Natural Monopoly, Common Carriers, and the Internet: The Economics of *Texas v. TechLords*

Eric Rasmusen

May 23, 2024

Abstract

Is Twitter a natural monopoly (in economics) and a common carrier (in law)? Yes, I argue. Its market niche has strong network externalities, which makes it a natural monopoly, and I argue that natural monopoly is the underlying rationale of the law of common carriers. The question then arises of how best to regulate this market failure, given the possibility of government failure. The answer is not to rely on a government agency such as the state utility commissions or the federal Interstate Commerce Commission but to treat social media platforms as common carriers, with additional features useful because of the use of automated algorithms on the Internet. Texas and Florida have passed statutes along these lines, but their constitutionality has been challenged. The 5th and 11th Circuits split, and the issue will be resolved by the U.S. Supreme Court in the spring of 2024. This paper is based on an amicus brief submitted in that merged appeal, *NetChoice v. Paxton* and *Moody v. NetChoice,* less formally called *Texas v. TechLords.*

Eric Rasmusen, former Dalton Professor of Business Economics and Public Policy, Kelley School of Business, Indiana University, 2810 Dale Court, Bloomington, Indiana 47401. (812) 345-8573. Erasmuse61@gmail.com. *Presentation slides are at https//rasmusen.org/papers/techlords_slides.ppt. Latest draft is at https//rasmusen.org/papers/techlords.pdf. The amicus brief is at https://www.supremecourt.gov/DocketPDF/22/22-555/298407/20240123110046414_Rasmusen%20Amicus%20Brief%20Filing.pdf*

INTRODUCTION

If someone wants to post "Vote for Bernie" on Facebook, should Facebook be able to refuse? The issue is whether Facebook is more like a landline phone company or a magazine. If Facebook is more like the phone company, it can't refuse. When John Doe wants to telephone a friend and say, "Vote for Bernie", the phone company can't drop Doe as a customer. It owns the fiber optic lines, and maybe allowing the phone call will make people think the company is pro-Bernie, but that doesn't matter. If Facebook is more like a magazine, on the other hand, it *can* refuse. When someone wants the magazine to publish "Vote for Bernie" as a letter to the editor, it has every right to refuse.

Which is the correct analogy, telephone or magazine? The question has high significance. If Facebook can ban "Vote for Bernie!" it can ban posts by his supporters on any subject. It can even make a declaration of support for Bernie part of its "terms of service". Indeed, if the company is not a common carrier, "Twitter unapologetically argues that it could turn around and ban all pro-LGBT speech for no other reason than its employees want to pick on members of that community, Oral Arg. at 22:39–22:52." *NetChoice v. Paxton*, 49 F.4th 439, 2 (5th Cir. 2022).

One list of criteria for whether a firm is a common carrier is:

> (1) whether a firm exercises market power,
> (2) whether an industry is affected with "the public interest,"
> (3) whether the entity regulated is part of the transportation or communications industry,
> (4) whether the industry receives countervailing benefits from the government, or
> (5) whether the firm holds itself out as providing service to all.
>
> *Biden v. Knight First Amendment Inst.,* 141 S. Ct. 1220, 1222-1223 (Thomas, J., concurrence on denial of certiorari).

What is better is to get a general principle out of cases. This is what the *Restatements* do. They do it formally, though. An example is in the agency law of contracts. What if an agent makes a contract with a third party and the principal doesn't like it. There are a number of doctrines that might apply, depending on the circumstances:

Actual express authority.

Actual implied authority.
Apparent authority.
Estoppel.

Ratification.
Inherent agency power.

These all, however, can be explained as varieties of the application of the least-cost-avoider principle. The common law judges had something in mind; they just didn't phrase it as neatly as they could have. Ockham's Razor, applied nonobviously, helps us simplify.

One way to decide which analogy, telephone or magazine, is most appropriate in the case of internet platforms is to look at precedent in the law of common carriers. We need to go deeper, however. The internet is a new technology and precedents need to be applied with attention to their first principles. Is the precedent still on point. Why was it first decided? As Professors Sitaraman and Ricks say,

> Both Google's response to Ohio's complaint and some of the scholarly literature discussing common carriers and public utilities typify our formalist era. Rather than reasoning analogically, Google's lawyers read common law opinions as if they are analyzing statutory text, and scholars seem perplexed when they cannot identify some singular criterion that will define what is or is not a common carrier for all time, in all places, and in all contexts. Ganesh Sitaraman & Morgan Ricks, Tech Platforms and the Common Law of Carriers, DUKE L. J. (forthcoming)

The idea of "natural monopoly" applies. In economics a monopoly is defined not so much by a firm's market share as by its market power, its ability to raise price without attracting competition. A firm may have 95% of sales, but no market power because if it raised its price it would instantly lose those sales to competitors.

Market power can arise in various ways. Antitrust law deals with what we might call "artificial monopoly": market power created by firms merging with their competitors, conspiring with them to keep prices high, or driving them out with unfair practices.

But some monopolies are "natural", arising without violating antitrust laws. Consider the water company. The first company in a city to lay pipe to each house will have an unbreakable monopoly without violating antitrust law. Any new competitor would have to lay new pipe at high cost, after which competition between the two rivals would reduce the price so low neither could recover their investment.

The water company is a natural monopoly on the supply side: costs. There also exist natural monopolies on the demand side: customers. In the days of landlines, only one local phone company could survive. Customers value phone service more if they could phone more other people. No-

body wants to be a phone company's only customer; the company with the biggest network would have the most attractive product.

Economists use the term "network externalities" for this idea that when a customer joins the network he generates a positive spillover onto other customers, who are all the happier to be part of the network.[1] Ordinary markets are worse for consumers if they are monopolized. An industry with a natural monopoly *ought* to be monopolized, because splitting it into two companies would hurt consumers. Even if the city government were in charge, it would set up one company, not ten competing companies.

A natural monopoly, however, will set prices too high and quality too low because it is immune to competitive pressure. It will keep to itself the advantages of bigness. It will be lazy and the Invisible Hand of Providence will fail: the seller's greed will not benefit the customers but its shareholders, at best, and maybe just its managers, its majority shareholders, or the government.[2]

Thus, state utility commissions require businesses to serve all customers, maintain quality, and keep prices low. The law has come to call power companies "common carriers" to justify utility regulation, but the underlying idea is natural monopoly. A power company is carrying electrons, not customers, and its common carrier status is a legal fiction. The law is right to look at the underlying idea, not the product sold. And that idea is that natural monopolies should be regulated.

I. IN NORMAL MARKETS, ANTITRUST LAW CAN BE RELIED UPON TO PREVENT MONOPOLY

In most industries, the size of a company is determined by the balance of two factors. The company incurs fixed costs such as overhead, plant, and equipment which it must pay for even if it never

[1] Network "spillovers" would be a clearer term than "externalities, but in 1890 Alfred Marshall discussed how one company's growth could create benefits to nearby companies "external" to itself. PRINCIPLES OF ECONOMICS, 1st ed. (1890).

[2] The "Invisible Hand":

> He intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it." Adam Smith, *The Wealth of Nations,* ch. 2 (1776).

On Providence, see Helen Joyce*, Adam Smith and the Invisible Hand*, PLUS.MATHS.ORG (2007). Or, "Divine Action, Providence and Adam Smith's Invisible Hand," in *Adam Smith as Theologian*, ed. by Paul Oslington (2011).

For a more Straussian view, see Gavin Kennedy, *The Hidden Adam Smith in His Alleged Theology*, 33 J. HISTORY OF ECON. THOUGHT, 385-402 (2011).

produces a unit of output. It also incurs variable costs such as wages and materials costs which rise as it produces more output. The average cost per unit depends on both of these. For small levels of output, the fixed cost is spread over very few units, so the average cost is very high. For large levels of output, the fixed cost is spread over many more units, but variable costs tend to rise because the business comes closer to capacity and because management becomes more difficult as the size of the business increases. Eventually the fixed cost is spread over so much output that its effect on the average cost becomes negligible, and the average cost begins to rise because the variable cost part of it dominates.

This pattern is the common one for businesses. If a firm is too small, it can't spread its fixed costs over enough units of output. If a firm is too big, its costs tend to rise faster and faster as it strains its capacity. The minimum average cost will be somewhere in the middle. Figure 1 graphs average cost with dollars per ton on the vertical axis and tons of production on the horizontal axis. The result is what is called a "U-shaped cost curve" with an optimal size at which average cost per unit is minimized

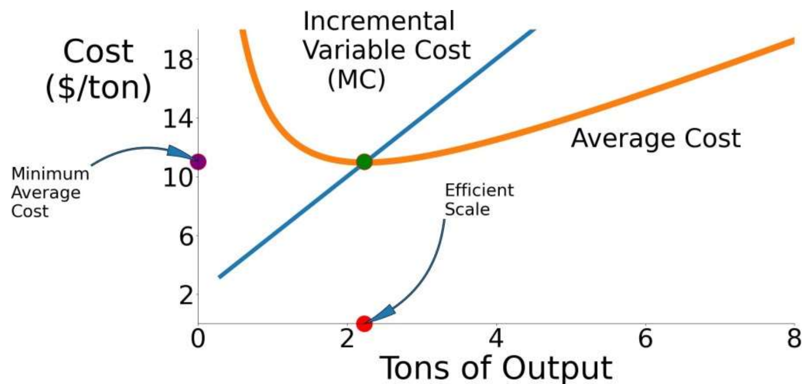


Figure 1: A U-Shaped Cost Curve

Consider the implications of the U-shaped cost curve on how much the industry is concentrated in a few firms. If the minimum average cost is at an output of 10 tons per day, and 50 tons per day is demanded by buyers, the market would be served by 10 firms competing the price down to minimum average cost. No company could dominate the market, because if it tried to produce all 50 tons, its average cost would rise and it couldn't compete with the smaller companies. If demand were 150 tons per week, we'd have fifteen companies; if it were 20 tons we'd have only two.

What we might call "artificial monopoly" ruins this picture. Price conspiracies are an example. Even if there are 10 firms in the industry, they could agree to all charge a high price. Since passage of the Sherman Act of 1891, however, it has been illegal for businesses even to talk to each other about prices, even if they don't make formal agreements. This is a ban on speech, but courts have decided this kind of government regulation does not violate the First Amendment any more than non-enforcement of cartel agreements violates the Contract Clause. U.S. CONST., Article I, Section 10.[3]

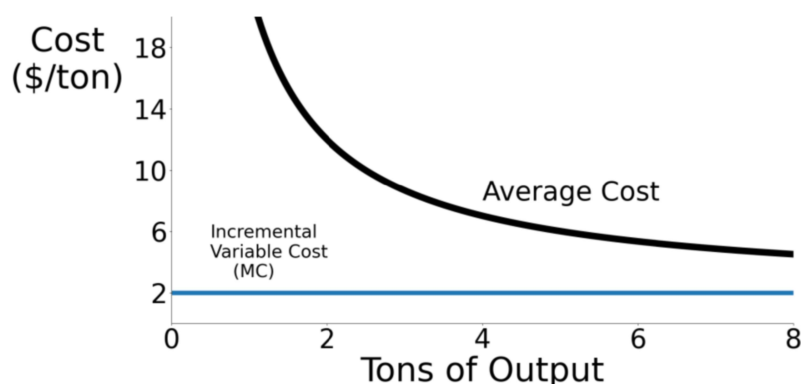
II. Some markets are "natural monopolies" where antitrust law fails and a different kind of regulation is needed

This reasoning rests on cost curves being U-shaped so average cost first falls and then rises with output. That in turn depends on the variable cost rising with output, so the extra cost of producing extra units rises with output.

Suppose, instead, that bigger is better, with diminishing returns never setting in. Then we get "natural monopoly".

III-A. Increasing returns to scale is the most common reason for natural monopoly

Not all industries have U-shaped cost curves. Consider Figure 2. It shows what happens when firms have a fixed overhead cost and then a constant variable cost for each extra unit. As the overhead is spread over more and more units, the average cost falls. Unlike before, though, average cost never rises again, because the unit variable cost never rises.



[3] ? Hillary Greene & Dennis Yao, *Antitrust as Speech Control,* 60 WILLIAM & MARY L. REV. 1215-1268 (2019). In Wilhelmine Germany, cartel agreements *were* enforced by the courts. Francis Walker, *The Law Concerning Monopolistic Combinations in Continental Europe,* 20 POL. SCIENCE Q. 13-41 (1905).

Figure 2: Increasing Returns to Scale

Only one firm can survive in this industry. Indeed, only one firm *should* survive. There is no sense in making two firms incur the overhead. If the customers owned the industry, they would want to consolidate it into one firm. The problem, however, is that though having one firm minimized the cost of product, it also allows that firm to operate as a monopoly, raising the price and reducing quality.

In Figure 2 the average-cost curve is falling over its entire length, and the variablel cost curve is flat. The company has a large fixed cost but constant variablecost; it has to pay for overhead, but its cost to produce an extra unit is always the same no matter how much it produces. Thus, the bigger a company's output, the lower its average cost.

Suppose there are two firms in the industry and we think about having them compete price down to variable cost and split the market. What would happen? Competition will drive them to reduce their prices so as to produce more output and spread the fixed cost over more units. If both firms do that, however, neither will have enough sales to cover their fixed costs. If one firm has a head start, however, and gets most of the customers, it will have the lowest average cost and be able to survive charging a lower price—which in turn means it will get more customers. We would expect a costly war of attrition as the two firms each struggle along making losses in the hopes that the other firm would drop out, leaving it free to raise prices drastically as a monopoly.

Whichever company first enters and invests will have a monopoly. Potential competitors know what will happen if they enter: a war of attrition that will hurt them as much as the incumbent firm. The first firm will naturally have a monopoly. Bruce Wyman put it well:

> From an economic point of view the duplication of plant that is necessary to make competition possible in these public utilities is sheer waste, without compensating advantages. From a business point of view this fact is a most effective deterrent. When one of these public services is established in a neighborhood, it is infrequent that men will be found to invest their money in the construction of another plant. The risk of loss in such a case is too great, for since the market for both old and new is limited to the locality, the struggle must of necessity be so desperate that neither can expect to escape serious injury.
> Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARVARD L. REV. 156-173 (1904).

III-B. Network externalities also create natural monopoly and that is a problem for social media platforms

Network externalities are the demand-side equivalent of the supply-side's increasing returns to scale. Increasing returns to scale make bigger better because as scale increases, the average cost falls. Network externalities make bigger better because as scale increases, each consumer is willing to pay a higher price. The classic example is the telephone. A telephone is useless if nobody else has one. If two people have them, they can call each other, but the usefulness is still limited. If a hundred people have them, each is willing to pay quite a bit more. If a hundred million people have them, each is willing to pay even more, since the group of consumers will include many people they know.

The biggest phone company will be able to charge the highest price, because its product is more useful. If no government regulation is imposed, only one company will survive. Government regulation, however, in the form of a requirement that each phone company to place calls to its customers, can restore competition to the market by eliminating network externalities; all the companies are then in one big network.

Social media platforms have obvious network externalities. People who want to post short message open to everyone will prefer Twitter/X to any small company that tries to compete. People who want to post messages just to friends will prefer Facebook to any small copycat. People who want to post pictures will prefer Instagram. Note the difference from Google, which is not a social media platform. When for the seventh time you look up "estoppel" on Google you don't care if everyone else uses Bing or DuckDuckGo instead. Google is not a platform; it is an app, and so has weak or nonexistent network externalities. Google is the biggest search engine, but it is not a natural monopoly. It succeeds because most people like its product best, and it gradually displaced its predecessor, Yahoo.[4]

Unlike supply-side natural monopoly, demand-side natural monopoly does not depend on physical objects. NetChoice's response brief in the 5th Circuit says (citations omitted):

> "Unlike the cable companies in *Turner* (and phone companies and railroads), websites have no natural monopoly over physical infrastructure. And websites do not possess any bottleneck that would "destroy[]" an entire speech medium used by half of the country. Platforms lack "the physical power to silence anyone's voices."

This is correct (except that platforms have the physical power to stop someone's voice just as much as a telephone company does) but irrelevant. A natural monopoly does not have to be based

[4] Thus, the suit launched by the State of Ohio against Google in 2021 to have it declared a common carrier was misguided. *Ohio ex. rel. Yost v. Google LLC* (complaint filed June 8, 2021) Common Pleas Court, Delaware County, Ohio. See Don Reisinger, *What Would It Take To Beat Google? We Take a Look at the Key Success Factors and the Opportunities for Other Companies in the Search Engine Space,* CNET (Jan. 2, 2009).

on "physical infrastructure" or "possessing a bottleneck". Invisible, non-material advantages are just as powerful.

The brief of amici Digital Economists says at 24,

> While network effects can have negative effects on competition, they also can be pro-competitive. Network effects mean that larger platforms can be more efficient than smaller ones, all else being equal.

The Digital Economists are correct that that network externalities means that larger platforms are more efficient. They are wrong in saying that this is pro-competitive. Consumers are better off with a large monopoly platform than with no platform at all. But this is true of any monopoly, even artificial ones. When U. S. Steel was formed in 1901 by merging most of America's steel capacity, steel rose, but America was nonetheless better off than if those steel mills had evaporated. In the case of a natural monopoly, we can go even further. If the town's monopoly telephone company is split into ten firms that don't interconnect, prices will fall, but the product will be so much less useful that consumers will be hurt. "Efficient" is not the same as "Pro-Competitive". Best of all would be to have one phone company, to obtain network externalities, but regulated prices, to avoid excessive profits.

The Digital Economists' brief also says at 24:

> Even in *Ohio v. Am. Express Co.*, antitrust violations were not found in the "indirect network effects" of two-sided platforms in merchant credit card networks or in anti-steering provisions.

This too is true but irrelevant. A natural monopoly, unlike an artificial one, does not violate antitrust laws. Our antitrust laws do not say that being big, or being a monopoly, is unlawful. They just say that engaging in unfair business practices, or merging, or conspiring with other firms to create a monopoly is unlawful. If a company just happens to grow so much that its competitors go bankrupt, the company has not violated any laws and it is free to enjoy its high profits without government interference. Such is the case with natural monopoly. Microsoft ran into antitrust trouble not because it was dominant in the market for computer operating systems but because it engaged in unfair business practices. *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001).

II-C. An additional problem is who controls the corporation

We must also consider who actually controls the social media corporation. This goes to the heart of the 1st Amendment issue. The speech of the corporation may not be the same as the speech of the corporation's owners. Shareholders do not vote their shares to decide which cus-

tomers to ban and which to boost. Rather, they elect directors, who elect a CEO, who hires the other employees. The speech that comes out of this may not be what the shareholders want. If so, regulating a corporation's speech does not compel the owners to speak; it prevents them from being compelled to speak.

II.C.1. Control by managers harms shareholders

A corporation's speech might be the speech not of its owners but of its employees. Twitter's head of "Trust and Safety" was Yoel Roth, an enthusiastic advocate of gay pornography whose doctoral dissertation was on underage persons using gay sex apps such as Grindr.[5] He banned The Babylon Bee for tweeting a joke about transgenderism, and popular podcasters Dave Rubin and Jordan Peterson for the same issue.[6] Was Twitter's President aware of this? Were the shareholders? The Bee, Rubin, and Peterson were big draws, and would bring in considerable advertising revenue.[7]

HB 20 would have prevented the Bee from being censored. Would that be compelled speech for the shareholders? Instead, we must consider the possibility that HB 20 would have freed the shareholders from being compelled to speak by disloyal employees, including, perhaps, the President.

To be sure, if corporate managers are using corporate assets to push their personal political beliefs instead of maximizing profits, a takeover that replaced the directors and fired the managers would be a profitable venture. Hostile takeover is difficult if the corporation is large, however--- and it is precisely large corporations that HB 20 regulates. Elon Musk did see an opportunity to profit by taking over Twitter, and took that opportunity. Whether this will work is unclear, however, and if his acquisition proves disastrous, it will be the exception that proves the rule.

II.C.2. Control by dominant shareholders harms minority shareholders

The problem of managerial control arises because if there are many small shareholders, none can muster enough votes to replace faithless directors. If the corporation has a majority shareholder, or a few large shareholders, the problem of managerial control disappears but is replaced by the problem of abuse of the minority shareholders. Corporate law prevents a dominant shareholder from such things as draining funds from the corporation or telling the directors to sell assets to him at a cheap price, but the business judgement rule makes it difficult for minority shareholders to pre-

---

[5] Mark Hemingway, A Setback for the Thought Police, WORLD magazine (December 27, 2022).

[6] Patrick Carroll, *Peterson, Rubin Suspended from Twitter as the Culture War Heats Up*, FEE.ORG (July 6, 2022).

[7] Rubin said, "It is clear they are breaking their fiduciary responsibility to their shareholders by letting a bunch of Woke activists run the company." *Ibid.*

vent the dominant shareholder from using corporate assets to advance his personal political views. Small shareholders of large corporations would like protection against that abuse of their rights.

II.C.3. Control by government hurts all shareholders and the public good

In traditional socialism, the government owns the corporation. A modern variant is for the government to eschew ownership and profit while controlling those actions of the corporation that it cares about. Statute HB 20 saves Facebook from government pressure to censor, pressure which may be illegal but which is hard to police.[8]

> As the Supreme Court held in *Norwood v. Harrison* (1973), it is an "axiomatic" principle of constitutional law that the government "may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." That's exactly what the Twitter Files show officials from the Federal Bureau of Investigation, the Centers for Disease Control and Prevention, the Central Intelligence Agency, the Department of Homeland Security and other federal agencies were doing—inducing and encouraging Twitter to censor constitutionally protected speech. Jed Rubenfeld, *How to Take the Twitter Files to Court,* WALL STREET J. (Jan. 4, 2023).[9]

HB 20 would restrict the corporation from sacrificing profits because of government pressure. The shareholders would be glad of rules which would save them from being compelled to speak by the government.

In particular, the algorithm disclosure feature of HB 20 would reduce government pressure. Modern repression has as one of its main tools the use of search terms, a primitive form of artificial intelligence. HB 20 would work by disallowing the use of terms such as "Democrat" or "Eric Rasmusen" in determining which accounts to throttle or speed up.[10] Viewpoint-neutral terms would have to be used, which, like the requirement of race-neutral terms, makes discrimination considerably more difficult.

---

[8] See Ryan Tracy, ***Facebook Bowed to White House Pressure, Removed Covid Posts***, WALL STREET J. (July 28, 2023).

[9] See also Brandon Gorrell, *The Twitter Files, Part Two: Twitter's Secret Blacklist Thread*, PIRATE WIRES (Dec. 8, 2022).

[10] A recent example of government pressure is the suggestion by the Treasury's Financial Crimes Enforcement Network that banks use the search terms "TRUMP" and "MAGA" to "search Zelle payment messages", and to check debit and credit cards for "the purchase of books (including religious texts) and subscriptions to other media containing extremist views." *Letter from Chairman Jim Jordan, Committee on the Judiciary, to Noah Bishoff* (January 17, 2024).

III. The social media platforms are natural monopolies, suitably regulated by HB 20

III.A. The social media platforms are natural monopolies

Are the social media platforms natural monopolies? Geoff Manne tells us in his *amicus* brief that Facebook has market share of 50%, Instagram 16%, Twitter 15%, and YouTube 2% . ADD CITE With a market share of 15%, how can Twitter be called a monopoly?

Recall that to the economist, the problem of monopoly is not market concentration but market power. This avoids the problem of how define "market" and "product". If we define the market as "social media platforms", Twitter's share is 15%. If we define it as "software", its share is tiny. If we define it as "social media platforms that limit posts to 280 characters or less", Twitter's share is 100%. Focus on market share is misplaced. Rather, we need to ask if Twitter has market power. If this were an antitrust case, companies and the Antitrust Division would bring expert witnesses to explain statistical analyses of whether advertising rates would rise if Twitter were to merge with YouTube. The Court would follow the Clayton Act and ask whether "the effect of such acquisition may be substantially to lessen competition" (15 U.S. Code §18).

One way to deal with HB 20 would be to remand the case to District Court for a trial to decide whether each of the large social media platforms has market power--- that is, whether a platform could change moderation policy without losing users to other platforms. But Musk's takeover of Twitter makes the answer obvious. Liberals are unhappy because now Twitter requires them to be on the same platform as The Babylon Bee, and they say they'll leave Twitter for platforms less tolerant of conservative posts. Yet few have left, and Twitter is still the social media platform of choice for journalists and pundits. Conservatives, too, grumble but accept whatever Twitter does. They were unhappy pre-Musk when the Bee was banned. Yet they remained on Twitter, unless Twitter expelled them involuntarily. Twitter changed its policies drastically and its customers did not leave.

Does anyone really believe Facebook, or Instagram, or You-Tube are different—that if they become more tolerant of dissenting political voices, liberal customers will leave? These are all social media platforms, but no one has succeeded in entering and competing with them head to head, despite the technological ease of doing so and the large advertising profits that could be earned. Nor do they compete with each other. Journalists unhappy with Twitter don't switch to Instagram. Podcasters unhappy with You-Tube don't switch to Facebook. If the big platforms had no market power, a user would laugh off his suspension. He would simply switch to a different platform and have just as much ad revenue as before. But users hate to be banned. This is a sufficient indication of market power.

It is also easy to see why *amicus* Francis Fukuyama's middleware argument fails. "Middleware" is software that picks and chooses among pages on different websites to choose the mix a given user wants; a consumer might use middleware that selects all the webpages that talk favorably about nuclear power, for example. The user would see both posts on Twitter and posts by users Twitter had banned who set up their own blogs. Fukuyama says at 12,

> [T]he existence of common protocols for information can disrupt the control over speech that is currently "centralized among a small group of very powerful companies" ... Given that social media platforms naturally create network effects, these effects can be limited by allowing users to choose the moderation regime most appropriate for them. ... Regulation could take the form of interoperability requirements enforced by a government agency, as with phone companies and the Federal Communications Commission, rather than must-carry requirements, as with HB 20.

Fukuyama is correct that middleware would reduce network externalities. Indeed, this is how weblogs work: the user manually chooses which pages to visit. Each user follows a different set of blogs and each blog has no more market power than an author has in the market for novels. But that's not a solution. Social media platforms replaced blogs for a reason. They create network externalities that blogs do not by making it easier to communicate with other users. Middleware is supposed to emulate the networks and convenience of social media platforms. But no such middleware exists at present. It does for shopping—though Amazon still has market power--- but not exist for social media. Dismissing HB 20 as unnecessary because of middleware is like dismissing antitrust law for energy company mergers because   with the impending advent of cheap solar power, those companies will have no market power. Maybe eventually— but not now.

III.B. Regulation such as that of common carriers helps solve the problem of natural monopoly

Natural monopoly can be dealt with in a number of ways. Sometimes the government owns the natural monopoly, as with a city's water company. Sometimes the government sells the right to serve the market, as with privatization, airwave auctions, or contracts for garbage disposal. Sometimes the government establishes a regulatory agency, as with state public utility commissions. Any of these might help in the case of social media platforms; each has its own problems.

The legal doctrine behind natural monopoly regulation is the idea of the common carrier. One list of criteria for whether a firm is a common carrier is:

(1) whether a firm exercises market power,
(2) whether an industry is affected with "the public interest,"
(3) whether the entity regulated is part of the

> transportation or communications industry,
> (4) whether the industry receives countervailing benefits from the government, or
> (5) whether the firm holds itself out as providing service to all.
>
> *Biden v. Knight First Amendment Inst.,* 141 S. Ct. 1220, 1222-1223 (Thomas, J., concurrence on denial of certiorari).

The idea of natural monopoly suggests that only criterion (1) really matters and the rest are epiphenomena, distractions from the essential problem. The essence of a common carrier is that the customer is at its mercy, not that it has some special public interest (is electricity more important than food?), or is in communications or transportation (what do those two have in common?), or gets government benefits (what does an innkeeper get from the government?), or is open to all customers (openness is a result of common carrier status, not a cause). Rather, market power is what matters.

Whether a business is a natural monopoly depends on its size but on its market power, its ability to raise price or reduce quality without losing customers. Common carrier doctrine recognizes that there can be monopoly even when sellers are small in size and there are many of them—so long as they are not all available at the same time and place. A medieval ferry was a small business, but it had a natural monopoly over crossing the river.[11] There were many stagecoaches in England, but only one for the time and route you want to travel. When Hale talks of "public interest", he means "the only seller".[12] When Blackstone talks of "an implied engagement to serve all persons", he really is worried about the customer having no other choice.[13] Bruce Wyman eloquently describes how a country inn is natural monopoly:

> When the weary traveller reaches the wayside inn in the gathering dusk, if the host turn him away what shall he do? Go on to the next inn? It is miles away, and the roads are infested with robbers. The traveller would be at the mercy of the innkeeper, who might practise upon him any extortion, for the guest would submit to anything almost, rather than be put out into the night. ... But the case of a customer in a town is altogether different. There are shops in plenty and he has time to choose... No special

[11] The Court of Common Pleas ruled that a ferryman is "required to maintain the ferry and to operate it and repair it for the convenience of the common people." *Trespass on the Case in regard to Certain Mills*, YB 22 Hen. VI, fol. 14 (C.P. 1444).

[12] When someone builds the only wharf in a port, "the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only." Matthew Hale, *De Portibus Maris*, in A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 77–78.

[13] A public innkeeper offers "an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages, if he without good reason refuses to admit a traveler." 3 Blackstone at 164

> law is required to meet this situation because, since the seller knows that the buyer may always do this, he in fact will almost never repulse him; rather he will by a low price induce him to purchase. The processes of competition may be trusted in the case of the shop, they do not act with any certainty in the case of the inn.

Common carrier law recognizes how difficult it is to measure market power precisely, but how easy it is to recognize situations where market power is likely. Wyman again puts it well:

> What, after all, is that element in the situation which differentiates the vending of candles from the purveying of gas? Is it not this, - that the box of candles may be sent from any factory into any market, a condition which preserves virtual competition in the sale of candles; while a thousand feet of gas can only be got by the consumer from the local gas company, a situation which presents an inevitable monopoly in the supplying of gas. It is in that sense that the monopoly of the local company is natural, and it is for that reason that it is permanent. Experience confirms this state- ment, that seldom in any community will competitive conditions prevail in the supply of gas, and never are these conditions lasting.

Electricity distribution is so often a natural monopoly that we don't check every time to see whether the company could get away with raising prices. For social media platforms, HB 20 uses the simple bright-line rule of whether a social media platform has 50 million users active each month. Tex. Bus. & Com. Code §§ 120.001(1), .002(b). This is a practical rule, not an arbitrary one, similar to regulations that apply to companies with more than 50 employees, e.g., 26 U.S. Code §4980H (c)(2)(A)'s "applicable large employer".

Amicus Geoffrey Manne objects to this, saying

> Revenue or user numbers do not show market power. It is, at the very least, market share (i.e., concentration) that could plausibly be instructive— and even then, market power entails a much more complex determination.

Number of customers does not show market power, but it can be thought of as a safe harbor more likely to exclude companies with market power than to include companies that are powerless. This is what an implementing regulation would do if the statute had simply said "large platforms with market power", and it would be strange if a state legislature could not do what a state agency can do.[14]

[14] ? This may remind the Court of what NetChoice's counsel so eloquently said in the oral argument of *Loper Bright Enterprises* v. *Raimondo*, docket no. 22-451: the Chevron Doctrine encourages Congressmen to pass ambiguous statutes, knowing they can later pressure election-proof bureaucrats to make them specific via rulemaking. Paul Clement, audio at https://www.c-span.org/video/?c5102885/user-clip-clement (January 17, 2024).

Economics is all about tradeoffs, and so, in reality, is law. In defining "free speech", we trade off the value of spreading information against other good things. We prohibit vast quantities of speech by prohibiting fraud, defamation, breach of nondisparagement contracts, military censorship, espionage statutes, and copyright violation.

HB 20, however, is not like sacrificing a little free speech of reporters to gain a large amount of national security. Rather, it is, even if we accept NetChoice's argument of compelled speech, sacrificing a little compelled speech of a few social media hosts to gain a lot of speech for tens of thousands of content-providing users. The 11th Circuit said in Moody at 20 that laws restricting platforms' ability to use content moderation trigger First Amendment scrutiny, which may or may not be good law, but call this a "commonsense conclusion", which it definitely is not. To the man on the street, letting monopoly social media corporations censor the political views of half the country is a non-obvious way of expanding the free flow of political discussion. The argument works the same for common carriers as it does for social media platforms. Can a bus company kick off a customer and refund his money if he quietly talks to a friend about his support for abortion? The bus company could argue, in exactly the same way as Facebook, that to allow him on the bus is compelled speech, associating the bus company with abortion and disturbing other customers who think abortion is murder. Indeed, the argument makes more sense for a bus, since the customers must actually see and hear each other. If Facebook can kick abortion supporters off its servers, why can't Greyhound kick them off its buses?

III.D. THE TEXAS STATUTE ADDRESSES MARKET FAILURE WITHOUT FALLING INTO GOVERNMENT FAILURE

Adam Smith showed that free markets maximize national wealth. Economists label the exceptions to the efficiency of free markets "market failure". This is not a rejection of free markets generally, but a list of exceptions such as spillover effects (e.g., pollution), information imperfections (fraud), unclear property rights (property law in developing countries), and market power (cartels). Natural monopoly results in market failure and justifies government regulation. Regulation reduces national wealth if applied randomly, increases it when directed to specific market failures.

In 1982, George Stigler won the economics Nobel Prize for his work on "government failure". He showed in detail that regulation may be a bad response even to market failure. The problem is government failure: governments don't always choose the right regulation. Policy is made by pressure from interest groups, which care for their own welfare, not the public's. If government failure is likely, the best policy is laissez faire even if the market is not working perfectly. The cure is worse than the disease.

With Claire Friedland, Stigler wrote "What Can Regulators Regulate? The Case of Electricity." George Stigler & Claire Friedland, 5 J. L. & ECON. 1 (1962). They took a classic example of natural monopoly-- electric utilities-- and argued that regulation had been "captured" by the regulated companies. State utility commissions had been created to help customers, but consumer inattention led to regulators actually helping the utility companies by preventing competition.

Airline regulation is another example. Stephen Breyer, who was involved in ending FAA regulation before he became a judge, said, "People found that it often would hurt the consumers and the producers as well, compared to what would happen if you allowed the market to function on its own." Stephen Breyer, *Why Regulation Rarely Achieves the Goals It Is Designed to Serve*, PBS-COMMANDING HEIGHTS. All economists now accept that market failure must be weighed against government failure. Economists may know what best cures market failure, but politicians know what best wins elections.

The potential for government failure in the regulation of social media is obvious. Suppose Facebook discriminates against Republicans. One solution would be to nationalize the company. But would Republicans really benefit if Joe Biden controlled Facebook instead of Mark Zuckerberg? How about a federal agency to regulate Facebook? This would fare no better, whether it was directly under political control like the Justice Department or less directly like the Federal Trade Commission. How about something more independent, like the Federal Reserve? Then the Fed Chairman would have the power, and we are back to the same one-man control Zuckerberg had.

Government failure is a powerful argument. Giving control of Facebook to Attorney-General Paxton in place of shareholder Zuckerberg is no improvement.

The policy in HB 20, however, *has* taken government failure into account. It neither nationalizes Facebook nor puts it under the control of an executive agency. Instead, it constrains Facebook with a law. It does not give Attorney-General Paxton the power to censor social media. Nor does it give that power to a new state agency. It does not even establish a new agency to enforce the new rules. HB 20 is merely a law, a government directive to be enforced by the Attorney-General in the same way he enforces laws against burglary of homes and the looting of nonprofits. This is what "narrow tailoring" is all about: finding a remedy for a problem narrow enough not to be abused.

Government failure must be addressed by good government design: careful choice of remedies and procedures. The relevant section of HB 20 is:

SUBCHAPTER D. ENFORCEMENT

Sec. 120.151. ACTION BY ATTORNEY GENERAL.

(a) The attorney general may bring an action against a social media platform to enjoin a violation of this chapter.

(b) If an injunction is granted in an action brought under Subsection (a), the attorney general may recover costs incurred in bringing the action, including reasonable attorney's fees and reasonable investigative costs.

The Attorney-General does not have day-to-day control of social media platforms. He does not have the control that the head of a new agency created to enforce HB 20 would have using a focussed staff of experts. He just has a new law added to the other laws he must enforce. Any effort to influence a social media company would be in a public filing before a court of law, and if he persuades the court that a violation has occurred, the only result is an injunction and legal fees. Government failure is minimized.

CONCLUSION

Isaac Asimov said in a 1974 speech,

> I discovered, to my amazement, that all through history there had been resistance... and bitter, exaggerated, last-stitch resistance... to every significant technological change that had taken place on earth. Usually the resistance came from those groups who stood to lose influence, status, money... as a result of the change. Although they never advanced this as their reason for resisting it. It was always the good of humanity that rested upon their hearts.
>
> For instance, when the stagecoaches came into England, the canal owners objected. Not that they would lose money, although they would, but they feared for humanity. Because as the stagecoaches tore along at fifteen miles an hour, the air whipping past the nostrils of the people on board, would by Bernoulli's Principle, suck all the air out of the lungs... Well naturally the stagecoach people laughed heartily, and all they had to do was run a stagecoach at fifteen miles an hour with people inside and show them there's no harm. But they memorized the argument... for when the railroads came in. (*The Future of Humanity: a Lecture by Isaac Asimov*, Newark College of Engineering, Nov. 8, 1974.)

Today the United States has come to product innovation, even though blogs and webzines are driving newspapers and magazines out of business. But we still see a vigorous struggle to stifle the legal innovation needed to deal with technological change.

References

Asimov, Isaac (1974) "The Future of Humanity: A Lecture by Isaac Asimov," speech at Newark College of Engineering (Nov. 8, 1974).
Bambauer, J., J. Rollins, V. Yesue (2022) "Platforms: The First Amendment Misfits," *Indiana Law Journal* (2022).
Bhagwat, Ashutosh (2021) "Do Platforms Have Editorial Rights?," *Journal of Free Speech Law* (2021).
Bhagwat, Ashutosh (2022) "Why Social Media Platforms Are Not Common Carriers," *Journal of Free Speech Law* 2: 127 (2022).
Bresnahan, Timothy & Peter Reiss (1991) "Entry and Competition in Concentrated Markets," J. POL. ECON. 99: 977 (1991).
Breyer, Stepehen "Why Regulation Rarely Achieves the Goals It Is Designed to Serve," PBS-COMMANDING HEIGHTS.
Burdick, Charles K. (1911) "The Origin of the Peculiar Duties of Public Service Companies," 11 COLUM. L. REV. 514
Busch, Christoph (2022) "Regulating the Expanding Content Moderation Universe: A European Perspective on Infrastructure Moderation," *UCLA Journal of Law and Technology* 27: 32 (2022).
Douek Evelyn (2022) "Content Moderation as Systems Thinking," *Harvard Law Review* 136: 526 (2022).
Bamberger, Kenneth & Orly Lobel (2017) "Platform Market Power," *Berkeley Technology Law Journal* 32: 1051 (2017).
Candeub, Adam (2020) "Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230," *Yale Journal of Law and Technology* (2020).
Candeub, Adam (2022) "Common Carrier Law in the 21st Century," *Tennessee Law Review* (2022).
Deacon, Daniel (2015) "Essay, Common Carrier Essentialism and the Emerging Common Law of Internet Regulation," *Administrative Law Review,* 67: 133, (2015).
Frieden, Rob (2014) "The Rise of Quasi-Common Carriers and Conduit Convergence," I/S: A JOURNAL OF LAW AND POLICY FOR THE INFORMATION SOCIETY, 9:471-496 (2014).
Greene, Hillary & Dennis Yao, "Antitrust as Speech Control," 60 WILLIAM & MARY L. REV. 1215-1268 (2019).
Hale, Matthew "*De Portibus Maris,*" in A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND.
Joyce, Helen (2007) "Adam Smith and the Invisible Hand," PLUS.MATHS.ORG (2007).
Kennedy, Gavin (2011) "The Hidden Adam Smith in His Alleged Theology," 33 *J. HISTORY OF ECON. THOUGHT,* 385-402 (2011).

Klonick, Kate (2018) "The New Governors: The People, Rules, and Processes Governing Online Speech," *Harvard Law Review* 131: 1598 (2018).
Lakier, Genevieve (2021) "The Non-First Amendment Law of Freedom of Speech," *Harvard Law Review* 134: 2299 (2021).
Lee, Edward (2021) "Moderating Content Moderation: A Framework for Nonpartisanship in Online Governance," AM U. L. REV 70: 913 (2021).
Lemley, Mark (2021) "The Contradictions of Platform Regulation," *Journal of Free Speech Law* 1: 303 (2021).
Marshall, Alfred (1890) PRINCIPLES OF ECONOMICS, 1st ed. (1890).
Nugent, N. (2023) "The Five Internet Rights," *Wash. L. Rev.,* 2023.
Ramseyer, J. Mark & Eric Rasmusen, MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN (2003).
Ramseyer, J. Mark. Eric Rasmusen & John Wiley (1991) "Naked Exclusion," 81 AM. ECON. REV. 1137-1145 (1991).
Rasmusen, Eric (2006) GAMES AND INFORMATION (1st ed. 1989, 4th ed. 2006).
Rasmusen, Eric (2004) "The Economics of Agency Law and Contract Formation," 6 AM. L. & ECON. REV. 369-409 (2004).
Reid, Blake (2024) "Uncommon Carriage," 76 STANFORD L. REV. 76: 89 (2024).
Sitaraman, Ganesh "Deplatforming,".
Sitaraman, Ganesh & Morgan Ricks, "Tech Platforms and the Common Law of Carriers," DUKE L. J. (forthcoming).
Skorup, Brent & Joseph Kane (2017) "The FCC and QuasiCommon Carriage: A Case Study of Agency Survival," MINN. J.L. SCI . & TECH 18: 631 (2017
Smith, Adam (1776) THE WEALTH OF NATIONS (1776).
Speta, J. "The Past's Lessons for Today: Can Common-Carrier Principles Make for a Better Internet?," *Marquette Law Review* (2022).
Stigler, George & Claire Friedland "What Can Regulators Regulate? The Case of Electricity," 5 J. L. & ECON. 1 .
Viner, Jacob (1931) "Cost Curves and Supply Curves," 3 ZEITSCHRIFT FÜR NATIONALÖKONOMIE/J. OF ECON. 23-46 (1931).
Volokh, Eugene (2021) "Treating social media platforms like common carriers?," *Journal of Free Speech Law.*
Volokh, Eugene (2023) "Does the First Amendment Prohibit All PlatformRegulation?," *Marquette Law Review* (Summer 2023).
Walker, Francis (1905) "The Law Concerning Monopolistic Combinations in Continental Europe," 20 POL. SCIENCE Q. 13-41 (1905).
Wyman, Bruce (1904) "The Law of the Public Callings as a Solution of the Trust Problem,"17 HARVARD L. REV. 156-173 (1904).

Yoo, Christopher (2018) "Common Carriage's Domain," 35 *Yale Journal on Regulation* 991 (2018).
Yoo, Christopher (2021) "The first amendment, common carriers, and public accommodations: net neutrality, digital platforms, and privacy," *Journal of Free Speech Law* 1: 463 (2021).
Yoo, Christopher (2023) "What's In a Name?: Common Carriage, Social Media, and the First Amendment," *Northwestern University Law Review Online 118 (2023).*