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I. Introduction

Over the last two years, Americans have come to understand two fundamental problems relating to digital concentration. First is the realization that political actors abroad and in the United States had figured out how to exploit digital platforms to distribute propaganda and misinformation – popularly called “fake news” – in ways that disrupt our electoral systems and politics. Second is that the advertising-dependent business models of Facebook and Google (and increasingly Amazon) are based on an intimate surveillance of the actions and communications of hundreds of millions of individuals, and on the manipulation of user and business data.

These two private corporations simultaneously have centralized control over the flow of information and news between reporters and readers and diverted advertising revenue away from both traditional and Internet “native” publishers, at both the national and local levels, into their own coffers. With the ability to control the distribution of information, ad money, and the relationship between the reader and the news outlet, tech platform monopolists now have unprecedented power over reporters and news publishers themselves. This dynamic poses a threat to American democracy and to the most fundamental liberties of the individual.

Americans have faced similar challenges before, with the rise of then-revolutionary technologies such as the telegraph and telephone in the 19th century and of radio and television in the 20th Century. In each instance, we used government and competition policy to ensure the independence and financial viability of the news media. Over the course of more than two centuries, Americans developed many regulatory and policy tools that can be of use to us today.

II. Threats to Democracy

For today’s hearing, I will focus on three main ways that digital platform monopolies threaten American democracy: (1) disinformation and propaganda; (2) the starving of journalism; and (3) control over speech.

A. Disinformation and Propaganda

First, digital platforms like Facebook and Google, and the Google-owned YouTube, are the main source of disinformation and propaganda. Facebook and Google track people both on their platforms and off, in order to target and influence them with advertising. And just as these platforms enable advertisers to influence people’s purchasing decisions, they likewise enable propagandists to influence people’s political decisions. Propagandists and disinformation agents are not hacking these platforms or misusing them. Rather, they are using these platforms exactly as designed, for influence and manipulation.

The problem is not just that Facebook and YouTube cannot properly identify and quickly take down disinformation, but rather that these platforms actually amplify propaganda. Facebook and YouTube program their algorithms to prioritize engagement to keep people on their platforms longer, collecting more of their data and showing them more ads. Their algorithms boost disinformation and propaganda because fear and anger “engage” humans the most.

Even worse, through ubiquitous tracking and compiling the data sets of billions of people, Facebook and Google learn what messages people are susceptible to – whether advertisements, extreme political propaganda, or election meddling.

Facebook and Google make a lot of their money by renting out their manipulation machines to just about anyone who comes along. In 2016 alone, the year of the U.S. presidential election and the Brexit vote, Facebook nearly *doubled* its ad revenue.¹ The scale of the manipulation is massive because of Facebook and Google’s dominance and control of the flow of information globally.

These problems are not inevitable, but rather are the result of business choices. If Facebook and Google stopped collecting massive amounts of user data to feed their targeted advertising business models, foreign agents would not be able to so easily interfere with our elections by precisely targeting and manipulating users. If Facebook and YouTube stopped programming their algorithms to prioritize engagement, fake news and incendiary, hateful and polarizing content would not rise to the top of news feeds. Facebook and YouTube make business choices to prioritize engagement, keeping users on their platforms as long as possible to show them ads and collect their data.

We cannot have Democracy if we turn our broadcast platforms over to control by foreign agents and purveyors of disinformation.

B. The Starving of Journalism

A second important threat is that Facebook and Google exploit their middlemen positions to divert advertising away from publishers and into their own pockets in ways that starve trustworthy journalism. Last year Facebook and Google accounted for approximately 85% of the growth of the more than \$150 billion North American and European digital advertising market.²

That’s because Facebook and Google can hyper-target users based on their 360-degree views of what their users read, think, and do, thanks to their ability to track users across millions of websites and even offline. Facebook got so good at tracking consumers –

1 “Facebook Ad Revenue Tops \$10bn,” BBC News. November 01, 2017.
<https://www.bbc.com/news/business-41835989>

2 Canada. Parliament. House of Commons. Standing Committee on Access to Information, Privacy and Ethics. *Testimony of Jason Kint*. 1st sess., 42nd Parliament, Meeting No. 151, 2019.
<https://www.ourcommons.ca/DocumentViewer/en/42-1/ETHI/meeting-151/evidence#Int-10649964>

whether on Facebook or on millions of other websites with Facebook pixels³ – that it could target ads better than any publisher could. Google likely knows more about consumers than even Facebook does.⁴

No publisher has anything similar, which means no publisher can really hope to compete with Google and Facebook for the advertising dollars needed to support journalism. As a result, we have seen our society hugely disrupted by the collapse of journalism at the local and state level. This means thousands fewer reporters and editors are covering the news.

The story of *Women You Should Know*, a pioneering online publisher that has been telling empowering women's stories for years, illustrates these first two threats to democracy. The site's founders, Jen Jones and Cynthia Hornig, built their small business with Facebook at its core, growing their Facebook fan base to more than 350,000 loyal followers. Their digital ad-supported business thrived, with Facebook followers regularly clicking to read their articles on their website.

But recently they began getting confusing messages from their followers, messages criticizing *Women You Should Know* for only sharing negative stories of violence against women and straying from their positive brand. Jen and Cynthia were baffled. Sure, they occasionally shared a story about gender-based violence, an important issue, but the uplifting stories outnumbered those articles by 20 to 1. Jen and Cynthia realized that Facebook's algorithms often were not showing followers their positive stories, but rather serving up the stories that provoke fear and anger. Jen and Cynthia wanted to empower women, but Facebook's algorithms were programmed to prioritize engagement, and so Facebook made women afraid instead.

Then Facebook tweaked its algorithm in 2018, promising to show more posts from friends and family.⁵ Facebook's flip of a switch decimated *Women You Should Know*'s website traffic, as it did to many other publishers, a stark demonstration of Facebook's monopoly and gatekeeper power. Jen and Cynthia tried to enlist financial support from their huge base of Facebook followers. But Facebook, again, had other plans. All posts that used words like "donate" or "contribute" got buried by Facebook's algorithms and did not show up in their followers' news feeds. Why? Facebook had vertically integrated into fundraising, and in order to get donations to show up in followers' feeds, Jen and Cynthia needed to use Facebook's own fundraising feature. This is a common tactic of big tech platforms, using their monopoly power to steer users to their own products and services.

3 "Facebook Letter to UK Parliament." Rebecca Stimson to Damian Collins Chair, Digital, Culture, Media and Sport Committee House of Commons. June 8, 2018.

<https://www.parliament.uk/documents/commons-committees/culture-media-and-sport/180608-Rebecca-Stimson-Facebook-to-Chair-re-oral-ev-follow-up.pdf>.

4 "What Google and Facebook Know About You," Al Jazeera, March 29, 2018; <https://www.aljazeera.com/news/2018/03/google-facebook-180329092252320.html>

5 Mark Zuckerberg's Facebook Page. January 11, 2018. <https://www.facebook.com/zuck/posts/10104413015393571>

Women You Should Know is a publisher that is digital-native, with a huge Facebook following, and Facebook nonetheless managed to decimate them. Publishers like Mother Jones,⁶ Vox⁷ and Slate⁸ also reportedly had their livelihood threatened by the 2018 algorithmic change. If Facebook had not consolidated gatekeeper power over the internet, its changes – even purportedly well-intentioned ones – would not determine which news publishers get to exist.

Jen and Cynthia are still struggling like so many other publishers to find a new, sustainable business model.

C. The Automation of Fear

On top of amplifying propaganda and starving journalism, Facebook and Google can exploit their control over access to the market to silence potential criticism. In most cases, people won't speak up in the first place, due to fear of retribution.

Wired Editor-in-Chief Nicholas Thompson and Fred Vogelstein in February 2018 published what may be the most concise description of today's relationship between reporters and publishers and the platform monopolists, a relationship characterized increasingly by dependence, exploitation, and fear.

*"Every publisher knows that, at best, they are sharecroppers on Facebook's massive industrial farm... And journalists know that the man who owns the farm has the leverage. If Facebook wanted to, it could quietly turn any number of dials that would harm a publisher – by manipulating its traffic, its ad network, or its readers."*⁹

Nick recently updated that piece in an article titled "15 Months of Fresh Hell Inside Facebook."¹⁰ He wrote that, just after the first article appeared last year:

"[T]raffic from Facebook suddenly dropped by 90 percent, and for four weeks it stayed there. After protestations, emails, and a raised eyebrow or two about the coincidence, Facebook finally got to the bottom of it. An ad run by a liquor advertiser, targeted at

6 Monika Bauerlein and Clara Jeffery. "How Facebook Screwed Us All." *Mother Jones*, March 2019. <https://www.motherjones.com/politics/2019/02/how-facebook-screwed-us-all/>

7 Jeremy Barr. "Post-Facebook News Feed Tweaks, Vox Media Lays off 50 Employees." *The Hollywood Reporter*, February 21, 2018. <https://www.hollywoodreporter.com/news/vox-media-laying-around-50-people-1086869>.

8 Will Oremus. "The Great Facebook Crash." *Slate*, June 27, 2018. <https://slate.com/technology/2018/06/facebooks-retreat-from-the-news-has-painful-for-publishers-including-slate.html>.

9 Nicholas Thompson and Fred Vogelstein. "Inside The Two Years That Shook Facebook – And The World." *Wired*, January 2018. <https://www.wired.com/story/inside-facebook-mark-zuckerberg-2-years-of-hell/>.

10 Nicholas Thompson and Fred Vogelstein. "15 Months of Fresh Hell Inside Facebook." *Wired*, April 2019. <https://www.wired.com/story/facebook-mark-zuckerberg-15-months-of-fresh-hell/>.

WIRED readers, had been mistakenly categorized as engagement bait by the platform. In response, the algorithm had let all the air out of *WIRED*'s tires. The publication could post whatever it wanted, but few would read it. Once the error was identified, traffic soared back."

Nick concluded by doubling down on what he wrote last year: "It was a reminder that journalists are just sharecroppers on Facebook's giant farm."

The same relationship applies to Google. As Jim VandeHei of *Axios* wrote recently, "The media is obsessed with Facebook."¹¹ But publishers and reporters are "exponentially more dependent on Google." The corporation, he wrote "is a gigantic octopus, with sprawling, growing tentacles reaching deep into every nook and crevice of media companies."

Today, in America, news publishers understand very well that digital platforms have the power to cut off their pathway to the reader and to cut off what little revenue remains. We cannot have democracy unless every one of us, every citizen and every journalist, feels free to speak their mind.

III. The Role of Weak Competition Policy

These threats to democracy are not an inevitability of the internet, but rather they result from bad competition policy and poor enforcement of the law. In this section, I will explain why these threats are monopoly problems and how weak antitrust enforcement impacted where we are today.

A. Unfair Competition Between Facebook, Google, and Publishers

A major problem in the age of big tech is that platform monopolists are internet gatekeepers that also compete against companies that must get through their gates to reach users. But of course, this is not a fair competition. Rather, tech platforms have what I call *platform privilege* – the incentive and ability to prioritize their own products and services over those of competitors. Tech platforms get to both umpire the game and play in it too.

As an example of platform privilege, Google was found by the European Commission to have abused its dominance by prioritizing its own comparison shopping services in Google search and tweaking its algorithms to demote competitors in search results.¹² Amazon has reportedly preferred its own goods and services on its platform.¹³ And Apple

11 Jim VandeHei, "Behind the Curtain: How Google Got Media Companies Addicted," *Axios*, May 8, 2018. <https://www.axios.com/google-media-companies-facebook-tech-industry-a10898ee-e0b7-46ef-bfc-d2561a2e0630.html>

12 European Commission. "Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service." News release, June 27, 2017. http://europa.eu/rapid/press-release_IP-17-1784_en.htm.

13 Julie Creswell, "How Amazon Steers Shoppers to its Own Products," *New York Times*, June 23 2018. <https://www.nytimes.com/2018/06/23/business/amazon-the-brand-buster.html>

has been accused of discriminating against Spotify and giving favorable treatment to Apple Music.¹⁴

In the same way, Facebook and Google compete against news publishers that must get through their gates to reach users, due to the two platforms' concentrated power over the flow of information. But Facebook and Google compete against news publishers for user attention, data and advertising dollars.¹⁵ Because Facebook and Google control the playing field for this competition, publishers never had a fair shot. How can publishers compete against platforms that can tweak their algorithms at any time to bury them?

Facebook and Google can simply change their algorithms or adjust their product design to keep users within their digital walls and reduce traffic to news publishers' properties, depriving publishers of the revenue essential to fund journalism and to counter disinformation.

Facebook's goal is to keep users engaged with content on its platform as much and as long as possible. The more time users spend on Facebook's platform, the more data it collects, the more ads it shows, and the more money it makes. On Facebook's first quarter 2016 earnings call, CEO Mark Zuckerberg announced that users spend on average more than 50 minutes per day using Facebook, Instagram and Messenger, up ten minutes from the number reported in 2014.¹⁶

And about 70 percent of Alphabet's total 2016 revenue came from the ads that the company sells on its own digital properties, including Google web search pages, YouTube and other Google apps.¹⁷ Google thus has the incentive to steer search users to its own properties. YouTube benefits from prioritization in Google search results, and, like Facebook, makes more revenue the more people engage with content on its platform.

Because disinformation is more likely to gain attention and foster engagement, it better serves both Facebook and YouTube's advertising-based business models than does trustworthy news. The more outrageous content is, the more it elicits likes, shares, comments and clicks, and the more the algorithms promote it.

14 Daniel Ek. "Consumers and Innovators Win on a Level Playing Field." *For the Record* (blog), March 13, 2019. <https://newsroom.spotify.com/2019-03-13/consumers-and-innovators-win-on-a-level-playing-field/>.

15 Sally Hubbard. "Fake News Is a Real Antitrust Problem." *Competition Policy International Antitrust Chronicle*, December 2017. <https://www.competitionpolicyinternational.com/wp-content/uploads/2017/12/CPI-Hubbard.pdf>.

16 James B. Stewart. "Facebook Has 50 Minutes of Your Time Each Day. It Wants More." *New York Times*. May 5, 2016. <https://www.nytimes.com/2016/05/06/business/facebook-bends-the-rules-of-audience-engagement-to-its-advantage.html>.

17 Shira Ovide. "Google Has a Chink in its Ad Armor," *Bloomberg*. January 27, 2017. <https://www.bloomberg.com/gadfly/articles/2017-01-27/google-s-high-powered-ad-juggernaut-has-a-weak-spot>.

B. Loss of Choice and Bargaining Power Due to Market Concentration

Because they lack meaningful competition, Facebook and Google can tailor their algorithms to serve their financial interests, rather than making profit-reducing changes to combat disinformation. Without choice and lacking bargaining power, consumers who want trustworthy news prioritized instead of disinformation and propaganda have limited ability to switch to alternatives. Hence the normal checks and balances of a free, competitive market do not constrain Facebook and Google from pursuing profits to democracy's detriment.

News companies also lack alternatives and bargaining power against Facebook and Google. Facebook and Google are constantly changing terms and adjusting their algorithms, and publishers have little choice but to adapt and accommodate regardless of how the changes may negatively affect their own profitability. In 2009, Rupert Murdoch accused Google of stealing media content and threatened to withdraw his media companies' articles from Google search, but he could not viably follow through on the threat.

Imagine instead a world with robust competition against Facebook and Google. Purveyors of disinformation would have less impact. News publishers would have bargaining power. Journalists and citizens would not be afraid to speak out. Users could vote with their feet when Facebook and Google amplify disinformation or abuse their privacy. The ability to switch to an alternative would apply competitive pressure on Facebook and Google to fix their problems because profits would be at stake.¹⁸

C. The Use of Anticompetitive Mergers and Conduct to Grow Monopoly Power

Facebook and Google started on their paths to dominance with innovation, but their monopoly power is not purely the result of competing on the merits or being the best.

Acquisitions of competitive threats have helped both firms amass and maintain market power, and weak merger enforcement is a big part of how we got where we are today. Instagram built a thriving social network with 27 million users on iOS alone, centered around sharing images.¹⁹ Then Facebook bought it. WhatsApp succeeded in getting the attention of 450 million users and was also acquired by Facebook. Facebook even reportedly has its own app to detect new apps that could be competitive threats, so that it

18 See Transcript of The Capitol Forum Conference Call with Professor Scott Galloway Vol. 5 No. 371, November 6, 2017 (“When big tech starts making noises that old media and the government seems to buy into that something would be impossible, that’s Latin for we would be less profitable if we did this.”).

19 “Facebook Buys Instagram For \$1 Billion; Turns Budding Rival Into Its Standalone Photo App,” TechCrunch. April, 2012. <https://techcrunch.com/2012/04/09/facebook-to-acquire-instagram-for-1-billion/>.

can build its own version.²⁰ DoubleClick was the leader in display advertising, and then Google bought it. Google's acquisitions cemented its market power throughout the vertical stack of the ad ecosystem, as it acquired the digital ad market spoke by spoke.²¹

Together Facebook and Google have bought over 150 companies just since 2013.²² Google alone has acquired nearly 250 companies since 2006.²³

Anticompetitive conduct has also grown Facebook and Google's monopoly power. Google has not competed purely on the merits, according to the European Commission decisions finding abuses of dominance regarding Google Shopping, Android, and AdSense.²⁴ In the Android case, the European Commission found that Google required phone manufacturers to install a suite of apps on Android phones as a condition of installing the must-have Google Play app, conduct that mirrors the *Microsoft* antitrust cases regarding Internet Explorer. The contracts also prohibited manufacturers from preinstalling competing search engines and other competing apps in Android phones, helping Google maintain its monopoly in search as the world moved from desktop to mobile. Google has also integrated into search verticals like reviews, maps and travel, and has been accused of degrading its search quality results in order to prioritize its own verticals or content that keeps users on Google search pages.²⁵

As for Facebook, the German cartel office recently determined that the social media platform abused its dominance by excessive and improper collection of user data, in violation of Europe's privacy law, the General Data Protection Regulation.²⁶ And documents recently published by the UK parliament provide evidence of Facebook

20 Elizabeth Dwoskin. "Facebook's Willingness to Copy Rivals' Apps Seen As Hurting Innovation," The Washington Post. August 10, 2017.

https://www.washingtonpost.com/business/economy/facebooks-willingness-to-copy-rivals-apps-seen-as-hurting-innovation/2017/08/10/ea7188ea-7df6-11e7-a669-b400c5c7e1cc_story.html.

21 "Infographic: Google's Biggest Acquisitions." Digital image. June 10, 2019.

<https://www.cbinsights.com/research/google-biggest-acquisitions-infographic/>.

22 Rani Molla. "Amazon's Ring buy gives it the same number of acquisitions this year as Facebook and Google," ReCode by Vox, March 4, 2018. <https://www.vox.com/2018/3/4/17062538/amazon-ring-acquisitions-2018-apple-google-cbinsights>

23 "Infographic: Google's Biggest Acquisitions." Digital image. June 10, 2019.

<https://www.cbinsights.com/research/google-biggest-acquisitions-infographic/>.

24 European Commission. "Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service," Supra note 4. News release, June 27, 2017. http://europa.eu/rapid/press-release_IP-17-1784_en.htm.

25 Luca, Michael, Timothy Wu, Sebastian Couvidat, Daniel Frank, and William Seltzer. *Does Google Content Degrade Google Search? Experimental Evidence*. Working paper no. 16-035. Business School, Harvard. September 2015, (Revised August 2016); Jack Nicas. "Google Has Picked An Answer For You—Too Bad It's Often Wrong," November 16, 2017.

<https://www.wsj.com/articles/googles-featured-answers-aim-to-distill-truthbut-often-get-it-wrong-1510847867>.

26 Germany. German Federal Cartel Office. *Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources*. 2019.

https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf?__blob=publicationFile&v=5

cutting off competitors' access to its API.²⁷ Such conduct likely amounts to a discriminatory refusal to deal, which is prohibited under Section 2 of the Sherman Act.

Thus far antitrust enforcers have not stopped Facebook and Google from using acquisitions to grow and maintain their monopoly power and leveraging their monopoly power to exclude competition. Weak antitrust enforcement deserves a large part of the blame for publishers' lack of bargaining power and alternatives to Facebook and Google, and it set the stage for these platforms to extract the fruits of publishers' labor.

IV. History of the American System of the Free Press

The failings of competition policy are not the only cause of the devastation of journalism in America. Government has also failed to protect the free press through public policy.

To understand what went wrong, the history of American journalism is instructive. That history is one of ceaseless private initiative and innovation, as individual citizens strive to figure out better ways and smarter business models to a) keep a check on government and private power, b) inform citizens, and specific communities within society, of the basic events and challenges of the day, and c) pay the costs of reporting, editing, and distributing the news.

From even before the Declaration of Independence, Americans used government both to promote the building of technologically sophisticated infrastructures to distribute the news, and to directly address threats to the free press posed by either private monopolists or by government actors.²⁸

By the first decades of the 19th century a basic American model of the Free Press had been shaped. The model had three main components:

- **Local ownership of newspapers.** Most towns of any consequence came to have at least one and often more, independent papers.
- **An advertising-based business model.** Although many early papers were supported in part by various forms of government and party patronage, by the early 19th century American newspapers were supported, crucially, by subscriptions and local advertising.
- **A politically neutral network for distributing the news,** strongly buttressed where necessary by government funding, initially in the form of the Post Office system.

27 United Kingdom. Parliament. House of Commons. *Disinformation and Fake News: Final Report*. 2019.

28 Paul Starr, *The Creation of the Media: Political Origins of Modern Communications* (New York: Basic Books, 2004)

A. Protecting the “American System” Against the First Tech Monopolies

The first great technological challenge to the basic balances of this “American System” of the free press came in the 1840s with the rise of the railroad and, especially, the telegraph. These technologies greatly sped the movement of news both in the form of the physical newspaper and in the form of the news story itself, which could now be distributed almost instantaneously across hundreds of miles by the telegraph. These technologies, however, also created chokepoints in the flow of information and ideas. During this period, the distribution of news became dependent on infrastructures developed and owned by rich and powerful private corporations that often enjoyed positions as *de facto* monopolies – over both communications and transportation – across large swaths of the nation.²⁹

In response, American legislatures and courts at all levels of government began enacting policies designed to ensure that the private ownership and operation of these crucial technologies did not privilege some people's speech while suppressing others. Although there were widespread calls simply to nationalize the telegraph system, and perhaps attach it to the Post Office (as many European nations were then doing), Americans generally focused more on using other legal and policy tools to prevent these networks from discriminating in favor of, or against, any one person, party, or corporation, while leaving ownership and management of the networks in private hands.³⁰ Hence, perhaps the single most important action during this period was to impose various forms of common carriage rules, or common-carriage-like principles, to these new networks.

One of the first such efforts was New York State's Telegraph Act of 1848. Its goal was to check what one journalist at the time called the “stupendous power” of telegraph monopolies over the flow and content of news by making it easier for new competitors to join the market.³¹ The law did so by prohibiting telegraph operators from discriminating in favor of any one person's or company's messages, which it did by mandating that the operator carry messages on a first- come, first-served basis, and that it charge all senders the same price and terms.

By the beginning of the 20th century, monopolists such as John D. Rockefeller and J.P. Morgan had captured control over great swaths of the American economy and American politics. Yet despite numerous attempts by the powerful to exploit the monopoly nature of the telecom and transportations networks of the day, Americans managed to protect and perpetuate the American System of the free press.

Indeed, it was America's magazines and newspapers which published the most powerful investigations and exposes of the Rockefellers and Morgans of the country, and of the politicians in Washington who served them, helping to catalyze public support for greater anti-monopoly action from the federal government.

29 Richard John, *Network Nation: Inventing American Telecommunications* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2010)

30 John, *Network Nation*, 124-125, 138.

31 John, *Network Nation*, 91

B. Perpetuating the “American System” in the Era of Radio and Television

During and immediately after the First World War, Americans allowed the federal government to monopolize control over key communications and transportation systems, and over the use of the new wireless technologies. But after the end of the war, Americans moved swiftly to return telecommunications and transportation networks to private control. Despite the fact that radio (and later television) introduced entirely new ways to broadcast the news and sped up communications dramatically, Americans began to shape these technologies to make them fit with the American System of free press that had worked so well for so long.

Indeed, while other major nations moved to centralize communications and the news under the control of the government – as in the case of the United Kingdom’s BBC – Americans took a directly opposed path, working to ensure that the new wireless networks would be as decentralized and democratic as possible, composed of thousands of local stations that would be locally owned, locally directed, and locally funded, mainly through local advertising.³²

Within a few years, Americans had established policies that strictly limited the number of broadcast licenses a single person or corporation could control. They did so, for instance, by blocking any one corporation or individual from owning more than one TV or radio station in the same market, and by blocking corporations from owning more than seven TV stations, seven AM radio stations, and seven FM stations nationally.³³ They also limited how many networks any one independent broadcaster could affiliate with.³⁴

American legislatures and courts also continued to promote and enforce "common carrier" rules that prohibited price discrimination in communication markets and kept networks open and neutral.

C. The American System in Crisis – Neoliberalism and the Internet

Over the last generation, the American System of Free Press has come under unprecedented pressure. Although many Americans only really began to focus on the state of the news media following the revelations about Russian meddling in the last general election, there has been a sharp and persistent decline in the number of American journalists working at the local, national, and international levels.³⁵ This is true for the

32 Starr, *Creation of the Media*, 9

33 U.S. Library of Congress, Congressional Research Service, *The FCC’s Rules and Policies Regarding Media Ownership, Attribution, and Ownership Diversity*, by Dana A. Scherer, R43936 (2016), 9, 11, 20.

34 Tim Wu, *The Master Switch: The Rise and Fall of Information Empires* (New York: Random House, 2010), 83.

35 Elizabeth Greico, "Newsroom employment dropped nearly a quarter in less than 10 years, with greatest decline at newspapers," Pew Research Center. (July, 30, 2018). <https://www.pewresearch.org/fact-tank/2018/07/30/newsroom-employment-dropped-nearly-a-quarter-in-less-than-10-years-with-greatest-decline-at-newspapers/>

journalism that aims to keep a check on our governments. And it is true for the journalism that is designed to keep a check on large private enterprises, such as business corporations and financial institutions. The overall result is a grave and growing threat to American liberties and American democracy.

Two radical changes are largely responsible for the dangerous state of American journalism today.

The first is intellectual, in the form of a new philosophy of competition. From the founding, Americans used government to promote open markets and wide distribution of power and opportunity. This played out in policies that promoted independent farms, independent business, and local control of enterprise and finance, across the whole American political economy, in almost exactly the same way as Americans promoted wide distribution of ownership over the news media. To the extent there was an organizing concept behind this approach to political economy, it was to protect and promote the interests and rights of a thinking, acting, productive citizenry.

But a generation ago, in the late 1970s and early 1980s, an alliance from across the political spectrum promoted the adoption of a new approach to competition policy. The new goal, they said, should be to promote more “efficient” forms of production, distribution, and business organization, in theory to create more material wealth to share across society. To the extent there was an organizing concept, it was to protect and promote the interests of the American as a “consumer.” This movement is sometimes known as the “Chicago School,” as many of its early promoters taught at the University of Chicago. It is also widely known as “neoliberalism.”

This radical shift from a philosophy that promoted diversity and the distribution of power, to a philosophy that promoted efficiency—and hence the concentration and centralization of power—directly affected the American System of the free press in profound ways. Following the insights of the Chicago School, antitrust enforcers permitted private actors to concentrate far greater control than ever before over American news and entertainment media. And policymakers made a series of decisions that actually made it easier for powerful actors to further centralize control over news and information flows.

The second radical change over the last generation was the development and deployment of the Internet. Much in the same ways that the telegraph and the radio disrupted preexisting balances in the 19th and early 20th centuries, the rise of globe-spanning Internet-based communications corporations such as Facebook and Google similarly broke down existing structures and practices. These new tech platforms consolidated power over America’s news system, controlling and manipulating the flow of news and information across the internet.

And, closely related, these platforms developed a new system of automated advertising that depended on the intimate surveillance of individuals, and that – over the course of a few short years - allowed them to capture control over much if not most of the advertising

market that once sustained America's independent press, and especially its local news media. The result, in a remarkably short period of time, was the choke pointing of news across a few vital platforms, the creation of extreme or even complete dependency by journalists and publishers on these platforms, and the development by the platforms of ever more automated systems for controlling and manipulating news flows in ways that promote their own financial – and ultimately their own political – interests.

Google and Facebook erected a duopoly over online advertising. Because these companies command far more data than other advertising-based businesses can hope to bring in, Google and Facebook can offer ads that are more targeted, more precise, and which reach more people than those sold by newspapers, magazines, and other journalistic outlets.

This is a significant change from the previous structure of the U.S. advertising market, under which news organizations drew in advertising revenue by creating products that attracted local audiences. Under the new system, it doesn't matter if newspapers attract local audiences or forge a strong connection with local readers. No matter what, advertisers can reach those audiences by going to Google or Facebook directly, bypassing local media entirely.

The rise of Facebook and Google's advertising businesses neatly coincides with the declining ad revenue of America's newspapers. Google launched its digital advertising business in 2001 and made its first billion from digital advertising in 2003. Facebook started its digital advertising business in 2009, after which it grew every single year. The two corporations in 2017 grossed just under \$140 billion in advertising revenue, which represents 73% of the entire digital advertising market. Meanwhile, newspapers' aggregate revenue fell from the 2005 high of nearly \$50 billion to less than \$20 billion in 2017, when adjusted for inflation.³⁶

The main difference in recent years from previous periods in American history is that for the first time ever, America's citizens have not used government to neutralize the power of today's monopoly communications networks. As a result, the executives and financiers in charge of these corporations have been left almost entirely free to further increase their power through the buying of potential rivals, to manipulate the flow of news between reporters and readers through such practices as personalized (“first-degree”) discrimination in pricing and terms, and to divert the great bulk of remaining advertising dollars away from local and even national news media into their own pockets.

36 “Google's ad revenue from 2001 to 2017,” Statista, accessed June 11, 2018 <https://www.statista.com/statistics/266249/advertising-revenue-of-google/>; “Facebook's advertising revenue worldwide from 2009 to 2017,” Statista, accessed June 11, 2018 <https://www.statista.com/statistics/271258/facebooks-advertising-revenue-worldwide/>; Jillian D'Onfro, “Google and Facebook extend their lead in online ads, and that's reason for investors to be cautious,” CNBC, Dec. 20, 2017, Accessed June 11, 2018 <https://www.cnbc.com/2017/12/20/google-facebook-digital-ad-marketshare-growthpivotal.html>; “Estimated aggregate revenue of U.S. newspaper publishers from 2005 to 2017,” Statista, accessed June 11, 2018 <https://www.statista.com/statistics/184046/estimated-revenue-of-us-newspaper-publishers-since2005/>

V. Solving the Crisis: Towards Regulated Competition³⁷

Drawing on these lessons from history, saving the free press will require organizing market structures around four principles.

1. Business models must exist that allow for independent news gathering, because independent news gathering is a social good critical to democracy.
2. Any policy levers must preserve free speech and avoid government censorship.
3. Markets should be decentralized so that information production can be decentralized. Local communities need to be able to produce and distribute information about their own communities.
4. There should be no price and terms of service discrimination against consumers, advertisers, or publishers. Relationships between publishers and the audience should be kept under the control of publishers and audiences, and not structured to enable third parties to monetize relationships they don't invest in to produce.

Specific solutions include: a) non-discrimination regulations; b) structural separation; c) stronger antitrust enforcement; d) interoperability; and e) data privacy rules.

A. Non-Discrimination

Tech platforms that are providers of essential communications and information services should be subject to common carrier style regulation, which we have applied to every previous network monopoly in our history. There must be no discrimination in price or terms, be it towards the user or the publisher. When private companies become the infrastructure of the economy, policymakers must impose neutrality, non-discrimination, and equal access regulations.

B. Structural Separation and Market Segmentation

Both Google and Facebook have not only enormous advertising power but also multiple dominant networks as subsidiaries. As discussed above, each has an incentive to unfairly and inefficiently prioritize the content of its subsidiaries.

By applying common sense standards to network products to split up Facebook and Google, policymakers would produce new independent companies that can compete: Instagram, WhatsApp, Facebook, Messenger, Maps, Search, YouTube, Android, Play, Analytics, DoubleClick Advertising, Analytics, Chrome, Gmail, and infrastructure services. This has been done before. One model for such a simplification would be the

³⁷ This section is excerpted, with additions and modifications, from the forthcoming, “Financing Free Speech: Tech Platforms and Advertising Markets,” Matt Stoller, Open Markets Institute.

Public Utility Holding Company Act of 1935, which forced utility holding companies to break themselves up into component parts.

C. Stronger Antitrust Enforcement Against Mergers and Anticompetitive Conduct

First, the Department of Justice or Congress should recreate vertical merger guidelines to prohibit mergers that create anticompetitive market structures. These guidelines should establish “bright lines” for market share thresholds that make enforcement simple and market expectations clear.

Second, policymakers should establish a new strengthened framework for vertical restraints and monopolization. Congress could implement rules by statute, or the FTC could use its Section 5 rule-making authority to bar exclusionary practices by dominant internet platforms. It should also bar the use of dominant platform power to foreclose on or discriminate against competitors using that platform, and bar the use of data acquired as a result of platform dominance in anti-competitive ways.

The U.S. Department of Justice brought its antitrust case against Microsoft 18 years ago. The dearth of enforcement in the meantime is partly attributable to legal precedent that imposes high bars for prevailing on monopolization claims. Legal precedent involving monopoly, monopoly leveraging, attempted monopoly, predatory pricing, tying and bundling all require adaptation for Sherman Act Section 2 to optimally serve its purpose of preventing monopolization. Even under existing U.S. law, however, antitrust enforcers have the tools to combat illegal conduct and are beginning to gain the political will as well.

Immediately, antitrust enforcers should bar Facebook and Google from acquiring competitive threats and companies that fortify their monopoly power. Enforcers should also unwind anticompetitive deals to open up competition and sue to stop exclusionary practices.

The antitrust laws, however, should not be used against journalists who collectively negotiate against tech platforms. The Open Markets Institute thus supports the *Journalism Competition and Preservation Act* proposed by Representative Cicilline. Although Open Markets ordinarily does not favor exemptions from the antitrust laws, this measure is now necessary due to the absence of bargaining power against tech platform monopolists. The exemption is structured in a way that is limited in scope and duration.

D. Interoperability

Policymakers should impose interoperability requirements to end the chokehold over the flow of commerce.

Interoperability requirements for tech platforms would be a mechanism to organize pro-competitive regulations to reduce the market power of any specific choke point for information flow. The National Institute of Standards and Technology (NIST) is a branch of the Commerce Department designed to organize standards. It has promulgated standards recently on fingerprinting technology, SMART grid interoperability frameworks, industrial control system security, and cybersecurity. NIST and the FTC could jointly serve as a convening body for the development of interoperability standards for platform.

Interoperability requirements would allow competitors to emerge by reducing entry barriers to competition. Such requirements were imposed by both regulators and antitrust enforcers against AT&T and by antitrust enforcers in *US v. Microsoft*.³⁸

E. Data Privacy Rules

Policymakers need to restore the bargaining leverage of publishers and the ability of individuals to protect their right not to be tracked.

Since the late 1990s, consumer groups and technologists have been proposing various mechanisms to enable more consumer control. One popular idea is a Do Not Track list, a global list maintained by the Federal government barring collection of personalized data across the web by companies whose business model is largely studying, monitoring, or analyzing user behavior. Such a Do Not Track list would mean a single toggle switch for a citizen in which that citizen could prevent third-party tracking of their data or use of that data by an intermediary whose business model is oriented around behavioral manipulation or targeting.

Such a law, if structured and implemented well, could reorient bargaining power and protect privacy towards institutions that build trusted relationships with users by creating useful content. Each entity in the market – whether an entertainment website or the New York Times – would have to compete with each other with only the data they have on each user from a first-party relationship.

A related concept would simply bar the tracking of individuals for personalized behavioral ad targeting and the combination of personalized third-party data for such targeting. Individually targeted ads would be legal when the user has a first-party

38 The Wilson Department of Justice “endorsed the interconnection of Bell and non- competing independent operating companies and ordered Bell to devise protocols necessary to give these noncompeting independents access to Bell’s long-distance network.” See John, *Network Nation*, p. 360; “The Microsoft Settlement: A Look to the Future,” Statement of Charles A. James, Assistant Attorney General Antitrust Division before the Committee on the Judiciary, United States Senate. December 12, 2001. p. 8; “And Microsoft will be required to license any intellectual property to computer manufacturers and software developers necessary for them to exercise their rights under the proposed decree, including, for example, using the middleware protocols disclosed by Microsoft to interoperate with the operating system.” p. 8

relationship with a publisher, but that targeting can only use data acquired from that relationship.

For instance, the New York Times can segment and target its readers with ads, but only based on their use of the New York Times apps and website. Facebook, however, could not individually target users with ads based on their purchase of Mastercard data, or their acquisition of data through social plug-ins on third-party sites, or their use of the Facebook Audience Network. Such a market structure would prohibit publishers from using data not acquired in that direct relationship with the publisher.

Implementing either policy would end up protecting the rights of publishers to control their subscriber and user data, because publishers have a first-party relationship with their audience. Publishers would be allowed to engage in granular targeting, but the use of third-party user-specific data to engage in ad targeting would be significantly restricted. In this framework, you can only target your own readers. This would restore the power imbalance in the market and reduce intermediaries to their rightful place of matching ad buyers and publishers.

VI. Conclusion

At the Open Markets Institute, we believe the American people have both a right and a duty to use government to ensure the independence and financial viability of both national and locally based news organizations. As a country, we have been here before. We have stood up to powerful tech monopolists. Each time, we were better for it. We unleashed new waves of innovation. We dispersed opportunity. We restored our markets and removed gatekeepers. But if we don't act now to change the structure of our markets, titans will continue to control speech, journalism will continue to suffer, and so will our democracy.