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THE PERILS OF CLASSIFYING SOCIAL MEDIA PLATFORMS AS PUBLIC UTILITIES

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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. The question has been whether Internet service providers should be considered "essential facilities" or "natural monopolies" and regulated as public utilities. The debate over "net neutrality" regulation has been animated by such concerns.[1]

While that debate still rages, 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.[2] More recently, there have been rumblings within academic and public policy circles regarding whether social media platforms, especially social networking sites, might also possess public utility characteristics. Presumably, such a classification would entail greater regulation of those sites' structures and business practices.

Proponents of treating social media platforms as public utilities offer a variety of justifications for regulation. Amorphous "fairness" concerns animate many of these calls, but privacy and reputational concerns are also frequently mentioned as rationales for regulation. Proponents of regulation also sometimes invoke "social utility" or "social commons" arguments in defense of increased government oversight, even though

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[1] Barbara van Schewick, *Internet Architecture and Innovation* (Cambridge, MA: MIT Press, 2010).
[2] Kevin Werbach, "Only Connect," 22 *Berkeley Tech Law Journal* 1233 (2007).

these notions lack clear definition.

Social media platforms do not resemble traditional public utilities, however, and there are good reasons 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. Furthermore, treating 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" or enforce a "Separations Principle" on integrated information platforms would be particularly problematic. Such regulation also threatens innovation and investment. 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 possess the editorial discretion to determine how their platforms are configured and what can appear on them.

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, such as Amazon, Apple, and Google? Should "neutrality" mandates be imposed upon their sites, services, or devices?

These applications layer service providers have not typically been the focus of much regulatory consideration. To the extent public utility–style regulation has been debated within the Internet policy arena over the past decade, the focus has been primarily on the physical layer of the Net. The question has been whether Internet service providers should be considered "essential facilities" or "natural monopolies" and regulated accordingly. The debate over "net neutrality" regulation has been animated by such concerns.[3] 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. "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," he writes.[4]

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[3] Barbara van Schewick, *Internet Architecture and Innovation* (Cambridge, MA: MIT Press, 2010).

[4] Andrew Odlyzko, "Network Neutrality, Search Neutrality, and the Never-Ending Conflict between Efficiency and Fairness in Markets," 8 *Review of Network Economics*, 40 (March

Indeed, as search giant Google has grown larger in recent years, academics such as Frank Pasquale have suggested that we may need "search neutrality" regulation modeled after net neutrality regulation and that a "Federal Search Commission might be needed to enforce such a regime."[5] Similarly, George Washington University law professor Dawn Nunziato has 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."[6]

Although no federal agency has yet taken action on these calls, there have been hints of interest. In a 2009 Notice of Inquiry on wireless innovation, the Federal Communications Commission (FCC) asked, "Can 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?"[7] This inquiry follows the FCC's push to impose net neutrality mandates on

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2009).

[5] Frank Pasquale, "Internet Nondiscrimination Principles: Commercial Ethics for Carriers and Search Engines, *University of Chicago Legal Forum* 263 (2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134159; Frank Pasquale and Oren Bracha, "Federal Search Commission? Access, Fairness, and Accountability in the Law of Search," *Cornell Law Review* 93 (2008): 1,149, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1002453.

[6] Dawn Nunziato, *Virtual Freedom: Net Neutrality and Free Speech in the Internet Age* (Stanford, CA: Stanford University Press, 2009), 151.

[7] Federal Communications Commission (FCC), *Fostering Innovation and Investment in the Wireless Communications Market*, GN Docket No. 09-51 (August 27, 2009), 21.

wireline broadband platforms, which could foreshadow a broader regulatory push to come.[8] The Federal Trade Commission (FTC) is also expanding its interest in this arena.

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

Calls for public utility-style regulation of social media platforms are growing. The rationales for regulation are varied, ranging from traditional economic concerns to more amorphous social and cultural concerns.

A columnist at *SAI Business Insider* recently argued that, "Social networks are a critical layer of infrastructure for a wide variety of applications and content," and claimed users might get locked into some online services without "social network neutrality."[9]

Writing in the *Nation*, political scientist Benjamin R. Barber argues, "For 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."[10]

Social media researcher danah boyd has argued that Facebook is acquiring public utility characteristics and has suggested that regulation may be in its future.[11] "Facebook may not be at the scale of the Internet

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[8] FCC, *In the Matter of Preserving the Open Internet*, FCC Report and Order, GN Docket No. 09-19 (December, 21, 2010), http://transition.fcc.gov/Daily_Releases/Daily_Business/2010/db1223/FCC-10-201A1.pdf.
[9] Jake Levine, "It's Time for a Social Network Neutrality," *SAI Business Insider*, July 18, 2011, http://www.businessinsider.com/its-time-for-a-social-network-neutrality-2011-7.
[10] Benjamin R. Barber, "Calling All Liberals: It's Time to Fight," *Nation*, October 19, 2011, http://www.thenation.com/article/164071/calling-all-liberals-its-time-fight.
[11] danah boyd, "Facebook is a Utility; Utilities Get Regulated," Apophenia, May 15, 2010, http://www.zephoria.org/thoughts/archives/2010/05/15/facebook-is-a-utility-utilities-get-regulated.html.

(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.[12] Thus, boyd regards regulation as an inevitability. "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," she says.[13]

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."[14] She worries about Facebook and Google in particular causing a "corporatization of social commons"[15] and about the danger of "the privatization of our publics."[16]

Tufekci's and boyd's works reflect the way many academics and Internet policy pundits increasingly speak of larger social networking sites like Facebook as the equivalent of "social utilities" or "social commons," and claim that such sites are essential to one's social existence. "Presence on the Internet is effectively a requirement for fully and effectively participating in the 21st century as a citizen, as a consumer, as an informed person and as a social being," says Tufekci.[17] Similar thinking is on display in recent books by New America Foundation Senior Fellow Rebecca

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[12] Ibid.
[13] Ibid.
[14] Zeynep Tufekci, "Google Buzz: The Corporatization of Social Commons," Technosociology.org, February 17, 2010, http://technosociology.org/?p=102.
[15] Ibid.
[16] Zeynep Tufekci, "Facebook: The Privatization of Our Privates and Life in the Company Town," Technosociology.org, May 14, 2010, http://technosociology.org/?p=131.
[17] Tufekci, "Google Buzz."

MacKinnon and by law professor Lori Andrews,[18] who suggest that we should begin to think of Facebook and Google as nation-states or "sovereigns of cyberspace." Constitutional notions and "bill of rights" proposals follow.

Privacy concerns motivate many of these calls for regulation. Critics claim utility-like regulation may be necessary not so much to satisfy traditional economic or equity rationales, such as affordability and universal service, but to achieve various social policy objectives, such as the protection of user privacy.[19]

Others worry about long-term reputational harm. Pasquale has also called for a variety of increased intermediary policing responsibilities or regulations, including a "Fair Reputation Reporting Act."[20] Building on his proposal to increase search engine regulation, 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."[21] At the search layer, Professor Brian Leiter of the University of Chicago Law School has suggested that "Google could set up a panel of neutral arbitrators who would evaluate claims by private individuals that Google is returning

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[18] Rebecca MacKinnon, *Consent of the Networked: The Worldwide Struggle for Internet Freedom* (New York: Basic Books, 2012); Lori Andrews*, I Know Who You Are and I Saw What You Did: Social Networks and the Death of Privacy* (New York: Free Press, 2011).

[19] Tufekci, "Facebook."

[20] Frank Pasquale, "Reputation Regulation: Disclosure and the Challenge of Clandestinely Commensurating Computing," in Saul Levmore and Martha C. Nussbaum, eds., *The Offensive Internet: Speech, Privacy, and Reputation* (Cambridge, MA: Harvard University Press, 2010), 107–23.

[21] Frank Pasquale, "Asterisk Revisited: Debating a Right of Reply on Search Results," *Journal of Business and Technology Law* 3, no. 1 (2008), http://www.law.umaryland.edu/academics/journals/jbtl/issues/3_1/3_1_061_Pasquale.pdf.

search results that might constitute tortious or dignity harms."[22] Failure by Google (and presumably other search providers as well) to evaluate the claim or take action would open the company to liability "for negligent dissemination of tortious material," proposes Leiter.[23]

Such concerns about online reputation, especially regarding children, have also motivated federal legislative calls for social media regulation. In May 2011, Reps. Edward Markey (D-Mass.) and Joe Barton (R-Texas) introduced H.R. 1895, the Do Not Track Kids Act of 2011.[24] The proposal would expand the Children's Online Privacy Protection Act of 1998 (COPPA), which mandates certain online privacy protections for children under the age of thirteen.[25] 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. Finally, the measure would mandate that social media sites offer consumers "Eraser Buttons," a concept modeled loosely on a similar idea being considered in the European Union, a so-called "right to be forgotten" online.[26] Specifically,

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[22] Brian Leiter, "Cleaning Cyber-Cesspools," in Levmore and Nussbaum, eds., *The Offensive Internet*, 170.
[23] Ibid., 171.
[24] "Markey, Barton Introduce Bipartisan 'Do Not Track Kids' Online Privacy Legislation," May 13, 2011, http://markey.house.gov/press-release/may-13-2011-markey-barton-introduce-bipartisan.
[25] See Berin Szoka and Adam Thierer, "COPPA 2.0: The New Battle over Privacy, Age Verification, Online Safety and Free Speech," *Progress on Point* 16, no. 11 (2009), http://www.pff.org/issues-pubs/pops/2009/pop16.11-COPPA-and-age-verification.pdf.
[26] Adam Thierer, "Erasing Our Past on the Internet," Forbes.com, April 17, 2011, http://blogs.forbes.com/adamthierer/2011/04/17/erasing-our-past-on-the-internet; Larry Downes, "Europe Reimagines Orwell's Memory Hole," Technology Liberation Front, November 16, 2010, http://techliberation.com/2010/11/16/europe-reimagines-orwells-memory-hole.

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."[27] In theory, eraser buttons would help minors wipe out embarrassing facts they have placed online but later come to regret, but the proposal also raises many serious free speech issues since it is tantamount to a form of digital censorship and also threatens press freedoms.[28]

Twitter is also coming under scrutiny as it becomes an increasingly vibrant social media platform. In mid-2011, the FTC announced it was investigating how Twitter interacts with the companies building applications and services for its platform.[29] 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.[30] 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

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[27] Office of Rep. Ed Markey, "Markey, Barton Introduce Bipartisan 'Do Not Track' Kids Online Privacy Legislation,"
Press Release, May 13, 2011,
http://markey.house.gov/index.php?option=content&task=view&id=4353&Itemid=125.

[28] Adam Thierer, "Kids, Privacy, Free Speech and the Internet: Finding the Right Balance" (working paper, Mercatus Center at George Mason University, Arlington, VA, 2011), http://mercatus.org/publication/kids-privacy-free-speech-internet.

[29] Amir Efrati, "Antitrust Regulator Makes Twitter Inquiries," *Wall Street Journal*, July 1, 2011,
http://online.wsj.com/article/SB10001424052702304450604576418184234003812.html.

[30] Ibid.

degree of market power in its emerging, undefined market sector.[31]

The FTC's current concern with Twitter deals mostly with potential exclusionary business practices pertaining to the company exerting great control over its API, but another potential flashpoint in this debate involves Twitter's management of "hashtags" and "trends." Twitter users can easily follow their favorite subjects using subject-specific hashtags (such as #taxes or #freespeech). This feature makes Twitter a freewheeling forum that allows instantaneous debate and commentary about virtually every subject under the sun. Occasionally on Twitter, however, accusations fly of "hashtag censorship" or "trend censorship" if users of a particular hashtag believe it should be higher in the Twitter Trends ranks. Twitter Trends, which are algorithmically generated by Twitter, identify popular topics that are "trending" on Twitter at any given time. For example, users voiced such complaints when hotly debating WikiLeaks and Occupy Wall Street. The topics' respective hashtags (#wikileaks and #occupywallstreet or #OWS) were often trending, but were not always leading the trending topics.

Cornell University communications professor Tarleton Gillespie worries about "the specter of censorship" at Twitter through "algorithmic intervention." He predicts,[32]

> The debate about tools like Twitter Trends is, I believe, a debate we will be having more and more often. As more

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[31] Adam Thierer, "Twitter, the Monopolist? Is This Tim Wu's 'Threat Regime' in Action?" Technology Liberation Front, July 1, 2011, http://techliberation.com/2011/07/01/twitter-the-monopolist-is-this-tim-wus-threat-regime-in-action.

[32] Tarleton Gillespie, "Can an Algorithm Be Wrong? Twitter Trends, The Specter of Censorship, and Our Faith in the Algorithms around Us," Social Media Collective Research Blog, October 19, 2011, http://socialmediacollective.org/2011/10/19/can-an-algorithm-be-wrong.

> 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.[33]

As with search results, we will likely see a push for "algorithmic neutrality" and a resurrection of the long-standing debate about editorial discretion and the First Amendment rights of platform owners. Many users mistakenly believe that algorithms are already perfectly neutral and that ranks are based on a strict scientific or mathematical calculus devoid of any human intervention. In reality, every search provider and social media platform service uses a mix of automated and human elements.[34] Digital platform owners often tweak algorithms to ensure more relevant results and to prevent spammers and scammers from "gaming" the algorithm. 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

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[33] Ibid.

[34] See James Grimmelman, "Some Skepticism about Search Neutrality," in Berin Szoka and Adam Marcus, eds., *The Next Digital Decade: Essays on the Future of the Internet* (Washington, DC: TechFreedom, 2011), 435–60; Eric Goldman, "Search Engine Bias and the Demise of Search Engine Utopianism," in Szoka and Marcus, eds., *The Next Digital Decade*, 461–473; Geoffrey A. Manne and Joshua D. Wright, "If Search Neutrality Is the Answer, What's the Question?" Lewis and Clark Law School Legal Studies Research Paper No. 2011-14, April 12, 2011, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1807951.

'right,' without being shaped by the interests of their providers."[35]

C. Wu's "Separations Principle" for "Information Monopolies"

Influential Columbia Law School professor Tim Wu has prompted much of the recent angst over the growing scale of some social media providers. In his book *The Master Switch: The Rise and Fall of Information Empires* and in essays like "In the Grip of the New Monopolists," Wu argues that "information monopolies" are on the rise and that they require regulation.[36] Wu's list of "information monopolists" includes Facebook, Apple, Google, and even Twitter.

Wu makes several provocative assertions in his work. First, he has extremely expansive constructions of "information monopoly" and he argues that traditional antitrust analysis is not sufficient for information sectors. "Information industries . . . can never be properly understood as 'normal' industries,"[37] Wu claims, and even traditional forms of regulation, including antitrust regulation, "are clearly inadequate for the regulation of information industries."[38] Wu believes that because information industries "traffic in forms of individual expression" and are "fundamental to democracy," they should be subject to differential regulatory treatment.[39] His argument contradicts the thrust of the First Amendment, which traditionally has imposed a higher level of legal scrutiny on media-focused regulatory efforts.

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[35] Gillespie, "Can an Algorithm Be Wrong?"
[36] Tim Wu, *The Master Switch: The Rise and Fall of Information Empires* (New York: Knopf, 2010); Wu, "In the Grip of the New Monopolists," *Wall Street Journal*, November 13, 2010, http://online.wsj.com/article/SB10001424052748704635704575604993311538482.html.
[37] Wu, *Master Switch*, 302.
[38] Ibid., 303.
[39] Ibid., 301–2.

Second, running counter to the thrust of most modern antitrust analysis, Wu is generally far more concerned with vertical integration than horizontal, referring to "the corrupting effects of vertically integrated power" in information sectors.[40] This concern leads to his advocacy of a so-called "Separations Principle" for the information economy, which would segregate information providers into three buckets: creators, distributors, and hardware makers. Wu says this remedy

> is 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 control the network infrastructure on which it travels, and those who control the tools or venues of access must be kept apart from one another.[41]

Wu calls this a "constitutional approach" because he models it on the separation of powers found in the US Constitution, even though the Constitution focused on constraining the powers of government, not businesses.[42]

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. Structural separation is the nuclear option of antitrust and usually reserved for the most extreme cases of entrenched monopoly. The primary recent example is the 1984 government breakup of

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[40] Ibid., 307, 311.
[41] Ibid., 304 (emphasis in the original).
[42] Ibid.

the Bell system, which had a comprehensive, nationwide, government-sheltered telephone monopoly.[43] AT&T was forced to shed its local telephone-exchange facilities, which became seven independent regional operators.[44] Although Wu is short on details about how his "Separations Principle" for the information economy would be implemented, 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. The Twitter case comes on the heels of FTC investigations into the business practices of both Apple and Google.[45] (Recall that Apple, Google, and Twitter are three of the many companies that Wu labels "information monopolies" or "information empires" in his work.) Antitrust interest in Google's business practices increased following the January 2012 launch of "Search, plus Your World," the company's attempt to make its search results include more personalized information.[46] Some critics protested the move on privacy grounds,[47] while others (including rival

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[43] Adam Thierer, "Unnatural Monopoly: Critical Moments in the Development of the Bell System Monopoly," *Cato Journal* 14, no. 2 (Fall 1994), http://www.cato.org/pubs/journal/cjv14n2-6.html.

[44] Richard H. K. Vietor, *Contrived Competition: Regulation and Deregulation in America* (London: Belknap, 1994), 167–233.

[45] Thomas Catan, "Apple's Mobile Rules to Get FTC Scrutiny," *Wall Street Journal*, June 12, 2010, http://online.wsj.com/article/SB10001424052748703509404575301242754089172.html; Thomas M. Lenard and Paul H. Rubin, "The Federal Trade Commission Penalizes Google for Being Successful, *Forbes*, June 28, 2011, http://www.forbes.com/2011/06/28/google-ftc-investigation.html.

[46] Amit Singhal, "Search, plus Your World," The Official Google Blog, January 10, 2012, http://googleblog.blogspot.com/2012/01/search-plus-your-world.html.

[47] Jessica Guynn, "Google Likely to Face FTC Complaint over 'Search Plus Your World,'" *Los Angeles Times* blog, January 11, 2012,

Twitter) accused Google of unfairly favoring its own social service (Google+) over those of its rivals.[48] The FTC promptly announced it was expanding its antitrust probe of the company to include these concerns.[49]

D. "API Neutrality" for App Platforms

In his book *The Future of the Internet—And How to Stop It*,[50] Harvard University cyberlaw professor Jonathan Zittrain suggests we might need "API neutrality" to ensure fair access to certain online services or digital platforms. Although he does not label it as such, API neutrality assumes the platform or device is a sort of public utility or common carrier.

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. Primary examples include general-purpose personal computers (PCs) and the traditional "best efforts" Internet. By contrast, Zittrain contemptuously refers to "tethered, sterile appliances," or digital technologies or networks that discourage or disallow tinkering. Zittrain's primary examples are proprietary devices like Apple's iPhone or the TiVo, or online walled gardens like the old AOL and current cell phone networks. Such "take it or leave it" devices or platforms earn

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http://latimesblogs.latimes.com/technology/2012/01/google-likely-to-face-ftc-complaint-over-search-plus-your-world.html.

[48] Tim Carmody, "Dirty Little Secrets: The Trouble with Social Search," Wired Epicenter, January 12, 2012, http://www.wired.com/epicenter/2012/01/dirty-secrets-social-search; Farhad Manjoo, "I'm Not Here to Make Friends," *Slate,* January 11, 2012, http://www.slate.com/articles/technology/technology/2012/01/google_social_search_the_tech_giant_s_disastrous_decision_to_muck_up_its_search_results_.html.

[49] Sara Forden and Brian Womack, "FTC Said to Expand Antitrust Probe of Google to Social Networking Service," *Bloomberg*, January 13, 2012, http://www.bloomberg.com/news/2012-01-13/google-s-social-networking-service-said-to-be-added-to-ftc-antitrust-probe.html.

[50] Jonathan Zittrain, *The Future of the Internet—And How to Stop It* (New Haven, CT: Yale University Press, 2008).

Zittrain's wrath. 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.[51] He fears most users will flock to tethered appliances in search of stability or security, and worries because those tethered appliances are less "open" and more "regulable," thus allowing easier control by either large corporate intermediaries or government officials. In other words, the "future of the Internet" Zittrain is hoping to "stop" is a world dominated by tethered digital appliances and walled gardens, because they are too easily controlled by other actors.

He argues,

> 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.[52]

Because he fears the rise of "walled gardens" and "mediated experiences," Zittrain goes on to wonder, "Should we consider network neutrality-style mandates for appliancized systems?"[53] He responds to his own question as follows:

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[51] "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. This counterrevolution would push mainstream users away from the 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. A seductive and more powerful generation of proprietary networks and information appliances is waiting for round two. If the problems associated with the Internet and PC are not addressed, a set of blunt solutions will likely be applied to solve the problems at the expense of much of what we love about today's information ecosystem." Ibid., 8.

[52] Ibid., 181.

[53] Ibid., 183.

> 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.[54]

While many would agree that API neutrality represents a fine generic norm for online commerce and interactions, Zittrain implies it should be a *legal* standard to which online providers are held. He even alludes to the possibility of applying the common law principle of adverse possession more broadly in these contexts. 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."[55] He does not make it clear when that principle would be triggered as it pertains to digital platforms or social media APIs.

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 after making a general case against classifying social media as essential facilities or public utilities in part IV. First, however, part III will provide a general sketch of the law and economics of public utility regulation and essential facilities doctrine.

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

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[54] Ibid., 183–4.
[55] Ibid., 183.

regulatory concepts and mechanisms of the past century—public utility mandates, common carriage regulations, "neutrality" rules, and even the Fairness Doctrine or "right or 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 will animate the discussion as well. "Access to technological standards, software platforms, and interconnection information is the 21st century equivalent of the bridges, roads, and ports that gave rise to the essential facilities doctrine in the first place," argue Loyola University Chicago law professor Spencer Weber Waller and attorney William Tasch.[56]

To explain why it would be misguided to apply such designations to social media sites, this section will offer 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[57]—two broad forms of "market failure" serve as rationales for regulating the private sector.[58] The first is economic market failure, which exists when the market tends toward monopoly instead of competition.[59] A natural monopoly is said to exist

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[56] Spencer Weber Waller and William Tasch, "Harmonizing Essential Facilities," *Antitrust Law Journal* 76, no. 3 (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1418081.

[57] David L. Kaserman and John W. Mayo, *Government and Business: The Economics of Antitrust and Regulation* (Orlando: Dryden Press, 1995), 444.

[58] Paul L. Joskow and Roger G. Noll, "Regulation in Theory and Practice: An Overview," in Gary Fromm, ed., *Studies in Public Regulation* (Cambridge, MA: MIT Press, 1981), 1–65.

[59] Ernest Gellhorn and Richard J. Pierce Jr., *Regulated Industries* (St. Paul, MN: West,

when a single firm can serve the entire relevant market at the lowest cost possible thanks to economies of scale.[60] In theory, this leaves the monopolist free to raise prices and enjoy excessive profits. Traditional remedies include antitrust laws, public utility regulation, price controls, or even government ownership. 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. Of these goals, regulators typically emphasize price and undertake special efforts to prevent price gouging.[61] Since most social media services are free of charge to consumers, 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, "fair" or "nondiscriminatory" industry practices, cultural goals, environmental values, or privacy concerns. This category is an extremely amorphous catchall, but it is particularly relevant to discussions about social media regulation since pricing is not typically a factor.[62]

Calls for social media regulation can have both economic and social components. But 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 definitions of "essential facilities" and "public utilities"

1987), 9–10.

[60] W. Kip Viscusi, John M. Vernon, and Joseph E. Harrington Jr., *Economics of Regulation and Antitrust*, 2nd ed. (Cambridge, MA: MIT Press, 1995), 323–5, 351–53; Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions*, vol. 2, *Institutional Issues* (Cambridge, MA: MIT Press, 1971), 2, 119.

[61] Kaserman and Mayo, *Government and Business*, 413.

[62] Gellhorn and Pierce Jr., *Regulated Industries*, 10–11.

and of the regulatory policies associated with them is in order.

B. Definitional Confusion

While "natural monopoly" has a fairy standard meaning in the study of economics, "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."[63] "'Utility' is a term, much like 'innovation,' that is widely used but curiously immune to precise definition," notes Kevin Werbach, associate professor of legal studies and business ethics at the University of Pennsylvania's Wharton School.[64] "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," he notes.[65]

As with "public utility" designations, the term "essential facility" is mired in conceptual confusion. In fact, the Supreme Court has avoided defining the term altogether in the handful of decisions that are considered "essential facility" cases.[66] Despite the ambiguity and potential circularity in these definitional debates, it is the supposedly "essential" nature of the good or service in question that leads to calls for public-

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[63] Kahn, *Economics of Regulation*, vol. 1, *Economic Principles*, 10.
[64] Kevin Werbach, "The Network Utility," *Duke Law Journal* 60 (2011): 1761, 88.
[65] Ibid.
[66] Leading cases include: *United States v. Terminal Railroad Association*, 224 U.S. 383 (1912); *Associated Press v. United States*, 326 U.S. 1 (1945); *Gamco, Inc. v. Providence Fruit & Produce Building, Inc*., 69. 194 F.2d 484 (1st Cir.), cert. denied, 344 U.S. 817 (1952); *Hecht v. Pro-Football, Inc*., 73. 570 F.2d 982 (D.C. Cir. 1977), cert. denied, 436 U.S. 956 (1978); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Aspen Skiing Company v. Aspen Highlands Skiing Corporation*, 472 U.S. 585 (1985).

utility classification and regulation.[67] Thus, in antitrust parlance, an "essential facility" is a service or network that is entirely unique and possesses few (or no) good alternatives. Local sewage and water systems are classic examples. A single bridge over a river in a local community might be another. Economist Geoff Manne writes that to prevail in a monopolization case rooted in the essential facilities doctrine, a plaintiff would need to prove the following:[68]

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
4) the feasibility of providing the facility to competitors

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. Again, the only bridge in town is the paradigmatic example. Regulators typically require "non-discriminatory access" to such facilities for that reason. Alternatively, the government takes control of the asset or network in question.

Second, the physical nature of the network or facility is important because it entails significant fixed costs that are considered nonduplicable.[69] These characteristics often lead to the service being labeled a "natural monopoly," although that term has also been hotly

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[67] *West's Encyclopedia of American Law,* 2nd ed., s.v. "Public Utility."
[68] Geoffrey A. Manne, "The Problem of Search Engines as Essential Facilities: An Economic and Legal Assessment," in Szoka and Marcus, eds., *The Next Digital Decade*, 421.
[69] Rick Geddes, "Public Utilities," in Boudewijn Bouckaert and Gerrit De Geest, eds., *Encyclopedia of Law and Economics* (2000), 1162.

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:[70]

1) control of firms' entry into and exit from the industry
2) price regulation (out of fear of "gouging" by the supposed monopolist)
3) conditions of service/quality controls
4) universal service obligations (a general duty to serve all customers, typically in a well-defined geographic area)

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. 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.

C. Doubts Surrounding the Legitimacy or Application of Theories

Some economists 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-

[70] Kahn, *Economics of Regulation,* vol. 1, *Economic Principles*, 3.

essentiality of the relevant facilities," notes Manne.[71] 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. Law professors Phillip Areeda and Herbert Hovenkamp have argued that essential facilities doctrine is harmful because "forcing 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."[72] Areeda and Hovenkamp believe that the essential facilities doctrine "is both harmful and unnecessary and should be abandoned."[73]

Antitrust attorney and former Assistant Attorney General R. Hewitt Pate has similarly argued that 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."[74]

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[71] Geoffrey A. Manne, "The Problem of Search Engines as Essential Facilities: An Economic and Legal Assessment," in Szoka and Marcus, eds., *The Next Digital Decade*, 421.
[72] Phillip Areeda and Herbert Hovenkamp, *Antitrust Law*, 2nd ed. (New York: Aspen Publishers, 2002), 171–2.
[73] Ibid., 173.
[74] R. Hewitt Pate, "Refusals to Deal and Essential Facilities," Testimony Submitted to DOJ/FTC Hearings on Single Firm Conduct, July 18, 2006, http://www.justice.gov/atr/public/hearings/single_firm/docs/218649.htm (quoting

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 facility doctrine to force owners to share access with competitors."[75]

Some economists have challenged the logic supporting natural monopoly assertions, or argued that the source of monopoly often springs from other sources—namely, government.[76] Other economists and political scientists have suggested that the notion sprang from a desire for a more activist government in general.[77]

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.[78] 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

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Trinko, 540 U.S. at 408).

[75] Keith N. Hylton, "Economic Rents and Essential Facilities," *Brigham Young University Law Review* (1991), 1,243–84, 1,245.

[76] James R. Nelson, "The Role of Competition in the Regulated Industries," *Antitrust Bulletin* 11 (January–April 1966), 3.

[77] Thomas W. Hazlett, "The Curious Evolution of Natural Monopoly Theory," in Robert W. Poole, ed., *Unnatural Monopolies: The Case for Deregulating Public Utilities* (Lexington, MA: Lexington Books, 1985), 21.

[78] Thomas J. DiLorenzo, "The Myth of Natural Monopoly," *Review of Austrian Economics* 9, no. 2 (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."]

technology."[79]

Regardless of these definitional disputes, social networking services and social media sites do not qualify as either natural monopolies or essential facilities. Part IV will elaborate 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.[80] Clifford Winston, a Brookings Institution senior fellow of economic studies, also studied the deregulation of these sectors and reached similar conclusions.[81] Congressional Democrats, the Carter administration, and liberal consumer advocates (Alfred Kahn, Sen. Edward Kennedy, Supreme Court Justice Stephen Breyer, Ralph Nader, and others) led deregulation efforts because they became convinced that regulation was harming consumer welfare by limiting competition and

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[79] Mark Green and Ralph Nader, "Economic Regulation vs. Competition: Uncle Sam the Monopoly Man," *Yale Law Journal* 82, no. 5 (April 1973), 872.

[80] Robert Crandall and Jerry Ellig, "Economic Deregulation and Customer Choice: Lessons for the Electric Industry" (working paper, Center for Market Processes, Fairfax, VA, 1997), http://mercatus.org/publication/economic-deregulation-and-customer-choice-lessons-electric-industry.

[81] Clifford Winston, "Economic Deregulation: Days of Reckoning for Microeconomists," *Journal of Economic Literature* 31*,* no. 3 (September 1993): 1,263–89.

driving up prices.[82]

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. The council's final report found that "while the intentions of many regulations are laudable, they can have unintended adverse impacts on the general public."[83] 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 five deregulated sectors were enjoying greater choices from increased competition.[84]

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."[85]

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

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[82] Thomas K. McCraw, *Prophets of Regulation* (London: Belknap, 1984), 266–8, 293–6; Vietor, *Contrived Competition,* 14, 50–2; Green and Nader, "Economic Regulation vs. Competition."
[83] The President's Council on Competitiveness, *The Legacy of Regulatory Reform: Restoring America's Competitiveness* (Washington, DC: GPO, 1992), v.
[84] Ibid.
[85] Geddes, "Public Utilities," 1,163.

"capture" the rulemaking process and use it for their own ends.[86] Capture theory is closely related to the "rent-seeking" and "political failure" theories developed by the public choice school of economics.[87] While capture theory cannot explain all regulatory decisions or developments, it does explain with dismaying consistency how self-interested motives explain political actions.[88] The traditional normative theory of regulation failed to address this problematic, recurring reality, as well as other deficiencies in the political decision-making process. Scholars developed a new, more robust economic theory of regulation to help explain why the traditional paradigm was incomplete in this and other ways.[89] These scholars argued it was inappropriate to assume regulatory intervention was always "in the public interest" or would always improve consumer welfare.[90]

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."[91] Kahn's

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[86] 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* (New York: Basic Books, 1989), 76. Also see Wilson, *The Politics of Regulation* (New York: Basic Books, 1980).

[87] Gordon Tullock, Arthur Seldon, and Gordon L. Brady, *Government Failure: A Primer in Public Choice* (Washington, DC: Cato Institute, 2002).

[88] Adam Thierer, "Regulatory Capture: What the Experts Have Found," Technology Liberation Front, December 19, 2010, http://techliberation.com/2010/12/19/regulatory-capture-what-the-experts-have-found.

[89] Viscusi, Vernon, and Harrington Jr., *Economics of Regulation and Antitrust*, 328–46.

[90] Sam Peltzman, "The Economic Theory of Regulation after a Decade of Deregulation," *Brookings Papers on Economic Activity* (1989), 1–59.

[91] George Stigler, "The Theory of Economic Regulation," *Bell Journal of Economics and*

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 goods.[92]

Many other scholars have identified capture as a reoccurring problem in regulated industries.[93] They concur with UCLA Emeritus Professor of Business Economics Harold Demsetz's conclusion that "in utility industries, regulation has often been sought because of the inconvenience of competition."[94] The railroad industry provides a particularly egregious

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Management Science 2, no. 1 (1971): 3. A broader discussion of capture theory can be found in W. Kip Viscusi, John M. Vernon, and Joseph E. Harrington Jr., *Economics of Regulation and Antitrust*, 2nd ed. (Cambridge, MA: MIT Press, 1998), 327–46.

[92] Kahn, *Economics of Regulation*, vol. 2, *Institutional Issues*, 12, 46.

[93] Anthony Downs, "An Economic Theory of Political Action in a Democracy," *Journal of Political Economy* 65, no. 2 (1957): 135–50; William A. Jordan, "Producer Protection, Prior Market Structure and the Effects of Government Regulation," *Journal of Law and Economics* 15, no. 1 (April 1972): 151–76; Green and Nader, "Economic Regulation vs. Competition," 876; Barry Weingast, "Regulation, Reregulation and Deregulation: The Foundation of Agency-Clientele Relationships," *Law and Contemporary Problems* 44 (1981): 147–77; Bruce Yandle, "Bootleggers and Baptists: The Education of a Regulatory Economist," *Regulation* 3, no. 3 (May/June 1983): 12–6; William W. Bratton and Joseph A. McCahery, "Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis," *North Carolina Law Review* 73 (1995): 1,861; Fred S. McChesney, "Rent Extraction and Rent Creation in the Economic Theory of Regulation," *Journal of Legal Studies* 16, (1987) 101–118; J. J. Lafont and Jean Tirole, "The Politics of Government Decision-Making: A Theory of Regulatory Capture," *Quarterly Journal of Economics* 106, no. 4 (November 1991): 1,089–127.

[94] Harold Demsetz, "Why Regulate Utilities?" *Journal of Law and Economics* 11, no. 1 (April 1968): 61.

example of such capture;[95] so does the airline industry.[96] Both industries used their respective regulators (the Interstate Commerce Commission and the Civil Aeronautics Board) to promote cartelization and market protectionism. 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.

One can debate the chicken-and-egg question of which came first—the assignment of utility status or the capture of regulators by special

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[95] Thomas Frank, "Obama and Regulatory Capture," *Wall Street Journal*, June 24, 2009, http://online.wsj.com/article/SB124580461065744913.html. ["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.'"]

[96] Thomas K. McCraw, *Prophets of Regulation* (Cambridge, MA: Harvard University Press, 1984), 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."]

interests—but the inquiry is largely irrelevant. Capture *is* a recurring problem within such sectors and undercuts traditional "public interest" rationales for intervention. Capture also explains why many natural monopoly assertions are bogus, since—as noted in the previous section—there is nothing natural about a monopoly or a public utility that affected corporate interests seek as a shield from competition or innovation.[97] Writing in 1940, economist Horace M. Gray noted that "between 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."[98]

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 essential facilities doctrine, social media platforms possess none of their supposed qualities.

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[97] 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, "In the Grip of the New Monopolists."

[98] Horace M. Gray, "The Passing of the Public Utility Concept," *Journal of Land and Public Utility Economics* 16, no. 1 (February 1940): 9.

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, 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 physical infrastructure. The infrastructure needed to compete is essentially 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 doesn't 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 of these cyberservices relatively new, but they keep displacing each other in fairly rapid fashion.[99] Today's social networking platforms evolved from a market we once called "web portals." Social networks and algorithmic search engines quickly overtook the giants of the web portal era—AOL, AltaVista, CompuServe, and Prodigy.

Moreover, the first generation of social networks has already largely

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[99] Adam Thierer, "Of 'Tech Titans' and Schumpeter's Vision," *Forbes*, August 22, 2011, http://www.forbes.com/sites/adamthierer/2011/08/22/of-tech-titans-and-schumpeters-vision.

come and gone. Just five years ago, Six Degrees, Friendster, Live Journal, and MySpace were the leading social networking sites, but they faded quickly from the spotlight. In February 2007, a columnist for the UK newspaper the *Guardian* asked, "Will MySpace Ever Lose Its Monopoly?"[100] 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.[101]

It would not be at all surprising if these 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.[102] It already had 20 million members when it sold.[103]

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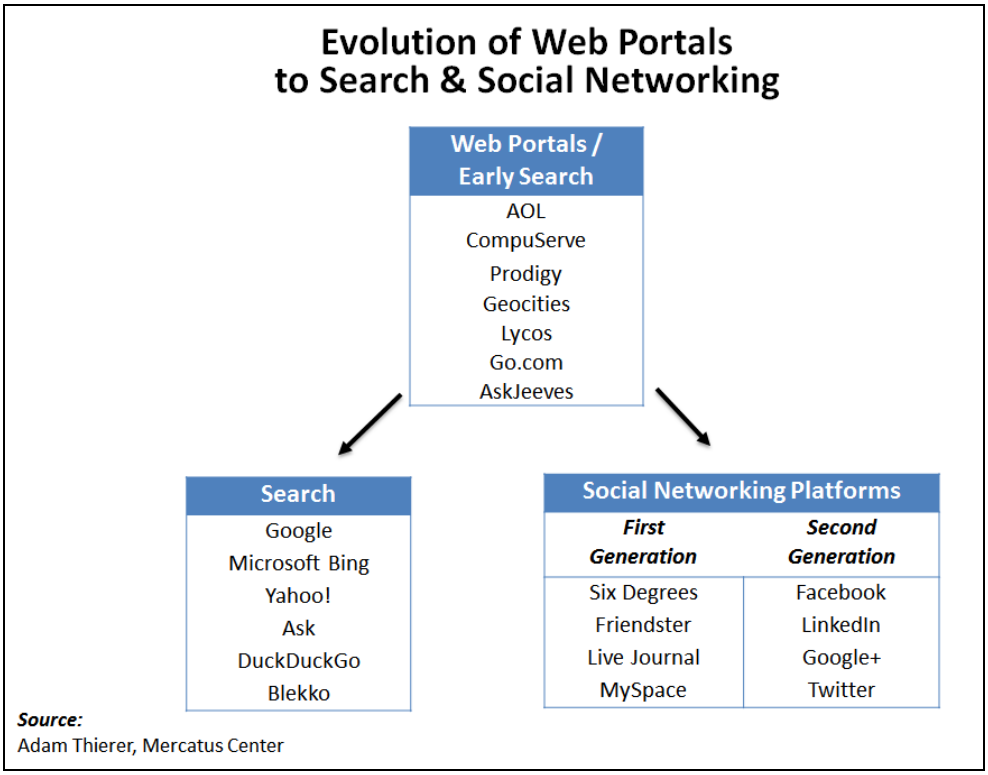
[100] Victor Keegan, "Will MySpace Ever Lose Its Monopoly?" *Guardian*, February 7, 2007, http://www.guardian.co.uk/technology/2007/feb/08/business.comment. ["John Barrett of TechNewsWorld claims that MySpace is well on the way to becoming what economists call a 'natural monopoly.' Users have invested 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."]

[101] Brian Stelter, "News Corporation Sells MySpace for $35 Million," *New York Times* blog, June 29, 2011, http://mediadecoder.blogs.nytimes.com/2011/06/29/news-corp-sells-myspace-to-specific-media-for-35-million.

[102] Deborah Sweeney, "myYearbook: The $100 Million Startup Name You Need To Know," *Forbes*, July 21, 2011, http://www.forbes.com/sites/deborahsweeney/2011/07/21/myyearbook-the-100-million-startup-name-you-need-to-know.

[103] Ibid.

Figure 1



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.[104] These dangers

[104] 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. See Daniel F. Spulber, "Unlocking Technology: Antitrust and Innovation," *Journal of Competition Law and Economics* 4, no. 4 (2008): 915–96, 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

have not manifested themselves in the real world, as many pessimistic analysts and policymakers predicted they would.[105] Churn and change have been constant in information technology markets. Market entry is not 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, 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. Facebook is the most popular social networking service today, but 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-

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to bundle products, antitrust reduces incentives to improve technologies. Avoiding such misguided antitrust policies allows competitive markets to continue unlocking technology."]

[105] 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 is a truly pernicious bit of faux wisdom; it has helped companies throw themselves madly off a cliff like lemmings, 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 winner-take-all than the bricks-and-mortar counterparts of these companies." Stan Liebowitz, *Re-Thinking the Network Economy: The True Forces that Drive the Digital Marketplace* (New York: AMACOM, 2002), 27, 48.

to-face contact. And many businesses and individuals with accounts on popular sites like Facebook simply redirect visitors to other social media sites. Furthermore, users can port their digital profiles over to alternative platforms fairly easily. From an antitrust perspective, this ability is important because it lessens the concern that consumers could somehow be denied access to an essential service. 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 with the classification of social media as essential facilities or public utilities is that, as with the application of utility status to telecommunications companies generations ago, 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.[106] Also, by forcing standardization or a common platform, regulation can erect de jure or de facto barriers to entry that restrict beneficial innovation and disruption of market leaders.

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 go on to grow faster than any prior entrant, providing a very

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[106] Kahn, *Economics of Regulation,* vol. 2, *Institutional Issues*, 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."]

formidable threat to Facebook. Such a market response or competitive landscape is atypical in utility sectors. But 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 tend not to be 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.[107] Thus, treating today's leading social media providers as digital essential facilities threatens to freeze marketplace innovation and encourage users to settle for a regulated platform.

Of course, social networking sites are already available to everyone and are almost universally free of charge. 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 and reasonable" rate. 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.[108]

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[107] Viscusi, Vernon, and Harrington Jr., *Economics of Regulation and Antitrust*, 535. ["If a regulatory agency prevents a regulated firm from reaping the return from innovating by always making it price at average cost, then the regulated firm will have little or no incentive to innovate."]

[108] Chris Anderson, *Free: The Future of a Radical Price* (New York: Hyperion, 2009,) 26–27,

Not only are social media sites largely free and universally available, but they are also constantly innovating. Thus, it is unclear what the problem is and how regulation would solve it. It is clear, conversely, that the problem long associated with regulated public utilities, so-called "monopoly sloth" (a general lack of incentives to innovate),[109] 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.[110] Just as Foursquare forced Facebook to respond by introducing locational check-ins in today's unregulated marketplace, 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 even define markets in the social media context. For example, it remains uncertain what market Twitter serves, and it will be interesting to see how narrowly or broadly FTC officials define that market if they continue to investigate Twitter's business practices. It is important to recall that Twitter has only existed since 2006, and it continues to evolve rapidly alongside many other digital innovations. Similarly, Facebook is only seven years old and continues to evolve rapidly. Of course, there is nothing stopping other companies from offering services similar to Twitter and Facebook. Many competitors already do. It is vital, therefore, that policymakers not box in emerging,

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245–49.

[109] Glenn Manishin, "Off With Their Heads! The Fantasy Google Monopoly," *Forbes*, February 3, 2012, http://www.forbes.com/sites/ciocentral/2012/02/03/off-with-their-heads-the-fantasy-google-monopoly.

[110] Viscusi, Vernon, and Harrington Jr., *Economics of Regulation and Antitrust*, 514.

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 informal rulemaking. In a market that changes rapidly, taking several months or even years to complete informal rulemakings will almost certainly mean that most rules will be completely out of date by the time they are implemented. And once implemented, there will be very little incentive to rework them as rapidly as the market contours change. Regulation could retard innovation in social media markets by denying firms the ability to evolve or innovate across pre-established, artificial market boundaries.[111]

D. Regulation Could Impose Direct Costs on Consumers

Price has been the crucial variable in most regulatory deliberations over utilities in the past, but it has been largely irrelevant in the context of modern social media platforms, since they are generally free of charge to all comers. It is far more difficult to identify market power or consumer harm in the case of social media, since regulators typically first look to the price variable as a measure of abusive behavior by a supposed monopolist.

Another danger of government intervention in this context is that regulation could 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

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[111] Viscusi, Vernon, and Harrington Jr., *Economics of Regulation and Antitrust*, 514. ["Even in a static setting, a regulatory agency must attempt to set socially optimal price in spite of having very imperfect information about cost and demand conditions. The problems become even more difficult when the environment changes in significant ways over time."] Ibid.

to adjust to the new rules. Because regulation could make it more expensive for the firms to operate, social media providers might have to pass those costs on to consumers in order to remain profitable.

Online advertising today allows consumers to enjoy a cornucopia of innovative, and mostly free, sites and services. Government regulation could 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—by regulating data collection or online advertising practices.[112]

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 might revolt since they have grown accustomed to an abundance of "free" online services. 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.[113] For social media services that have yet to find a way to generate revenue, regulation could 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, prices will likely rise once these companies are sheltered from competition.

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[112] Adam Thierer, *Public Interest Comment on Federal Trade Commission Report, Protecting Consumer Privacy in an Era of Rapid Change* (Arlington, VA: Mercatus Center at George Mason University, 2011), http://mercatus.org/publication/public-interest-comment-protecting-consumer-privacy-era-rapid-change.

[113] Adam Thierer, "Birth of the Privacy Tax," *Forbes*, April 4, 2011, http://www.forbes.com/2011/04/02/privacy-tax-social-networking-advertising-opinions-contributors-adam-thierer.html.

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).[114] 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.[115] As traditional media markets have evolved and grown more diverse and competitive, these rationales have become even more dubious.[116]

Regardless, these regulatory rationales are completely inapplicable to

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[114] *National Broadcasting Co. v. United States*, 319 U.S. 190, 226–227 (1943); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375 (1969).

[115] 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* (Cambridge, MA: Harvard University Press, 1983), 141. And, 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,"It 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 scare 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," *Journal of Law and Economics* 2 (1959): 1, 14.

[116] Adam Thierer, "Why Regulate Broadcasting? Toward a Consistent First Amendment Standard for the Information Age," *CommLaw Conspectus* 15 (Summer 2007): 431–82; http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1092137.

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 remedy 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 mandate "API neutrality" or any variant of "algorithmic neutrality" would compromise the editorial discretion and 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.[117] 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. Compelling certain speech requires association with speech that may be disagreeable to those who have to disseminate it, and violates the First Amendment.[118] 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 of the free flow of information online.[119]

So far, the courts have rejected most attempts to regulate online content and expression.[120] In striking down the Communications Decency Act's effort to regulate underage access to adult-oriented websites, the

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[117] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241(1974). ["The 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."]

[118] *Pacific Gas & Elec. Co. v. Public Utilities Com'n of CA,* 475 U.S. 1 (1986).

[119] Adam Thierer, "Kids, Privacy, Free Speech and the Internet," 7.

[120] *Reno v. ACLU*, 521 U.S. 844 (1997); *ACLU v. Ashcroft*, 534 F.3d 181 (3d Cir. 2008).

Supreme Court declared in *Reno v. ACLU* (1997) 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.[121] 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. Disclosure and data-portability policies—either voluntary or perhaps even mandatory—would address many of the problems critics raise. Disclosure policies reveal to social media users exactly what data are collected and retained on the sites they visit. Data portability allows consumers to use their social media data—including messages, contacts, calendars, and pictures—across many sites and services.

Whether the concerns relate to child safety, online privacy, or reputation management, a diverse array of private empowerment tools are already available to block or limit various types of data collection, and every major web browser has cookie control tools to help users manage data collection. "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.[122] Meanwhile, DuckDuckGo offers an alternative

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[121] *Reno v. ACLU*.

[122] Google Ads preferences, http://www.google.com/ads/preferences; Microsoft Advertising, "AdChoices: Learn About Ads," http://choice.live.com/Default.aspx; Microsoft Advertising, "Personalized Advertising from Microsoft," September 2011, https://choice.live.com/AdvertisementChoice/Default.aspx; Yahoo! Privacy, Ad Interest

search experience that blocks data collection altogether.[123]

Major browser providers also offer a "private browsing" mode that allows users to avoid having their data collected or their online activity tracked. This functionality is available as a menu option in Microsoft's Internet Explorer ("InPrivate Browsing"),[124] Google's Chrome ("Incognito"),[125] and Mozilla's Firefox ("Private Browsing").[126] Firefox also has many add-on programs that provide the functional equivalent to a private browsing mode.[127] "With just a little effort," notes Dennis O'Reilly of CNetNews.com, "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 to build their valuable user profiles."[128]

There are also many supplemental tools and browser add-ons that users can take advantage of to better protect their privacy online by managing cookies, blocking web scripts, and making the web-browsing experience more anonymous. As in the marketplace for parental control

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Manager BETA, http://info.yahoo.com/privacy/us/yahoo/opt_out/targeting/details.html; Microsoft Advertising, http://advertising.microsoft.com/home?s_cid=us_msn_footer; Yahoo! Privacy Center, http://info.yahoo.com/privacy/us/yahoo; Google, "Advertising and Privacy," http://www.google.com/privacy/ads.

[123] DuckDuckGo, "Privacy," http://duckduckgo.com/privacy.html. See also Jennifer Valentino-DeVries, "Can Search Engines Compete on Privacy?" *Wall Street Journal* blog, January 25, 2011, http://blogs.wsj.com/digits/2011/01/25/can-search-engines-compete-on-privacy.

[124] http://windows.microsoft.com/en-US/internet-explorer/products/ie-9/features/in-private.

[125] Google Chrome, "Incognito mode (browse in private)," http://www.google.com/support/chrome/bin/answer.py?hl=en&answer=95464.

[126] Mozilla, "Firefox Help: Private Browsing," http://support.mozilla.com/en-US/kb/Private%20Browsing.

[127] Mozilla, "Add-Ons: Search Results for tag 'incognito,'" https://addons.mozilla.org/en-US/firefox/tag/incognito.

[128] Dennis O'Reilly, "Add 'Do Not Track' to Firefox, IE, Google Chrome," CNetNews.com, December 7, 2010, http://news.cnet.com/8301-13880_3-20024815-68.html.

technologies, a remarkable amount of innovation characterizes the market for privacy empowerment tools. 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 these 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 regulations satisfy a least-restrictive means test. 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."[129] The agency has documented these efforts in a recent white paper on privacy policy.[130] Such targeted enforcement actions also represent a superior approach to dealing with problems that might arise on social media sites.

To summarize, public utility–like regulation of social media is not

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[129] "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." Kenneth A. Bamberger and Deirdre K. Mulligan, "Privacy on the Ground and on the Books," *Stanford Law Review* 63 (January 2011): 127, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1568385.

[130] Federal Trade Commission (FTC), *Protecting Consumer Privacy in an Era of Rapid Change* (Washington, DC: FTC, December 2010), 45, http://www.ftc.gov/os/2010/12/101201privacyreport.pdf.

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 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.[131] Social media services make themselves more attractive to users and advertisers by providing platforms with plentiful opportunities for diverse interactions and innovations. The "walled gardens" of the Internet's first generation are largely things of the past.

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

[131] Zittrain, *The Future of the Internet,* 184.

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 ("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. The result was an outpouring of innovation. Customers in more than 123 countries had downloaded more than eighteen billion apps from Apple's App Store at a rate of more than 1 billion apps per month as of late 2011.[132]

But what if Apple decides to suddenly shut its App Store and prohibit all third-party contributions, after initially allowing them? There is no obvious incentive for Apple to do so, and there are plenty of competitive reasons for Apple not to close off third-party development, especially as its application dominance is a key element of Apple's success in the smartphone and tablet sectors. Under Zittrain's proposed paradigm, regulators would treat the iPhone as the equivalent of a commoditized common carriage device and force the App Store to operate on regulated, public utility–like terms without editorial or technological (and perhaps interoperability) control by Apple itself. But 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 be only too happy to take

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[132] "Apple's Mac App Store Downloads Top 100 Million," *Apple Press Info*, December 12, 2011, http://www.apple.com/pr/library/2011/12/12Apples-Mac-App-Store-Downloads-Top-100-Million.html.

Apple's business by offering a wealth of stores and devices that allow users greater freedom. 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. It is now partially abandoning that policy by taking greater control over the uses of its API. This policy reversal will, no doubt, lead to claims that the company is acting like one of Wu's proverbial "information empires" and that perhaps 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.[133] Zittrain's actions could 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 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

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[133] "The Twitter move looks like the kind of bait-and-switch that I worry about at http://yupnet.org/zittrain/archives/19#25." Jonathan Zittrain, Twitter post, March 12, 2011, https://twitter.com/#%21/zittrain/statuses/46782861507952640.

innovators would quickly find work-arounds. A decade ago, similar angst surrounded AOL's growing power in the instant-messaging (IM) marketplace. Many feared AOL would monopolize the market and exclude competitors by denying interconnection. Markets evolved quickly, however. 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.[134] These innovations occurred despite a mandate in the conditions of Time Warner's acquisition of AOL that the post-merger firm provide for IM interoperability. The provision was quietly sunset as irrelevant a short three years later.[135]

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. Thus, major competition for Twitter is more than possible, and it is likely to come from sources and platforms we cannot currently imagine, just as few of us could have imagined something like Twitter developing.

Even if some social media platform owners did want to abandon previously open APIs and move to a sort of walled garden, there is no reason to classify such a move as anticompetitive foreclosure or leveraging of the platform. Marketplace experimentation in search of a sustainable

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[134] See http://www.digsby.com and http://adium.im.

[135] FCC, *Memorandum Opinion and Order*, FCC 01-12, CS Docket No. 00-3, §128, January 11, 2001, http://www.fcc.gov/Bureaus/Cable/Orders/2001/fcc01012.pdf.

business model should not be made illegal.

Since most social media sites such as Twitter do not charge for the services they provide, some limited steps to lock down their platforms or APIs might help them earn a return on their investments by monetizing traffic on their own platforms. 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 since the company would be forced to share its only valuable intellectual property.

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. Such a move would constitute a serious disincentive to future innovation and investment.

B. Wu's "Separations Principle"

Wu's proposed "Separations Principle" for the information economy would also have a profound impact on social media operators. In concrete regulatory terms—and despite Wu's claim to the contrary, his approach most assuredly *would* require regulation—the Separations Principle would segregate information providers into three buckets: creators, distributors, and hardware makers. 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. Verizon, once just an analog wireline telephone company, now sells pay TV services and a variety of wireless devices. AOL reinvented itself as a media and advertising company after its brief reign as the king of dial-up Internet access. Netflix focused exclusively on mail delivery of movies before moving into electronic distribution. Similarly, at first, Amazon only sold books by mail. 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.

Should these firms have stayed put in their old sectors? And 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. Wu's proposal would make many of these efforts illegal.

Wu shrugs off such concerns. "The Separations Principle accepts in advance that some of the benefits of concentration and unified action will be sacrificed," he writes, "even in ways that may seem painful or costly."[136] 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 would likely require the breakup of dozens of technology companies and many social media

[136] Ibid., 305.

providers. He 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 throughout his book would be held in check under his proposed regime. He says "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.[137]

Equally surprising is Wu's assertion that "a Separations regime would take much of the guesswork and impressionism, and indeed the influence trafficking, out of the oversight of information industries."[138] 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 the agency will continue to have "day-to-day authority over the information industries."[139] The FCC's current regulatory authority is limited mostly to older sectors of the information economy (broadcasting and telecommunications in particular), but Wu believes its role should be expanded, particularly through net neutrality mandates on information distributors.

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[137] Ibid., 304.
[138] Ibid., 306.
[139] Ibid., 312.

Yet, stepped-up FCC oversight will not be enough according to Wu. He says 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."[140] Here the "breadth and ambition" that Wu says will be necessary to enforce his Separations Principle become more apparent.[141] 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 make sure 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. Yet, despite the inefficiencies historically associated with such heavy-handed regulation, Wu claims this new regime will lead to more innovation and consumer choice than Internet entrepreneurs have achieved during the last two decades.

C. The Question of Property Rights in Platforms and Protocols

Zittrain, Wu, and other proponents of stepped-up regulation of social media have not yet offered a serious antitrust analysis of their proposals. Their proposals offer an amalgam of traditional antirust remedies, including structural separation and nondiscriminatory access or network sharing. 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

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[140] Ibid.
[141] Ibid., 308.

these scholars do. "There is no general duty to share," notes Areeda, summarizing the Supreme Court's current antitrust jurisprudence. "Compulsory access, if it exists at all, is and should be very exceptional."[142] 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.[143]

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. Whether forcing access to a privately built social media platform constitutes unconstitutional taking of an innovator's property rights remains an open question. Proponents of such regulation might

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[142] Phillip Areeda, "Essential Facilities: An Epithet in Need of Limiting Principles," *Antitrust Law Journal* 58 (1989): 852–3.
[143] Ibid.

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 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. And since APIs and "protocols" can be and typically are subject to intellectual property protection, 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.[144] Finally, forcible disintegration could mean the loss of a valued part of the firm's labor force, as well as a significant loss of

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[144] Thomas F. Cotter, "The Essential Facilities Doctrine," *Legal Studies Research Paper Series,* Research Paper No. 08-18, (2008), 12, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1125368. ["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."]

shareholder value. These losses constitute sound legal grounds for a "takings" challenge under the Fifth Amendment.[145]

At a minimum, regulatory proponents should not be surprised when these matters are litigated by social media operators and lengthy legal wrangling ensues. 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.[146]

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 could sacrifice America's current role as 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. 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.

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[145] Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard University Press, 1985); Kaserman and Mayo, *Government and Business*, 435.

[146] Cotter., 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."]

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.[147] 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."[148] 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.[149]

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[147] Joseph Schumpeter, *Capitalism, Socialism and Democracy* (New York: Harper Perennial, 1942,), 84.

[148] Jerry Ellig, "Introduction," in Jerry Ellig, ed., *Dynamic Competition and Public Policy: Technology, Innovation, and Antitrust Issues* (Cambridge: Cambridge University Press, 2001), 6.

[149] Eric Goldman, "Revisiting Search Engine Bias," Santa Clara University Legal Studies Research Paper No. 12-11 (June 2011), 5,

The Schumpeterian model explains why some online operators can gain scale so rapidly only to stumble and fall with equal velocity. Digital Davids are constantly displacing cyber-Goliaths. Social and economic risk takers and innovators are constantly shaking things up in the digital economy and bringing about equally seismic disruptions throughout our culture.[150] 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 become 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. For a time, it was easy to see why some might 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. Then AOL and media titan Time Warner announced a historic megamerger that had some critics, such

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http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1860402.

[150] "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." Jerry Ellig and Daniel Lin, "A Taxonomy of Dynamic Competition Theories," in Ellig, ed., *Dynamic Competition and Public Policy*, 18–9.

as Norman Soloman and Robert Scheer, predicting the rise of "new totalitarianisms" and a corporate "Big Brother."[151]

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 (EarthLink) before it made AOL's service available across its largest cable divisions.[152] Another FCC-imposed provision mandated interoperability of instant messaging systems based on the fear that AOL was poised to monopolize that emerging technology.[153]

Despite all the hand-wringing and regulatory worry, the merger quickly went off the rails and AOL's online "dominance" quickly evaporated.[154] By April 2002, just two years after the deal was struck, AOL–Time Warner had reported a staggering $54 billion loss.[155] By January 2003, its losses had grown to $99 billion.[156] By September 2003, Time Warner decided to drop AOL from its name altogether, and the deal continued to slowly unravel from there.[157] In a 2006 interview with the *Wall Street Journal*, Time

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[151] Norman Soloman, "AOL Time Warner: Calling the Faithful to Their Knees," Fair.org, January 2000, http://www.fair.org/media-beat/000113.html; Robert Scheer, "Confessions of an E-Columnist," Online Journalism Review, January 14, 2000, http://www.ojr.org/ojr/workplace/1017966109.php.

[152] FTC, "FTC Approves AOL/Time Warner Merger with Conditions," FTC.gov, December 14, 2000, http://www.ftc.gov/opa/2000/12/aol.shtm.

[153] FCC, *Memorandum Opinion and Order*, FCC 01-12, CS Docket No. 00-3, §128, January 11, 2001, http://www.fcc.gov/Bureaus/Cable/Orders/2001/fcc01012.pdf.

[154] Adam Thierer, "A Brief History of Media Merger Hysteria: From AOL-Time Warner to Comcast-NBC," Progress and Freedom Foundation, *Progress on Point* 16.25, December 2, 2009, http://www.pff.org/issues-pubs/pops/2009/pop16.25-comcast-NBC-merger-madness.pdf.

[155] Frank Pellegrini, "What AOL Time Warner's $54 Billion Loss Means," *Time*, April 25, 2002, http://www.time.com/time/business/article/0,8599,233436,00.html.

[156] Jim Hu, "AOL Loses Ted Turner and $99 billion," CNetNews.com, January 30, 2004, http://news.cnet.com/AOL-loses-Ted-Turner-and-99-billion/2100-1023_3-982648.html.

[157] Ibid.

Warner President Jeffrey Bewkes famously declared the death of merger "synergy" and went so far as to call synergy a "bullsh*t" theory.[158] In early 2008, Time Warner decided to shed AOL's dial-up service,[159] and in 2009, it spun off AOL entirely.[160] Further deconsolidation followed for Time Warner, which spun off its cable TV unit and various other properties. Looking back at the deal in 2009, *Fortune* magazine Senior Editor Allan Sloan called it the "turkey of the decade."[161]

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.[162] There are many social media platforms. There is nothing unique

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[158] Matthew Karnitschnig, "After Years of Pushing Synergy, Time Warner Inc. Says Enough," *Wall Street Journal*, June 2, 2006, http://online.wsj.com/article/SB114921801650969574.html.

[159] Geraldine Fabrikant, "Time Warner Plans to Split Off AOL's Dial-Up Service," *New York Times,* February 7, 2008, http://www.nytimes.com/2008/02/07/business/07warner.html?_r=1&adxnnl=1&oref=slogin&adxnnlx=1209654030-ZpEGB/n3jS5TGHX63DONHg.

[160] "Time Warner, Time Warner Inc. Completes Spin-off of AOL Inc.," news release, December 10, 2009, http://www.timewarner.com/corp/newsroom/pr/0,20812,1946835,00.html.

[161] Allan Sloan, "'Cash for . . .' and the Year's Other Clunkers," *Washington Post*, November 17, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/11/16/AR2009111603775.html.

[162] John F. Blevins, "Meet the New Scarcity: A First Amendment Framework for Regulating Access to Digital Media Platforms," Berkeley Electronic Press, 43,

or essential about any one of them. Escape from any of them is reasonably easy. Barriers to entry by new firms are low. Innovation continues at a healthy clip.

We must not forget that we are dealing with a space that is still so new that we do not yet know what to call it. "Social media" is a very broad term, and one that is constantly morphing. For that reason alone, we should be skeptical of calls for a preemptive regulatory strike. We need 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's no reason to raise the white flag on social media innovation. Progress continues.
