra note 224, at 712.


233. See Rossi & Ricks, supra note 224, at 713.
B. Creating a Moral Political Economy: Current Scholarship on Public Utilities

The modern quest to understand and redefine the category of public utility arises from the perceived need to justify novel regulatory regimes of monopolistic industries that have been left to self-regulate in the private market but which now pose serious threats to public welfare.234 K. Sabeel Rahman in particular has called for a new formulation of a “trans-substantive, twenty-first century framework for public utility regulation,” based on a reconception of public utilities as key players in a moral political economy.235 Rahman has proposed adapting the concept of public utility to include “social infrastructure,” encompassing industries “where the concentration of private power over [certain] services poses a unique potential threat to public welfare.”236 More broadly, William Novak has called for a reevaluation of American political economy, encouraging scholars and policymakers to recover forgotten, pre-neoliberal “political-economic worlds” in order to generate alternative policy proposals for addressing economic inequity.237

Of particular concern is how to legitimize regulation that is not primarily focused on preventing concentrations of economic power, the traditional purview of the public utility. Internet-related services are a central focus of attention. Some scholars have advocated categorizing social media platforms as public utilities in order to promote government regulation that prohibits these private companies from unilaterally removing content they consider objectionable. Blaine Goodwin, for instance, concerned about the possibility of political bias and censorship, has argued that Twitter should be considered a public utility so it can be regulated to protect all constitutional speech equally.238 Tim Wu has likewise proposed using public utility tools to ensure net neutrality.239 Other scholars have advocated public utility status not just for individual platforms, but for internet service providers and even the internet writ large.240

234. Id. at 713–14.
235. Rahman, supra note 224, at 1625.
236. Id. at 1641–42. This threat is assessed by examining “the economics of production; the downstream uses of the good or service; and the degree to which the good or service is a necessity that makes its users particularly vulnerable to exploitation.” Id. (emphasis in original).
238. Goodwin, supra note 224, at 601–02.
240. See Brenner, supra note 224, at 178–79 (internet service providers should be considered public utilities to protect free speech and due process concerns in the removal of content); Benjamin H. Winters, A Clear and Present Danger: The Need for Regulated Accountability for Online Service Providers to Preserve and Promote Free Speech, Notice, and Due Process, 25 CARDOZO J. EQUAL RTS. & SOC. JUST. 161, 166 (2018) (proposing a regulatory regime to classify the internet as a public utility in order to regulate the ability of hosting companies and domain registries to remove content). But see Christopher S. Yoo, Common Carriage’s Domain, 35 YALE
The public utility category has also been discussed as a potential tool to promote environmental and social justice. William Boyd has argued that re-vitalizing the concept of public utility, as “a collective project aimed at harnessing the power of private enterprise and directing it toward public ends,” could facilitate decarbonization of the economy by realigning business models and regulatory frameworks. Shelley Welton similarly advocates for a more public-centric model of environmental decisionmaking, recommending that states “harness the power of public utility law” to compel energy utilities to incorporate their customers’ values. Social justice scholarship has explored the possibility of applying a public utility framework for the provision of essential services such as medical care, food security, banking, and electricity. Some of these proposals have been quite creative, such as Ann Eisenberg’s suggestion that in some food deserts, Walmart may in effect constitute a public utility, since it may have a monopoly on the local market that gives the superstore excess power over a vulnerable population dependent on services it provides.

Many legal scholars and policymakers have turned to the history of the public utility to support taking a more normative approach to designating certain industries as public utilities. For instance, Rahman has argued that Progressive Era regulation of public utilities was informed not only by concerns about the economic impact of monopoly control of the market, but also by the “moral or social importance” of vital industries. Similarly, Boyd uncovers the influence of the medieval conception of “just price” on the development of

244. Bagley, supra note 241; Rahman, supra note 241; Skoutas, supra note 241; White, supra note 241.
245. See Eisenberg, supra note 241, at 786.
246. See Novak, supra note 104, at 144 (undertaking to “exhume . . . the lost world of public utility law”).
247. Rahman, supra note 224, at 1637.
the public utility, arguing that a belief in economic fairness formed the “normative core” of the public utility idea.248 In a final example, James Moeller criticizes the deregulation of power utilities in the 1980s for resulting in environmental injustice for low-income communities.249 These scholars have relied on history to support the reevaluation of contemporary public utility regulation.

C. The Contribution of the Telegraph Cases to Contemporary Debates

The telegraph cases bolster these policy proposals by highlighting that the public utility category can and did have a normative as well as an economic purpose. Additionally, the telegraph cases reveal another understudied aspect of public utility history: the importance of private law in the creation of the public utility construct.250 Scholarship on the history of public utilities has focused on the expansion of the administrative state and regulatory law during this period.251 Yet individual lawsuits had as much impact on the development of the concept of public utility as state enforcement regimes.252 Adding the private law dimension of the story reveals a previously unexamined angle on the development of public utility doctrine: the role of the affective relationship between certain corporations and the public, which influenced public and legal perceptions of what constituted permissible private and public oversight of those corporations. While current public utility scholarship has focused on the relationship between the corporation and the state, switching to a private law frame illuminates the relationship between the corporation and the actual people who compose “the public.” Examining how the concept of the public service corporation emerged in tort law expands our understanding of the role

---


249. Moeller, supra note 224, at 5, 23–24.


251. Novak, supra note 104, at 139.

252. This is true not just in the telegraph cases, but in the context of railroad regulation as well. For instance, private suits for personal injury in railroad accidents prompted state safety regulations, which were upheld by the Supreme Court as constitutional exercises of state police power to oversee essential industries to protect the public welfare. See Mo. Pac. Ry. Co. v. Mackey, 127 U.S. 205 (1888).
of “private” versus “public” law in regulating the activity of monopolistic economic actors at the turn of the twentieth century.\textsuperscript{253} 

Why is examining the emergence of public utility in tort law important to current debates? Broadly, tort cases provide a unique window into the mutually constitutive nature of cultural norms and legal relationships, mapping how social ties and cultural expectations about rights and duties influence the creation of legal categories.\textsuperscript{254} Specifically, the telegraph cases reveal something new about the public utility category; it was developed not just to uphold regulations involving economic interactions, but also to enforce unique duties that certain powerful corporations were perceived to owe the public, including the duty not to cause noneconomic and nonphysical harm. Whereas state regulatory schemes addressed the economic impact of monopolistic corporations as market actors, tort cases against telegraph corporations responded to the emotional injuries wrongfully inflicted by these entities on individuals and communities. The grassroots-level demand for corporate responsibility in the telegraph cases prompted judges to reassess traditional common law doctrine in light of emerging technology on which the public had come to depend. In response, many judges concluded that tort law must evolve to meet new social and technological needs. Eventually, the judicial recognition of a cause of action for mental anguish against telegraph companies was codified in several jurisdictions. In other words, the identification of changing social values in these common law rulings subsequently influenced the creation of a novel regulatory regime.\textsuperscript{255} 

As with economic regulations, telegraph corporations challenged the constitutionality of these mental anguish laws. Recognizing the protection of the public’s emotional wellbeing as a legitimate exercise of state police power, courts upheld the statutes. In so doing, they created precedent that was subsequently cited in cases involving economic regulations. In this instance, tort lawsuits and regulation worked in tandem to create a multifaceted regime of

\textsuperscript{253} The distinction between “private” versus “public” law is useful taxonomically. “Private” generally refers to areas of law where disputes between individuals are adjudicated in civil cases where the goal is to provide post hoc damages for individual injury. “Public” refers to areas where the state directly imposes regulations on individuals to prevent future harm or address past harm that impacts the public welfare. See generally Barnett, supra note 250.

\textsuperscript{254} See Goldberg & Zipursky, supra note 89, at 20 (“[T]ort law, by entrenching a variety of social norms and crafting enforceable legal rights and duties, contributes to sustaining and reforming a range of valuable relationships and institutions in our society.”). David M. Engel and Michael McCann have emphasized the need for an increased focus on tort law as a cultural practice in law and society research. David M. Engel & Michael McCann, Introduction: Tort Law as Cultural Practice, in Fault Lines 1, 6–7 (David M. Engel & Michael McCann eds., 2009); Engel, supra note 61, at 554. For representative scholarship exploring the interrelation of tort law and society, see, for example, Barbara Young Welke, The Cowboy Suit Tragedy: Spreading Risk, Owning Hazard in the Modern American Consumer Economy, 101 J. Am. Hist 97 (2014); Witt, supra note 140; Welke, supra note 12; and Chamallas with Kerber, supra note 12.

\textsuperscript{255} See Goldberg & Zipursky, supra note 89, at 13.
corporate responsibility to the public. Together, they shaped the distinct legal category of the “public service corporation.”

D. Do Social Media Platforms Have a Duty to Protect the Public’s Health and Safety?

So what is a modern scholar of public utility law to do with the telegraph cases? First, as discussed above, they show us the power of private lawsuits to shape a complementary regime of regulating corporate behavior. Second, and more importantly, they highlight that the concept of the public service corporation, or public utility, has from its inception been tied to the affective, normative relationship between business actors and those who depend on their services. Holding monopolistic corporations to a heightened standard of non-economic care, in other words, is not a deviation or innovation from the original regime of public utility regulation, but rather accords with its core purpose.

What does this mean in practice? Consider, as one of many possibilities, the responsibility the social media colossus Meta might have to its users and the broader public. Certainly, the analogy is not perfect; there would likely be little support for the claim that Meta could be considered a member of the family. Yet there are striking parallels between Meta and Western Union: like the telegraph company, social media companies like Meta are monopolistic corporations that, through the provision of novel technology, hold out the promise of increased connectivity to family, friends, and community in a rapidly changing world. So, would a social media company like Meta fit within the category of the public service corporation, as laid out in the telegraph cases? Encompassing popular platforms like Facebook, WhatsApp, Messenger, and Instagram, Meta has a near-monopoly on the provision of social media services. Meta’s monopoly power is evidenced by the current Federal Trade Commission’s antitrust suit against the company, as well as a bipartisan

---

256. Tort law and regulatory law may be mutually reinforcing or may work at cross-purposes. The degree to which tort law can be considered a species of regulation is a point of debate. For instance, John C.P. Goldberg and Benjamin Zipursky argue that tort law is better conceived of as a means of identifying values or goals that should be solidified through regulation. Id. Gregory Keating takes a holistic approach, arguing that tort law is not an autonomous system but a “member of a family of institutions,” including administrative and regulatory schemes, that are “sometimes competitive, sometimes complementary institutions for reconciling liberty and security.” Gregory C. Keating, Is Tort Law “Private”? in CIVIL WRONGS AND JUSTICE IN PRIVATE LAW 351, 365 (Paul B. Miller & John Oberdiek eds., 2020). Susan Rose-Ackerman suggests that tort doctrines can act as “stoppages” that allow private plaintiffs to impose a common law duty of care in the absence of state regulation, as well as complement existing statutory schemes by providing a supplementary means of enforcement and compensation. Susan Rose-Ackerman, Regulation and the Law of Torts, AM. ECON. REV., May 1991, at 54, 55.

257. Note that this question is different from that of whether internet platforms can be considered “common carriers,” the question that has mistakenly dominated state attempts to constrain social media platforms’ ability to regulate their content. See infra notes 279–287 and accompanying text.
bill in the Senate to reign in the power of tech giants like Meta.258 Furthermore, in much of the developing world, Meta’s platforms have become “synonymous with the internet” itself.259

Not only does it effectively hold a monopoly over a huge swath of internet communication, but Meta also arguably provides an essential public service.260 The Supreme Court has recognized in the First Amendment context that, for many, social media platforms are “the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.”261 These platforms “provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard,” operating effectively as a town square in which every citizen is a “town crier.”262 Social media platforms also function on an intimate level, overriding geographical boundaries to connect loved ones and create online communities.

Not only are these platforms used by people across the world to maintain and build connections with friends, family, and likeminded strangers, but, like the telegraph companies, the platforms themselves emphasize that building community and maintaining connections are their key functions. Facebook, for instance, promises its users the ability to “[h]arness the [p]ower of [g]roups to [b]uild [c]ommunity.”263 Instagram, in prominent text, similarly emphasizes that it will “[g]ive people the power to build community and bring the world closer together.”264 WhatsApp stresses that “[m]ore than 2 billion people in over 180 countries use WhatsApp to stay in touch with friends and family,


262. Id.


anytime and anywhere,” including by sharing their “most personal moments.”265 Finally, Messenger’s website announces, “Messenger makes it easy and fun to stay close to your favorite people.”266 Is this not the twenty-first-century equivalent of pledging oneself to be “the promising sustenance of so many families”?267

Reenvisioning social media giants like Meta as public service corporations opens new legal avenues for enforcing standards of public accountability and duties of care. For instance, a teenage user of Meta’s social media platform Instagram might bring a tort claim for negligent infliction of emotional distress against the company for failing to monitor content that is foreseeably harmful to users’ mental health. The impact of Instagram’s photo-sharing platform on the mental health of teenagers, particularly young women, has been well-documented in congressional inquiries and psychological research studies, as well as in anecdotal reporting.268 Indeed, according to leaked internal documents, Meta itself has long known of the deleterious impact of its photo-sharing app on the body image of teenage users.269 Furthermore, Instagram even pledges on its website that the company is “committed to fostering a safe and supportive community for everyone.”270 It would not be unreasonable to recognize Meta’s common law duty to protect its users from harmful content, since a) Instagram has expressed its commitment to its users’ safety and b) the harm has been documented by the company and is therefore foreseeable. To allow such a cause of action would provide redress for a harm that is currently damnum absque injuria.

267. Reid, supra note 80, at 110.
As another example, Twitter (not owned by Meta) has come under fire in recent years for allowing misleading, hateful, and/or violent speech to proliferate on its platform. As of May 2023, Twitter’s website pledges, “We foster free and global conversations, and are committed to healthy discourse,” which includes the platform taking affirmative steps “to minimize the distribution and reach of harmful or misleading information, especially when its intent is to disrupt a civic process or cause offline harm.” YouTube (owned by Alphabet), which like Meta’s platforms promises to be “the place you can find an audience, join a community, and create impact, both online and off,” has faced similar scrutiny. Announcing that “[t]he safety of our creators, viewers, and partners is our highest priority,” YouTube emphasizes “our shared responsibility to keep YouTube safe.” Both Twitter and YouTube, therefore, have made public professions of their own responsibility for monitoring and removing harmful content on their sites. Would it be unreasonable for a user to sue for the failure to perform this duty, as a result of which they were harmed? Would it be unreasonable for a state to codify this duty as a safety regulation to promote the public welfare?

There are admittedly several hurdles to such claims, in regard to both tort suits and regulation. The Communications Decency Act (CDA) currently protects providers of an “interactive computer service” from being “treated as the publisher or speaker of any information provided by another information content provider.” This may or may not be pertinent to private tort suits, as the


276. 47 U.S.C. § 230(c)(1). There has been discussion in both the media and in government channels regarding the need to overturn this part of the Act in response to the proliferation of hate speech on online platforms. See Biden Vows to End Social Media Immunity over ‘Spreading Hate,’ AL JAZEERA (Sept. 16, 2022), https://www.aljazeera.com/news/2022/9/16/biden-vows-to-end-social-media-immunity-over-spreading-hate [https://perma.cc/S5UE-A55M]; VALERIE C. BRANNON, CONG. RSC. SERV., R46560, FREE SPEECH & THE REGULATION OF SOCIAL MEDIA CONTENT (2019); Department of Justice’s Review of Section 230 of the Communications Decency
platform need not be considered a “publisher or speaker” in order to find that it has a duty of care not to facilitate harm to its users.\(^{277}\) In fact, the CDA implicitly supports the assumption that platforms do or will exercise some sort of content control, as the Act also prevents platforms from being held liable for “any action voluntarily taken in good faith to restrict access to or availability of . . . objectionable” material.\(^{278}\)

With regards to regulation, recent cases have drawn attention to the conflict between the alleged First Amendment rights of social media companies and the ability of states to control how platforms monitor content.\(^{279}\) This conflict has arisen primarily in response to some states’ concerns that conservative-leaning posts will be censored by platforms due to the companies’ disagreement with the political content of those viewpoints.\(^{280}\) The Eleventh Circuit recently determined that a Florida law prohibiting platforms from “de-platforming” or restricting content by political candidates and “journalistic enterprises” was likely unconstitutional on the basis that it violated the platforms’ First Amendment rights.\(^{281}\) One question was whether the statute could be upheld on the basis that social media platforms were essentially “public utilities” or “common carriers,” and so required to provide equal access to their services.\(^{282}\) Notably, while the Eleventh Circuit dismissed the argument that the social media platforms were “common carriers” on the grounds that they do not “serve the public indiscriminately,”\(^{283}\) the court failed to note the difference between the more limited concept of common carrier and the broader category of public utility,\(^{284}\) stating cursorily that the platforms were “indisputably private actors.”\(^{285}\) In contrast, the Fifth Circuit upheld a similar Texas statute, concluding that social media platforms were indeed common

---

\(^{277}\) See BRANNON, supra note 276, at 9–10, 12 n.110, 22 n.218.


\(^{279}\) While clearly necessary, a detailed analysis of these cases and the implications of a “public utility” or “public service corporation” approach to the question of social media platform content and First Amendment rights is beyond the scope of this Article.


\(^{281}\) NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1203, 1206 (11th Cir. 2022).

\(^{282}\) Id. at 1221.

\(^{283}\) Id.

\(^{284}\) See id. at 1221–22; supra notes 105–120 and accompanying text.

\(^{285}\) NetChoice, 34 F.4th at 1203. Indeed, it appears the State’s common carrier argument was fairly weak. See id. at 1220 (expressing “uncertainty” about the State’s precise argument).
carriers.286 The Fifth Circuit’s reasoning is muddy, however, and like the Eleventh Circuit fails to recognize the distinction between common carrier and public utility.287 Florida has appealed the Eleventh Circuit’s decision to the Supreme Court.288 Yet while untangling the muddled analyses of these decisions will be a challenge, the resolution of this First Amendment question does not necessarily preclude laws imposing a duty on social media companies to take care not to facilitate harm to their users. First Amendment scholar Genevieve Lakier’s discussion of the history of free speech restrictions on communications entities—including telegraph companies—shows that, even during the time period of the death telegram cases, free speech restrictions coexisted with private lawsuits and state regulation designed to enforce duties of care on those companies.289

**CONCLUSION**

Contention over the telegraph cases was fierce, but relatively brief. With the increasing prevalence of the telephone—in 1901, one in ten American homes had a phone, while by 1920, about one in three did—the telegraph gradually fell out of use as a means of maintaining family connections, and telegraph cases became less and less common.290 Yet rather than an esoteric outlier in the history of American law, the telegraph cases provide an important window into a moment of drastic change in the nature of the regulatory state and the relationship of powerful corporations to the public.

The telegraph cases illuminate a new dimension of the concept of the public service corporation. Telegraph patrons, as well as the companies themselves, presented telegraph corporations as embedded in an affective, hierarchical relationship with the public, more akin to the intimate relationship of master and servant than an impersonal market transaction between profit-motivated strangers. The willingness of a significant minority of courts to recognize this special relationship reveals an understudied aspect of the nature of the corporation and corporate-public relations at the turn of the century. Contrary to the assumption that business corporations had become purely profit-driven market actors by this period, the success of telegraph cases

287. Id. at 473 (mistakenly conflating common carriers with businesses “affected with a public interest,” a precursor to the category of public service corporation).
290. CLAUDE S. FISCHER, AMERICA CALLING: A SOCIAL HISTORY OF THE TELEPHONE TO 1940, at 22 (1992); see HOCHFELDER, supra note 15, at 165. Telegraph cases also fell prey to Commerce Clause litigation that limited states’ ability to regulate interstate commerce. W. Union Tel. Co. v Brown, 234 U.S. 542 (1914); e.g., W. Union Tel. Co. v Speight, 254 U.S. 17 (1920); S. COMM. ON RULES, 68th Cong., THE CONSTITUTION OF THE UNITED STATES OF AMERICA (ANNOTATED) 158 (1923).
in many Southern and Midwestern states highlights that, even in the early twentieth century, the belief that corporations owed special duties to society that trumped their duties to their shareholders still had significant power. The image of the corporation presented not only by litigants and sympathetic judges, but telegraph corporations themselves, prioritized the public service aspect of telegraph corporations, while barely mentioning the profit motive. This extramarket, affective relationship between the public and one of the biggest monopolies of the turn of the century suggests that a different vision of American corporate capitalism was and is possible: one based not on the neoliberal principles of the free market, but on a shared conception of a moral political economy.291

As the ongoing debate over the proper relationship between the state, social media companies, and the public shows, there is a clear expectation among social media users and their legislative representatives that social media companies should have some type of responsibility to the public. As we work through these questions of how to adapt the legal framework of public accountability to our changing technological and social environment, the telegraph cases offer a potential path toward reconceptualizing the affective as well as economic duties of companies that provide essential services. As one scholar presciently put it in the 1990s, the telegraph was the equivalent of the “Victorian Internet.”292 From the vantage point of the 2020s, he little knew how true that analogy would become. As the telegraph cases show, the law’s capacity to hold powerful corporations accountable for noneconomic aspects of the public welfare is grounded in precedent and ripe for possibility.

291. Rahman, supra note 224, at 1625.
292. STANDAGE, supra note 15.