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America's Fourth Estate: History and Law

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TABLE OF CONTENTS

Introduction 2

I. The News and the Government: A Symbiotic Relationship from the Beginning 4

A. The First Amendment and the Foundations of Structuring Speech in the United States 4

B. The Postal System 6

C. The Telegraph and Telephone 8

D. Radio and Television Broadcasting 11

E. Cable 16

II. The Decline of Public Controls and the Genesis of Technology Platforms as Essential Conduits for Information 17

A. Changing Philosophy on Antimonopoly and Technological Convergence 17

B. The Telecommunications Act of 1996 19

III. Big Tech is Allowed to Take Over 20

A. Congress Exempts the Platforms from Liability 21

B. Monopolization of the Internet After 2001 23

C. Digital Dominance Chokes off Journalism in America 25

IV. Conclusion: Understanding the Lessons from History and Where We Go from Here 27

Author and Acknowledgments 28

Endnotes 29

INTRODUCTION

America's news industry is in crisis and has been for decades. Journalism outlets continue to be taken over by predatory private equity companies, hedge funds, and other concentrations of private capital.[1] Journalists are being laid off in record numbers.[2] Technology giants like Google and Meta (formerly Facebook) have monopolized the content distribution system on the internet and, therefore, govern practically all public discourse in the United States. Their control over digital advertising revenue, the central lifeline of the industry, continues to maintain a chokehold over the news industry.

Moreover, misinformation continues to proliferate on the internet, and social media platforms are commoditizing journalism, eroding the public's confidence in the news industry, and polluting the quality of content that informs readers. Reviewing the current data shows the true extent of the crisis facing American journalism. Meanwhile, the federal government has sat idly by while the entire industry continues to crumble.

Between 2008 and 2021, newsroom employment has declined by 26%.[3] Only six months into 2023, media job losses are over 17,000.[4]

- A third of prominent newspapers had layoffs in 2020, up from 27% in 2018.[5]
- Between 2005 and 2022, 2,500 newspapers (~25%) closed in the United States.[6] Current research shows that another third of newspapers will be lost by 2025.[7]
- As of 2022, 200 of the 3,143 counties in the United States do not have a newspaper.[8]
- As of 2018, 1,449 counties only have one newspaper.[9]
- As of 2022, 200 counties, comprising more than 70 million people, have no daily newspaper.[10]
- Half of the daily newspapers in the United States are owned by private equity companies, hedge funds, or other financial institutions.[11]
- Between 2003 and 2014, the number of full-time newspaper statehouse reporters declined by 35%, and more than two-thirds (71 percent) of U.S. newspapers do not have a statehouse reporter.[12] In a follow-up report, between 2014 and 2022, the number of full-time statehouse reporters at U.S. newspapers declined by an additional 34%.[13] Another report stated that the shrinking coverage of municipal governments around the country raises the risk of corruption and contributes to wasted taxpayer dollars.[14]
- Google and Facebook are responsible for 75% of all website referral traffic.[15] Even major news sites depend on Google and Facebook for 10-25% of their traffic.[16]
- Newspaper revenue from advertising declined 62% between 2008 and 2018.[17]
- Confidence and trust in news organizations continue to plummet.[18]
- In addition to wealthy benefactors, a significantly growing source of investment dollars to local outlets comes from Google and Facebook.[19]

- Nearly every faction of the media is vertically integrated and owned by conglomerate corporations, including Disney, Comcast, AT&T, Paramount Global, Access Industries, Discovery Inc., and Hasbro.[20]
- The public's trust in the news media is at an all-time low.[21]

A durable and thriving fourth estate is fundamental to a free, informed, and democratic society.[22] Democracy is not possible without high-quality journalism informing the public, connecting communities, and holding the powerful to account.[23] However, a profound misunderstanding exists about how the federal government has shaped the news industry and its ability to regulate and structure the sector in the public interest. In fact, since the founding of the United States, the federal government has had an intimate relationship with the news industry and has been an essential means of providing the public access to multiple high-quality and diverse news sources.

This Article details the extensive history of federal media regulation in the United States. The focus on the media industry is purposeful as the industry is not only essential to a thriving democracy but is also "at the center of the structure of the U.S. republic."[24] Examining historic media regulation also helps us see what robust public policy makes possible.

Reviewing the history makes clear that, like all markets, the media industry is constructed by the state, and the practices that corporations use to compete and how they compete are constructed from the law.[25] This Article also illuminates that antimonopoly has been a fundamental aspect of much of the federal regulation enacted to support and structure the news industry.

While it has historically had different meanings throughout history, antimonopoly, particularly more modern incarnations of the phrase, is predominantly predicated on the idea that the public should be free from corporate domination in all aspects of their life, economic opportunities should be accessible to all, and that no corporation should have undue control over the economy.[26] Critically, antimonopoly ensures that the law structures markets to ensure thriving and vigorous competition, open access to new entrants, and inhibits the usage of monopolistic or other unfair market practices that entrench and perpetuate monopoly. When applied to the news industry, these principles help foster a news industry that is deconcentrated, capable of providing diverse opinions, able to hold the government and other powerful actors accountable to the rule of law, and maintains as wide a distribution system as possible so that the public can access information.

This report first explores the history surrounding the extensive and inseparable role the federal government has had in shaping and fostering the growth and subsequent contraction of America's news industry since the founding of the United States. It concludes that the federal government was and still is the most vital and consequential force shaping the news industry and that antimonopoly was central to many policies structuring the industry.[27] Indeed, America's once robust communications regulations were critical to supporting the growth of democracy and the economy more generally.[28] Second, this report directly challenges the repeatedly and dubiously asserted free market fiction that the federal government neither had nor has a role in regulating the news industry in the public interest, and that the sector remains completely shielded from public regulations.

This Article does not position itself as a comprehensive volume on the history of communications in America – such an endeavor is left to historians and other scholars.[29] However, this Article details some of the most critical federal regulations that shaped the news industry to operate in the public interest.

I. THE NEWS AND THE GOVERNMENT: A SYMBIOTIC RELATIONSHIP FROM THE BEGINNING

A. The First Amendment and the Foundations of Structuring Speech in the United States

Since the founding of the United States, the news industry has been an essential component of American democracy. Indeed, it is arguable that without a flourishing and robust news ecosystem, the United States would not have turned into the global economic and cultural powerhouse it is today. Buttressing America's democratic system was a set of affirmative policies by Congress to regulate and foster the development of the news industry so that it operates in the public interest.[30] Central to Congress's justification for encouraging a resilient news environment was the fourth estate's essential role in informing the public of political developments.[31] The founders codified this belief with the enactment and positive interpretation of the First Amendment to the U.S. Constitution.

The relevant part of the First Amendment states, "Congress shall make no law…abridging the freedom of speech, or of the press."[32] Commentators often focus on the strict wording in the first half of the amendment – "Congress shall make no law…." Emphasizing only this wording attempts to restrict its interpretation to a libertarian "marketplace of ideas" philosophy where the government is unable to promote, prohibit, or restrict the speech of individuals or corporate entities in any manner whatsoever, no matter how benign or beneficial the regulation is to the public or to the market itself.[33] However, such an interpretation differs from the Founders' vision of the First Amendment.[34]

The wording of the First Amendment clearly reveals that the government's legislative powers are restricted when it concerns the regulation of the news industry. But, by no means was the amendment designed to limit the government's power entirely.[35] The Founders believed that the First Amendment empowered the government to provide the means and infrastructure for the public to be able to access information – in other words, provide the mechanisms and means to achieve its political goals. For example, James Madison, the primary architect of the Constitution, stated, "A people who mean to be their own governors must arm themselves with the power which knowledge gives. A popular Government, without popular information, *or the means of acquiring it*, is but a Prologue to a Farce or a Tragedy; or, perhaps both."[36]

Madison also saw access to information as a means of ensuring the vitality of American democracy, which he helped create. Madison stated that "independent… [citizens are the]…basis of public liberty, and the strongest bulwark of public safety" and came to see access to information as a necessary predicate for an independent and free citizenry.[37] Legal scholar Noah Feldman aptly stated, "it became clear [to Madison] that free speech would be necessary to keep public opinion informed," and that Madison believed the wide-spread transmission of public opinion and political information represented "the ultimate guarantor of liberty."[38] Moreover, for Madison, the government was required to have robust (albeit in some cases, narrowly tailored) legislative mechanisms to promote and restrict speech to ensure a well-informed populace and well-functioning democracy.[39]

Alexander Hamilton, the Treasury's first secretary of and ardent supporter of the Constitution, stated in *Federalist No. 84* that "provision against restraining the liberty of the press [would] afford a clear implication that a power to prescribe proper regulations concerning it was intended to be vested in the national government."[40] In other words, since the beginning of the American

democratic experiment, public policy was seen as a necessary element in fostering and facilitating the rights granted by the First Amendment.

The Founders implicitly codified this belief within the wording of the First Amendment itself. Critics often omit the fact that Congress is only restricted from "abridging" the freedom of speech. Within the context of the amendment, Congress is not forbidden to enact laws that regulate speech but rather is prohibited from enacting laws that unduly curtail it. Said differently, Congress is not prohibited from enacting legislation or implementing policies that expand, enrich, and foster speech, nor its corollary, restricting speech against the public interest.[41] Speech, in other words, is a qualified right rather than an absolute one.[42]

Even during the enactment of the First Amendment, it was clear that the government could and has an obligation to deter, prohibit, and punish certain kinds of harmful and unwarranted speech that are contrary to public policy, such as libel, slander, and even sedition and treason.[43] Therefore, the right to publish or speak has always been a qualified right rather than an absolute one. As historian Norman Rosenberg aptly stated, "government, if not at the national then at the state level, had a positive responsibility to monitor – and, when necessary, to step in and moderate – political communication."[44] In other words, the First Amendment is a reinforcing mechanism of democracy since it empowers the government to facilitate speech in the public interest to ensure the vitality of public discourse.[45] As Supreme Court Justice Felix Frankfurter would later say:

> A free press is vital to a democratic society because its freedom gives it power. Power in a democracy implies responsibility in its exercise. No institution in a democracy, either governmental or private, can have absolute power. Nor can the limits of power which enforce responsibility be finally determined by the limited power itself. In plain English, freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise. Most State constitutions expressly provide for liability for abuse of the press's freedom. That there was such legal liability was so taken for granted by the framers of the First Amendment that it was not spelled out. Responsibility for its abuse was imbedded in the law.[46]

In other words, democratic controls over speech are necessary and work in conjunction with facilitating and restricting it when necessary.

Further supporting the views of the Founders, English jurist William Blackstone's Commentaries on the Laws of England, the most influential legal treatise at the time of the nation's founding and basis for much of the early American common law, stated in clear terms that although "[e]very freemen has an undoubted right to lay what sentiments he pleases before the public… [which is an] essential to the nature of a free state…[restrictions on speech were] necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty."[47]

The positively oriented First Amendment view was more formally codified into American law in 1945 when the Supreme Court held in *Associated Press v. United States* that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public…"[48] Notably, the Supreme Court noted that while the government does have limited powers to restrict and regulate speech, the Court also stated that "It would be strange indeed…if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom."[49]

During this time, the Supreme Court also confirmed

that corporate speech, such as commercial advertising, was not protected by the First Amendment and that the government was endowed with broad powers to regulate the channels of communication in the public interest. The Court forcefully stated:

> We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment. The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the people *in fulfillment of the public use to which streets are dedicated*.[50]

The First Amendment also formed the basis of ensuring democratic accountability from the media by partially insulating the press from certain forms of litigation and regulation. The Supreme Court held in *Miami Herald v. Tornillo* that the government cannot force the press to publish specific content.[51] In *New York Times v. United States,* the Supreme Court held that the government has an exceptionally high burden in inhibiting the press from publishing content.[52] Lastly, in *New York Times Co. v. Sullivan*, the Supreme Court imposed a high burden on public officials suing the press for defamation.[53] Collectively, these decisions strengthened democracy and the underlying intent of the First Amendment. They structured the media industry to hold the government accountable by providing broad constitutional protections while allowing the possibility of legal consequences should the press operate outside of its public interest mandate.[54]

Thus, the Supreme Court believed that while the First Amendment did wholly constrain government actions on restricting speech, it also generally affirmed the Founders' intentions to favor the public's need for information over the rights of corporations to transmit and market specific content. The Court also ruled that the First Amendment did not inhibit the government from structuring markets to ensure that speech was disseminated in the public interest. A positively oriented First Amendment proved to be an essential guiding principle for future regulatory initiatives by the federal government to foster the growth of the news industry.

B. The Postal System

Against the backdrop of a positively oriented view of the First Amendment and the inherent value of disseminating the news to the public, Congress enacted the most consequential law for distributing news in America.[55] In 1792, in the wake of the adoption of the Bill of Rights, Congress authorized the Postal Act.[56] Of its many substantial effects, the law first established the Post Office – the most foundational public institution in the early years of the American republic. Soon after its creation, the Post Office would prove to be a "dynamic institution that would exert a major influence on American commerce, politics, and political thought" and become critical to distributing news and information in America.[57]

Given its ability to establish post offices from the 1792 Postal Act[58] and authority to designate postal routes from the Constitution,[59] as well as a fervent desire to communicate with constituents and supply citizens with the means to hold the government accountable, Congress was eager to affirmatively use its broad legislative powers to create a robust national communications system.[60] The Post Office became the primary institution to embody and facilitate this goal.

With Congress directly funding the Post Office's operations, the institution could build sufficient physical infrastructure to disseminate and transport information

to the entire country.[61] Shortly after the ratification of the Constitution, the Post Office would become the only institution with a national presence.

Congress rapidly expanded the Post Office, almost in a haphazard manner, disregarding the cost of the service as it was clear that a robust national postal system was of critical importance and provided a vital public service.[62] Between 1800 and 1815, Congress tripled the number of post offices.[63] By establishing a network of post offices, Congress built a nationwide communications infrastructure that was meant to bind the nation together after the Revolutionary War and facilitate the creation of a new national identity and culture.[64]

For many Americans, post offices became local gossip hubs for community residents who often waited for the mail to be delivered.[65] The Post Office thus was not merely public infrastructure that facilitated information transmission between citizens near and far, but a centralizing cultural force that helped operationalize democracy in the new republic.

The bipartisan consensus amongst members of Congress on the importance of the Post Office and an expansive postal policy was practically unparalleled, particularly compared with today's partisan environment.[66] The idea that the country should rapidly expand this public service went practically unchallenged in the quarter century following the nation's founding.[67]

After establishing the Post Office, the 1792 Postal Act also empowered Congress to provide two "indispensable" services to the press and facilitated turning "the abstract idea of democracy into a concrete reality."[68] First, the 1792 Postal Act allowed newspapers to share editions with each other for free through the mail so that they could reprint one another's content, thereby facilitating the spread of news throughout the country.[69] Second, the Act set postal rates at exceptionally low values for all newspapers. For comparison, sending a letter could cost as much as six to 25 times more than distributing a newspaper.[70] The justification for this decision was simple. The Founders recognized that for a government to be held accountable to the people, citizens must have access to information and, thus, have the means, not just the ability, to be informed of public affairs.[71] Congress's enactment of the 1792 Postal Act meant that the government collected and used public dollars to subsidize newspapers to ensure that the public actively monitored America's political institutions by making information as universally accessible as possible. Subsidizing newspaper distribution effectively created the public infrastructure in order to hold itself accountable to constituents and proactively prevent abuses of power.[72] The first president, George Washington, proclaimed the post office would "diffuse[s] a knowledge of the law and proceedings of the Government [to the public]."[73] Information, therefore, would no longer be a privilege.[74] The vision of the Post Office was clear – it should operate as an essential public good available to all.[75]

Congress's investment and devotion to expanding the post office led to the explosive growth of America's news industry. In 1800, America's postal system transmitted 1.9 million newspapers.[76] The number of newspapers would triple by 1820, double again by 1830, and more than doubled again by 1840.[77] By 1840, the Post Office was transmitting 39 million newspapers a year.[78] Supporting this growth was the rapidly expanding physical infrastructure of the post office, which was essentially a national "information grid" that established nationwide communications.[79] Between 1801 and 1809, for example, the United States went from 903 post offices and 21,000 miles of postal routes to 2,300 post offices and 36,000 miles of routes.[80] By 1860, American would have almost 30,000 post offices and just over 240,000 miles of postal routes.[81]

By charging all newspapers the same amount regardless of origin or destination, the 1792 Postal Act's non-discrimination policy led to a unique outcome.

Congress's postal policy protected smaller rural newspapers from being supplanted by newspapers from big cities.[82] This policy allowed the public to become aware of local as well as national issues shaping the culture of a new nation. It also acted as a state-backed policy that would prevent the centralization of news distribution in the cities and ensure diverse news sources.[83] In his third address to Congress, President Washington acknowledged the importance of diverse and subsidized information transmitted by the post office. He stated:

> The importance of the post office and post roads on a plan sufficiently liberal and comprehensive, as they respect the expedition, safety, and facility of communication, is increased by their instrumentality in diffusing a knowledge of the laws and proceedings of the Government, which, while it contributes to the security of the people, also serves to guard them against the effects of misrepresentation and misconception.[84]

The U.S. Post Office proved to be a critical means of disseminating newspapers, and thus information, to the entire nation. Indeed, America's newspapers were seen as a necessary condition to the vitality of democracy itself and proved instrumental in helping Americans cultivate "a sense of identity" and acquire "intellectual sophistication."[85] French historian Alexis de Tocqueville codified this belief by stating, "hardly any democratic association can do without newspapers."[86] By 1812, half of the mail was newspapers; by the 1830s, some estimates show that 95% of the mail was newspapers.[87] Such a situation cemented the post office's role as the nation's nervous system transmitting information to the entire population.[88] Thus, the post office embodied the spirit of the founder's intentions with the First Amendment – that government policy can promote the spread of ideas while retaining the capability to restrict them in the public interest.[89]

During the nascent years of the American Republic, there was also heavy investment in roads, turnpikes, and canals,[90] and by the mid-1800s, railroads would connect the entire nation.[91] Aided by a transportation revolution, newspapers expanded from a means of obtaining political information to one that also provided critical commercial information to aid the rapidly industrializing American economy.[92] By the mid-1840s, the telegraph, once again supported and guided by federal action, would make its commercial debut and radically transform the news industry in America.[93]

C. The Telegraph and Telephone

The electromagnetic telegraph was a revolutionary technology when it made its public debut in 1844, and it quickly became a key source of information infrastructure for the United States. Given its capacity to quickly transmit information across great distances, the telegraph became critical to disseminating news and information to the masses. According to historian David Hochfelder, the telegraph "changed how Americans consumed the news, helping to create modern sensibilities about timeliness and newsworthiness."[94]

While inventor Samuel Morse's first telegraph message, "What Hath God Wrought," is widely known amongst the general populace, his second less famous message, "Have you any news?" would prove to be a more insightful predictor of the telegraph's influence on the news industry in the United States.[95] Morse and his contemporaries who held prominent positions in journalism quickly recognized the potential of this revolutionary new medium of communication.[96] Aided by laws[97] that eased the legal requirements for creating new telegraph companies, they sought to expand the new technology in the same spirit as the post office as a way to provide "rapid and regular transmission[s] of intelligence" to the general population.[98]

By the end of the American Civil War, telegraph lines spanned the entire nation.[99] In 1843, there

were just under 2,000 miles of telegraph wire in the United States, and by 1852 there were over 23,000 miles.[100] With space and time ostensibly collapsed by the telegraph, the technology would radically change the relationship between the general population and the news industry. In fact, the telegraph altered the psychology of America's citizenry.

The expansion of the telegraph brought a new kind of communal unity to the young nation. From the nomination of James K. Polk as a presidential candidate in 1844, to the Battle of Bull Run at the onset of the American Civil War, to President James Garfield's assassination in 1881, critical events like these, transmitted via telegraph line, overhauled the public's expectations for what constituted timeliness of information and contributed to the nation's transition from a predominantly agrarian society to an industrial one.[101] Sporting events such as boxing and baseball also became widely distributed via the telegraph system, thus making the telegraph not just a source of political information but a source of entertainment and recreational information as well.[102] It quickly became clear that the telegraph significantly transformed the transmission of news in the United States.[103]

From the onset of the telegraph's public debut, the federal government made a committed effort to develop the technology. Before the Civil War, the federal government primarily sought to aid the growing telegraph system with direct funding and in 1843, Congress allocated $30,000 to Samuel Morse as a proof of concept.[104] In 1857, Congress funded the ships that laid the first trans-Atlantic cable,[105] following up a few years later with funding for the construction of a trans-national telegraph line from Missouri to San Francisco.[106]

In 1864, Congress amended the law passed in 1860 to ensure that transcontinental lines would be used "without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others."[107] This nondiscrimination requirement represented the first instance of Congress's direct regulation of an industry to ensure the equitable use and development of telegraph lines – much in the same way it did with the post office. In fact, the 1864 Act laid the foundation for not just future regulation of the telegraph industry, but also other emerging communications technologies.

After the Civil War, the cultural efflorescence created by the telegraph continued, and the technology's potential greatly incentivized telegraph companies and newly formed press associations, like the Associated Press, to work together. Collusion between these two industries was meant to ensure the wide distribution of news to the public as speed to get news in front of the public became an ever more important variable of competition.[108] The relationship between Western Union (the dominant provider of telegraph services in the late 19th century) and the Associated Press (the dominant news association) became so intertwined that they were called "a double-headed monopoly."[109] Both parties believe their partnership was necessary because, although transmission wires spanned the nation, the telegraph was limited as a utility in part because it lacked some critical features of the postal service – most notably privacy protections.[110] For instance, the 1792 Postal Act barred government officials from opening and reading letters.[111] With the telegraph, however, users had to divulge the message they wanted to send to operators. The telegraph also lacked the broad national presence of the Post Office.

The close relationship between the news industry and telegraph companies made sense. Transmission of the news via telegraph validated several notable features of the technology. It confirmed that the telegraph had an apparent use, rapid expansion was attractive by making the technology even more useful, and transmission of

the news would help ensure the telegraph's profitability since it could be relied upon to provide a minimum use of the service.[112] Journalists and news organizations viewed the technology as a means for transmitting their reporting to a larger audience. However, the collusion between telegraph companies and press associations also led to control over the news and public information channels.

The combined forces of Western Union and the Associated Press exerted enormous control over the news and telegraph industries. Western Union penned hundreds of exclusive contracts with the railroads, known as rights of way, to erect telegraph lines along their tracks, and with press associations to exclusively use their wires for news transmission. These agreements made it "perfectly impracticable" for any rival to challenge Western Union.[113] The collaboration between the two industries ran so deep that they became "overlord[s]" of the news and were able to dictate the terms for the content and telegraph rates for any newspaper.[114] If a newspaper chose not to adhere to the demands made by Western Union or the Associated Press, they were swiftly excluded from using their infrastructure to spread their news.[115] As a result, many firms went out of business. The overwhelming control exercised by the corporations led to an investigation in 1874 by the Senate, which bluntly concluded that Western Union's exclusive agreements "amalgamate[d] rival [telegraph] lines, and thereby end[ed] all competition, and reduce[d] the press to entire subjection to its power."[116]

The stranglehold maintained by the two industry goliaths over their respective industries was an unacceptable situation for Congress, which recognized that control over the country's news distribution – the lifeblood of democracy – could not be left in the hands of dominant corporations. Congress eventually tackled this problem by enacting the 1866 National Telegraph Act, which would predominantly regulate the relationship between the telegraph industry and the government for 70 years.

The National Telegraph Act was Congress's first attempt to regulate an entire industry at the federal level, kicking off a centuries-long process of safeguarding that essential communications infrastructure, like the Post Office, operated in the public interest.[117]

Besides recognizing the government's active role in regulating the economy,[118] the National Telegraph Act initiated two vital policies that reshaped the telegraph industry.[119] First, Congress believed that breaking Western Union's collusion with the railroads via its exclusive deals was critical to destroying its telegraph monopoly and promoting competition in the sector.[120] Western Union's exclusive agreements allowed the corporation to rapidly scale its operations while foreclosing the ability of existing competitors to grow their operations and deterring the entry of new rivals. Seeking to end this practice, the National Telegraph Act allowed telegraph corporations to run their wires alongside railroad tracks on any post road – effectively transfiguring competition in the industry by opening the entire United States to telegraph wires.[121] Second, in exchange for a telegraph company to build alongside railroad tracks, the National Telegraph Act granted Congress the power, but not the obligation, to assume control and purchase the entire telegraph system after 1871.[122]

With the National Telegraph Act, its author Senator John Sherman was laying the groundwork for the Sherman Act,[123] the nation's first federal antitrust law. Sherman stated the purpose of the National Telegraph Act in clear terms: "The present monopoly that now controls all the telegraph wires of this great country is in the hands of a single corporation chartered by the State of New York... and the only question is, whether we shall leave them in the ascendant, sole possessors of the field, or whether we shall, if we can, create competition."[124] Other members of Congress affirmed this purpose.[125]

Despite the National Telegraph Act's broad ambitions,

it failed to meet Congress's full expectations. By 1870, a Congressional committee found that American newspapers were "completely in the power of the telegraph companies."[126] While Congress could purchase the telegraph system under the National Telegraph Act, it never did. While it is possible that lobbying by Western Union dissuaded Congress from taking action,[127] it is, nevertheless, almost certain that the threat of action tamed the company's monopolistic behavior.[128]

The act also had some deficiencies. For one thing, it did not define precisely what was a post road – a problem that took until 1872 for Congress to address.[129] Another deficiency was that the act included no provisions meant to undo existing concentration. It only allowed for new competition by increasing access to telegraph lines.[130] It took until rulings by the Supreme Court in 1877 and later in 1895 to give any teeth to the National Telegraph Act, and by then, it was too little, too late.[131]

Other factors, including federal legislation, Supreme Court decisions, and actions by the Department of Justice, would prove critical to reshaping the industry. Together, they eventually weakened Western Union's dominant market power and prevented the company from monopolizing new industries such as news distribution or telephone services.[132]

One example of additional Congressional action was the 1910 Mann-Elkins Act.[133] It expanded the jurisdiction of the Interstate Commerce Commission (ICC), established in 1887 to regulate the railroads, to regulate telegraph (and telephone) companies as common carriers. Common carriage regulations require "an obligation to provide service on request at just and reasonable rates, without unjust discrimination or undue preference."[134] Although failing to include restrictions on mergers – which companies like AT&T immediately exploited to entrench their market dominance[135] – the Mann-Elkins Act established the precedent that communications technologies did not have free reign to operate as they pleased but rather were subject to public control. The ICC repeatedly used its new statutory powers to prevent arbitrary rate increases by the railroads. Scholar Tim Wu characterizes the Mann-Elkins Act as a precursor to net neutrality, which maintains that internet service providers must treat all users the same.[136]

Then, in 1910, AT&T, the nation's dominant telephone company, purchased Western Union and created a giant corporation controlling two essential communication mediums.[137] Recognizing the inherent dangers of one corporation controlling two essential communication mediums, the Department of Justice brokered a settlement with AT&T in 1913.[138] This forced AT&T to divest Western Union, thus preventing a single corporation from monopolizing all electrical communication in the United States.[139] The so-called McReynolds Settlement also required AT&T to interconnect its service with rival telephone service providers.[140]

D. Radio and Television Broadcasting

Like the postal system and the telegraph, radio and television broadcasting radically transformed news distribution in the United States – and the government would once again serve as a critical manager. Unlike the postal system and the telegraph, significantly less physical infrastructure was needed for radio. Once a broadcasting tower was set up, consumers merely required a receiver to listen to or watch the latest broadcast.

The radio experienced the fastest-ever adoption of any technology in the United States, only to be surpassed by the television in the 1950s.[141] The speed of radio's consumer adoption was remarkable. In 1921, there were 28 stations.[142] Just one year later, there were over 500.[143] The creation of stations had to match the unprecedented pace with which Americans purchased radio receivers. Within a decade, the entire nation could

be reached via radio.[144] Between 1922 and 1932, the portion of the population with radio receivers grew from 0.2% to over 50%.[145] By the start of World War II, over 80% of Americans had a radio receiver.[146] Throughout the 1920s, Americans experimented with the radio to broadcast a range of topics, including news, music, sporting events, and religious sermons.[147] By the end of the war, the radio had become "an essential part of everyday life" for Americans.[148] The ubiquity of the radio facilitated news consumption and most members of the public used it to complement the news they consumed from newspapers.[149]

Much like the telegraph, the radio also came to be dominated by one corporation, this one known as American Marconi.[150] This time, too, the federal government decided that public controls were needed to curb monopoly power. In 1912, Congress enacted the Radio Act151 to manage the electromagnetic spectrum to keep radio broadcasts from interfering with one other.[152] Seen as a "watershed" moment in wireless regulation, the act meant that the government, not individuals, would assign usage of the electromagnetic spectrum, ensuring its use in the public interest.[153]

The prospect of a wireless method of communication that could easily connect the public and be used as a medium for entertainment led many dominant companies to pool their financial and intellectual property resources in an attempt to quickly control the industry. Corporations like AT&T saw radio as a technology to reinforce and extend their monopoly power in the telephone industry.[154] However, the McReynolds Settlement lurked in the background, and as one scholar stated, "Bell got the message," keeping AT&T out of the radio industry.[155]

As radio continued to develop in the United States through the early 20th century,[156] the Radio Act of 1912 proved insufficient to regulate the industry,[157] and in 1927, Congress beefed it up with a new version[158] that created the Federal Radio Commission and endowed it with the power to grant licenses in the "public interest." In a similar spirit to the antitrust laws, the 1927 Radio Act also banned a single corporation from owning essential technologies such as the radio, telegraphy, and telephone – and expressly prohibited the cross-ownership of broadcasting stations and telephone companies (specifically AT&T).[159] Thus, telegraph and telephone companies could not acquire radio stations that would "create [a] monopoly in any line of commerce[.]"[160]

Even though the 1927 Act was essential to establishing a regulatory regime over the broadcast industry, its reach was not broad enough to properly manage the growing industry.[161] Moreover, the Federal Radio Commission (FRC) was "handicapped at first by lack of funds, instability of personnel, and fear of constitutional difficulties[.]"[162]

Fortunately, other existing legal avenues were able to hinder dominant corporations from monopolizing the radio industry. For example, to prevent the nascent industry from becoming captured by a handful of corporations, the Department of Justice in 1930 initiated a lawsuit to break up the patent-pooling agreements between General Electric, United Fruit, Westinghouse, General Motors, and Western Electric that led to the creation of the Radio Corporation of America (RCA).[163] Divestiture of many of these companies was the eventual remedy applied by the courts.[164]

Recognizing the weakness of the 1927 Act, Congress decided a more comprehensive legislative approach was required to manage the electromagnetic spectrum to ensure that broadcasted content adhered to the public interest.[165] In 1934, Congress enacted the Communications Act,[166] a law designed to govern both wired and wireless communications that would go on to regulate nearly every aspect of telecommunications

policy in the country for the next 60 years.

Among many notable provisions, the Communications Act established the Federal Communications Commission (FCC) as a successor to the FRC, intended as a completely new "regulatory body, to which would be committed any further control of two-way communications and broadcasting."[167] Congress endowed the agency with broad substantive regulatory powers to manage all wireless and wired communications, or the "services affected to be all of those which rely on wires, cables, or radio as a means of transmission."[168] The Supreme Court noted with the creation of the FCC that the Communications Act sought to create "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy."[169]

Two of the agency's powers are worth describing for their role in restructuring news distribution in the United States. First, Congress gave the FCC broad merger review authority.[170] The Department of Justice and the Federal Trade Commission also have merger review authority over the communications industry. But Congress recognized that an additional check on the industry would provide even more robust protection against concentrations of private power over such a vital sector of the economy.

In particular, the FCC analyzes mergers under a public interest standard. This standard requires that merging parties (i.e., the applicants) bear the burden to prove that the submitted transfer would serve the "public interest, convenience, and necessity."[171] Critically, the merging parties, rather than the FCC, must prove that the merger would "enhance, as opposed to preserve or suppress competition."[172] The agency's preference is to "preserv[e] and enhance[e] competition in relevant markets."[173]

The public interest standard gives the FCC broad discretion when reviewing mergers for the transfer of licenses and when analyzing a merger under its jurisdiction.[174] The Supreme Court has stated that the standard "no doubt leaves wide discretion and calls for imaginative interpretation" and that the agency has "comprehensive powers to promote and realize the vast potentialities" of communications technologies.[175] The Supreme Court has also stated that the FCC is in the best position to make decisions regarding telecommunications as the subject matter is "technical, complex, and dynamic'" and that the "Commission is in a far better position to address these questions than [a court of general jurisdiction]."[176] The Supreme Court has also recently affirmed that the FCC has "broad authority to regulate broadcast media in the public interest."[177]

During the merger review process, the FCC is "informed by, but not limited to, traditional antitrust principles,"[178] and its review should facilitate "the broad aims of the Communications Act." In this context, the public interest standard has a significantly lower legal threshold than the Clayton Act's Section 7, which proscribes mergers based on whether they "may be substantially to lessen competition" or "tend to create monopoly."[179] The FCC's potent merger review authority, hence, offered a vital check on usage of the radio spectrum to keep it open to competition.

Second, and far more consequentially, Congress gave the FCC exceptionally expansive authority to enact structural rules to ensure that the industry remains free from undue concentrations of private power. The agency's policies were also meant to explicitly facilitate the goal and objectives of the Sherman Act, America's primary antimonopoly statute enacted in 1890.[180] The FCC used its authority generously by enacting several rules that ensured a deconcentrated broadcasting industry. For example, the FCC enacted line-of-business restrictions on media entities. From the 1940s to the 1970s, the FCC prevented the cross-ownership of radio, television, and newspaper companies.[181] Viewing

each of these information mediums as essential to the public interest, the FCC implemented policies aimed at ensuring diverse news sources with high-quality information.

The FCC also used its authority to reconstruct the entire broadcasting industry to prevent the concentration of economic power from controlling both the distribution and creation of content. In the 1940s, the FCC forced the divestiture of ABC from NBC to prevent NBC from monopolizing the radio industry.[182] In 1970, the FCC enacted its Financial Interest and Syndication, or Fin-Syn, rules, which separated television production (i.e., content creation) from programming distribution by prohibiting the dominant networks, such as ABC, CBS, and NBC, from syndicating and obtaining a financial interest in programs the networks did not produce themselves. The Fin-Syn rules were designed to ensure that broadcast programming was not only derived from the major networks, since they effectively operated as monopsony purchasers and monopoly providers of broadcasting content. In that sense, television networks could not leverage their dominance in one industry to control another, preventing them from giving broadcasted shows preferential treatment just because the network created them.[183] With the Fin-Syn rules, the FCC sought to create a deconcentrated production and distribution system with the widest diversity of broadcast content.

Indeed, the Supreme Court would recognize the value of the FCC's regulations and its limiting of dominant corporate actors in adhering to the principles of the First Amendment. For example, in *FCC v. The National Citizens Committee for Broadcasting*, the Supreme Court upheld the FCC's restrictions on the cross-ownership of broadcasting and newspapers. In its decision, the Supreme Court stated that given the FCC's restrictions were "quite similar to the prohibitions imposed by the antitrust laws," the agency's policies were "actually supportive of…the values underlying…the First Amendment."[184]

The FCC also used its broad authority to ensure the information being distributed to the public aligned with the public interest. In 1949, the FCC instituted the Fairness Doctrine, which had two essential requirements. First, the doctrine required that every broadcast licensee "devote a reasonable portion of broadcast time to the discussion and consideration of controversial issues of public importance."[185] Second, the Fairness Doctrine required that television broadcasters "must affirmatively endeavor to make … facilities available for the expression of contrasting viewpoints held by responsible elements with respect to the controversial issues presented."[186] In effect, the Fairness Doctrine sought to create a programming environment in the image of the founders' positivist view of the First Amendment, such that the welfare of the listeners was prioritized over the rights and ability of broadcasters to control their programming. In *Red Lion Broadcasting v. FCC*, the Supreme Court echoed this goal:

> A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others…the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.[187]

In 1969, despite attacks from media corporations that the Fairness Doctrine violated the First Amendment, the Supreme Court unanimously upheld the doctrine's constitutionality.[188] One of the main rationales for upholding it was the worry that power would be concentrated in the hands of only a few broadcasters.

Specifically, the Supreme Court stated that without the Fairness Doctrine, "station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agree... Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."[189]

With authority vested in the 1934 Communications Act, the FCC also developed policies to ensure that all news transmitted to the public was as truthful as possible without infringing on a broadcaster's First Amendment rights. The FCC initiated what became its News Distortion Doctrine, which sought to prevent a broadcaster from "abusing his position as public trustee ... [by] slant[ing] or distort[ing] the presentation [of] the news."[190] In other words, the FCC specifically sought to prohibit "intentional falsification" of the news,[191] justifying this policy on the basis of the enormous responsibility broadcasters had in informing the public.[192]

The agency elaborated on its intent in 1949 by stating:

The basis for any fair consideration of public issues, and particularly those of a controversial nature, is the presentation of news and information concerning the basic facts of the controversy in as complete and impartial a manner as possible. A licensee would be abusing his position as public trustee of these important means of mass communications were he to withhold from expression over his facilities relevant news or facts concerning a controversy or to slant or distort the presentation of such news.[193]

Beginning in the late 1960s, the FCC began to formalize its news distortion policy,[194] highlighting the "tremendous influence of the television networks" which "must carry with it the highest responsibilities of intellectual integrity and independence."[195] The actual process of determining precisely when the news is deliberately distorted was somewhat unclear.[196] Typically, the agency made its determination "through the adjudicatory process in decisions resolving challenges to broadcasters' licenses."[197] Despite this vagueness in identifying a news distortion violation, scholars have been able to piece together a four-part test applied by the FCC. "First, there must be an accusation of deliberate intent to distort the news or mislead the audience....Second, the accusation must be supported by evidence extrinsic to the broadcast itself....Third, this evidence must show that the distortion was initiated by or known to the licensee or to its principals, top management or news management...Fourth, distortion must involve a significant event, rather than an incidental part of the news."[198]

The FCC did not enforce the News Distortion Doctrine to its full capacity, both because of hypothetical First Amendment concerns and because of the high burden of proof the agency established for itself.[199] Nevertheless, in conjunction with the FCC's other policies, the doctrine attempted to establish an ethical and behavioral floor for the broadcast industry to ensure that news organizations using the broadcast spectrum served the public and provided high-quality information.

E. Cable

Cable television, which distributes broadcasted content via wire or cable directly into consumers' homes, has had a complicated and winding history in the United States. Growing rapidly from servicing merely hundreds of customers in the 1950s to millions today,[200] cable arose out of the need to provide broadcasting services to communities that could not receive a broadcast signal.[201] During the initial years, it was unclear whether the FCC had the authority to regulate cable. Nevertheless, the FCC believed it did.

In 1962, the FCC issued a significant decision known as

Carter Mountain, in which the agency denied a company's application to provide cable services because it refused to carry the programming of a local broadcast station to its customers.[202] The FCC justified its decision on the grounds that "after weighing the public interest involved in Carter's improved facility against the loss of the local station, it must be concluded, beyond peradventure of a doubt, the need for the local outlet and the service which it would provide to outlying areas outweighs the need for improved service which Carter would furnish... ."[203] In other words, the FCC put the needs of the community to be able to access and obtain information via "fair, efficient, and equitable broadcasting" over the entrepreneurial desires of a cable company. [204]

Soon after the *Carter Mountain* decision, the FCC developed comprehensive rules regulating cable companies.[205] Some rules included must-carry rules, which required cable operators to transmit certain broadcast signals or restrained them from retransmitting certain programming unless they paid transmission fees.[206] The FCC's rules were designed to prevent the cable industry from engaging in "unfair competitive practices" that would unduly harm broadcast television.[207]

While it was initially unclear whether the FCC could regulate cable, the Supreme Court in 1968 stated that the FCC's powers to regulate cable extended as far as "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[208] The Supreme Court would later affirm the FCC's powers, partly because it "preserves and enhances the integrity of broadcast television."[209]

By 1972, the FCC began to vigorously exercise its authority and required all cable companies to obtain certificates of compliance from the agency before constructing or operating a cable system network.[210] Some of the FCC's rules were designed to protect local television stations.[211]

During the 1980s, there was an explosion of cable channels that wanted to provide content to consumers. CNN, ESPN, and MTV, to name a few, were all founded in the 1980s.[212] Cable provided a new means for consumers to view a wide variety of content. But, against the backdrop of a desire to deregulate industries and declutter state and local regulations,[213] in 1984, Congress enacted the Cable Communications Policy Act.[214] The first explicit federal policy that regulated the cable industry, the 1984 Act instituted two major policies. One, the act abolished rate regulations, and two, cable franchises had a presumption of having their licenses renewed by the FCC.

Dissatisfied with the 1984 Act and dealing with rising cable rates, Congress enacted the Cable Television Consumer Protection and Competition Act in 1992.[215] The 1992 Act re-regulated the cable industry. The act required cable companies to provide a basic tier of service for customers that would include local broadcast channels and empowered the FCC to determine if cable rates were unreasonable. In 1994, the Supreme Court would eventually uphold the constitutionality of the 1992 Act.[216] Ultimately, the effects of the 1992 Act were short-lived as several years later, Congress enacted another law that restructured the entire telecommunications industry.

II. THE DECLINE OF PUBLIC CONTROLS AND THE GENESIS OF TECHNOLOGY PLATFORMS AS ESSENTIAL CONDUITS FOR INFORMATION

After enacting the 1934 Communications Act, Congress delegated much of the regulation for the communications sector to the FCC. As explained previously, the FCC used its broad regulatory powers to structure the communications industry in the public interest. However, the growth of the internet radically altered the communications landscape in the country, including the news industry. At the same time, several deregulatory decisions weakened structures that prevented dominant monopolies from forming. Decisions from Congress, the Department of Justice, and the FCC between World War II and 2001 charted a course that led to dominant internet platforms controlling critical sectors of the economy and undermining the nation's news industry.

A. Changing Philosophy on Antimonopoly and Technological Convergence

Although the computer revolution has been well underway since the 1970s, it took its modern form at the turn of the 21st century. Computing fundamentally changed the way the communications industry was structured. By the 1990s, it became clear that existing communications technologies were no longer dependent on the same services that had previously made them possible. For instance, telephone companies no longer relied on wires to provide service, while television providers no longer needed to use the broadcast spectrum and could use cable instead. Soon, both telephone and cable companies began to offer internet connection services to consumers.

Simultaneously, there was also a significant retreat from the enforcement of antimonopoly policies. Between the 1940s and 1970s, Federal antitrust prosecutorsgenerally opposed any merger that would result in a single company having more than a 30% market share.[217] In many cases, there were absolute prohibitions on product tying, territorial restrictions, and exclusive agreements.[218] But starting in the late 1970s, a radical movement began to upend longstanding frameworks in order to actually encourage corporate concentration.

In his 1978 book *The Antitrust Paradox*, Robert Bork, one of the movement's leading lights, called for narrowing the application of antitrust law away from its moral foundations and toward low prices.[219] In Bork's view, antitrust should focus principally on low prices for consumers. The consumer welfare standard asserts that corporate consolidation would produce low prices and natural market forces were sufficient to tame any adverse effects derived from increased market power.[220]

Despite Bork's assertions resting on dubious grounds,[221] other consumer welfare promoters such as Richard Posner, Frank Easterbrook, and Antonin Scalia were critical to ensuring the judiciary adopted Bork's antitrust framework.[222] Even ostensibly more liberal judges such as Ruth Bader Ginsburg and Stephen Breyer helped cement the consumer welfare standard as the predominant framework for antitrust in the courts.[223] With such a limited framing, the Supreme Court eventually reversed many of its long-established holdings and heightened procedural requirements for restricting the concentration of corporate power.[224] It was only a matter of time before the consumer welfare framework would seep into other areas of our political system – most notably the Federal Communications Commission – with devastating consequences.[225]

Between the 1970s and the 2000s, the combination

of significant changes in technology and the increasing acceptance of the consumer welfare framework as the prevailing antitrust doctrine caused the FCC to retreat from its historical mission and purpose.[226] The FCC repealed many of its longstanding regulations, including prohibitions on cross-ownership between radio, television broadcasters, and newspapers.[227] In 1973, the FCC repealed the Fin-Syn rules, which structurally separated television production and distribution to prevent dominant broadcasters from controlling content.[228] In 1985, the FCC repealed the Fairness Doctrine.[229] In the 1980s, the FCC also deregulated computer and data processing services, overturning a previous prohibition[230] on common carriers offering data processing services.[231] By 2004, the FCC had spent nearly 16 years repealing many of its line-of-business restrictions established in the early 1970s.[232]

While the FCC carried out its deregulatory agenda, two critical events radically shaped the news and the computer industry. First, in 1981, a massive antitrust case against IBM, initiated by the DOJ in 1969, came to an end. The case, focused on IBM's monopolization of the computer mainframe industry,[233] ultimately[234] incentivized IBM to conduct business differently. Rather than use monopolistic practices such as tying its hardware and software together, IBM decided to unbundle its product offerings, giving significant control to third parties to supply the company with the necessary hardware and software to create its personal computer.[235] As a result, companies like Intel, which provided the chips, and Microsoft, which licensed the basic operating system, were able to achieve mass-market success. Robust federal antitrust enforcement, as seen in the IBM case, was critical to deterring monopolistic conduct in the early stages of the modern computer industry, which, as we now see, became essential to news consumption and distribution.

Second, AT&T and its Bell System, which tightly controlled the distribution, service, maintenance, and manufacturing of telephones in the United States, were broken up in 1982. Between 1956 and 1982, AT&T operated under an antitrust settlement with the United States government that prohibited the corporation from entering any other business that was not telephone services, including data processing and computing.[236] This settlement had profound effects on the technology sector. The settlement predominantly included a compulsory licensing provision, which required AT&T to share its patent portfolio on fair and reasonable terms. Access to AT&T's patent portfolio helped spur competition from the company's rivals. One study showed that the forced sharing of AT&T's technology generated almost $6 billion in revenue for smaller companies.[237]

Despite the 1956 settlement, throughout the 1960s and 70s, AT&T used its control over the telephone system to block potential competitors, stifling innovation in the sector.[238] The Department of Justice initiated a new lawsuit against AT&T for violating the Sherman Act,[239] and in 1984, the company was broken up into seven regional companies.[240]

Like the lawsuit against IBM, the antitrust case against AT&T was enormously consequential to the entire technology industry, since it allowed the increasingly significant computer sector to grow without being subverted by the most dominant corporation at the time.[241] While the breakup predominantly concerned the telephone and computer industry, the news industry was also directly affected. Soon after the breakup, AT&T– limited as a long-distance provider and divested of its regional Bell operating companies – was eager to use its national infrastructure to enter the electronic publishing industry.[242] Judge Harold Greene quickly used his judicial authority overseeing the breakup to impose a seven-year ban on AT&T from entering the industry, since AT&T would be able to own both the news products it produced as well as the means to electronically transmit the content.[243]

The growing movement against antitrust enforcement eventually caused Congress to backtrack on antitrust enforcement by passing the 1996 Telecommunications Act, paving the way for the telecommunications industry to consolidate. The seminal law delivered another shock to the entire telecommunications industry.

B. The Telecommunications Act of 1996

As the computer industry continued to evolve, technological convergence became a paramount concern, particularly for the FCC,[244] as traditional barriers between communications industries started to break down. Rather than refine regulations to meet this new challenge, a deregulatory wave, in part fueled by consumer welfare advocates and Chicago School economists, took place – even within the executive branch. Members of the National Telecommunications and Information Administration, an agency of the U.S. government that advises the president on telecommunications policies, argued that consolidation and integration could benefit the companies and the public.[245] Lawmakers and supporters of the 1996 Telecommunications Act extensively advocated for deregulation as a means of promoting competition and development inthe industry.[246] Soon, the FCC and the Department of Justice would also advocate for deregulation of the telecommunications sector.[247] Congress eventually heeded the advice.

The Telecommunications Act of 1996 changed vital aspects of the Communications Act of 1934, embodying the spirit of the consumer welfare framework of promoting consolidation under the auspices of economic efficiency. Instead of upholding fair methods of competition to succeed in the marketplace,[248] the act facilitated a distorted notion of market competition akin to "might makes right." While the 1996 Act had some beneficial sections,[249] it was primarily a statute that paved the way for deregulation, resulting in significant corporate concentration of the telecommunications industry. As scholar Ben Bagdikian stated, the 1996 Act encouraged "the creation of colossal media giants."[250]

The 1996 Act changed nearly every aspect of the communications industry. Some of the most notable changes were:

Increasing the number of radio stations a single corporation could own in a local market.[251]

Requiring the FCC to engage in a laborious biennial (subsequently changed to quadrennial) regulatory review of its own media ownership rules and regulatory policies.[252]

Repealing the FCC's telephone-cable television cross-ownership ban and the video dial-tone rules, which had hindered telephone companies from entering the cable television industry.[253]

Substantially repealing the consent decree, which broke up AT&T and restricted the regional Bell companies from entering the data processing industry.[254]

Entrenching the dominance of existing broadcast license holders by favoring them in license renewals rather than evaluating them based on the public interest.[255]

As explained in greater detail in section III.A. below, the Telecommunications Act was also amended to include a provision that exempted internet platforms from liability for the user content they transmit over their systems. Seemingly innocuous, this simple protection had far-reaching implications for the emergence of the technology giant, especially when combined with a continuing retreat from traditional antitrust enforcement.

These deregulatory efforts, combined with anemic antitrust enforcement, led to a dangerously consolidated media ecosystem in the United States. Currently, two to four firms control over 50% of the market across critical media industries, including cable providers, cable networks, broadcast television, news syndicates, radio broadcasters, satellite television providers, and more.[256]

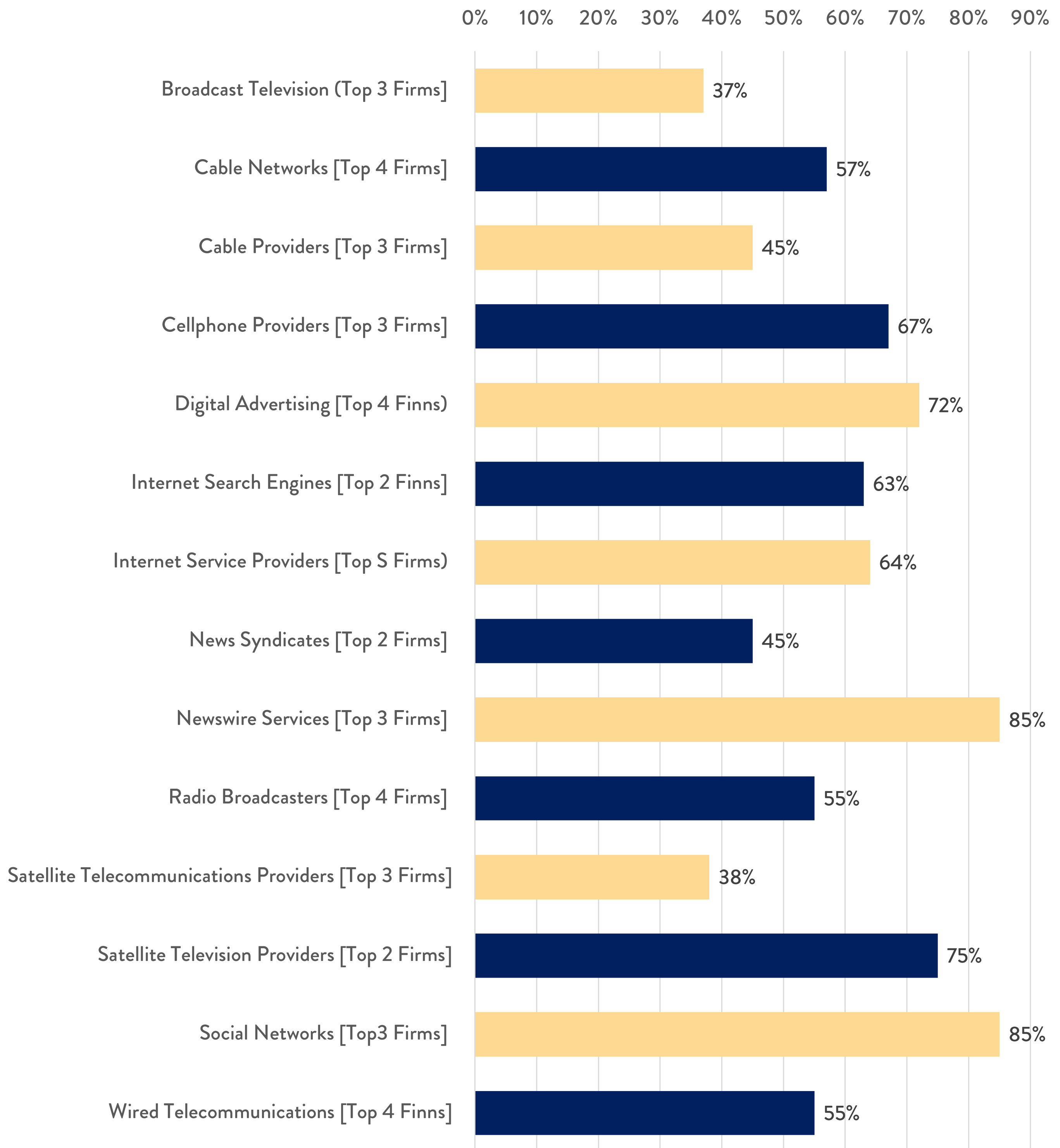


Image Credit: Daniel A. Hanley, *The FCC Has Untapped Powers. The Next Administration Needs to Use Them.*, Wash. Monthly (Oct. 9, 2020), https://washingtonmonthly.com/2020/10/09/the-fcc-has-untapped-powers-the-next-administration-needs-to-use-them/.

III. BIG TECH IS ALLOWED TO TAKE OVER

In 2004, Microsoft, a technology corporation that had persistently engaged in predatory and exclusionary conduct since the 1990s,[257] narrowly escaped being broken up by a DOJ antitrust suit. Instead, the company entered into a settlement.[258]

Along with other minor adjustments, the settlement required the company to share application program interfaces (APIs) and other software protocols on a non-discriminatory basis.[259] This had the beneficial effect of allowing smaller companies to develop in the marketplace relatively unhampered by Microsoft's hostile actions.[260] But with this settlement, any hope for a resurgence of antitrust enforcement vanished for decades.[261] For example, the Department of Justice did not bring another major antitrust case invoking Section 2 of the Sherman Act until its blockbuster lawsuit against Google in 2020.[262] Meanwhile, Congress passed an amendment to the Telecommunication Act that enabled new digital firms to monopolize the internet, unleashing a series of harmful practices, including invasion of privacy, dis- and misinformation, and the destruction of the country's news industry. It is this last event that is explored in the following section.

A. Congress Exempts the Platforms from Liability

Critical to any industry is the state's assignment of liability to those operating within it.[263] For example, studies have shown that access to limited liability was a key factor in the rise of the modern corporation.[264]

Historically, liability for publishers and distributors of information was fairly straightforward. Liability for transmitted content could be placed into three distinct categories.[265] Publishers of information, like book authors and newspapers, would be held liable for their statements if they contained any libelous, defamatory, or otherwise objectionable or unlawful content.[266] Distributors of information, like bookstores or news vendors, would only incur liability if they knew the information being distributed was libelous, defamatory, or otherwise objectionable or unlawful.[267]

Common carriers like telephone providers faced no liability for the information traveling along their wires,[268] since they merely transmitted information from Point A to B and were not involved in producing the content. The reasoning behind liability protection for common carriers is simple. Common carriers have no active role in the actual structure or wording of the content moved through their systems. In contrast, publishers and distributors play a much more active role in generating and distributing content to consumers, and thus face a higher burden, including exposure to litigation.

As entrepreneurs created new internet platforms in the early 1990s, courts originally applied traditional publisher liability if the platform directly moderated the content – such as removing user content hosted by the platform.[269] When platforms did not moderate content, they did not incur liability for libelous, defamatory, or harmful content from their users. This situation created a problem. Platforms did not want to host content that was unlawful or otherwise harmful to their users. However, at the same time, platforms also did not want to incur liability for moderating content that they hosted and transmitted.

In the early 1990s, certain members of Congress became consumed with the belief that if websites were exposed to traditional liability, it would stifle the development of the emerging internet.[270] Within the landmark Telecommunications Act of 1996, Congress enacted a sweeping provision called Section 230 of the Communications Decency Act.[271]

A foundational law for the internet sector, Section 230 broadly provides two basic protections to internet

platforms, or what the statute calls "interactive computer services," like Facebook and Google. The first part of the statute shields platforms from most legal liability for transmitting a user's content or for not removing a user's content.[272] For example, if John decides to publish a defamatory statement against Jane on Platform Y, Jane can sue John for his defamatory remarks, but she cannot sue Platform Y. The second section shields a platform from liability when it does decide to filter or remove a user's content.[273] This means that if Facebook removes a user's defamatory post, Facebook is not liable for defamation because it removed the content.

In other words, Congress explicitly chose to bestow liability protections typically granted only to common carriers to modern-era digital publishers. Conversely, instead of limiting platforms to be mere transmitters of content like common carriers, Congress affirmatively allowed platforms to moderate user speech without incurring liability. In other words, internet platforms could have their cake and eat it too. The primary justification for this immunity was that Congress believed that "self-regulation was essential to tackling objectionable content."[274] Representative Chris Cox, a co-sponsor of Section 230, stated, "Frankly, there is just too much going on the internet for [government regulation] to be effective. No matter how big the army of bureaucrats, it is not going to protect my kids because I do not think the federal government will get there in time."[275] Section 230 would prove instrumental in empowering internet platforms to monopolize critical sectors of the industry. According to the Cyber Civil Rights Initiative, the liability shield gives online platforms "an unearned, anticompetitive advantage ... over their offline counterparts."[276]

Since the enactment of Section 230, federal courts have radically extended the law's protections to conduct that can hardly be considered speech on the internet. Legal scholars Danielle Citron and Benjamin Wittes assert that "the courts are in a near-unanimous agreement that it conveys protection from liability far in excess of what we think constitutes reasonable public policy."[277] For example, courts have extended the law's protections to "cases involving negligence; deceptive trade practices, unfair competition, and false advertising; the common-law privacy torts; tortious interference with contract or business relations; intentional infliction of emotional distress; and dozens of other legal doctrines."[278] Even when platforms encourage users to post illegal content or blatantly ignore harassment or the sale of illegal items, courts have granted them Section 230 immunity.[279]

Section 230 has proven nearly impossible to circumvent. Internet law scholar Olivier Sylvain stated aptly that courts "have held that Section 230's reach is not confined to reputational harms or content that is harmful to children, the only categories of conduct to which the statute refers. *The consensus today is that Section 230(c) immunizes all providers from liability for all tortious third-party user content to the extent they do not materially contribute to its creation or development.* More to the point, the courts have held that the immunity is not contingent on monitoring or voluntarily taking good-faith steps to screen or take down illicit content as the statute suggests."[280] In the words of one commentator, Section 230 allows platforms to enjoy "power without responsibility."[281]

In 1998, Congress further immunized the conduct of digital platforms by passing the Digital Millennium Copyright Act (DMCA). Specifically, Section 512 of the DMCA granted civil immunity to internet platforms for copyright infringement when users uploaded content onto their services.[282] While the DMCA does require compliance with a notice-and-takedown system and the removal of access to the infringing materials, the act partly incentivizes platforms to ignore copyright infringement by content farms, which are sites specifically designed to "mass produce low-quality and plagiarized content."[283] Ambivalence toward content farms is expected because, despite the low-quality

content, they still drive user traffic, leading to advertising dollars, user attention, and user data.[284] However, content farms siphon off advertising dollars from legitimate news sites. Meanwhile, sites like Facebook and Google can funnel this low-quality content to users without losing their user base.

B. Monopolization of the Internet After 2001

In the early 1990s, industry experts stated that due to the "significant increases in the number of information sources... it is extremely unlikely that any group owner could 'homogenize' nationally the information that Americans receive."[285] As explained previously, after other federal agencies also advocated for the deregulation of the telecommunications sector, Congress enacted the Telecommunications Act of 1996, which deregulated most of the sector. Deregulation, combined with weak antitrust enforcement, led to what we see today, where the indispensable internet[286] is dominated by two oligopolies – Google and Facebook.

With Google initially focused on search and Facebook on social media, both companies eventually realized that the vast troves of information acquired from users made it easy to adopt digital advertising as their primary revenue source.[287] Advertising was the perfect business model for each of the companies because the core operation of each company is user attention and information acquisition.[288] This meant that as long as each of the corporations figured out how to obtain as many user eyeballs as possible (and keep them there),[289] the money would flow into their coffers. In the words of one scholar, "[Platforms] produce nothing and sell nothing except advertisements and information about users, and conflict among those users may be good for business."[290]

As they matured, Google and Facebook developed a surfeit of methods to keep user engagement as high as possible. Both companies transformed from a service provided to *consumers* to a service provided to *advertisers*, effectively turning users into the product being sold.

To transform consumers' attention and information into a sellable product for would-be advertisers, Google and Facebook first needed to collect as much data as possible. The lack of robust privacy regulations, a favorable legal environment, and the lack of legal constraints on behavioral manipulation handed Google and Facebook the opportunity to develop overarching systems to collect and use data to fuel their business models.[291] From a user's search history to videos watched or websites clicked on, there is almost no user interaction that is not tracked by Google and Facebook.[292] Former Google CEO Eric Schmidt once boasted that the company collects so much data that Google "know[s] where you are. [W]here you've been. [And] can more or less know what you're thinking about."[293]

Both companies can then use collected user data to maximize engagement.[294] Google and Facebook implemented algorithms that analyze various user data points (such as age, race, interests, etc.) that push content that would almost surely meet a user's particular interests, ensuring they remain engaged with the platform.

From the troves of collected data about each of their users, both companies can tailor their platforms individually to each user. Journalist Molly Wood stated that "[a]s you build up a history of clicks and queries, Google will start delivering search results tailored to what it thinks you want to see. Consequently, your results reinforce your worldview or even become less accurate, as you see only sites like those you have clicked on before."[295]

Section 230 proved to be a powerful legal weapon because its protections were applied so broadly that it incentivized conduct that was the exact opposite of what Congress intended. The law transformed platforms from mere conduits of information to content manipulators without having to incur liability over their tactics to maximize user engagement. Internet law scholar Sylvain described the situation aptly:

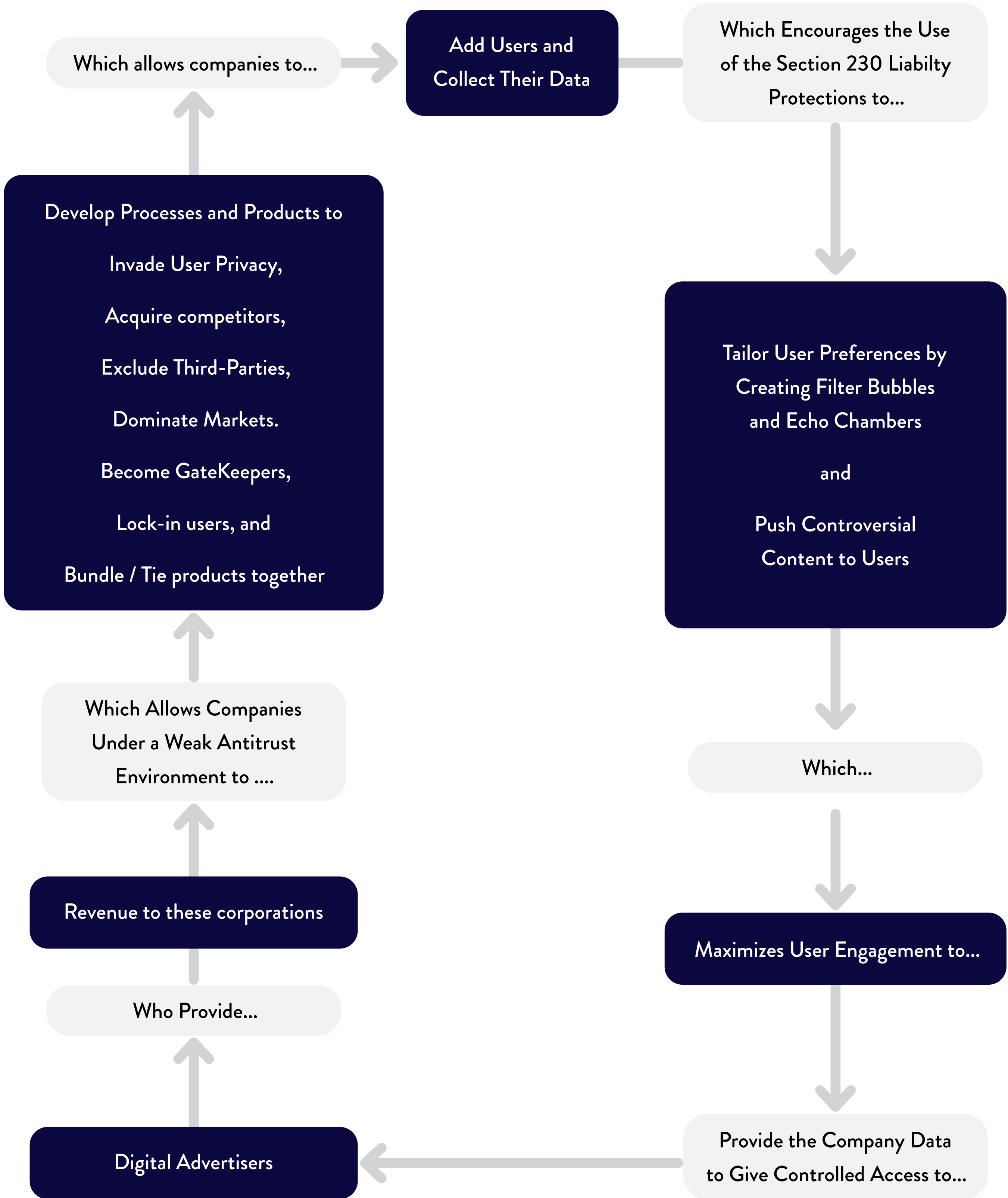
Today, the largest online companies do not merely host and relay messages, uninterested in what their users say or do. They use behavioral and content data to engineer online experiences in ways that are unrelated to the charming interest in making connections. Some of the most successful companies, moreover, collect, analyze, sort, and repackage user data for publication in ancillary and secondary markets. This is how the [Section 230] immunity doctrine, first developed by the courts two decades ago, is ill-suited to the world today.[296]

In other words, Section 230 gave internet platforms legal approval to manipulate user content. Section 230's nearly unquestioned liability shield allows, as scholar Rebecca Tushnet has stated, "[i]nternet intermediaries to have their free speech and everyone else's too."[297]

Exacerbating the effects of Section 230 was the consumer welfare framework. From the 1970s to the present day, the consumer welfare framework has beenthe predominant antitrust philosophy guiding federal regulation, or lack thereof.[298] In their early years, Facebook and Google used this weak regulatory environment to make several strategic business decisions. In particular, both companies made critical acquisitions that turned them into the digital advertising behemoths they are today. Google acquired DoubleClick in 2007, making it the world's largest ad server provider.[299] A year earlier, it purchased YouTube, the world's most dominant internet video site, which became a critical way for Google to deliver advertising to users.[300] Google similarly made acquisitions to control the emerging mobile advertising space.[301] In 2012, Facebook bought Instagram for $1 billion after recognizing it as a significant threat to its own business.[302] In total, between 2001 and 2019, Google and Facebook acquired over 300 companies.[303] Federal enforcers challenged none of these acquisitions.

As explained below in Figure 1, Google and Facebook use their significant financial muscle and market power to exploit anemic antitrust enforcement, and they use Section 230's broad liability shield to deploy inherently manipulative corporate practices that further consolidate their monopolies over several critical sectors of our economy.[304]

Figure 1: How Big Tech Dominates Markets



C. Digital Dominance Chokes off Journalism in America

Google and Facebook reign as oligopolists over the digital advertising market, which constitutes over 90% of their total revenues.[305] Their market dominance over the digital advertising industry has had grave repercussions on the news industry, thereby threatening democracy, which depends on the Fourth Estate's vitality.

Since Colonial times, advertising was (and in most cases still is) the primary revenue source for the news industry.[306] Though far from perfect, it has historically provided newspaper publishers, for example, with the ability to collect and disseminate public affairs journalism at a price that most citizens could afford and were willing to pay. Relying exclusively on subscription revenue, by contrast, can be expensive for readers and block the public from accessing vital information.[307] Advertising revenue has allowed most journalists to avoid dependence on public subsidies and, by extension, on remaining in the good graces of the public officials they cover. Similarly, journalism that is supported by a broad base of advertisers avoids becoming dependent on wealthy benefactors who can compromise an outlet's integrity, potentially steering users toward other news sources.[308]

As discussed in other Open Markets Institute publications, the arrival of Google, Facebook, and other platforms deeply damaged the economic foundations of an independent press in four main ways. The first was by creating and then monopolizing a rival system of surveillance advertising, based on vast collections of digitized personal data. The second was through theft of intellectual property, as the platforms attracted readers by appropriating content created by others. Third, the platforms also damaged journalism by eliminating diversity, as their predatory practices drove thousands of independent news sources out of business. Finally, platforms have compromised the editorial independence of even the largest news organizations by entering into collusive business dealing with them or influencing their coverage through purported charitable contributions.[309]

IV. CONCLUSION: UNDERSTANDING THE LESSONS FROM HISTORY AND WHERE WE GO FROM HERE

Federal law has structured media and communications markets since the founding, both guiding and shaping the development of American democracy. Even as multiple disruptive technological changes affected the news industry for two centuries, federal policy has been an inseparable element of the vitality of news and its distribution to the public.

Many of these policies ensured that owners of essential communications infrastructure remained merely conduits for information rather than manipulators or controllers of it. By curtailing monopoly control over the news industry, such policies also fostered journalistic organizations in service of the public interest and ensured the free flow of information and dialogue between citizens, which is central to a democracy.

Over the last 40 years, however, the careful balance of public policies that historically enabled and governed freedom of the press in the United States was dismantled. Today, the consequences extend throughout the globe. Google and Facebook have become, for example, the "integral and inescapable" infrastructure of contemporary journalism in the Majority World/ Global South,[310] providing not just the audiences and the publishing platforms but also serving as vectors for massive manipulation of democratic processes and the spread of disinformation.[311]

As dominant "content cartels,"[312] these American platforms decide what can be said or not in the public sphere and often work together to do so.[313] These systems inherently structure the ability of news organizations to reach their audiences, monetize their content, and shape the public discourse. Yet, news publishers have virtually no way to seek recourse for the unilateral decisions made by these far-flung companies that shape the media environment on which democracy depends. The decisions made by these platforms mean that when news outlets lose access to their accounts or have them blocked, it can have devastating impacts on their journalism, on their traffic and revenue, and on their public interest role.[314] How we regulate Big Tech corporations in the United States, therefore, shapes the visibility and viability of news media around the world and, thus, the strength of democracy globally.

If we are to solve the crisis of journalism in the United States and around the world, we must learn the lessons of the past. As this paper has shown, some of the most important lessons are that:

News is an essential public good, and public access is necessary to ensure the vitality of American democracy.

Public policy plays an essential role in ensuring not only the right of free speech, but also the right to hear the speech of others. Public controls help prevent the formulation of monopolies and support adequate public access to diverse news sources.

Public controls come in all forms, ranging from direct public subsidization to structural separation and divestiture, and come from all sources, including Congress, federal agencies, and the judiciary.

The industry's dynamism is evidence that the rules structuring the market must be broad and flexible.

These lessons are essential to designing robust solutions to begin the process of revitalizing American democracy. We can break excessive concentrations of corporate power while also facilitating public access to high-quality,diverse, and affordable journalism.[315]

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