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# THE PERILS OF CLASSIFYING SOCIAL MEDIA PLATFORMS AS PUBLIC UTILITIES

Adam Thierer<sup>‡</sup>

## I. INTRODUCTION

To the extent public utility-style regulation has been debated within the Internet policy arena over the past decade, the focus has been almost entirely on the physical layer of the Internet.<sup>1</sup> The question has been whether Internet service providers should be considered “essential facilities” or “natural monopolies” and therefore regulated as public utilities.<sup>2</sup> Such concerns served to drive

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<sup>‡</sup> Senior Research Fellow, Mercatus Center at George Mason University. This paper was originally presented at a Michigan State University event, “The Governance of Social Media,” held at Georgetown University on November 11, 2011. The author wishes to thank the following individuals for helpful comments on various drafts of the paper: Glenn Manishin, Ben Compaine, Jerry Ellig, Richard Williams, Joshua Wright, Jerry Brito, Mark Adams, Brent Skorup, Kasey Higgins, and Sean Flaim.

<sup>1</sup> See, e.g., JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 211-13 (2005) (outlining the economic considerations underlying the FCC’s 1998 decision not to apply public utility regulation to applications riding on top of the physical layer of the Internet); Randolph J. May, *Why Stovepipe Regulation No Longer Works: An Essay on the Need for a New Market-Oriented Communications Policy*, 58 FED. COMM. L.J. 103, 107, 111-12 (2006) (arguing that regulation of the physical layer of the Internet could “stultify the continued evolution” of the network); Kevin Werbach, *A Layered Model for Internet Policy*, 1 J. ON TELECOMM. & HIGH TECH. L. 37, 60 (2002) (explaining that most communications regulation is directed at the physical layer of the Internet because “it has historically been viewed a natural monopoly”).

<sup>2</sup> See, e.g., Tim Wu & Christopher S. Yoo, *Keeping the Internet Neutral?: Tim Wu and Christopher Yoo Debate*, 59 FED. COMM. L.J. 575, 585-86 (2007) (explaining that Internet access is arguably a good example of natural monopoly because deploying the infrastructure requires such high upfront costs, making market entry challenging, while the “incremental” costs of running the infrastructure are low); see Davina Sashkin, Comment, *Failure of Imagination: Why Inaction on Net Neutrality Regulation Will Result in a de Facto Legal Regime Promoting Discrimination and Consumer Harm*, 15 COMMLAW CONCEPTUS 261, 289 (2006) (reasoning that because most people access the Internet through a single provider, that provider has a monopoly over the consumer’s online experience; and further, because the majority of United States markets have two or fewer broadband providers, “those providers control an essential facility through which consumers access [online] content”); see

the debate over “net neutrality” regulation.<sup>3</sup>

While the net neutrality debate rages on, the rhetoric of “public utilities” and “essential facilities” is increasingly creeping into policy discussions about other layers of the Internet, such as the search layer.<sup>4</sup> More recently, academic and public policy circles are discussing whether social media platforms—especially social networking sites—might also possess public utility characteristics.<sup>5</sup> Presumably, such a classification would entail greater regulation of those sites’ structures and business practices.

Proponents of a public utility regulatory regime for social media platforms offer a variety of justifications for this approach. Amorphous “fairness” concerns animate many of these calls, but privacy and reputational harms are also frequently mentioned as rationales for regulation.<sup>6</sup> Proponents of regulation also sometimes invoke “social utility” or “social commons” arguments in defense of increased government oversight, even though these notions lack clear definition.<sup>7</sup>

However, social media platforms do not resemble traditional public utilities, and there are good reasons for why policymakers should avoid a rush to regulate them as such. Treating these nascent digital services as regulated utilities would harm consumer welfare because public utility regulation has traditionally been the archenemy of innovation and competition.<sup>8</sup> Furthermore, treating

also Marissa A. Piropato, Comment, *Open Access and the Essential Facilities Doctrine: Promoting Competition and Innovation*, 2000 U. CHI. LEGAL F. 369, 380 (2000).

<sup>3</sup> See BARBARA VAN SCHEWICK, *INTERNET ARCHITECTURE AND INNOVATION* 1-2, 219-221 (2010) (defining “net neutrality” as a “rule that would prevent network providers from blocking independent applications, content, or portals” through the use of “discriminatory technology”).

<sup>4</sup> See, e.g., Kevin Werbach, *Only Connect*, 22 BERKELEY TECH. L.J. 1233, 1291-92 (2007) (“Nonetheless, it is possible for applications to become exclusive platforms with anti-competitive effects similar to those of exclusive physical broadband networks. Google’s dominant search engine and MySpace’s massive social networking site might be candidates for such scrutiny at some point in the future.”).

<sup>5</sup> See, e.g., Ambrose Thompson, *Social Media as Public Expectation: The New Public Utility*, N.Y. PUB. LIBR. (June 30, 2010), <http://commcns.org/17T7nvb> (arguing that social media sites like Facebook, YouTube, and LinkedIn are an “essential commodity” in an interconnected world and, therefore, satisfy the definition of a public utility).

<sup>6</sup> See Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1175 (2008); Philip N. Howard, *Let’s Nationalize Facebook*, SLATE (Aug. 16, 2012, 7:07 AM), <http://commcns.org/15kgLcq> (proposing to nationalize Facebook, or regulate it as a public utility, in hopes of making the company more responsive to users’ privacy rights and expectations).

<sup>7</sup> See, e.g., danah boyd, *Facebook Is a Utility; Utilities Get Regulated*, ZEPHORIA (Mar. 15, 2010), <http://commcns.org/14OYsZF>.

<sup>8</sup> See generally Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548 (1969) (arguing that a public utility’s rate of innovation may be “suboptimal” unless the regulatory payoff is quite high, and also that general innovation may be stronger in a

today's leading social media providers as digital essential facilities threatens to convert natural monopoly or essential facility claims into self-fulfilling prophecies. Related proposals to mandate "API neutrality"<sup>9</sup> or enforce a "Separations Principle"<sup>10</sup> on integrated information platforms would be particularly problematic because such regulation threatens innovation and investment.<sup>11</sup> Marketplace experimentation in search of sustainable business models should not be made illegal.

Remedies less onerous than regulation are available. Transparency and data- portability policies would solve many of the problems that concern critics, and numerous private empowerment solutions exist for those users concerned about their privacy on social media sites. Finally, because social media are fundamentally tied up with the production and dissemination of speech and expression, First Amendment values are at stake, warranting heightened constitutional scrutiny of proposals for regulation. Social media providers should retain the editorial discretion to determine how their platforms are configured and what can appear on them.

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competitive market as opposed to one with a natural monopoly).

<sup>9</sup> "API" (or application programming interface) refers to the method by which applications and programs "communicate with and draw functionality from a given website or service." The API for an Internet platform can be open or closed. If an API is closed, its users can only interact with the website or service directly, while "sites with more open API allow users to interact with the website using other sites or applications created by third parties." Jeffrey Jarosch, *Novel "Neutrality" Claims Against Internet Platforms: A Reasonable Framework for Initial Scrutiny*, 59 CLEV. ST. L. REV. 537, 572-73 (2011). Proponents of API neutrality take issue with platform providers that seek to cut off third-party interaction with their interfaces. Professor Jonathan Zittrain, for instance, has suggested that certain social networking sites might be required to maintain open interfaces. See JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET AND HOW TO STOP IT* 184-85 (2008) ("Those who offer open APIs on the Net in an attempt to harness the generative cycle ought to remain application-neutral after their efforts have succeeded, so all those who have built on top of their interfaces can continue to do so on equal terms.").

<sup>10</sup> The so-called "Separations Principle" is Professor Tim Wu's "constitutional approach" to our modern information economy. Modeled after the separation of powers in the American government, the regime aims to "constrain and divide *all* power that derives from the control of information" such that "those who develop information, those who own the network infrastructure on which it travels, and those who control the tools or venues of access must be kept apart from one another." Additionally, Wu emphasizes that government must keep its distance because such interference is ultimately destructive to the information market. TIM WU, *THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES* 304-05 (2010).

<sup>11</sup> Marissa A. Piropato, *supra* note 2, at 405-06; see, e.g., *Internet Access and the Consumer: Hearing Before the S. Comm. on Commerce, Sci., & Transport.*, 106th Cong. 35 (1999) (statement of James O. Robbins, President, Cox Communications) ("The mere suggestion from Government that such risky investments could be subjected to old-fashioned cost-of-service regulation would have a chilling effect on going-forward investments and would slow the roll-out of these new advanced Internet services.").

## II. RISING CALLS FOR THE REGULATION OF A NEW MEDIUM

### A. “Search Neutrality” and “Net Neutrality” as a Prelude to Broader Debate

Are social networking sites such as Facebook, LinkedIn, and Twitter “information monopolies” that should be regulated as public utilities? What about other social media and digital application platforms like Amazon, Apple, and Google? Should “neutrality” mandates be imposed upon these sites, services, or devices?

With attention focused on the physical layers of the Internet,<sup>12</sup> these application-layer service providers have not received much regulatory consideration from the public utility perspective.<sup>13</sup> The underlying question has been whether Internet service providers should be considered “essential facilities” or “natural monopolies” and be regulated accordingly.<sup>14</sup> The debate over “net neutrality” regulation has been animated by such concerns.<sup>15</sup> Andrew Odlyzko, a University of Minnesota mathematics professor, argues that the underlying issue in the net neutrality debate—the “conflict between society’s drives for economic efficiency and for fairness”—will likely continue in other layers of the Internet.<sup>16</sup> Odlyzko predicts, “There is no reason to expect that this conflict will lessen, and instead there are arguments that suggest it will intensify. Should something like net neutrality prevail, the conflict would likely move to a different level. That level might become search neutrality.”<sup>17</sup>

Indeed, as search giant Google has grown larger in recent years, some in academia suggest that we may need “search neutrality” regulation modeled after net neutrality regulation, and that “such concerns will ultimately warrant creation of a Federal Search Commission” to enforce such a regime.<sup>18</sup> Similarly,

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<sup>12</sup> Kevin Werbach, *Breaking the Ice: Rethinking Telecommunications for the Digital Age*, 4 J. ON TELECOMM. & HIGH TECH. L. 59, 74 (2005).

<sup>13</sup> See NÜECHTERLEIN & WEISER, *supra* note 1, at 211.

<sup>14</sup> Robert A. Penchuk, Comment, *Unleashing the Open Mobile Internet*, 10 J. HIGH TECH. L. 74, 81 (2009); see James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM. L.J. 225, 252 (2002).

<sup>15</sup> See VAN SCHEWICK, *supra* note 3, at 219-21.

<sup>16</sup> Andrew Odlyzko, *Network Neutrality, Search Neutrality, and the Never-ending Conflict Between Efficiency and Fairness in Markets*, 8 REV. NETWORK ECON. 40, 41 (2009).

<sup>17</sup> *Id.*

<sup>18</sup> Frank Pasquale, *Internet Nondiscrimination Principles: Commercial Ethics for Carriers and Search Engines*, 2008 U. CHI. LEGAL F. 263, 276-99 (arguing that “ultimately [I]nternet nondiscrimination principles should be applied equally to dominant players, whether search engines or carriers”); see *Competition on the Internet: Hearing Before the Task Force on Competition Policy & Antitrust Laws of the H. Comm. on the Judiciary*, 110th Cong. 48 (2008) (statement of Frank Pasquale, Professor, Seton Hall Law School); see also Holman W. Jenkins, Jr., Op-Ed., *Business World: Sort of Evil*, WALL ST. J., July 18, 2007, at A14 (“Google’s . . . dominance in search and advertising . . . [and i]ts ability to

other legal scholars have advocated a more expansive view of First Amendment jurisprudence that would permit more robust regulation to prohibit “dominant search engines . . . from manipulating search results on an individualized basis and . . . require them to provide political candidates with meaningful, uncensored access to forums for communicating with the public.”<sup>19</sup>

While no federal agency has acted on these calls, there have been hints of interest. In a 2009 Notice of Inquiry on wireless innovation, the Federal Communications Commission (“FCC”) asked,

[C]an a [company’s] dominant cloud computing position raise the same competitive issues that are now being discussed in the context of network neutrality? Will it be necessary to modify the existing balance between regulatory and market forces to promote further innovation in the development and deployment of new applications and services?<sup>20</sup>

This inquiry preceded the FCC’s push to impose net neutrality mandates on wireline broadband platforms and could foreshadow a broader regulatory push to come.<sup>21</sup> The Federal Trade Commission (“FTC”) is also expanding its interest in this arena.<sup>22</sup>

## B. Generic Calls for Public Utility-Style Regulation of Social Media

Calls for public utility-style regulation of social media platforms are growing, and the rationales for regulation vary, ranging from traditional economic concerns to more amorphous social and cultural concerns.<sup>23</sup> While varying in

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control which Web sites and Web businesses receive traffic makes it a far likelier candidate for ‘public utility’ treatment than the diverse and growing array of players who make up the broadband world.”)

<sup>19</sup> DAWN C. NUNZIATO, *VIRTUAL FREEDOM: NET NEUTRALITY AND FREE SPEECH IN THE INTERNET AGE* 151 (2009).

<sup>20</sup> *In re* Fostering Innovation and Investment in the Wireless Communications Market; A National Broadband Plan for Our Future, *Notice of Inquiry*, 24 F.C.C.R. 11,322, ¶ 60 (Aug. 27, 2009).

<sup>21</sup> *See In re* Preserving the Open Internet; Broadband Industry Practices, *Report and Order*, 25 F.C.C.R. 17,905, ¶ 1 (Dec. 21, 2010).

<sup>22</sup> In June 2007, the FTC concluded a yearlong inquiry into net neutrality issues and decided to adopt an essentially deregulatory wait-and-see approach. Equally significant was the agency’s assertion of authority to regulate broadband providers if and when it ever changes its mind. *See* FTC, STAFF REPORT: BROADBAND CONNECTIVITY COMPETITION POLICY 38 (2007), available at <http://commcns.org/156XmaS> (“[B]ecause most broadband Internet access services are not provided on a common carrier basis, they are part of the larger economy subject to the FTC’s general competition and consumer protection authority with regard to methods, acts, or practices in or affecting commerce.”); *see also* Sara Jerome, *FTC Head Endorses Net-Neutrality Rules*, HILLICON VALLEY (Dec. 15, 2010, 11:39 AM), <http://commcns.org/156XA1v>.

<sup>23</sup> Howard, *supra* note 6 (insisting that Facebook be nationalized to “fix the company’s woeful privacy practices, allow the social network to fulfill its true potential for providing social good, and force it to put its valuable data to work on significant social problems”);

rationale, these pronouncements all come to the same conclusion. A columnist recently argued that “[s]ocial networks are a critical layer of infrastructure for a wide variety of applications and content,” and claimed that users may get locked into some online services without “social network neutrality.”<sup>24</sup> Another opinion piece further argues that, “[f]or new media to be potential equalizers, they must be treated as public utilities, recognizing that spectrum abundance (the excuse for privatization) does not prevent monopoly ownership of hardware and software platforms and hence cannot guarantee equal civic, educational and cultural access to citizens.”<sup>25</sup>

Social media researcher danah boyd contends that Facebook is acquiring public utility characteristics and suggests that regulation may be in its future.<sup>26</sup> “Facebook may not be at the scale of the Internet (or the Internet at the scale of electricity), but that doesn’t mean that it’s not angling to be a utility or quickly becoming one,” she writes.<sup>27</sup> Thus, boyd regards regulation as inevitable: “We can argue about whether or not regulation makes things cheaper or more expensive, but we can’t argue about whether or not regulators are involved with utilities: they are always watching them because they matter to the people.”<sup>28</sup>

Zeynep Tufekci, an assistant professor at the University of North Carolina, Chapel Hill, argues that, “many such services are natural monopolies: Google, Ebay [*sic*], Facebook, Amazon, all benefit greatly from network externalities which means that the more people on the service, the more useful it is for everyone.”<sup>29</sup> She worries about Facebook and Google, in particular, causing a “corporatization of social commons”<sup>30</sup> and about the danger of the “privatization of our publics.”<sup>31</sup>

The works of Tufekci and boyd are representative of the way that many academics and Internet policy pundits increasingly speak of larger social networking sites as the equivalent of “social utilities” or “social commons,” and claim that such sites are essential to one’s social existence. Indeed, going beyond characterizing social networking sites as mere commons, there are those who

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see, e.g., boyd, *supra* note 7.

<sup>24</sup> Jake Levine, *It’s Time for a Social Network Neutrality*, BUS. INSIDER (July 18, 2011, 10:12 AM), <http://commcns.org/14Pe3by>.

<sup>25</sup> See Benjamin R. Barber, *Toward a Fighting Liberalism*, NATION, Nov. 7, 2011, at 20, 23, available at <http://commcns.org/1dda1wb>.

<sup>26</sup> We respectfully honor the wishes of danah boyd that her name remain in lowercase for all official publications. See boyd, *supra* note 7.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Zeynep Tufekci, *Google Buzz: The Corporatization of Social Commons*, TECHNOSOCIOLOGY (Feb. 17, 2010), <http://commcns.org/14PACNd>.

<sup>30</sup> *Id.*

<sup>31</sup> Zeynep Tufekci, *Facebook: The Privatization of Our Privates and Life in the Company Town*, TECHNOSOCIOLOGY (May 14, 2010), <http://commcns.org/15kO3rV>.

suggest that we should begin to think of Facebook and Google as nation-states or “sovereigns” of cyberspace.<sup>32</sup> In these scholar’s views, it is seemingly one’s civic duty to participate in these online services because “[p]resence on the Internet is effectively a requirement for fully and effectively participating in the [twenty-first] century as a citizen, as a consumer, as an informed person[,] and as a social being.”<sup>33</sup>

Privacy concerns provoked many of these critics to claim that utility-like regulation may be necessary, not so much to satisfy traditional economic or equity rationales like affordability and universal service, but to achieve various social policy objectives, such as the protection of user privacy.<sup>34</sup>

Others worry about long-term reputational harm, and call for a variety of increased intermediary policing responsibilities or regulations, including a “Fair Reputation Reporting Act.”<sup>35</sup> Building on proposals to increase search engine regulation, Frank Pasquale has called for search engines to provide the equivalent of a “right of reply” for information that users find about themselves online but consider inaccurate or defamatory—a sort of “Internet Fairness Doctrine.”<sup>36</sup> At the search layer, it is suggested that, “Google could set up a panel of neutral arbitrators who would evaluate claims by *private* individuals that Google is returning search results that might constitute tortious or dignitary harms.”<sup>37</sup> Failure by Google (and presumably other search providers as well) to evaluate the claim or take action would open the company to liability “for its negligence in disseminating tortious material.”<sup>38</sup> Thus, in addition to public utility obligations, social media platforms might be subjected to greater tort liability.

Such concerns about online reputation, especially regarding children, have also motivated federal legislative efforts to establish some social media regulation. In May 2011, Reps. Edward Markey (D-Mass.) and Joe Barton (R-Texas)

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<sup>32</sup> REBECCA MACKINNON, *CONSENT OF THE NETWORKED: THE WORLDWIDE STRUGGLE FOR INTERNET FREEDOM* 150-51, 165 (2012); see LORI ANDREWS, *I KNOW WHO YOU ARE AND I SAW WHAT YOU DID: SOCIAL NETWORKS AND THE DEATH OF PRIVACY* 1-2, 13-14 (2012).

<sup>33</sup> Tufekci, *Google Buzz*, *supra* note 29.

<sup>34</sup> Tufekci, *Facebook*, *supra* note 31.

<sup>35</sup> See Frank Pasquale, *Reputation Regulation: Disclosure and the Challenge of Clandestinely Commensurating Computing*, in *THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION* 107, 113 (Saul Levmore & Martha C. Nussbaum eds., 2010).

<sup>36</sup> Frank Pasquale, *Asterisk Revisited: Debating a Right of Reply on Search Results*, 3 *J. BUS. & TECH. L.* 68-69 (2008) (discussing how the Internet Fairness Doctrine would allow regulatory agencies the ability to compel directories and search engines to catalog websites using objective criteria, hence guaranteeing that users are directed to websites not based on commercial relationships, but on their likely benefit to the user).

<sup>37</sup> Brian Leiter, *Cleaning Cyber-Cesspools: Google and Free Speech*, in *THE OFFENSIVE INTERNET*, *supra* note 35, at 155, 170.

<sup>38</sup> *Id.* at 171.

introduced H.R. 1895, the Do Not Track Kids Act of 2011.<sup>39</sup> Their legislation would expand the Children's Online Privacy Protection Act of 1998 ("COPPA"), which requires websites that are directed or targeted towards children under the age of thirteen, to have significant privacy safeguards in place.<sup>40</sup> The Markey-Barton bill would also apply Fair Information Practice Principles ("FIPPS") to teenagers via a "Digital Marketing Bill of Rights for Teens" and impose limits on the collection of geolocation information (such as country, city, zip code, time zone, latitude, and longitude) from both children and teens.<sup>41</sup> Finally, the measure would mandate that social media sites offer consumers "Eraser Buttons,"<sup>42</sup> a concept modeled loosely on an idea being considered in the European Union, the so-called "right to be forgotten" online.<sup>43</sup> Specifically, the Markey-Barton bill would require online operators "to the extent technologically feasible, to implement mechanisms that permit users of the website, service, or application of the operator to erase or otherwise eliminate content that is publicly available through the website, service, or application and contains or displays personal information of children or minors . . . ."<sup>44</sup> In theory, eraser buttons would help minors wipe out embarrassing facts that they have placed online but later come to regret.<sup>45</sup> However, the proposal also raises many serious free speech issues because it is tantamount to a form of digital censorship and also threatens press freedoms.<sup>46</sup>

<sup>39</sup> Do Not Track Kids Act of 2011, H.R. 1895, 112th Cong. (2011); see Press Release, Rep. Ed Markey, May 13, 2011: Markey, Barton Introduce Bipartisan "Do Not Track Kids Act" (May 13, 2011), available at <http://commcns.org/17buov4>.

<sup>40</sup> Children's Online Privacy Protection Act (COPPA) of 1998, 15 U.S.C. §§ 6501-6506 (2006); see generally Berin Szoka & Adam Thierer, *COPPA 2.0: The New Battle over Privacy, Age Verification, Online Safety & Free Speech*, PROGRESS ON POINT (Progress & Freedom Found., Wash., D.C.), June 2009, available at <http://commcns.org/17cLn0j> (discussing earlier efforts to expand COPPA's regulatory framework on the state level).

<sup>41</sup> H.R. 1895, §§ 5-6; see Press Release, Rep. Ed Markey, *supra* note 39.

<sup>42</sup> H.R. 1895, § 7; see Press Release, Rep. Ed Markey, *supra* note 39.

<sup>43</sup> See Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation), at 51-53, COM (2012) 11 final (Jan. 25, 2011) (providing for an individual right to have personal data deleted by a data processor and third parties it has shared the data with when it is no longer necessary, where consent has been withdrawn, or if data is used contrary to the European Commission's privacy regulation); see also Adam Thierer, *Erasing Our Past on the Internet*, FORBES (Apr. 17, 2011, 1:46 PM), <http://commcns.org/17essjR> (discussing the inherent constitutional and enforcement issues raised by a mandatory "right to be forgotten" or "Eraser Button"); Larry Downes, *Europe Reimagines Orwell's Memory Hole*, TECH. LIBERATION FRONT (Nov. 16, 2010), <http://commcns.org/1dg5i3D> (emphasizing the breadth of the proposed "right to be forgotten" and warning colloquially that the devil is in the details).

<sup>44</sup> H.R. 1895, § 7(b)(1)(A).

<sup>45</sup> Adam Thierer, *Initial Thoughts About the Markey-Barton "Do Not Track Kids" Bill*, TECH. LIBERATION FRONT (May 6, 2011), <http://commcns.org/18Txqnf>.

<sup>46</sup> Adam Thierer, *Kids, Privacy, Free Speech and the Internet: Finding the Right Bal-*



Twitter is also coming under scrutiny as it becomes an increasingly vibrant social media platform. In mid-2011, the FTC announced that it was investigating how Twitter interacts with the companies building applications and services for its platform.<sup>47</sup> The agency reached out to competing application and platform providers to ask questions about Twitter's recent efforts to exert more control over third-party uses of its application programming interface ("API"), the code vocabulary that programs use to communicate with one another.<sup>48</sup> It remains to be seen whether the FTC's investigation will lead to any regulatory action against Twitter, but the Commission seems to believe that Twitter has some degree of market power in its emerging, presently undefined market sector.<sup>49</sup>

The FTC's investigation concerns the alleged threat of exclusionary business practices posed by Twitter exerting greater control over its API,<sup>50</sup> but another potential flashpoint in this debate involves Twitter's management of "hashtags" and "trends." Twitter users can easily follow their favorite or trending topics by using subject-specific hashtags, such as "#taxes" or "#freespeech."<sup>51</sup> This feature makes Twitter a freewheeling forum that allows instantaneous debate and commentary about virtually every subject under the sun. Occasionally, however, accusations of "hashtag censorship" or "trend censorship" are let loose if users of a particular hashtag believe that it should be higher in the Twitter Trends ranks.<sup>52</sup> Twitter Trends, which are algorithmically generated by Twitter, identify popular topics that are being discussed on Twitter at a given point in time, more so than they were previously.<sup>53</sup> For ex-

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ance 7 (Mercatus Ctr., George Mason Univ., Working Paper No. 11-32, 2011), available at <http://commcns.org/16yMh2P>.

<sup>47</sup> Amir Efrati, *Antitrust Regulator Makes Twitter Inquiries*, WALL ST. J. (July 1, 2011), <http://commcns.org/16IFg2U>.

<sup>48</sup> *Id.*; see NEWTON'S TELECOM DICTIONARY 131 (25th ed. 2009) (defining "API" as "a set of standard software interrupts, calls, and data formats that application programs use to initiate contact with network services, mainframe communications programs, telephone equipment or program-to-program communications.").

<sup>49</sup> Adam Thierer, *Twitter, the Monopolist? Is This Tim Wu's "Threat Regime" in Action?*, TECH. LIBERATION FRONT (July 1, 2011), <http://commcns.org/16IGnr> (discussing the FTC's more aggressive approach towards Internet companies and how, in antitrust enforcement actions, the market in question must be defined to show market power).

<sup>50</sup> Jeff Bliss & Brian Womack, *FTC Begins Twitter Antitrust Inquiry*, BLOOMBERG (July 1, 2011, 2:36 PM), <http://commcns.org/19SUuHk>.

<sup>51</sup> See Lorien Roux, *Using Twitter Hashtags for Your Small Business*, HASHTAGS.ORG (Jan. 30, 2013), <http://commcns.org/19SUx5Y>.

<sup>52</sup> See, e.g., Adrienne Jeffries, *Twitter Says It's Not Censoring Occupy Wall Street—People Really Are More Concerned With Doritos Right Now*, BETABEAT (Sept. 26, 2011, 3:18 PM), <http://commcns.org/13QEPpb> (discussing claims made by Occupy Wall Street protesters that Twitter was censoring tweets related to the protest movement).

<sup>53</sup> *To Trend or Not to Trend...*, TWITTER (Dec. 8, 2010), <http://commcns.org/1c6DPgN> ("Twitter Trends are automatically generated by an algorithm that attempts to identify topics

ample, users voiced such complaints when hotly debating WikiLeaks and the Occupy Wall Street movement.<sup>54</sup> The topics' respective hashtags (#wikileaks and #occupywallstreet or #OWS) were often trending, but were not always leading the Trends list.<sup>55</sup>

Cornell University communications professor Tarleton Gillespie worries about "the specter of censorship" at Twitter through "algorithmic intervention."<sup>56</sup> He predicts,

[T]he debate about tools like Twitter Trends is, I believe, a debate we will be having more and more often. As more and more of our online public discourse takes place on a select set of private content platforms and communication networks, and these providers turn to complex algorithms to manage, curate, and organize these massive collections, there is an important tension emerging between what we expect these algorithms to be, and what they in fact are. Not only must we recognize that these algorithms are not neutral, and that they encode political choices, and that they frame information in a particular way. We must also understand what it means that we are coming to rely on these algorithms, that we want them to be neutral, we want them to be reliable, we want them to be the effective ways in which we come to know what is most important.<sup>57</sup>

As with search results, we will likely see a push for "algorithmic neutrality" and a resurrection of the long-standing debate over editorial discretion and the First Amendment rights of platform owners. Search engines frequently claim—and users mistakenly believe—that algorithms are already perfectly neutral and rank data using a strict scientific or mathematical calculus devoid of any human intervention.<sup>58</sup> In reality, every search provider and social media platform service uses a mix of automated and human elements.<sup>59</sup> Digital platform owners often tweak algorithms to ensure more relevant results and to prevent spammers and scammers from "gaming" the algorithm.<sup>60</sup> The controversy will likely continue because, as Gillespie notes, "we want so badly for these tools to perform a simple, neutral calculus, without blurry edges, without human intervention, without having to be tweaked to get it 'right,' without be-

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that are being talked about more *right now* than they were previously. . . . The Trends list captures the hottest emerging topics, not just what's most popular.").

<sup>54</sup> Jeffries, *supra* note 52.

<sup>55</sup> *Id.*

<sup>56</sup> See Tarleton Gillespie, *Can an Algorithm Be Wrong? Twitter Trends, the Specter of Censorship, and our Faith in the Algorithms Around Us*, SOC. MEDIA COLLECTIVE (Oct. 19, 2011), <http://commcns.org/17VQtvW>.

<sup>57</sup> *Id.*

<sup>58</sup> See Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, in *THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET* 461, 461-62 (Berin Szoka & Adam Marcus eds., 2010).

<sup>59</sup> See *id.* at 462-65 (explaining that, although search engines typically automate their core operations, they "make editorial judgments just like any other media company").

<sup>60</sup> See, e.g., *Optimizing Your Website for Search Engines and Directories*, VERIO, <http://commcns.org/16IJMyh> (last visited Apr. 13, 2013).

ing shaped by the interests of their providers.”<sup>61</sup>

### C. Wu’s “Separations Principle” for “Information Monopolies”

Columbia Law School professor Tim Wu has prompted much of the recent angst over the growing scale of some social media and online service providers. In his recent works *The Master Switch: The Rise and Fall of Information Empires* and *In the Grip of the New Monopolists*, Wu argues that “information monopolies” are on the rise, and the current “laissez-faire approach” towards them is no longer feasible.<sup>62</sup> Wu’s list of “information monopolists” includes Facebook, Apple, Google, and even Twitter.<sup>63</sup>

Wu makes several provocative assertions in his work. First, he uses extremely expansive constructions of “information monopoly.”<sup>64</sup> According to Wu, because “information industries . . . can never be properly understood as ‘normal’ industries,”<sup>65</sup> traditional forms of regulation, including antitrust laws, “are inadequate for the regulation of information industries.”<sup>66</sup> Wu believes that because information industries “traffic in forms of individual expression” and are “fundamental to democracy,” they require differential regulatory treatment.<sup>67</sup> His argument contradicts the thrust of the First Amendment, which traditionally has imposed a higher level of legal scrutiny on content-focused regulatory efforts.<sup>68</sup>

Second, running counter to the thrust of most modern antitrust analysis, Wu

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<sup>61</sup> Gillespie, *supra* note 56.

<sup>62</sup> Tim Wu, *In the Grip of the New Monopolists*, WALL ST. J. (Nov. 13, 2010), <http://commcns.org/19SWPBV>; see WU, MASTER SWITCH, *supra* note 10, at 303-04.

<sup>63</sup> See Wu, *New Monopolists*, *supra* note 62.

<sup>64</sup> See WU, MASTER SWITCH, *supra* note 10, at 302 (“[I]nformation industries are collectively embedded in our existence in a way unprecedented in industrial history, involving every dimension of our national and personal lives—economic, yes, but also expressive and cultural, social and political.”).

<sup>65</sup> *Id.* at 301-02 (discussing how information monopolies use speech as their commodity and thus combine economic and political power).

<sup>66</sup> *Id.* at 303.

<sup>67</sup> *Id.* at 301-04.

<sup>68</sup> *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 255-58 (1974) (providing no statutory right of reply to newspaper articles because it compels speech by interfering with editorial independence); *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 638 (5th Cir. 2012) (“Laws singling out a small number of speakers for onerous treatment are inherently suspect”); see *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994) (“Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.”). *But see Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 386-390 (1969) (justifying the application of intermediate scrutiny for broadcast media due to “the scarcity of radio frequencies”). Wu argues that these information monopolies have political power *because* of the content they possess, see WU, MASTER SWITCH, *supra* note 10, at 302-03, so it could be argued that these monopolists are receiving differential treatment because of the content they possess.

is generally far more concerned with vertical integration than horizontal, referring to “the corrupting effects of vertically integrated power” in information sectors.<sup>69</sup> This concern leads to his advocacy for a so-called “Separations Principle” for the information economy,<sup>70</sup> which would segregate information providers into three buckets: content creators, distributors, and hardware makers.<sup>71</sup>

Wu says this remedy:

[I]s not a *regulatory* approach but rather a *constitutional* approach to the information economy. By that I mean a regime whose goal is to constrain and divide *all* power that derives from the control of information. . . . A Separations Principle would mean the creation of a salutary distance between each of the major functions or layers in the information economy. It would mean that those who develop information, those who own the network infrastructure on which it travels, and those who control the tools or venues of access must be kept apart from one another.<sup>72</sup>

Wu calls this a “constitutional approach” because he models it on the separation of powers found in the United States Constitution, even though the Constitution focused on constraining the powers of government, not businesses.<sup>73</sup>

Wu’s proposal is relevant to the discussion of treating social media like public utilities because it is a variant of structural separation, a rarely used but sweeping antitrust remedy.<sup>74</sup> Structural separation is the nuclear option of antitrust and usually reserved for the most extreme cases of entrenched monopoly.<sup>75</sup> The primary recent example is the 1984 government breakup of the Bell system, which had a comprehensive, nationwide, government-sheltered telephone monopoly.<sup>76</sup> AT&T was forced to shed its local telephone-exchange fa-

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<sup>69</sup> WU, MASTER SWITCH, *supra* note 10, at 305, 311-12 (“Here, the priorities must be both the prevention and dissolution of large-scale vertical mergers in the communications industry . . .”).

<sup>70</sup> *Id.* at 304-05.

<sup>71</sup> *Id.* at 304.

<sup>72</sup> *Id.* at 304-05 (emphasis in original).

<sup>73</sup> *Id.*

<sup>74</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 106 (D.C. Cir. 2001) (quoting 3 AREEDA & HOVENKAMP, ANTITRUST LAW ¶¶ 650a, 653b) (“[S]tructural relief, which is ‘designed to eliminate the monopoly altogether . . . require[s] a clearer indication of a *significant causal connection* between the conduct and creation or maintenance of the market power.’ Absent such causation, the antitrust defendant’s unlawful behavior should be remedied by ‘an injunction against continuation of that conduct’”); see *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961) (labeling divestiture as the “most drastic, but most effective” antitrust remedy); see also U.S. DEP’T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 155-58 (2008) *withdrawn as agency policy* Press Release, U.S. Dep’t of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), available at <http://commlaw.org/17d6M9t>.

<sup>75</sup> See *Microsoft Corp.*, 253 F.3d 34 at 106.

<sup>76</sup> Adam Thierer, *Unnatural Monopoly: Critical Moments in the Development of the Bell System Monopoly*, 14 CATO J. 267, 269-70 (1994), available at <http://commlaw.org/1dG70ZN>; see *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151-52 & n.85 (D.D.C. 1982) (describing AT&T as “the largest corporation in the world by

cilities, which became seven independent regional operators.<sup>77</sup> Although Wu is short on details about how his “Separations Principle” for the information economy would be implemented,<sup>78</sup> presumably it would entail a similar disintegration and reordering of social media operations.

Incidentally, Wu was named a senior advisor to the FTC in early 2011, just before the agency announced an investigation into Twitter’s business practices.<sup>79</sup> The Twitter case comes on the heels of FTC investigations into the business practices of both Apple and Google.<sup>80</sup> Antitrust interest in Google’s business practices increased following the January 2012 launch of “Search, plus Your World,” the company’s attempt to personalize search results.<sup>81</sup> Some critics protested the move on privacy grounds,<sup>82</sup> while others—including rivals like Twitter—accused Google of unfairly favoring its own social service over those of its competitors.<sup>83</sup> The FTC promptly announced that it was expanding its antitrust probe of the company to include these concerns.<sup>84</sup>

#### D. “API Neutrality” for App Platforms

In his book *The Future of the Internet—And How to Stop It*, Harvard University cyberlaw professor Jonathan Zittrain suggests that we might need “API

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any reckoning”).

<sup>77</sup> See RICHARD H. K. VIETOR, *CONTRIVED COMPETITION: REGULATION AND DEREGULATION IN AMERICA* 211 (1994).

<sup>78</sup> See WU, *MASTER SWITCH*, *supra* note 10, at 309, 313 (suggesting implementation through an “informal compact between the people and their government” or through self-regulation by the information industry).

<sup>79</sup> Nicholas Carlson & Dan Frommer, *Twitter Is Under Federal Investigation*, *BUS. INSIDER* (June 30, 2011, 2:30 PM), <http://commcns.org/174cZ9z> (five months after Wu joined the agency); see Spencer E. Ante & Thomas Catan, *Columbia Law’s Tim Wu to Advise FTC*, *WALL ST. J.* (Feb. 8, 2011, 4:37 PM), <http://commcns.org/1dgzdZw>.

<sup>80</sup> Thomas M. Lenard & Paul H. Rubin, *The Federal Trade Commission Penalizes Google for Being Successful*, *FORBES* (June 28, 2011, 5:00 PM), <http://commcns.org/15a3kYD>; see Thomas Catan, *Apple’s Mobile Rules To Get FTC Scrutiny*, *WALL ST. J.* (June 12, 2010), <http://commcns.org/1dG8hjq>. Recall that Apple, Google, and Twitter are three of the many companies that Wu labels “information monopolies” or “information empires” in his work. Wu, *New Monopolists*, *supra* note 62.

<sup>81</sup> Ian Paul, *Google’s Search Plus Your World: What it Means for Users*, *PCWORLD* (Jan. 11, 2012, 6:56 AM), <http://commcns.org/1aFyQpm>; see Sara Forden & Brian Womack, *FTC Said to Expand Antitrust Probe of Google to Social Networking Service*, *BLOOMBERG* (Jan. 13, 2012, 6:31 PM), <http://commcns.org/13QVvN9>.

<sup>82</sup> Jessica Guynn, *Google likely to face FTC complaint over ‘Search Plus Your World,’* *L.A. TIMES* (Jan. 11, 2012, 10:14 AM), <http://commcns.org/14SuuUr>; see, e.g., Letter from Mark Rotenberg, Exec. Dir., Elec. Privacy Info. Ctr., to Jon Leibowitz, Chairman, Fed. Trade Comm’n, et al. (Jan. 12, 2012), available at <http://commcns.org/18dzkNe>.

<sup>83</sup> Farhad Manjoo, *I’m Not Here to Make Friends*, *SLATE* (Jan. 11, 2012, 6:02 PM), <http://commcns.org/14110X5>; see Tim Carmody, *Dirty Little Secrets: The Trouble with Social Search*, *WIRED* (Jan. 12, 2012, 6:28 PM), <http://commcns.org/174eYLB>.

<sup>84</sup> See Forden & Womack, *supra* note 81.

neutrality” to ensure fair access to certain online services or digital platforms.<sup>85</sup> Although he does not label it as such, API neutrality assumes that the platform or device is a sort of public utility or common carrier.<sup>86</sup>

Zittrain is concerned that the absence of API neutrality could imperil “generativity,” technologies or networks that invite or allow tinkering and all sorts of creative secondary uses.<sup>87</sup> Primary examples include general-purpose personal computers (“PCs”) and the traditional “best efforts” Internet.<sup>88</sup> By contrast, Zittrain contemptuously refers to “sterile appliances, tethered to a network of control” or digital technologies or networks that discourage or disallow tinkering.<sup>89</sup> Zittrain’s primary examples are proprietary devices like Apple’s iPhone, TiVo, or online walled gardens like the old AOL and current cell phone networks.<sup>90</sup> Such “tethered” devices or platforms earn Zittrain’s wrath.<sup>91</sup> He argues that we run the risk of seeing the glorious days of generative devices and the open Internet give way to those tethered appliances and closed networks.<sup>92</sup> He fears that most users will flock to tethered appliances in search of stability or security, and worries that those tethered appliances are less “open” and more “regulable,” thereby allowing easier control by either large corporate intermediaries or government officials.<sup>93</sup> In other words, the “future of the Internet” Zittrain is hoping to “stop” is a world dominated by tethered digital

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<sup>85</sup> ZITTRAIN, *supra* note 9, at 181-84.

<sup>86</sup> *Id.* at 183-84 & n.33 (using market power as a triggering effect—which is often used to justify regulating utilities).

<sup>87</sup> *See id.* at 70-73 (defining the term as “a system’s capacity to produce unanticipated changes through unfiltered contributions from broad and varied audiences,” and setting out the five principal features of a generative system); *see also* Jonathan L. Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1975, 1981 (2006) (“Generativity is a function of a technology’s capacity for leverage across a range of tasks, adaptability to a range of different tasks, ease of mastery, and accessibility.”).

<sup>88</sup> The Internet was designed as a network of networks with no guarantee of bandwidth between one point and another; instead, users are forced to rely on “falling dominos of trust.” In a “best efforts network,” you simply “Send it and pray,” hoping that a properly implemented Internet Protocol will make sure every bit of data moves from one end to the other. ZITTRAIN, *supra* note 9, at 33. Zittrain argues, “[t]his same quality is found within traditional PC architecture. *Id.* at 69. He continues with an explanation of each “generative feature” at work in the two systems. *See id.* at 71-73.

<sup>89</sup> *Id.* at 3-5 (concluding that these tethered devices inhibit the ability of “mainstream technology [to] be influenced, even revolutionized, out of left field”).

<sup>90</sup> *See id.* at 106-07.

<sup>91</sup> *Id.* at 107.

<sup>92</sup> *See id.* at 8 (“Today, the same qualities that led to [the success of the Internet and general-purpose PCs] are causing [them] to falter. As ubiquitous as Internet technologies are today, the pieces are in place for a wholesale shift away from the original chaotic design that has given rise to the modern information revolution.”).

<sup>93</sup> *Id.* (“This counterrevolution would push mainstream users away from a *generative* Internet that fosters innovation and disruption, to an *appliancized* network that incorporates some of the most powerful features of today’s Internet while greatly limiting its innovative capacity—and, for better or worse, heightening its regulability.”).

appliances and walled gardens, because they are too easily controlled by other actors.

He argues that, “If there is a present worldwide threat to neutrality in the movement of bits, it comes not from restrictions on traditional Internet access that can be evaded using generative PCs, but from enhancements to traditional and emerging appliancized services that are not open to third-party tinkering.”<sup>94</sup> Because he fears the rise of “walled gardens” and mediated experiences,<sup>95</sup> Zittrain goes on to wonder, “should we consider network neutrality-style mandates for appliancized systems?”<sup>96</sup> He responds to his own question as follows:

The answer lies in that subset of appliancized systems that seeks to gain the benefits of third-party contributions while reserving the right to exclude it later. . . . Those who offer open APIs on the Net in an attempt to harness the generative cycle ought to remain application-neutral after their efforts have succeeded, so all those who built on top of their interface can continue to do so on equal terms.<sup>97</sup>

While many would agree that API neutrality represents a fine generic norm for online commerce and interactions, Zittrain implies that it should be a *legal* standard to which online providers are held.<sup>98</sup> He even alludes to the possibility of applying the common law principle of adverse possession more broadly in these contexts.<sup>99</sup> He notes that adverse possession “dictates that people who openly occupy another’s private property without the owner’s explicit objection (or, for that matter, permission) can, after a lengthy period of time, come to legitimately acquire it.”<sup>100</sup> He does not make it clear when that principle would be triggered as it pertains to digital platforms or social media APIs,<sup>101</sup> nonetheless, he seemingly believes that API-neutrality gives users a property right in someone else’s API.<sup>102</sup> In other words, if someone creates an API and a user or third-party developer builds something that adds to the underlying service (e.g., Twitter or smartphone app stores), API-neutrality dictates that the user’s interest could supersede the rights of the API’s owner and the original developer.

Zittrain’s API neutrality proposal would have a profound impact on how social media and digital application platforms operate. This paper will consider specific problems with his and Wu’s proposals. First, Part III will provide a

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<sup>94</sup> *Id.* at 181.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 183.

<sup>97</sup> *Id.* at 183-84.

<sup>98</sup> *See id.* (discussing certain common law doctrines and concluding that they “point to a deeply held norm that certain consistent behaviors can give rise to obligations, sometimes despite fine print that tries to prevent those obligations from coming about”).

<sup>99</sup> *See id.* at 183.

<sup>100</sup> *Id.*

<sup>101</sup> *See id.* at 183, 184 (making no reference to when or how such rights would apply to an API).

<sup>102</sup> *See id.*

general sketch of the law and economics of public utility regulation and the essential facilities doctrine. Part IV will then make a general case against classifying social media as essential facilities or public utilities.

### III. THE BASIC LAW AND ECONOMICS OF PUBLIC UTILITIES AND ESSENTIAL FACILITIES

The proposals outlined in Part II make it clear that many of the regulatory concepts and mechanisms of the past century—public utility mandates, common carriage regulations, “neutrality” rules, and even the Fairness Doctrine or “right of reply” mandates—could soon be applied to the Internet and other digital platforms. While some of these proposals will be premised on amorphous social concerns, such as privacy and reputation, references to traditional public-utility and essential-facility rationales for regulation likewise animate the discussion. As it has been argued, “Access to technological standards, software platforms, and interconnection information is the [twenty-first] century equivalent of the bridges, roads, and ports that gave rise to the essential facilities doctrine in the first place.”<sup>103</sup>

To explain why it would be misguided to apply such designations to social media sites, this section offers a brief sketch of the basic law and economics of essential facilities doctrine and public utility regulation.

#### A. Traditional Rationales for Regulation

Under traditional theories of regulation—sometimes labeled the “Public Interest Theory” of regulation<sup>104</sup>—two broad forms of “market failure” serve as rationales for regulating the private sector.<sup>105</sup> The first is economic market failure, which exists when the market tends toward monopoly instead of competition.<sup>106</sup> A natural monopoly is said to exist when a single firm can satisfy the entire demand within a relevant market at the lowest cost possible due to econ-

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<sup>103</sup> Spencer Weber Waller & William Tasch, *Harmonizing Essential Facilities*, 76 ANTI-TRUST L.J. 741, 765 (2010).

<sup>104</sup> DAVID L. KASERMAN & JOHN W. MAYO, GOVERNMENT AND BUSINESS: THE ECONOMICS OF ANTITRUST AND REGULATION 444 (Dryden Press, 1995); see M.B. Adams & G.D. Tower, *Theories of Regulation: Some Reflections on the Statutory Supervision of Insurance Companies in Anglo-American Countries*, 19 GENEVA PAPERS ON RISK & INS. (SPECIAL ISSUE) 156, 163-65 (1994); see also Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 335-37 (1974).

<sup>105</sup> See Paul L. Joskow & Roger G. Noll, *Regulation in Theory and Practice: An Overview*, in STUDIES IN PUBLIC REGULATION 1, 3 (Gary Fromm ed., 1981).

<sup>106</sup> See, e.g., RICHARD J. PIERCE, JR. & ERNEST GELLHORN, REGULATED INDUSTRIES IN A NUTSHELL 9 (4th ed. 1999).



omies of scale.<sup>107</sup> In theory, this leaves the monopolist free to raise prices and enjoy excessive profits.<sup>108</sup> Traditional remedies include antitrust laws, public utility regulation, price controls, or even government ownership.<sup>109</sup> The goal of these regulatory interventions is to create or preserve objectives that competitive markets usually ensure, such as affordability, quality, and ongoing innovation and investment.<sup>110</sup> Of these goals, regulators typically emphasize price and undertake special efforts to prevent price gouging. Since most social media services are free of charge to consumers,<sup>111</sup> accusations of market failure must be premised on some other alleged harm to consumers.

A second broad category of regulation involves social goals and values. Those goals and values can include the universal provision of a good or service,<sup>112</sup> “fair” or “nondiscriminatory” industry practices,<sup>113</sup> cultural goals,<sup>114</sup> environmental values,<sup>115</sup> or privacy concerns.<sup>116</sup> This category is an extremely amorphous catchall,<sup>117</sup> but it is particularly relevant to discussions on social media regulation because pricing is typically not a factor.

Calls for social media regulation can have both economic and social components. However, proposals to classify social media operators as essential facilities or public utilities—even if premised on social concerns—would involve fairly comprehensive economic regulation. Thus, a closer examination of the

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<sup>107</sup> Posner, *Natural Monopoly Regulation*, *supra* note 8, at 548; see PIERCE & GELLHORN, *supra* note 106, at 9.

<sup>108</sup> See Posner, *Natural Monopoly Regulation*, *supra* note 8, at 550-53.

<sup>109</sup> See *id.* at 548-550, 636.

<sup>110</sup> See PIERCE & GELLHORN, *supra* note 106, at 9-11.

<sup>111</sup> See, e.g., Daniel Lyons, *It's Time to Pony Up: Why Good Web Sites Shouldn't Be Free*, NEWSWEEK (July 22, 2009, 8:00 PM), <http://commcns.org/141rnJV>.

<sup>112</sup> See, e.g., *In re Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund, Report and Order and Further Notice of Proposed Rulemaking*, 26 F.C.C.R. 17,663 ¶ 1 (Oct. 27, 2011) (reforming the FCC's universal service program).

<sup>113</sup> See, e.g., Robinson-Patman Act, 13 U.S.C. §§ 13-13h (2006) (stating that it is unlawful to, directly or indirectly, discriminate in price between different purchasers of commodities of like grade and quality).

<sup>114</sup> See, e.g., National Historic Preservation Act, 16 U.S.C. § 470f (2006) (requiring federal agencies to evaluate the effect of any federally funded undertaking or federally licensed undertaking to evaluate the effect of the project on historical or culturally significant sites).

<sup>115</sup> See, e.g., 49 U.S.C. §§ 32901-32919 (2006) (providing the Secretary of Transportation with authority to set average fuel economy standards for automobiles).

<sup>116</sup> See, e.g., Children's Online Privacy Protection Act (COPPA) of 1998, 15 U.S.C. §§ 6501-6506 (2006) (prohibiting, without parental permission, the online collection of personally identifiable information of any child under the age of 13).

<sup>117</sup> PIERCE & GELLHORN, *supra* note 106, at 9-11 (discussing how social-goal regulations do not “displace competition as a major method of control” and “is a supplement to the market place . . . designed to achieve specific purposes”).

definitions of “essential facilities” and “public utilities” and of the regulatory policies associated with them is in order.

## B. Definitional Confusion

While “natural monopoly” has a fairly standard meaning in the study of economics,<sup>118</sup> “public utilities” and “essential facilities” have been less rigorously defined and, consequently, have been the subjects of continuing debate. Alfred E. Kahn, author of the seminal *Economics of Regulation*, observed that the line between public utilities and other industries “is a shadowy area . . . [that] shifts over time.”<sup>119</sup> Professor Kevin Werbach aptly describes the problem at the outset: “‘Utility’ is a term, much like ‘innovation,’ that is widely used but curiously immune to precise definition. Most descriptions of the concept are circular: a utility is a company, such as a telephone network, water, or electricity provider, which has special obligations because it functions as a public utility.”<sup>120</sup>

As with “public utility” designations, the term “essential facility” is equally mired in conceptual confusion.<sup>121</sup> In fact, the Supreme Court has avoided defining the term altogether in the handful of decisions that are considered “essential facility” cases.<sup>122</sup> Despite the ambiguity and potential circularity in these

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<sup>118</sup> See Posner, *Natural Monopoly Regulation*, *supra* note 8, at 550 (arising when one single firm can satisfy the entire demand of a relevant market at a lower cost than any collection of two or more firms, such that competition is not viable); see also PIERCE & GELLHORN, *supra* note 106, at 8.

<sup>119</sup> ALFRED E. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS*, VOL. 1: ECONOMIC PRINCIPLES 10 (John Wiley & Sons, Inc., 1970).

<sup>120</sup> Kevin Werbach, *The Network Utility*, 60 DUKE L.J. 1761, 1788 (2011) (footnote omitted).

<sup>121</sup> Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 841 (1989) (noting that most Supreme Court cases applying the essential facilities doctrine “do not speak of it and can be explained without reference to it”).

<sup>122</sup> See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (affirming a jury verdict that the defendants attempted to monopolize or monopolized downhill skiing facilities in Aspen, Colorado, but declining to rule on the lower court’s holding that a multi-day, multi-area ski ticket could be characterized as an “essential facility”); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) (finding that denial of access to electricity transmission lines constituted a Sherman Act violation); *Associated Press v. United States*, 326 U.S. 1 (1945) (holding that the Associated Press had been violating the Sherman Antitrust Act by barring member newspapers from selling news to nonmember organizations); *United States v. Terminal R.R. Ass’n of St. Louis*, 224 U.S. 383 (1912) (holding that it was illegal to restrain trade by controlling all railway bridges and switching yards and thus restricting competing railroads from servicing St. Louis); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977) (holding that the lower court erred in not instructing the jury on the essential facility doctrine with regards to whether RFK stadium was essential to the operation of a professional football team in Washington); *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir. 1952) (holding that there had been a violation of

definitional debates, it is the supposedly “essential” nature of the good or service in question that leads to calls for public-utility classification and regulation.<sup>123</sup> Thus, in antitrust parlance, an “essential facility” is a service or network that is entirely unique and possesses few (or no) good alternatives.<sup>124</sup> Local sewage and water systems are classic examples. A single bridge over a river in a local community might be another. Professor Geoff Manne writes that, to prevail in a monopolization case rooted in the essential facilities doctrine, a plaintiff would need to prove: 1) control of the essential facility by a monopolist; 2) a competitor’s inability practically or reasonably to duplicate the essential facility; 3) the denial of the use of the facility to a competitor; and 4) the feasibility of providing the facility to competitors.<sup>125</sup>

The physical nature of these facilities often matters greatly in two senses. First, the exclusive possession of an important physical network is thought to create a “bottleneck” through which all other traffic must pass or all service must flow.<sup>126</sup> Again, the only bridge in town is the paradigmatic example. Regulators typically require “non-discriminatory access” to such facilities for that reason.<sup>127</sup> Alternatively, the government takes control of the asset or network in question.<sup>128</sup>

Second, the physical nature of the network or facility is important because it

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the Sherman Antitrust Act when the named defendant excluded the plaintiff, a competitor, from accessing the market).

<sup>123</sup> Adam Thierer, *The Perils of Classifying Social Media Platforms as Public Utilities*, 22-23 (Mercatus Ctr., George Mason Univ., Working Paper No. 12-11, 2012); see WEST’S ENCYCLOPEDIA OF AMERICAN LAW (2nd ed. 2004).

<sup>124</sup> See Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187, 1211 (1999); cf. *Hecht*, 570 F.2d at 992 (“To be “essential” a facility need not be indispensable; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants.”).

<sup>125</sup> Geoffrey A. Manne, *The Problem of Search Engines as Essential Facilities: An Economic & Legal Assessment*, in THE NEXT DIGITAL DECADE, *supra* note 58, at 419, 421 (citing *MCI Commc’ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983)). This test has been adopted by virtually every court to consider an essential facilities claim. Robert Pitofsky, Donna Patterson & Jonathan Hooks, *The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70 ANTITRUST L.J. 443, 448-49 (2002).

<sup>126</sup> See *MCI Commc’n Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1132 (7th Cir. 1983) (“[A] refusal [to deal] may be unlawful because a monopolist’s control of an essential facility (sometimes called a “bottleneck”) can extend monopoly power from one stage of production to another, and from one market into another. Thus, the antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms.”); see also Pitofsky, Patterson & Hooks, *supra* note 125, at 447.

<sup>127</sup> *MCI Commc’n Corp.*, 708 F.2d at 1132 (“Thus, the antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms.”); see Pitofsky, Patterson & Hooks, *supra* note 125, at 447.

<sup>128</sup> Public ownership has been used widely in the distribution of electricity at the municipal level as well as for water utilities. See W. KIP VISCUSI, JOHN M. VERNON & JOSEPH E. HARRINGTON, JR., *ECONOMICS OF REGULATION AND ANTITRUST* 413 (2d ed. 1998).

entails significant fixed costs that are considered non-duplicable.<sup>129</sup> These characteristics often lead to the service being labeled a “natural monopoly,” although that term has also been hotly debated among economists.

Once the label “natural monopoly,” “essential facility,” or “public utility” is assigned to a given network, facility, or service, governments typically impose four types of regulation:<sup>130</sup>

- 1) Control of firms’ entry into and exit from the industry;<sup>131</sup>
- 2) price regulation (out of fear of “gouging” by the supposed monopolist);<sup>132</sup>
- 3) conditions of service/quality controls;<sup>133</sup> and
- 4) universal service obligations (a general duty to serve all customers, typically in a well-defined geographic area).<sup>134</sup>

Such regulations and obligations can be imposed by officials and agencies at the federal, state, or local level, but typically such rules have been administered by state public utility commissions (“PUCs”), as authorized by state-based enabling statutes.<sup>135</sup> Importantly, such state-based regulation raises special practical and legal problems for industries and forms of commerce that are more interstate in character, thus necessitating some degree of federal oversight.<sup>136</sup>

<sup>129</sup> Rick Geddes, *Public Utilities*, in *ENCYCLOPEDIA OF LAW AND ECONOMICS: THE HISTORY AND METHODOLOGY OF LAW AND ECONOMICS* 1162, 1162-63 (Boudewijn Bouckaert & Gerrit de Geest, eds., 2000), available at <http://commcns.org/17f61f0>.

<sup>130</sup> See KAHN, *ECONOMIC PRINCIPLES*, *supra* note 119, at 3.

<sup>131</sup> See, e.g., Telecommunications Act of 1996, 47 U.S.C. § 271 (2006) (governing Bell operating company entry into long-distance telephone service markets).

<sup>132</sup> See, e.g., Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§751-760h (1976) (repealed 1981) (authorizing price and allocation controls on crude oil and petroleum products).

<sup>133</sup> See, e.g., 47 C.F.R. § 20.18(b) (2013) (requiring all commercial mobile radio service providers to provide basic emergency 911 service).

<sup>134</sup> See, e.g., 47 U.S.C. § 254 (regarding basic telephone services being available to rural consumers at reasonably comparable rates comparable to urban areas).

<sup>135</sup> See, e.g., TEX. UTIL. CODE ANN. § 11.002(a) (1997) (“This title is enacted to protect the public interest inherent in the rates and services of public utilities. The purpose of this title is to establish a comprehensive and adequate regulatory system for public utilities to assure rates, operations, and services that are just and reasonable to the consumers and to the utilities.”).

<sup>136</sup> See, e.g., 47 U.S.C. § 152 (“The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio . . .”). Conflict over regulatory authority is still unclear, providing businesses with uncertainty and competing regulators. See, e.g., *In re AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition*; Petition of the National Telecommunications Cooperative Association for a Rulemaking to Promote and Sustain the Ongoing TDM-to-IP Evolution, *Comments of Verizon and Verizon Wireless*, GN Docket No. 12-353, at 22-23 (Jan. 28, 2013) (“Nevertheless, even in the face of the [FCC’s] clear intent to create regulatory certainty with the *Vonage Order*, some state commissions have continued to assert authority to regulate VoIP services. The Commission should once and for all make clear that VoIP and other IP-enabled services are interstate for jurisdictional purposes and therefore not subject to a patchwork of 50 different state regulatory regimes that would slow the transition to IP networks. . . .”).

### C. Doubts Surrounding the Legitimacy or Application of Theories

Some scholars have challenged the notion that monopolies are in any sense “natural” and have questioned exactly how “essential” some supposedly essential facilities are in reality. Others worry about the implications for innovation and investment when the labels are too casually affixed.

“A key problem with many essential facilities cases is the non-essentiality of the relevant facilities,” notes Manne.<sup>137</sup> Too often, regulatory proponents or plaintiffs in antitrust cases casually affix the label to an asset or system that they are simply unwilling to attempt to duplicate themselves.<sup>138</sup> Law professors Phillip Areeda and Herbert Hovenkamp have argued that essential facilities doctrine is harmful because

[F]orcing a firm to share its monopoly is inconsistent with antitrust basic goals for two reasons. First, consumers are no better off when a monopoly is shared; ordinarily, price and output are the same as they were when one monopolist used the input alone. Second, the right to share a monopoly discourages firms from developing their own alternative inputs.<sup>139</sup>

Areeda and Hovenkamp believe that the essential facilities doctrine “is both harmful and unnecessary and should be abandoned.”<sup>140</sup>

Antitrust attorney and former Assistant Attorney General R. Hewitt Pate similarly argued that the essential facilities doctrine threatens innovation:

At bottom, a plaintiff making an essential facilities argument is saying that the defendant has a valuable facility that it would be difficult to reproduce, and suggesting that is a reason for a court to intervene and impose a sharing duty. But at least in the vast majority of the cases, the fact that the defendant has a highly valued facility is a reason to *reject* sharing, not to *require* it, since forced sharing “may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.”<sup>141</sup>

Most antitrust experts today tend to agree with Boston University law professor Keith Hylton’s conclusion that “there should be a presumption against claims that consumer welfare will be enhanced by applying the essential facilities doctrine to force owners to share access with competitors.”<sup>142</sup>

Some economists have challenged the logic supporting natural monopoly assertions, or argued that the source of monopoly often springs from other

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<sup>137</sup> Manne, *supra* note 125, at 421.

<sup>138</sup> *See id.* at 420-21.

<sup>139</sup> PHILLIP AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* 195 (3d ed. 2008).

<sup>140</sup> *Id.* at 196.

<sup>141</sup> R. Hewitt Pate, Hunton & Williams LLP, Refusals to Deal and Essential Facilities, Testimony Submitted to U.S. Dep’t of Justice/Fed. Trade Comm’n: Hearings on Single Firm Conduct 18 (July 18, 2006) (quoting *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004)), available at <http://commcns.org/12EINyn>.

<sup>142</sup> Keith N. Hylton, *Economic Rents and Essential Facilities*, 1991 BYU L. REV. 1243, 1245.

sources—namely, government.<sup>143</sup> Other economists and political scientists have suggested that the notion sprang from a desire for a more activist government in general.<sup>144</sup>

Finally, others suggest that natural monopoly is unlikely to be a lasting problem because technological change and new entry and innovation will help markets innovate around existing bottlenecks or entrenched incumbents.<sup>145</sup> Even consumer advocates Mark Green and Ralph Nader have argued that, “some care must be taken in defining natural monopoly, for what may appear to be an inevitable state of non-competition may be nothing more than a lack of imagination or an insensitivity to new technology.”<sup>146</sup>

Regardless of these definitional disputes, social networking services and social media sites do not qualify as either natural monopolies or essential facilities. Part IV elaborates on this argument.

#### D. The Success of Liberalization Efforts Calls the Wisdom of Regulation into Question

The success of market liberalization in many utility sectors has also called into question the wisdom of regulating sectors thought to be “natural monopolies” or considered to need regulatory oversight for other reasons.

Economists Robert Crandall and Jerry Ellig reviewed five major industries that were once heavily regulated (airlines, natural gas, railroads, telecommunications, and trucking) and found that deregulation lowered prices, increased competitive entry, broadened consumer choices, and improved overall service quality.<sup>147</sup> Clifford Winston also studied the deregulation of these sectors and reached similar conclusions.<sup>148</sup> Congressional Democrats, the Carter administration, and liberal consumer advocates, such as Alfred Kahn, the late Senator

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<sup>143</sup> See, e.g., James R. Nelson, *The Role of Competition in the Regulated Industries*, 11 ANTITRUST BULL. 1, 3 (1966).

<sup>144</sup> Thomas W. Hazlett, *The Curious Evolution of Natural Monopoly Theory*, in UNNATURAL MONOPOLIES: THE CASE FOR DEREGULATING PUBLIC UTILITIES 21 (Robert W. Poole, ed., 1985).

<sup>145</sup> Thomas J. DiLorenzo, *The Myth of Natural Monopoly*, 9 REV. AUSTRIAN ECON. 43, 44 (1996) (“If competition is viewed as a dynamic, rivalrous process of entrepreneurship, then the fact that a single producer happens to have the lowest costs at any one point in time is of little or no consequence. The enduring forces of competition—including potential competition—will render free-market monopoly an impossibility.”).

<sup>146</sup> Mark Green & Ralph Nader, *Economic Regulation vs. Competition: Uncle Sam the Monopoly Man*, 82 YALE L.J. 871, 872 (1973).

<sup>147</sup> Robert Crandall & Jerry Ellig, *Economic Deregulation and Customer Choice: Lessons for the Electric Industry* 3 (Ctr. for Market Processes, Inc., unnumbered working paper, 1997), available at <http://commcns.org/15doPY1>.

<sup>148</sup> Clifford Winston, *Economic Deregulation: Days of Reckoning for Microeconomists*, 31 J. ECON. LIT. 1263, 1284-85 (1993).

Edward Kennedy, Supreme Court Justice Stephen Breyer, and Ralph Nader, led deregulation efforts because they became convinced that regulation was harming consumer welfare by limiting competition and driving up prices.<sup>149</sup>

In 1992, President George H. W. Bush formed a Council on Competitiveness to study the impact of economic regulatory reform on consumers and the economy.<sup>150</sup> The council's final report found that "[w]hile the intentions of many regulations are laudable, they can have unintended adverse impacts on the general public."<sup>151</sup> The report gathered all relevant economic evidence of the impact of deregulation up to that point, and concluded that "deregulation is saving the American economy at least tens of billions of dollars annually" and that consumers in each of the six deregulated sectors were enjoying greater choices from increased competition.<sup>152</sup>

In light of this evidence, many economists and regulatory analysts today express more skepticism about "natural monopoly" claims. Rick Geddes, an associate professor in the Department of Policy Analysis and Management at Cornell University, concludes, "Where once regulated or government-owned monopolies dominated because of the belief that most utilities were 'natural monopolies,' there is now a growing consensus that competition can perform a broader and more effective role."<sup>153</sup>

#### E. The Problem of Regulatory Capture

Public utility regulation has also been widely criticized by economists and political scientists who have documented how affected parties often "capture" the rulemaking process and use it for their own ends.<sup>154</sup> The capture theory is closely related to the "rent-seeking" and "political failure" theories developed

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<sup>149</sup> VIETOR, *supra* note 77, at 14, 50-52; Green & Nader, *supra* note 146, at 883-84; see THOMAS K. MCCRAW, *PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN* 266-68, 293-96 (Cambridge, MA: Harvard University Press, 1984).

<sup>150</sup> Murray Weidenbaum, *Regulatory Process Reform: From Ford To Clinton*, REGULATION, Winter 1997, at 20, 23.

<sup>151</sup> THE PRESIDENT'S COUNCIL ON COMPETITIVENESS, *THE LEGACY OF REGULATORY REFORM: RESTORING AMERICA'S COMPETITIVENESS*, at v (1992).

<sup>152</sup> See *id.* at v-vii (summarizing the success of economic deregulation in transportation—airlines, railroads, trucking—energy, telecommunications, and financial services).

<sup>153</sup> Geddes, *supra* note 129, at 1163.

<sup>154</sup> Another term for regulatory capture is "client politics," which, according to James Q. Wilson, "occurs when most or all of the benefits of a program go to some single, reasonably small interest (and industry, profession, or locality) but most or all of the costs will be borne by a large number of people (for example, all taxpayers)." JAMES Q. WILSON, *BUREAUCRACY* 76 (New York: Basic Books, 1989); see JAMES Q. WILSON, *THE POLITICS OF REGULATION* (New York: Basic Books, 1980).

by the public choice school of economics.<sup>155</sup> While the capture theory does not explain all regulatory decisions or developments, it does explain with dismaying consistency how self-interested motives explain political actions.<sup>156</sup> The traditional normative theory of regulation failed to address this problematic, recurring reality, as well as other deficiencies in the political decision-making process.<sup>157</sup> Scholars developed a new, more robust economic theory of regulation to help explain why the traditional paradigm was incomplete in this and other ways.<sup>158</sup> These scholars argued that it was inappropriate to assume that regulatory intervention was always “in the public interest” or would always improve consumer welfare.<sup>159</sup>

In particular, University of Chicago economist George Stigler’s pioneering work in developing this more robust economic theory of regulation revealed how “as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefits.”<sup>160</sup> Kahn’s meticulous study of the regulatory process also identified how capture was a particular problem for utility sectors:

When a commission is responsible for the performance of an industry, it is under never completely escapable pressure to protect the health of the companies it regulates, to assure a desirable performance by relying on those monopolistic chosen instruments and its own controls rather than on the unplanned and unplannable forces of competition. . . . Responsible for the continued provision and improvement of service, [the regulatory commission] comes increasingly and understandably to identify the interest of the public with that of the existing companies on whom it must rely to deliver these goods.<sup>161</sup>

Many other scholars have identified capture as a recurring problem in regulated industries.<sup>162</sup> They concur with UCLA Emeritus Professor of Business

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<sup>155</sup> GORDON TULLOCK, ARTHUR SELDON & GORDON L. BRADY, CATO INSTITUTE, GOVERNMENT FAILURE: A PRIMER IN PUBLIC CHOICE 43-47 (2002); Adam Thierer, *Regulatory Capture: What the Experts Have Found*, TECH. LIBERATION FRONT (Dec. 19, 2010), <http://commcns.org/1di31nn>.

<sup>156</sup> Thierer, *Regulatory Capture*, *supra* note 155.

<sup>157</sup> *Id.*

<sup>158</sup> VISCUSI, VERNON & HARRINGTON, *supra* note 128, at 328-46.

<sup>159</sup> See SAM PELTZMAN, BROOKINGS INSTITUTE, THE ECONOMIC THEORY OF REGULATION AFTER A DECADE OF DEREGULATION 43, 59 (1989), available at <http://commcns.org/18WjkRX>.

<sup>160</sup> George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). For a broader discussion of capture theory, see VISCUSI, VERNON & HARRINGTON, *supra* note 128, at 327-46.

<sup>161</sup> ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS, VOL. 2: INSTITUTIONAL ISSUES 12, 46 (2d ed. MIT Press 1988) (1971).

<sup>162</sup> William W. Bratton & Joseph A. McCahery, *Regulatory Competition, Regulatory Capture, and Corporate Self Regulation*, 73 N.C. L. REV. 1861 (1995); Anthony Downs, *An Economic Theory of Political Action in a Democracy*, 65 J. POL. ECON. 135 (1957); Green & Nader, *supra* note 146, at 871; William A. Jordan, *Producer Protection, Prior Market Structure and the Effects of Government Regulation*, 15 J. L. & ECON. 151 (1972); Jean-Jacques Laffont & Jean Tirole, *The Politics of Government Decision-Making: A Theory of Regulatory Capture*, 106 Q. J. ECON. 1,089 (1991); Fred S. McChesney, *Rent Extraction*



Economics Harold Demsetz's conclusion that, "in utility industries, regulation has often been sought because of the inconvenience of competition."<sup>163</sup> Both the railroad<sup>164</sup> and airline<sup>165</sup> industries provide particularly egregious examples of such capture. Both industries used their respective regulators—the Interstate Commerce Commission and the Civil Aeronautics Board—to promote cartelization and market protectionism.<sup>166</sup> When capture occurs, it lessens not only the innovation that would flow from other market entrants and entrepreneurs, but also the innovation of the regulated entity itself, which shifts its focus to controlling the regulatory process and sheltering itself from disruptive change.<sup>167</sup>

One can debate the chicken-and-egg question of which came first—the assignment of utility status or the capture of regulators by special interests—but the inquiry is largely irrelevant. Capture is a recurring problem within such sectors and undercuts traditional "public interest" rationales for intervention.

*and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987); Barry R. Weingast, *Regulation, Reregulation and Deregulation: The Foundation of Agency-Clientele Relationships*, 44 L. & CONTEMP. PROBS. 147 (1981); Bruce Yandle, *Bootleggers and Baptists—The Education of a Regulatory Economist*, 3 AEI J. GOV'T & SOC'Y 12-6 (1983).

<sup>163</sup> Harold Demsetz, *Why Regulate Utilities?*, 11 J.L. & ECON. 55, 61 (1968).

<sup>164</sup> Thomas Frank, *Obama and 'Regulatory Capture'*, WALL ST. J. (June 24, 2009), <http://commcns.org/1feNwJD> ("The first federal regulatory agency, the Interstate Commerce Commission, was set up to regulate railroad freight rates in the 1880s. Soon thereafter, Richard Olney, a prominent railroad lawyer, came to Washington to serve as Grover Cleveland's attorney general. Olney's former boss asked him if he would help kill off the hated ICC. Olney's reply, handed down at the very dawn of Big Government, should be regarded as an urtext of the regulatory state: 'The Commission . . . is, or can be made, of great use to the railroads. It satisfies the popular clamor for a government supervision of the railroads, at the same time that that supervision is almost entirely nominal. Further, the older such a commission gets to be, the more inclined it will be found to take the business and railroad view of things . . . The part of wisdom is not to destroy the Commission, but to utilize it.'").

<sup>165</sup> MCCRAW, *supra* note 149, at 263 ("Clearly, in passing the Civil Aeronautics Act [of 1938], Congress intended to bring stability to airlines. What is not clear is whether the legislature intended to cartelize the industry. Yet this did happen. During the forty years between passage of the act of 1938 and the appointment of [Alfred] Kahn to the CAB chairmanship, the overall effect of board policies tended to freeze the industry more or less in its configuration of 1938. One policy, for example, forbade price competition. Instead the CAB ordinarily required that all carriers flying a certain route charge the same rates for the same class of customer . . . A second policy had to do with the CAB's stance toward the entry of new companies into the business. Charged by Congress with the duty of ascertaining whether or not 'the public interest, convenience, and necessity' mandated that new carriers should receive a certificate to operate, the board often ruled simply that no applicant met these tests. In fact, over the entire history of the CAB, no new trunkline carrier had been permitted to join the sixteen that existed in 1938. And those sixteen, later reduced to ten by a series of mergers, still dominated the industry in the 1970s. All these companies . . . developed into large companies under the protective wing of the CAB. None wanted deregulation.").

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

Capture also explains why many natural monopoly assertions are simply false, because, as noted in the previous section, there is nothing natural about a monopoly or a public utility using regulation as a shield from competition or innovation.<sup>168</sup> Writing in 1940, economist Horace M. Gray noted that:

[B]etween 1907 and 1938, the policy of state-created, state-protected monopoly became firmly established over a significant portion of the economy and became the keystone of modern public utility regulation. Henceforth, the public utility status was to be the haven of refuge for all aspiring monopolists who found it too difficult, too costly, or too precarious to secure and maintain monopoly by private action alone.<sup>169</sup>

#### IV. GENERAL PROBLEMS WITH SOCIAL NETWORKS AS PUBLIC UTILITIES

Building on the discussion in Part III, this section outlines the downsides of assigning “public utility” or “essential facility” classifications to social media platforms.

##### A. Social Media Are Not Natural Monopolies or Essential Facilities

Regardless of the definitional deficiencies associated with public utility designations and the essential facilities doctrine, social media platforms possess none of their supposed qualities.

Social media services are not physical resources with high fixed costs, and they do not possess “bottlenecks” in any conventional sense of the term. Even if network externalities exist that reward larger social media platforms,<sup>170</sup> and even if an existing social media platform denies a competitor use of its “facility,” competitors can duplicate such platforms and, as documented below, have continued to do so. If the tumultuous first decade of web 2.0 social media services has taught us anything, it is that competitors’ ability to duplicate these services comes down to the challenge of building a user base, not building a physical infrastructure.<sup>171</sup> The infrastructure that is needed to compete is essen-

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<sup>168</sup> Even regulatory proponents like Tim Wu seem to understand this. He writes, “Monopolies may be a natural development, but the most enduring ones are usually state-sponsored. All the more so since no one has ever conceived a better way of scotching competitors than to make them comply with complex federal regulation.” Wu, *New Monopolists*, *supra* note 62.

<sup>169</sup> Horace M. Gray, *The Passing of the Public Utility Concept*, 16 J. LAND & PUB. UTIL. ECON. 481, 486 (1940).

<sup>170</sup> Keith Hampton, *It’s a Matter of Network Externalities*, N.Y. TIMES (June 20, 2012, 9:54 AM), <http://commcns.org/1aJfUj> (describing the theory that more people are likely to use social media when others within their circle are using social media).

<sup>171</sup> For example, Facebook overtook MySpace as the most successful social networking site by creating a larger user base. Adam Hartung, *How Facebook Beat MySpace*, FORBES (Jan. 14, 2011, 12:36 AM), <http://commcns.org/178yar6>.

tially code, computers, and servers. This digital infrastructure represents a huge distinction from the physical infrastructure required in other industries, where creating competing facilities requires a massive capital investment. Rolling out a new version of code simply does not entail anywhere near the same fixed costs as rolling out new physical towers, wires, and distribution hardware that are used in traditional communications networks.

The breakneck pace of change in social media also makes these sites and services distinct from utilities. Not only are most cyberservices relatively new, they are also rapidly displacing each other.<sup>172</sup> Today's social networking platforms evolved from markets that were once referred to as "web portals."<sup>173</sup> Social networks and algorithmic search engines quickly overtook the giants of the web portal era—AOL, AltaVista, CompuServe, and Prodigy.<sup>174</sup>

Moreover, the first generation of social networks has largely come and gone. Facebook, Six Degrees, Friendster, Live Journal, and MySpace, which used to be the leading social networking sites, have faded quickly from the spotlight.<sup>175</sup> In February 2007, a columnist for the UK newspaper *The Guardian* asked, "Will MySpace Ever Lose Its Monopoly?"<sup>176</sup> A short time later, MySpace lost its early lead and became a major liability for owner Rupert Murdoch. Murdoch paid \$580 million for MySpace in 2005, only to sell it for \$35 million in June 2011.<sup>177</sup>

It would not be surprising if the first generation of social networking markets morphed and divided again in the near future. Indeed, new alternatives continue to emerge from unexpected quarters. In July 2011, myYearbook, a social networking site started five years earlier by two high school-aged siblings, sold for \$100 million.<sup>178</sup> It already had 20 million members when it

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<sup>172</sup> Adam Thierer, *Of 'Tech Titans' and Schumpeter's Vision*, FORBES (Aug. 22, 2011, 12:31 PM), <http://commcns.org/1dJCSwF>.

<sup>173</sup> Jeffrey F. Rayport, *Social Networks Are the New Web Portals*, BLOOMBERG BUSINESSWEEK (Jan. 21, 2009), <http://commcns.org/143VOiD> (describing how social networks incorporate web portals, which serve as gateways to other websites, into their designs).

<sup>174</sup> Michele Masterson, *Memories of CompuServe, Prodigy and Other Dinosaurs*, CRN BLOG (July 7, 2009), <http://commcns.org/14WCh3K>.

<sup>175</sup> danah boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMMUN 1, 1 (2007), available at <http://commcns.org/16G2eUR>.

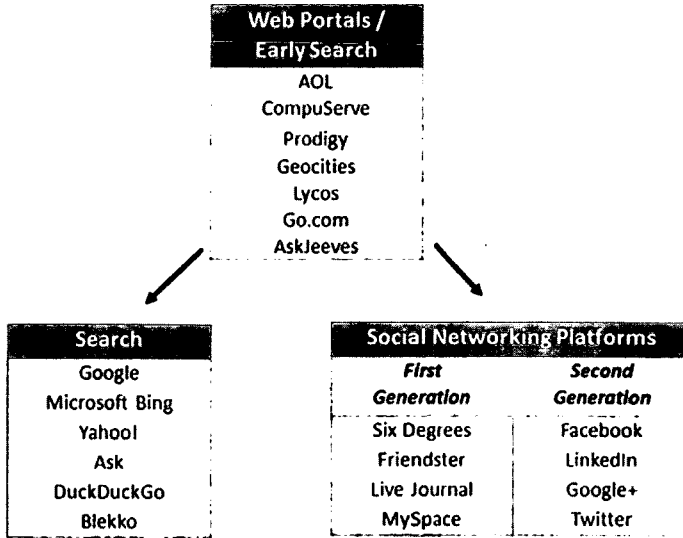
<sup>176</sup> Victor Keegan, *Will MySpace Ever Lose Its Monopoly?*, THE GUARDIAN (Feb. 7, 2007), <http://commcns.org/17fA0V8> ("John Barrett of TechNewsWorld claims that MySpace is well on the way to becoming what economists call a 'natural monopoly.' Users have invested so much social capital in putting up data about themselves it is not worth their changing sites, especially since every new user that MySpace attracts adds to its value as a network of interacting people.").

<sup>177</sup> Brian Stelter, *News Corporation Sells MySpace for \$35 Million*, N.Y. TIMES (June 29, 2011, 2:31 PM), <http://commcns.org/16G3Nly>.

<sup>178</sup> Deborah Sweeney, *myYearbook: The \$100 Million Startup Name You Need To Know*, FORBES (July 21, 2011, 6:47 PM), <http://commcns.org/1dksPQW>.

sold.<sup>179</sup>

### Evolution of Web Portals to Search & Social Networking



Source:  
Adam Thierer, Mercatus Center

The rapid metamorphosis of this market, the constant entry of new players and platforms, and the unrelenting reality of disruptive change should call into question pessimistic fears about “first-mover advantage,” “technological lock-in,” and “winner-take-all” economics.<sup>180</sup> These dangers have not manifested

<sup>179</sup> *Id.*

<sup>180</sup> Daniel F. Spulber, *Unlocking Technology: Antitrust and Innovation*, 4 J. COMPETITION L. & ECON. 915, 915-16, 933, 965-66 (2008). Also, as will be noted in the next section, government attempts to supposedly “solve” the lock-in problem run the risk of creating a self-fulfilling prophecy by facilitating the very essential facilities or natural monopoly regulators fear. *Id.* at 966 (“Antitrust policy towards lock-in risks causing the very problem that it tries to solve. Private sector experimentation is particularly valuable in resolving uncertainties in discovering and developing new technologies. Antitrust policy that targets successful innovators threatens to reduce such experimentation. By enforcing standardization, antitrust discourages the type of innovation that generates product variety. By requiring successful firms to disclose IP, antitrust damages incentives to innovate both for leading firms and for their competitors. By requiring compatibility, antitrust raises prices and costs, while discouraging the development of unique proprietary systems. By limiting the ability of successful firms to add product features and to bundle products, antitrust reduces incentives to improve technologies. Avoiding such misguided antitrust policies allows competi-

themselves in the real world, as many pessimistic analysts and policymakers predicted they would.<sup>181</sup> Churn and change have been constant in information technology markets. Market entry is not as cost prohibitive, as is typically the case in natural monopolies.

Finally, although some regulatory proponents increasingly speak of larger social media platforms like Facebook as a sort of “social utility” or a “social commons” and claim that they are essential to one’s social existence,<sup>182</sup> the reality is that such sites are not essential to survival, economic success, or online life. There are many different speech platforms from which to choose from. While Facebook is the most popular social networking service today,<sup>183</sup> the company could lose its competitive edge tomorrow. Users can take advantage of LinkedIn, Google+, MySpace, Twitter, or a number of other, smaller social media services.

Moreover, unlike water and electricity, life can go on without Facebook or other social networking services. In fact, many people never use Facebook and still have plenty of ways to find and interact with friends, family, coworkers, and acquaintances. These methods include phone calls and voice messages, instant messaging, email and physical mail, and face-to-face contact. Many businesses and individuals with accounts on popular sites, like Facebook, can utilize it to simply redirect visitors to other social media sites.<sup>184</sup> Furthermore, users can transport their digital profiles over to alternative platforms fairly easily.<sup>185</sup> From an antitrust perspective, this ability is important because it lessens the concern that consumers could somehow be denied access to an essen-

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tive markets to continue unlocking technology.”)

<sup>181</sup> Economist Stan Liebowitz, author of *Re-Thinking the Network Economy*, has shown how these much-ballyhooed concepts have been greatly overplayed. He writes, “This idea that being first is essential was a truly pernicious bit of faux wisdom. This idea has helped firms madly throw themselves off a cliff like lemmings, and to do so thinking they were bound for glory.” In terms of lock-in and winner-takes-all, he has argued, “The type of lock-in that most strongly supports claims of first mover advantages [has] no empirical support whatsoever. It appears to be a theory with little or no application to the world. . . . Internet markets are no more likely to be winner-takes-all than the brick-and-mortar counterparts of these firms.” STAN LIEBOWITZ, *RETHINKING THE NETWORKED ECONOMY: THE TRUE FORCES DRIVING THE DIGITAL MARKETPLACE* 27, 55 (2002).

<sup>182</sup> boyd, *supra* note 7.

<sup>183</sup> Spencer Weber Waller, *Antitrust and Social Networking*, 90 N.C. L. REV. 1771, 1773-74, 1781 (2012).

<sup>184</sup> For example, businesses and individuals can add their Twitter handles to their Facebook pages to redirect Facebook visitors to their Twitter pages; see Lauren Dugan, *No One’s Listening to Your Tweets? Start Putting Your Twitter Handle Everywhere*, ALL TWITTER (Aug. 16, 2012, 12:00 PM), <http://commcns.org/12Fp4i7>.

<sup>185</sup> Yana Welinder, *A Face Tells More Than a Thousand Posts: Developing Face Recognition Privacy in Social Networks*, 26 HARV. J.L. & TECH. 165, 218-219 (2012) (noting how data portability allows users to export their data in a format that they could use in another network or in distributed social networks).

tial service.<sup>186</sup> Again, in the case of social media, consumers have many options to connect and communicate.

### B. The Danger of Creating An Actual Social Media Monopoly

A second danger in classifying social media as essential facilities or public utilities, is that, similar to applying utility status to telecommunications companies generations ago,<sup>187</sup> such a classification could become a self-fulfilling prophecy. The very act of imposing “utility” obligations on a particular platform or company tends to lock it in as the preferred or only choice in its sector. Public utility regulation shelters a utility from competition once it is enshrined as such.<sup>188</sup> Also, by forcing standardization or a common platform, regulation can erect de jure or de facto barriers to entry that restrict beneficial innovation and disrupt market leaders.<sup>189</sup>

Regulatory proponents like Wu apparently do not see the irony of classifying all social media services as “monopolies” when so many of them compete vigorously against each other and market leaders are constantly being displaced. For example, when Wu released his book in 2010, he could not have foreseen that Google’s new Google+ social network would launch and grow faster than any prior entrant, providing a very formidable threat to Facebook.<sup>190</sup> While such a market response or competitive landscape is atypical in utility sectors, regulation could foreclose such dynamic entry and competition in social media.

### C. Public Utility Regulation Would Stifle Dynamic Digital Innovation and Raise Prices

Regulated utilities typically are not as innovative as other industries. The mechanisms used to control utilities (e.g., price controls, rate of return regulation, entry and exit barriers) guarantee consumers access to a plain vanilla service at a “fair” price—but, without any incentive for utility providers to earn a greater return, innovation typically suffers.<sup>191</sup> Thus, treating today’s leading

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<sup>186</sup> Waller, *supra* note 183, at 1771 (providing that the goal of antitrust law is to create options and limit “the abuse of market power” in essential services).

<sup>187</sup> Werbach, *Network Utility*, *supra* note 120 at 1788-89, 1791.

<sup>188</sup> KAHN, INSTITUTIONAL ISSUES, *supra* note 161, at 116 (“No barrier to entry is more absolute than one imposed or enforced by the sovereign power of the state. All others are potentially subject to hurdling, erosion, or circumvention.”).

<sup>189</sup> VISCUSI, VERNON & HARRINGTON, *supra* note 128, at 568-70.

<sup>190</sup> Alex Masters, *Watch out Facebook, Google+ is Now the World’s Second Largest Social Network and It’s Growing Fast!*, THE INDEPENDENT (Jan. 29, 2013, 4:00 PM), <http://commens.org/1dLMXZL>.

<sup>191</sup> VISCUSI, VERNON & HARRINGTON, *supra* note 128, at 570 (“If a regulatory agency

social media providers as digital essential facilities threatens to freeze market-place innovation and encourage users to settle for a regulated platform.

Of course, social networking sites are already readily available to everyone and are almost universally free of charge.<sup>192</sup> Thus, the “universal service” objective that motivates many calls for public utility regulation is already satisfied in this case. Regulators have often created complex cross-subsidization schemes within public utility sectors to ensure that some basic level of service was available to all consumers at a “just, reasonable, and affordable” rate.<sup>193</sup> For social media sites and services, a combination of online advertising and “freemium” business models utilize price discrimination techniques to charge premium users while keeping basic service cheap or free for all other users.<sup>194</sup>

Not only are social media sites largely free and universally available, they are also constantly innovating.<sup>195</sup> Thus, both the problem and the regulatory solution are unclear. It is clear, however, that the problem long associated with regulated public utilities, so-called “monopoly sloth” (a general lack of incentives to innovate),<sup>196</sup> could easily occur in social media “utilities” as the absence of competitive pressures, coupled with regulator preference for and protection of utility “monopolists,” would plainly reduce the business incentive for dominant social media platforms to innovate.<sup>197</sup> Just as Foursquare pressured Facebook to respond by introducing locational check-ins in today’s unregulated marketplace,<sup>198</sup> as a utility in the ecosystem advocated by regulatory proponents, Facebook would likely never have had a competitor like Foursquare against which to respond.

Moreover, it is unclear how policymakers would define markets in the social media context. For example, Twitter’s particular market remains unclear, and it will be interesting to see how narrowly or broadly FTC officials define that

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prevents a regulated firm from reaping the return from innovating by always making its price at average cost, then the regulated firm will have little or no incentive to innovate.”)

<sup>192</sup> Tom Johansmeyer, *Social Media is Free: Social Media Marketing is Not*, SOCIAL-TIMES (Jan. 11, 2011, 3:45 PM), <http://commcns.org/181vHLr>.

<sup>193</sup> Telecommunications Act of 1996, 47 U.S.C. § 254(b)(1) (2006); see, e.g., *Universal Service*, FCC, <http://commcns.org/1cdcERo> (last visited Apr. 13, 2013).

<sup>194</sup> Diane Ebersole, *Software as a Service for the Legal Community*, 88 MICH B.J. 50, 50 (2009); CHRIS ANDERSON, *FREE: THE FUTURE OF A RADICAL PRICE* 26–27 (2008).

<sup>195</sup> For example, Facebook introduced an application called Poke to compete with Snapchat, a free messaging application that protects users’ privacy by automatically deleting messages after a timed period. Felix Gillette, *Snapchat and the Erasable Future of Social Media*, BLOOMBERG BUSINESSWEEK (Feb. 7, 2013), <http://commcns.org/15tpUj1>.

<sup>196</sup> Glenn Manishin, *Off With Their Heads! The Fantasy Google Monopoly*, FORBES (Feb. 3, 2012, 12:57 PM), <http://commcns.org/1dk3MMT>.

<sup>197</sup> Werbach, *Network Utility*, *supra* note 120, at 1787 (noting that less regulation can encourage innovation).

<sup>198</sup> Jenna Wortham, *Rather than Share Your Location, Foursquare Wants to Suggest One*, N.Y. TIMES (June 7, 2012), <http://commcns.org/17bVdRN>.

market if they continue to investigate Twitter's business practices. It is important to recall that Twitter has only existed since 2006,<sup>199</sup> and it continues to rapidly evolve alongside many other digital innovations. Similarly, Facebook is only nine years old and continues to rapidly evolve.<sup>200</sup> Of course, companies are not precluded from offering services similar to Twitter and Facebook. Many competitors already do.<sup>201</sup> It is vital, therefore, that policymakers do not box in emerging, quickly evolving digital sectors by artificially constraining or narrowly defining their contours.

These market-definition concerns are especially important because of how long it takes to formulate regulations using rulemaking.<sup>202</sup> In a market that changes rapidly, taking several months or even years to complete rulemakings will almost certainly mean that most rules will be outdated by the time that they are implemented. Once implemented, there will be very little incentive to rework to conform to drastically altering market contours. Regulation could retard innovation in social media markets by denying firms the ability to evolve or innovate across pre-established, artificial market boundaries.<sup>203</sup>

#### D. Regulation Could Impose Direct Costs On Consumers

While price has been the crucial variable in most regulatory deliberations over utilities in the past,<sup>204</sup> it has been largely irrelevant in the context of modern social media platforms because they are generally free of charge.<sup>205</sup> It is far more difficult to identify market power or consumer harm in the case of social media because regulators typically look first to the price variable as a measure of abusive behavior by a supposed monopolist.<sup>206</sup>

<sup>199</sup> Melodie M. Dan, *Social Networking Sites: A Reasonably Calculated Method to Effect Service of Process*, 1 CASE W. RES. J.L. TECH. & INTERNET 183, 202 (2010).

<sup>200</sup> boyd & Ellison, *supra* note 175, at 1; for example, Facebook began as an online social network for Harvard students and since 2004 has grown into "the social media juggernaut" and "exploded to 600 million active users." Hartung, *supra* note 171.

<sup>201</sup> For example, Google's social networking website Orkut, which was created in 2004, allows users to create online communities by posting extensive profiles and discussion topics. Sajai Singh, *Anti-Social Networking: Learning the Art of Making Enemies in Web 2.0*, 12 J. INTERNET L. 3, 3 (2008).

<sup>202</sup> Thomas O. McGarity, *Some Thoughts on 'Deossifying' the Rulemaking Process*, 41 DUKE L.J. 1385, 1387-88 (1992).

<sup>203</sup> Derrick Harris, *Will a Crackdown on Privacy Kill Big Data Innovation*, GIGAOM (May 16, 2011, 1:35 PM), <http://commens.org/19WGMTO>.

<sup>204</sup> PIERCE & GELLHORN, *supra* note 106, at 9; Posner, *Natural Monopoly Regulation*, *supra* note 8, at 550, 577-78.

<sup>205</sup> Johansmeyer, *supra* note 192; Chris Anderson, *The Economics of Giving It Away*, WALL ST. J. (Jan. 31, 2009) <http://commens.org/1dn4vOo> ("The standard business model for Web companies that don't actually have a business model is advertising. A popular service will have lots of users, and a few ads on the side will pay the bills.").

<sup>206</sup> See Posner, *Natural Monopoly Regulation*, *supra* note 8, at 550; see also Brent



Another danger of government intervention in this context is that regulation has the potential to generate a direct cost for consumers in the form of higher prices. If social media operators are classified as utilities and the government regulates their data-collection practices or advertising-based business models, sites may impose fees for the first time as they struggle to adjust to the new rules.<sup>207</sup> Because regulation may make it more expensive for the firms to operate, social media providers may need to reallocate those costs to consumers in order to remain profitable.

Today, online advertising allows consumers to enjoy a cornucopia of innovative, and mostly free, sites and services.<sup>208</sup> Government regulation has the potential to destroy the implicit quid pro quo currently governing online sites and services—that consumers enjoy a bevy of free resources and services in exchange for allowing ads and data collection<sup>209</sup>—by regulating data collection or online advertising practices.<sup>210</sup>

Precisely because so few social media operators charge for their services, it is impossible to know the elasticity of demand and the extent of consumers' willingness to pay for any particular service. If regulation spawns charges for social media services, consumers may revolt because they have grown accustomed to an abundance of "free" online services.<sup>211</sup> It is impossible to determine what prices online providers might seek to charge for their services, but anything more than the \$0.00 they currently charge will likely shock consumers.<sup>212</sup> For social media services that do not generate revenue, regulation could potentially discourage further investment and innovation. Furthermore, if the government imposes utility-like regulation on specific social media platforms, and those interests eventually "capture" and control the regulatory process,

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Skorup & Adam Thierer, *Uncreative Destruction: The Misguided War on Vertical Integration in the Information Economy*, 65 FED. COMM. L.J. 157 (2013).

<sup>207</sup> Adam Thierer, *The Danger of Making Facebook, LinkedIn, Google And Twitter Public Utilities*, FORBES (July 24, 2011, 3:31 PM), <http://commcns.org/17bXFHZ>; *A Status Update on the Development of Voluntary Do-Not-Track Standards: Hearing Before the S. Comm. on Commerce, Sci. and Transp.*, 113th Cong. 1 (2013) (statement of Adam Thierer, Senior Research Fellow, Mercatus Center, George Mason Univ.) (outlining the costs associated with regulatory restrictions on data collection).

<sup>208</sup> Johansmeyer, *supra* note 192; Adam Thierer, *Advertising, Commercial Speech, and First Amendment Parity*, 5 CHARLESTON L. REV. 503 (2011).

<sup>209</sup> Thierer, *Danger of Making Public Utilities*, *supra* note 207; see Johansmeyer, *supra* note 192; see also Adam Thierer, *The Pursuit of Privacy in a World Where Information Control Is Failing*, 36 HARV. J. L. & PUB. POL. 409 (2013).

<sup>210</sup> Adam Thierer, Public Interest Comment on Federal Trade Commission Report, *Protecting Consumer Privacy in an Era of Rapid Change* 21-22 (George Mason Univ. ed. 2011), available at <http://commcns.org/15gaKtn>.

<sup>211</sup> Adam Thierer, *A Framework for Benefit-Cost Analysis in Digital Privacy Debates*, GEO. MASON UNIV. L. REV. (forthcoming Summer 2013).

<sup>212</sup> Adam Thierer, *Birth of the Privacy Tax*, FORBES (Apr. 4, 2011 12:01 AM), <http://commcns.org/17jJcGo>.

prices will likely rise once these companies are sheltered from competition.

#### E. Social Media Regulation Could Raise First Amendment Issues

The traditional linchpins of media regulation in the United States—especially the regulation of broadcast radio and television—have been scarcity and the supposed need for government allocation of the underlying resource (the broadcast spectrum).<sup>213</sup> Employing these rationales, lawmakers, regulators, and judges have all accorded broadcast platforms a lesser constitutional standard of review as it pertains to free speech regulation. These rationales for reduced speech protections have always been controversial, however.<sup>214</sup> As traditional media markets have evolved and grown more diverse and competitive, these rationales have become even more dubious.<sup>215</sup>

Regardless, these regulatory rationales are completely inapplicable to modern social media platforms, which are abundant, rapidly evolving, and entirely privately-owned. Depending on what form social media regulation takes, therefore, profound First Amendment issues could be raised. Any regulation that requires a social media operator to offer access to competitors or even users on regulated terms could qualify as compelled speech. For example, an effort to

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<sup>213</sup> See *Nat. Broad. Co. v. United States*, 319 U.S. 190, 226–27 (1943) (holding that the FCC can issue regulations pertaining to associations between broadcast networks and affiliated stations); see also *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 375 (1969) (holding that the First Amendment permits a federal agency to formulate rules to allow persons defamed or potentially defamed access to equal time to respond and a fairness standard for editorial speech by broadcast radio stations).

<sup>214</sup> Ithiel de Sola Pool writes, “The scheme of granting free licenses for use of a frequency band, though defended on the supposition that scarce channels had to be husbanded for the best social use, was in fact what created a scarcity. Such licensing was the cause not the consequence of scarcity.” ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 141 (1983). As spectrum engineer Charles L. Jackson noted during a 1982 Senate Commerce Committee hearing, “If there ever was any scarcity of electronic communications outlets that scarcity was artificial and legalistic. It grew out of policy constraints and not out of fundamental technological limitations.” *Freedom of Expression: Hearing Before the Senate Committee on Commerce, Science, and Transportation*, 97th Cong. 50 (1982) (statement of Dr. Charles L. Jackson, Shooshan and Jackson). Furthermore, in 1959, Nobel Prize-winning economist Ronald Coase argued, “[I]t is a commonplace of economics that almost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce, in that people would like to use more than exists. Land, labor, and capital are all scarce, but this, of itself, does not call for government regulation. It is true that some mechanism has to be employed to decide who, out of the many claimants, should be allowed to use the scarce resource. But the way this is usually done in the American economic system is to employ the price mechanism, and this allocates resources to users without the need for government regulation.” Ronald H. Coase, *The Federal Communications Commission*, 2 *J.L. & ECON.* 1, 14 (1959).

<sup>215</sup> See Adam Thierer, *Why Regulate Broadcasting? Toward a Consistent First Amendment Standard for the Information Age*, 15 *COMMLAW CONSPECTUS* 431, 432-33 (2007).

mandate API neutrality or any variant of algorithmic neutrality would compromise the editorial discretion and the First Amendment rights of platform owners. The Supreme Court has rejected such mandates for newspapers, which were far less dynamic or competitive than modern social media.<sup>216</sup> The Court has also held that compelling a private corporation to include a newsletter with content provided by third parties was a First Amendment violation.<sup>217</sup> Compelling certain speech requires association with speech that may be disagreeable to those who have to disseminate it, and violates the First Amendment.<sup>218</sup> Some of the proposed social media regulations discussed in Part II, such as the eraser button or the right to be forgotten concept, would also likely give rise to immediate First Amendment challenges because of their direct impact on the free flow of information online.<sup>219</sup>

So far, courts have rejected most attempts to regulate online content and expression.<sup>220</sup> In *Reno v. ACLU*, the Supreme Court declared that a law that places a “burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving” the same goal, thus striking down the Communications Decency Act’s effort to regulate underage access to adult-oriented websites.<sup>221</sup> There are widely available methods of dealing with various social media concerns that would be less restrictive than regulation. The next section discusses these methods.

#### F. Less Restrictive Means Are Available to Address Concerns

While privacy concerns motivate some calls for utility-like regulation of social media platforms, less onerous remedies are available to address those issues.<sup>222</sup> Disclosure and data-portability policies—either voluntary or perhaps even mandatory—would address many of the problems that critics raise. Disclosure policies reveal to social media users exactly what data are collected

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<sup>216</sup> See *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (“[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time”).

<sup>217</sup> See *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 910 (2010) (holding that the First Amendment prohibits the government from restricting independent political expenditures by corporations and unions).

<sup>218</sup> See *Pac. Gas & Elec. Co. v. Pub. Util. Comm’n of Cal.*, 475 U.S. 1, 16-17 (1986).

<sup>219</sup> Thierer, *Kids, Privacy, Free Speech*, *supra* note 46, at 7.

<sup>220</sup> See *Reno v. ACLU*, 521 U.S. 844 (1997); see also *ACLU v. Mukasey*, 534 F.3d 181, 184 (3d Cir. 2008).

<sup>221</sup> See *Reno*, 521 U.S. at 874.

<sup>222</sup> Adam Thierer, *Pursuit of Privacy*, *supra* note 209, at 436-454.

and retained on the sites they visit.<sup>223</sup> Data portability allows consumers to use their social media data—including messages, contacts, calendars, and pictures—across many sites and services.<sup>224</sup>

Whether the concerns relate to child safety, online privacy, or reputation management, a diverse array of private empowerment tools is already available to block or limit various types of data collection.<sup>225</sup> For instance, every major web browser has cookie control tools to help users manage data collection.<sup>226</sup> “Ad preference managers” have also caught on with major search companies. Google, Microsoft, and Yahoo! all offer easy-to-use opt-out tools and educational webpages that clearly explain to consumers how digital advertising works.<sup>227</sup> Meanwhile, DuckDuckGo offers an alternative search experience that blocks data collection altogether.<sup>228</sup>

Major browser providers also offer a “private browsing” mode that allows users to avoid having their data collected or their online activity tracked.<sup>229</sup> This functionality is available as a menu option in Microsoft’s Internet Explorer (“InPrivate Browsing”),<sup>230</sup> Google’s Chrome (“Incognito”),<sup>231</sup> and Mozilla’s Firefox (“Private Browsing”).<sup>232</sup> Firefox also has many add-on programs that provide the functional equivalent to a private browsing mode.<sup>233</sup> Dennis O’Reilly of CNetNews.com notes that, “[w]ith just a little effort you can set Mozilla Firefox, Microsoft Internet Explorer, and Google Chrome to clear out and block the cookies most online ad networks and other web trackers rely on

<sup>223</sup> See, e.g., Somini Sengupta, *Staying Private on the New Facebook*, N.Y. TIMES (Feb. 6, 2013), <http://commcns.org/16KWlpr>.

<sup>224</sup> See Christopher Yoo, *When Antitrust Met Facebook*, 19 GEO. MASON L. REV. 1147, 1154 (2012).

<sup>225</sup> Thierer, *Kids, Privacy, Free Speech*, *supra* note 46, at 10-12.

<sup>226</sup> See Max Stul Oppenheimer, *Internet Cookies: When is Permission Consent?*, 85 NEB. L. REV. 383, 388 (2006).

<sup>227</sup> See, e.g., *Ads Settings*, GOOGLE, <http://commcns.org/17cuDbn> (last visited Apr. 13, 2013); *Your Privacy and Microsoft Personalized Ads*, MICROSOFT, <http://commcns.org/181V7bS> (last visited Apr. 13, 2013); *Ad Interest Manager*, YAHOO!, <http://commcns.org/1cdElJU> (last visited Apr. 13, 2013); *Policies and Principles*, GOOGLE, <http://commcns.org/19KEy6h> (last visited Apr. 13, 2013).

<sup>228</sup> *Privacy*, DUCK DUCK GO, <http://commcns.org/14ZU4al> (last visited Apr. 13, 2013); see Jennifer Valentino-DeVries, *Can Search Engines Compete on Privacy?*, WALL ST. J. (Jan. 25, 2011, 4:02 PM), <http://commcns.org/12IaK8y>.

<sup>229</sup> Thierer, *Kids, Privacy, Free Speech*, *supra* note 46, at 10.

<sup>230</sup> *InPrivate Browsing*, MICROSOFT WINDOWS, <http://commcns.org/14ZUrS3> (last visited Apr. 13, 2013).

<sup>231</sup> *Incognito mode (browse in private)*, GOOGLE CHROME, <http://commcns.org/1fgRVfa> (last visited Apr. 13, 2013).

<sup>232</sup> *Private Browsing – Browse the Web Without Saving Information About the Sites You Visit*, MOZILLA SUPPORT, <http://commcns.org/1cdFwSE> (last visited Apr. 13, 2013).

<sup>233</sup> *Add-Ons: Search Results for tag ‘incognito’*, MOZILLA, <http://commcns.org/16Oj4ED> (last visited Apr. 13, 2013).

to build their valuable user profiles.”<sup>234</sup>

There are also many supplemental tools and browser add-ons that users can implement to better protect their online privacy by managing cookies, blocking web scripts, and making the web-browsing experience more anonymous.<sup>235</sup> Similar to the marketplace for parental control technologies, a remarkable amount of innovation characterizes the market for privacy empowerment tools.<sup>236</sup> These tools represent a less restrictive way of dealing with privacy concerns than do proposals to regulate social media platforms as public utilities.

The existence of less restrictive methods for protecting privacy and consumer choice in social media services is important for two reasons. First, from a constitutional perspective, the First Amendment requires that proposed content-based regulations satisfy a least-restrictive means test.<sup>237</sup> Arguably, these successful, free, and widely-available private sector solutions are much less restrictive than government regulation of speech.<sup>238</sup> Second, as University of California Berkeley law professors Kenneth A. Bamberger and Deirdre K. Mulligan note:

Since 1996 the [Federal Trade Commission] has actively used its broad authority under Section 5 of the FTC Act, which prohibits ‘unfair or deceptive practices,’ to take an active role in the governance of privacy protection, ranging from issuing guidance regarding appropriate practices for protecting personal consumer information, to bringing enforcement actions challenging information practices alleged to cause consumer injury.<sup>239</sup>

The Commission has documented these efforts in a recent white paper on privacy policy.<sup>240</sup> Such targeted enforcement actions also represent a superior approach to dealing with problems that might arise on social media sites.

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<sup>234</sup> Dennis O’Reilly, *Add ‘Do Not Track’ to Firefox, IE, Google Chrome*, CNETNEWS (Dec. 7, 2010, 2:17 PM), <http://commcns.org/1dknDLS>.

<sup>235</sup> Thierer, *Kids, Privacy, Free Speech*, *supra* note 46, at 11.

<sup>236</sup> *See id.* at 10-12.

<sup>237</sup> *See generally* *Schneider v. State*, 308 U.S. 147 (1939) (overturning an ordinance which prohibited the distribution of handbills, stating that the city’s goal of controlling litter should instead be pursued through anti-littering measures, because such measures would intrude less on free speech rights); *see also* *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (noting that time, place, or manner regulation of protected free speech must be narrowly tailored to serve the government’s legitimate, content-neutral interest. However, regulation need not be the least restrictive or least intrusive means in doing so).

<sup>238</sup> Tom W. Bell, *Free Speech, Strict Scrutiny, and Self-Help: How Technology Upgrades Constitutional Jurisprudence*, 87 MINN. L. REV. 743, 743 (2003) (“The state ought not help those who can better help themselves.”).

<sup>239</sup> Kenneth A. Bamberger & Deirdre K. Mulligan, *Privacy on the Ground and on the Books*, 63 STAN. L. REV. 247, 273 (2011).

<sup>240</sup> *See* FED. TRADE COMM’N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: A PROPOSED FRAMEWORK FOR BUSINESSES AND POLICYMAKERS 45 (2010), *available at* <http://commcns.org/1dkzKIR>.

To summarize, public utility—like regulation of social media is not necessary because there are market solutions or more targeted and less restrictive government remedies to privacy problems. The market solutions are extensive and almost universally free of charge to users. Moreover, these solutions are evolving to address emerging problems and are likely more timely than government solutions, which typically lag behind marketplace developments.

## V. PROBLEMS WITH SPECIFIC REGULATORY PROPOSALS

Zittrain's and Wu's proposals deserve special attention. While they have not suggested formally classifying social media as public utilities, they borrow their regulatory proposals from the toolbox traditionally reserved for networks or technologies that are considered to be natural monopolies or essential facilities.

### A. Zittrain's Adverse Possession and API Neutrality

There are many problems with the logic of Zittrain's API neutrality proposal and with the application of adverse possession to social media platforms or digital applications. Most developers who offer open APIs are unlikely to close them later because they do not want to incur the wrath of "those who built on top of their interfaces," to use Zittrain's parlance.<sup>241</sup> Social media services make themselves more attractive to users and advertisers by providing platforms with a vast array of opportunities for diverse interactions and innovations.<sup>242</sup>

Thus, a powerful self-correcting mechanism is at work in this space. If social media operators were to lock down their platforms or applications in a highly restrictive fashion, both application developers and average users would likely revolt. Moreover, a move to foreclose or limit generative opportunities could spur more entry and innovation as other application developers ("app developers") and users seek out more open, pro-generative alternatives.

Consider an example involving Apple and the iPhone. Shortly after the iPhone's release, Apple reversed itself and opened its iPhone platform to third-party app developers.<sup>243</sup> The result was an outpouring of innovation. Customers in more than 123 countries had downloaded more than twenty-five billion apps from Apple's App Store as of March 2012.<sup>244</sup>

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<sup>241</sup> ZITTRAIN, *supra* note 9, at 184.

<sup>242</sup> Adam Thierer, *The Problem with API Neutrality*, TECH. LIBERATION FRONT (Sept. 21, 2012), <http://commcns.org/18iIecd>.

<sup>243</sup> *Id.*

<sup>244</sup> Press Release, Apple Press Info, Apple's App Store Downloads Top 25 Billion (Mar.

What if Apple decides to shut its App Store and prohibit all third-party contributions, after initially allowing them? No obvious incentive exists for Apple to do so, and numerous competitive reasons exist for Apple not to close off third-party development,<sup>245</sup> especially because its application dominance is a key element of its success in the smartphone and tablet sectors.<sup>246</sup> Under Zittrain's proposed paradigm, regulators would treat the iPhone as the equivalent of a commoditized common carriage device and compel the App Store to operate on regulated, public utility-like terms without editorial or technological (and perhaps interoperability) control by Apple itself. However, if Apple were to open the door to developers only to slam it shut a short time later, the company would likely lose those developers and customers to alternative platforms. Google, Amazon, Microsoft, and others would likely seize the opportunity to capitalize on Apple's business by offering a wealth of stores and devices that allow users greater freedom.<sup>247</sup> Market choices, not regulatory edicts, such as mandatory API neutrality, should determine the future of the Internet.

The same logic indicates the likely counterproductive effects of efforts to impose API neutrality on Twitter. Until recently, Twitter had a voluntary open access policy, in that it allowed nearly unlimited third-party reuse and modification of its API.<sup>248</sup> It is now partially abandoning that policy by taking greater control over the uses of its API.<sup>249</sup> This policy reversal will undoubtedly lead to claims that the company is acting as one of Wu's proverbial "information empires"<sup>250</sup> and that Zittrain's API neutrality regime should be put in place as a remedy. Indeed, Zittrain has already referred to Twitter's move as a "bait-and-switch" and recommended an API neutrality remedy.<sup>251</sup> Zittrain's remarks may foreshadow more pressure from academics and policymakers that will first encourage Twitter to continue open access, but then potentially force the company to grant nondiscriminatory access to its platform on regulated terms. Nondiscriminatory access would represent a step toward the forced commoditization of the Twitter API and the involuntary surrender of the company's property rights to some collective authority that will manage the platform as a

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5, 2012), available at <http://commcns.org/1aN3ihg>.

<sup>245</sup> Thierer, *Problem with API Neutrality*, *supra* note 242.

<sup>246</sup> *Id.*

<sup>247</sup> See, e.g., Don Reisinger, *Can Apple's App Store Maintain Its Lead Over Google Play?*, CNET NEWS (Sept. 27, 2012, 6:52 AM), <http://commcns.org/17cUFLs>; see also Claire Cain Miller, *Apple's Feud with Google is Now Felt on iPhone*, N.Y. TIMES (Sept. 23, 2012), <http://commcns.org/17k4JyG>.

<sup>248</sup> Thierer, *Problem with API Neutrality*, *supra* note 242.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> TWITTER, <http://commcns.org/1dMuA7e>, Mar. 12, 2011, 8:01 PM (last visited Apr. 13, 2013) (citation omitted) ("The Twitter move looks like the kind of bait-and-switch that I worry about at <http://yupnet.org/zittrain/archives/19#25>.").

common carrier or essential facility.

Yet again, innovation and competitive entry remain possible in this arena. There is nothing stopping other microblogging or short-messaging services from offering alternatives to Twitter. Some people would decry the potential lack of interoperability among competing services at first, but innovators would quickly find ways to circumvent this. A decade ago, similar angst surrounded AOL's growing power in the instant-messaging ("IM") marketplace.<sup>252</sup> Many feared that AOL would monopolize the market and exclude competitors by denying interconnection.<sup>253</sup> Nonetheless, markets evolved quickly. Today, anyone can download a free chat client like Digsby or Adium to manage IM services from AOL, Yahoo!, Google, Facebook, and just about any other company, all within a single interface, essentially making it irrelevant which chat service your friends use.<sup>254</sup> These innovations occurred despite a mandate in the conditions of Time Warner's acquisition of AOL that the post-merger firm provides for IM interoperability.<sup>255</sup> A short three years later, the provision was quietly sunset because of its irrelevance.<sup>256</sup>

A similar market response would almost certainly follow a move by Twitter to exert excessive control over its APIs. In web 2.0 markets—that is, markets built on pure code—the fixed costs of investment are orders of magnitude less than they were with the massive physical networks of pipes and towers from the era of analog broadcasting and communications.<sup>257</sup> Thus, major competition for Twitter is more than possible, and it is likely to come from sources and platforms that we are unable to currently imagine, just as few of us could have imagined something like Twitter developing.

Even if some social media platform owners wanted to abandon previously open APIs and move to a walled garden, there is no reason to classify such a move as anticompetitive foreclosure or leveraging of the platform.<sup>258</sup> Marketplace experimentation in search of a sustainable business model should not be made illegal.

Because most social media sites such as Twitter do not charge for the ser-

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<sup>252</sup> Thierer, *Problem with API Neutrality*, *supra* note 242.

<sup>253</sup> *Id.*

<sup>254</sup> See *IM, Email, and Social Networks in One Easy To Use Application!*, DIGSBY, <http://commcns.org/16LDp9W> (last visited Apr. 13, 2013); see also ADIUM, <http://commcns.org/146sacx> (last visited Apr. 13, 2013).

<sup>255</sup> Thierer, *Problem with API Neutrality*, *supra* note 242.

<sup>256</sup> *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee Memorandum Opinion and Order*, 16 F.C.C.R. 6547, ¶¶ 326-28 (Jan. 11, 2001) [hereinafter *Time Warner–AOL Memorandum Opinion & Order*], <http://commcns.org/13X06xw>.

<sup>257</sup> Thierer, *Problem with API Neutrality*, *supra* note 242.

<sup>258</sup> *Id.*



vices they provide, some limited steps to lock down their platforms or APIs may help them earn a return on their investments by monetizing traffic on their own platforms.<sup>259</sup> If a social media provider had to live under a strict version of Zittrain's API neutrality principle, however, it might be extremely difficult to monetize traffic and increase businesses because the company would be forced to share its only valuable intellectual property.<sup>260</sup>

In sum, if the government were to forcibly apply API neutrality or adverse possession principles through utility-like regulation, it would send a signal to social media entrepreneurs that their platforms are theirs in name only and could be coercively commoditized once they are popular enough.<sup>261</sup> Such a move would constitute a serious disincentive to future innovation and investment.<sup>262</sup>

### B. Wu's Separations Principle

Wu's proposed "Separations Principle" for the information economy would also have a profound impact on social media operators.<sup>263</sup> In concrete regulatory terms—and despite Wu's claim to the contrary,<sup>264</sup> his approach most assuredly *would* require regulation—the Separations Principle would segregate information providers into three buckets: creators, distributors, and hardware makers.<sup>265</sup> Presumably these categories would become three of the new "titles" (or regulatory sections) of a forthcoming Information Economy Separations Act.

While conceptually neat, these classifications do not conform to our highly dynamic digital economy, the parameters of which can change wildly within the scope of just a few years. For example, Google cut its teeth in the search and online advertising markets, but it now markets phones, travel services, televisions, and computers.<sup>266</sup> Verizon, once just an analog wire line telephone

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<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> Skorup & Thierer, *supra* note 206, at 157.

<sup>264</sup> WU, MASTER SWITCH, *supra* note 10, at 304.

<sup>265</sup> *Id.* at 304.

<sup>266</sup> See Danyll Wills, *New Google Smart Phone Recognizes Your Face*, MIT TECH. REVIEW (Oct. 19, 2011), <http://commcns.org/146tNXD>; see also Edward C. Baig, *Google Chromebook Pixel: Cloud-Computing Showpiece*, NEWSFACTOR (Feb. 28, 2013, 9:48 AM), <http://commcns.org/15ufG1Y> (explaining that Google "is competing in the high-rent computing district" with its new Chromebook Pixel); Rue Liu, *Google Travel Launches with Flight Search Service*, SLASHGEAR (Sept. 13, 2011), <http://commcns.org/15ufm2Z>; Matthew Moskovciak, *Google TV: What You Need to Know (FAQ)*, CNET (Oct. 14, 2010, 7:49 AM), <http://commcns.org/15ufv6N>.

company, now sells pay TV services and a variety of wireless devices.<sup>267</sup> AOL reinvented itself as a media and advertising company after its brief reign as the king of dial-up Internet access.<sup>268</sup> Netflix focused exclusively on mail delivery of movies before moving into electronic distribution.<sup>269</sup> Similarly, at first, Amazon only sold books by mail.<sup>270</sup> Now it is a diversified retailer of countless goods and has moved into electronic publishing and distribution as well as the digital device business with its Kindle.<sup>271</sup>

Should these firms have stayed put in their old sectors? Would firms that already possess integrated operations and investments (Microsoft, Apple, and Amazon, for instance) be forced to divest control of them to comply with the Separations Principle? If so, it would hinder integrative efficiencies and restrict many potentially beneficial forms of technological innovation. Firms often invest and innovate across market segments to lower costs, find new profit opportunities, and develop new products to serve existing or new customers.<sup>272</sup> Wu's proposal would make many of these efforts illegal.

Wu shrugs off such concerns, stating that, "the Separations Principle accepts in advance that some of the benefits of concentration and unified action will be sacrificed even in ways that may seem painful or costly."<sup>273</sup> Such a flippant attitude ignores not only the potential benefits of certain forms of integration, but also the fact that his proposed information apartheid would upend the digital economy. It likely would require the breakup of dozens of technology companies and many social media providers. Wu also ignores the litigation nightmare that would ensue once the government started forcing divestitures.

Nor does Wu explain how the bureaucratic machinations and regulatory capture he decries would be held in check under his proposed regime. He states that the "government [should] also keep its distance and not intervene in the market to favor any technology, network monopoly, or integration of the major functions of an information industry," but he does not explain how to accomplish this plan.<sup>274</sup>

Equally surprising is Wu's assertion that "[a] Separations regime would take much of the guesswork and impressionism, and indeed the influence traffick-

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<sup>267</sup> Amy Chozick, *Mobile Services and Cable TV Are Unexpected Allies*, N.Y. TIMES (Sept. 23, 2012), <http://commcns.org/18iO3q9>.

<sup>268</sup> Adam Thierer, *Congrats, Tim Wu! But Please Don't Toss "The Regulatory Switch,"* TECH. LIBERATION FRONT (Feb. 8, 2011), <http://commcns.org/1fh9NGM>.

<sup>269</sup> Mickey Ferri, *Rent or Buy: The Effectiveness of Netflix and Redbox Windows*, 11 (Jan. 24, 2013) (unpublished manuscript), available at <http://commcns.org/1dnGJBR>.

<sup>270</sup> Steve Wasserman, *The Amazon Effect*, THE NATION, June 18, 2012, at 13.

<sup>271</sup> *Id.*

<sup>272</sup> Michael E. Porter, *The Five Competitive Forces that Shape Strategy*, HARV. BUS. REV. (Jan. 2008), available at <http://commcns.org/18YFXoL>.

<sup>273</sup> WU, MASTER SWITCH, *supra* note 10, at 305.

<sup>274</sup> *Id.* at 304.

ing, out of the oversight of the information industries.”<sup>275</sup> To the extent that his Separations Principle eliminates “guesswork” and creates more regulatory certainty, it would do so only by creating rigid artificial barriers to market entry and innovation across the information economy.

Who or what would enforce this new regulatory system? Wu does not offer a detailed roadmap, but he indicates that some traditional regulatory bodies would continue to have a role. Despite his admission that the FCC “has on occasion let itself become the enemy of the good, effectively a tool of repression,” Wu suggests that the agency will continue to have “day-to-day authority over the information industries.”<sup>276</sup> The FCC’s current regulatory authority is limited mostly to older sectors of the information economy (broadcasting and telecommunications in particular),<sup>277</sup> but Wu believes that its role should be expanded, particularly through net neutrality mandates on information distributors.<sup>278</sup>

Nonetheless, Wu asserts that increased FCC oversight will not be enough. Instead, he states that we need “not only an FCC institutionally committed to a Separations Principle but also a structural arrangement to guard against such deviations, including congressional oversight as well as attention and corrections from other branches of government.”<sup>279</sup> Here, the “breadth and ambition” that Wu argues will be necessary to enforce his Separations Principle becomes more apparent.<sup>280</sup> Layer upon layer of prophylactic regulation would be required under such a regime.

Creating firewalls between the classifications that Wu proposes would be extraordinarily challenging and would demand incessant interventions to ensure that the walls are not breached. Regulatory line drawing would be mind-bogglingly complex and costly, as each new information-sector innovation would be subjected to a laborious classification proceeding.<sup>281</sup> Yet, despite the inefficiencies historically associated with such heavy-handed regulation, Wu claims that this new regime will lead to more innovation and consumer choice than Internet entrepreneurs have achieved during the last two decades.

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<sup>275</sup> *Id.* at 307.

<sup>276</sup> *Id.* at 309, 312.

<sup>277</sup> PATRICIA MOLONEY FIGLIOLA, CONG. RESEARCH SERV., RL32589, THE FEDERAL COMMUNICATIONS COMMISSION: CURRENT STRUCTURE AND ITS ROLE IN THE CHANGING TELECOMMUNICATIONS LANDSCAPE (2012).

<sup>278</sup> WU, MASTER SWITCH, *supra* note 10, at 310-312.

<sup>279</sup> *Id.* at 312.

<sup>280</sup> *Id.* at 308.

<sup>281</sup> Skorup & Thierer, *supra* note 206, at 186-191 (explaining the complexities associated with devising and enforcing such a scheme); Adam Thierer, *Thoughts on Wu’s Master Switch, Part 6 (His Audacious Information Industrial Policy)*, TECH. LIBERATION FRONT (Nov. 2, 2010), <http://commns.org/150tgqp>.

### C. The Question of Property Rights in Platforms and Protocols

Zittrain, Wu, and other proponents of increased regulation of social media have not yet offered a serious antitrust analysis of their proposals. Their proposals offer an amalgam of traditional antitrust remedies, including structural separation and nondiscriminatory access or network sharing.<sup>282</sup> However, they have moved right into the question of remedies without proving market failure or showing consumer harm.

Modern antitrust law sets the bar for intervention much higher than these scholars. Summarizing the Supreme Court's current antitrust jurisprudence, Phillip Areeda notes that, "[t]here is no general duty to share. Compulsory access, if it exists at all, is and should be very exceptional."<sup>283</sup> He goes on to explain why policymakers should be fundamentally skeptical of "essential facility" claims:

No one should be forced to deal unless doing so is likely substantially to improve competition in the marketplace by reducing price or by increasing output or innovation. Such an improvement is unlikely (a) when it would chill desirable activity; (b) [when] the plaintiff is not an actual or potential competitor; (c) when the plaintiff merely substitutes itself for the monopolist or shares the monopolist's gains; or (d) when the monopolist already has the usual privilege of charging the monopoly price for its resources. . . . Even when all these conditions are satisfied, denial of access is never per se unlawful; legitimate business purpose always saves the defendant.<sup>284</sup>

It is difficult to see how or why any social media provider or platform would be subject to essential facility or public utility classification or regulation on the basis of these criteria.

Antitrust-specific analysis largely sidesteps the broader question of property rights in social media platforms. Zittrain's suggestion that policymakers might apply adverse possession principles to any digital platform with enough users is, at root, a call to limit or even abolish property rights in digital platforms once those platforms or devices gain popularity.<sup>285</sup> Whether forcing access to a privately built social media platform constitutes unconstitutional taking of an innovator's property rights remains an open question.<sup>286</sup> Proponents of such regulation might claim that regulation of a protocol is not the same as regulation of a company's property. For most social media operators, however, this is

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<sup>282</sup> See ZITTRAIN, *supra* note 9; see also WU, MASTER SWITCH, *supra* note 10, at 312.

<sup>283</sup> Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 852 (1990).

<sup>284</sup> *Id.*

<sup>285</sup> ZITTRAIN, *supra* note 9, at 183-84.

<sup>286</sup> Elizabeth Drews, *Takings in the Context of Telecommunications and Electric Utility Restructuring in Texas*, 7 TEX. TECH. ADMIN. L. J. 241, 262-263 (2006).

a distinction without a difference. If Twitter, Google, Apple, Facebook, Amazon, or any other social media platform were forced to surrender control of its APIs to regulatory officials, this would significantly undermine the firm's right and ability to control one of its most valuable assets—perhaps its only monetizable asset. Because APIs and “protocols” can be and typically are subject to intellectual property protection,<sup>287</sup> whether copyright or patent, they are plainly the property of their respective companies.

Wu's Separations Principle would also undermine companies' rights to their most valuable assets. His plan would likely require the forcible disintegration of information platforms and providers that operate in the three layers of the information economy that Wu wants to keep strictly quarantined. For vertically integrated companies such as Apple or Microsoft, this requirement would have devastating ramifications. Indeed, for any social media operator or information platform, being forced to divest assets or being structurally separated could mean the loss of integrative efficiencies, core competencies, and important product lines. Such breakups might also require companies to sacrifice crucial intellectual property rights.<sup>288</sup> Finally, forcible disintegration could mean the loss of a valued part of the firm's labor force, as well as a significant loss of shareholder value. These losses constitute sound legal grounds for a “takings” challenge under the Fifth Amendment.<sup>289</sup>

At a minimum, regulatory proponents should not be surprised when social media operators begin to litigate these matters and lengthy legal wrangling ensues.<sup>290</sup> Litigation would further limit innovation by the regulated entities and others in the field, and would likely chill broader industry investment by both the incumbent social media provider and its potential competitors.<sup>291</sup>

In sum, Zittrain's API neutrality regime and Wu's Separations Principle mandate would upend the way much of the modern digital economy operates and cripple many of America's most innovative companies and sectors. In the long run, such changes have the potential to sacrifice America's current role as

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<sup>287</sup> Edward J. Naughton, *Copyright in APIs: The Sky Won't Fall, and The Clouds are Safe*, EMERGING TECH. BLOG (May 30, 2012), <http://commens.org/16OFqWu>.

<sup>288</sup> Thomas F. Cotter, *The Essential Facilities Doctrine*, in ANTITRUST LAW AND ECONOMICS 12 (Keith N. Hylton, ed., 2008), available at <http://commens.org/15umbll> (“To the extent governments confer intellectual property rights (IPRs) precisely for the purpose of encouraging such investments, the application of the essential facilities doctrine to IPRs therefore may seem particularly dubious.”).

<sup>289</sup> RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 35-36 (1985); KASERMAN & MAYO, *supra* note 104, at 435.

<sup>290</sup> See e.g., Sharon Pian Chan, *Long antitrust saga ends for Microsoft*, SEATTLE TIMES (May 11, 2011, 9:37 PM), <http://commens.org/15h2GZj>.

<sup>291</sup> Cotter, *supra* note 288, at 12 (“The prospect of obtaining access to the monopolist's facility reduces the plaintiff's incentive to invest in developing its own competing facility, thus perpetuating the monopolist's control over the facility and reducing the prospect of future competition”).

a global information technology leader.

## VI. CONCLUSION: DYNAMIC, SCHUMPETERIAN CHANGE VS. THE STATIC, ADMINISTRATIVE MINDSET

The debate over whether to treat social media platforms as utilities comes down to a classic conflict of visions between the static and dynamic competition mindsets.<sup>292</sup> Those who take static snapshots of markets are bound to imagine that the popularity of some social media platforms over others constitutes an intractable problem unlikely to be remedied by new entry or innovation.

By contrast, a dynamic view of market economies—especially markets built on code—appreciates what economist Joseph Schumpeter famously called the “perennial gales of creative destruction” that continuously blow through the digital economy.<sup>293</sup> Economist Jerry Ellig has explained that, in the Schumpeterian paradigm, “firms compete not on the margins of price and output, but by offering new products, new technologies, new sources of supply, and new forms of organization. Possession of market power is consistent with vigorous competition, and many seemingly anticompetitive practices actually facilitate innovation.”<sup>294</sup> The Schumpeterian paradigm and other dynamic competition models best capture the nature of competition and innovation in today’s digital marketplace. Eric Goldman, a Santa Clara University law professor, has summarized the dynamic nature of Internet competition and the problem with the static mindset that dominates academic and policy discussions:

First, if we evaluate Internet competition only by taking a point-in-time snapshot of existing competitors, we will probably fail to anticipate the identity and business proposition of disruptive new entrants. Second, in a digital environment with low switching costs between vendors, consumers will flock to new entrants that solve their informational needs—even if the competitors offer a very different solution. As a result, a dominant information provider in one technological niche still faces significant cross-elasticities of demand from providers in other technological niches.<sup>295</sup>

The Schumpeterian model explains why some online operators can gain scale so rapidly only to stumble and fall with equal velocity. Digital-Davids are

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<sup>292</sup> Jerry Ellig & Daniel Lin, *A Taxonomy of Dynamic Competition Theories*, in *DYNAMIC COMPETITION AND PUBLIC POLICY: TECHNOLOGY, INNOVATION, AND ANTITRUST ISSUES* 16, 30-31 (Jerry Ellig ed., 2001); see Eric Goldman, *Revisiting Search Engine Bias* 101 (Santa Clara University Legal Studies Research Paper No. 12-11) (2011), <http://commens.org/1cebzkz>.

<sup>293</sup> JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 84 (1942).

<sup>294</sup> *DYNAMIC COMPETITION AND PUBLIC POLICY: TECHNOLOGY, INNOVATION, AND ANTITRUST ISSUES* 6 (Jerry Ellig ed., 2001).

<sup>295</sup> Goldman, *Search Engine Bias*, *supra* note 292, at 101.

constantly displacing cyber-Goliaths. Social and economic risk-takers and innovators are constantly revolutionizing the digital economy and bringing about equally seismic disruptions throughout our culture.<sup>296</sup> New disruptions flow from many unexpected quarters as innovators launch groundbreaking products and services, while also devising new ways to construct cheaper and more efficient versions of existing technologies.

It is during what some might regard as a market's darkest hour that some of the most exciting, disruptive technologies and innovations develop. People do not sit still; they respond to incentives, including short spells of apparently excessive private power. Moreover, when markets are built upon code rather than expensive physical infrastructure, the pace and nature of change becomes unrelenting and utterly unpredictable.

The AOL case study is constructive in this regard. Just a decade ago, AOL was cast as the great villain of online openness and was thought to possess an unassailable position of digital dominance.<sup>297</sup> For a time, it was easy to understand why some may have been worried: "twenty five million subscribers were willing to pay \$20 per month to get a guided tour of AOL's walled-garden version of the Internet."<sup>298</sup> Then AOL and media titan Time Warner announced a historic megamerger that had some critics, such as Norman Soloman and Robert Scheer, predicting the rise of "new totalitarianisms" and a corporate "Big Brother."<sup>299</sup>

Fearing the worst, the FTC and the FCC placed several conditions on the merger. These included "open access" provisions that forced Time Warner to offer the competing ISP service of the second largest ISP at the time (Earth-Link) before it made AOL's service available across its largest cable divisions.<sup>300</sup> Another FCC-imposed provision mandated interoperability of instant messaging systems based on the fear that AOL was poised to monopolize that

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<sup>296</sup> "Schumpeterian competition is primarily about active, risk-taking decision makers who seek to change their parameters," note economists Jerry Ellig and Daniel Lin. "It is about continually destroying the old economic structure *from within* and replacing it with a new one." Ellig & Lin, *supra* note 292, at 18-19.

<sup>297</sup> See Joe Wilcox, *Apple Is the new AOL and new Microsoft; and Whoa that Can't Be a Good Thing*, BETANEWS (June 1, 2010), <http://commcns.org/1fheVL7>.

<sup>298</sup> Adam Thierer, *The Case for Internet Optimism, Part 2: Saving the Net from Its Supporters*, in *THE NEXT DIGITAL DECADE*, *supra* note 58, at 139, 150; see Nathan DeSelm, *Facebook Is The New AOL: How Marketing Missteps Will Destroy the World's Most Popular Social Network*, VILLING & COMPANY (June 2, 2010), <http://commcns.org/1aNh1Vf>.

<sup>299</sup> Norman Soloman, *AOL Time Warner: Calling the Faithful to Their Knees*, FAIR.ORG (Jan. 13, 2000), <http://commcns.org/16OIYYE>; Robert Scheer, *Confessions of an E-Columnist*, ONLINE JOURNALISM REVIEW (Jan. 14, 2000), <http://commcns.org/1dkOGqh>.

<sup>300</sup> Press Release, Fed. Trade Comm'n, *FTC Approves AOL/Time Warner Merger With Conditions* (Dec. 14, 2000) (on file with author), *available at* <http://commcns.org/18YKQya>.

emerging technology.<sup>301</sup>

Despite all the tension and regulatory worry, the merger quickly went off the rails and AOL's online "dominance" quickly evaporated.<sup>302</sup> By April 2002, just two years after the deal was struck, AOL–Time Warner had reported a staggering \$54 billion loss.<sup>303</sup> By January 2003, its losses had grown to nearly \$99 billion.<sup>304</sup> By September 2003, Time Warner decided to drop AOL from its name altogether, and the deal continued to slowly unravel.<sup>305</sup> In a 2006 interview with the *Wall Street Journal*, Time Warner President Jeffrey Bewkes famously declared the death of merger "synergy" and went so far as to call synergy a "bullsh\*t" theory.<sup>306</sup> In early 2008, Time Warner decided to shed AOL's dial-up service,<sup>307</sup> and in 2009, it spun off AOL entirely.<sup>308</sup> Further deconsolidation followed for Time Warner, which spun off its cable TV unit and various other properties.<sup>309</sup> Looking back at the deal in 2009, *Fortune* magazine Senior Editor Allan Sloan called it the "turkey of the decade."<sup>310</sup>

The concern about AOL's threat to monopolize instant messaging proved particularly unfounded. Consumers have access to multiple IM services that can be integrated into a single interface. In a truly Schumpeterian sense, innovators came in and disrupted AOL's plans with innovative offerings that few critics or regulators would have believed possible just a decade ago.

The AOL case study proves that even the mightiest of tech titans can stumble and fall—and in very short order. There is no reason to believe that such dynamic, disruptive change will not continue in the social media arena.<sup>311</sup> Many social media platforms exist; each one neither unique nor essential. Es-

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<sup>301</sup> Time Warner–AOL Memorandum Opinion & Order, *supra* note 256, ¶¶ 129–131.

<sup>302</sup> Adam Thierer, *A Brief History of Media Merger Hysteria: From AOL–Time Warner to Comcast–NBC*, PROGRESS ON POINT, Dec. 2009, at 2, available at <http://commcns.org/18YLFfAF>.

<sup>303</sup> Frank Pellegrini, *What AOL Time Warner's \$54 Billion Loss Means*, TIME (Apr. 25, 2002), <http://commcns.org/19XkOQm>.

<sup>304</sup> Jim Hu, *AOL Loses Ted Turner and \$99 Billion*, CNETNEWS (Jan. 30, 2003, 1:37 PM), <http://commcns.org/19XkQb0>.

<sup>305</sup> Jim Hu, *AOL Time Warner Drops AOL from Name*, CNETNEWS (Sept. 18, 2003, 10:58 AM), <http://commcns.org/1dMKQ80>.

<sup>306</sup> Matthew Karnitschnig, *After Years of Pushing Synergy, Time Warner Inc. Says Enough*, WALL ST. J. (June 2, 2006), <http://commcns.org/18iVXzP>.

<sup>307</sup> Geraldine Fabrikant, *Time Warner Plans to Split Off AOL's Dial-Up Service*, N.Y. TIMES (Feb. 7, 2008), <http://commcns.org/17kiDkc>.

<sup>308</sup> Press Release, Time Warner, Time Warner Inc. Completes Spin-Off of AOL Inc. (Dec. 10, 2009) (on file with author), available at <http://commcns.org/15fclXb>.

<sup>309</sup> Frank Ahrens, *Time Warner To Spin Off Cable*, WASH. POST (May 1, 2008), <http://commcns.org/182rFm5>.

<sup>310</sup> Allan Sloan, *Deals: The Financial World's Turkeys of the Year*, WASH. POST (Nov. 17, 2009), <http://commcns.org/17hZjGe>.

<sup>311</sup> John F. Blevins, *Meet the New Scarcity: A First Amendment Framework for Regulating Access to Digital Media Platforms*, BERKELEY ELECTRONIC PRESS, August 2011, at 43.



cape from any of them is reasonably easy. Barriers to entry by new firms are low. Innovation continues at a healthy clip.

It is significant to note that this industry realm is still so novel that it remains unnamed. Social media is a very broad term, and one that is constantly morphing. As a result, it is necessary to be skeptical of calls for a preemptive regulatory strike. It is essential to have a little faith in the entrepreneurial spirit and the dynamic nature of markets built upon code, which have the uncanny ability to evolve and upend incumbent “tech titans” seemingly every few years.

Keeping these insights in mind, analysts and policymakers should avoid casually affixing “public utility” or “essential facility” labels to today’s dynamic social media platforms. In essence, public utility regulation is a declaration of surrender on competition. There is no reason to raise the white flag on social media innovation. Progress continues.