

“JUST TREAT FACEBOOK AS A PUBLIC UTILITY!”: THE PROMISE AND PERIL OF REGULATING SOCIAL MEDIA AS A PUBLIC UTILITY

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INTRODUCTION

Few industries have been the topic of such intense bipartisan scrutiny and criticism as social media platforms. Worries about disinformation, censorship, election interference, and privacy have united parties as disparate as Elizabeth Warren and Ted Cruz in calling for heightened regulation and government control.¹ Numerous suggestions on how, precisely, to better regulate the industry have been put forward, from the creation of internal industry self-regulation to the breakup of major tech companies by government anti-trust bodies.²

One idea that has been receiving increasing traction is that social media companies should be regulated as public utilities or common carriers. The argument is, simply put, that just as progressive reformers created the public utility framework to curtail the power of natural monopolies during the early 20th century, the new power of social media giants can be curtailed by applying that same regulatory framework to them.³ This proposal has been the subject of a cavalcade of articles and opinion pieces. Furthermore, it is no longer simply in the realm of the hypothetical. Supreme Court Justice Clarence Thomas recently supported the idea of treating big tech companies as common carriers in a concurring opinion; this spurred the Ohio Attorney General to file a lawsuit seeking to have Google regulated as a common carrier.⁴ Similarly, a federal judge discussed the idea of social media as a common carrier in his enjoining of a Florida law concerning censorship on social media—though he notably did not think social media counted as a common carrier.⁵

¹ Alex Rochefort, *Regulating Social Media Platforms: A Comparative Policy Analysis*, 25 *Comm. L. & Pol'y* 225, 227; Dipayan Ghosh, *Don't Break Up Facebook — Treat It Like a Utility*, *HARVARD BUSINESS REVIEW* (5/30/2019)

² Rochefort, *supra*.

³ K. Sabeel Rahman, *Regulating Informational Infrastructure: Internet Platforms As The New Public Utilities*, 2 *GEO. L. TECH. REV.* 234 (2018)

⁴ Jon Brodikin, *Spurred by Clarence Thomas, Ohio AG wants Google declared a public utility*, *ARSTECHNICA* (June 8, 2021), <https://arstechnica.com/tech-policy/2021/06/spurred-by-clarence-thomas-ohio-ag-wants-google-declared-a-public-utility/>.

⁵ Phillip Hamburger & Clare Morrell, *The First Amendment Doesn't Protect Big Tech's Censorship*, *THE WALL STREET JOURNAL* (July 31, 2021), <https://www.wsj.com/articles/big-tech-twitter-facebook-google-youtube-sec-230-common-carrier-11627656722>.

Now that the idea of regulation of social media as a public utility has begun the transition from the op-ed page to the courtroom, it is time to discuss whether such a regulatory scheme is feasible or desirable. The answer to this question is far from simple. While the proponents of regulating social media as a public utility claim that the similarities between the industry and traditional public utilities are significant, critics have noted several differences, including casting doubts on whether social media companies constitute a natural monopoly.⁶ Furthermore, there is much debate over what the actual effects of implementing such a regulatory framework would be. Proponents claim it would heighten privacy protections, empower customers, and strengthen free speech;⁷ critics worry that it will fail to solve the problems surrounding social media while creating new ones.⁸ In the end, public utility style regulation is neither simple nor without risk, and should be approached with appropriate caution.

DEFINING “PUBLIC UTILITY”

The definition of “public utility” varies by jurisdiction in the United States.⁹ Most generally, a public utility is an entity that provides goods or services to the public and is overseen by a government regulatory commission.¹⁰ Because the idea of regulating social media as a public utility has been primarily promoted by the scholars Sabeel Rahman and Dipayan Ghosh in academic circles,¹¹ I will use their definitions of the term for this paper.

The concept of a “public utility” arose in the Progressive Era, as reformers tried to tackle the problem of powerful monopolies.¹² Large corporations were able to use their dominance of certain sectors of the market to—essentially—abuse consumers through tactics such as price hikes or denial of service, since the lack of viable competitors meant consumers had no alternatives if they

⁶ Peter Swire, *Should the Leading Online Tech Companies Be Regulated as Public Utilities?*, LAWFARE BLOG (August 8, 2017), <https://www.lawfareblog.com/should-leading-online-tech-companies-be-regulated-public-utilities>.

⁷ Ghosh, *supra*.

⁸ Adam Thierer, *The Perils of Classifying Social Media Platforms as Public Utilities*, 21 COMMLAW CONSPECTUS 249 (2013)

⁹ *Public Utility*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/public_utility.

¹⁰ *Id.*

¹¹ Ashutosh Bhagwat, *The Law of Facebook*, 54 U.C. DAVIS L. REV. 2353 (2021)

¹² K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621 (2018)

wished to make use of the product or service.¹³ Antitrust laws were the preferred solution for addressing this issue, in many cases, ending the monopoly by breaking up the offending corporations.¹⁴ Trust-busting was not a viable solution in some cases, however, notably for governing what were known as “natural monopolies.” These were industries where barriers to entry—usually the building of infrastructure such as electrical grids—and other factors prevented competitors from breaking into a market, and made the administration of the resource or product by a single company in each market the more natural solution.¹⁵ Instead of being broken up, such natural monopolies were—and still are—subject to public utility regulation, wherein heightened government regulation and oversight—such as price controls—act as an intermediary between the consumer and the corporation and lessen the power imbalance.¹⁶ Thus, public utility regulation is appropriate when a natural monopoly creates a power imbalance between consumers and the providers of a good or service that market forces alone cannot correct. Notably, this regulation generally only applies to “essential” goods such as electricity, water, gas, transportation, or telecommunications; those things customers cannot just choose not to buy, even if they are not strictly necessary for survival.¹⁷

A subset of the public utility is the “common carrier.” The common carrier is a provider that offers transportation of people, goods, or information to the general public.¹⁸ They are, therefore, subject to the same regulation as other public utilities, with the additional obligation to indiscriminately transport any legal goods in exchange for payment.

DOES SOCIAL MEDIA FIT THE PUBLIC UTILITY MODEL?

A key question, then, is whether social media is similar enough to the industries traditionally regulated as public utilities to justify implementing the same regulatory scheme. One of the most common arguments that social media does not match the public utility model is that social media companies are not, in fact, natural monopolies. Proponents of this view point out that the barriers for entry into the social media market are relatively low, requiring only a few skilled programmers. Furthermore, the nature of the internet means that a competitor is only a click away at any moment, and

¹³ *Id.* Ghosh, *supra*.

¹⁴ Rahman, *supra*.

¹⁵ Ghosh, *supra*.

¹⁶ *Id.*

¹⁷ Rahman, *supra*.

¹⁸ *Common Carrier*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/common_carrier.

that competitor can be based anywhere in the world.¹⁹ They point to Facebook supplanting Myspace, and in turn, Facebook’s decline in userbase, as proof that the social media market is not stagnant, and that innovation does happen.

Other critics claim that, even if social media companies are natural monopolies, they are too different from traditional public utilities like electricity, gas, or railroads to be governed similarly. They note that social media platforms are free apps anyone can use or stop using at will, unlike the payment models of traditional utilities.²⁰ It was the payment models, after all, that formed the basis of the predatory practices that required the creation of public utilities in the first place. They furthermore claim the lack of physical infrastructure involved in social media is an important distinction, and that conflating social media with common carriers or public utilities will only serve to weaken regulation of real natural monopolies.²¹

Proponents of public utility regulation for social media, however, point out that a few social media companies—such as Facebook, Google, and Twitter—have been able to achieve near universal dominance of the market. They claim that the “network effect,” the fact that a larger user base makes a social media platform more attractive to customers, creates the same sort of natural monopoly seen in traditional public utilities.²² They also note that any new social media companies that do overcome this barrier tend to be bought up quickly by one of the big players, preserving the monopoly.²³ So while social media companies might not exactly map onto the “classic” model of a natural monopoly, they function sufficiently similarly to one to warrant the same regulatory framework.

Supporters of public utility regulation further argue that the ingrained power imbalance seen in industries where the public utility model has been applied is very much present in social media. One aspect where this imbalance exists is in the collection of personal data, and the privacy concerns that such collection creates. The argument, essentially, is that while social media users do not face price hikes or similar practices, they do essentially pay for these services by allowing social media platforms access to their data. Users have no power to negotiate lopsided user agreements if they

¹⁹ Swire, *supra*.

²⁰ Susan Crawford, *Calling Facebook a Utility Would Make Things Worse*, WIRED (April 20, 2018), <https://www.wired.com/story/calling-facebook-a-utility-would-only-make-things-worse/>

²¹ *Id.*

²² Ghosh, *supra*.

²³ *Id.*

want to use social media sites, giving the platforms essentially free reign to moderate their platforms and sell or utilize user data with impunity.²⁴

Another area of concern is what Rahman calls “informational infrastructure,” or how the systems social media platforms build allow them to act as gateways to both information and other sectors of the market.²⁵ This gives social media companies enormous power over not just how their customers interact with their product, but how they interact with other companies, individuals, and the market as a whole. Therefore, the argument goes, their control of this new and vital infrastructure means that social media companies must, for the good of society, be subject to the heightened scrutiny of a public utility.²⁶

Finally, others calling for social media companies to be treated as public utilities note that, through regulations such as Section 230,²⁷ social media companies already receive some of the legal privileges and protections afforded to common carriers such as radio and telecommunications companies.²⁸ However, unlike actual common carriers, they have free reign to allow and disallow content on their services solely at their discretion. Because they are already acting as de facto information common carriers, it would make more sense (and be better for public discourse) if they were subject to full common carrier regulation.²⁹

THE EFFECTS OF APPLYING THE PUBLIC UTILITY MODEL TO SOCIAL MEDIA

There is a great deal of dispute over what, exactly, the effects of treating social media as a public utility would be. Proponents of the public utility model put forward several beneficial effects as a result of the policy. Some claim that it will increase personal privacy. Public utility regulation will give consumers greater power in determining how their data is used, and allow the government to regulate strictly the use of data by social media companies.³⁰ Others go further, claiming that public utility regulations will transform social media from purely a profit-driven enterprise to an integrated part of our national infrastructure, allowing it to serve better the vital purpose of connecting people to markets, businesses, and each other rather than simply treating them as products.³¹ Finally, free-speech

²⁴ *Id.*

²⁵ Rahman, *supra*.

²⁶ *Id.*

²⁷ 47 U.S.C. 230 (2020).

²⁸ Hamburger, *supra*.

²⁹ *Id.*

³⁰ Ghosh, *supra*.

³¹ Rahman, *supra*.

advocates believe public utility regulation will ensure that private companies cannot censor speech they dislike in what are essentially public spaces.³²

On the other hand, opponents of the idea assert several possible downsides to treating social media as a public utility. Most foundationally, they point out that no one actually knows (or has proposed) the details of such a regulatory scheme. This makes judging its efficacy and price difficult. Regardless, the price of creating new government regulatory bodies on both the state and federal levels will doubtless be costly, and the benefits uncertain.³³ The risk is simply not worth the reward.

Several more specific perils are predicted as well. Burdensome regulation could hamper companies in providing the services social media users desire.³⁴ There is also the worry that public utility style regulation could worsen some of the ills it was meant to cure. It is possible that public utility regulation could turn social media platforms into monopolies even if they are not acting as monopolies currently, and make it impossible for newer, innovative platforms to supplant the now government-backed giants.³⁵ Furthermore, public utility regulation might make dealing with one of the primary concerns surrounding social media, disinformation, much more difficult. Since the government would now be partly responsible for regulating speech on social media through public utility commissions, social media companies would have less freedom to remove accounts spreading disinformation, hate speech, or other objectionable content due to First Amendment concerns.³⁶

Until the advocates for regulating social media as a public utility come up with a concrete regulatory scheme, or propose actual legislation, the effects of the policy, both good and bad, will remain unclear.

CONCLUSION

As we have seen, there is much disagreement among legal experts on the possibility of regulating social media as public utilities. Though similarities between social media platforms and traditional public utilities do exist—especially the disparity in power between the consumer and the provider—significant and real differences are present, notably in the nature of the services provided and the method of user engagement. Furthermore, the actual consequences of such a regulatory framework remain unclear.

³² Hamburger, *supra*.

³³ Bhagwat, *supra*.

³⁴ *Id.*

³⁵ Thrier, *supra*.

³⁶ Bhagwat, *supra*.

It could, as advocates claim, solve a variety of the current problems surrounding social media, but it could also fail to solve these problems while introducing myriad new ones.

What can we take away from this uncertainty? Two important points can be drawn from the current debate. The first is that while “social media should be a public utility” makes a fine headline or campaign slogan, it is not a cure-all for the regulatory deficit surrounding social media. Even if regulating social media as a public utility achieved everything its proponents desire, it would still be expensive and difficult to implement, and would not address every issue surrounding the industry—for example, it would likely make the regulation of disinformation more difficult, not less. The second point, however, is that this does not mean that there is no place for the idea of social media as a public utility in the debate surrounding how best to regulate big tech. The unbalanced power dynamics between social media users and social media companies discussed by Rahman, Ghosh, and others are real. Looking at how we have dealt with similar dynamics in other industries can only make our decision on how to solve the imbalance in social media more informed. While social media as a public utility might not be a feasible regulatory path on its own, elements of that model can strengthen and help us better implement a regulatory framework suited to the unique challenges posed by social media.