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**Net Neutrality's 'Founder' Was Wrong About Broadband Markets:  
Competition Protects Internet Access But Big Tech Poses Realistic Harms**

by

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**I. Introduction and Summary**

On December 1, the Senate Commerce Committee voted to approve one of President Joe Biden's nominees to the FCC, and it held a hearing on another, possibly paving the way for a Democrat-majority Commission to try to reimpose net neutrality regulation on broadband Internet services. Ironically, the origins of the two decades-old net neutrality debate can be traced to Biden White House advisor Tim Wu, who is generally acknowledged to have coined the term "net neutrality." Yet the harms to online innovation and free speech that Wu warned would come from broadband Internet service providers (ISPs), absent imposition of net neutrality mandates, are nowhere to be seen. Rather it is now Big Tech that poses the real threat.

The non-existence of ISP-based harms, absent net neutrality, to innovation and speech is hugely significant because Tim Wu, net neutrality's most prominent early advocate, regarded these conjectured harms as key reasons for imposing anticipatory regulation. Yet existing competition between traditional wireline, cable, and next-generation wireless broadband ISPs now protects consumers' access to innovative applications and lawful speech content. Indeed,

the competitiveness of the broadband market and lack of harm to consumers should prompt the FCC, when and if it has a Democrat majority, to reject any imposition of net neutrality regulation. But to the extent that the Biden FCC seeks to reimpose Title II regulation, a perhaps unintended effect may be to draw significant attention to the more realistic blows to innovation and free speech posed by Big Tech platforms.

Mr. Wu, a law professor who has been in and out of government, ranks among the most prolific proponents of public utility-style regulation of broadband Internet access services. He now serves in the Biden Administration as the Special Assistant to the President for Technology and Competition Policy. His views have done much to shape the two decades-long debate over net neutrality regulation, and they almost certainly will be influential in driving the Biden Administration's broadband policies, including "net neutrality redux," if there is a redux.

According to Wu, net neutrality is an Internet design principle that ought to be secured by regulation. This includes the imposition of bright-line rules that bar ISPs from blocking and throttling the lawful data traffic of Internet end users and online edge content providers. Wu also has advocated restricting broadband ISPs from offering premium services to higher-paying edge service providers. In Wu's view, such "paid priority" arrangements risk draining away ISP network investment, deterring innovation, and shuffling startup edge providers into Internet "slow-lanes."

But Mr. Wu [has acknowledged](#) that net neutrality regulation would do little or nothing to enhance last-mile *broadband* competition. Rather, Wu's writings consistently have focused on *platform* competition and speech distribution as primary justifications for net neutrality. Supposedly, without net neutrality regulation, ISPs would discriminate against third-party Internet platforms and favor their own vertically-integrated content – like AT&T providing its subscribers faster and more reliable access to HBO Max as opposed to third-party streaming services. Or the absence of net neutrality regulation purportedly would result in ISPs favoring dominant web platforms like Facebook or Netflix that more readily could pay for priority access over smaller competitors or would-be market entrants that could not. In Wu's view, allowing such vertical arrangements would render innovative startups dead on arrival because they would be blocked, throttled, or less able to pay ISPs for expensive priority transmission.

Although ISPs have not been subject to public utility-style "net neutrality" regulation over most of the two decades since Wu popularized the term, the harmful sort of online discrimination practices that he warned against have [never materialized](#). Indeed, the increasing competitiveness of the broadband Internet services market makes it risky for ISPs to engage in harmful discrimination.

According to the FCC's 2020 *Communications Marketplace Report*, at the end of 2019, 74% of Americans had access to two or more broadband ISP options at 25 Mbps/3Mbps benchmark speeds and 29% had three or more options. Those access figures constituted 6% and 7.3% annual increases, respectively. Along with this continuing strong broadband network investment that reached \$79.4 billion in 2020, ongoing reports of new fiber broadband network deployments in localities across the nation indicate that competitive choices are even stronger at the end of 2021. Additionally, broadband speed increases and price decreases show that ISPs are competing for customers. [USTelecom data](#) for early 2021

shows the most popular broadband plans cost \$48.42 on average per month, down 26.2% since 2015. This same broadband plan has average speeds of 98 Mbps/43 Mbps, an increase of 126% for download and 256% for upload speeds since 2015.

Importantly, rapid deployment of capacious high-speed 5G networks offers consumers a stronger-than-ever intermodal competitive alternative to fixed terrestrial broadband. Also, fixed wireless providers now serve [6.9 million customers](#) and are available to [46% of the population](#). Moreover, existing satellite broadband providers as well as new entrants such as SpaceX's Starlink provide additional competitive and potential competitive alternatives.

There hasn't been evidence of instances of blocking, throttling, or harmful discrimination by ISPs in recent memory, and none since repeal of Title II regulation by the [Restoring Internet Freedom Order](#). For the most part, network "openness" is useful and has value for most broadband subscribers. In general, blocking, throttling, and acts of truly harmful discrimination reduce the usefulness of broadband services and gives subscribers a strong inducement to switch to competing providers that don't engage in such practices.

Significantly, Wu's more recent scholarship has focused on harms attributable to the market power of Big Tech platforms like Amazon, Facebook, and Google. Increasingly, Big Tech titans engage in precisely the kind of political censorship that Wu sought to prevent by advocating for net neutrality restrictions on ISPs.

In his 2018 book, *The Curse of Bigness*, Wu drew similarities between the behaviors of the old AT&T monopoly and the behaviors of today's Big Tech platforms. In Wu's telling of history, AT&T for years stifled innovations developed at Bell Labs because of their potential to disrupt the monopolistic Bell System. According to Wu, Big Tech buyouts of startup potential competitors have similar innovation-stifling effects. Examining the years 2010 to 2018, he pointed to 67 unchallenged acquisitions by Facebook, 91 by Amazon, and 214 by Google – with some conditioned – as examples of how these massive companies purchase disruptive competitors.

The fact that Wu's warnings about ISP-caused harms to online innovation and free speech never materialized ought to give pro-regulatory advocates, and the likely impending Biden FCC, serious pause. Those failed predictions helped precipitate and fuel the ongoing, expensive, and sometimes acrimonious two decades of public policy debate over net neutrality. Ironically, net neutrality regulation has received strong lobbying support from the most dominant Big Tech platforms that Mr. Wu now recognizes actually pose the most serious threats to online innovation and free speech.

In sum, the script that Mr. Wu once wrote for imposing public utility regulation on broadband ISPs does not hold up in today's broadband market – and it remains questionable as to whether it ever made sense. And that script does not justify replacing the FCC's deregulatory policy adopted in the [Restoring Internet Freedom Order](#) with Title II restrictions. If anything, it would be more suited to the regulation of Big Tech titans, which have considerably more market power than ISPs.

Imposing public utility regulation on Big Tech platforms may or may not be sound as a matter of policy or law. This *Perspectives from FSF Scholars* takes no position on that matter. But if

the Biden Administration and the FCC seek to reimpose net neutrality regulation, the new wave of public debate that will accompany such action could serve to highlight how concerns about harm to innovation and online speech apply with much greater force to today's Big Tech platforms than they do to broadband Internet service providers.

## II. Wu's Views on Net Neutrality Regulation

Tim Wu serves in the Biden Administration as the Special Assistant to the President for Technology and Competition Policy. Prior to that post, he worked as a law professor, served in the Obama Administration and as an FTC advisor, and wrote extensively on technology and competition policy. Wu is widely credited for coining the term "net neutrality" in his 2003 article in the *Telecommunications & High Technology Journal* titled "Network Neutrality, Broadband Discrimination."<sup>1</sup> And in the nearly two decades since he introduced the term into the public lexicon, Wu has been among the most prolific proponents of public utility-style regulation of broadband Internet access services. Given his role in the current administration, his work will almost certainly be influential in driving the Biden Administration's broadband policies, including "net neutrality redux," assuming there is one.

Mr. Wu views net neutrality as an Internet design principle that must be protected by public utility-style regulation. He wrote in his 2003 article: "The basic principle behind a network anti-discrimination regime is to give users the right to use non-harmful network attachments or applications, and give innovators the corresponding freedom to supply them."<sup>2</sup> According to Wu, net neutrality regulation preserves Internet platform competition and innovation by keeping broadband networks "open."<sup>3</sup> In his view, broadband Internet access services are "open" networks because they connect users to other networks, such as online platforms like Facebook. And he calls the opposite a "closed network," like cable television, which connects users to content largely controlled by the cable system owner. This is not always a clear distinction, as there's a strong degree of subjectivity in determining just how "closed" a network may be.<sup>4</sup> However, for the sake of argument, this paper will presume that Wu's distinction holds up.

Open networks, according to Wu, generate the highest benefit for consumers when the owner of the network does not discriminate based on the origin of network traffic or the applications it supports. He analogizes a broadband Internet network engaged in content discrimination to an electric grid that would only support General Electric appliances but none made by

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<sup>1</sup> See, e.g., Tim Wu, Network Neutrality, Broadband Discrimination, 2 J. ON TELECOMM. AND HIGH TECH. L. 141 (2003).

<sup>2</sup> *Id.* at 142.

<sup>3</sup> *Id.* at 141.

<sup>4</sup> See Brent Skorup & Adam Thierer, *Uncreative Destruction: The Misguided War on Vertical Integration in the Information Economy*, 65 FED. COMM. L.J. 183-84 (2013). Paul Starr criticizes Wu for describing both the 1930-60s Hollywood cartel that enforced a censorship code and the post 1980s consolidated Hollywood film market as closed, despite one being dramatically more closed than the other. Paul Starr, *The Manichean World of Tim Wu*, AM. PROSPECT (June 9, 2011), at: <https://prospect.org/culture/manichean-world-tim-wu/>. Based on our reading of *The Master Switch*, we can draw these comparisons ad nauseum. For example, Wu criticizes the Macintosh computer as "closed" because Apple refused to license its operating system or allow certain modifications. TIM WU, *THE MASTER SWITCH* 278 (2010). But it still connects users to the Internet unfettered, meaning it has closed and open attributes. And it seems less stifling than Hollywood's censorship code.

Samsung.<sup>5</sup> The idea is that a network that limits its interoperability is less useful for society. The same could be said of a hypothetical broadband subscription that connects to Netflix but blocks HBO Max. This means that open broadband networks would have the highest societal value for subscribers and edge platforms. In Wu's view, bright-line rules against blocking and throttling of broadband Internet subscribers' access to third party applications and lawful content of their choosing are thus necessary to achieve this value. Similarly, he has warned that allowing broadband service providers to offer paid priority services to higher-paying edge service providers risks shuffling startup edge service providers into low quality Internet "slow-lanes," denying new content and services for consumers.<sup>6</sup>

To Mr. Wu's credit, his writings about net neutrality have been mostly devoid of inflammatory and empty claims made by pro-regulatory activists that the absence of net neutrality rules would "grind the Internet to a halt" or spell the end of the Internet as we know it.<sup>7</sup> Rather, he has consistently focused on *platform* competition and speech distribution as the primary justifications for net neutrality. Contradicting claims from some pro-regulatory advocates, Wu has acknowledged that net neutrality regulation had nothing to do with *broadband* competition. As Wu stated in a 2007 debate: "I think [Christopher Yoo] is right that in the big picture of last-mile economics, net neutrality is chump change."<sup>8</sup>

Wu's scholarship repeatedly emphasizes that vertical integration and content discrimination by ISPs are the main threat to platform competition and free speech online. Sans net neutrality regulation, Wu claims ISPs would discriminate against platforms to favor their own vertically-integrated content – like AT&T providing faster and more reliable access to HBO Max as opposed to third-party streaming services. Or the absence of net neutrality regulation would result in ISPs favoring dominant web platforms like Facebook or Netflix over smaller competitors and would-be market entrants. In Wu's view, such vertical arrangements would render innovative startups dead on arrival because they would be subject to ISPs blocking or throttling their services – or they would be less able to pay ISPs for relatively more expensive priority transmission than dominant platforms.

### **III. The Harms Wu Feared Haven't Happened, Thanks to ISP Competition**

For most of the nearly twenty years since Mr. Wu popularized "net neutrality," ISPs have not been subject to utility-style regulation. Yet the sort of harmful discrimination that Wu warned against has never happened. As the FCC recognized in its 2017 *Restoring Internet Freedom*

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<sup>5</sup> Tim Wu & Christopher Yoo, *Keeping the Internet Neutral?: Tim Wu and Christopher Yoo Debate*, 59 FED. COMM. L.J. 575, 582 (2007).

<sup>6</sup> Robin S. Lee & Tim Wu, *Subsidizing Creativity through Network Design: Zero-Pricing and Net Neutrality*, 23 J. ECON. PERSPECTIVES 61, 73-74 (2009).

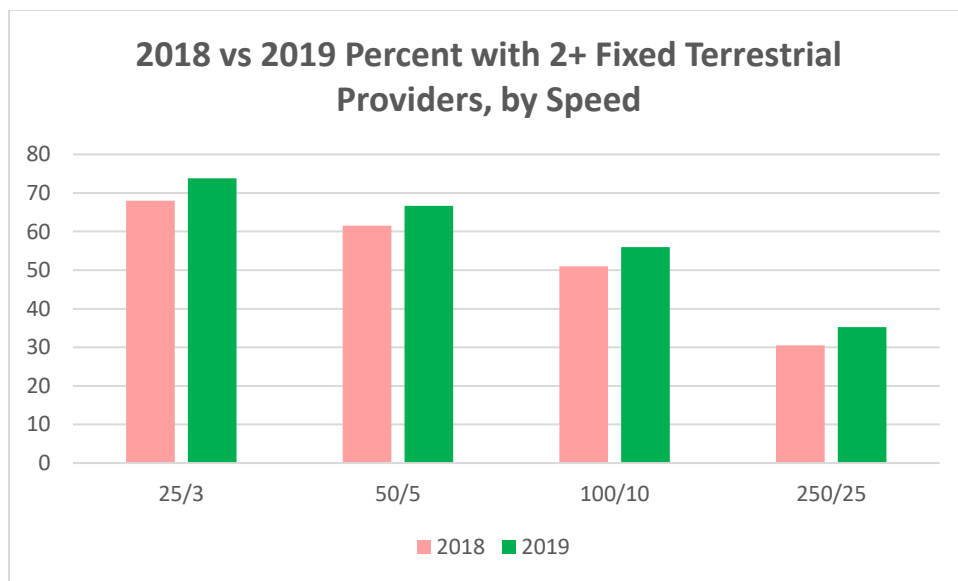
<sup>7</sup> Some activists alleged that repealing Title II regulation for broadband would have led ISPs to charge premium prices for access to specific websites, such as Facebook or Twitter. Others claimed that Title II regulation prevents tiering Internet plans by speed for end users, which was a severe misunderstanding of the Title II Order. *See, e.g.*, Keith Collins, *Net Neutrality Repeal Is Official. Here's How that Could Affect You*, N.Y. TIMES (June 11, 2018), at: <https://www.nytimes.com/2018/06/11/technology/net-neutrality-repeal.html>. Posts from Democratic Party Twitter pages and politicians claimed the Internet would become so slow it would load "one word at a time." Salvador Rizzo, *Will the FCC's Net Neutrality Repeal Grind the Internet to a Halt?*, WASH. POST (Mar. 5, 2018), at: <https://www.washingtonpost.com/news/fact-checker/wp/2018/03/05/will-the-fccs-net-neutrality-repeal-grind-the-internet-to-a-halt/>.

<sup>8</sup> Wu & Yoo, *supra* note 5 at 591.

*Order*, "fixed broadband Internet access providers frequently face competitive pressures that mitigate their ability to exert market power" and "the presence of competitive pressures in itself protects the openness of the Internet."<sup>9</sup> Such harmful discrimination never materialized because it makes no economic sense for broadband ISPs facing increasing competition to engage in such discrimination.<sup>10</sup>

There hasn't been any evidence of blocking, throttling, or harmful discrimination by ISPs in recent memory, and none since repeal of Title II regulation by the *Restoring Internet Freedom Order*. Just like broadband network "openness" mostly yields a positive externality for society, it also has a value to most broadband consumers, even though in some instances the trade-offs might favor so-called closed systems. In general, harmful discrimination would reduce the value of a broadband subscription by making it less useful to subscribers. Broadband subscribers would have a strong incentive to switch to competing providers that don't discriminate. And if many providers chose to discriminate, the provider(s) that didn't discriminate could pluck frustrated subscribers from their competitors.

Furthermore, switching is a realistic deterrent thanks to stronger than ever broadband competition. According to the FCC's *2020 Communications Marketplace Report*, at the end of 2019, competition among fixed terrestrial providers is at a highpoint, with 74% of Americans having access to two or more options at benchmark speeds and 29% with three or more options.<sup>11</sup> This is a 6% and 7.3% annual improvement, respectively. The chart below shows that competition improved at every speed category: the percentage of Americans with access to two or more providers increased for every broadband speed.



<sup>9</sup> *Restoring Internet Freedom Order*, Docket No. 17-108 (released Jan. 4, 2018) at ¶ 123.

<sup>10</sup> See Seth Cooper, Net Neutrality is Dead, and the Internet is Much Better Off for It, WASH. EXAM'R (Nov. 17, 2020), at: <https://www.washingtonexaminer.com/opinion/op-eds/net-neutrality-is-dead-and-the-internet-is-much-better-off-for-it>.

<sup>11</sup> *2020 Communications Marketplace Report*, Docket No. 20-60 (released Dec. 31, 2020) (2020 report) at ¶ 126.

According to USTelecom, broadband ISPs invested \$79.4 billion in network infrastructure in 2020.<sup>12</sup> Along with this continuing strong investment, ongoing reports of new fiber broadband network deployments in localities across the nation indicate that competitive choices are even stronger at the end of 2021. The Fiber Broadband Association reports that fiber broadband is now available for 40% of U.S. households, and fiber network availability is growing at a faster pace than did availability for cable and legacy technologies.<sup>13</sup>

Additionally, broadband speed increases and price decreases show that ISPs compete for customers. USTelecom data for early 2021 shows the most popular broadband plans cost \$48.42 on average per month, down 26.2% since 2015.<sup>14</sup> These same broadband plans have average speeds of 98 Mbps/43 Mbps, a speed increase of 126% for download and 256% for upload since 2015. High speed broadband prices are down even more, now just \$74.80, a 39.2% plunge since 2015. And high speeds are higher than ever, now 248 Mbps/141 Mbps. This is a 77% improvement to download speeds and a 98% improvement for upload speeds since 2015.

Importantly, rapid rollout of capacious high-speed 5G networks bolsters intermodal competition with fixed terrestrial broadband. The speeds and capacity of these next-generation wireless networks are comparable to fixed terrestrial networks and offer substitution potential for a wide variety of broadband Internet applications, ranging from email, social media, Web surfing, and streaming video. The percentage of Americans who "mostly use a smartphone" to access the Internet almost doubled to 37% in 2019 from 19% in 2013, as mobile broadband user habits increasingly are reflecting the underlying capability of next-generation wireless networks to meet their consumer demands.<sup>15</sup> The *Communications Marketplace Report* data shows average 4G LTE download speeds are up to 36.3 mbps, a 6% improvement over 2018. 5G speeds for the major carriers are in the high-40s to high-50s mbps range, and are expected to increase quickly as carriers activate newly freed mid-band spectrum.<sup>16</sup>

Meanwhile, outside of traditional options, fixed wireless providers now serve 6.9 million customers and are available to 46% of the population.<sup>17</sup> And satellite broadband providers such as HughesNet and Viasat provide alternative access options, with SpaceX's Starlink preparing to make its new satellite broadband service available to communities that are hardest to serve. Plus, hybrid mobile virtual network operators (H-MVNOs) such as Comcast's Xfinity Mobile and Charter Communications' Spectrum Wireless, are growing their

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<sup>12</sup> USTelecom, 2020 Broadband Capex Report (2021) at 1, at: <https://www.ustelecom.org/research/2020-broadband-capex-report/>.

<sup>13</sup> Fiber Broadband Association, *The Market Has Spoken* (2021) at 5, at: <https://www.fiberbroadband.org/page/fiber-research>.

<sup>14</sup> USTelecom, 2021 Broadband Pricing Index (2021) at 4-7, at: <https://ustelecom.org/wp-content/uploads/2021/05/2021-Broadband-Pricing-Index-Report.pdf>.

<sup>15</sup> 2020 report, *supra* note 11.

<sup>16</sup> Opensignal, 5G User Experience Report (2021), at: <https://www.opensignal.com/reports/2021/01/usa/mobile-network-experience-5g>; see also Bevin Fletcher, T-Mobile 5G Speeds on 2.5 GHz See 40% Boost – Opensignal, FIERCE WIRELESS (Oct. 27, 2021), at: <https://www.fiercewireless.com/5g/t-mobile-5g-speeds-get-40-boost-from-2-5-ghz-opensignal>.

<sup>17</sup> WISPA, *The 2021 Fixed-Wireless and Hybrid ISP Industry Report* (2021) at 4, at: [https://www.wispa.org/docs/2021\\_WISPA\\_Report\\_FINAL.pdf](https://www.wispa.org/docs/2021_WISPA_Report_FINAL.pdf); Tyler Cooper, Fixed Wireless Internet in the USA, BROADBANDNOW (Mar. 23, 2021), at: <https://broadbandnow.com/Fixed-Wireless>.

presence in wireless, with 550,000 new customers in Q2 2021.<sup>18</sup> Simply put, there are options for most people, and there are more options at better service levels than ever before.

Aside from competitive market pressures that deter blocking, throttling, and anticompetitive discriminatory conduct by ISPs, consumers have additional protections. In their terms of service, nearly all broadband ISPs have pledged *not* to block or throttle subscribers access to legal content or impose harmful forms of paid prioritization. And under the *Restoring Internet Freedom Order*, the Federal Trade Commission has authority to enforce those service terms against ISPs that do not comply with their representations.

#### **IV. Implications of Failed Predictions About ISPs' Harm to Innovation and Online Speech**

While Mr. Wu feared that a closed-network Web would emerge in the absence of public-utility like regulation of broadband Internet services, the fact that pro-Title II advocates haven't pointed to any recent examples of broadband ISPs inhibiting consumers' ability to access innovative applications or lawful speech content on the Internet severely undermines the case for reimposing net neutrality regulation. For Wu, net neutrality's prominent advocate, speculation regarding potential ISP-based harms to innovation and free speech constituted key reasons for imposing such regulation.

The increasing competitiveness of the broadband market and the lack of evidence of blocking, throttling, or harmful discrimination by ISPs should prompt the FCC to reject any reinstatement of net neutrality or repeal of the deregulatory policy adopted in the *Restoring Internet Freedom Order*. And, as will be discussed, realistic threats to online innovation and free speech in today's digital marketplace appear to be coming from the Big Tech platforms that, ironically, have strongly lobbied for net neutrality regulation.

#### **V. Wu Highlights Potential Big Tech Harms to Innovation**

Significantly, Mr. Wu's more recent scholarship focused on harms from the market power of dominant web platforms like Facebook and Google. Indeed, it is Big Tech titans that engage in the sort of content-based censorship that Wu previously warned would come from ISPs in the absence of net neutrality regulation.

Wu's apparent foundational belief about antitrust policy is that harms to disruptive innovation are more serious than harms from higher prices. He argues in both *The Master Switch* and *The Curse of Bigness* that monopolies such as the old AT&T telephone regime did the most harm to consumers *not* by charging high prices but by sitting on breakthrough inventions or preventing disruptive competitors from reaching market.<sup>19</sup> According to Wu, AT&T's supposed intentional failure to deploy magnetic recording, mobile telephony, DSL lines, fax machines, and other inventions did more damage than supposedly expensive phone bills.

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<sup>18</sup> Diana Goovaerts, Cable MVNOs add 550,000 Wireless Subs in Q2, FIERCE WIRELESS (July 30, 2021), at: <https://www.fiercewireless.com/wireless/cable-mvnos-add-550-000-wireless-subs-q2>.

<sup>19</sup> While this appears many places in Wu's writing, he dedicated a paper exclusively to this subject. Tim Wu, Taking Innovation Seriously: Antitrust Enforcement If Innovation Mattered Most, 78 ANTITRUST L.J. 313 (2012).



AT&T purportedly buried these innovations in filing cabinets in Bell Labs because it recognized that they posed serious competitive threats to the monopolistic Bell System.<sup>20</sup> Presumably, AT&T could afford to kill its own discoveries thanks to its government-sponsored monopoly status. And AT&T vigorously petitioned the FCC to bar long-distance competitor MCI from lawfully entering the market.

In what appears to be a departure from his stated outlook in 2010, when he predicted Big Tech platforms could remain "benign" monopolies,<sup>21</sup> Wu has expressed concern about the anticompetitive threats dominant web platforms pose to innovation. Looking at today's Big Tech companies, Wu has identified similarities between their behaviors and those of the old AT&T monopoly. He has pointed to the 67 unchallenged acquisitions by Facebook, 91 by Amazon, and 214 by Google (with some conditioned) – all taking place between the years 2010 and 2018 – as examples of how these companies may be purchasing and defanging disruptive competitors.<sup>22</sup> Wu said these transactions tended to follow the analytical approach that the United Kingdom applied to Facebook's purchase of Instagram.<sup>23</sup> UK authorities reviewing the merger concluded that Instagram would not "be uniquely placed to compete against Facebook, either as a potential social network or as a provider of advertising space," despite its growing user base, relatively low cost of adding monetization features to platforms, and the credible possibility that Facebook saw it as a threat – all points raised by third parties.<sup>24</sup>

Today, it's fairly easy to see how Instagram could have been a standalone competitor to Facebook. Instagram generated \$20 billion in ad revenue in 2019 and now sports many of the same knacks as Facebook, including direct messaging, shopping features, and stories.<sup>25</sup> And Facebook now includes some of Instagram's original features, such as exposure to content outside of a friend's list. Facebook has even integrated or made these features interoperable, allowing users to post the same content to both platforms at once or to send messages between users on either platform. While Facebook's subsequent investment in these features can't be dismissed, the fact that these platforms are so similar today shows that the possibility of head-to-head competition was at least realistic.

Wu also pointed to Google's purchase of AdMob as a transaction raising foreclosure concerns that seem partly analogous to AT&T foreclosing competition in both long-distance and local phone markets by denying interconnection.<sup>26</sup> Antitrust litigation commenced earlier this year may lend additional credence to Wu's concerns. An antitrust lawsuit led by the Texas Attorney General and joined by 15 states and Puerto Rico alleges that Google's vertical integration with mobile advertising exchange AdMob results in consumer harm.<sup>27</sup> This

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<sup>20</sup> See, e.g., TIM WU, THE CURSE OF BIGNESS 106-07 (2018).

<sup>21</sup> Tim Wu, In the Grip of the New Monopolists, WALL ST. J. (Nov 13, 2010), at: <https://www.wsj.com/articles/SB10001424052748704635704575604993311538482>.

<sup>22</sup> *Id.* at 122-23.

<sup>23</sup> *Anticipated Acquisition by Facebook Inc of Instagram Inc*, OFFICE OF FAIR TRADING 1 (Aug. 22, 2012).

<sup>24</sup> *Id.* at 5-6, 9.

<sup>25</sup> Rob Price, Instagram Reportedly Generated \$20 Billion in Ad Revenue in 2019 — Even More Than YouTube, BUS. INSIDER (Feb. 4, 2020), at: <https://www.businessinsider.com/instagram-20-billion-ad-revenue-2019-report-2020-2>.

<sup>26</sup> Wu, *supra* note 20 at 124.

<sup>27</sup> See generally Complaint, Texas v. Google, LLC, (S.D.N.Y. 2021) (No. 1:21-cv-06841-PKC); see also Jeff Horowitz & Keach Hagey, Google's Secret 'Project Bernanke' Revealed in Texas Antitrust Case, WALL STREET

allegedly comes from Google Ad Manager – which is Google's ad server for publishers – requiring advertising clients to exclusively bid for publishers' ad space through Google's AdMob. The result is that AdMob's competitors (including Microsoft and Yahoo) exited the market due to dramatically reduced demand since Google has a dominant ad server position, giving Google a higher than 90% market share for mobile ad exchange. Publishers thus have little to no alternative to using AdMob for ad exchange services. In step two of this scheme, Google Ad Manager allegedly uses historical bidding data its parent company gleans from its own auctions on AdMob to give Google Ad Manager's advertising clients a bidding advantage, erecting a barrier to competition that bolsters Google's 75% ad server market share. This alleged scheme allows Google to charge higher AdMob transaction fees on both publishers and advertisers and higher prices on advertisers, all while excluding innovative competition in both markets.

This pattern of alleged exclusionary conduct by Google Ad Manager and Google's AdMob is at least reminiscent of how AT&T foreclosed competition in the local phone market by refusing to interconnect local carriers with its long-distance lines, limiting their ability to compete outside of tiny markets. At the very least, Wu's anticompetitive concerns about the Google/AdMob merger look more substantiated and less speculative than concerns raised in his earlier writings about anticompetitive harms from ISPs absent the imposition of net neutrality regulation.

## **VI. Speech Concerns With Concentrated Platforms Look Much More Real Than Wu's Similar Concerns With ISPs**

Particularly alarming is how dominant market shares among Big Tech platforms seem to abet social media censorship of user speech on topics of public concern. The past two years have been rife with examples of seemingly arbitrary decisions about speech by Big Tech. Notable instances include Facebook and Twitter's blocking the *New York Post's* accurate reporting about Hunter Biden's laptop on their respective platforms and Facebook's decision to ban discussion of the Wuhan lab leak hypothesis regarding the origins of the COVID-19 coronavirus. In both cases, the dominant platforms made premature decisions to censor content, later reversed these decisions upon learning new information, and seemingly suffered no competitive consequences from rival platforms promising to do better. And there is evidence that those dominant platforms haven't changed their approach.

Mr. Wu understands that market concentration facilitates content censorship, but he was wrong about which digital age actors would engage in speech censorship.<sup>28</sup> *Almost all* of Wu's anti-censorship sentiment has focused on ISPs, which haven't engaged in censorship and compete in a less concentrated market than dominant Big Tech platforms even absent net neutrality regulation.<sup>29</sup> For example, as a preview to his push for net neutrality on ISPs, in his earlier book, *The Master Switch*, Wu highlights how market concentration facilitated censorious conduct by Western Union's telegraph business during the 1876 election:

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J. (Apr. 11, 2021), at: <https://www.wsj.com/articles/googles-secret-project-bernanke-revealed-in-texas-antitrust-case-11618097760>.

<sup>28</sup> Wu, *supra* note 4 at 121.

<sup>29</sup> In one chapter in *The Master Switch* (2010), Wu entertains that Apple could begin blocking apps on the App Store, though his concern had more to do with Apple blocking competitors than censoring speech. However, Wu has paid almost zero attention to the type of political censorship coming from dominant platforms today.

With the common law notion of common carriage deemed inapplicable, and the latter-day concept of net neutrality not yet imagined, Western Union carried Associated Press reports exclusively. Working closely with the Republican Party and avowedly Republican papers like the New York Times... they did what they could to throw the election to Hayes. It was easy: the AP ran story after story about what an honest man Hayes was, what a good governor he had been, or just whatever he happened to be doing that day. It omitted any scandals related to Hayes and declined to run positive stories about his rivals.<sup>30</sup>

The actions taken by Western Union to censor speech content resemble actions by Facebook and Twitter blocking reporting about Hunter Biden (Twitter CEO Jack Dorsey later called his web platform's decision to censor the *New York Post's* reporting a "total mistake."<sup>31</sup>). Somewhat curiously, Wu has not addressed the relationship between concentrated platforms and speech in *The Curse of Bigness*, or elsewhere, like he did in his earlier scholarship advocating for the imposition of net neutrality regulation on broadband ISPs. Yet even assuming that market concentration-facilitated censorship of speech by dominant Big Tech platforms occurred in only a few isolated instances when Wu published his book in 2018, such occurrences now appear to be much more numerous and hardly in isolation. Think about the many high-profile moderation decisions made relating to COVID-19, some of which were later reversed, like blocking discussion of the virus's origin.<sup>32</sup> Moreover, the White House Press Secretary told the public in July of this year that it was "flagging" problematic posts about COVID-19 for Facebook to remove – though Facebook denied it complied.<sup>33</sup> If the Press Secretary's statement is true, the purported state action by the White House to facilitate censorship of online speech would raise serious First Amendment concerns.

Furthermore, neither Facebook nor Twitter face realistic competitive pressure to correct their decisions to censor content. Facebook appears to be continuing its approach in selectively censoring content and then later reversing course. For example, it recently [blocked](#) users from searching for posts about the Kyle Rittenhouse trial, even hours after a not guilty verdict.<sup>34</sup> And although rival online platform Parler seemed to gain at least some footing in the social media platform market on a promise to abstain from censorship, it was shut down for a month and had to secure new infrastructure support after Apple and Google ceased its distribution

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<sup>30</sup> Wu, *supra* note 4 at 23.

<sup>31</sup> Noah Manskar, Jack Dorsey Says Blocking Post's Hunter Biden Story Was 'Total Mistake' — But Won't Say Who Made It, NY POST (Mar. 25, 2021), at: <https://nypost.com/2021/03/25/dorsey-says-blocking-posts-hunter-biden-story-was-total-mistake/>.

<sup>32</sup> Cristiano Lima, Facebook No Longer Treating 'Man-Made' Covid as a Crackpot Idea, POLITICO (May 26, 2021), at: <https://www.politico.com/news/2021/05/26/facebook-ban-covid-man-made-491053>.

<sup>33</sup> Wall Street Journal Editorial Board, Censorship Coordination Deepens, WALL STREET J. (July 16, 2021), at: <https://www.wsj.com/articles/censorship-coordination-deepens-11626474643>.

<sup>34</sup> Andrew Mark Miller, Facebook Search for 'Kyle Rittenhouse' Turns Up Nothing for Users During his Trial, FOX NEWS (Nov. 10, 2021), at: <https://www.foxnews.com/politics/facebook-search-rittenhouse-trial>. Free State Foundation Legal Fellow Andrew Magloughlin searched "Kyle Rittenhouse" on Facebook after the not guilty jury verdict, and Facebook still returned zero search results. Facebook did not stop blocking searches on Rittenhouse until roughly five hours after the verdict.

and cloud provider Amazon Web Services denied it service.<sup>35</sup> Parler has since been restored to Apple's App Store but not to Google Play.

Contrast the evidence of dominant Big Tech platforms engaging in censorship with the absence of evidence of ISPs engaging in censorship since repeal of Title II net neutrality regulation. The only instances of ISP-derived censorship that Title II advocates can reasonably point to are the same outdated contextless examples that were deemed to be underwhelming by Senior Judge Laurence Silberman almost eight years ago in *Verizon v. FCC* (2014):

The majority does contend that four possible instances of broadband providers restricting users' access to certain edge providers are sufficient evidence of broadband providers' incentives and ability to restrict Internet traffic. That the Commission was able to locate only four potential examples of such conduct is, frankly, astonishing. In such a large industry where, as Verizon notes, billions of connections are formed between users and edge providers each year, one would think there should be ample examples of just about any type of conduct.<sup>36</sup>

Hypothetical, unobserved harms to speech hardly provide a reasonable basis for future designation of broadband ISPs as common carriers.<sup>37</sup> However, two traditionally recognized bases for designating an entity as a common carrier for a communications network are demonstrated market power or holding itself out to the public.<sup>38</sup> When it comes to Big Tech platforms, both conceivably could apply: any member of the public can sign up and there is obvious industry concentration. These platforms' ability to censor political opinions and news about current events without realistic threat of losing significant market share could be interpreted as evidence of market power.<sup>39</sup> And while the Communications Act cabins the FCC's power to designate entities as common carriers to only those entities that meet the statutory definition of "telecommunications carriers,"<sup>40</sup> Congress conceivably could apply similar rules to tech platforms or expand the Commission's jurisdiction.<sup>41</sup> Policymakers in the future might plausibly conclude that the real examples of censorship from tech companies provide stronger grounds for increased regulation, including common carrier style anti-discrimination rules, than the past network management practices of ISPs.

This *Perspectives from FSF Scholars* expresses no position on whether imposing common carrier or anti-discrimination rules on dominant Big Tech platforms is sound as a matter of

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<sup>35</sup> Queenie Wong & Andrew Morse, Parler Returns Online After Monthlong Absence: Here's What You Need to Know, CNET (Feb. 16, 2021), at: <https://www.cnet.com/news/parler-returns-online-after-month-long-absence-heres-what-you-need-to-know/>.

<sup>36</sup> *Verizon v. FCC*, 740 F.3d 623, 665 (2014) (Silberman, J., concurring) (internal quotations removed) (*Verizon*).

<sup>37</sup> See *Verizon*, 740 F.3d 623, at 656 (holding that antidiscrimination provisions against blocking and throttling required common carrier designation under the communications act).

<sup>38</sup> Knight First Amendment Inst., 141 S. Ct. 1220, 1222-23 (2021) (Thomas, J., concurring) ("*Knight*"); Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463, 466 (2021).

<sup>39</sup> Knight, 141 S. Ct. at 1223-25.

<sup>40</sup> *Mozilla v. FCC*, 940 F.3d 1, 17 (D.C. Cir. 2019).

<sup>41</sup> *Verizon*, 740 F.3d at 655-56.

law or policy. But to the extent that a future Biden FCC seeks to reimpose Title II net neutrality regulation, an unintended effect of such an action may be to draw significant attention to the fact that concerns about harm to innovation and online speech apply with greater force to today's Big Tech platforms than they do to broadband ISPs. In the process of advocating for reimposition of Title II restrictions for ISPs, proponents of net neutrality regulation may inadvertently be writing a script for future common carriage of Big Tech platforms.

## **VII. Conclusion**

The fact that net neutrality's foremost academic proponent Tim Wu, now the Special Assistant to the President for Technology and Competition Policy, has warned of harmful discrimination by broadband Internet services providers that never materialized ought to give advocates, and the impending Biden FCC, serious pause. Wu's scholarship, which helped precipitate nearly two decades of ongoing, widespread, and sometimes acrimonious public policy debate over net neutrality regulation, appears to have significantly underestimated the check that competition increasingly places on harmful discriminatory behavior by ISPs.

And now with more serious evidence of possible anticompetitive harm by dominant web platforms, Wu's expressed concerns about harm to innovation and free speech as key justifications for net neutrality just might provide a handy script for imposing common carriage regulation on Big Tech platforms, whether that would be good policy or not.

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