CHAPTER II: WHEN IS SECTOR-SPECIFIC REGULATION NECESSARY?

Calls for regulation of search and social media platforms, from both the left and the right, have argued that comprehensive regulation is needed either because of the monopoly power of these companies, or because they constitute "public utilities" and should therefore be regulated like public utilities (Feld 2017; Kahn 2017). Alternatively, opponents of regulation argue that these platforms built their businesses on a set of regulatory presumptions, and this forecloses Congress from imposing comprehensive new regulation that dramatically alters the regulatory environment. Accordingly, I begin with a brief review of the traditional legal justification for sector-specific regulation. I explain how traditional common-law principles of common carriage, not theories of natural monopoly or public utility, provide the basis for application of pro-competitive, sector-specific regulation (Noam 1993, Wu 2017b). Additionally, modern First Amendment doctrine and consumer protection law provide further justification for sector-specific regulation generally and apply to digital platforms specifically.

A. The Difference Between Antitrust and Sector-Specific Regulation.

The antitrust laws are laws of general applicability to address the overall problem of corporate concentration. Even accepting the modern critique of antitrust law as too narrowly focused on direct consumer impact (and even more narrowly construed as a rise in prices to consumers), the chief concerns of the antitrust laws are size and the damage such a concentration of economic power can cause. By its nature as a law of general applicability, antitrust law does not focus specifically on any one industry. Even at its most aggressive, it is reactive rather than pro-active, generally operating via enforcement action (Wu 2017a).

By contrast, sector-specific regulation seeks to address specific concerns that arise from the unique nature of the regulated industry. Even predating the first antitrust statute, the common law imposed special regulatory obligations on businesses operating in the "public interest" or for the "public convenience and necessity." As a general rule, these regulations centered around necessary infrastructure for commerce and daily life such as toll roads, inns, and teamsters and generally involved aspects of "common carriage." (Candeub 2004) Importantly, this did not require either monopoly or the even more stringent test for public utility. Rather, common-law common carriage responsibility arose from a combination of several factors. First and most important, the "public-facing" nature of the business, i.e., did the business as a general matter of course offer service indiscriminately to all members of the public, in contrast to specialized trades where tradesmen routinely negotiated terms with customers on an individualized basis.[32]

[32] As the D.C. Circuit explained in one of the most significant modern cases on common carrier obligation, the fact that a business reserves the right to refuse service or negotiate terms on an individual basis does not

Second, common carriage typically applied when the overall impact of exclusion significantly affected someone's daily life or livelihood. Again, the question was not exclusion merely from a specific business or establishment. Rather, a business was presumed to be "affected with the public interest" when access to a provider of the relevant service was considered necessary for commerce or the routine conduct of one's daily life (Cherry 2006, Noam 1994). As Professor Barbara Cherry has explained, "Distinctive legal principles evolved in response to differing relationships of access recipients — as end user customer, competitor, speaker, or audience member — relative to the access provider. These legal principles, in turn, created differing rights — economic, welfare, or free speech — for access recipients according to the nature of the relationship with the access provider." (Cherry 2006)

Indeed, at a time when the Supreme Court expressed general hostility to industry regulation, the legal tradition of common carrier regulation of businesses "affected with a public interest" provided a justification for sector-specific regulation (Candeub 2004). In *Munn v. People of the State of Illinois*,[33] the Supreme Court affirmed the right of the State of Illinois to regulate grain elevators by requiring them to offer service on a non-discriminatory basis at rates fixed by the legislature. In analyzing the case, the Court pointed to several important factors in considering whether a business was "affected with the public interest" and subject to regulation. Because many of the arguments addressed and rejected in *Munn* are often repeated whenever new sector-specific regulation is proposed, it is worth reviewing the arguments in *Munn* in detail.

First, the Court dismissed the argument that regulating the manner in which grain elevators must do business constituted a "taking" under the Fifth Amendment. To the contrary, the Court found that regulating the nature by which people and businesses conduct themselves "so as to not unnecessarily injure another" and "when such regulation becomes necessary for the public good" was consistent with the role and purpose of government. Regulation to prevent conduct injurious to the public good (or to require conduct consistent with the public good) therefore cannot be a taking. Turning to what circumstances would make regulation "necessary for the public good," the Court opined:

> Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest,

defeat the common carrier designation. Rather, courts and regulators look to the actual conduct of the business in the way in which it generally offers its services to the public. *National Association of Regulatory Utility Commissioners v. FCC,* 533 F.2d 601 (1976) ("*NARUC I*").

[33] 94 U.S. 113 (1876)

> he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.

Turning to the specifics of the case, the Court found that the grain elevators in question were critical structures for the sale and distribution of grain "by the inhabitants of seven or eight of the Great States of the West with four or five of the States lying on the seashore." These grain elevators were "massive structures" that were not easily replicated (or, as we might say today, there existed significant barriers to entry). Further, although there were nine competing firms, they routinely agreed together on prices, constituting a "virtual monopoly." Therefore, despite the fact that the grain elevators were private businesses built entirely by private capital, with no direct grant of any monopoly or franchise of the government, the grain elevators were "clothed with a public interest . . . not by the operation of the Constitution of Illinois or this statute, but it is by its facts."

Critically, and what made the case of particular significance, the Court rejected the argument that because grain elevators were a new industry and a new technology, without precedent in the common law, the traditional principle of common carriage could not apply. Rather than limiting the principle of common carriage regulation to its traditional confines, common carriage obligations would apply to any new form of business which met the (admittedly somewhat vague) criteria as being affected with the public interest. Even where the "public" character of the business did not become clear until decades into the development and maturation of the business, the state could then "recognize" the essential public character of the business and apply common carrier regulation.

Over time, Congress and the Supreme Court began to recognize additional grounds for finding a business "affected with the public interest." For example, in 1906, Congress passed the Pure Food and Drug Act, recognizing public health and safety as additional grounds to regulate commerce. The financial panic of 1907 led first to the Aldrich-Vreeland Act of 1908 and ultimately to the Federal Reserve Act of 1913. Following the election of Roosevelt and the shift in the Supreme Court that permitted greater regulation of commercial activity,[34] Congress identified an ever-increasing number of reasons why it served the broader public interest to impose sector-specific regulation — including the need to enhance competition.

[34] *West Coast Hotel v. Parish*, 300 U.S. 379 (1937). This case is widely viewed as ending the Supreme Court's declaring most forms of economic regulation a violation of due process — the so called *Lochner* era — that began in 1905 with *Lochner v. New York*, 198 U.S. 45 (1905).

In addition to commercial considerations, the common law tradition and the evolution of this tradition in the industrial age have focused on sector-specific regulation to protect consumers from specific harms unique to a specific sector. Food purity laws are an example going back to the Middle Ages. The Pure Food and Drug Act of 1906 was a direct response to the industrialization of food production and the inability of consumers to determine the contents or basic safety of staple foodstuffs without federal oversight. Of particular relevance to the regulation of search and social media platforms, common carrier regulation also traditionally imposed a duty of privacy (Candeub 2018). Although the United States has no general privacy law, Congress has enacted numerous sector-specific privacy laws where the unique aspects of the sector have given rise to specific privacy concerns (Feld, *et al*. 2016).

B. Regulation to Protect the First Amendment and Democracy.

Likewise, where regulation has been necessary to enhance democratic discourse and preserve access to the fundamental right to communicate, both the common law and modern legislative law recognize a responsibility of the government to act (Leanza 2007, Cherry 2006). Although the First Amendment primarily addresses itself to restraining government efforts to censor speech, the Supreme Court has also found the First Amendment to act as a limit on private power, and to permit state action to protect and enhance civic discourse. For example, the First Amendment imposes a significantly higher burden to prove libel against a newspaper engaged in reporting on newsworthy events than on ordinary citizens,[35] or against satire of public figures.[36] The government has the responsibility to shield unpopular speakers from harassment to prevent a "heckler's veto" over civic discourse (Leanza 2007).

Two particular strains of First Amendment jurisprudence come into play when the government regulates a private entity for the purpose of enhancing civic discourse. The first is the "Public Forum Doctrine." Under this doctrine, certain traditional gathering places — such as parks and the public streets — have been places for individuals seeking to address the public on issues of public concern. The doctrine protects the "speaker on a soap box" seeking to address, or harangue, the passing members of the public (Lidsky 2011). Traditionally, as with most other First Amendment jurisprudence, this has been interpreted as a restriction on the government's ability to foreclose speakers from the public forum, prohibiting the government from imposing limits beyond those setting a "reasonable time and place" to maintain public order (and cover any associated expenses, such as security for unpopular speakers) (Lidsky 2011). But the Supreme Court has also found that the state may take steps to preserve the public character of a traditional public forum, even when

[35] *New York Times v. Sullivan*, 376 U.S. 254 (1964).
[36] *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984).

privately owned. Thus, in *Pruneyard Shopping Center v. Robins*,[37] the Court upheld a California law prohibiting private shopping-mall owners from banning all soliciting on their property so as to maintain the traditional public character of the town square.

More significantly, in *Packingham v. North Carolina*,[38] the Supreme Court expressly applied the public forum doctrine to social media. That case involved a state law prohibiting anyone on the state's convicted sex offender registry from accessing any social media service. In striking down the statute as an overly broad infringement on the First Amendment, the majority opinion explicitly invoked public forum doctrine and applied it to social media. "While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular." Whether *Packingham* in fact applied the public forum doctrine in its entirety to social media — and if so what consequences follow for regulating social media platforms so as to preserve their 'public' character — remains wildly unsettled.[39] Even in the short time since the *Packingham* decision, scholars have split over whether application of the public forum doctrine would appropriately apply to privately owned social media services (Harvard Law Review 2017), or whether requiring social media to remain "public" in character would prohibit any effort to address online harassment or "fake news," rendering the application of the public forum doctrine "a cure worse than the disease" (Hassen 2017). It is sufficient for our purposes here (and discussed in greater detail in Chapters V and VI below) to note that the public forum doctrine provides one possible avenue of addressing the inevitable First Amendment claims that social media platforms and internet search engines are likely to raise against future regulation (Wu 2017a).

The second relevant line of First Amendment jurisprudence centers on what Cass Sunstein has called the "Madisonian" view of the First Amendment. Under this view, democracy and self-governance depend on exposing individuals to views and perspectives they would not necessarily seek out on their own (Sunstein 1995). This view reached its apex in the Supreme Court in *Red Lion Broadcasting Co. v. FCC*,[40] where the Supreme Court affirmed the FCC's authority to require broadcasters to air opposing and diverse views as part of the "Fairness Doctrine." While the Court subsequently narrowed *Red Lion* to broadcasting based on the "unique physical limitations of the broadcast medium" which require the government to limit broadcasting to a handful of licensees,[41] this does not foreclose regulation designed to promote exposure to diversity of perspectives. In

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[37] 447 U.S. 74 (1980).
[38] 528 U.S. __ (2017).
[39] Justices Samuel Alito and Clarence Thomas, joined by Chief Justice John Roberts, concurred in judgment but dissented from the "undisciplined dicta" of the majority opinion, expressly warning against importing the public forum doctrine into social media.
[40] 395 U.S. 367 (1969).
[41] This concept, called the "Scarcity Doctrine" because the number of licenses is artificially limited and therefore "scarce," is discussed at greater length in Chapter III below.

Turner I,[42] the Court upheld the "must carry" regulation of cable systems (requiring them to carry broadcast channels) as a necessary infringement of the cable operator's First Amendment right to choose what programming to carry because it served the important government purpose of promoting "the widespread dissemination of information from a multiplicity of sources." While I will discuss these two cases and the First Amendment implications of common carriage in greater detail below, it is sufficient for this section to observe both that the government may clearly engage in sector-specific regulation to promote democratic discourse, and that it may — under appropriate circumstances — regulate private speakers to achieve these ends.

C. Regulation to Address Recurring Issues and Ensure Consistency.

Even when a distinct sector of the economy is not "clothed in the public interest," sector-specific regulation can be useful to address recurring or endemic problems, promote desired consistency, and generally make the market function more efficiently. For example, the passage of "Lemon Laws" in the 1970s giving purchasers of used cars the right to return a defective car (a "lemon" in the industry jargon) addressed the recurring problem of consumers lacking a remedy if they discovered they had purchased a "lemon" rather than a "cream puff" (industry slang for a good used car) (Akerlof 1970). Definitions by regulators as to what constitutes "whole milk," "lowfat milk" or "skim milk" assist consumers in making informed decisions without needing to investigate the unique definition for each brand, requiring every competitive retailer to advertise precisely what she means by "lowfat," or meeting the need to reassure the public that anything sold as "milk" means pasteurized cow's milk whereas milk from other animals requires specific labelling. Laws requiring cab drivers to prominently display their license promote accountability, while laws requiring all taxi cabs to accept credit cards permit consumers to hail cabs without worrying whether the cab requires cash (or, worse, discovering this fact after the cab driver starts the meter).

In some cases, of course, the private sector can reach its own set of standards without the need for outside regulation, but not always. Lemon laws, for example, were adopted precisely because the economist George Akerlof demonstrated that it was impossible for the market to develop a solution on its own. Additionally, as I discuss in Chapter VII on consumer protection, sectors may produce unique consumer protection problems that require sector-specific regulation to address. For example, robocalls and junk faxes are nuisances that general law does not address. They happen only as a result of having a telephone or a fax machine, and therefore require sector-specific regulation to address. In the realm of online services, including digital platforms, advocates refer to practices designed to trick consumers (such as disguising a box that gives consent to share data as if it were a box to exit the application) as "dark patterns." These "dark patterns" are only

[42] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994).

possible because users have been trained to expect certain types of interfaces, which the platform designer subtly changes to trick the user.

In short, the trigger for sector-specific regulation need not hinge on whether the industry is sufficiently important so as to be "clothed in the public interest" or to protect constitutional interests. It can be as simple a thing as being able to buy a used car with reasonable confidence that the car will work, knowing that you do not need to carry $100 to get a taxi cab from your home to the airport, or owning a fax machine without being flooded with unwanted faxes. What matters is that the problem is unique to an identifiable type of business, and the problem is not easily addressed by existing generally applicable law.

D. The Doctrine of Public Utility.

Finally, because the principle of "public utility" is often invoked as grounds for the regulation of digital platforms (particularly social media and search), I will briefly discuss the distinction between the two as generally used in modern regulatory practice. At the beginning of the 20th century, the terms "public utility" and "affected with the public interest" were used somewhat imprecisely, sometimes interchangeably (Burdick 1911a, 1911b, 1911c). As one scholar lamented, "so far as the courts were concerned, especially the United States Supreme Court, a public utility was *de gustibus non est disputandum* to the particular judge or majority writing the opinion" (Geffs 1937). Over the course of the 20th century however, with the rise of vastly expansive critical infrastructure necessary to meet the needs of modern society, the distinction between a "public utility" and a business "affected with the public interest" (and thus potentially subject to common carrier or other sector-specific regulation) began to change. Professor Barbara Cherry argues that "public utility" is a legal status that arises from a "grant of governmental privilege to provide service of public importance and necessity." By contrast, common carriage is an economic status derived from the common law based on the public or quasi-public character of the service (Cherry 2016; Cherry and Pierce 2014).

I have argued that the modern U.S. concept of "public utility" roughly corresponds with the positive human rights framework more generally employed internationally (Feld 2015). Relying on Cherry, Noam and the legislative history of important federal statutes designating various sector-specific regulation as either "affected with the public interest" or "public utility," I use the term "public utility" to mean a relatively small class of services considered so essential that it is the responsibility of government to ensure that everyone has access (Feld 2017). This small class includes things such as clean water and power. Critically, while all public utilities are common carriers, not all (or even most) common carriers are public utilities.

We therefore need not concern ourselves with whether specific digital platforms, or certain services such as search and social media, are “public utilities.” Despite 15 years of argument over the status of broadband and net neutrality thoroughly confusing the matter (Cherry 2014, Cherry 2006), sector-specific regulation — including common carriage — does not need a finding that the service is a “public utility.” It is enough to observe that digital platforms have clearly reached a level of prominence in our economy and in our lives to constitute a business “affected with the public interest.” Taxi cabs are regulated as common carriers not because they are monopolies or public utilities, but because of their public character and the fact that once one has stepped into a cab and the doors are locked the ability to argue with the driver about the fare in the face of new and sudden demands is profoundly limited.

By the same token, digital platforms have become integral to our economy, with some becoming impossible to avoid in any realistic way. Such a huge percentage of internet traffic flows through Amazon’s cloud networks that a person who blocks all traffic that originates or goes to an Amazon-owned IP address sees entire portions of the World Wide Web go dark (Hill 2019a). Cutting off traffic that flows to or from Google causes web traffic to your device to slow to a veritable crawl as applications and services constantly try to report their location and operation to the “Google mother ship.” (Hill 2019c) Businesses in the United States spent over $65 *billion* dollars in 2016 on “search engine optimization” (SEO), which they deemed essential for trying to land at the top of Google’s search results. Approximately 68 percent of Americans reported getting some news from social media sources in 2018 (Pew Research Center 2018), with more Americans reporting getting news from social media than from traditional newspapers (Shearer 2018).

By any criteria one uses to measure importance in our lives, digital platforms clearly meet them as a sector in need of oversight. No other sector of the economy, with the possible exception of the physical infrastructure through which digital platforms reach their users, has so much power to affect us in so many ways, yet remains subject to such little public oversight. If we are to remain a democratic society where citizens genuinely govern themselves, this needs to change. As was the case of the grain elevators in *Munn v. Illinois*, we have no difficulty concluding that digital platforms are “clothed in the public interest” and that sector-specific regulation is required to protect consumers, promote competition and generally serve the public interest, convenience, and necessity.