A GENEALOGY OF DIGITAL PLATFORM REGULATION

Elettra Bietti*

CITE AS: 7 GEO. L. TECH. REV. 1 (2023)

ABSTRACT

Until recently, the internet was imagined as a decentralized, horizontal, and open space that would foster freedom and equality. Today, it is a collection of walled gardens, a hierarchical ecosystem ruled by a few gatekeepers who leverage access to data and infrastructural capability to enclose users and competitors in relations of dependency. Until recently, the growth of digital platform companies such as Alphabet, Meta and Amazon has been met with regulatory apathy. The intellectual and institutional toolbox available to Western lawyers, policymakers, and thinkers has been grossly inadequate to diagnosing and addressing harm and power formation in the information capitalist era. Now regulatory attitudes toward Big Tech are changing, but how?

To understand current path-dependencies and blind spots, this Article adopts a genealogical methodology, tracing digital platform regulation efforts and controversies between the 1990s and today, interpreting them as efforts to contest and define notions of freedom, law, power, and democracy in a changing society. It isolates three paradigmatic conceptions in early Internet regulation discourse: anarcho-libertarian, liberal, and critical perspectives. It shows that these have shaped a similar spectrum of three views today on how to regulate digital platforms: libertarian aversion to regulation; liberal perspectives on self-regulation, fiduciary obligations, data protection, competition, and utility regulation; and critical accounts of platform governance.

* NYU Law & Cornell Tech, Joint Postdoctoral Fellow. SJD Harvard Law School. Affiliate Berkman Klein Center at Harvard, Yale Law School Information Society Project. I thank Yochai Benkler, Jennifer Cobbe, Julie Cohen, Evelyn Douek, Brenda Dvoskin, Richard Fallon, Urs Gasser, Thomas Kadri, Amy Kapczynski, Daniel Susser, Rory Van Loo, Salome Viljoen for helpful comments and conversations on this work.

Although the move from an Internet of decentralized networks to an Internet of concentrated platforms represents a significant shift, understandings of digital freedom, power, and law have remained relatively constant throughout the Internet's existence. Moving beyond free market blind spots requires embracing the porosity and ambiguities that underlie efforts to redefine platforms as public utilities and efforts to decentralize the digital economy. Efforts in both directions hold promise as ways of breaking with past errors and re-inventing the role of law in the digital economy.

TABLE OF CONTENTS

INTRODUCTION

There is a tendency to think of the power of digital platform companies such as Google, Facebook, or Amazon as intractable. Notwithstanding a plethora of court decisions, antitrust investigations, and innovative legislative reforms, addressing harm in the information era remains a challenge. Harms themselves often appear elusive, impervious to theorizing, and controversial. A question that arises then, is *why are our modes of thinking and governance so poorly equipped to address the experienced erosion of basic human and collective needs in an increasingly digitalized and privatized society*? Answering this question and re-imagining regulation in the digital platform economy requires looking back before moving forward. How did we reach our current condition? What factors shaped who we are as people, as societies, and our decisions regarding the future?

To avoid reproducing platform power in new institutional and technical forms, awareness of past ideologies and utopias and their effects on the present is key. This requires a genealogical account of the evolution of

platform regulatory efforts and of the disagreements that accompanied them. I trace these debates' roots in early discourse about Internet regulation: contestations around the meaning of freedom, law, power, and democracy in digital spaces. I show that the blind spots inherent in early cyberutopian Internet regulation—exhibiting faith in the virtues of deregulation, decentralization, openness, and permissionless innovation—have led to the oligopolistic and privatized platform economy of today. I frame the task of imagining a better Internet and platform economy as an active struggle to move beyond the gravitational pull of free market rationales and toward governing platform environments as utilities or more durably decentralized ecosystems.

I isolate three paradigmatic conceptions as part of the early 1990s Internet regulation debates. First, "anarcho-libertarian" conceptions portrayed the Internet as an autonomous and utopian sphere of free social interaction, immune to external interferences from the state or the law. Second, "liberal" conceptions included a plurality of perspectives on freedom and law. Most notably, Joel Reidenberg and Lawrence Lessig developed the idea that code is law--that law and behavior-modifying regulation exists in digital environments, but that it manifests in different ways, most effectively through different material means. Finally, a smaller group of "critical" thinkers questioned prevalent (liberal) understandings of cyberlaw, showing their individualist and techno-optimistic limitations. The respective normative roots of these three moments and the success of liberal and libertarian paradigms help explain the slow evolution from an open horizontal Internet to a concentrated platform economy. Early libertarian conceptions of freedom from regulation, for instance, have conditioned the reluctant attitude toward market and speech regulation in digital spaces.

How have these three conceptions influenced the platform economy today? Moving from an Internet of networks to an Internet of platforms entailed a move from a decentralized environment where freedom seemed to be the norm, to a centralized and enclosed economy controlled by a few private actors, where freedom is more precarious. Yet, the growth of platform monopolies is a result of the same philosophies and faith in decentralized networks that characterized early Internet utopias. In the digital platform context, anarcho-libertarianism has retreated and morphed into a "libertarian" aversion to regulation as well as a series of market optimistic perspectives. Liberal views continue to expand, forming a vast liberal and "neoliberal" terrain of contestation that has absorbed large parts of anarcho-libertarian ideologies. The liberal terrain now includes proposals for platform self-regulation, fiduciary obligations, data protection, competition, and utility regulation. Finally, the terrain of "critique" remains fertile and is advancing

the overall discourse on platform governance, as questions of power and surveillance capitalism are increasingly central.

I make three substantive claims. First, complacency about notions such as "freedom" and "innovation" must be avoided. The Internet is a very good example of an ecosystem that evolved from a relatively decentralized, hybrid, and democratizing space towards a concentrated, privatized environment that is controlled by a handful of actors. This happened because the celebratory attitude toward freedom and innovation slowed down a full reckoning with the extractive dynamics that accompanied innovative business models. Second, from the 1990s until today, Internet governance has been pervaded by a liberal and neoliberal ideology of free competitive marketplaces, individual preferences, and efficiency maximization. Faith in markets often conflicts with tackling the most pressing questions of the time: disinformation, propaganda, polarization, structural surveillance, discrimination, and racial injustice. Third, a pre-condition of asking, "How ought one regulate digital platforms?" is to engage in prior critical inquiry. Moving forward requires taking history seriously and situating oneself within a broader context and trajectory: a questioning before re-imagining.

Moving beyond the current landscape requires breaking the genealogical cycle of liberal and libertarian hegemony and re-imagining the platform economy as a space that better reflects collective—not just individual or consumerist—needs. I suggest two ways forward: (1) an Internet of utilities, whereby large players are subjected to regulations from the top-down that aim at rendering their actions accountable, transparent, and democratic and/or (2) a more decentralized platform economy, composed of many platform incumbents, competitors, and challengers, all regulated and coordinated through standards, protocols, and other bottom-up and top-down controls. As I also show, these are not mutually exclusive alternatives.

In Part I, I outline early debates on the Internet's origins, as well as how and whether to regulate it. I organize early perceptions of freedom, law, and power in these debates into three views: the anarcho-libertarian moment, the liberal/neoliberal moment, and the critical moment. In Part II, I describe the platform regulation context, explaining path-dependencies, and showing that debates in this space map onto the same tripartite distinction. I describe the libertarian, liberal/neoliberal, and critical tendencies in this new context, as well as ambiguities that underlie them. In Part III, I analyze liberal and neoliberal understandings of platform regulation in more detail—tracing the conceptions of freedom, law, and power they represent. In Part IV, I outline two more visions of platform regulation, utility regulation, and decentralized platform infrastructures. I articulate their ambivalent roots and grapple with them as starting points for further experimentation that departs from liberal/neoliberal path-dependencies.

A. A Word on Methodology

My method in this Article is genealogical. The term "genealogy" was first used in this way by Friedrich Nietzsche.[1] The term has been subsequently borrowed and re-adapted by a number of critical scholars and philosophers, including Michel Foucault.[2] In the words of Bernard Williams, a "genealogy is a narrative that tries to explain a cultural phenomenon by describing a way in which it came about, or could have come about, or might be imagined to have come about."[3] Rather than trace linear chains of causes and effects, this method identifies patterns of influence and conditions for the existence of certain forms of discourse or ways of understanding, interpreting, and speaking about—or acting in—the world. Genealogy unveils the ways in which conceptions of freedom, law, and power have evolved and mutated in response to new infrastructural and material digital conditions. Each of these notions has an intuitive fixed core and a mutable periphery; the controversies around core and periphery are the central theme of this Article. Before proceeding, I briefly set out the bounds within which these concepts have crystallized in digital settings, including four varieties of liberalism.[4]

1. Freedom

"Like happiness and goodness, like nature and reality, the meaning of [freedom] is so porous that there is little interpretation that it seems able to resist." This was famously noted by Isaiah Berlin, who added that there are more than two hundred definitions of "freedom."[5] Freedom is a moral and political ideal that acquires its form and meaning in concrete circumstances,

---

[1] *See generally* FRIEDRICH NIETZSCHE, THE GENEALOGY OF MORALS (1887).

[2] *See* Michel Foucault, *Nietzsche, la généalogie, l'histoire*, *in* DITS ET ÉCRITS (1954-1988) (containing Foucault's writings on genealogy); COLIN KOOPMAN, GENEALOGY AS CRITIQUE. FOUCAULT AND THE PROBLEMS OF MODERNITY (2013) (explaining Foucault's genealogical method); Duncan Kennedy, *A Transnational Genealogy of Proportionality in Private Law*, THE FOUNDATIONS OF EUROPEAN PRIVATE LAW (Roger Brownsword et al. eds., 2011) (regarding the application of the genealogical method to law); *See generally*, Duncan Kennedy, *Savigny's family/patrimony distinction and its place in the global genealogy of classical legal thought*, 58 AM. J. COMPAR. L. 811-42 (2010) (providing an example of genealogical methodology applied to legal scholarship).

[3] BERNARD WILLIAMS, TRUTH AND TRUTHFULNESS: AN ESSAY IN GENEALOGY 20 (2010).

[4] I borrow the term "varieties" from the expression "varieties of capitalism" as used in VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Peter A. Hall & David Soskice eds., 2001). For another use of "varieties of liberalism" *see generally* VARIETIES OF LIBERALISM: CONTEMPORARY CHALLENGES (Jan Harald Alnes & Maunel Toscano eds., 2014).

[5] ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY: AN INAUGURAL LECTURE DELIVERED BEFORE THE UNIVERSITY OF OXFORD ON 31 OCTOBER 1958 6 (1958).

through a determination of legal, political, or infrastructural constraints necessary to ensure individual and collective emancipation in a given context. In the debates over cyberspace and digital platforms, conceptions of freedom vary. They manifest in different contexts as (1) negative autonomy, freedom *from* legal/state interferences, (2) positive autonomy, the freedom to pursue autonomous individual or collective purposes through law and digital infrastructure,[6] or (3) republican conceptions of freedom as non-domination and self-rule.[7]

In this Article, I show that in the abstract, freedom easily becomes a rhetorical weapon—increasingly detached from substantive ideals of emancipation. Instead, freedom is best understood as a situated concept. It must be defined in concrete terms as a set of morally urgent protections that it is feasible to give to persons and populations in a given social and material context.[8]

2. Law

Law has been traditionally defined as the command of a sovereign, backed by threats, or as the divine command of a moral authority, e.g., God.[9] The natural law tradition views law as an expression of moral principle and claims that "unjust law is not law."[10] H.L.A. Hart argues instead that law is the positive (descriptive) union of two types of rules: (primary) rules that impose obligations and (secondary) rules that regulate how primary rules are

---

[6] *See, e.g.*, Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23, 23 (2001) [hereinafter *Siren Songs*] (introducing a theory of autonomy in relation to information); YOCHAI BENKLER, THE WEALTH OF NETWORKS 133 (2006) [hereinafter WEALTH OF NETWORKS] (developing further a theory of positive informational autonomy).

[7] *See, e.g.*, PETTIT, *infra* note 47, AT XV (discussing freedom as non-denomination); *See, e.g.*, K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 TEX. L. REV. 1329, 1339 (2016); K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1629 (2018) [hereinafter *The New Utilities*] (discussing how theories of non-denomination which emerged during the New Deal make sense of today's economic and political challenges).

[8] On contractualism, see generally THOMAS SCANLON, WHAT WE OWE TO EACH OTHER (1998).

[9] *See, e.g.*, JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 18-37 (1832). The latter view is often traditionally attributed to THOMAS AQUINAS, SUMMA THEOLOGIAE (c. 1270) and JOHN LOCKE, ESSAYS ON THE LAW OF NATURE (1676). For a recent natural law account, *see* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980).

[10] *See* John Finnis, *Natural Law Theories*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Summer 2020), https://plato.stanford.edu/archives/sum2020/entries/natural-law-theories/ [https://perma.cc/DQ7A-798S].

established.[11] He claims that to count as a valid law, a given rule must satisfy the "rule of recognition," a meta-rule which acts as a test for legal validity in a given jurisdiction.[12] Views of law can be placed on a spectrum, from perspectives that emphasize law's moral imperatives to perspectives that see law as a factual social practice.

In digital environments, law acts as part of a social context, structuring material infrastructures and social relations, and it acts as a reactive force, enabling societies to self-govern, modify contexts, and effect social and material change. Law's operation can be structural, operating at the level of infrastructure, or procedural, operating more peripherally. Law can be public (pertaining to the relations between persons and public institutions) or private (pertaining to the relations between privates).

3. Power

Power has descriptive and normative components. Descriptively, power is an observable ability to influence. For example, Manuel Castells understands power as "the relational capacity to impose the will and values of [some] social actors over others."[13] Normatively, power is the ability to harmfully interfere with interests that are morally worthy of protection. In grappling with power and constraint, the question for lawyers, scholars, and regulators in the digital economy is not just how to recognize power *ex post* in its most abusive forms, but also how to delay (to the greatest extent possible) its worse formations through *ex ante* preventive measures, including infrastructural, legal, or other social and economic arrangements.

4. Four Branches of Liberalism

Liberalism is an "essentially contested" concept;[14] a progressive project of modernity, a family of political philosophies, or possibly an ideology.[15] Liberalism has been a consensus view in the West since the end of World War II, combining aspirations of human flourishing and democratic rule with free markets.[16] Nancy Rosenblum sums up liberalism as:

> a political theory of limited government, providing institutional guarantees for personal liberty. It is clear enough what

[11] H. L. A. HART, THE CONCEPT OF LAW 96 (1961).
[12] *Id.* at 103.
[13] Manuel Castells, *A Network Theory of Power*, 5 INT'L J. COMMC'N 773, 782 (2011).
[14] *See generally*, Gallie, *infra* note 317.
[15] Duncan Bell, *What Is Liberalism?* 42 POLITICAL THEORY 682, 683 (2014).
[16] *Id.* at 699. Also *see generally* KATRINA FORRESTER, IN THE SHADOW OF JUSTICE: POSTWAR LIBERALISM AND THE REMAKING OF POLITICAL PHILOSOPHY (2019).

> liberalism opposed in the past and must stand opposed to still: political absolutism and arbitrariness, an array of officially sanctioned obstacles to the free exercise of religion, speech and association. It protects at least some forms of private property and prohibits certain uses of wealth in public and private life.[17]

Liberalism exists in many forms, and I discuss some in detail below. Here are four varieties of liberalism one can distinguish. *Classical liberalism*, best illustrated by John Stuart Mill's *On Liberty*,[18] is a nineteenth century version of liberalism that values individual liberty, formal equality, and limits to state power. *Libertarianism*, rampant today in AI, crypto, and gaming contexts,[19] is primarily concerned with minimizing the state's power. In its Anglo-American form, it is an extension of classic liberalism in an individualist and anti-government direction. *Liberal constitutionalism* and *egalitarianism* are twentieth century conceptions of the state. They are rooted in Kantian and Rousseau-ian philosophical traditions and in the 1940s liberal constitutional response to 1930s authoritarian ideologies. The Universal Declaration of Human Rights of 1948, the post-fascist Italian Constitution of 1947, [20] and the German Grundgesetz [21] are liberal constitutionalist instruments. Post-World War II political philosophers and thinkers, particularly in the Anglo-American world, aimed at reconciling markets with democracy.[22] In 1971, John Rawls published his *Theory of Justice* which emphasizes a liberal conception of "justice" that aims at safeguarding liberty, constraints on the state and decentralized markets while promoting equality of opportunity, and a redistributive welfare state.[23] Rawls' followers have taken these ideas in many directions, including that of greater state intervention and equality of social positions.[24] Some egalitarian philosophers have also begun to distance themselves from Rawls, moving towards a more explicit

---

[17] Nancy L. Rosenblum, *Introduction* to LIBERALISM AND THE MORAL LIFE, 5 (Nancy L. Rosenblum ed., Harv. Univ. Press, 1989).
[18] JOHN STUART MILL, ON LIBERTY (1859).
[19] I have discussed libertarianism in detail in Section 1 and refer readers to that discussion. See Section 1, Part I.B.1 and Part II.B.1.
[20] *See*, e.g., COSTITUZIONE DELLA REPUBLICA ITALIANA [CONSTITUTION] arts. 2 & 3 (It.).
[21] Note that human dignity is protected under Article 1 of the Grundgesetz. *See* GRUNDGESETZ [CONSTITUTION] art. 1 (Ger.).
[22] Grewal & Britton-Purdy, *infra* note 260, at 20; Britton-Purdy et al., *infra* note 164.
[23] FORRESTER, *supra* note 16, at xii.
[24] *See*, e.g., JOSEPH FISHKIN, BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY (2013) (arguing for a new theory of opportunity); G. A. COHEN, WHY NOT SOCIALISM? (2009) (making the case for liberal socialism).

endorsement of socialist ideals possibly in tension with liberalism.[25] *Neoliberalism*, as will be discussed further below, is more an ideology than a philosophy. It places the advancement of free markets and individual choices before other political projects. As a mode of governance, it has been dominant in many parts of the world since the 1970s-80s.[26] Neoliberalism has been a fertile object of critique on the part of Foucaultian or Marxist-leaning thinkers.[27] This Article broadly distinguishes neoliberalism as an ideology that pervades real world policy settings from aspirational philosophical conceptions of the state.

In what follows, I outline the changing perception of three of these ideas—freedom, law, power–by comparing how they manifested during early Internet regulation debates with how they manifest in today's digital platform context. I present a number of paradigmatic 'types' and 'sub-types' of regulatory attitudes, some of which reflect the liberal ideas I just introduced. Each conception of regulation will act as a fixed point on a dynamic spectrum of actual worldviews.

I. EARLY VISIONS OF FREEDOM, LAW, AND POWER IN DIGITAL NETWORKS

In this Part, I provide some context for the birth of the Internet and for the debates about law and regulation in cyberspace that accompanied its wider adoption in the 1990s and early 2000s. I identify three paradigmatic early views of Internet regulation, what conceptions of freedom, law, and power underlie them, and I complicate these views with a discussion of broader trends, nuances, and outliers.

A. Internet Infrastructure

As Manuel Castells describes it, the Information Technology Revolution started in the 1970s in the Bay Area partly through the interplay between "macro-research programs and large markets developed by the state, on the one hand, and decentralized innovation stimulated by a culture of technological creativity and role models of fast personal success, on the other hand…"[28] In his words, the new information technologies that resulted from these social and material affordances came to form a new socio-technical paradigm clustering around networks of firms, organizations, and

[25] *See*, e.g., Lea Ypi, *A Sufficiently Just Liberal Society is an Illusion*, 25 RES PUBLICA 463, 463–74 (2019) (arguing that socialism may not be compatible with certain tenets of liberal individualism).
[26] Harvey, *infra* note 260.
[27] *See* Part III.B below.
[28] MANUEL CASTELLS, THE RISE OF THE NETWORK SOCIETY 69 (2d ed. 2010).

institutions[29]—a paradigm largely premised on building things quickly and cheaply, scaling, and reflecting on monetization and large-scale effects later.[30]

The Internet, whose birth date is generally set in 1962, is a mode of communication that operates as a distributed, interoperable, packet-switched network.[31] To put it simply, the Internet is composed of at least three layers sitting on top of, but independent from, one another.[32] The first layer is "physical" (hardware, wires, routers and host computers), the second layer is "logical" (the TCP/IP protocol and other application protocols such as HTTP, FTP, NNTP, SMTP), and the third layer is the "content" layer (including platform services like Facebook or Gmail). Given the layered structure of the Internet, those who control the physical pipes and telecommunications infrastructure (the physical layer) cannot significantly interfere with content that is transmitted in a distributed fashion through the TCP/IP protocol.[33]

Importantly, the Internet became possible thanks to funding and support from the U.S. Department of Defense and the National Science Foundation in the context of American Cold War politics.[34] Portraying it as a private entrepreneurial initiative, born in a laboratory of innovation is an error that has tainted the political trajectory of digital technologies from their infancy.[35]

B. Three Conceptions of Early Internet Regulation

---

[29] *Id.*

[30] *See, e.g.*, Langdon Winner, *Do Artifacts Have Politics*, 109 DAEDALUS 121, 121 (1980); *see also* STATES OF KNOWLEDGE: THE CO-PRODUCTION OF SCIENCE AND THE SOCIAL ORDER 225, 225-53 (Sheila Jasanoff ed., 2004) (regarding the notion of a sociotechnical artifact).

[31] Kevin Werbach, *Digital Tornado: The Internet and Telecommunications Policy* 17 (Fed. Commc'n Comm'n OPP, Working Paper No. 29, 1997).

[32] WEALTH OF NETWORKS, *supra* note 6, at 396.

[33] There are significant exceptions. *See, e.g.*, Olivia Solon, *'It's digital colonialism': how Facebook's free internet service has failed its users*, THE GUARDIAN (July 27, 2017), https://www.theguardian.com/technology/2017/jul/27 /facebook-free-basics-developing-markets [https://perma.cc/8QHK-5MFT] (discussing questions around Facebook's "free basics" initiative)*; see also* Jonathan Zittrain, *Law and Technology: The End of the Generative Internet*, 52 COMMC'NS OF THE ACM 18, 18 (2009) (arguing the dark sides of the move to walled mobile platforms).

[34] *See generally* JANET ABBATE, INVENTING THE INTERNET (2003); KATIE HAFNER & MATTHEW LYON, WHERE WIZARDS STAY UP LATE: THE ORIGINS OF THE INTERNET (1996).

[35] Elaboration on the ambiguous status of the scientific laboratory as an apolitical yet political unit of governance derives from the work of Bruno Latour. *See* Bruno Latour, *Give Me a Laboratory and I Will Raise the World*, *in* THE SCIENCE STUDIES READER 258, 258-75 (Mario Biagioli ed., 1999).

The Internet's open, distributed, and fractal[36] architecture—as well as its relative immunity to centralized control—have led to visions of it as an endless spiral of connectivity with exceptional resilience,[37] an exceptionally generative technology, [38] and an autonomy-enhancing mode of communication. [39] It has been framed as a zone of absolute freedom, immune from interferences from the state or others—a horizontal network devoid of power asymmetries. All these characterizations are underpinned by certain conceptions of freedom, law, and power in digital networks, which I uncover in an attempt to reveal underlying normative patterns that follow us to this day. I identify three archetypal conceptions of the early Internet, and of how to regulate it: libertarian, liberal, and critical conceptions. None of these are completely antithetical. For the most part, these conceptions co-existed and fed into each other in the 1990s. Today, a critical inquiry into their normative underpinnings reveals interesting tensions.

1. Anarcho-Libertarianism

Early accounts of the Internet view it as an autonomous space, separate from the nation-state. Practically, these accounts view the Internet as a private project that evolved into complete autonomy from state control after its initial government funding phase, facilitated by permissionless and material qualities of horizontality, openness, lack of scarcity, and infinite reproducibility. The state's involvement is thus portrayed as light touch, almost nonexistent and unwelcome. John Perry Barlow's February 1996 *A Declaration of the Independence of Cyberspace*, addressed to the "Governments of the Industrial World" is emblematic of early cyberlibertarian and utopian ideas:

> I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather. We have no elected government, nor are we likely to have one, so I address you with no greater authority than that with which liberty itself always speaks. I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor

[36] Werbach, *supra* note 31, at 2.
[37] *Id.* at i.
[38] *See* Jonathan Zittrain, *Introduction* to JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET – AND HOW TO STOP IT (2008). *See also* Zittrain, *The End of the Generative Internet*, *supra* note 33.
[39] WEALTH OF NETWORKS, *supra* note 6, at 133.

> do you possess any methods of enforcement we have true reason to fear.[40]

Barlow's credo is paradigmatic of an era of optimism in which the Internet was viewed as a utopian and anarchic space for open access, social interaction, and creative freedom. Barlow indeed calls for anarchy and for the autonomy of cyberspace from government control, in some ways imagining a future for the Internet.[41]

Around the same time, two legal scholars, David Johnson and David Post, published an article entitled "Law and Borders: The Rise of Law in Cyberspace" expressing similar views.[42] They argue that cyberspace is a self-standing geographical territory that challenges the territoriality of traditional nation-state law. The separateness of cyberspace as an environment makes it a *sui generis* territory, a sovereign jurisdiction that begs for internal rules and new forms of internal self-governance. Such territory, Johnson and Post argue, is capable of being governed by "its own effective legal institutions."[43] They argue that law in cyberspace must reflect cyberspace's special characteristics.

Cyberspace is imagined by Barlow, Johnson, Post, and ultimately, the U.S. Supreme Court in *Reno v. ACLU*,[44] as a "place" which echoes the imagery of the "Wild West." It is an autonomous territory that is independent, immune from external pressures, and capable of self-governance.[45] The illusion was that online governance could be treated as distinct from offline governance. This imagined separateness contributed to obscuring some digital issues to this day.[46]

---

[40] *See* John Perry Barlow, *A Declaration of Independence of Cyberspace*, ELEC. FRONTIER FOUND. (Feb. 8, 1996), https://www.eff.org/cyberspace-independence [https://perma.cc/VAT5-JU72].

[41] Cindy Cohn, *Inventing the Future: Barlow and Beyond*, 18 DUKE L. & TECH. REV. 69, 70 (2019).

[42] David R. Johnson & David Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1367-1402 (1996).

[43] *Id.* at 1387.

[44] Reno v. American Civil Liberties Union, 521 U.S. 844, 851 (1997) ("[A] unique medium-known to its users as 'cyberspace'-located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.").

[45] *See, e.g.*, Jennifer Bussell, *Cyberspace*, BRITANNICA (2013). *Cf.* BRIAN KAHIN & CHARLES NESSON (EDS.), BORDERS IN CYBERSPACE: INFORMATION POLICY AND THE GLOBAL INFORMATION INFRASTRUCTURE (1996) (for other perspectives on cyberspace as a 'place'); PETER LUDLOW (ED.), CRYPTO ANARCHY, CYBERSTATES, AND PIRATE UTOPIAS (2001). *But see* Jonathan J. Rusch, *Cyberspace and the "Devil's Hatband"*, 24 SEATTLE U. L. REV. 577 (2000); Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439–519 (2003).

[46] Yochai Benkler, *A Political Economy of Utopia?* 18 DUKE L. & TECH. REV. 78, 79 (2019) (arguing that cyberutopianism disguised emerging manifestations of power); Julie E. Cohen,

Anarcho-libertarian views are premised on three fallacies. The first is a belief that freedom means the absence of legal-governmental constraints and exists in a legal-institutional and power vacuum.[47] The second is a belief that laws and public institutions are inherently prone to abuse in a way that is qualitatively different from abuse by private actors. The third related belief is that politics, authority, and power take tractable non-threatening forms in digital networks; for example, networked horizontal relations are necessarily just relations of equality. Cyber-anarcho-libertarian views coupled these fallacies with faith in the political neutrality of code.

Anarcho-libertarianism fits within broader libertarian trends in law and political philosophy.[48] The Anglo-American version of libertarianism places absolute primacy on individual freedom from restraint and almost entirely disregards collective goods.[49] It views individual rights and free markets as natural and not as granted or constructed by the state. It views the state's role and the rule of law in a minimalist way: state power must be limited to police power and the enforcement of private transactions.

Anarcho-libertarianism also differs from other forms of libertarianism because it is distinctively anarchic.[50] Anarchism as a philosophy justifies forms of social and collective organization independent from state institutions or other concentrated power formations.[51] Although a less sophisticated version of libertarian anarchism attaches negative value to law and government action in all of its forms, a more sophisticated version is primarily

Internet Utopianism and the Practical Inevitability of Law, 18 DUKE L. & TECH. REV. 85, 86 (2019) (arguing that cyberutopianism simplified the nature of law with consequences for today's digital economy); Elettra Bietti, *Self-Regulating Platforms and Antitrust Justice*, 101 TEX. L. REV. 165 (forthcoming 2022) (arguing that the imagined separateness of digital markets from legal and political power can be noticed in antitrust law).

[47] On the philosophical distinction between freedom from restraint and freedom from domination, see PHILIP PETTIT, JUST FREEDOM: A MORAL COMPASS FOR A COMPLEX WORLD xv (2014); ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) 45 (2017).

[48] These include both individualist and collectivist philosophies. Noam Chomsky, for example, identifies as a libertarian socialist. *See* Brian Leiter, *Chomsky on Libertarianism and Its Meaning*, LEITER REPORTS: A PHILOSOPHY BLOG (Aug. 11, 2009), https://leiterreports.typepad.com/blog/2009/08/chomsky-on-libertarianism-and-its-meaning.html [https://perma.cc/2GY3-2LMC].

[49] *See generally* ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974); *see also* JAN NARVESON, THE LIBERTARIAN IDEA (1988); AYN RAND, THE VIRTUE OF SELFISHNESS (1964).

[50] *See* Eben Moglen, *Anarchism Triumphant: Free Software and the Death of Copyright*, 4 FIRST MONDAY 1, 1 (1999) (where cyberanarchist thinking is applied to software copyright).

[51] Andrew Fiala, *Anarchism*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter Ed. 2021).

concerned with bureaucracies' historical tendency to compound inequities.[52] In this sense, unlike some libertarians, anarchists are concerned not with the state as the sole source of harmful power, but with power in all of its concentrated forms. The propensity of state institutions to ossify creativity and social dynamism was a concern for cyber-anarchists who instead saw the internet as a window on new social and economic possibilities

2. Liberalism & Techno-Solutionism

In response to the rise of anarcho-libertarianism, scholars began to develop critiques of its limitations or alternative views on the Internet's nature and the role of law in its regulation. These critiques included liberal positions. Liberals began to reflect on the role and nature of law in cyberspace, asking how law and government power had manifested in these spaces and how to reimagine and channel them to protect rather than undermine individual freedom. Liberals understood that freedom was not just freedom *from* government or top-down interferences, and that the Internet required a positive conception of the role of law in protecting and enabling emancipation. Without such a vision, the Internet would continue to evolve towards control and tyranny.[53]

Paradigmatic among liberal arguments against libertarianism in cyberspace are the positions of Lawrence Lessig and Joel Reidenberg.[54] In the 1990s, they showed that code and technological infrastructure could act as functional equivalents to government laws in cyberspace.

Reidenberg argued that informal technical customary rules already existed and governed information flows. He called them "*Lex Informatica*," a new kind of customary transnational law, comparable to *Lex Mercatoria*.[55] *Lex Informatica* has three characteristics: it does not depend on national borders; it is flexible and customizable through a variety of technical mechanisms; and it automatically self-enforces without compliance checks and without requiring third party oversight.[56] Reidenberg's *Lex Informatica*

---

[52] *See, e.g.*, Eben Moglen, *The Invisible Barbecue*, in *Symposium: Telecommunications Law: Unscrambling the Signals, Unbundling the Law*, 97 COLUM. L. REV. 945, 945 (1997).

[53] For examples of how legal scholars progressively moved away from anarcho-libertarian discourses, *see, e.g.*, Rusch, *supra* note 45, at 579; Maureen A. O'Rourke, *Property Rights and Competition on the Internet: In Search of an Appropriate Analogy*, 16 HIGH TECH. L. J. 561, 590-91 (2001); Hunter, *supra* note 45; Mark A. Lemley, *Place and Cyberspace*, 91 CAL. L. REV. 521, 521-22 (2003).

[54] Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553, 553-54 (1998); LESSIG, *infra* note 57; LESSIG, *infra* note 60.

[55] Reidenberg, *supra* note 54, at 555.

[56] *Id.* at 577.

is an example of techno-optimism that only peripherally conflicted with anarcho-libertarian ideals, adding some visibility to the forms of law that already governed cyberspace.

Lessig also claimed that code was functionally equivalent to law in cyberspace and could self-enforce in the absence of an identifiable state or other sovereign.[57] However, he also adopted a clearer liberal stance on the relationship between law and freedom. His 1999 paper, "The Laws of Cyberspace" argues that, contrary to libertarian beliefs, cyberspace is not a place where freedom (from regulation) is assured:

> Cyberspace has the potential to be the most fully, and extensively, regulated space that we have ever known—anywhere, at any time in our history. It has the potential to be the antithesis of a space of freedom. And unless we understand this potential, unless we see how this might be, we are likely to sleep through this transition from freedom into control.[58]

In his book *Code v2*, Lessig warned once again of anarcho-libertarianism's potential to lead to a state of privatized control and tyranny, analogizing the Internet to the political uncertainties of 1989.[59] As he said:

> Liberty in cyberspace will not come from the absence of the state. Liberty there, as anywhere, will come from a state of a certain kind. We build a world where freedom can flourish not by removing from society any self-conscious control, but by setting it in a place where a particular kind of self-conscious control survives. We build liberty as our founders did, by setting society upon a certain *constitution*.[60]

Referring explicitly to John Stuart Mill in *On Liberty*,[61] Lessig also stated that, contrary to libertarians' focus on reducing government's power as an end in itself, Mill "was not concerned with the source of the threat to liberty. His concern was with liberty."[62]

---

[57] LAWRENCE LESSIG, The Laws of Cyberspace (1998) (unpublished manuscript), https://cyber.harvard.edu/works/lessig/laws_cyberspace.pdf [**https://perma.cc/VQZ8-W68D**].
[58] *Id.* at 3.
[59] LESSIG, *infra* note 60, at 1-2. The first version of this book, CODE AND OTHER LAWS OF CYBERSPACE, was published in 1999.
[60] LAWRENCE LESSIG, CODE: VERSION 2.0 4 (2006).
[61] JOHN STUART MILL, ON LIBERTY (1859).
[62] LESSIG, *supra* note 60, at 120.

Lessig's 1990s view, like Mill's, is consequentialist. His view of regulation demonstrates it. Lessig understood regulation as anything that modifies behavior.[63] He envisaged four modalities of regulation: laws, markets, social norms, and code or architecture.[64] Although each modality operates in its own way to modify behavior and resembles law, code is the most powerful—and dangerous—regulatory modality in cyberspace:[65] "[t]he code of cyberspace is itself a kind of sovereign. It is a competing sovereign. The code is itself a force that imposes its own rules on people who are there, but the people who are there are also the people who are here."[66]

Reidenberg and Lessig's views of law in cyberspace expanded the horizon of possibilities for understanding and regulating the Internet. However, both views remained neoliberal. The underlying vision of law in Reidenberg's and Lessig's accounts is functional, instrumental, and goal-directed: law or regulation is that which allows an authority to modify behavior in predetermined ways. Freedom exists because of regulatory constraint, but remains primarily conceived of as an individual sphere of autonomy and self-determination. Individual freedoms flourish in well-designed, functioning marketplaces and social settings. Causes have linear consequences, and consequences have clear causes. The stories Reidenberg and Lessig tell are simple and transparent. They are about simplifying governance conundrums by calling them problems of "regulation." They are about delegating some governance problems to code and engineers and others to politicians or lawyers, with a clear division of labor. They are about using the language of costs, benefits, taxes, and efficiencies to solve unquantifiable risks. They eliminate complexities, polish nuances, and present governance problems as ones that can be solved with pen, paper, and some planning. Questions of power, distribution, or unpredictable systemic risk are almost absent from these stories.

3. Critical Views of Cyberspace

Beyond anarcho-libertarianism and law as code, the early era of Internet regulation also birthed critical perspectives. Unlike anarcho-libertarians, who focus on negative freedom, and liberals, who focus on

---

[63] *See, e.g.*, Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662 n.1 (1998) ("[By regulation] I mean the constraining effect of some action, or policy, whether intended by anyone or not. In this sense, the sun regulates the day, or a market has a regulating effect on the supply of oranges.").
[64] LESSIG, *supra* note 60, at 2-3.
[65] *Id.* at 4.
[66] *Id.* at 13.

enhancing freedom through law and regulation, critics in this space tackle questions of power, equality, and distribution.

Paradigmatic among critical views are Batya Friedman and Helen Nissenbaum's "Bias in Computer Systems," which first highlighted the problem of emergent bias in software,[67] and James Boyle's "Foucault in Cyberspace," which shed light on cyberlibertarianism's limits.[68] Foucault viewed power not as power exercised in discrete linear ways by the state over citizens, but rather as a more diffuse "disciplining" force which manifests through social and material contexts.[69] Boyle adopted this understanding of power to challenge two aspects of Internet regulation. First, he argued that libertarians' focus on the power of the state obscures other forms of power that arise in digital environments: the power of private entities over one another in unregulated digital platforms, for example. Second, he challenged the techno-solutionist or techno-optimist turn in Internet regulation because it also fails to take seriously how power manifests *within* technological systems. For example, "technologies of freedom" actually require an intensification of the mechanisms of surveillance, public and private.[70] Further,

> the attraction of technical solutions is that they elude the question of power—both private and public—in the first place. If we are to have some alternatives to the jurisprudence of digital libertarianism, we will have to offer a richer picture of Internet politics than that of the coercive (but impotent) state and the neutral and facilitative technology.[71]

Boyle did not simply oppose libertarian trends; he also challenged liberal views insofar as they do not account for how power manifests in and through technological artifacts. While Lessig's approach remained embedded in a linear account of power as sovereignty, Boyle went further, seeing technologies as artifacts that channel power and shape political realities. His argument did not just point to the limits of digital libertarianism, but also embraced understandings of technology as political in ways aligned with

---

[67] *See generally* Batya Friedman & Helen Nissenbaum, *Bias in Computer Systems*, 14 ACM TRANSACTIONS ON INFO. SYS. 330, 330-47 (1996).
[68] *See generally* James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 UNIV. OF CINCINNATI L. REV. 177 (1997).
[69] *See generally* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).
[70] Boyle, *supra* note 68, at 204.
[71] *Id*. at 205.

Langdon Winner and the Science and Technology Studies (STS) school of thought.[72]

A number of other critical accounts emerged during the same period, contesting the private nature of Internet governance and highlighting the biases, inequalities, and asymmetries of power that resulted from moves to enclose digital resources. These critiques adopted different theoretical lenses. Some were anarcho-socialist.[73] Others more squarely adopted a Critical Legal Studies (CLS) perspective.[74] A third group oscillated between liberal, anarcho-libertarian, and critical stances.[75] Among the critical accounts in this third group are Oscar Gandy's prescient perspective on surveillance in *The Panoptic Sort*,[76] as well as Julie Cohen's distinctive critique of the political neutrality of private ordering in cyberspace and its distributive and anti-democratic consequences.[77] As Cohen puts it, "[d]igital technology is theorized as politically neutral and developmentally linear; the problem, if there is one, lies in humanizing its presumptively inhuman face."[78] Yochai Benkler also began to develop a critique of the enclosure movement and to call for peer-to-peer and commons-based governance, an important call to action as the "Copyright Wars" advanced.[79]

C. Law, Liberty, and Power in Networks

---

[72] On the point of technology being political, *see* generally Winner, *supra* note 30. STS, an acronym that stands for Science, Technology and Society or Science and Technology Studies, is an interdisciplinary field that understands science and technology in their historical, cultural, and social contexts.

[73] *See generally* Moglen, *supra* note 50.

[74] *See generally* Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 MICH. L. REV. 462 (1998).

[75] For middle ground positions on these debates, see Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L. J. 215, 216 (1996) [hereinafter *Cyberlaw and Social Change*]; *see also* Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 CARDOZO ARTS & ENT. L. J. 345 (1995) [hereinafter *Copyright Law and Social Dialogue on the Information Superhighway*]; Yochai Benkler, *Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment*, 11 HARV. J. L. & TECH. 287 (1998) [hereinafter *Overcoming Agoraphobia*]; Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 BERK. L. & TECH. J. 535 (2000) [hereinafter *Constitutional Bounds of Database Protection*]; Benkler, *Siren Songs*, *supra* note 6.

[76] *See generally* OSCAR H. GANDY, THE PANOPTIC SORT: A POLITICAL ECONOMY OF PERSONAL INFORMATION (Oxford University Press 2d ed., 2021) (1993).

[77] Cohen, *supra* note 74, at 464, 466.

[78] *Id.* at 561.

[79] *See Constitutional Bounds of Database Protection*, *supra* note 75, at 569-74.

Having articulated a tripartite division of perspectives on Internet regulation, it is time to address a few cross-cutting themes. Early controversies around free software and copyright in digital assets map onto the conceptions of cyberspace I discussed. Much debate focused on whether the U.S. government and other governments could impose proprietary restrictions on digital assets such as software or content, notwithstanding the jurisdictional and material challenges posed by the Internet. In the 1990s and 2000s, intellectual property (IP) controversies crystallized in the form of a "Copyright War" between software and content companies who wanted to assert ownership rights and openness advocates who imagined cyberspace as a utopian and open environment that required different forms of governance.

The history of free software is illustrative. Free software emerged in the 1980s in response to Unix, a proprietary operating system developed by Bell Labs in the 1960s through the 1970s.[80] As Unix gained in prominence, engineers, including Richard Stallman, began a crusade to liberate software from its proprietary ties.[81] This led to the creation of the GNU General Public License ("GNU GPL"): an open license that requires anyone reusing, buying or redistributing software to comply with the terms of the original license.[82] The process of popularizing free software was completed by a Finnish student, Linus Torvalds, who created Linux in the early 1990s.

Connected to the movement to liberate software was a movement to liberate content and other copyrightable material. Taking a stance against digital copyright John Perry Barlow argued that copyright protected the bottles or containers within which ideas were placed and that the Internet had made these containers obsolete: "[A]s information enters Cyberspace, the native home of Mind, these bottles are vanishing. With the advent of digitization, it is now possible to replace all previous information storage forms with one meta-bottle: complex—and highly liquid—patterns of ones and zeros."[83] Copyright disputes also hid conundrums about freedom, equality, and democracy.[84] As Niva Elkin-Koren put it in 1994, "What began as a controversy over the appropriateness of copyright law to accommodate… technological changes, became a political battle over the distribution of the potential gains that cyberspace offers."[85]

---

[80] *See, e.g.*, Moglen, *supra* note 50.
[81] *Id.* at 20.
[82] *Id.* at 20-21.
[83] John Perry Barlow, *Selling Wine Without Bottles: The Economy of Mind on the Global Net*, ELEC. FRONTIER FOUND., https://www.eff.org/pages/selling-wine-without-bottles-economy-mind-global-net [https://perma.cc/VQR3-P4F2].
[84] Yochai Benkler, *The Battle Over the Institutional Ecosystem in the Digital Environment*, 44 COMMS. OF THE ACM 84 (2001).
[85] Elkin-Koren, *Cyberlaw and Social Change*, *supra* note 75, at 216.; *see also* Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway*, *supra* note 75.

In a 1999 article entitled "Anarchism Triumphant,"[86] Eben Moglen, general counsel for the Free Software Foundation and Columbia Law professor, argued that free software was a first step towards a more general non-proprietary, freer, anarchic mode of Internet governance that could do away with intellectual property and other proprietary constraints. He grounded his argument for anarchism in the history of free software and the specific characteristics and incentives that applied to creativity and participation online. A few years later in 2001, Lawrence Lessig, Hal Abelson, and Eric Eldred founded Creative Commons, a nonprofit organization that developed and popularized open licenses similar to the GNU GPL license but which would apply to digital content.[87]

Around that same time, many critics began to contest the privatized nature of Internet governance. They highlighted the inequalities, asymmetries, and power concentration that emerged as a result of movements to enclose digital resources. Like Moglen, Yochai Benkler began to develop a theory of open governance and information commons, regarding wireless networks and spectrum rights, intellectual property, and private ordering in digital markets.[88] Julie Cohen argued that the politics of intellectual property rights governance had distributive and anti-democratic consequences.[89] Batya Friedman and Helen Nissenbaum demonstrated that computers encode human biases, opening the door to critiques of private control over digital infrastructures like search.[90]

Early disputes around intellectual property rights and the political economy of networks show that the boundaries between anarcho-libertarian, liberal, and critical positions are not clear-cut. They also highlight path-dependencies in Internet law. It is helpful to restate three salient aspects of the 1990s discourse.

First, the rhetoric of freedom and anarchy played a crucial role in strengthening commercial interests on the Internet. It reinforced and naturalized visions of the Internet as both an apolitical laboratory of innovation and a frictionless space governed by individual choices, both of which facilitated the accumulation of digital power and control in the hands of some, and not others. This happened through the assertion of intellectual property rights, but it also occurred more subtly, through contractual and proprietary schemes over digital assets such as data. As Cohen, Boyle, Lessig, and others

---

[86] Moglen, *supra* note 50.
[87] *See About the Licenses*, *CREATIVE* COMMONS, (last visited Oct. 29, 2022) [https://perma.cc/T2ZT-FX9X].
[88] *Overcoming Agoraphobia*, *supra* note 75; *Constitutional Bounds of Database* Protection, *supra* note 75; *Siren Songs*, *supra* note 6.
[89] Cohen, *supra* note 74, at 464.
[90] Friedman & Nissenbaum, *supra* note 67, at 332.

highlighted early on, the move toward private governance and governance-by-code opened the door to widespread and poorly regulated surveillance practices that remained partly invisible, disguised under the facial neutrality of code and cyber-economists' efficiency-based arguments.[91]

Second, anarcho-libertarian positions are latently ambiguous. As Boyle pointed out, it is as if libertarians "couldn't agree on whether [their] motto was to be 'Taxation is theft' or 'Property is theft'."[92] This conflation of libertarian individualism and anarcho-socialist ideals of commons-based governance remains salient in digital governance debates today. It has had profound implications on the rise and success of digital platform companies, particularly ones that purport to exist as communities and cooperative spaces while being in fact governed by individual shareholders, preference aggregation, and the urge to grow user-bases and advertising profits.

Third, there are important disagreements on the nature of power online. Many 1990s scholars took power to mean either discrete exercises of state sovereignty or visible forms of private influence. Only a few of these early thinkers openly tried to stretch the understanding of power beyond visible causal bounds, to include its less visible social and economic manifestations.

II. FROM NETWORKS TO PLATFORMS: FRAMING PLATFORM GOVERNANCE

Moving from the 1990's Internet of networks to today's Internet of platforms means moving from a decentralized hybrid to a centralized space controlled by platform gatekeepers. In the decade between the mid-1990s and the mid-2010s, controversies arose that extended the Patent Wars of the 1990s to the copyright and net neutrality fronts. Paradoxically, these controversies leveraged the same rhetoric of freedom, innovation, and creativity to help consolidate an Internet dominated by a few infrastructural monopolies.[93] In spite of a changed economic structure, today's platform governance debates are surprisingly aligned with earlier 1990s debates. To date, these visions of law and regulation have proved insufficient to tame abuses of platform power.

Julie Cohen defines information platforms as "intermediar[ies] that use… data-driven, algorithmic methods and standardized, modular

---

[91] Cohen, *supra* note 74; *see also* Lessig, *supra* note 57, at 3, 6; Boyle, *supra* note 68, at 205.
[92] Boyle, *supra* note 68, at 182.
[93] *See, e.g.*, RUSSELL NEWMAN, THE PARADOXES OF NETWORK NEUTRALITIES 10 (2019) (arguing that net neutrality is "the most neoliberal of neoliberal debates" and that "in perverse ways, it actually served to solidify the primacy of a commercially dominant Internet."). On the continuation of the IP controversies in the 2010s and their political economy repercussions, see, e.g., Yochai Benkler, *Wikileaks and the Protect-IP Act: A New Public-Private Threat to the Internet Commons*, 140 DAEDALUS 154, 154 (2011); Yochai Benkler, et al., *Social Mobilization and the Networked Public Sphere: Mapping the SOPA-PIPA Debate*, 16 Berkman CTR. RSCH. PUBL'N (2013), [https://perma.cc/ZG83-EHK5].

interconnection protocols to facilitate digitally networked interactions and transactions." [94] She understands platforms as a *sui generis* form of intermediary that "replace[s] (and rematerialize[s])" markets, constituting a new kind of market form for the information era.[95] Many scholars have taken platforms' undisputable significance in today's political economy as indication of their exceptional historical importance and have begun to analogize platforms to sovereigns, governors, or constitutional spaces in ways that are reminiscent of early talk of sovereignty in cyberspace.[96] Throughout this Article, I adopt Cohen's definition of the platform as a versatile information intermediary that gives rise to specific social, political, technical, and economic affordances.

The notion of a "digital platform" refers to a wide variety of companies, business models, and not-for-profit models that form the bulk of today's Internet and mobile browsing activity. While the early Internet was very diverse—with bulletin boards, individual blogs, small websites, and a variety of bottom-up initiatives—today's Internet is far more monolithic and concentrated. For example, Americans spend more than 40% of their mobile time on Google/Alphabet and Facebook apps,[97] and the same two platforms (plus Verizon) had the highest number of U.S. web visitors in April, 2021.[98] A large share of the money spent on the Internet in 2021 has gone to Amazon, the U.S. tech company with the highest market capitalization, the highest revenues, and largest revenue growth that year.[99] These platforms also have

---

[94] Julie E. Cohen, *Tailoring Election Regulation: The Platform Is the Frame*, 4 GEO. L. TECH. REV. 641, 656 (2020).

[95] JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM 41, 42 (2019) [hereinafter TRUTH AND POWER].

[96] Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1662 (2018); David Pozen, *Authoritarian Constitutionalism in Facebookland*, KNIGHT FIRST AMEND. INST. (Oct. 30, 2018), https://knightcolumbia.org/content/authoritarian-constitutionalism-facebookland [https://perma.cc/FAW9-58Z4].

[97] *Leading mobile app publishers in the United States as of September 2019, by share of total app time spent*, STATISTA (2019), https://www.statista.com/statistics/235048/share-of-time-spent-on-mobile-apps-by-ranking/ [https://perma.cc/Y6M2-G62C].

[98] *Most popular multi-platform web properties in the United States in April 2021, based on number of unique visitors (in millions)*, STATISTA (2021), https://www.statista.com/statistics/271412/most-visited-us-web-properties-based-on-number-of-visitors/ [https://perma.cc/XHY5-GDX6]. A similar trend can be seen in the UK where users spend most of their online time on Google and Facebook sites. *See* Consumer Markets Authority, Online platforms and digital advertising 48, fig.2.2 (July 1, 2020) https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf [https://perma.cc/MVU3-MUW3].

[99] *See Market capitalization of the largest internet companies worldwide as of February 2021 (in billion U.S. dollars)*, STATISTA, https://www.statista.com/statistics/277483/market-value-of-the-largest-internet-companies-worldwide/ [https://perma.cc/KLG4-5SMC];

large transnational user-bases. For example, for December 2020, Meta reported 2.60 billion active daily users globally across its main services (Facebook, Instagram, WhatsApp, and Messenger).[100]

In this Part, I focus on the birth and success of three key information platform companies, Alphabet, Amazon, Meta, and some of their subsidiaries and affiliates. I then describe current digital platform governance efforts, and the visions of law, freedom, and power that underlie them. I divide these efforts into three overarching categories that match earlier visions of Internet regulation: libertarian/de-regulatory efforts; liberal and neoliberal efforts; and critical and socialist efforts. The boundaries between these archetypal visions of platform regulation are contested and continuously in the making. Still, liberal and neoliberal visions undeniably constitute the bulk of current proposals and the largest terrain of contestation today. Their hegemony originated in 1990s Internet cyberutopias and in broader neoliberal trends in the Western world. Despite a dramatically altered landscape, early cyberlibertarianism and current neoliberal platform governance share many normative commitments and regulatory blind spots.

A. The Platform Economy

Before turning to freedom, law, and power in the platform context, an overview of the platform economy is necessary. What are digital platforms? How do they operate? What conditioned their growth and consolidation from Internet roots to today?

1. From Networks to Platforms

The Internet of today is very different from the Internet of the 1990s. It is far less "open" and decentralized. One reason for this is the expansion of Internet access via closed mobile and tablet devices that do not work according to a peer-to-peer model, corresponding to a proliferation of app stores and apps and the emergence and success of an Internet of "walled gardens."[101] This

Leading online companies ranked by revenue from 2017 to 2019 (in billion U.S. dollars), STATISTA, https://www.statista.com/statistics/277123/internet-companies-revenue/ [https://perma.cc/SEZ7-XN6Q].

[100] Press Release, *Facebook*, Facebook *Reports Fourth Quarter and Full Year 2020 Results* (Jan. 27, 2021), https://investor.fb.com/investor-news/press-release-details/2021/Facebook-Reports-Fourth-Quarter-and-Full-Year-2020-Results/default.aspx [https://perma.cc/9QMG-Q2DC].

[101] *See* ZITTRAIN, THE FUTURE OF THE INTERNET, *supra* note 38, at 2-3 (describing the increasingly gated and enclosed evolution of the Internet and asking how we might stop such enclosure trend). For a hopeful argument prompting scrutiny of points of control, *see* Yochai Benkler, *Degrees of Freedom, Dimensions of Power*, 145 DAEDALUS 18 (2016).

evolution is visible everywhere, and it is particularly salient in developing countries where the Internet is accessed primarily via mobile devices.[102] Another reason is that centralized intermediaries increasingly control Internet and mobile traffic: people search for websites through Google Search instead of typing web addresses; they access the Internet through browsers controlled by Google, Microsoft, and Mozilla; they communicate with friends through centralized messaging and email services largely controlled by Google, Microsoft, or social media platforms. People buy goods primarily on centralized e-commerce marketplaces like Amazon. Moreover, they increasingly purchase access rights and monthly subscriptions to goods and services, not physical ownership of goods.[103] Through a mix of multi-sided platform effects, network externalities, subscription models and personalized price structures,[104] platform gatekeepers have arguably changed not only the Internet but also production and consumption in the 21st century.

These trends have led to optimism and celebration on the part of economists, who see platforms as infrastructures that promote efficiency, perfect information, and optimal production and consumption levels. Privacy advocates, on the other hand, worry about the increasing enclosure of consumers in relationships of dependence, where data capture and commodification of life have become the default. As a result of the rise and growing importance of platforms, the average user's experience of the Internet is no longer that of serendipitous exchange in a decentralized ecosystem, and instead has become an experience of consumption within a controlled proprietary environment.

2. Platform Gatekeepers

When speaking of information platforms, a frequent question is: which types of platforms or organizations? As discussed above, the notion of a "platform" encompasses an incredibly diverse array of companies, organization structures, and business models, that range from very large to medium- and small-sized entities. I focus primarily on a handful of large,

---

[102] *See, e.g.*, *Desktop vs Mobile vs Tablet Market Share Africa (Apr 2020 - Apr 2021)*, STATCOUNTER, https://gs.statcounter.com/platform-market-share/desktop-mobile-tablet/africa [https://perma.cc/VMV3-VKNR]; *cf. Desktop vs Mobile vs Tablet Market Share North America (Apr 2020 - Apr 2021)*, STATCOUNTER, https://gs.statcounter.com/platform-market-share/desktop-mobile-tablet/north-america [https://perma.cc/V5HT-S8UA].

[103] *See* Shelly Kreiczer-Levy, *Share, Own, Access*, 36 YALE L. & POL'Y REV. 155, 184 (2017).

[104] Thomas Nachbar, *Platform Effects*, 62 JURIMETRICS J. 1, 7-9 (2021), https://ssrn.com/abstract=3775205 [https://perma.cc/C7R3-AD8X]; Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets,* 1 J. EUR. ECON. ASS'N 990 (2003).

private technology companies and the digital platforms that they manage. The reason for this is that these actors operate across content and other digital services; they are among the largest, most successful private platform companies in existence, and, as such, they raise key questions of power, freedom, and regulation, including regarding privacy and speech.

Amazon was founded by Jeff Bezos in 1994 as an online bookseller.[105] Jeff Bezos's motivation was to take advantage of the digital momentum of the 1990s and create a platform that could coordinate infinite preferences and infinite supplies.[106] The company now operates across a range of direct-to-consumer and business-to-business market segments, including e-commerce, consumer electronics, film production, groceries, cloud services and web hosting.[107] Amazon made $280 billion in total revenues in 2019, up 20 percent from 2018. It was the second largest American company in 2019,[108] one of America's most highly valued companies on the New York Stock Exchange, and America's largest employer with more than 500,000 employees in July 2020.[109]

Google launched in 1998 as a general search engine.[110] Its key innovation was the PageRank algorithm, which allows users to find links ranked by relevance based on how many other websites linked to them.[111] Between 2000 and 2020, Google grew by acquiring more than 260

---

[105] Amazon.com, Inc., Annual Report (Form 10-K) 3 (Jan. 31, 2020), http://d18rn0p25nwr6d.cloudfront.net/CIK-0001018724/4d39f579-19d8-4119-b087-ee618abf82d6.pdf [https://perma.cc/7DKZ-PHDP].

[106] TOM ROBINSON, BEZOS: AMAZON.COM ARCHITECT 9 (2010) ("Bezos learned that Internet use was increasing by more than 2300 percent a year. He realized the day would come when that increased use would include a way to conduct business… *that started me… thinking*.").

[107] H. COMM. ON the Judiciary, 116TH CONG., INVESTIGATION *of Competition in the Digital Marketplace: Majority Staff Report and Recommendations* 247 (Comm. Print 2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf [https://perma.cc/WEF5-9QMB] [hereinafter House Report].

[108] *List of largest companies by revenue*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_largest_companies_by_revenue#cite_note-2 [https://perma.cc/6M6U-FL56].

[109] Press Release, Amazon, *Amazon.com Announces Second Quarter Results* 14 (July 30, 2020), https://s2.q4cdn.com/299287126/files/doc_financials/2020/q2/Q2-2020-Amazon-Earnings-Release.pdf [https://perma.cc/HUZ4-BGZH]; Charles Duhigg, *Is Amazon Unstoppable?*, THE NEW YORKER (Oct. 10, 2019), https://www.newyorker.com/magazine/2019/10/21/is-amazon-unstoppable [https://perma.cc/HD5B-8GT2].

[110] Google Inc., Registration Statement (Form S-1) 1 (Apr. 29, 2004), https://www.sec.gov/Archives/edgar/data/1288776/000119312504073639/ds1.htm [https://perma.cc/3TZW-2BHV].

[111] Sergey Brin & Larry Page, *The Anatomy of a Large-Scale Hypertextual Web Search Engine*, 30 COMPUT. NETWORKS AND ISDN SYS. 107, 109-110 (1998), http://infolab.stanford.edu/pub/papers/google.pdf [https://perma.cc/W8FB-8ZJC].

companies,[112] including user-generated video company YouTube in 2006,[113] adtech player DoubleClick in 2007,[114] Motorola Mobility in 2011,[115] Waze in 2013,[116] DeepMind in 2014,[117] and FitBit in 2021.[118] In 2015, Google underwent an internal restructuring and became a wholly owned subsidiary of its parent company, Alphabet.[119] Today, Alphabet counts many products with more than a billion users each: Search, Gmail, Android, Chrome, Maps, Drive, Photos, Play Store, and YouTube.[120] In 2020, Alphabet reported a revenue of $257 billion, 83 percent of which is derived from advertisement revenue.[121]

Facebook, founded in 2004 by Mark Zuckerberg, is the youngest of the three companies. It is the largest global social networking platform. It made more than $70 billion in revenue in 2019 and reported 2.6 billion active daily users across its main services (Facebook, Instagram, WhatsApp, and Messenger) in December 2020.[122] It purchased Instagram in 2012, and

---

[112] *See List of mergers and acquisitions by Alphabet*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_mergers_and_acquisitions_by_Alphabet#cite_note-1 [https://perma.cc/66YM-BJ4H] (providing an updated list of publicly known acquisitions).
[113] Andrew Ross Sorkin & Jeremy W. Peters, *Google to Acquire YouTube for $1.65 Billion*, N.Y. TIMES (Oct. 9, 2006), https://www.nytimes.com/2006/10/09/business/09cnd-deal.html [https://perma.cc/8KH3-NGV9].
[114] Louise Story & Miguel Helft, *Google Buys DoubleClick for $3.1 Billion*, N.Y. TIMES (Apr. 14, 2007), https://www.nytimes.com/2007/04/14/technology/14DoubleClick.html [https://perma.cc/Q2JH-5LZ6].
[115] Hayley Tsukayama, *Google Agrees to Acquire Motorola Mobility*, WASH. POST (Aug. 15, 2011), https://www.washingtonpost.com/blogs/faster-forward/post/google-agrees-to-acquire-motorola-mobility/2011/08/15/gIQABmTkGJ_blog.html [https://perma.cc/L8L9-VGSD].
[116] Ingrid Lunden, *Google Bought Waze For $1.1B, Giving A Social Data Boost To Its Mapping Business*, TECHCRUNCH (June 11, 2013, 11:37 AM), https://techcrunch.com/2013/06/11/its-official-google-buys-waze-giving-a-social-data-boost-to-its-location-and-mapping-business/ [https://perma.cc/JUN5-UBV4].
[117] Kwame Opam, *Google Buying AI Startup DeepMind for a Reported $400 Million*, THE VERGE (Jan. 26, 2014), https://www.theverge.com/2014/1/26/5348640/google-deepmind-acquisition-robotics-ai [https://perma.cc/26YF-FK8C].
[118] Rick Osterloh, *Google Completes FitBit Acquisition*, GOOGLE: PRODUCT UPDATES (Jan. 14, 2021), https://blog.google/products/devices-services/fitbit-acquisition/ [https://perma.cc/EEJ2-87E2].
[119] Letter from Larry Page, CEO, Alphabet Inc. (2015), https://abc.xyz/investor/founders-letters/2015/index.html#2015-larry-alphabet-letter [https://perma.cc/6CMB-ABY6].
[120] Harry McCracken, *How Google Photos joined the billion-user club*, FAST CO. (July 24, 2019), https://www.fastcompany.com/90380618/how-google-photos-joined-the-billion-user-club [https://perma.cc/6D6S-H9NW].
[121] Alphabet Inc., Annual Report (Form 10-K) 33 (Feb. 1, 2022), https://abc.xyz/investor/static/pdf/20220202_alphabet_10K.pdf?cache=fc81690 [https://perma.cc/2ZAG-H6LB].
[122] Facebook, Inc., Quarterly Report (Form 10-Q) 33 (July 31, 2020), https://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/3d73f8a6-7608-4ac0-9348-dbd9b38f33fa.pdf [https://perma.cc/CV5K-Q7FL].

WhatsApp and Oculus in 2014.[123] In October 2021, Facebook announced that it would change its name to "Meta" to highlight the company's planned expansion into virtual reality.[124] Facebook's revenues are almost entirely derived from advertising.[125]

The platform economy also includes Apple, Microsoft, and a number of companies such as Netflix, Uber, and Airbnb, which dominate digital market segments but compete with offline businesses. Some of these companies dominate or compete in the cloud, storage, and back-to-business (B2B) industry segments. Some "challenger" platforms like Twitter, Spotify, eBay, Mozilla, DuckDuckGo, Pinterest, Snapchat, Lyft, Deliveroo and TikTok also compete with larger Big Tech players. Gaming platform companies such as Tencent, Sony, Nintendo, Activision Blizzard, and ByteDance are also noteworthy because they capture large fractions of the average time that individuals spend on web and mobile, making high revenues. In addition to its large presence in the gaming industry, China has its own large technology businesses that indirectly compete with American companies when jurisdictional constraints permit it. These include Alibaba, Baidu, and Huawei, to name a few.[126]

Some platform services are offered at a consumer price of zero dollars; they are monetized through data and advertising and permit anyone to use them. Other services follow subscription models or profit through commissions gained from intermediations between two or more customer groups. Some platforms exist exclusively on mobile and tablet devices, and others operate via the web.

3. The Rise of Platform Capitalism

Currently, the Internet and digital life are dominated by Alphabet, Meta, Amazon, Microsoft, and Apple. The question that the rest of this Article addresses is how the Internet evolved from a decentralized network to an oligopolistic platform economy. Did perceptions of law, freedom, and power in the 1990s contribute to the existing state of affairs, and if so, how? The 2000s and 2010s marked a period of contestation about the nature of

---

[123] *See List of Mergers and Acquisitions by Meta Platforms*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_mergers_and_acquisitions_by_Meta_Platforms (last visited Oct. 22, 2022) (listing Meta's known acquisitions) [https://perma.cc/7D4H-BUGR].

[124] Press Release, Facebook, *Introducing Meta: A Social Technology Company* (Oct. 28, 2021), https://about.fb.com/news/2021/10/facebook-company-is-now-meta/ [https://perma.cc/HF5W-ABJH].

[125] Facebook, Inc., Annual Report (Form 10-K) 15 (Feb. 3, 2022), https://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/14039b47-2e2f-4054-9dc5-71bcc7cf01ce.pdf [https://perma.cc/4775-KZ3B].

[126] Note that the focus here is primarily on the United States and Europe.

networked models. Early 2000s network-optimism, gave way, in the 2010s, to mounting critiques which culminated in the current discontent about platform models.

This evolution took place through the emphasis on permissionless innovation, decentralization, and deregulation or the absence of law, while partly obscuring less visible forms of centralization, including technical and economic manifestations of private power. In the 2000s, an optimistic rhetoric emphasized the superiority of networked ecosystems over traditional hierarchical and centralized models. For example, in the *Wealth of Networks*,[127] Yochai Benkler argued that the Internet was an opportunity to move towards more democratic, distributed, and collective forms of participatory action. Contrary to the industrial age where information was produced and distributed hierarchically, in the "networked information economy," more egalitarian and democratic opportunities for information production and sharing were possible—they were a political choice.

In 2008, Jonathan Zittrain warned about a possible future Internet of gated communities, and the need to fight to maintain openness.[128] In 2010, Timothy Wu published a historical perspective on the evolution of digital technologies and the media.[129] He argued that information is prone to being controlled by one "master switch." Beyond coining the term "net neutrality" and orienting the discourse around broadband access and Internet freedom in a free market direction, Wu's book also emphasized the dichotomy between open and closed business models.[130] He argues that unlike Apple, "Google is not a switch of necessity… but rather a switch of choice."[131] Or as Google's former CEO Eric Schmidt reportedly said, "The vote is clear [that…] the end user prefers choice, freedom, and openness [aka Google]."[132]

The evolution towards Google-like decentralized models had its own downsides.[133] These platforms are not freer than any other monopolistic

---

[127] WEALTH OF NETWORKS, *supra* note 6, at 1-35.

[128] ZITTRAIN, *supra* note 38, at 165; *see also* Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARV. J.L. & TECH. 253, 253-54 (2006).

[129] *See generally* TIMOTHY WU, THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES (Knopf 1st ed. 2010).

[130] *Id.*; *see also* NEWMAN, *supra* note 93. *But see* Paul Starr, *The Manichean World of Tim Wu*, AMERICAN PROSPECT (June 9, 2011), https://prospect.org/culture/manichean-world-tim-wu/ [https://perma.cc/CT32-WVHS] (offering a critique of Wu's book).

[131] WU, *supra* note 129, at 280.

[132] *Id.* at 297.

[133] *See* TIMOTHY WU, THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS (2016); TIMOTHY WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018); YOCHAI BENKLER, ROB FARIS & HAL ROBERTS, *Can the Internet Survive Democracy?*, in NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS 341, 345-46 (2018) [hereinafter NETWORK PROPAGANDA]; Jack M. Balkin & Jonathan Zittrain, *A Grand Bargain to Make Tech*

business model. "Free" services come at the cost of data collection, targeted advertising, and behavioral profiling, leaving individual choices in networks only apparently uninfluenced. Opt-ins to data collection are secured through a variety of opaque, manipulative techniques, as well as through the progressive and subtle enclosure of users in relationships of dependency.[134] These factors gave Google a centralizing power as strong as Apple's, if only less visible.

Throughout the evolution of networked spaces into concentrated platform ecosystems, privacy and surveillance scholars highlighted the limits of networked business models.[135] Among the starkest of perspectives on networked versus walled-garden models is Shoshana Zuboff's critique of networked surveillance capitalism. She highlights the two-faced nature of Google and other advertising-based digital business models and identifies their "instrumentarian" power,[136] all while simultaneously defending enclosed platform business models such as Apple's.[137] Zuboff's critique of Google and Facebook's business models has been influential. She argues that Google's power flows from its ability to capture, extract, and control large amounts of behavioral data about individuals, often in real-time, and to use that information as a form of power-knowledge to exert control over persons. For

Companies Trustworthy, THE ATLANTIC (Oct. 3, 2016), https://www.theatlantic.com/technology/archive/2016/10/information-fiduciary/502346/ [https://perma.cc/N2L8-RCXA].

[134] *See, e.g.*, Karen Yeung, *'Hypernudge': Big Data as a Mode of Regulation by Design*, 20 INFO., COMMC'N & SOC'Y 118, 131 (2016) (discussing data-driven influence and data exceptionalism); Tal Zarsky, *Privacy and Manipulation in the Digital Age*, 20 THEORETICAL INQUIRIES L. 157, 162-63 (2019); Daniel Susser et al., *Online Manipulation: Hidden Influences in a Digital World*, 4 GEO. L. TECH. REV. 1, 26 (2019); Daniel Susser, Beate Roessler & Helen Nissenbaum, *Technology, Autonomy, and Manipulation*, 8 INTERNET POL'Y REV. 1, 12 (2019).

[135] *See, e.g.*, Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373 (2000); Lucas D. Introna & Helen Nissenbaum, *Shaping the Web: Why the Politics of Search Engines Matters*, 16 INFO. SOC'Y 169 (2000) [hereinafter *Shaping the Web*]; Lucas D. Introna & Helen Nissenbaum, *Defining the Web: The Politics of Search Engines*, 33 IEEE COMPUT. 54 (2000) [hereinafter *Defining the Web*]; PRISCILLA M. REGAN, LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY (1995); Joel R. Reidenberg, *Privacy Wrongs in Search of Remedies*, 54 HASTINGS L.J. 877 (2003); Michael D. Birnhack & Niva Elkin-Koren, *The Invisible Handshake: The Reemergence of the State in the Digital Environment*, 8 VA. J.L. & TECH 6 (2003).

[136] Shoshana Zuboff, *Big Other: Surveillance Capitalism and the Prospects of an Information Civilization*, 30 J. INFO. TECH. 75, 83 (2015); SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER 252 (2019) [hereinafter AGE OF SURVEILLANCE CAPITALISM].

[137] For a critique of the ambiguity of Zuboff's position, see Amy Kapczynski, *The Law of Informational Capitalism*, 129 YALE L. J. 1460, 1474 (2020) (reviewing AGE OF SURVEILLANCE CAPITALISM, *supra* note 136, and TRUTH AND POWER, *supra* note 95).

her, data-intensive business models are "unprecedented" and closely resemble certain forms of totalitarianism.[138]

Zuboff also offers a quasi-genealogical account of the rise of surveillance and data capitalism. Around 1970, "[u]ser data provided value at no cost, and that value was reinvested in the user experience in the form of improved services: enhancements that were also offered at no cost to users."[139] The shift in the economic status of data occurred around the year 2000. With the bursting of the dot-com bubble, things changed. Tech companies were pressured by investors to show revenues, which led companies to develop an advertising ecosystem based on "behavioral surplus," or data capture, accumulation, and reuse for purposes not directly tied to offering the service in question. September 11, 2001, further entrenched the belief that privately captured surveillance surplus would serve security and defense purposes.[140] In other words, according to Zuboff, what began as virtuous networked business models in the 1990s became "evil" at the turn of the century, when companies began making profits based on collecting and using data for advertising and behavioral manipulation purposes.

Zuboff's focus on behavioral manipulation is questionable. An empirical limit of her account is that good evidence casts doubt on the effectiveness of micro-targeting.[141] Her argument that tech companies are exceptionally evil because they deny users choice obscures similarities with other forms of consumption that she leaves uncontested.

Other critics, such as Nick Couldry and Ulises Meijas, have added a colonialism lens and depicted the commercial harvesting and use of personal information as a form of colonial power exerted over subjected populations of disciplined users.[142] Along with Julie Cohen, they see data-intensive business practices as structured by logics of appropriation: the extraction and assertion of *de facto* rights over an unowned *terra nullius* of information, the colonization of raw data, and the construction of a "biopolitical public

---

[138] AGE OF SURVEILLANCE CAPITALISM, *supra* note 136, at 376 (arguing that there is a similarity between the "instrumentarian power" of surveillance capitalists and the control exerted over populations under totalitarian regimes in the 1930s).

[139] *Id.* at 69.

[140] *See* DAVID LYON, SURVEILLANCE AFTER SEPTEMBER 11 (2003); Jennifer Evans, *Hijacking Civil Liberties: The USA Patriot Act of 2001*, 33 LOY. U. CHI. L.J. 933, 971-72 (2002).

[141] *See* Kapczynski, *supra* note 137, at 1472-80; NETWORK PROPAGANDA, *supra* note 133, at 269; Wu Youyou et al., *Computer-Based Personality Judgments Are More Accurate than Those Made by Humans*, 112 PROCS. NAT'L ACAD. SCIS. 1036, 1039 (2015); Sandra C. Matz et al., *Psychological Targeting as an Effective Approach to Digital Mass Persuasion*, 114 PROCS. NAT'L ACAD. SCIS. 12714, 12714 (2017).

[142] NICK COULDRY & ULISES A. MEJIAS, THE COSTS OF CONNECTION: HOW DATA IS COLONIZING HUMAN LIFE AND APPROPRIATING IT FOR CAPITALISM 1 (2019).

domain."[143] Julie Cohen's work decenters from questions of autonomy and behavioral surplus and shows that power and capitalism are inseparable. Where Zuboff sees legal voids, Cohen demonstrates the presence of a neoliberal form of law that is particularly unfit for information era challenges.

Increasingly influenced by these critiques, today's debates have been enriched and propelled forward.

B. Three Conceptions of Platform Regulation

I now outline three archetypal visions of 2020s platform governance (law, freedom, and power in platform ecosystems) over the archetypal visions of early Internet regulation discussed in Part I. In the platform context, power concentration has become increasingly visible and calls for regulation are ubiquitous. Faced with strong public demands for regulation, anarcho-libertarianism is in retreat. In its place, a plurality of conservative, libertarian, and market-optimistic positions have developed that emphasize the need to deregulate or leave digital platform economies as they are. Liberal visions, on the other hand, have expanded to form the bulk of regulatory responses, absorbing a large section of conservative and deregulatory positions. These ideas include numerous competing perspectives that differ extensively from those of the 1990s. One could call most of these conceptions neoliberal, in that they rely on law to enable competitive marketplaces where entrepreneurs and consumers can exercise investment and purchasing choices. Critical perspectives have gained prominence in recent years, particularly as a result of the new attention around surveillance and informational capitalism; the interest in racial and colonial perspectives on race and algorithmic justice; and the interest in the impacts of digital platforms and the training of AI models on environmental justice.

Each of our three archetypal visions of law, freedom, and power has morphed into a sophisticated set of perspectives on regulation, with liberal and neoliberal visions occupying the largest terrain of action. When looking at today's intellectual and policy landscape, one risk is to forget the ways in which past visions of law, freedom, and power have enabled new forms of capital and power accumulation.

---

[143] *Id.*; *see also* Julie E. Cohen, *The Biopolitical Public Domain: The Legal Construction of the Surveillance Economy*, 31 PHIL. & TECH. 213, 214 (2017); IAIN MACKENZIE, *Truth and Power*, *in* RESISTANCE AND THE POLITICS OF TRUTH: FOUCAULT, DELEUZE, BADIOU 45 (2018).

1. Libertarian Conceptions

Anarcho-libertarianism in the 1990s was utopian and visionary. Was it a left-wing or a right-wing position? Did anarcho-libertarians come together to advocate for individual property rights in lawless marketplaces or for bottom-up socialism?[144] In the platform context, the path-dependencies are clear. Libertarianism is now less utopian; there are reasons to resist cyberutopian naiveite. It is more politically self-aware, in the sense that it has become a way of thinking about (de)regulation that is outspoken about who it favors: entrepreneurs and some consumers.[145]

In continuity with Reagan's deregulatory ideology, today's digital libertarians are either techno-solutionists, market apologists, or both. In relevant respects, engineers who fetishize the neutrality of technology and economists who fetishize the neutrality of economic models or of efficiency reason according to similar logics. In this sense, the answers to social problems manifest in those technical or economic models, not in broader and more multi-faceted dynamics of power or the law.[146]

---

[144] An early proponent of bottom-up cooperatives-based socialism was Charles Fourier. *See, e.g.*, CHARLES FOURIER, THE THEORY OF THE FOUR MOVEMENTS (Gareth Jones & Ian Patterson eds., 1996).

[145] While platform business models are accessible to all consumers at a price of zero and facially seem to benefit all consumers—rich and poor, their actual effects are less egalitarian. In the long run, business models based on data, algorithmic decision-making, and advertising tend to affect certain consumers more negatively than others. An example is advertising that targets deep-pocketed consumers which differs from ads that target poorer and indebted consumers by location and content. *See*, e.g., David Thorton, *Payday Lenders Are Using Facebook to Target the Financially Vulnerable*, MONEY MAGAZINE, (Oct. 18, 2019), https://www.moneymag.com.au/payday-lenders-facebook [https://perma.cc/J7TS-BV59] (critiquing the distributive effects of payday loan advertisements on Facebook). Note that in 2019, *Facebook* had a policy *banning payday loan ads*. *See* Francine McKenna, *Google Follows Facebook in Banning Payday Loan Ads*, MARKETWATCH, May 13, 2016, https://www.marketwatch.com/story/google-follows-facebook-in-banning-payday-loan-ads-2016-05-11 [https://perma.cc/9N6H-Z5BR]). More generally, algorithmic practices have a range of discriminatory effects on consumers, and these effects are often correlated with socio-economic status. *See, e.g.*, Safiya U. Noble, *The Loss of Public Goods to Big Tech*, NOĒMA, July 1, 2020, https://www.noemamag.com/the-loss-of-public-goods-to-big-tech/ [https://perma.cc/2UW8-BMZN]; Safiya U. Noble, *Google Has a Striking History of Bias Against Black Girls*, TIME, (Mar. 26, 2018), https://time.com/5209144/google-search-engine-algorithm-bias-racism/ [https://perma.cc/8E34-K7MC]. Regarding the effects of deregulated digital platforms on employment, *see, e.g.*, Pauline T. Kim, *Manipulating Opportunity*, 106 VA. L. REV. 867, 931 (2020).

[146] *See* Langdon Winner, *Sow's Ears from Silk Purses: The Strange Alchemy of Technological Visionaries*, *in* TECHNOLOGICAL VISIONS: THE HOPES AND FEARS THAT SHAPE NEW TECHNOLOGIES 34 (Marita Sturken et al. eds., 2004); HOWARD SEGAL, TECHNOLOGICAL UTOPIANISM IN AMERICAN CULTURE 1 (20th Anniversary ed. 2005) (articulating an obsession in technology policy with finding technical solutions for social

In the platform economy, cyber-libertarianism propagates among engineers in tech firms of all sizes as well as in crypto, blockchain, and artificial intelligence (AI) communities.[147] Scholars and practitioners have frequently justified these deregulatory libertarian and solution-driven visions through formalist and rationalist moves.[148] Companies such as Google, Facebook, and Amazon have a history of fighting against regulation including, among others, privacy regulations. These efforts often occur behind the scenes through funding conservative political campaigns and research centers, or hiring former politicians to lobby against regulation.[149]

---

problems); EVGENY MOROZOV, TO SAVE EVERYTHING, CLICK HERE: THE FOLLY OF TECHNOLOGICAL SOLUTIONISM (reprint ed. 2014); Evgeny Morozov, *The Tech 'Solutions' for Coronavirus Take the Surveillance State to the Next Level*, THE GUARDIAN, (Apr. 15, 2020, 10:46 AM), http://www.theguardian.com/commentisfree/2020/apr/15/tech-coronavirus-surveilance-state-digital-disrupt [https://perma.cc/WY3M-AX3R] (illustrating the pervasiveness of techno-solucionism in a pandemic context); Tony Lawson, *What Is Wrong with Modern Economics, and Why Does It Stay Wrong?* 80 J. AUSTL. POL. ECON. 26, 40 (2017); TONY LAWSON, ESSAYS ON THE NATURE AND STATE OF MODERN ECONOMICS (2015) (arguing that a monolithic ontological approach to modern economics lacks adaptability to social problems).

[147] *See, e.g.*, Gili Vidan & Vili Lehdonvirta, *Mine the Gap: Bitcoin and the Maintenance of Trustlessness*, 21 NEW MEDIA & SOC'Y 42, 46, 50 (2019) (outlining some ideological tendencies in blockchain efforts; Jacob Metcalf, Emanuel Moss & danah boyd, *Owning Ethics: Corporate Logics, Silicon Valley, and the Institutionalization of Ethics*, 82 SOC. RSCH: AN INT'L Q. 449, 449 (2019) (describing corporate capture of the language of ethics).

[148] *See* Thibault Schrepel, *Anarchy, State, and Blockchain Utopia: Rule of Law versus Lex Cryptographia*, in GENERAL PRINCIPLES AND DIGITALISATION 367 (2020); Thibault Schrepel & Vitalik Buterin, *Blockchain Code as Antitrust*, BERK. TECH. L.J. 2, 4-5 (2021). For a critical perspective, see, e.g., Elettra Bietti, *From Ethics Washing to Ethics Bashing: A Moral Philosophy View on Tech Ethics*, *in* PROCS. ACM FAT* CONFERENCE 210 (2020); Vidan & Lehdonvirta, *supra* note 147, at 46; Monique Mann et al., *Between Surveillance and Technological Solutionism: A Critique of Privacy-Preserving Apps for COVID-19 Contact-Tracing*, NEW MEDIA AND SOC'Y 1461, 1461 (2022), https://doi.org/10.1177/14614448221109800 [https://perma.cc/9Q7F-5SBY].

[149] For a discussion of Google's lobbying efforts, see, e.g., the revolving door between the company and the Obama administration and its funding of the conservative George Mason University Law and Economics Center. AGE OF SURVEILLANCE CAPITALISM, *supra* note 136, at 122. *See also* a discussion of Facebook and other companies' lobbying, including in relation to the regulation of biometric technologies in 2015. AGE OF SURVEILLANCE CAPITALISM, *supra* note 136, at 251. As a result of lobbying efforts, a consent requirement was abandoned in favor of companies being "encouraged" to give notice to consumers about their facial recognition technologies. *See Privacy Best Practice Recommendations for Commercial Facial Recognition Use*, NTIA https://www.ntia.doc.gov/files/ntia/publications/privacy_best_practices_recommendations_for_commercial_use_of_facial_recogntion.pdf [https://perma.cc/L88S-ZGNP]; *see e.g.*, David McCabe & Karen Weise, *Bezos and Zuckerberg Take Their Pitches to Washington*, N.Y. TIMES (Sept. 19, 2019), https://www.nytimes.com/2019/09/19/business/bezos-zuckerberg-washington.html [https://perma.cc/Q9N4-TY3D].

Libertarian deregulatory rhetoric is prominent among investors and venture capitalists, as well as economists, lawyers, and mechanism design proponents.[150] Hal R. Varian, for instance, argues that the Internet was an innovative "lab experiment that got loose," a technical endeavor initially independent from social and political factors.[151] Some argue for the complete deregulation of digital platform economies because digital marketplaces that take data as a form of money are utopian laboratories for innovation and information exchange that should be permitted to self-regulate without external interventions.[152] Some of these new libertarians, particularly in the United States, emphasize the First Amendment and freedom of speech as grounds for resisting regulation.[153] These same people also emphasize a related interest in enabling and incentivizing innovation by granting regulatory immunities and deregulation.[154]

Such views are optimistic about the ability of platforms to act as self-regulating marketplaces and the ability of technological and economic forces to solve the social and political problems that arise on platforms. Like under early anarcho-libertarian conceptions, law is conceived as unimportant or self-effacing: It is either absent or works in the background to diminish its own role. Law acts in the service of sovereign markets or sovereign technologies, never directly in the interests of citizens or people.

---

[150] *See, e.g.*, Marc Andreessen, *It's Time to Build*, ANDREESSEN HOROWITZ Blog (Apr. 18, 2020), https://a16z.com/2020/04/18/its-time-to-build/ [https://perma.cc/LYA4-2ULK]; PETER THIEL, ZERO TO ONE: NOTES ON STARTUPS, OR HOW TO BUILD THE FUTURE (2014); Varian, *infra* note 151; Hal R. Varian, *Beyond Big Data*, 49 BUS. ECONS (2013); Hal R. Varian, *Intelligent Technology*, 53 FIN. & DEV. 7 (2016). For a use of economic reasoning and mechanism design to propose radical solutions in digital platform environments, see POSNER & WEYL, *infra* note 155. For responses to these tendencies, see Elettra Bietti, *Locked-in Data Production: User Dignity and Capture in the Platform Economy*, SSRN (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3469819 [https://perma.cc/LD9Q-PSZW]; Salome Viljoen et al., *Design Choices: Mechanism Design and Platform Capitalism*, 8 BIG DATA & SOC'Y (2021).

[151] Hal R. Varian, *Computer Mediated Transactions*, 100 AM. ECON. REV. 1 (2010).

[152] *See, e.g.*, VIKTOR MAYER-SCHONBERGER & THOMAS RAMGE, REINVENTING CAPITALISM IN THE AGE OF BIG DATA 1 (2018) (envisioning the possibilities of a data powered economy). For a critique, *see* Evgeny Morozov, *Digital Socialism?*, 116/117 NEW LEFT REV. 33, 36-62 (2019),

[153] *See, e.g.*, Clyde Wayne Crews Jr., *The Case against Social Media Content Regulation: Reaffirming Congress' Duty to Protect Online Bias, 'Harmful Content,' and Dissident Speech from the Administrative State*, 4 CEI Issue Analysis 1, 7 (2020) https://ssrn.com/abstract=3637613 [https://perma.cc/SQ9J-E4TM]; *see* Julie COHEN, *supra* note 95, at Ch. 3.

[154] *Id*; *see also* Langdon Winner, *The Cult of Innovation: Its Colorful Myths and Rituals*, LANGDON WINNER BLOG (June 12, 2017), https://www.langdonwinner.com/other-writings/2017/6/12/the-cult-of-innovation-its-colorful-myths-and-rituals [**https://perma.cc/VSY2-3N69**].

Freedom, as part of these conceptions, has two dimensions. It has a negative component—the (imagined) absence of top-down regulatory interference and absence of redistribution—and a positive component—the freedom to consume, invest, and make entrepreneurial choices. Freedom belongs to those who have sufficient means or agency to participate in reaping the benefits of platform markets by acquiring, exchanging, and licensing entitlements. The freedom of users, those who access platforms in exchange for data, is not clear. Their bargain is not entirely free or voluntary, which is why some scholars have developed more radical, auction-based theories of equitable, albeit broadly libertarian, data governance.[155]

Libertarian conceptions of digital governance are limited in their theorization of private, economic, and platform power. State power is visible, and these conceptions construe it as a threat.

2. Liberal and Neoliberal Conceptions

As mentioned above, liberal and neoliberal visions of platform governance are the main terrain of contestation for how law must be used to govern platform ecosystems. Within this broad set, conceptions vary widely in their normative and ideological roots and implications. Some favor bottom-up, private ordering, while others value top-down, public regulation. Some view the concentration of private power as a threat, while others see it as a necessary lesser evil.

These conceptions' core commonality is that they all promote competitive markets, and consumer and entrepreneurial choices as key goals of regulation: regulation should protect markets, not interfere with them. Many of these conceptions take the power of digital monopolies as a serious concern, but their rationales and justifications for addressing monopolies vary, and they tend to be tolerant of existing business models.

Some liberal conceptions commit to self-regulation and internal platform self-governance, transparency, and accountability, while others commit to competition and certain forms of pro-market regulation. Self-regulation visions include establishing internal AI ethics councils within tech

[155] ERIC POSNER & GLEN WEYL, RADICAL MARKETS: UPROOTING DEMOCRACY FOR A JUST SOCIETY (2018), at Ch. 5 [hereafter RADICAL MARKETS].

companies,[156] hiring AI ethics philosophers or consultants,[157] establishing content regulation adjudicatory bodies such as the Facebook Oversight Board,[158] or self-regulation of data.[159] Many of these perspectives resonate with early cyberlibertarian ideals, yet they deploy an added layer of internal quasi-law. Other approaches include treating platforms as information fiduciaries,[160] creating ownership and dividends schemes over data,[161] competition law, data protection, and European digital platform regulation reforms.[162]

In Part III, I explore all of these conceptions in more detail, and the conceptions of freedom, law, and power that underpin these dominant attitudes towards platform regulation. At a high level, both liberal and neoliberal visions

---

[156] Sam Levin, *Google Scraps AI Ethics Council After Backlash: "Back to the Drawing Board"*, THE GUARDIAN (Apr. 4, 2019, 9:50 PM), https://www.theguardian.com/technology/2019/apr/04/google-ai-ethics-council-backlash [**https://perma.cc/T5P3-6967]**; Metcalf et al., *supra* note 147; *see, e.g.*, Responsible AI, MICROSOFT (2020), https://www.microsoft.com/en-us/ai/responsible-ai?activetab=pivot1:primaryr6 [**https://perma.cc/V36J-L4M2]**.

[157] *See* Tobias Rees, *Why Tech Companies Need Philosophers—And How I Convinced Google to Hire Them*, QUARTZ (Nov. 22, 2019), https://qz.com/1734381/why-tech-companies-need-to-hire-philosophers [https://perma.cc/2967-8H5R].

[158] *See* Evelyn Douek, *What Kind of Oversight Board Have You Given Us?*, U. CHI. L. REV. ONLINE (2020), https://lawreviewblog.uchicago.edu/2020/05/11/fb-oversight-board-edouek/ [**https://perma.cc/88K4-7JTQ]**.

[159] *See, e.g.*, Fred H. Cate & Viktor Mayer-Schonberger, *Notice and Consent in a World of Big Data*, 3 INT'L DATA PRIV. LAW 67, 67 (2013); Solove, *infra* note 179; Solove & Hartzog, *infra* note 180, at 598; Julie E. Cohen, *Turning Privacy Inside Out*, 20 THEORETICAL INQUIRIES IN L. 1, 8 (2019).

[160] *See, e.g.*, Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1186 (2016) [hereinafter *Information Fiduciaries*]; Pozen & Khan, *infra* note 235; Jack M Balkin, *The Fiduciary Model of Privacy*, 134 HARV. L. REV. 11, 11 (2020) [hereinafter *The Fiduciary Model*]; Richards & Hartzog, *infra* note 229; Andrew F. Tuch, *A General Defense of Information Fiduciaries*, 98 WASH. U. L. REV. 1897 (2021).

[161] *See* RADICAL MARKETS, *supra* note 155, at Ch. 5; Laura Hautala, *California Wants Silicon Valley to Share the Wealth with You. Here's How*, CNET, (Feb. 25, 2019), https://www.cnet.com/news/california-wants-silicon-valley-to-pay-you-a-data-dividend/ [https://perma.cc/5FEB-DVGZ]; Bietti, *supra* note 148.

[162] Regulation (EU) 2016/679, of the European Parliament and the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) [hereinafter GDPR]; Commission Proposal for a Regulation on a Single Market For Digital Services (Digital Services Act), (COM) (2020) 825 final, [hereinafter DSA] https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608117147218&uri=COM%3A2020%3A825%3AFIN [https://perma.cc/TJ4M-53F5] [hereinafter DSA]; Commission Proposal for a Regulation on Contestable and Fair Markets in the Digital Sector (Digital Markets Act), (COM) (2020) 842 final, https://ec.europa.eu/info/sites/info/files/proposal-regulation-single-market-digital-services-digital-services-act_en.pdf [https://perma.cc/4CT6-L5EU] [hereinafter DMA].

of law 'encase' markets.[163] They rely on the separation of, on the one hand, the laws that regulate the public realm, which guarantee the rule of law, representative government, and equal basic rights, and, on the other hand, the laws that govern private transactions and production, which ensure the protection and recognition of economic entitlements.[164] This separation produces a distinction between economic matters and questions of democracy and representation. This separation can also lead to impoverished regulatory approaches in markets and digital environments.

Regarding conceptions of freedom, the focus tends to be on discrete, individual acts of the will, and only rarely on not structural questions of collective empowerment. This discrete and somewhat aseptic understanding of freedom as a tractable individualized problem in private marketplaces promotes legal frameworks that rely on disclosures, commercial options, and opt-ins.

Finally, the common thread in liberal and neoliberal perspectives is faith in the emancipatory potential of self-regulating autonomous markets, which often obscures a complete understanding of the way power and law pervade markets. Power and law influence the market by constructing and shifting priorities, generating inequalities, subordinating rights to profit rationales, and entrenching hegemonic logics and heuristics that favor some interests or talents over others.

3. Critical Conceptions

Beyond liberal and neoliberal conceptions, critical and socialist perspectives on platform governance remain contested and marginal, yet they are currently undergoing vigorous expansion. Current critiques follow the spirit and roots of early critical approaches to cyberspace but are (arguably) less deregulatory. They are increasingly central to the imagination of new digital possibilities. A subset of critical conceptions is openly socialist or in continuity with certain cyberutopian visions, with scholars who seek to re-imagine digital ecosystems and political economies in a more inclusive and egalitarian direction.

One of the first critiques of platform-based markets from the year 2000 concerned the political nature of search engines.[165] Early on, Lucas Introna and Helen Nissenbaum pointed out that search engines did not operate

[163] For a use of the term "encasing," see QUINN SLOBODIAN, GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM 5-7, 13 (2018).
[164] Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J 1784, 1790-91 (2020).
[165] Introna & Nissenbaum, *Shaping the Web*, *supra* note 135; Introna & Nissenbaum, *Defining the Web*, *supra* note 135.

neutrally, but reinforced the existing biases of searchers or search engines; large websites had no trouble rising in the rankings while smaller sites ended up with low rankings.[166] They noted that an Internet dominated by market dynamics was likely to lead to social harms. A commercially driven Internet allowed sites preferred by a majority of users to rise to the top, skewing pluralism and diversity in the information ecosystem. In the view of Introna and Nissenbaum, the web is a public good that should be democratized.

The most thorough and articulate contemporary critique of platforms and platform regulation is Julie Cohen's.[167] Cohen envisions platforms as "infrastructure-based strategies for introducing friction into networks"[168] which operate "with the goal of making clusters of transactions and relationships stickier—sticky enough to adhere to the platform despite participants' theoretical ability to exit and look elsewhere for other intermediation options."[169] They "represent strategies for bounding networks and privatizing and disciplining infrastructures."[170] For her, "[p]latforms do not simply enter markets, they replace (and rematerialize) them."[171] Cohen also defines the data economy as a "biopolitical public domain" that was imagined as open but was captured and managed asymmetrically by platforms who appropriate and use data to "discipline" subjects.[172] She describes the existing regulation of platform power as reliant on both inadequate, old industrial models and on "managerialism," a hands-off, co-regulatory approach to fixing information age problems.[173] She is critical of platforms' content practices and the discourse of content moderation as well, which "diverts attention from questions about why flows of online information are immoderate to begin with."[174]

Others have advanced new visions of the politics of digital platforms, including Lisa Nakamura on race in virtual reality and gaming settings;[175] Safiya Umoja Noble on search engines' racially discriminatory impacts on

---

[166] Introna & Nissenbaum, *Defining the Web*, *supra* note 135, at 57.
[167] *See* TRUTH AND POWER, *supra* note 95; *see generally* Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133 (2017); *see generally* JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE (2012).
[168] TRUTH AND POWER, supra note 95, at 41.
[169] *Id.* at 41.
[170] *Id*.
[171] Id. at 42.
[172] *Id.* at Ch. 2; *see generally* Katharina Pistor, *Rule by Data: The End of Markets?*, 83 L. AND CONTEMP. PROBS. 101 (2020) (describing the hierarchical power of platforms over data and the *sui generis* role of data in the digital economy).
[173] *See, e.g.*, TRUTH AND POWER, *supra* note 95, at Ch. 6.
[174] *Id.* at 100.
[175] *See generally* LISA NAKAMURA, RACE IN CYBERSPACE: RACE, ETHNICITY, AND IDENTITY ON THE INTERNET (2002).

Black women;[176] Tressie McMillan Cottom on platform and racial capitalism;[177] and Shoshana Zuboff on surveillance capitalism, discussed above.[178] These and other accounts border on utopianism and focus on alternative civic infrastructures, platform cooperatives, or digital socialism. Of course, critical views themselves have been subject to criticism, often from people who see these ideas as fundamentally at odds with market-driven innovation, diversity, or even democracy.

Libertarian, liberal, and critical accounts of platform governance are by no means siloed wholes; they are archetypes situated on a spectrum. I now turn to a more detailed account of liberal and neoliberal conceptions.

III. (NEO)LIBERAL PLATFORM GOVERNANCE

Compared to the debates of the 1990s on Internet regulation, digital platform governance controversies are now mainstream and include a much wider range of perspectives. Overall, policymakers and scholars agree that digital platform gatekeepers are too large and powerful, have too much control over people's lives, and need to be regulated. But the justifications and scope of prospective regulation in this area are far from univocal.

Having set out the three archetypal conceptions of freedom, power and law in platform settings, the aim is now to look at liberal and neoliberal conceptions in more detail. Scholars, policy makers, and thinkers might find themselves in one or more categories, and one category does not exclude the others. The taxonomy is meant to reveal cross-cutting patterns in the literature, not to put thinkers and policy proponents in boxes. Clarifying the normative stakes of existing conceptions and their histories opens new space for discussion.

A. Four (Neo)liberal Conceptions of Platform Regulation

1. Self-Regulation

I now briefly describe three paradigmatic self-regulatory domains: self-regulatory privacy and data practices, self-regulatory AI ethics practices, and self-regulatory content practices. Although each of these sets of practices has given rise to separate and large bodies of literature, they are similar in more ways than one: they are premised on faith in individualized disclosures

---

[176] *See generally* SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM (2018).

[177] *See generally* Tracie McMillan Cottom, *Where Platform Capitalism and Racial Capitalism Meet: The Sociology of Race and Racism in the Digital Society*, 6 SOCIO. RACE AND ETHNICITY 441 (2020).

[178] AGE OF SURVEILLANCE CAPITALISM, *supra* note 136.

and procedural forms of accountability and transparency, and a relative disregard for the structural power of private platform companies.

Much of U.S. privacy law has long been centrally concerned with what Daniel Solove has called "privacy self-management," [179] or companies' reliance on consumer privacy policies to govern their data practices. In the U.S., the voluntary practice of "notice and choice" established itself as the digital privacy default for American consumers between the 1970s and 2000s.[180] Self-certification emerged in the late 1990s through organizations like TRUSTe, which issue "seals" to companies that have privacy policies that comply with certain standards.[181] By 2001, almost all websites had privacy notices.[182] The fact that privacy policies in the U.S. were voluntary rather than mandated by law [183] served industry players who could thereby avoid regulatory scrutiny over data practices. Today, privacy self-management is ubiquitous, and not just in the U.S. Access to platforms such as Facebook, Google, or Amazon begins after the user has "opted-in" by clicking that they have read and agree to the company's terms of service. Internet infrastructures are pervasively tracked, and users are constantly asked to "opt-in" to cookies and other tracking processes. People rarely read companies' terms and conditions and are subjected to practices that are too opaque for them to understand or challenge. Additionally, trade secrecy law and machine learning algorithms shield these practices from accountability or human understanding.[184]

---

[179] Daniel J. Solove, *Introduction* to *Symposium: Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1880 (2013).

[180] Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 592-94 (2014).

[181] *Id.* at 594.

[182] Allyson W. Haynes, *Online Privacy Policies: Contracting Away Control over Personal Information?* 111 PENN ST. L. REV. 587, 594 (2007).

[183] Note that even prior to GDPR, European Data Protection regimes relied on the principle that data processing had to be grounded in an explicit legal basis, which meant that data processing was illegal absent consent or other legal bases. This makes E.U. data practices regulated by default, and as such, it can be argued that they fall outside the scope of self-regulation.

[184] Andrew D. Selbst & Solon Barocas, *The Intuitive Appeal of Explainable Machines*, 86 FORDHAM L. REV. 1085, 1085 (2018) ("We show that machine learning models can be both inscrutable and nonintuitive"); Cohen, *Turning Privacy*, *supra* note 159, at 8 ("Scholars have raised important questions about whether it is possible to explain certain types of machine learning-driven processes at all and about whether such explanations, if available, constitute meaningful remedies for complaints… If a requirement of meaningful disclosure is to have any teeth, moreover, it needs to be accompanied by skepticism toward broad trade secrecy claims that would shield key information about logics and consequences from disclosure.").

A second instance of self-regulation has emerged as the rise and promise of machine learning and AI technologies brings new urgency to the debate on the political nature and ethical implications of technologies.[185] Private companies have begun to develop public statements of AI principles,[186] hire in-house ethicists,[187] form in-house ethics bodies such as the Google Advanced Technology External Advisory Council (ATEAC–which was quickly withdrawn in response to backlash),[188] and implement ethics and diversity trainings and structures for their employees.[189] By way of example, Microsoft's website indicates the company's willingness to move to more formalized internal governance:

> We put our responsible AI principles into practice through the Office of Responsible AI (ORA) and the AI, Ethics, and Effects in Engineering and Research (Aether) Committee. The Aether Committee advises our leadership on the challenges and opportunities presented by AI innovations. ORA sets our rules and governance processes, working closely with teams across the company to enable the effort.[190]

Private funding also matters. Tech companies shape the research agenda and discourse around the societal impact of AI by sponsoring AI conferences, research institutes, and other efforts.[191] They fund major law, computer science, and privacy conferences, for example.[192] The Partnership

---

[185] *See generally* MIREILLE HILDEBRANDT, SMART TECHNOLOGIES AND THE END(S) OF LAW: NOVEL ENTANGLEMENTS OF LAW AND TECHNOLOGY (2015); CATHERINE O'NEILL, WEAPONS OF MATH DESTRUCTION (2016); NOBLE, *supra* note 176; VIRGINIA EUBANKS, AUTOMATING INEQUALITY (2018); Julia Angwin et al., *Machine Bias: There's software used across the country to predict future criminals. And it's biased against blacks,* PROPUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing [https://perma.cc/C7Q6-W6D2].

[186] *See* Jessica Fjeld et al., *Principled Artificial Intelligence: Mapping Consensus in Ethical and Rights-based Approaches to Principles for AI*, BERKMAN CENTER FOR INTERNET AND SOCIETY (2020), https://dash.harvard.edu/handle/1/42160420 [https://perma.cc/VD34-HLEU].

[187] Rees, *supra* note 157.

[188] Levin, *supra* note 156.

[189] Linnet Taylor & Lina Dencik, *Constructing Commercial Data Ethics*, TECH. & REG., 1, 8-9 (2020).

[190] *See, e.g.*, Microsoft, "Responsible AI" (2020), https://www.microsoft.com/en-us/ai/responsible-ai?activetab=pivot1:primaryr6 [https://perma.cc/955V-6EAA].

[191] Rodrigo Ochigame, *How Big Tech Manipulates Academia to Avoid Regulation*, THE INTERCEPT (Dec. 20, 2019, 1:19 PM), https://theintercept.com/2019/12/20/mit-ethical-ai-artificial-intelligence/ [https://perma.cc/7TFS-XUXH].

[192] Taylor & Dencik, *supra* note 189, at 7.

on AI, a nonprofit established to study and formulate best practices on AI technologies, was founded by Amazon, Facebook, Google, DeepMind, Microsoft, and IBM to create a synergetic dialogue with civil society organizations, yet it is entirely funded by industry stakeholders.[193]

Third, a number of self-regulatory content moderation initiatives have developed over the years. Some consist of automated copyright infringement detection mechanisms, such as YouTube's Content ID system that fingerprints copyrighted content and automatically detects when similar content is uploaded to the platform.[194] Others consist of informal coordination mechanisms between platforms to ensure consistent policies in moderating content, particularly with respect to child pornography, terrorism-related content, and other forms of illicit speech.[195] More recent, and much discussed, is Facebook's initiative to establish an Oversight Board: a *sui generis* independent tribunal that acts as an appeal mechanism and procedural buffer in ensuring some level of internal oversight and transparency over Facebook's content decisions.[196] The Board is funded by a trust, which is in turn funded by Facebook. It has 20 founding members from a number of geographic backgrounds and disciplines,[197] all of whom were appointed by Facebook.[198]

---

[193] Press Release, *The Partnership on AI, Industry Leaders Establish Partnership on AI Best Practices* (Sept. 28, 2016), https://www.businesswire.com/news/home/20160928005965/en/Industry-Leaders-Establish-Partnership-on-AI-Best-Practices [https://perma.cc/AWC7-SAKF]. *See* Alex Hern, *'Partnership on AI' formed by Google, Facebook, Amazon, IBM and Microsoft*, THE GUARDIAN, (Sept. 28, 2016), https://www.theguardian.com/technology/2016/sep/28/google-facebook-amaxon-ibm-microsoft-partnership-on-ai-tech-firms [https://perma.cc/TC2K-3FWX].

[194] *How Content ID Works*, YOUTUBE HELP, https://support.google.com/youtube/answer/2797370?hl=en [https://perma.cc/3EMB-3LXS]. For an argument on the lack of accountability of these systems, *see*, e.g., Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 STAN. TECH. L. REV. 473 (2016).

[195] On this problem and its implications, see Evelyn Douek, *The Rise of Content Cartels*, KNIGHT FIRST AMEND. INST. (Feb. 11, 2020), https://knightcolumbia.org/content/the-rise-of-content-cartels [https://perma.cc/2M2L-2W2K].

[196] On the Facebook Oversight Board, see Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. (2020); Kate Klonick, *Inside the Making of Facebook's Supreme Court*, THE NEW YORKER (Feb. 12, 2021), https://www.newyorker.com/tech/annals-of-technology/inside-the-making-of-facebooks-supreme-court [https://perma.cc/8NE7-RYGL]; Douek, *supra* note 158.

[197] Meet the Board, OVERSIGHT BOARD, https://oversightboard.com/meet-the-board/ [https://perma.cc/H4ME-YQ5L].

[198] Elizabeth Culliford, *Facebook names first members of oversight board that can overrule Zuckerberg*, REUTERS, (May 6, 2020, 1:12 PM), https://www.reuters.com/article/us-facebook-oversight/facebook-names-first-members-of-oversight-board-that-can-overrule-zuckerberg-idUSKBN22I2LQ [https://perma.cc/L6NW-VGRC].

Appeals of Facebook's content decisions can be referred to the Board by users with an active account on the service or by Facebook itself.[199] Appeals can seek to reinstate content on the platform or ask for content to be removed from the platform.[200] Once the Board issues a decision, Facebook must implement it, but is not obliged to extend its application to any similar cases.[201] This is problematic if one considers that Facebook's model is primarily about making decisions at scale.[202] In the context of controversial social media platforms' decisions to ban Trump after the January 6th Riots, the Oversight Board's status as a *sui generis* arbiter of democracy generated controversy.[203]

The evolution of these three sets of self-regulatory visions demonstrates a shift from purely automated systems, often developed by companies behind closed doors and with no rights to appeal (e.g., Digital Rights Management [DRMs]), towards increasingly open instances of self-governance and accountability, which despite increased transparency, remain under companies' private control.[204] These more recent forms of governance, including content self-regulatory procedures, data self-management and AI accountability measures, are part of sophisticated procedural frameworks that aim at public disclosures, fairness, and accountability.

What these measures actually do, however, is balance the public's interest in transparency against the protection of business interests and digital companies' freedom to pursue profits. Underlying these procedural self-regulatory paradigms is an idea that the infrastructural power of platform companies is not the key concern. Transparency and oversight are. The aspiration is that procedural guarantees are sufficient to democratize commercial spaces, rendering them free, open, and participatory communities.

---

[199] Oversight Board Charter, art. 2, (Sept. 2019), https://about.fb.com/wp-content/uploads/2019/09/oversight_board_charter.pdf [https://perma.cc/LHN4-DXB2].

[200] Jacob Kastrenakes, *You can now appeal for Facebook's Oversight Board to take down bad posts*, THE VERGE, (Apr. 13, 2021, 9:08 AM), https://www.theverge.com/2021/4/13/22381499/facebook-oversight-board-remove-posts-appeals [https://perma.cc/LA34-8HVB].

[201] Oversight Board Charter, *supra* note 199, at art. 4.

[202] *See* Mike Ananny, *Probably Speech, Maybe Free: Toward a Probabilistic Understanding of Online Expression and Platform Governance*, KNIGHT FIRST AMEND. INST. (Aug. 21, 2019), https://knightcolumbia.org/content/probably-speech-maybe-free-toward-a-probabilistic-understanding-of-online-expression-and-platform-governance [https://perma.cc/GWK4-MW4Q].

[203] *See, e.g.*, Thomas Streinz, *The Flawed Dualism of Facebook Oversight* (Apr. 30, 2021) (unpublished manuscript) (on file with author).

[204] It is interesting to note that in 2006, Jonathan Zittrain suggested that the opposite trend would be more promising. *See* Zittrain, *History of Online Gatekeeping*, *supra* note 128, at 255-57 (arguing that there are two visions of Internet Governance, one that focuses on intermediaries and gatekeepers as points of control, the other than relies on technological tools).

As part of these self-regulatory visions, *freedom* is a strongly rhetorical pursuit: individual privileges to occupy privately-controlled spaces are granted through emulations of the rule of law and otherwise subject to platforms' discretion. *Private power* is left to operate freely in the background. The vision of *law* that underpins these efforts is more complex. At its best, law has a functional, expert-driven color. These self-regulatory efforts are part of a quasi-public, administrative law project.[205] The project, though, is entirely dependent on the will of private actors and on transnational negotiations with civil society in response to media and government pressures.[206] At their worst, these forms of self-regulation are purely performative and a self-legitimating public relation strategy. Governance efforts and law-like procedures are often instrumentalized for commercial ends. They become a façade with little intrinsic value and detrimental effects for the public.

What is often missing as part of self-regulatory visions of governance is a thick conception of constraint on private power and an emphasis on the effects of concentrated private commercial power on democracy. Self-regulation does not grant users opportunities to contest platforms' power.

2. Data Protection and Informational Self-Determination

Data protection-centric visions of platform regulation originated in Europe but have expanded and been transposed to numerous jurisdictions, giving rise to a phenomenon that Anu Bradford has called the "Brussels Effect."[207] While the U.S.' approach to digital privacy is consumer law-based and largely sectoral,[208] in Europe, data protection is an umbrella body of law centered on the protection of personal data as a fundamental right. The German Constitutional Court's jurisprudence on the right to informational self-determination influenced the development of European Union data protection

---

[205] *See*, e.g., Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV. 526 (2022) (arguing that content moderation is a quasi-administrative legal project).

[206] Brenda Dvoskin, *Expert Governance of Online Speech*, HARV. INT'L L. J (forthcoming 2022) (highlighting the limits of international human rights standards as relied on by the Oversight Board); Brenda Dvoskin, *Representation Without Elections: Civil Society Participation as a Remedy for the Democratic Deficits of Online Speech Governance*, 67 VILL. L. REV. 447 (2022) (describing the role of civil society in negotiating speech standards with social media platforms).

[207] ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD (2020); Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1 (2012) (arguing that GDPR influenced other data protection laws around the world including in the US). *But see* Anupam Chander, Margot E Kaminski & William McGeveran, *Catalyzing Privacy Law*, 105 MINNESOTA L. REV. 1733 (2021) (countering the "Brussels Effect" narrative).

[208] *See e.g.*, California Consumer Privacy Act, CAL. CIV. CODE §§ 1798.100–1798.199 (2020) (following a consumer protection approach); *see also* Chander, Kaminski & McGeveran, *supra* note 207, at 1747.

law, particularly in how it affords individuals the power to control information about themselves in digital environments.[209] "Natural persons should have control of their own personal data," establishes Recital 7 of the E.U. General Data Protection Regulation (GDPR), the Union's umbrella data protection law.[210] European data protection is based on the foundational principle that any processing of personal data—a term that is broadly construed—[211] is unlawful unless it adheres to specific requirements: lawfulness, fairness, and transparency; the principle of purpose limitation; the principles of adequacy, relevance, and data minimization; the obligation to ensure that data is accurate and kept up to date; and the requirement that it be retained for no longer than necessary and that it be securely stored.[212]

In May 2018, the E.U. GDPR came into force, repealing the previous data protection regime[213] and reconfiguring privacy protection both in Europe and worldwide as a result of its extra-territorial scope of application. It reinforced the requirement for informed consent as one of its bases, though not its only basis,[214] for legitimate data processing. It also introduced new inalienable data subject rights that cannot be waived, including expanded rights to access information about one's personal data being processed; rights to rectify and erase personal data; the right to data portability; and the right to have human intervention in AI-based decision-making.[215] The GDPR also introduced compliance mechanisms such as internal codes of conduct for companies; [216] data protection impact assessments (DPIAs) whereby companies are encouraged to describe and evaluate potentially high-risk aspects of their data processing practices; [217] data protection seals and

[209] BVERFGE, 1 BVR 484/83, Oct. 18-19, 1983, 65 BVerfGE 1, available in German at: [https://perma.cc/LT44-NX3K]; *see also* Herbert Burkert, *Privacy - Data Protection: A German/European Perspective*, SECOND SYMP. GER. AM. ACAD. COUNCIL'S PROJECT "GLOB. NETWORKS AND LOC. VALUES" 44 (1999).
[210] GDPR, *supra* note 162, at recital. 7.
[211] *See id.* at art. 4(1).
[212] *See id.* at art. 5.
[213] *See* Directive 95/46 of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31 (EC) [hereinafter Council Directive 95/46/EC].
[214] *See* GDPR, *supra* note 162, at art. 6.
[215] *See id.* at arts. 12-23.
[216] *Id.* at art. 40.
[217] *Id.* at art. 35; *see generally* EU Article 29 Working Party, *Guidelines on Data Protection Impact Assessment (DPIA) and Determining Whether Processing is "likely to result in a high risk" for the Purposes of Regulation 2016/679*, 17, WP 248 (Apr. 4, 2017), https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=611236 [https://perma.cc/2MSP-5Z24].

certifications overseen by apposite certification bodies;[218] and perhaps most importantly, data protection by design and by default which requires, for example, setting up appropriate data minimization standards.[219] The Regulation further establishes a network of regulatory bodies across the E.U., requiring each E.U. Member State to have a National Data Protection Authority.[220]

The vision underpinning the GDPR is arguably contributing to the advent of a new political economy of data and digital services. Its thick guarantees, broad scope of application, and roots in fundamental rights jurisprudence suggest it. The Regulation remains nonetheless grounded in procedural and neoliberal paradigms: the primacy of individual rights, individual choices, and self-determination.[221] Data protection's "dignitarian" focus on individual rights, choice, and control does not capture the most salient aspects of data in platform ecosystems.[222] Data is relational and collectively constructed in ways that individual consent or self-determination guarantees cannot alone address.

Although in theory the GDPR could be interpreted and applied as a very radical instrument, that empowers persons in the digital platform economy, in practice, it has largely operated within neoliberal parameters of governance, only marginally addressing core issues of power and manipulation that underlie the data economy.[223] GDPR and other data protection regimes, in other words, continue to place the burden of regulation on individuals and give one-stop-shop oversight powers to captured or timid national regulators. The fetishistic emphasis on data protection contrasts with a regime that remains atomistic and ill-equipped to durably constrain platforms' asymmetric power or address long-term informational and capitalist threats. What is needed is greater emphasis on enabling persons and

---

[218] GDPR, *supra* note 162, at arts, 42-43, 3.

[219] *Id.* at arts. 5(c), 25 (discussing the principle of data minimization in the GDPR).

[220] *Id.* at arts. 51-59 (explaining the powers and jurisdiction of national data protection authorities).

[221] *See, e.g.*, Angela Daly, *Neo-Liberal Business-as-Usual or Post-Surveillance Capitalism with European Characteristics? The EU's General Data Protection Regulation in a Multipolar Internet*, in COMMUNICATION INNOVATION AND INFRASTRUCTURE: A CRITIQUE OF THE NEW IN A MULTIPOLAR WORLD 93, 93 (Rolien Hoyng & Gladys Pak Lei Chong eds. 2021).

[222] *See* Cohen, *Turning Privacy*, *supra* note 159, at 3-4; Salome Viljoen, *A Relational Theory of Data Governance*, 131 YALE L. J. 573 (2021); Jennifer Cobbe & Jatinder Singh, *Data Protection Doesn't Work: Oversight Failure in Data Processing Figurations*, (2022) (unpublished manuscript) (on file with author).

[223] Elettra Bietti, *The Discourse of Control and Consent Over Data in EU Data Protection Law and Beyond*, AEGIS PAPER SERIES, HOOVER INSTITUTION, at 4 (Jan. 10, 2020, 8:00 AM), https://www.lawfareblog.com/discourse-control-and-consent-over-data-eu-data-protection-law-and-beyond [https://perma.cc/LV2Q-DX63].

groups to collectively address systemic harm in the digital political economies of the future.

3. Informational Fiduciaries and Duties of Care

A third liberal conception for the future governance of the Internet focuses on the relationships between platform actors, such as Facebook, Google, and Amazon, and their users. This configures the governance of digital environments in terms of asymmetric bargaining power, knowledge, and control over digital resources such as data and platform infrastructure. Contrary to data protection regimes that are guided by concepts of informational self-determination, fiduciary approaches operate with the assumption that individuals are not well placed to make decisions, and that governance must be entrusted to actors with power and control over infrastructure.

Jack Balkin advances a proposal on the need to impose fiduciary obligations–duties of care, loyalty, and confidentiality–on large platform companies and digital actors that process personal information.[224] The driving idea is that persons entrust these actors with their personal data and the legal system should recognize these relationships as relationships of trust and afford protections against violations of such trust. Duties of confidentiality and care mean that digital companies must keep their customers' data confidential and secure; these duties 'run with the data' in the sense that they attach to any subsequent entity dealing with that data.[225] Duties of loyalty mean that companies should not betray their end-users' trust or manipulate them. Companies must ensure that their systems and business models are aligned with their users' interests and do not structurally conflict with them.[226]

Others have advanced related proposals.[227] James Grimmelmann proposes treating search engines as trusted advisors, ensuring that search results reflect users' interests and the relationships of trust between users and search companies.[228] Neil Richards and Woodrow Hartzog propose a duty of loyalty and an interest-based theory of privacy as a way to move beyond individual control-centric views in data protection and privacy law.[229] As they argue, "[t]he virtue of [a best interests] approach is that it puts the customers'

---

[224] Balkin, *Information Fiduciaries*, *supra* note 160, at 1221; Balkin, *The Fiduciary Model*, *supra* note 160.
[225] Balkin, *The Fiduciary Model*, *supra* note 160, at 14.
[226] *Id.*
[227] *See generally* Claudia E. Haupt, *Platforms as Trustees: Information Fiduciaries and the Value of Analogy*, HARV. L. REV. F. 34, 34-35 (2019); Tuch, *supra* note 160.
[228] James Grimmelmann, *Speech Engines*, 98 MINN. L. REV. 868, 874-75 (2014).
[229] Neil M. Richards & Woodrow Hartzog, *A Duty of Loyalty for Privacy Law*, 99 WASH. U. L. REV. 961, 966-67 (2022).

wellbeing first, even when they don't understand the technology, the legal terms they are agreeing to, or the full consequences or risks of their actions."[230] They further justify their approach, stating that:

> a best interests standard could have some appeal to tech companies, at least those interested in long-term sustainable (and profitable) relationships rather than one-time cash grabs. The most important digital information relationships are not discrete transactions, but long-term relationships with providers of email and cloud services and operating systems and hardware. … Modern information relationships are long-term and characterized by trust through exposure and confidence. Both the trusting party and entrustees should favor a safe and sustainable state of affairs.[231]

Some privacy laws that are currently under consideration in the United States incorporate the idea of fiduciary duties and tortious liability for Big Tech companies.[232] In the UK, the Online Harms approach also focuses on the idea of imposing duties of care on online intermediaries, particularly as regards harmful content.[233] The idea behind these proposals is to impose new obligations on gatekeepers under tort and trust law, changing the industry's incentives without directly interfering with existing business models through top-down regulatory intervention. This approach is less costly than alternatives, and it avoids certain First Amendment hurdles that make the regulation of data difficult under U.S. law.[234]

These proposals have not been without their critics. Lina Kahn and David Pozen argue that the fiduciary model "invites an enervating complacency toward online platforms' structural power and a premature

---

[230] *Id.* at 992.
[231] *Id.* at 994.
[232] *See, e.g.*, Tuch, *supra* note 160.
[233] UK Department for Digital, Culture, Media and Sport, *Consultation outcome:* Online Harms White Paper, (2020), https://www.gov.uk/government/consultations/online-harms-white-paper/online-harms-white-paper; Alex Hern, *Online Harms Bill: Firms May Face Multibillion-Pound Fines for Illegal Content,* The Guardian (Dec. 15, 2020), https://www.theguardian.com/technology/2020/dec/15/online-harms-bill-firms-may-face-multibillion-pound-fines-for-content [https://perma.cc/37F5-W6HL]; Susanne Norris, *Online Harms Bill: What You Need to Know About New Online Harms Laws*, GOOD HOUSEKEEPING (May 17, 2021), https://www.goodhousekeeping.com/uk/consumer-advice/technology/a36051531/online-harms-bill/ [https://perma.cc/X2M7-3HD4].
[234] Sorrell v. IMS Health Inc., 564 U.S. 552 (2011); *see also* Balkin, *The Fiduciary Model*, *supra* note 160.

abandonment of more robust visions of public regulation."[235] The proposal assumes that it is possible to "trust" digital business models and tech companies to appropriately determine what is in the interests of users, with only minor oversight by the courts. However, the incentives of these companies are structurally antithetic to the interests of consumers and require competition or other forms of top-down regulation. Further, fiduciary proposals concede that an actual relationship can exist between individuals and tech companies, when the reality of the digital environment is that these relationships are too dispersed, fragmented, and untransparent to give rise to trust or care.[236]

Ultimately, the fiduciary model is premised on faith in private litigation and the courts. It delegates most oversight of digital harms to the courts or to other dispute resolution mechanisms, which are often unsuited to tackle public sphere issues.[237] Leaving aside the question of who bears the cost of litigation, the fiduciary model remains structured around pre-information era models of governance: harms are perceived as discrete and identifiable by two litigants and a neutral adjudicator, disputes have two sides, evidence can be adduced in tractable ways to ensure impartiality, and remedies are mainly monetary and require limited monitoring.

Despite these limits, information fiduciary-based conceptions of governance have virtues. The conceptions of *power* and *freedom* that underlie them are relational. There is asymmetry in the relationships between users and platforms, and such asymmetry must be remedied by imposing greater obligations on the more powerful side in these relationships. In some ways, this view of *power* is not dissimilar to the view of dominance advanced in European competition law, which is tortious in spirit, if not as a matter of strict doctrine.[238] The important difference between these regimes is that under competition law, abuses of dominance are monitored primarily through agency investigations, not court adjudication.

The conceptions of *freedom* and rights that underlie fiduciary perspectives are interest-based. Fiduciary obligations focus on persons' objective interests in privacy or freedom of expression or safety, not their will. Focusing on interests reflects a large strand of moral and political philosophy. As part of these theories, persons' interests—defined as things people have objective reason to want—are taken as a basis of moral rights and

---

[235] David E. Pozen & Lina M. Khan, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 498 (2019).
[236] Julie E. Cohen, *How (Not) to Write a Privacy Law*, KNIGHT FIRST AMEND. INST. (Mar. 23, 2021), https://knightcolumbia.org/content/how-not-to-write-a-privacy-law [https://perma.cc/P4HT-YY7Z].
[237] *See* TRUTH AND POWER, *supra* note 95, at Ch. 5.
[238] *See* Treaty on the Functioning of the EU art. 102, Oct. 26, 2012, O.J. (C 626) 26.

entitlements.[239] The focus on objective interests also engages interest-based views of power, such as that of Steven Lukes.[240] Overall, a focus on fiduciary relationships and interests is sensitive to the limitations of agency that arise in digital settings and overcomes the limitations of theories centered on individual autonomy and purely self-directed acts of the will.

4. Competition

Moving to questions of regulatory enforcement and market power, competition-based visions of platform governance are primarily focused on decentralizing the power of companies such as Amazon, Meta, and Alphabet by enabling greater competition between and across firms. Some competition law proponents are interested in breaking up existing platform monopolies and dividing them into smaller units, or in prohibiting future mergers between them. Others want to create a more plural marketplace by enabling other companies and alternative business models to emerge and be successful.

For a long time, competition law, at least in the U.S., was apathetic towards digital markets. Platforms and the Internet were considered perfectly competitive spaces where services were cheap or free and infinite scale and lack of scarcity made choice plentiful. This deregulatory and optimistic ethos was crystallized by the Federal Trade Commission's (FTC's) 2013 decision not to pursue an antitrust case against Google.[241] A lot of academic literature, often funded by tech companies, supported that decision.[242] The approach towards Google and digital markets was far more vigorous on the other side of the Atlantic, where the E.U. Commission conducted three long

---

[239] *See* THOMAS M. SCANLON, *Content Regulation Reconsidered*, *in* THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY 151 (2003); JOSEPH RAZ, THE MORALITY OF FREEDOM (1986), Ch. 7.

[240] *See* STEPHEN LUKES, POWER: A RADICAL VIEW 19 (2005).

[241] Craig Timberg, *FTC: Google did not Break Antitrust Law with Search Practices*, WASH. POST (Jan. 3, 2013), https://www.washingtonpost.com/business/technology/ftc-to-announce-google-settlement-today/2013/01/03/ecb599f0-55c6-11e2-bf3e-76c0a789346f_story.html [https://perma.cc/8K5T-AB44**].**

[242] *See* Eugene Volokh & Donald Falk, *First Amendment Protection for Search Engine Search Results*—WHITE PAPER COMMISSIONED BY GOOGLE, UCLA SCH. LAW RSCH. PAPER NO. 12-22 (Apr. 20, 2012), https://ssrn.com/abstract=2055364 [https://perma.cc/8HQL-UJET]; Geoffrey Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Antitrust Case Against Google*, 34 HARV. J. L. & PUB. POL'Y. (2011), https://ssrn.com/abstract=1577556 [https://perma.cc/ZEU9-Y7NN]; Geoffrey Manne & William Rinehart, *The Market Realities that Undermined the FTC's Antitrust Case Against Google*, HARV. J. L. & TECH. (2013), https://ssrn.com/abstract=3172435 [https://perma.cc/X48E-7MRT].

investigations against Google for abuse of dominance during the 2010s and concluded each of them with the imposition of fines.[243]

It is only recently that Big Tech's U.S. critics have begun to build a successful antitrust counter-movement, pushing to regulate platform monopolies and reform antitrust law. Lina Khan's student note, "*Amazon's Antitrust Paradox*"[244] in 2017 provoked an important conversation on the need to re-adapt antitrust law to digital market harms.[245] In the piece, the now FTC Chair argues that the predominant Chicago School approach to antitrust law fails to capture the anti-competitive risks that digital monopolies like Amazon generate in digital markets.[246] By focusing on price increases and output restrictions, predominant antitrust models have long been blind to platforms' vertical power and winner-take-all dynamics. Although Amazon's prices are low, its structural and infrastructural access and power allows it to squeeze merchants' margins, directly compete with merchants on its own marketplace, and make new entrants' possibilities to compete with Amazon very limited.[247] In the long term, this contributes to the centralization of commerce in one firm's hands, and to a lack of competitive possibilities and diversity.

Neo-Brandeisianism[248] also gained in political prominence recently, uniting around a common interest in the anti-monopolistic and institutionalist path of early Progressives such as Louis D. Brandeis. Neo-Brandeisian scholars and policymakers unite around a common legal and political agenda that has a negative component—pushing back against the Chicago School's antitrust standard and the "consumer welfare" standard[249]—and a positive component—promoting decentralization of power and democracy through antimonopoly law. Views within the movement vary on how best to regulate

---

[243] Christian Bergqvist & Jonathan Rubin, *Google and the Trans-Atlantic Antitrust Abyss*, U. COPENHAGEN FAC. LAW RSCH. PAPER NO. 2019-73 (2019), https://ssrn.com/abstract=3354766 [https://perma.cc/HE5A-8AY8].

[244] Lina M. Khan, *Amazon's Antitrust Paradox,* 126 YALE L. J. 710 (2017).

[245] David Streitfeld, *Amazon's Antitrust Antagonist Has a Breakthrough Idea*, N.Y. TIMES (Sept. 7, 2018), https://www.nytimes.com/2018/09/07/technology/monopoly-antitrust-lina-khan-amazon.html [https://perma.cc/Q9XZ-XWZT]; *see, e.g.*, Brody Mullins et al., *Inside the U.S. Antitrust Probe of Google*, WALL ST. J. (Mar. 19, 2015, 7:38 PM), https://www.wsj.com/articles/inside-the-u-s-antitrust-probe-of-google-1426793274 (noting that the FTC started a case against Google in 2011 which it closed without bringing charges) [https://perma.cc/Z7NQ-JSSS].

[246] Khan, *supra* note 244.

[247] *Id.*

[248] *But see generally* Daniel A. Crane, *How Much Brandeis Do the Neo-Brandeisians Want?*, 64 ANTITRUST BULL. 531 (2019).

[249] *See* the foundational argument of Judge Robert Bork in ROBERT BORK, THE ANTITRUST PARADOX (1978).

big tech with some pushing for break-up remedies,[250] others more interested in merger reform,[251] and a third more loosely connected group pushing for interoperability or duty-to-deal remedies, [252] amongst other views. [253] Together, these efforts are paying off. They led to one large House Judiciary Committee Report on Big Tech and Antitrust, a number of lawsuits against tech companies, new proposed legislation, public officials, and a new presidential executive order on antitrust.[254]

---

[250] Rory Van Loo, *In Defense of Breakups: Administering a "Radical" Remedy*, 105 CORNELL L. REV. 1955 (2020); *see also* ZEPHYR TEACHOUT, BREAK 'EM UP: RECOVERING OUR FREEDOM FROM BIG AG, BIG TECH, AND BIG MONEY (2020).

[251] Terrell McSweeny & Brian O'Dea, *Data, Innovation, and Potential Competition in Digital Markets—Looking Beyond Short-Term Price Effects in Merger Analysis*, CPI ANTITRUST CHRONICLE (Feb. 2018); John Kwoka, *Reviving Merger Control: A Comprehensive Plan for Reforming Policy and Practice*, ANTITRUST INST. (Oct. 9, 2018), https://www.antitrustinstitute.org/wp-content/uploads/2018/10/Kwoka-Reviving-Merger-Control-October-2018.pdf [https://perma.cc/7QYQ-LDNJ]; Scott C. Hemphill & Timothy Wu, *Nascent Competitors*, 168 U. PA. L. REV. (2021).

[252] Fiona Scott Morton, *Why 'breaking up' big tech probably won't work*, WASH. POST (July 16, 2019), https://www.washingtonpost.com/opinions/2019/07/16/break-up-facebook-there-are-smarter-ways-rein-big-tech/ [https://perma.cc/9CAL-W6E9]; Michael Kades & Fiona Scott Morton, *Interoperability as a competition remedy for digital networks*, WASH. CTR. FOR EQUITABLE GROWTH (2020); Nikolas Guggenberger, *Essential Platforms*, 24 STAN. TECH. L. REV. 237 (2021).

[253] *See also* Lina M Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 988-1000 (2019) (arguing against self-preferencing in platform marketplaces and for non-discrimination obligations).

[254] House Report, *supra* note 107; see New York v. Facebook, No. 1:2020cv03589 (D.D.C. filed Dec. 9, 2020); FTC v. Facebook, No. 1:2020cv03590 (D.D.C. filed Dec 9, 2020); United States v. Google, No. DC/1:20-cv-03010 (D.D.C. filed Oct. 20, 2020); Colorado v. Google, No. 1:2020cv03715 (D.D.C. filed Dec. 17, 2020); Texas v. Google, No. 4:2020cv00957 (E.D. Tex. filed Dec. 16, 2020); *see generally* Rachel Kraus, *A running list of American antitrust lawsuits against Google and Facebook*, MASHABLE (Dec. 17, 2020), https://mashable.com/article/antitrust-lawsuits-facebook-google/ [https://perma.cc/LR2M-B5A8]; *see also* Rebecca Klar, *Amazon hit with antitrust lawsuit alleging e-book price fixing*, THE HILL (Jan. 14, 2021), https://thehill.com/policy/technology/534364-amazon-hit-with-class-action-lawsuit-alleging-e-book-price-fixing [https://perma.cc/4659-G7NF]; Chris M. Rodrigo, *Klobuchar to introduce omnibus antitrust bill*, THE HILL (Feb. 4, 2021), https://thehill.com/policy/technology/537279-klobuchar-to-intro-omnibus-antitrust-bill [https://perma.cc/4EHY-SSMC]; American Economic Liberties Project, *The Courage to Learn: A Retrospective on Antitrust and Competition Policy During the Obama Administration and Framework for a New Structuralist Approach* (Jan. 12, 2021), https://www.economicliberties.us/our-work/courage-to-learn/ [https://perma.cc/29Z8-78YY]; *Executive Order on Promoting Competition in the American Economy*, 86 Fed. Reg. 36987, 36999 (July 9, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/ [https://perma.cc/529F-D84J].

These antitrust visions are united by a common concern around diffusing digital commercial *power*, leveling the playing field and rendering the competitive process fairer for smaller players and new entrants. The conception of law, power, and freedom underpinning these perspectives is therefore attuned to the structural dominance of big tech platforms and of the harms they cause to other businesses and consumers. They are arguably decentralizing visions, trusting in fairer and more diffused market processes that can bring about benefits to consumers and entrepreneurs.[255] *Freedom* as part of these visions is the freedom to conduct a business and have a fair chance to succeed, and the freedom to consume, produce, and make economic choices on marketplaces. *Law* is a hybrid conception of court adjudication and public regulation, overall meant to represent the public interest, but frequently captured by elite and corporate interests.[256]

Despite their welcome emphasis on market structure and on the importance of diffusing and dissolving concentrations of private power, antitrust conceptions often suffer from continued attachment to law and economics frameworks and rationales. For example, they frequently lack a critical perspective on the effects of market mechanisms on persons and ecosystems.[257] Holding antitrust law and its existing pillars as fixed means assuming many aspects of a market economy.[258] It is possible to reframe many antitrust and market regulation questions in ways more centrally concerned with the advancement of a just, moral, and democratic society.

---

[255] Frank Pasquale has called these visions "Jeffersonian." *See* Frank Pasquale, *Tech Platforms and the Knowledge Problem*, AM. AFFS. (Vol. II, Summer 2018), https://americanaffairsjournal.org/2018/05/tech-platforms-and-the-knowledge-problem/ [https://perma.cc/8CWC-K953].

[256] *See* Elliott Ash, Daniel L. Chen & Suresh Naidu, *Ideas Have Consequences: The Effect of Law and Economics on American Justice* 2 (Nat'l Bureau of Econ. Rsch., Working Paper 29788, 2022), https://ssrn.com/abstract=2992782 [https://perma.cc/R2HG-9KBL] (explaining the influence of the Manne Economics Institute for Federal Judges on federal judges' antitrust and other rulings, showing that after Manne trainings judges tended to issue more conservative judgments); *see also* David Dayen, *Corporate-Funded Judicial Boot Camp Made Sitting Federal Judges More Conservative*, THE INTERCEPT (2018), https://theintercept.com/2018/10/23/federal-judiciary-henry-manne-law-economics/ [https://perma.cc/T4C5-H4XD].

[257] *But see* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L. J. 175, 175 (2021) (arguing for a revival of the moral justifications of antitrust law).

[258] On the limits of competition, *see* MAURICE E. STUCKE & ARIEL EZRACHI, COMPETITION OVERDOSE: HOW FREE MARKET MYTHOLOGY TRANSFORMED US FROM CITIZEN KINGS TO MARKET SERVANTS 1-225 (2020); MICHELLE MEAGHER, COMPETITION IS KILLING US: HOW BIG BUSINESS IS HARMING OUR SOCIETY AND PLANET - AND WHAT TO DO ABOUT IT (2020).

B. Reflections on Liberal and Neoliberal Platform Governance

Self-regulation, data protection, fiduciary obligations, and competition are often imagined as coherent wholes or slogans: competition is seen as about breaking-up Facebook; self-regulation is represented by the Facebook Oversight Board; data protection is crystallized, wrongly, as a notice and consent instrument. In reality, each of these conceptions is multi-faceted, containing extreme deregulatory stances and more emancipatory angles. For example, data protection can be a shallow hologram of regulation or a way to radically restructure surveillance ecosystems.[259]

Defining these visions as neoliberal means recognizing their limits and beginning the journey of envisioning a transformative future. Neoliberal tendencies confine political economy problems to discrete and tractable stories which strengthen private interests in the end. They rhetorically celebrate freedom, individual choice, accountability, and competition, while conferring political and economic power and advantages to a commercial elite.

1. What is Neoliberalism?

As a concept, neoliberalism admits diverse interpretations that fall more or less neatly into two major schools of thought.[260] The first school focuses on neoliberalism as a historical movement, and as a conscious project of the dominant ruling class aimed at promoting "individual entrepreneurial freedom within an institutional framework characterized by strong property rights, free markets, and free trade."[261] The critique here centers on the organized efforts of the Mont Pelerin Society (MPS) amongst others. According to this perspective, neoliberalism emerged as a conscious

---

[259] Jef Ausloos & Michael Veale, *Researching with Data Rights*, TECH. AND REGUL. 136, 136 (2020), https://techreg.org/article/view/10991/11965 [https://perma.cc/2AKN-L8HL]1; Michael Veale & Frederik Zuiderveen Borgesius, *Adtech and Real-Time Bidding under European Data Protection Law*, GER. L. J. (2021).

[260] *See, e.g.*, DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2005); WENDY BROWN, UNDOING THE DEMOS (2015); THE ROAD FROM MONTPELERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE (Philip Mirowski & Dieter Phelwe eds., 2009); MUTANT NEOLIBERALISM: MARKET RULE AND POLITICAL RUPTURE (William Callison & Zachary Manfredi eds., 2019); SLOBODIAN, *supra* note 163; David Singh Grewal & Jedediah Britton-Purdy, *Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1 (2014); Britton-Purdy et al., *supra* note 164; Samuel Moyn, *A Powerless Companion: Human Rights in the Age of Neoliberalism*, 77 L. & CONTEMP. PROBS. 147 (2015); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 L. & CONTEMP. PROBS. 195 (2015); Zephyr Teachout, *Neoliberal Political Law*, 77 L. & CONTEMP. PROBS. 215 (2015); Michael A. Wilkinson, *Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?*, 21 EUR. L. J. 313 (2015).

[261] HARVEY, *supra* note 260, at 2.

intellectual movement, and subsequently as an ideology, after the Second World War in response to classical liberalism and socialist ideas. In April of 1947, European and American economists, philosophers, and sociologists including Albert Hunold and Friedrich Hayek met in Mont Pelerin in Switzerland and founded MPS. At this meeting, the group agreed on a rather loose statement of aims that included the promotion of "the rule of law,"[262] the "belief in private property and the competitive market," [263] and the advancement of methods to combat "the misuse of history for the furtherance of creeds hostile to liberty."[264]

The MPS quickly developed into a transnational network of intellectuals that to this day meets regularly globally or regionally in various regions of the world to promote ideas such as free markets, cross-border trade, limited regulation, and the rule of law.[265] Over more than half a century, this movement silently advanced into and influenced every area of human life. Hayek, an MPS founder, played an instrumental role in the creation of the Chicago School of Economics at the University of Chicago in 1946, which went on to greatly influence American economic policy and law.[266] Western political leaders, including conservatives Ronald Reagan and Margaret Thatcher, and progressives Bill Clinton, Tony Blair, and Barack Obama, have contributed to advancing neoliberalism either deliberately or sometimes because for lack of alternatives.[267]

The second school is influenced by Foucault's thought. In his 1979 Lectures at the *Collège de France*, Michel Foucault described neoliberalism as a hegemonic governing rationality. [268] He painted it as a subconscious mode

---

[262] *Statement of Aims*, THE MONT PELERIN SOCIETY (Apr. 1947), https://www.montpelerin.org/event/429dba23-fc64-4838-aea3-b847011022a4/websitePage:6950c74b-5d9b-41cc-8da1-3e1991c14ac5 [https://perma.cc/7RCA-7G8B].

[263] *Id.*

[264] *Id.*

[265] See the Mont Pelerin Society's website here: https://www.montpelerin.org/event/429dba23-fc64-4838-aea3-b847011022a4/websitePage:d0c34bd9-1aa4-48df-a55e-4be50dfb57ee [https://perma.cc/7ZKJ-LPCC].

[266] *See* Rob van Horn & Philip Mirowski, *The Rise of the Chicago School of Economics and the Birth of Neoliberalism*, *in* THE ROAD FROM MONT PELERIN 139 (Philip MIROWSKI & Dieter PLEHWE EDS., 2009).

[267] *See* HARVEY, *supra* note 260, at Ch. 2 (discussing how neoliberal figures such as Thatcher and Reagan came to power around 1980 and started developing a neoliberal agenda); *see also* Farhad Manjoo, *Barack Obama's Biggest Mistake*, N.Y. TIMES (Sept. 18, 2019), https://www.nytimes.com/2019/09/18/opinion/obama-2008-financial-crisis.html [https://perma.cc/GZE7-XG7U].

[268] MICHEL FOUCAULT, LEÇONS AU COLLÈGE DE FRANCE, NAISSANCE DE LA BIOPOLITIQUE (1979).

of governance ingrained in political and social practices that embeds a certain discipline of power through market rationality into people's lives. Neoliberalism, to Foucault, is therefore understood not simply as a historical phenomenon, but also as a mode of political organization that embodies principles of unhindered entrepreneurial freedom, privatization, and the primacy of the rational *homo economicus* over the collective interest.[269]

These two schools have commonalities. Each speaks to genealogical and historical methods in fertile ways. In the context of technology, neoliberalism functions as a conscious political effort to construct and expand "free market" thinking, which makes the historical school perhaps more useful as a lens to adopt in order to move forward. At the same time, neoliberalism as an ideology operates in ways that extend beyond class struggle. In Foucault's terminology, neoliberalism has evolved into a governmental logic that has become entrenched in legal and technological institutions. It now pervades many technology circles, as well as corporate, legal, and bureaucratic settings.

What distinguishes neoliberalism from liberalism, libertarianism, and classical liberalism, is not a de-regulatory rationale, but a specific conception of the role of law and institutions as enablers of market expansionism. Classical liberalism placed political freedom at the center, it saw markets as primitive, as prior to politics and as necessary enablers of political freedom. Neoliberals invert this relationship of the political and the economic and describe political freedom as an instrument that must be used to advance free markets.[270]

2. Neoliberalism and Platforms

In the context of platform regulation, neoliberalism is pervasive and part of the air we breathe.[271] For many years, platform governance efforts were only plausible to the extent they aligned with a neoliberal blueprint. Recognition by regulatory and governmental authorities that profit incentives are a fundamental source of harm in the digital platforms sphere has long

---

[269] *See* William Davies, *Commentary on Nicholas Gane's 'The Emergence of Neoliberalism'*, THEORY, CULTURE & SOC'Y (Feb. 21, 2014), https://www.theoryculturesociety.org/blog/responses-william-davies-on-nicholas-ganes-the-emergence-of-neoliberalism (discussing the tension between historical work on economic ideas and sociological work on the governmental rationalities that underlie Foucauldian neoliberalism) [https://perma.cc/3X54-D2KM].

[270] Keith Tribe, *Liberalism and Neoliberalism in Britain*, 1930-80, *in* THE ROAD FROM MONT PÈLERIN (Philip Mirowski & Dieter Phelwe eds., 2009) (discussing FRIEDRICH HAYEK, THE ROAD TO SERFDOM (1944)).

[271] *See, e.g.*, Kapczynski, *supra* note 137, at 1460, 1466-67.

remained taboo.[272] Yet, as Erik Olin Wright has put it, critiques of capitalism and neoliberalism can be highly nuanced: "the diagnosis and critique of capitalism does not imply that capitalism is the only cause of deficits in the values of equality, democracy and community, but only that it is a significant contributor."[273]

The institutional effort to construct free markets has become so ingrained in the way many people understand technology, politics, society, and the economy that one might call it an ideology: it operates beyond the conscious and limits collective imagination. Contemporary neoliberal assumptions include the idea that the market is the most efficient and exact means of resource allocation, that collective policy-making processes that do not rely on individual choices are paternalistic, and that the market is able to satisfy and subsume all forms of human flourishing including political participation, leisure, education, and culture. Although changes are arguably on the horizon,[274] neoliberalism's ideological tenets are presumptively woven into the larger debate on platform regulation and drives policy toward one of the four "neoliberal" conceptions that I outlined.

IV. BEYOND NEOLIBERAL PLATFORM GOVERNANCE? UTILITIES AND DECENTRALIZATION

Having discussed the porosity and elusive meanings of neoliberalism, I now turn to how we ought to move forward. Where do spaces for emancipatory digital policy and theoretical renewal begin? Is there a point where neoliberal governance can or should end?

In Part IV, I illustrate the validity of two propositions. First, functionally similar conceptions of law can carry different normative commitments. Second, normatively aligned understandings of society can stem from very different conceptions of law and of digital ecosystems. For example, centralized and decentralized visions of law and technological infrastructures can both suffer neoliberal biases and limitations, and can both serve as windows on emancipatory platform regulation. Shifting to a forward-looking perspective on how to regulate digital environments, there are two contested conceptions that sit across neoliberal, liberal, and critical understandings of digital regulation. Discussing these visions' normative ambivalence will bring concreteness to the question of what constitutes

[272] *See, e.g.*, Julie E. Cohen, *From Lex Informatica to the Control Revolution*, 36 BERKELEY TECH. L.J. (forthcoming 2022).
[273] ERIK O. WRIGHT, HOW TO BE AN ANTICAPITALIST IN THE TWENTY-FIRST CENTURY 36 (2019).
[274] *See, e.g.*, Jon D. Michaels, *We the Shareholders: Government Market Participation in the Postliberal U.S. Political Economy*, 120 COLUM. L. REV. 465 (2020).

normatively appealing platform governance for the future, and how to avoid perpetuating past mistakes.

A. Porous Boundaries: Beyond Neoliberal Visions of Platform Regulations

1. Platforms as Public Utilities

Proposals to treat big tech companies as utilities are not infrequent and have taken various forms. A spectrum of solutions has emerged, ranging from bolstering competition through interoperability and duties to deal, to more radical forms of public provision and nationalization.

Historically, in the U.S. the concept of a public utility was a product of the Industrial Revolution and evolved from common law roots in the law of public callings, the police power, as well as legislative and public service corporate chartering.[275] Contrary to popular belief that sees the utility as an idea that peaked with the *Granger cases* and *Munn v. Illinois* in the late 19th century,[276] utility regulation remained a key way to confront political and economic power in productive settings until the 1980s. According to William Novak, the utility concept successfully co-existed with anti-monopoly and antitrust regulation.[277] It had three primary characteristics: it "drew directly on a new positive conception of statecraft and the public duties of a modern polity,"[278] particularly concerning the provision of public services; it took police power regulations and administrative rulemaking and adjudication in a new expansive direction; and it propelled "a more generalized and autonomous conception of the public interest itself as the basis for increased state and governmental regulation."[279] The prominence of the public utility notion began to decline during the second half of the 20th century in response to critiques and attacks by neoliberals and law and economics thinkers.[280]

Building on these Progressive ideas, scholars have suggested adopting the public utility as a concept and methodology for re-imagining the governance of digital platforms. Sabeel Rahman, for example, advances a multi-pronged approach to utility regulation in the 21st century. After

---

[275] William J. Novak, *The Public Utility Idea and the Origins of Modern Business Regulation*, in THE CORPORATION AND AMERICAN DEMOCRACY 154 (N.R. Lamoreaux & W. J. Novak eds., 2017) [hereinafter *The Public Utility Idea*]; *see also* WILLIAM J. NOVAK, NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE (2022) [hereinafter NEW DEMOCRACY].

[276] Munn v. Illinois, 94 U.S. 113 (1876).

[277] Novak, *The Public Utility Idea*, *supra* note 275, at 154.

[278] *Id.* at 155.

[279] *Id.* at 157.

[280] *Id*. at 143.

identifying "infrastructural" goods and services, e.g., Internet access,[281] the second step contemplates potential oversight by bodies such as the Federal Communications Commission (FCC) or the FTC. Further considerations include the adequacy of remedies such as firewalls or structural separations, and public options, which include nationalization or municipalization, but also government competition with private entities on given market segments.[282] With his co-author Zephyr Teachout, Rahman applies this proposal to the digital public sphere: a public interest space for exchange, rather than one fueled by advertising profits.[283] Josh Simons and Dipayan Ghosh propose a utility model for platform infrastructures as loci of democratic self-government.[284] This vision has parallels to Facebook's Oversight Board model. There are interesting questions around how visions that imagine platforms as constitutional or sovereign spaces differ depending on whether they embrace the utility or constitutionalist tendencies.[285]

One constitutionalist vision, though less clearly aligned with utility law's Progressive roots, is U.S. Conservatives' recent interest in treating platforms as common carriers to prevent them from permanently or temporarily banning high profile users like Trump.[286] In a recent opinion, Justice Thomas recognized the problem of platform power[287]:

> Today's digital platforms provide avenues for historically unprecedented amounts of speech, including speech by government actors. Also unprecedented, however, is the

[281] K. Sabeel Rahman, *Infrastructural Regulation and the New Utilities*, 35 YALE J. ON REG. 911, 926 (2018); Rahman, *The New Utilities*, *supra* note 7, at 1647.
[282] *Id*.
[283] K. Sabeel Rahman & Zephyr Teachout, *From Private Bads to Public Goods: Adapting Public Utility Regulation for Informational Infrastructure*, KNIGHT FIRST AMEND. INST. (Feb. 4, 2020), https://knightcolumbia.org/content/from-private-bads-to-public-goods-adapting-public-utility-regulation-for-informational-infrastructure [https://perma.cc/2KVS-VQXA].
[284] Josh Simons & Dipayan Ghosh, *Utilities for democracy: Why and how the algorithmic infrastructure of Facebook and Google must be regulated*, BROOKINGS INST. 1 (Aug. 2020), https://scholar.harvard.edu/dipayan/publications/utilities-democracy-why-and-how-algorithmic-infrastructure-facebook-and-google [https://perma.cc/ZQX9-6WCH]. *But see, e.g.*, Adam Thierer, *The Perils of Classifying Social Media Platforms as Public Utilities*, 21 COMMLAW CONSPECTUS 249, 250 (2013).
[285] *See, e.g.*, Rory Van Loo, *Federal Rules of Platform Procedure*, 88 U. CHI. L. REV. 829, 829 (2021); Nicolas Suzor, *Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms*, 4 SOCIAL MEDIA & SOC'Y 1 (2018); Dennis Redeker et al., *Towards digital constitutionalism? Mapping attempts to craft an Internet Bill of Rights*, 80 INT'L COMMC'N GAZETTE 302 (2018).
[286] *See, e.g.*, Eugene Volokh, *Social Media Platforms as Common Carriers?*, Draft Presented at Freedom of Expression Scholars Conference (Apr. 29, 2021).
[287] Biden v. Knight First Am. Inst. at Columbia Univ., 593 U.S. 1220 (2021) (Thomas, J., concurring).

> concentrated control of so much speech in the hands of a few private parties. We will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms.[288]

He then went on to argue that part of the solution was to rely on "doctrines that limit the right of a private company to exclude," such as treating platforms as common carriers subject to special regulations that require that they remain neutral conduits,[289] or as public accommodations, holding themselves out to the public without "carrying" freight, passengers, or communications.[290] Recent Bills and caselaw in Florida and Texas have been further playing with this analogy, with uncertain results in terms of how platform companies will be held to account regarding the speech they carry.[291]

In Europe today, new laws are being introduced as part of the Digital Services Act, Digital Markets Act, and AI Act.[292] Together, these reforms conceive of Big Tech companies as bottlenecks that require regulating to let other smaller businesses enter digital market segments and compete with incumbents. The regulations would impose new obligations on gatekeepers to ensure that digital spaces are safe and that competitors can fairly compete against incumbents on all monopolized market segments. Part of the motivation behind these proposals includes a geopolitical interest in regulating U.S. Big Tech platforms to enable E.U.-based innovation. The reform package has yet to come into force and is already generating substantial controversy in Europe and elsewhere.

Despite functional similarities, the spectrum of conceptions of platforms as public utilities is broad, ranging from the regulation of non-

---

[288] *Id.* at 1221.

[289] *See, e.g.*, German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 411 (1914) (affirming state regulation of fire insurance rates).

[290] *See, e.g.*, The Civil Rights Cases, 109 U.S. 3, 41-43 (1883).

[291] *See, e.g.*, H.B. 20, 87th Leg., 2nd Sess. (Tx. 2021) ("An Act relating to censorship of or certain other inference with digital expression, including expression on social media platforms or through electronic mail messages.); S.B. 7072, 2021 Leg. Sess. (Fl. 2021) ("Social Media Platforms"); NetChoice, L.L.C. v. Paxton, 49 F4th 439 (5th Cir. 2022) (upholding HB 20 in its entirety as compliant with the First Amendment); NetChoice, L.L.C. v. Attorney General, Florida, 34 F4th 1196 (11th Cir. 2022) (striking down the part of SB 7072 that limits the power of social media platforms to moderate and curate content, but upholding the law's disclosure provisions).

[292] DMA, *supra* note 162; DSA, *supra* note 162; *see also* Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonized Rules on Artificial Intelligence *(Artificial Intelligence Act) and Amending Certain Union Legislative Acts*, COM (2021) 206 final (Apr. 21, 2021), https://eur-lex.europa.eu/resource.html?uri=cellar:e0649735-a372-11eb-9585-01aa75ed71a1.0001.02/DOC_1&format=PDF [https://perma.cc/GBP7-U72N].

discriminatory and fair access that enables competition, to conceptions of platforms as public squares or libraries.[293] Some of these may seem more or less emancipatory and more or less appropriate directions for future reform. Conceptions more sensitive to the limits of private digital power, for example, could move us beyond neoliberal platform capitalism and toward a renewal of past antimonopoly and utility ideals.[294] Where neoliberal and non-neoliberal visions of digital utilities differ is indeed in the primacy they give to markets and price equilibrium. As I argue below, resisting a strongly market-based vision is key to upholding social and ecological values in the digital economy of the future.

2. Decentralizing Platform Governance

A second group of hybrid conceptions includes various technical and social mechanisms for governing digital resources, such as data or content, in ways that overcome or disintermediate from platforms' power and enable more contestation and decentralized decision-making in platform markets. Focusing on data in particular, at one end of the spectrum, there is what the U.K. Furman Report calls "data mobility," that is to say, portability and interoperability measures that would enable greater personal choice in digital environments, and to some extent, overlap with competition or utility visions.[295] Interoperability measures have been imposed in the U.S. *Microsoft* case[296] and in the recent E.U. decision to clear Google's acquisition of *FitBit*.[297] Data portability measures are included in privacy legislation in the U.S. and Europe and enable data transfers at data subjects' request.[298] Other

---

[293] Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017) (declaring that the Internet is "the modern public square"); *see also* Sebastian Benthall & Jake Goldenfein, *Essential Infrastructures*, PHENOMENAL WORLD (July 27, 2020), https://phenomenalworld.org/analysis/essential-infrastructures [https://perma.cc/8RRS-U63Y].

[294] *See* Novak, *The Public Utility Idea*, *supra* note 275, at 154.

[295] Furman Report, UNLOCKING DIGITAL COMPETITION 5 (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf [https://perma.cc/W8TW-CYRZ]; *see, e.g.*, DATA TRANSFER PROJECT, https://datatransferproject.dev/ [https://perma.cc/AVQ2-QDVH].

[296] 253 F.3d 34 (D.C. Cir. 2001).

[297] European Commission Press Release IP/20/2484, *Mergers: Commission clears acquisition of Fitbit by Google, subject to conditions* (Dec. 17, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2484 [https://perma.cc/EZW7-XBJ2].

[298] Note that data portability is an individual right in a number of data protection laws, including in the California Consumer Privacy Act, CAL. CIV. CODE § 1798.100(d) and the GDPR, art. 20.

protections for non-commercial uses and for non-personal data processing are envisaged under the E.U. Data Governance Act.[299] All of these possibilities seem not only compatible with, but also conducive to a neoliberal conception of platforms as spaces for perfect competition, individual choice, and efficient cross-platform switching.

At the opposite end of the spectrum are civic visions of platform governance,[300] which aim to decentralize and diversify the platform economy by building public-purpose infrastructure and spaces for democratic and public engagement.[301] Some of these visions are socialist and utopian and consciously seek to shift economic paradigms towards small cooperatives and bottom-up models of data, content, and infrastructural governance.[302] Many of these proposals also tend to fall–more or less voluntarily–into individualist paradigms, proposing solutions like personal data wallets and relying on blockchain infrastructures to collect and store data about individuals.[303]

In between pro-competitive and civic visions, one finds proposals that aim at more distributed control over digital resources through infrastructural and trusteeship solutions, separating the functions of data production, collection, and use from other platform services such as e-commerce or social

---

[299] Proposal for a Regulation on European data governance (Data Governance Act*)*, COM (2020) 767 final (Nov, 25, 2020), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0767&from=EN [https://perma.cc/QM6T-K4BE].

[300] Ethan Zuckerman, *The Case for Digital Public Infrastructure*, KNIGHT FIRST AMEND. INST. (Jan. 17, 2020), https://knightcolumbia.org/content/the-case-for-digital-public-infrastructure [https://perma.cc/9KUH-ZMGT]; Michael Kwet, *Fixing Social Media: Toward a Digital Democratic Commons*, 5 MARKETS, GLOBALIZATION & DEV. REV. 1 (2020).

[301] Zuckerman, *supra* note 300; Ellen P. Goodman, *Building Civic Infrastructure for the 21st Century*, GER. Marshall Fund (Nov. 19, 2020), https://www.gmfus.org/publications/building-civic-infrastructure-21st-century [https://perma.cc/AT4C-9C4M].

[302] *See* PLATFORM COOPERATIVISM CONSORTIUM, https://platform.coop/ [https://perma.cc/C5JW-M4XC]; OURS TO HACK AND TO OWN: PLATFORM COOPERATIVISM. A NEW VISION FOR THE FUTURE OF WORK AND A FAIRER INTERNET (Trebor Scholz & Nathan Schneider eds., 2016); Michele Loi, Paul-Olivier Dehaye & Ernst Hafen, *Towards Rawlsian "property-owning democracy" through personal data platform cooperatives*, CRITICAL. REV. INT'L SOC. AND POL PHIL. 1 (2020); Jennifer Cobbe & Elettra Bietti, *Rethinking Digital Platforms for the Post-COVID-19 Era*, CTR. FOR INT'L GOVERNANCE INNOVATION (May 12, 2020), https://www.cigionline.org/articles/rethinking-digital-platforms-post-covid-19-era [https://perma.cc/S7XQ-ZJY2].

[303] *See, e.g.*, POLYPOLY COOPERATIVE, polypoly.coop [https://perma.cc/D8TA-B7NT]; SALUS COOP, salus.coop [https://perma.cc/5AC3-NDCT]; DORG, dOrg.tech [https://perma.cc/H2WF-UDVM].

networking.[304] An example is *Solid/Inrupt*,[305] an infrastructural solution that separates data storage functionality from data usage. As part of this vision, users store personal data in a chosen decentralized data store called a "Pod," which automatically communicates with service-providers (e.g., Google search), providing them only with the limited data a user has accepted to share with them. Related approaches include blockchain-based data stores,[306] physical data boxes,[307] or auction-based mechanisms for democratizing data.[308]

Analogous pathways can be discerned regarding content: interoperability projects such as Twitter's *BlueSky* initiative[309] and portability possibilities on TikTok, which allow users to make content and share it on other platforms or mediums.[310] Decentralized platform models such as Mastodon and Diaspora are organized into federated communities and allow users to move across groups and to have a choice regarding how and with whom to share content as well as on what to see.[311] Mastodon advertises itself as a platform in which you can "Publish anything you want: links, pictures, text, video. All on a platform that is community-owned and ad-free."[312] Diaspora's slogan is "The online social world where you are in control."[313]

All of these initiatives share an appetite for radical re-imagination of platform structures in the direction of a more decentralized, diverse, and

---

[304] AI Council & Ada Lovelace Institute, *Exploring legal mechanisms for data stewardship* (Mar. 4, 2021), https://www.adalovelaceinstitute.org/report/legal-mechanisms-data-stewardship/ [https://perma.cc/8NZA-BAFE].

[305] *See About Solid*, SOLID, https://solidproject.org/about [https://perma.cc/32V8-TL99].

[306] *See, e.g.*, *Datum*, https://datum.org/ (data storage and monetization through blockchain) [https://perma.cc/84AP-9TGV].

[307] *See, e.g.*, the UK Data Box project, https://github.com/me-box/databox/ [https://perma.cc/D638-YZHY].

[308] *See* RADICALXCHANGE, www.radicalxchange.org [https://perma.cc/PD2K-GPEM]; RADICAL MARKETS, *supra* note 155, at Ch. 5; *see also* Imanol Arrieta-Ibarra, et al., *Should We Treat Data as Labor? Moving beyond "Free,"* 108 AEA PAPERS AND PROCS. 38 (2018); Jaron Lanier & Glen E. Weyl, *A Blueprint for a Better Digital Society*, HARV. BUS. REV. (2018).

[309] Adi Robertson, *Twitter's decentralized social network project takes a baby step forward*, THE VERGE (Jan. 21, 2021, 3:34 PM), https://www.theverge.com/2021/1/21/22242718/twitter-bluesky-decentralized-social-media-team-project-update [https://perma.cc/EYX2-RVVC].

[310] Liz Stanton, *TikTok testing a new Story-sharing feature*, HOOTSUITE BLOG, (Aug. 23, 2022: 5:11 PM), https://blog.hootsuite.com/social-media-updates/tiktok/tiktok-testing-a-new-story-sharing-feature/.

[311] For a discussion of federated social media networks, *see* Alan Rozenshtein, *Moderating the Fediverse: Content Moderation on Distributed Social Media*, 2 J. OF FREE SPEECH L. (forthcoming 2023).

[312] MASTODON, https://joinmastodon.org [https://perma.cc/W2YR-VP5H].

[313] DIASPORA, https://diasporafoundation.org/ [https://perma.cc/J9YD-BHQ2].

horizontal digital economy. Yet they differ in their normative conceptions of law, freedom, and power. Data mobility conceptions see the role of law as that of facilitating more fluid data flows and market processes through publicly-mandated regulation. *Solid*, Twitter *Bluesky*, and other private or community-led visions are far less concerned with government intervention and legislation and more concerned with bottom-up, private design. Both public regulation and bottom-up conceptions, however, can be considered neoliberal in the sense that they aim to enhance individual choice and do not question markets as a primary mode of governance.

Civic or cooperative-based proposals see technology and collective, bottom-up participation as ways to enable democratic possibilities, limiting the advance of digital markets and ad-based business models. *Freedom* as part of these visions is the ability to participate in collective governance, rather than the ability to make consumer choices. Markets are allegedly not the priority, while democracy is. Yet cooperative proposals have significant limits, too. They arguably repeat the utopian and anarchic errors of the past, prioritizing individual freedoms in decentralized spaces over public action, thereby facilitating new manifestations of private power. Paradoxically perhaps, few of these initiatives represent concrete alternatives to neoliberal or capitalist logics.[314]

All these conceptions understand centralized platform power as a threat, but they differ in their tolerance of markets and of the monopolistic tendencies they might enable. Many projects structured around decentralization remain fragile in the face of re-centralization possibilities.[315] They also have downsides in terms of reversibility, actions on the blockchain are very hard to undo; security, enclosed environments are purportedly more secure; and environmental impact.[316]

While some of these utility and decentralizing proposals, particularly civic infrastructures and non-individualistic models, have the potential to change the relationship between persons and processes of production in digital and non-digital contexts, these possibilities remain significantly underexplored.

---

[314] *See* CARL RATNER, THE POLITICS OF COOPERATION AND CO-OPS: FORMS OF COOPERATION AND CO-OPS, AND THE POLITICS THAT SHAPE THEM (2015).

[315] Elettra Bietti, *Explainer: Competition, Data and Interoperability in Digital Markets*, PRIV. INT'L (Aug. 20, 2020), https://privacyinternational.org/explainer/4130/explainer-competition-data-and-interoperability-digital-markets [https://perma.cc/AQJ3-VUPR].

[316] On the environmental aspects of blockchain technologies, *see*, e.g., James Vincent, *Bitcoin Consumes More Energy Than Switzerland, According to New Estimate*, THE VERGE (July 4, 2019, 8:33 AM), https://www.theverge.com/2019/7/4/20682109/bitcoin-energy-consumption-annual-calculation-cambridge-index-cbeci-country-comparison [https://perma.cc/UX7D-XD3K].

B. Constructing New Conceptions of Law, Freedom, and Power in the Platform Economy

This Article tackled three core themes: regulatory deadlock in digital markets, neoliberal capture, and the need to deconstruct and historicize before reconstructing and imagining new digital spaces. I discussed the specificities and limits of neoliberal conceptions of platform regulation, particularly that they obscure the way private digital power manifests, escapes regulatory scrutiny, and can lead to harm to humans and ecosystems in ways that repeat the deregulatory and cyberutopian errors of the past. I also began the work of showing that any conception—regardless of whether it can be characterized as libertarian, liberal, neoliberal, or critical—is partly determinative of future trajectories and partly indeterminate and malleable. In other words, each of us lawyers, activists, policy makers, scholars, or students is constrained by context, but retains agency, i.e., the ability to change states of affairs.

Embracing utilities or decentralizing perspectives in the platform context carries an inescapable ambiguity. The effort remains that of mapping past errors and constructing new possibilities for law and regulation that—to the extent possible—–avoid repeating mistakes while constraining private digital power in durable ways.

Here are a few concluding remarks meant to open future paths. Throughout this Article, I have emphasized a distinction between libertarian, liberal, and critical perspectives, and more concretely, between liberal and neoliberal understandings of platform regulation on the one hand, and critical, egalitarian, and socialist understandings on the other. The purpose of these categories is expository clarity, showing that noble ideas such as law and freedom can be instrumentalized for wrongful purposes if we fail to pay attention to their normative roots and effects in concrete circumstances. Unless subjected to iterative and situated moral scrutiny, these ideas risk becoming empty facades that favor or even protect powerful interests.

Moving forward requires three steps, which embody the need to incorporate conceptions of utilities and decentralization into a rich understanding of law, power and freedom that can prove durable and emancipatory.

First, there are sound reasons to depart from the apparent deadlock that neoliberal digital platform governance today represents. Neoliberal platform governance is an essentially "contested concept,"[317] a family of approaches to digital regulation that share resemblances, yet differ too. Core aspects of neoliberal governance include conscious efforts by an intellectual, economic,

[317] Walter B. Gallie, *Essentially Contested Concepts*, 56 PROCS. ARISTOTELIAN SOC'Y 167-98 (1956).

and political elite of investors, policy makers, and technologists to leverage the rhetoric of individual freedom, innovation, and deregulation to expand digital markets significantly to their benefit. Notice and consent or individual-centric data governance tend to elevate an elite's economic interests to the status of primary fundamental values, and to systematically undermine important interests in dignity, relational and political equality, and collective self-determination. As such, neoliberal governance tends to subordinate fundamental human values to the pursuit of business interests and welfare maximization goals.

Second, it is essential to look at the past—the way conceptions have evolved, along with their positive and negative repercussions—to avoid repeating mistakes and to situate oneself more precisely and contextually in a long-term process of change, innovation, and regulatory experimentation. Because of past failures to look at history and context, current options on the platform regulation table are far less creative than they could be. Antonio Gramsci wrote that "[a] main obstacle to change is the reproduction by the dominated forces of elements of the hegemonic ideology. It is an important and urgent task to develop alternative interpretations of reality."[318] One purpose of the genealogical method here, therefore, has been to contribute to the development of alternatives to neoliberal digital policy constrictions. Understanding the past is key to situating oneself more cautiously as part of trajectories of emancipation.

Third, the effort of devising new utility-like or re-decentralization strategies in the platform economy requires a two-fold methodological commitment. First, it requires willingness to bridge across disciplinary silos, and second, it requires an effort to understand the values and social consequences of any regulatory effort. Antitrust and regulation are not substitutes for one another or opposites; they instead must be understood as overlapping frameworks encompassing functionally equivalent remedies. Privacy must inform efforts to regulate content moderation or to rein in monopoly power, particularly when it comes to weighing the proper scope of data sharing or portability obligations. The right kind of reform requires a mapping of various alternative possibilities and requires that people ask what values underlie these alternatives, what costs and benefits flow from each of them, and what regulatory path seems overall most promising, considering the past and looking to the future.

CONCLUSION

[318] Antonio Gransci, *Ordine* Nuovo, as cited in NOAM CHOMSKY, IMPERIAL AMBITIONS: CONVERSATIONS ON THE POST 9/11 WORLD 63 (2005).

The history of digital regulation is cyclical—it repeats itself, yet changes ever so slightly along the way. As James Beniger demonstrated, technology evolves by expanding and changing the nature of control over information.319 The proliferation of information and of technological and legal capabilities for information processing are what Beniger calls the control revolution, a goal-directed, revolving process of technological, informational, and legal development. Notions of law, freedom, and power are in constant evolution in response not only to technological change, but also to each other. They evolve to fit or react to a range of pressures, yet their evolution is far from linear or rational and requires constant critical scrutiny.

When asking how to regulate or govern the platform economy, scholars and policy-makers too often start from the assumption that what exists today is here to stay: existing platform monopolies; existing market imperatives of free competition, economic growth, and exponential consumption; existing individualist or libertarian self-regulatory framings of speech and privacy protection; inefficient or poorly funded public institutions; methodologies for measuring regulatory success; and gaps in transnational cooperation. What this Article has shown is that the problems lawyers and policymakers perceive today are the result of past trajectories. There is no fixed way to understand and frame the legal, moral, and political questions that will be relevant in the future.

[319] *See generally,* JAMES BENIGER, THE CONTROL REVOLUTION (1986).