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Democracy, Journalism, and Monopoly

How to Fund Independent News Media in the 21st Century

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EXECUTIVE SUMMARY

Today's broken information environment is not the result of inherent features of the internet or of digital technology. Rather, the crisis largely derives from wide-ranging policy failures that have occurred mainly since the early 1980s.

Previous generations of Americans met the challenges posed by the arrival of new information technologies, from the postal service to the telegraph and other electronic media, by using government to structure competition in communications and media markets. Examples include laws designed to preserve freedom of speech and of the press by prohibiting arbitrary discrimination in access to essential communications infrastructure, and by statutes and regulations that prevented the owners of such infrastructure from simultaneously doing business as news organizations, advertising agencies, or engaging in adjacent lines of business.

Prior to the 1980s, public policy also included privacy protections that prohibited communications companies from selling or otherwise monetizing their customers' personal information. Regulators did not allow telegraph and telephone companies, for example to wiretap their own customers and use what they learned to target third-party ads, as Google and Facebook do today. Public policy further ensured that the cost of journalism was largely borne through advertising revenue that flowed directly to those who did the work of gathering the news, rather than to platform monopolies acting as predatory middlemen.

Beginning in the 1980s, however, this carefully balanced policy regime governing the "marketplace of ideas" began to be dismantled, through a combination of outright repeal and by failure to extend the same regulatory principles to new media technologies, most notably digital platforms such as Google and Facebook.

No single bill or new regulation can repair the damage done to our information environment or our democracy by these policy failures. But as this paper argues, through a broad and integrated program of reform that restores traditional American principles of competition policy, it is certainly possible to restructure media and communications markets in ways that will protect, preserve, and ultimately enhance the functioning of American democracy.

INTRODUCTION: AMERICA'S NEWS MEDIA IN CRISIS

In the early 21st century many futurists predicted that the open internet—and the spread of chatrooms, "social media," and other modes of online and mobile publication and broadcast—would foster a new era of constructive debate, community journalism, more inclusive democracy, and equalitarianism.[1] And for awhile it did, before a handful of tech corporations appropriated the promise of new information communication technologies to build a privately controlled system built on the surveillance and manipulation of what people read, buy, think, and do. Today, voices on both the left and right see deep threats to democracy, liberty, even the health and mental wellbeing of individuals and families, and are demanding a variety of bold government interventions,

Specific threats include a sharp decline in trustworthy journalism in communities across America and around the world, ranging from traditional local newspapers, television, and radio news to once promising new media publications like Buzzfeed and Vice. They also include extreme and growing concentrations of power and control in a few far-reaching communications platforms, such as Facebook and Google, which appropriate journalism produced by others, monopolize digital advertising, enter into secret bargains with large publishers, and threaten to cut off whole countries when their governments seek to protect the freedom and independence of the press.

The harms also include increasingly blatant and unaccountable forms of individual censorship and manipulation of debate by powerful communications corporations, and the rapid spread of misinformation and dangerous foreign propaganda.[2 3] Increasingly, they include as well the blunt and haphazard imposition of new and poorly understood generative Artificial Intelligence tools by businesses able to leverage vast monopolies and unprecedented troves of data.

In recent years these changes have resulted in a wide variety of political harms, including the disruption of democratic norms in the United States and almost every major U.S. ally in the world, the routine subversion of U.S. national security, and the stoking of conflict within and between nations.[4] These changes have also exacerbated many economic harms, including the rapid monopolization of economic opportunity and control, and soaring inequality between individuals and regions.[5] And they have amplified and sometimes created new social harms, including engagement addiction, social isolation, depression, racism, and nativism.[6]

Policymakers and law enforcers across the United States and around the world have responded with an array of legislation, lawsuits, and regulatory actions designed to address some specific aspect of this intricate cluster of threats. These include bills to regulate the structure and behavior of online platforms, to restrict some forms of political advertising and marketing that targets children, and to shift some advertising revenue from digital platforms to publishers and broadcasters. Other proposed legislation seeks to protect the privacy of users by imposing limits on the collection and trade in data, to outlaw foreign-owned (especially Chinese) platforms, to prohibit or otherwise regulate the use of certain forms of AI, and even to reorder the basic regulatory structure of the internet.

Competition law enforcers and other regulators, meanwhile, have filed lawsuits and taken other actions that would break apart Google and Facebook, radically alter how Apple operates online markets such as for apps, block a major acquisition by Microsoft, and sharply reduce the power that Amazon can wield over both rivals and marketplaces. Law enforcers have also launched a variety of other far-reaching investigations. These include Federal Trade Commission (FTC) and Department of Justice probes into various aspects of Elon Musk's takeover and management of Twitter, and far-reaching moves in Germany against Facebook and in the U.K. against Microsoft. They also include potentially game-changing lawsuits by the U.S. Department of Justice (DOJ) and the European Commission that charge Google with monopolizing the markets for digital advertising and demand that the corporation divest most of its online advertising technologies and businesses.

If successful, these actions will thoroughly disrupt the balance of market power among online platforms, advertisers, and publishers, both in the United States and in many societies around the world. This disruption, in turn, creates an enormous opportunity to envision how to update America's journalism traditions and institutions for the 21st century, and then to build a market structure that will deliver this vision.

A THREE-PART SOLUTION GROUNDED IN DEMOCRATIC TRADITION

The purpose of this paper is to provide a foundation for rebuilding American journalism by adding a new perspective to these developments at a moment when debate over governance of the world's information environment seems to be coming to a head. We do so by drawing lessons from the now mostly forgotten history of how, during previous revolutions in information technology, Americans successfully protected free speech and democracy by using government to carefully manage competition and structure news media markets, including through direct regulation of essential communications platforms.

For more than two centuries, dating to the Constitution in 1789, Americans continually developed

> ***During previous revolutions in information technology, Americans successfully protected free speech and democracy by using government to carefully manage competition and structure news media markets.***

and updated market rules to ensure that a succession of new communications technologies did not lead to concentrated private power over essential information infrastructure or over the gathering and publication of news. Americans used public policy to structure these markets and platforms in ways that sustained the growth of competitive, financially independent producers of ideas and information—from newspapers and book publishers to makers and distributors of radio and television programing as well as movies and documentaries.

This American system of promoting free speech and democracy through managed competition of media and communications markets had many flaws. It failed to prevent the emergence of powerful press barons in the late 19th century, for example, and it failed to give anywhere near adequate representation to marginal or minority voices and dissident points of view. And although the American approach tended to create editorial products that were generally affordable to most Americans, a bias remained toward content that would attract the upscale consumers whom advertisers most wanted to reach.

Yet despite these shortfalls, the American system, on balance and over time, created uniquely accessible and professional news media, which in turn helped empower Americans both to protect our democracy, and to facilitate an unprecedented expansion of democratic rights and democratic rule. The American system also

> ***This American system of promoting free speech and democracy through managed competition of media and communications markets began to be dismantled by both Democrats and Republicans starting about 40 years ago.***

succeeded for more than two centuries in preventing the people who control intermediary platforms—such as the postal service, telegraph, telephone, and internet itself—from interfering in any significant way in the generation and communication of news and information.

Starting about 40 years ago, however, policymakers in both parties began systematically dismantling this system. The reversals included a general retreat from antimonopoly enforcement beginning in the early 1980s, which led to increased corporate concentration throughout the economy but especially in the communications sector. In the early days this meant the growth of giant, vertically integrated media conglomerates like AOL-TimeWarner and NewsCorp. Over the last 15 years it has meant the rise of immensely powerful online communications and commercial platform monopolies like Google, Facebook, and Amazon with far-reaching control over news, debate, book publishing, music, television and film, online gaming, and how individuals and groups share information with one another.

This problem of size and scale was made vastly worse by closely related changes in regulatory philosophy, law enforcement, and policy that allowed the new platform monopolies to engage in forms of personalized discrimination that were previously strictly prohibited. These include the powers granted in the 1990s to the owners of basic digital communications infrastructure to manipulate the information and news that individuals receive, and to manipulate debate, including through denying service to individual speakers and other forms of censorship. Such powers extend to previously illegal practices such as providing different people and companies with different prices, and terms of service based on the close surveillance of their communications.

These and other policy failures also created a more immediate danger to our democracies. They did so by empowering Google, Facebook, and other monopolies to engage in predatory and erstwhile illegal practices that destroyed the primary business model that had historically supported the kind of quality independent journalism upon which a healthy democratic republic depends.

Fully correcting these policy failures will be the work of a generation, but fortunately clear, specific policy solutions are available. To be sure, some technological features of today's digitalized information technology are unique, at least in degree. These include exceptionally efficient powers of surveillance and manipulation of almost every individual with an internet connection—now being further augmented by fast advances in data management, computational power, and artificial intelligence. But the basic principles and tradeoffs at work are much the same as those faced by previous generations following the introduction of such once revolutionary communications technologies as the telegraph, telephone, radio, and television, all of which originally posed huge potential threats to the free press, free speech, and privacy. All that is required in many instances is reapplication of the now abandoned competition policies that Americans long used—imperfectly, but successfully—to expand the scope of free speech, a free press, individual liberty, and our common democracy.

A close reading of this history points to three key lessons that should guide the public, policymakers, and law enforcers today.

- First, we must use government to protect and promote free speech and the free press. To expect private corporations and powerful private individuals to do this job for us, in ways that protect democracy and individual liberty, violates reason, experience, and more than two centuries of practice.

- Second, we must impose systems of non-discrimination—or neutrality—on all essential communications infrastructure to prevent dominant intermediaries from interfering with open and democratic journalism, communications, debate, and commerce. This means using existing law and regulatory authorities—and if necessary new law—to disrupt the current business models for Google, Meta, Amazon, and other platforms, including an end to their cross-ownership of adjacent lines of business.

- Third, we must carefully rebuild the open market structures where publishers and advertisers can interact directly with readers and each other without interference from digital platforms acting as predatory middlemen.

These three actions alone will not fix every challenge. For instance, they will not rebuild the base of local advertising that provided the main support for local journalism from before the country's founding until a generation ago. That is because most local forms of business—such as retail, services, and light manufacturing—have themselves undergone extreme consolidation and centralization of control over the last generation. By reducing competition, this trend toward consolidation has reduced the need for marketers to spend money on advertising. At the same time, it has consolidated control over the buying and selling of advertising in the hands of fewer, larger retailing, services, financial, and manufacturing corporations that operate at a national or international level.[7]

In the near term, this means that some form of additional public and/or philanthropic support may be necessary if we choose to rebuild true community-based journalism. But a return to more rigorous and balanced competition policies will address the most pressing political and economic threats to the free press and free speech in America and around the world. It will also thereby help establish a stable foundation for democracy and individual liberty in the 21st century and provide a solid foundation for other types of interventions.

> ***Changes in regulatory philosophy, law enforcement, and policy have allowed the new platform monopolies to engage in forms of personalized discrimination that were previously strictly prohibited, while also destroying the economic foundations of independent journalism.***

CHAPTER 1:
ANTIMONOPOLY AND FREE SPEECH

Most Americans learn early in school that the First Amendment limits Congress's ability to pass laws abridging freedom of speech or of the press. Less well known is that until about 40 years ago, both the courts and public opinion interpreted the First Amendment, as well as the spirit of the Constitution generally, to mean that the government also had a positive mandate to protect and promote free speech, an independent press, and the right to communicate and share information with other individuals.

This tradition in America's political economy extends back to the country's origins. James Madison, a primary architect of the Constitution, believed like most of the founding generation that democracy could only work if ordinary people have a right to free speech *and* open access to information. "A people who mean to be their own governors must arm themselves with the power which knowledge gives," he wrote. "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."[8]

The Founders' conviction that democracy depends on the open exchange of information was so strong that they included a clause in the Constitution mandating that the federal government take direct responsibility for providing equal access to the essential communications network of their time.[9] Benjamin Rush articulated the principles behind the Constitution's Postal Clause by arguing that it was "For the purpose of diffusing knowledge, as well as extending the living principle of government to ... every state—city—county—village—and township in the union," concluding that "It is the only means of conveying heat and light to every individual in the federal commonwealth."[10]

In 1792 Congress took key measures to implement this vision by passing the Post Office Act. It established a principle akin to what today is called "net neutrality" in debates over governance of the internet. The act prohibited the post office from favoring some individual users with lower prices than others, and equalized terms of service among all communities through uniform postal rates.[11] It also importantly set rates low enough for the mailing of printed material to make the production and distribution of newspapers, pamphlets, and books economically viable, even in rural or remote areas.[12]

The act further fostered the growth of a robust and independent press by allowing printers to mail newspapers to one another free of postage, thereby facilitating the distribution of national and foreign news to the hinterlands. President Washington, in arguing in favor of the Post Office Act during an address to Congress, called it a "liberal and comprehensive plan," adding: "While it contributes to the security of the people, [it] serves also to guard them against the effects of misrepresentation and misconception."[13]

Congress's investment in the post office as a means of promoting an informed, democratic citizenry was widely successful. By 1800, it had already sparked explosive growth of America's news industry, with the postal system delivering 1.9 million newspapers, a number that would grow to 16 million by 1830 and 39 million by 1840.[14]

In his book, *Democracy in America*, Alexis de Tocqueville famously emphasized the critical role played by newspapers during the early American republic in both fostering and reflecting democratic values. "What best explains to me the enormous circulation of the daily press in the United States," de Tocqueville wrote in 1835, "is that among the Americans I find the utmost national

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freedom combined with local freedom of every kind."[15]

More recently, the historian Paul Starr noted that "when the United States was neither a world power nor a primary center of scientific discovery, it was already a leader in communications," thanks to public investment in a universally accessible postal system and the innovations of its flourishing free press.[16]

PROTECTING DEMOCRACY AGAINST THE FIRST TECH MONOPOLIES

Soon after de Toqueville wrote his seminal book on America, a mind-bending new information technology—the telegraph—began to challenge the political and commercial foundations of America's news and information reporting and distribution system. Telegraphy greatly increased the speed at which news and information could be gathered and distributed. Unlike in many other countries—where regulation of the telegraph was overseen by the national postal service—Americans chose to leave ownership and management of the telegraph generally in private hands. Americans instead relied on extensive and intensive regulation of the structure and behavior of the telegraph—and later the telephone—to ensure that these networks operated under much the same rules as the postal service. These regulations most importantly included requirements that the corporations provide every user, or class of users, with the same price and terms of service. They also included early forms of competition regulation, such as prohibitions on colluding or merging with similar or adjacent businesses. And they included bans on selling or otherwise misusing the data of the individuals and businesses that used these networks, with rules remarkably similar to those of 21st-century privacy law and regulation.

Regulation of telegraph networks provides an instructive example of the main principles involved. By the mid-19th century, rich and powerful individuals and private corporations were gaining control over telegraph networks and technologies, including the patents of the teletype machine itself, and had begun to exploit this control to create choke points in the open flow of ideas and information. Most Americans at the time recognized this as a deep threat to free speech and democracy, and in response, legislatures and courts at all levels of government began enacting policies designed to ensure that the private owners of telegraph companies did not privilege some people's speech and news while suppressing others.

One of the first such efforts was New York state's Telegraph Act of 1848. Its purpose, according to one journalist at the time, was to check what he called the "stupendous power" of telegraph monopolies over the flow and content of news.[17] It did so not just by encouraging new entrants, but also by preventing telegraph companies from discriminating in favor of or against any one person or company. Telegraph operators could prioritize traffic of "general and public interest" ahead of regular dispatches. But otherwise, they had to carry messages on a first-come, first-served basis, charging everyone the same price for the same service.

In the years leading up to the civil war, telegraphy become so integral to the nation's economic and political development that the federal government took a direct role in subsidizing the construction of a telegraph line across the continental United States, just as it did with the transcontinental railroad. But the problem of monopoly continued to grow worse.[18] By 1866, the Western Union Telegraph Company had consolidated with its major rivals, giving it a nearly total monopoly over the American telegraph. Congress responded with what business historian Joshua Wolff describes as an "entering wedge" against the monopoly by passing the Telegraph Act of 1866, which threatened to nationalize the industry if Western Union did not desist from abuses.[19]

Yet as the Gilded Age unfolded the problem of monopoly grew worse. After the railroad robber baron Jay Gould gained control of both Western Union and the Associated Press (the dominant wire news provider), their operations became so intertwined that they were called "a double-headed monopoly."[20] Gould also structured their service to reinforce the power of each platform. If an independent newspaper chose not to sign contracts with Western Union for telegraph services and with the Associated Press for news wire services, they were swiftly excluded from using either to gather and spread their news.[21]

A similarly collusive relationship came to exist between Western Union and railroads. Western Union struck hundreds of contracts with the railroads giving the company exclusive rights to erect telegraph lines along their right of ways. These exclusionary deals made it "perfectly impracticable" to form competing new telegraph companies, thus further entrenching Western Union's monopoly.[22]

During the late 19th century and into the Progressive era, Congress responded to the growing problem of monopoly with a series of landmark laws that restructured the terms of competition throughout the economy, including in media and communications markets. For example, in 1887 Congress enacted the Interstate Commerce Act, drawing on the same principles of net neutrality that had long governed the postal office and early state regulation of telegraphs and railroads.[23] The ICA created the first independent federal agency, the Interstate Commerce Commission (ICC), and charged it with clamping down on the widespread practice of railroads offering discounts or rebates to favored customers while discriminating against others.[24]

In the late 19th and early 20th centuries, the federal government applied its increasing powers to regulate mergers and pricing practices not just to railroads and large industrial companies, but also to the communications sector.

During this era Congress also for the first time involved the federal government with the regulation of competition in the political economy as a whole, starting with the passage of the Sherman Antitrust Act in 1890, to supplement longstanding state and local anti-monopoly law. Proponents of all these measures argued that they were necessary to preserve the American Revolution's promise of individual independence and wide distribution of property, power, and democratic governance. In explaining the need for the antitrust legislation that bears his name, Senator John Sherman proclaimed: "If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessaries of life."[25]

The Sherman Act imposed economy-wide prohibitions on restraints of trade and other monopolistic tactics. It also outlawed differential treatment to strengthen market dominance, a provision the government used in its antitrust lawsuit against Standard Oil.[26] Subsequent legislation, such as the Clayton Act and the Federal Trade Commission Act, strengthened the Sherman Act and curbed the ability of reactionary courts to undermine it.[27]

The federal government applied its increasing powers to regulate mergers and pricing practices not just to railroads and large industrial companies, but also to the communications sector. In the Mann-Elkins Act of 1910, Congress extended the ICC's jurisdiction to other key network industries, imposing common carriage principles

In the early 1940s, the Federal Communications Commission used its extensive antitrust power to force the divestiture of ABC from NBC to prevent NBC from monopolizing the radio industry.

to both the telephone and telegraph, and to the newly emerging wireless communications systems, across the United States as a whole.[28] Then in 1913, under Woodrow Wilson, the Justice Department filed an antitrust suit opposing AT&T's plans to buy a long-distance regional phone company in Oregon. The threat of similar litigation, combined with threats from the ICC to crack down on pricing abuses by AT&T and increasingly prominent calls to simply nationalize the whole national communications industry, led AT&T to swiftly agree to spin off its ownership of Western Union, which it had previously acquired.[29] AT&T also promised, as part of the settlement, to desist from further acquisitions of independent phone companies and to begin the process of interconnecting with smaller carriers. Independent companies proclaimed this a "gift from Santa Claus Bell" and "the acceptance of the principle of competition in the conduct of [the telephone] business."[30]

Regulators continued to apply this same basic suite of rules to AT&T right through to the 1980s. In exchange for being allowed to maintain its dominant market share, AT&T had to accept strict regulation of service and rates. And even this was not enough to avoid all antitrust lawsuits. In 1956, the Justice Department used an antitrust lawsuit to force AT&T to desist from manufacturing telephone equipment except for the use of its own Bell System and to license its existing patents royalties for free and its future patents on reasonable, nondiscriminatory rates. This and similar consent decrees against monopolistic technology companies would later prove pivotal to the growth of Silicon Valley and modern computer era by promoting the technological development of key information technologies such as the transistor.[31]

Another early constraint on America's network monopolists were privacy laws. By the late 19th century, nearly every U.S. state had passed laws forbidding telegraph operators and those with access to telephone messages stored in telegraph company files from disclosing their content.[32] According to one early court ruling, these laws were intended "to prevent the betrayal of private affairs ... for the promotion of private gain or the gratification of idle gossip."[33]

Such privacy protections, combined with legal restraints on discrimination against individual customers, prevented the communications platforms of that era from adopting the surveillance business model used today by Google and Facebook. Telegraph and telephone companies, regardless of their market share, would have been prosecuted under multiple state and federal laws had they tried to adopt such a business model built on surveillance of users' personal data and systematic discrimination in the allocation of service.[34] Regulators did allow phone corporations to offset their costs by selling advertising in the "yellow pages." But they did not allow them to wiretap their own customers and use what they learned to target third-party ads, as Google and Facebook do today. In that era, such an abuse of privacy and monopoly power to manipulate and exploit customers was simply unthinkable.

THE "AMERICAN SYSTEM" IN THE BROADCAST ERA

In the early 20th century, the introduction of radio—a wireless system for the transmission of sound built around centralized "broadcasters"—opened the way to entirely new modes for producing, delivering, and consuming news and other information. But the

American people once again ensured that the underlying business model in broadcast media markets remained largely the same as for print. For example, while early radio networks hoped to sustain themselves by generating sales of radio sets to consumers, and later by using subscription-like models, by the early 1920s nearly all had followed newspapers in relying on advertising to pay for the cost of producing content.[35]

A generation later, after the Second World War, the television industry followed much the same course. Part of the reason was that most consumers tolerated advertising far better than they tolerated being asked to cover the cost of producing the television programing they consumed, especially television news. At a storied dinner party in the 1950s, Edward R. Murrow and Walter Cronkite engaged in a heated exchange, with Murrow arguing that sponsors should play no role in television journalism and Cronkite arguing that ads "paid the rent."[36] Cronkite's pragmatism proved justified. As it turned out, millions of Americans would tune into programing like *CBS News with Walter Cronkite or 60 Minutes*, but not if they had to write a check for the privilege or rely on the government to subsidize the industry.

In another way, however, emerging broadcast markets were fundamentally different than print markets. While there are effectively no limits to the number of print publishers, there are physical constraints on the number of broadcasters who can do business at any one time and place. If two nearby radio or television stations broadcast at or near the same frequency, they will interfere with one another's signals, and neither will have a clear channel. As early as the mid-1920s, the Commerce Department was already having to make case-by-case decisions on which of the rapidly growing number of radio stations had to either shift their frequency or operate them over limited hours each day.

As this case-by-case approach became increasingly unworkable, Congress stepped in with the Radio Act of 1927, which established a commission charged with deciding who could have a license to broadcast radio waves at specific frequencies, times, locations, and power levels. In 1934, Congress created the Federal Communications Commission (FCC) and gave it independent licensing and other regulatory powers over not only radio but interstate and international telegraph and telephone services as well. Eventually its authority would extend to broadcast and cable television.[37]

The regulatory constraints on the number of broadcasters have no analog in the print sector but other fundamental principles of political economy carried over. Congress gave the FCC, for example, expansive authority to enforce antitrust principles in broadcast markets. In the early 1940s, the FCC used these powers to force the divestiture of ABC from NBC to prevent NBC from monopolizing the radio industry.[38] The government also extended this thinking to other entertainment markets. In 1948, the Justice Department applied the same principle by forcing the big eight Hollywood studios of the era to divest ownership of movie theater chains.[39]

From the 1940s to the 1970s, the FCC similarly put a check on monopoly by preventing the cross-ownership of radio, television, and newspaper companies. In 1970, the FCC went further by enacting its Fin-Syn rules. These were aimed at preventing the three dominant networks (ABC, CBS, and NBC) from monopolizing the production of television programming by limiting the number of hours they could broadcast their own content in prime time. The rule change led to what many have described as a golden age of television as independent television production companies gained the ability to bring groundbreaking programming like the *Mary Tyler Moore Show* and Norman Lear's *All in the Family* to market.[40]

Consistent with the view that the public had a First Amendment right to a free flow of ideas, the FCC also took special measures to ensure that broadcast license holders, whose numbers were necessarily limited in any one location, did not suppress or monopolize the news and public affairs programming going out over the public's airwaves. Thus, in 1949, the FCC instituted the Fairness Doctrine. Its first essential requirement was that every broadcast licensee "devote a reasonable portion of broadcast time to the discussion and consideration of controversial issues of public importance."[41] The Fairness Doctrine also promoted diversity of content by requiring 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."[42]

In effect, the Fairness Doctrine created a programming environment in the image of the Founders' positivist view of the First Amendment by prioritizing the need for a well-informed citizenry over the rights and ability of broadcasters to control their programming solely for their own private interests.

THE "AMERICAN SYSTEM" INTO THE DAWN OF THE INTERNET ERA

With little controversy, the Supreme Court consistently upheld such government intervention to prevent monopoly in both print and broadcast markets, citing the First Amendment. In a 1945 antitrust case challenging the monopoly power of the Associated Press, for example, Supreme Court Justice Hugo Black wrote for the majority in finding that "a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom." In a succinct summation of the relationship between monopoly and free speech, Black concluded: "Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not."[43]

> ***In the post-war era, the Supreme Court consistently upheld government intervention to prevent monopoly in both print and broadcast markets, citing the First Amendment's guarantee of not only a right to free speech, but of a right to hear the speech of others.***

In 1969, in *Red Lion Broadcasting v. FCC,* the Supreme Court echoed this goal when it stated that "There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others. ... It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[44] The FCC extended the same principle to cable TV, ruling in 1972, for example, that cable companies must maintain facilities for production of local programming and to make these facilities available to the public on a non-discriminatory basis.[45]

The Court reaffirmed this standard of neutrality in 1995 when it upheld a law requiring cable companies to carry content from broadcast stations in the interest of maximizing diversity of content and consumer choice. Writing for the majority, Justice Anthony Kennedy stated that people, not corporations, should decide what they watch, noting that "At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal."[46]

Even well into the digital era, public policy continued to guard strongly against monopoly in media and communications markets. Examples include the originally open architecture and democratic governance of the internet itself, the 1982 antitrust suit that broke apart the AT&T monopoly, and the 2000 antitrust decision that prevented Microsoft from bundling its Windows operating system with an internet browser, which opened opportunities for new companies—including Google and Facebook—to develop application-based services for the emerging World Wide Web.

In summary, over the course of nearly two centuries and up until the last generation, a well-balanced public policy regime set the terms of competition in media and communications markets to ensure that they served the needs of free speech and democracy. This policy regime adhered to several core principles, including most notably:

- **Common Carriage:** Basic communications infrastructure, whether in the form of the post office or telecommunications systems, should operate under rules guaranteeing neutrality in their treatment of all users. This means not censoring any content created by others outside of government-approved content regulation regimes or published terms of service, not favoring any particular content or content provider over any other, and not creating their own content. As part of this regulatory bargain, however, common carriers were held harmless for the speech that users conveyed through their communications infrastructure.

- **Public Purpose:** Wireless platforms, such as radio and television networks, and later cable systems, were required to share their capacity with a broad range of independent voices while also providing content necessary to the functioning of democracy, such as programming covering local news and public affairs.

- **Privacy:** Owners of essential communications networks were prevented from monetizing their users' personal information, first by state-level privacy laws that prevented telegraph and telephone companies from sharing information contained in their users' messages, and second by a prevailing regulatory and antitrust enforcement philosophy that generally looked askance at all forms of vertical integration. Regulatory barriers to vertical integration precluded leveraging access to personal data by moving into advertising and other adjacent lines of business.

- **Diversity:** Across all media, and particularly in broadcasting, government policy favored pluralism in sources of news and information, in terms of ownership, political viewpoint, and regional equality.

- **Financial Independence from government.** Indirect, generic government subsidies were sometimes deemed appropriate, such as preferential rates offered by the post office for the mailing of printed material or government funding of the Corporation for Public Broadcasting. State ownership of media also occurred in special circumstances, as with the Voice of America during the Cold War. But for the most part, government assured a free press by enforcing fair rules of competition that allowed journalism to be supported through non-governmental revenue streams, primarily private-sector advertising.

The American press, and with it, American democracy, developed within these broad market rules. The system was far from perfect. But across most cities and towns, public policy structured media and communications markets in ways that allowed for locally owned news outlets to flourish within highly competitive local markets.

One related result was to put tens of thousands of journalists on the street, in the city council and state house, and on Wall Street and in Washington. By 1992, the full-time editorial workforce in U.S. media reached 122,015.[47] These media jobs were also highly distributed geographically, with the highest concentration of journalists, relative to total population, in the U.S. Midwest, a region nowadays often dismissed as "flyover America."[48]

Supporting this expanding and diverse sector was a business model that allowed most journalists to remain financially independent of both the politicians and the powerful private business elites they covered. As we will see in the next chapter, a key component enabling that independence was revenue provided by a broad base of large and small advertisers.

CHAPTER 2:
FINANCING FREE SPEECH

In the last chapter we surveyed how, from the nation's founding through the 1970s, Americans sought to protect and promote democracy by making extensive use of government to manage competition in media and communications markets. In this chapter we examine how those same government policies enabled a critical core of publishers and broadcasters to finance independent journalism and coverage of public affairs at a price ordinary American were able and willing to pay.

This was not an easy challenge to meet. Gathering and distributing news is expensive, and while there is always strong demand for salacious and emotionally charged content, it is difficult to get ordinary people to pay for the kind of civic journalism they need to be informed voters. Because of this problem, many American newspapers in the earliest days of the nation depended heavily on political parties, government printing contracts, and government advertising to pay their bills. But from the very first, long before the American Revolution, most publishers solved this challenge by financing their work primarily through advertising.

The pattern was set by the *Boston News-Letter,* launched in 1704 and widely regarded as the first newspaper in what would become the United States. Publisher John Campbell used the first issue to solicit both subscriptions and advertisements and then published his first ad—for a piece of land—in the third issue. As business developed, a typical newspaper in colonial America came to contain at least one, and often two, full pages dedicated to ads for goods and services. Ben Franklin's *Pennsylvania Gazette*, launched in 1728, pioneered the use of illustrations in advertising and devoted about 45 percent of its pages to advertisements.[49] As James Parker, the owner of colonial-era newspapers in New York, Connecticut, and New Jersey, said during this period, advertisements are "the Life of a Paper."[50]

In the early Republic, much the same was true even of newspapers backed by political parties. Noah Webster, who later went on to publish the famous dictionary, in 1793 founded the newspaper *Minerva* with support from Alexander Hamilton and the Federalist Party. Webster, who ran the paper until 1803, soon rechristened it the New York Commercial Advertiser, a name it retained until 1904 when it became the *New York Globe.*

From early on, newspaper advertising took on a basic format. Advertisers seeking to reach a particular market segment would place ads in a publication—or in sections of a publication, such as the sports or women's pages—that were read by their target audience. The revenues publishers earned from these ads could in turn cover the cost of producing all kinds of journalism, including cartoons and celebrity gossip, but also the kind of election and civic affairs coverage essential to making democracy work. Though many media commentators and members of the press are obtuse to the fact, advertising-supported journalism became, despite its many drawbacks, the primary way that American democracy financed the free speech it needed without making journalists financially dependent on the political leaders they cover.[51]

> ***From the very first, long before the American Revolution, most newspapers used advertising to finance the cost of gathering and delivering the news at a price most Americans could afford.***

> ***Frederick Douglass financed his crusading Black civil rights newspaper, [The North Star](), in part by publishing ads for products ranging from used clothes to a "Hair Cutting, Saloon, and Perfumery Emporium."***

ADVERTISING AND DEMOCRATIZATION OF THE MEDIA

In recent years, some academics have focused on the fact that many antebellum newspapers in the United States earned revenue by publishing notices of slave actions or ads seeking the return of fugitive enslaved persons.[52] But along with subscriptions, advertising also played an essential role in supporting newspapers that promoted or helped to promote social justice causes, notably including abolition. Abolitionist William Lloyd Garrison kept the lights on at *The Liberator* by running ads for ladies' "Champooing and Hair Dyeing" and for the "Boston Trecothic Calisthenic Academy and Gymnasium."[53] Later, Frederick Douglass financed his crusading Black civil rights newspaper, *The North Star,* in part by publishing ads for products ranging from used clothes to a "Hair Cutting, Saloon, and Perfumery Emporium."[54] Similarly, a few decades later, advertising for women's designer clothes and Washington, D.C., gift shops paid for the advocacy journalism of *The Suffragist,* an essential organ of the Congressional Union for Woman Suffrage.

The marriage of journalism and advertising had another enormous civic benefit beginning later in the 19th century. It democratized citizen access to journalism by dramatically lowering the price that publishers charged for their news. One of the most important periods of such democratization of the press took place in the mid 19th century. Because of the influx of advertising revenue, the typical newspapers went from costing six cents per issue to just a penny—a price working-class Americans could easily afford. This new "penny press" produced lots of sensationalist journalism. But it also for the first time allowed some publications to serve a mass market with balanced in-depth reporting. One of the most successful penny papers was the *New York Daily Times*, which would change its name to the *New York Times* in 1857. Advertising-supported, mass circulation metropolitan newspapers, like Joseph Pulitzer's *St. Louis Post-Dispatch* and *New York World*, employed investigative reporters like Nellie Bly, whose exposés elevated social causes like reform of mental hospitals.

In this era the competition among publishers for more readers and hence more advertising revenue also led to a broad expansion of modern "muckraking" magazine journalism that helped to uncover the abuses of corporate monopolies like Standard Oil and corrupt political machines like Tammany Hall. To finance the exposés of pioneering investigative journalists like Ida Tarbell and Lincoln Steffens, the publisher of *McClure's Magazine* sold ad space to corporations hawking, among other items, the La Creole brand of dandruff shampoo.[55] Advertising also supported important publications promoting minority civil rights, such as *The Crisis* magazine, created in 1910 by renowned historian, civil rights activist, sociologist, and cofounder of the National Association for the Advancement of Colored Persons, W. E. B. Du Bois.[56] Similarly, advertising funded a plethora of regional and religious publications, such *The Midland,* the magazine dedicated to the culture of the Midwest,[57] and the *Christian Science Monitor*, founded with the mission "to injure no man, but to bless all mankind."[58]

Gradually, even magazines that had once rejected advertising opened their pages to it in order to better finance expensive journalism at lower subscription prices. *Century* was one of the first magazines aimed mainly at upper-class readers to adopt an advertising-driven business model, followed in the 20th century by publications ranging from *Ladies Home Journal* and *Cosmopolitan* to the *Saturday Evening Post and Time.*

In the 1950s, 1960s, and 1970s publishers took increasing advantage of the highly diversified advertising markets to support different forms of special interest journalism. These ranged from *Golf Digest* and *Runner's World* to *Jet* magazine, launched in 1951 as *The Weekly Negro News Magazine*. Other periodicals focused on local and regional coverage, from *Texas Monthly* to *Creative Loafing*.

Perhaps even more importantly, advertising enabled a blossoming of niche publications focused on cultural and political change. It financed the "new journalism" of such dissident writers as Hunter Thompson, Truman Capote, Joan Didion, and Gay Talese in publications like *Esquire* and *Rolling Stone.* Classified personals helped finance the growth of counterculture publications like the *Village Voice* and the *Berkeley Barb*. Ads by book publishers sustained niche political magazines ranging from the *National Review* to *Dissent*, *Ramparts*, and the *Washington Monthly*. The need for advertisers to more efficiently reach niche audiences also led to myriad publications focused on the emerging feminist, environmental, and gay rights moments like *Ms.*, *Mother Earth News,* and *The Advocate.*

Finally, during the late 20th and early 21st century, advertising supported a flourishing of professional and trade publications, with titles like *Aviation Week Multi-Housing News, and Defense Contract Litigation Reporter*. Supported mostly by business-to-business advertising, these played an important role in the information ecosystem of the era by reporting on often obscure corners of the country's political economy and developing stories that only later came to the attention of mainstream media publications, such as the flaw in the design of a booster rocket that destroyed the space

> ***Wealthy patrons abuse their control of major media organs and platforms such as Facebook and Twitter to punish their enemies and reward friends while slanting coverage of themselves and other businesses they own.***

shuttle Challenger, real estate financing scams, and corporate espionage.[59]

Importantly, the prevailing approach to enforcement of antimonopoly laws in the United States also played a huge part in supporting this robust publishing environment by helping to protect a wide diversity of regional and community-focused companies that purchased advertising space to promote their products and services. A good example of the effectiveness of this antimonopoly regime is the *Vons Grocery* antitrust decision by the Supreme Court in 1966, which blocked a merger of two small Los Angeles grocery chains that would have resulted in a single corporation controlling seven percent of that local market.[60] The 1935 Robinson-Patman Act is another important example of U.S. laws that helped to ensure a diverse, locally owned retail sector that financed local and regional journalism, in this instance by checking abusive business practices by chain stores.[61]

Because of such aggressive competition policies, cities across America could support a robust, locally owned, media ecology, including major newspapers, broadcast stations, as well as world-class advertising and public relations firms. In St. Louis, for instance, robust competition among many different local firms competing for advertising space—including scores of locally owned banks, savings and loans, and grocery and department stores—helped local newspapers as well as radio and television stations both to pay their bills and to escape becoming overly dependent on any one private, public, or philanthropic sponsor.[62]

To be sure, the American system of advertising-supported journalism has long had many prominent critics. In the mid-20th century, economist and public intellectual John Kenneth Galbraith excoriated the advertising industry and its allies in journalism for engaging in a form of production that, in his view, created more wants than it satisfied, thereby breeding an excessive materialism and never-ending cycle of economic dependency among citizens.[63]

In the same era, best-selling author and social critic Vance Packard attacked the use of manipulative psychological techniques to instill insecurities and insatiable craving in consumers.[64] In 1988, Edward S. Herman and Noam Chomsky published a highly influential leftist critique of the symbiotic relationship between advertising and journalism, arguing that it was part of an organized effort by capitalist elites to "manufacture consent" from the powerless by lulling them into consumerism and a preoccupation with the superficialities of life.[65] More recently, journalism professor Victor Pickard has charged that reliance on advertising dollars caused American journalism to become infected by "corporate libertarianism."[66]

All these critiques make important points and are often held by journalists themselves, many of whom resent what they see as the undue influence of advertisers over their work. But it is important to ask the "compared-to-what" question. Journalism financed by advertising is often biased toward the rich and powerful, but journalists who depend on financial support from politicians or plutocrats are highly unlikely to bring the full force of their skills to bear on their patrons, to say the least. And, although there certainly is an important role for publicly funded journalism like the Corporation for Public Broadcasting, such institutions are ultimately at the mercy of those who control the purse strings, in particular political appointees, members of Congress, as well as corporate donors.[67] Moreover, as we'll see, so is journalism that is financed by "grants" and exclusive contracts with platform monopolies like Google or Facebook.[68]

> ***Advertising may be the worst way of financing free speech except for all the others, much as has been said of democracy itself.***

Similarly, journalism that depends on the beneficence of billionaire philanthropist owners like Amazon's Jeff Bezos, who owns the *Washington Post,* is also compromised in its scope and independence.[69] At best, notes Nick Lemann, former dean of the Columbia School of Journalism, "the trouble with wealthy patrons is that they appear unpredictably, are most reliably interested in the more nationally prominent properties, and over time aren't always as generous and committed to editorial independence as the staffs of the organizations they acquired might have hoped." [70] At worst, wealthy patrons abuse their control of major media organs and platforms such as Facebook and Twitter to punish their enemies and reward friends while slanting coverage of themselves and other businesses they own.[71]

Finally, it is important to remember that other business models also come with serious downsides. Models that rely too much on subscription revenue, for example, are unlikely to support the kind of broadly accessible public affairs journalism most required by democracy because too few people are able or willing to pay for such coverage. This is particularly a problem in the digital age when people don't have ready access to newspapers or magazines. As Rob Howard has observed, "the paywall is inherently in conflict with journalism's primary goal: to educate and inform the public about important issues."[72] Moreover, even when elite national publications do make them work, paywalls aggravate unequal access to high-value information while further segregating news consumers into narrow "echo chambers."[73]

So, it turns out that advertising may be the worst way of financing free speech except for all the others, much as has been said of democracy itself. Yet as we shall see, reckless changes to public policy over the last generation—most importantly the *de facto* suspension of enforcement of America's traditional antimonopoly laws—have severely damaged this model, leaving most of today's information environment under the control of corporate giants who are more than happy to be able to manufacture consent—and sometimes informational chaos—without any accountability to an independent press or an informed citizenry.

CHAPTER 3:
THE LIBERTARIAN ATTACK ON OPEN MEDIA MARKETS

Beginning in the early 1980s and accelerating over the next 40 years, the United States began repealing and reversing many of the market rules upon which its political economy had long been based. Under the banner of "free markets," the Reagan administration overturned America's traditional system of regulating competition and corporations, first established at America's founding and then renewed and reinforced in the early years of the 20th century. Subsequent administrations—notably Bill Clinton's in the 1990s—then extended this thinking into specific key sectors of the economy, including banking, securities and energy markets, and the defense industrial base.[74] Similarly, under the banner of "free trade," both parties cooperated in largely dismantling the international trading system that for more than two centuries had protected Americans from the power of foreign monopoly.[75]

As part of this bipartisan counterrevolution, the Reagan and Clinton administrations—often in tandem with Congress—repealed or reversed many of the regulations and competition policies that had long governed American media and communications markets. This meant that market rules that had guided and shaped previous communications revolutions to public purposes, from the telegraph to television, were no longer in place just as the internet age was beginning. It also meant that many of the regulatory regimes established since the advent of the internet were shaped by extreme libertarian thinking. The consequences for journalism and democracy would prove tragic.

Robert Bork led the intellectual charge, having written a highly influential book in the late 1970s that argued for radically rethinking the purpose and crimping the power of America's antitrust laws.[76] Following the guidance of Bork and his allies, the Reagan administration adopted new prosecutorial guidelines in 1982 and 1984 whose practical effect was to give the green light to virtually all mergers and acquisitions except in cases that involved provable collusion or conclusive evidence that the merger would lead to higher consumer prices.[77]

At roughly the same time, libertarians began also to target specific regulatory regimes that Americans had long used to structure media and communications markets. Soon after President Reagan took power in 1981, the FCC, for example, began dismantling many of its longstanding prohibitions on cross-ownership of radio, television, and newspapers properties, while also lifting limits on the number of broadcast stations a single person or corporation could own.[78] Then in 1987, the FCC repealed the Fairness Doctrine. Within months, this allowed an obscure radio personality named Rush Limbaugh to sit down before a microphone at radio station KFBK-AM in Sacramento and begin broadcasting the hyper-partisan programming that launched nationally syndicated conservative talk radio.[79] In combination with relaxed antitrust enforcement, these and similar measures led not only to the decline of diverse, locally owned media outlets committed to balanced local journalism, but also to their replacement by giant national chains dedicated to "talking head" opinion journalism, such as NewsCorp's Fox News, Comcast's MSNBC, and the Sinclair Broadcast Group.

The movement to overturn the traditional public systems for governing media and communications

Just months after repeal of the Fairness Doctrine, an obscure radio personality named Rush Limbaugh began broadcasting the hyper-partisan programming that launched nationally syndicated conservative talk radio.

markets continued under President Clinton, most notably with passage of the 1996 Telecommunications Act. This legislation repealed, for example, the FCC's ban on cross-ownership of telephone and cable television companies.[80] It also removed restraints on AT&T and the seven regional "Baby Bells" that had previously prevented them from entering the data processing industry.[81] These and other changes to the policy map erased the legal boundary lines that had historically kept the owners of private communications infrastructure from simultaneously engaging in adjacent lines of business, including advertising and the production of news and entertainment programming.

Thus, it was that AT&T, while nominally broken up by a 1984 antitrust settlement, was allowed to slip out of its historical constraints as a highly regulated common carrier phone company and dramatically expand its holdings, including into wireless and even cable television and media. The 1996 Act also cleared the way for media moguls to forge other vast conglomerates, most notably News Corporation (now NewsCorp), Viacom, Comcast, and the Walt Disney Company, often combining ownership of broadcast, cable, and internet service provider infrastructure with ownership of television and radio stations, movie studios and other entertainment enterprises, and most recently streaming platforms.

By 2004, CNN founder Ted Turner already was writing that media consolidation had gone so far that it was no longer possible for an entrepreneur like he once was to start new media enterprises or remain independent:

> *Today, the only way for media companies to survive is to own everything up and down the media chain—from broadcast and cable networks to the sitcoms, movies, and news broadcasts you see on those stations; to the production studios that make them; to the cable, satellite, and broadcast systems that bring the programs to your television set; to the Web sites you visit to read about those programs; to the way you log on to the Internet to view those pages. Big media today wants to own the faucet, pipeline, water, and the reservoir. The rain clouds come next.*[82]

Apologists for such radical media consolidation argued that government regulation of media and communications markets was no longer needed to ensure diversity, competition, or local control. Because of the growth of cable and the internet, they asserted, consumers enjoyed an infinitude of choices in their sources of news and entertainment.

The opposite proved true. By the mid-2000s, 90 percent of the top 50 cable TV stations were owned by the same parent companies that owned the broadcast networks. And the top 20 web-based news sites were owned by the same media conglomerates that controlled the broadcast and cable networks.[83] This first round of massive consolidation under corporate conglomerates focused on maximizing short-term returns to shareholders soon began to result in declines in the quality of news and entertainment. One result, for instance, was the replacement of expensive enterprise reporting and local journalism with low-cost programming featuring media "personalities" who shouted "hot takes" about cultural wedge issues, as pioneered by CNN's *Crossfire* and perfected by Roger Ailes's Fox News. In entertainment, it meant a move away from the expensive scripted dramas of television's golden age to low-cost "reality TV," as spearheaded by shows like *Survivor* and perfected by *The Apprentice* starring Donald Trump.

UNPRECEDENTED POWERS FOR COMMUNICATIONS PLATFORMS

The broad deregulation of media markets also extended to a rapidly expanding new communications technology, the internet. In 1996, Congress passed legislation known as Communication Decency Act, whose stated purpose was to make sure that business on the internet remain "unfettered by Federal or State regulation."[84] In pursuit of this goal, the new law also provided private communications corporations with a combination of legal privileges that had never been seen before. These included unprecedented exemptions from liability for third-party speech published on these platforms.

The act came about without much deliberation after some members of Congress began looking for ways to remove what they saw as a growing legal threat to the era's "chatrooms" and small "electronic bulletin boards." As U.S. Senator Ron Wyden (D-Oregon) recalled recently, emerging court decisions at the time seemed to imply that if such sites exercised any control whatsoever over third-party posts, they would be subject to the same libel laws and other legal liabilities as traditional publishers.[85]

Fearing that exposure to liable law would retard the growth of what we today call social media, Wyden and others fashioned a 26-word amendment to the Communications Decency Act, which President Bill Clinton signed into law in 1996. Known as Section 230, it has two main components.

The first is a special exemption to libel law for corporations operating what it called "interactive computer service." Historically and still today, owners of publishing houses, newspapers, and other journals, as well as radio and television station owners, are responsible for the content they disseminate even if it is created by others. A newspaper, for example, can be found guilty of libel if it publishes a letter to the editor that contains a defamatory statement. Similarly, traditional distributors of media, like bookstores or news vendors, can also be found guilty of libel if they know the material they are distributing is defamatory, seditious, violates hate speech laws or is otherwise illegal.[86] Section 230 stated that going forward, owners of "interactive computer services" would not be regarded as publishers or even speakers, and as such could not be held legally responsible when third parties posted illegal speech on their websites or in the chatrooms they controlled. [87]

In this way, Section 230 treats "interactive computer services" as if they were neutral communications utilities like Western Union or AT&T, which, as we saw in Chapter 1, have always been held harmless when other people used their lines to commit libels, plot criminal conspiracies, conduct telephone scams, or otherwise break laws.

But a second provision in Section 230 granted owners of "interactive computer services" a privilege never extended to phone companies or other utilities. Phone companies were never allowed to censor their users or to provide different services and terms to different users. But Section 230 gave the owners of interactive computers services the right to ban whatever speakers they found

1996 Telecommunications Act repealed ban on cross-ownership of telephone and cable television companies and erased the legal boundary lines that had historically kept the owners of private communications infrastructure from simultaneously engaging in adjacent lines of business, such as journalism, entertainment, and advertising.

"objectionable" from their platforms, "whether or not such material is constitutionally protected."

With the benefit of hindsight, it is now clear that Section 230—in combination with the wider overthrow of antimonopoly law and regulation in the 1980s and 1990s—cleared the way for the creation of an entirely new kind of communications corporation. Unlike publishers, these new legal constructs enjoyed the same freedom from liability traditionally granted to highly regulated common carriers like telegraph and telephone companies. But unlike common carriers, they enjoyed a wide license to provide radically different service to each specific speaker, publisher, and user.

These radical changes in policy and principle eroded the economic foundations that had supported news gathering and publishing since before the American Revolution. But one key piece of the new machinery for the control of communications and information was still to be forged. This was the creation of a business model that would allow private digital monopolies to fully exploit their exemption from traditional regulation and competition policy.

CHAPTER 4:
SURVEILLANCE ADVERTISING AND DEMOCRACY

In the late 1990s and early 2000s, the initial emergence of digital advertising enabled a flourishing of both amateur and professional journalism. Revenues derived from banner ads financed new independent voices, such as Joshua Marshall at Talking Points Memo and Ana Marie Cox, founder of the political blog, Wonkette. It also enabled a wave of new digital publications including the Daily Dish in 2000, Gawker in 2002, Pajamas Media in 2004, and the Huffington Post in 2005. And it enabled entirely new forms of journalism, such as an explosion of blogs by individual experts in specific issues, from trade and national security to hobbies and parenting.

At the same time, many legacy news publications began to create digital editions as well as their own blogs, selling display ads alongside this content. For many newspapers that had lost significant classified advertising revenue to Craigslist and other websites, the new online advertising earnings provided an important boost.

Much of this updraft was made possible by a company named DoubleClick, founded by Kevin O'Connor and Dwight Merriman in 1995. Based on software they had developed in O'Connor's basement, DoubleClick enabled both large and small internet publishers to host display ads in standardized formats while also allowing ad buyers to measure instantly how well their pitches were working. By 1997, DoubleClick had further facilitated the growth of digital advertising by taking advantage of newly invented "cookies," or code that made it possible to follow users across the different publications that were part of DoubleClick's network.[88]

None of this affected the basic relationship between publishers and advertisers nor involved serious losses of privacy. Cookies could help target ads more effectively, but in those days, the information collected from internet users was limited and did not include actual or inferred data about political views, healthcare status, finances, or the like. Advertisers seeking to reach a specific audience still had to depend on the editorial content of a specific publication to attract that audience, and they had to pay those publications for the right to place an ad. With the money publishers thereby received from digital advertisers, they financed web-based journalism, creating a financially self-sustaining information ecosystem.

But that would soon change. In 2006 Google started selling highly targeted digital ads based on demographic data from its search engine users—a big leap from the keyword-based ads it had previously offered. [89] But Google still lacked the online infrastructure DoubleClick offered for buying and selling ads with even more precise targeting tools. And so, in 2007 Google bought DoubleClick for $3.1 billion.

Thus, Google executives launched a business model that was unprecedented in the history of the last two centuries of electronic communications and the more than 300 years of advertising-based journalism. It was a business model based precisely upon a new legal foundation established in the wake of the overthrow of America's traditional antimonopoly-based approach to regulating the political economy, one that especially capitalized on the suspension of the centuries-old requirement that infrastructure monopolies provide every user with the same services, pricing, and terms.

Then, in 2016, Google took this model to a whole

> ***In recent years, Amazon has been muscling into the surveillance advertising business as well and now offers marketers access to consumer data beyond even what Meta and Google can capture and resell.***

new level. When it had originally acquired DoubleClick, Google told Congress and the FTC that it would not combine its vast troves of personal data—from properties like Google Maps and Gmail—with information gleaned from DoubleClick about which consumers visited which digital publications and had viewed which ads. For nearly 10 years, Google kept that promise, but then decided to break it.[90]

So today, Google is truly an all-seeing surveillance machine. When a person uses Google's search engine, maps, email, YouTube, Android, and Chrome operating systems, or any of the dozens of other services and products it owns, Google stores a complete record of those interactions. Google then aggregates all this personal data to allow marketers to target ads directly to that person wherever they may happen to be on the web or on their phone. Google collects even more personal data from seemingly innocuous data points (such as IP addresses, email, and age) from consumers directly or from public sources. And it gathers still more personal data from third-party websites that use its software products, such as Google Analytics, or that run ads placed through Google-controlled exchanges. These insights can reveal a person's voting intentions, religious beliefs, sexual orientation, or health conditions, even when an individual never intended to provide such information to anyone.

To fortify its dominance, Google also acquired many other component pieces of the technical infrastructure, known as "ad tech," on which surveillance advertising is bought and sold.[91] In addition to DoubleClick, it purchased other companies that controlled the servers most publishers use to list the ad space they want to sell, as well as the servers used by most advertisers to list the ad space they wish to buy.

Google's control over ad tech market exchanges means it occupies a strategic choke point between publishers and advertisers that is uses to extract monopoly rents and to preference its own advertising and editorial products. But that is hardly the only measure of Google's dominance. No newspapers or magazines, nor even the largest publishing, broadcasting, telecom, or cable companies, can ever know as much about its own customers as Google does. Its only real rival in surveillance advertising until recently was Facebook, which tracks users across the various platforms it controls (including such giants as Facebook Messenger, Instagram, and WhatsApp), as well as across the wider open web through websites embedded with Facebook buttons.

Google's position, combined with its surveillance business model, has proven enormously profitable. According to a study by the United Kingdom's Competition and Markets Authority, by 2020 Google controlled a dominant position—as high as 90 percent—in every layer of the ad tech market.[92] In 2021, control of ad tech infrastructure combined with its vast troves of surveillance data allowed Google's holding company, known as Alphabet, to collect $218 billion in advertising sales, or more than 44 percent of all the money spent in the world that year on digital advertising.[93]

Facebook's business model is different from Google's in that it does not sell ad space on third-party publications, but only on platforms it owns. But like Google, it also controls its own ad tech exchanges on which advertisers bid against each other to buy the right to advertise on Facebook. According to lawsuits brought by the Federal Trade Commission and several state attorneys general, Facebook has engaged in unfair and illegal practices to impede the growth of would-be rivals, such as bundling products and engaging in exclusionary contracts.[94]

In 2021, Facebook (which renamed itself Meta that year) leveraged its troves of data, powers of surveillance, and control of ad tech infrastructure to collect $115 billion in advertising revenue.[95] This amounted to more than 23 percent of all worldwide spending on digital advertising and has helped it maintain its place among the most valuable companies in the world.[96]

In recent years, Amazon has been muscling into the surveillance advertising business as well and now offers marketers access to consumer data beyond even what Meta and Google can capture and resell. Amazon has long made money by allowing merchants to advertise on its Marketplace platform. For a price, Amazon will display an ad for a specific merchant's product whenever a Marketplace user types a specific term into the Marketplace search bar.

In recent years, however, Amazon has moved far beyond simple ad sales with a new product known as Demand Side Platform (DSP). It operates like Google's surveillance advertising program, yet with even better sales data on how much individual consumers are able and willing to pay for products, mostly gleaned from spying on visitors to Amazon's Marketplace site and other properties it owns.[97]

Through Amazon's DSP infrastructure, marketers can target individual consumers as they visit sites across the internet, including Amazon-owned Prime Video, Kindle, FireTV, and Amazon Music, to name a few. Since Amazon also has a nearly 60 percent market share in e-commerce sales, nobody knows more than it does about what consumers actually spend for different products online.[98] In 2021, according to its annual report, Amazon collected $31 billion in revenue from "advertising services to sellers, vendors, publishers, authors, and others, through programs such as sponsored ads, display, and video advertising."[99]

Amazon's power extends further yet thorough its Amazon Web Services division, which dominates cloud computing. Leading news publications, such as *The Seattle Times*, as well other major media and entertainment companies, depend on AWS to host their digital content and production tools, and in the process give Amazon access to their private editorial and business side processes, even as Amazon competes against them for advertising sales.[100]

Altogether, Google, Facebook and Amazon collected nearly three quarters (74 percent) of all dollars spent globally on digital advertising in 2021. This is nearly half the total amount spent on all forms of advertising throughout the world that year.[101] Within the U.S. alone, the three corporations collect 90 percent of digital advertising revenues.[102][103]

HOW SURVEILLANCE ADVERTISING DESTROYS JOURNALISM

The rise of surveillance advertising has damaged journalism in four main ways: appropriation of ad revenue, theft of intellectual property, compromised editorial independence, and loss of diversity.

APPROPRIATION OF AD REVENUE

Much of the ad revenue newspapers and other traditional publishers have lost to Google, Facebook, and Amazon is, of course, due simply to new products and changing habits. There is only so much time in the day, and when people's attention is diverted to new sources of information and entertainment such as online maps and search engines, or Twitter and TikTok, advertisers naturally follow.

But much of the rerouting of advertising revenue away from journalism doesn't stem from new competition for attention. People still consume huge amounts of news every day even if they are now more likely to view it through their smartphones. North American adults on average spend 48 minutes a day consuming online news.[104] Advertisers pay huge sums of money trying to reach these news consumers, in no small measure because they tend to have higher than average discretionary income. But that money no longer goes directly to people who produce the journalism. Rather, it flows primarily through the Big Three platforms, which simply exploit their control of the platform to divert the funds into their own vaults.

Google claims that when its places an ad on an independent website, the publisher of the website keeps 69 percent of the revenue collected.[105] Even if that were true, it would mean that Google is collecting more than 30 cents of every advertising dollar it handles. That is 30 cents the publishers would be collecting themselves if Google had not inserted itself as a self-dealing middleman in ad tech markets it owns and controls.

In reality, Google exploits its position as Master-in-the-Middle to take far more than 30 percent of the ad revenue, as do both Facebook and Amazon. A study of the ad tech supply chain sponsored by an association of British publishers found that publishers get to keep only 51 percent of each advertising dollar, with the rest going to fees extracted by various middlemen, mostly Google and Facebook.[106] A study by *The Guardian* newspaper in the U.K. suggests that some 70 percent of the money spent by ad buyers is consumed by ad tech middlemen.[107]

Even this does not capture the full extent of the tax on journalism imposed by the platforms. Before Google, for example, if a marketer wanted to reach a person who read the *New Yorker*, it had to take out an ad in that magazine. But now this is no longer necessary. Today, Google surveillance technology allows a marketer to serve ads to a *New Yorker* subscriber on cheaper sites that Google knows the subscriber also visits. In this way, the marketer avoids having to help pay for the expensive quality journalism that attracts the *New Yorker*'s audience, while Google captures the majority of every one of these ad dollars.

Moreover, an alarming amount of the ad revenue the Big Three do share with publishers goes not to high-quality journalism, but to hyper-partisan and hate speech sites. According to a study by the Campaign for Accountability, in 2017 Google placed ads with hundreds of sites peddling hate speech and conspiracy theories whose ownership isn't even publicly known.[108] Similarly, the Campaign for Accountability's Tech Transparency Project recently found that when people type the names of 91 different white supremacy groups into Facebook's search engine, they get served ads from marketers ranging from the Coast Guard Foundation to the social shopping marketplace Poshmark and Walmart.[109] Google and Facebook have repeatedly promised that they are doing a better job at placing ads, but the problem continues and so does the damage to journalism. The money that marketers spend on these ads, often unwittingly, would most likely have gone to reputable publishers but for the role of Facebook's out-of-control surveillance advertising.

Both publishers and advertisers are hurt by this monopoly power in other ways as well. The cost for digital ad spots has continually gone up even as all identifiable metrics show that digital ads reach fewer eyeballs.[110] Moreover, the lack of third-party auditing has contributed to a huge amount of outright fraud, such as ads getting placed in fake publications and fueling content farms.[111] A study conducted by Adobe in 2018 concluded that about 28 percent of website traffic showed "non-human signals," indicating that it originated in automated scripts or in click farms. At one point, Facebook even claimed to reach 25 million more Americans than actually exist, according to the United States Census.[112]

One study predicted that the online advertising industry would lose $19 billion to click fraud in 2018—a loss of about $51 million per day. Some place this loss even higher. By one estimate, $1 of every $3 spent on digital advertising is lost to click fraud.[113] The full cost cannot be measured because, unlike in the days before the buying and selling of advertising became monopolized by digital platforms, there is no outside auditing to reveal who collects what advertising dollars, or even whether and where ads placed through Google, Facebook, or Amazon actually appeared. The harms inflicted on publishers and advertisers are ultimately passed on to society in the form of local news deserts and degraded reporting around the world as well as higher prices for goods.[114]

THEFT OF INTELLECTUAL PROPERTY

Compounding the loss of ad revenue experienced by producers of journalism is the theft of their intellectual property. Both Google and Meta attract eyeballs to their own properties in no small measure by offering users a way to access journalism and other editorial content produced by others, such as an article produced by a local newspaper that appears in a Facebook or Google news feed. But these platforms pay little if anything to help shoulder the cost of producing the content they appropriate. Though Google and Facebook may drive traffic toward news sites, the sites are not able to sufficiently monetize this traffic since the platforms control the digital advertising infrastructure with dominion over both ad placement and rates, as well as access to the audience.

This is a classic free-rider problem that publications and governments around the world have tried to remedy by various means. The first efforts focused on copyright violations in Google News, which organizes and presents a continuously updated stream of articles from around the world, operating in more than 140 countries. It typically lists articles with a headline, a thumbnail image,

> ***The harms inflicted on publishers, journalists, and advertisers by the monopolization of surveillance advertising are ultimately passed on to society in the form of local news deserts and degraded reporting around the world as well as higher prices for goods.***

and a snippet of text or summary of content, with a hyperlink that allows readers to click through to the article's host site. Copyright lawsuits filed by Agence France-Press in 2005 and the Associated Press in 2007 resulted in private settlements with undisclosed terms. Except for these wire services, most other publications continued to go uncompensated.[115]

Later came taxation and licensing strategies, including France's 2012 threat to apply levies on ad revenue earned from aggregated articles, and Germany's plan to require publishers be paid for snippets displayed in search results. In October 2014, Spain designed a copyright infringement law to tax Google for use of snippet summaries; in response, Google chose to shutter its news portal in Spain. Australia planned to follow Spain's lead, until Google's censorship caused news traffic to plummet so much that some news sites shuttered as well.[116]

In 2020, after a report found that Google, Facebook and YouTube collectively absorbed 80 percent of all advertising dollars spent in Australia,[117] the Australian Competition and Consumer Commission proposed limiting the market power of digital platforms by imposing a bargaining code that would levy significant fines should they fail to negotiate fair payments to publishers. This has resulted in Google and Facebook reluctantly agreeing to pay some $140 million ($200 million AUD) to Australian publications for the use of their content—an important but small victory in an otherwise losing war.[118] And it has prompted countries around the world from Canada and Brazil to India and South Africa to pursue similar efforts aimed at making platforms pay for the news they use, including more recently the use of news content to develop and train AI systems.[119]

LOSS OF DIVERSITY

Platform monopolies have also damaged journalism by effectively appropriating the role that diverse news editors used to play in influencing readers' attention. Nearly half of U.S. adults (47 percent) say they regularly get their news from Facebook or Instagram.[120] In many foreign countries, Facebook's control over the news environment is even higher.[121] Yet Facebook's voting stock is controlled by a single person, Mark Zuckerberg.

Meanwhile, just two individuals, Sergey Brin and Larry Page, control a majority of Google's voting stock, which gives these two men ultimate decision-making control over a corporation that controls the personalized news feeds of billions of human beings, including a plurality of the U.S. population. Google-owned YouTube alone is the most common regular source of news for Americans after Facebook, and the second most popular search engine.[122] Nearly two-thirds of Americans say they use search engines (mostly Google) as a means of finding news on topics that interest them,[123] while one in ten Americans report using Google News often.[124] One man, Elon Musk, controls the platform formerly known as Twitter and regularly uses it to amplify his own views and those of favorites while "deplatforming" those who express views he does not like.[125]

Such concentrated control over the flow of news and information is a huge problem for democracy. It is further exacerbated by two additional problematic features. Because their business model requires that they maximize viewers' "engagement," Google and Facebook abuse their algorithms and powers of personal surveillance to serve up content that reinforces readers' personal prejudices, deepening their internet addictions.[126][127]

Additional loss of diversity comes through the commodification of news that occurs as dominant platforms become the initial and primary means of accessing news articles. Publications no longer have direct relationships with readers and lose their brand equity as readers encounter their content simply as part of a flow of information from a social feed or search engine result. With consumers getting their news this way, no publication seems more trustworthy than another but rather just part of a mass of "content" published "online."

News media are also held hostage by the content moderation systems of these dominant tech platforms and the way they enforce, or don't, their terms of service.[128] Furthermore, poorly implemented techno-legal regimes like notice-and-takedown requirements and filtering have empowered wealthy and powerful individuals to intimidate and coerce platforms into shaping or removing coverage.[129]

All these factors come together to fuel the rapid growth of a post-truth news environment monopolized by just a handful of multi-billionaires and the destruction of legitimate journalism on an unprecedented scale. A quarter of all U.S. newspapers went out of business between 2005 and 2020 and the country is on track to lose a third by 2025. The number of news deserts, or communities that now have no original reporting of local issues whatsoever, in print or digitally, has grown to 1,800 from 1,300 over that same timeframe.[130] Especially hard hit are rural areas dominated by Republicans and low-income urban areas dominated by Democrats.[131]

At the same time, all these trends have fostered increasingly concentrated power among remaining elite-media legacy publications. Thirty years ago, flagship newspapers in cities like St. Louis, Boston, St. Petersburg, Los Angeles, and Chicago still played a major role in influencing elites and setting policy agenda, not only locally but nationally. Today, that power is largely monopolized by the *New York Times,* which is now edited for a global elite audience, followed distantly by *Washington Post* and *Wall Street Journal.*

LOSS OF EDITORIAL INDEPENDENCE/ FEAR OF DOMINATION

Most profoundly, platform monopolies have also damaged journalism by dominating the editorial and business decisions of publishers and journalists. Today, a very small number of very powerful people can cause whole publications to simply vanish from large swaths of the internet, and news organizations know this.

In 2018 *Wired*'s then editor-in-chief Nick Thompson and reporter Fred Vogelstein published a cover story critical of Facebook noting that "Every publisher knows that, at best, they are sharecroppers on Facebook's massive industrial farm [...] 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."[132]

More than a year later, in a second cover story on Facebook, Thompson and Vogelstein reported how shortly after their first article was published, *Wired's traffic from Facebook dropped by 90 percent and stayed there for four weeks, a confirmation to Wired's editors that they do indeed face domination—and other forms of political intimidation—by Facebook.*[133]

This relationship of dependency extends to individual journalists as well. After Elon Musk took over Twitter, for example, the accounts belonging to journalists who have covered Musk aggressively were abruptly and permanently suspended, including those of the *New York Times*' Ryan Mac, the *Washington Post*'s Drew Harwell, and CNN's Donie O'Sullivan.[134] While Musk rails against "cancel culture," he has also canceled the accounts of The Intercept's Micah Lee, and Mashable's Matt Binder, Aaron Rupar, and Tony Webster.[135]

The use of such power to censor and suppress individual publications and authors has two effects. One is that it gives the platforms the ability to extort additional funds from publications and other businesses in exchange for being allowed to reach their readers and customers. The other effect is political. As publishers and journalists learn that Google, Facebook, and other gatekeeper corporations are not only tracking their work, but will act to suppress that work, they become ever less willing to buck the power of these Masters-in-the-Middle.[136]

Beyond these forms of domination come another intimately interrelated threat to editorial independence: bribery parading as philanthropy.[137] Facebook in 2019 committed $300 million over three years to a variety of news-related initiatives, including groups that place journalists in local newsrooms,[138] then pledged $100

> ***Platform monopolies also damage journalism by dominating the editorial and business decisions of publishers and journalists. Today, a very small number of very powerful people can cause whole publications to simply vanish from large swaths of the internet, and news organizations know this.***

million more in 2020 as the pandemic decimated news advertising in its early months.[139] In October 2020, Google announced that it planned to pay publishers more than $1 billion over three years to launch its Google News Showcase.[140]

Skeptics deride such payments as efforts to stave off more aggressive regulation and to retain or even expand existing levels of power, control, and profitability. Google, for instance, launched the program immediately after the U.S. federal and state governments filed three antitrust cases against the corporation. And since then, Google's support to journalism outlets—and to other portions of the news ecosystem including fact-checking and journalist associations—has gone only to news organizations in countries where it is the target of antitrust actions.[141] The News Showcase platform itself actually increases Google's power to discriminate against publishers it does not favor, which is one reason why it has drawn scrutiny from German antitrust enforcers.[142]

Even more ominously Google and Facebook appear to be entering special contracts with select news organizations as a way of influencing their coverage. For example, an investigation by Dan Froomkin in the *Washington Monthly* has revealed that Facebook has been funneling money to the *New York Times*, the *Washington Post*, the *Wall Street Journal*, ABC News, *Bloomberg*, and other select paid partners since late 2019 under the cover of a feature called Facebook News. "Participating in Facebook News doesn't appear to deliver many new readers to outlets…," Froomkin writes. "What Facebook News does deliver—though to only a handful of high-profile news organizations of its choosing—is serious amounts of cash." *New York Times* CEO Mark Thompson told Froomkin that Facebook is paying the Times "far, far more" than $3 million a year—"very much so."[143]

Subsequent reporting by the *Wall Street Journal* found that Facebook had funneled average annual fees of just over $20 million to the *New York Times*, as well as $15 million to the *Washington Post*, and more than $10 million to the *Wall Street Journal* itself. Another article by the *Wall Street Journal* reported that Google has agreed to pay the *New York Times* around $100 million over three years. This reporting also made clear that Facebook also provided these publishers with the equivalent of millions of dollars in non-cash services. The *Times* deal with Google, according to the *Wall Street Journal*, also includes "content distribution and subscriptions, as well as using Google tools for marketing and ad-product experimentation."[144]

The *New York Times* has never officially commented on these relationships. This makes it entirely impossible for the public to understand whether, and to what degree, this conflict of interest affects how the *Times* covers these corporations, including for the government's multiple antitrust suits against Google.

Google and Facebook have also influenced coverage by spreading grants widely among smaller publications and professional organizations that often come to depend on them financially.[145] This extends even to organizations that are supposed to be fact-checking the vast flows of disinformation that appear on these platforms. Open Markets Institute senior fellow Nikki Usher has detailed how Facebook's Third-Party Fact-Checking Program was the largest source of revenue for the Poynter Institute's International Fact-Checking Network, making up roughly 43 percent of the members' total revenue.[146] A study by the Campaign for Accountability finds that Google grants tend to track with areas where it faces threat of regulation and therefore needs to invest most in improving its press coverage."[147]

These totals add up fast. Since 2018, Google and Facebook have emerged as the two biggest funders of journalism in the world. "The irony is hard to miss," notes Mathew Ingram in the *Columbia Journalism Review*. The surveillance advertising model cornered by Google and Facebook has “left many media companies and journalistic institutions in desperate need of a lifeline. Google and Facebook, meanwhile, are happy to oblige, flush with cash from their ongoing dominance of the digital ad market.”[148] The basic quid pro quo is that starving media organizations will quietly open their hands when Google and Facebook promise to restore some portion of these revenues to them in the form of under-the-table payouts.

Meanwhile, Amazon’s dominance over the media is amplified by founder Jeff Bezos’s ownership of the *Washington Post*, its foray into digital advertising, and its infrastructural technology. While Bezos’s resources have allowed the Post to expand its newsroom and cover many stories aggressively, it is incapable as an institution of reporting critically on issues related to Amazon or on corporate monopoly more generally without being compromised by at least the appearance of conflict of interest. Bezos has further leveraged his power over the media by also controlling the key digital content management system, known as Arc XP, that serves as the digital backbone of many major American newspapers, including *The Boston Globe*, *The Philadelphia Inquirer*, and the Tribune Publishing chain.[149] Meanwhile, as previously mentioned, leading newspapers, such as *The Seattle Times*, as well other major media and entertainment companies, depend on Amazon’s Web Services to host their digital content and production tools.[150]

So, today’s journalists are indeed sharecroppers or surfs in a very real way, beholden for their livelihood on the sufferance of a small number of powerful overlords. The ultimate result is terrifying for democracy. Today, platform monopolies credibly threatened to cut off whole nations from the work of their own domestic new organizations, as Google and Meta most recently did when they blocked all Canadian news content from their platforms in retaliation for the Canadian government having dared to pass a law Google disapproved of.[151]

> ***A surveillance advertising model that combines Big Data with profit maximization makes possible a new kind of personal discrimination: the ability to set different undisclosed prices and terms of service for each individual customer based on surveillance of his or her personal data.***

Australia and the state of California have been similarly threatened in recent years.

THE POLITICAL PROBLEM OF DISCRIMINATION AND MANIPULATION

Beyond the damage done directly to journalism, the surveillance advertising model that now dominates the internet has brought many other societal harms. Prime among these is the facilitation of new forms of personal discrimination.

One example brought to light by independent investigations and court settlements is Facebook’s practice of allowing landlords to target housing ads to whites only and exclude African-Americans, Jews, and Spanish speakers from seeing them.[152] Indeed, because the algorithms used by Facebook and other platforms depend on putative correlations between specific personal behaviors and membership in specific demographic categories, it may be impossible to prevent any form of surveillance advertising from having an outsized impact on marginalized groups.[153]

Perhaps more fundamentally, surveillance advertising gives the communications platforms and a few other large online sellers the ability to engage in individual price discrimination, or as it is more politely known these days, "personalized pricing," in ways that undermine fundamental democratic rights and equality of opportunity. The ability to set different prices and terms of service for different consumers, based on their willingness and ability to pay, or simply the time available to them to shop around, has long been the holy grail of marketing. When perfectly executed, it means that sellers never leave any money on the table and that buyers never get what economists call a consumer surplus, otherwise known as a "good deal." As Andrew Odlyzko, the former head of the University of Minnesota's Digital Technology Center, observed nearly 20 years ago, "The powerful movement to reduce privacy that is coming from the private sector is motivated by the incentives to price discriminate, to charge different prices to various customers for the same goods or services."[154]

As noted earlier, the requirement that owners of essential infrastructure provide the same service at the same price to all comers dates to long before the founding of the United States. The only partial exception was the ability to charge different *classes* of customers different publicly posted prices, such as a uniformly lower price for all students or all seniors. But a surveillance advertising model that combines Big Data with profit maximization makes possible something different in kind: the ability to set different undisclosed prices and terms of service for each individual customer based on surveillance of his or her personal data.[155] [156]

Hal Varian, an economics professor at UC Berkeley who became Google's chief economist, did pioneering work in describing how digital platforms could be exploited to achieve this end. "The rapid advance in information technology now makes it feasible for sellers to condition their price offers on consumers' prior purchase behavior," Varian and a co-author wrote in 2001. "In this paper we examine when it is profitable to engage in this form of price discrimination."[157]

In some cases, large retailers have used data gleaned from their own websites to engage in price discrimination. For example, a *Wall Street Journal* investigation in 2012 found that Staples and Home Depot consistently adjusted prices and displayed different products on their website based on surveillance of users' personal data, such as location and purchase history. But large digital platforms such as Google, Facebook, or Amazon have access to far more personal data, and therefore have a correspondingly greater ability to engage in price discrimination.

Amazon's earliest efforts included charging some Marketplace buyers 20 percent more (and in some cases 166 percent more) than other buyers for the same Kindle e-book based on the buyer's location.[158] But Amazon soon learned how to profit from discrimination against Marketplace sellers as well. A 2016 ProPublica investigation, revealed that when consumers entered Amazon's virtual mall and searched for the best deal on Loctite Super Glue, the platform would prominently display offers available directly from Amazon rather than those offered by highly rated merchants who were selling the same glue for less.[159] Merchants who hope for a better deal pay for enhanced product placement, advertising, or search engine optimization. And because Amazon is effectively able to view the cash registers of the merchants on its Marketplace, it has deep knowledge of just how much they can afford. Today, as previously discussed, Amazon is expanding its powers of discrimination across the entire world of e-commerce through its expansion into the ad tech markets.

Even more directly threatening to social cohesion, the same systems of personalized surveillance and manipulation have also empowered malevolent actors to discriminate among individuals in the political messages they receive. As a study by research center Data & Society concluded, "Today's digital advertising infrastructure ... creates disturbing new opportunities for political manipulation and other forms of antidemocratic strategic communication."[160]

More fundamental yet, these systems of personalized surveillance and manipulation are part of an overall business model that leads these powerful Masters-in-the-Middle to engage in still more socially destructive behaviors. This includes suppressing, amplifying, and distorting the flow of information between individuals in order to maximize each person's "engagement" with their particular platform and hence, the advertising services that provide their profits.[161] This results in a variety of harms, including less time and ability to seek out a user's own sources of information; being served tailored content that tends to reinforce preexisting obsessions or inflame preexisting prejudices; and a broader collapse of the ability of members of the same communities to communicate with one another based on a shared sense of reality.[162]

The model also leaves journalists, essayists, authors, filmmakers, musicians, and other creators and speakers unable to reach the public except through portals controlled by these giant corporations, always unfairly, often capriciously, and sometimes maliciously.[163] When combined with its destructive effects on the business model for independent journalism, our monopolized and degraded information environment poses the gravest threat to the world's democracies since the Second World War.

CHAPTER 5: SOLUTIONS

Today's broken information environment is not the result of inherent features of the internet or of digital technologies more generally. Rather, the crisis largely derives from wide-ranging policy failures that have occurred mainly since the early 1980s. These include repeal or abandonment of regulations and antitrust enforcement that Americans historically used to ensure fair competition and diversity in media and communications markets and to structure them toward public purposes. They also include the failure to extend such policies to the governance of the new digital technologies that have emerged over the last generation.

No single bill or new regulation can repair the damage done to our information environment or our democracy by these policy failures. But through a broad and integrated program of reform, it is certainly possible to restructure media and communications markets in ways that will protect, preserve, and ultimately enhance the functioning of American democracy. In some cases, new laws will help speed the process. But reform can be achieved in large measure simply by enforcing antitrust laws and other market-structuring laws still on the books.

PRINCIPLES OF REFORM

A program of reform should be informed by three broad principles.

- First, we must use government to protect and promote free speech and the free press. To expect private corporations and powerful private individuals to do this job for us, in ways that protect democracy and individual liberty, violates reason, experience, and more than two centuries of practice.

- Second, we must impose systems of non-discrimination—or neutrality—on all infrastructural communications platforms to prevent these essential intermediaries from interfering with open and democratic journalism, communications, debate, and commerce. This means replacing the present advertising-supported business models for such platforms with fee-for-service models based on uniform and fully transparent pricing and terms of service.

- Third, we must carefully rebuild the open market structures where publishers and advertisers can interact directly, without interference from the online communications and commercial platforms on which they rely to reach readers and the customers for their products and services.

REFORM PROPOSALS

The three principles listed above can be put into practice through a combination of the following policies:

I. Ban Discrimination by Making Platforms Subject to Common Carriage Laws.

As we have seen, enforcement of a longstanding body of law and regulation once promised broadly equal access to essential communications infrastructure. Our failure to enforce these policies over the last 40 years is a root cause of our broken information environment. It is as if the old Ma Bell monopoly were free to listen to, censor, and overwise control what phone messages its customers sent and received while also being shielded from liability when it knowingly transmitted telephone scams, libels, and other forms of illegal speech across its wires.

A necessary, albeit not sufficient, reform is for law enforcers to make clear that a legal shield for third-party

Restoring the business model for independent journalism can be achieved in large measure simply by enforcing antitrust laws and other market-structuring laws still on the books.

content applies only to corporations that operate as neutral, licensed utilities subject to common carriage principles. Such utilities can properly enforce broad terms of service, just as common carriers like railroads may legally refuse to carry highly explosive materials, or airlines may legally refuse to serve drunken, armed, or disorderly passengers. But such terms of service must be publicly disclosed in advance and cannot single out individuals for special treatment or arbitrarily discriminate among different groups, or classes of users.

The practical effect of such a reform would be to force companies like Google and Facebook, as well as other digital platforms, to operate as common carriers or not. This approach would allow these corporations to retain their legal shield for third-party content, but only if they stopped engaging in all arbitrary personalized discrimination. This would include discrimination in who gets to post what messages and, just as significantly, in who gets to see what content. This would also force them to abandon surveillance advertising and any other business model that involves the use of personal data and algorithms to discriminate in the information, services, and prices delivered to individual people.

The simplest and most straightforward way to move toward these goals would be for the Federal Trade Commission and/or the Federal Communications Commission to assert their full authority to regulate the terms of service and pricing behaviors of these platform monopolists. This is essentially what the FCC did to internet service providers in 2015 with its Open Internet Order, only in that case it applied the principle to physical, as opposed to virtual infrastructure.[164] Furthermore, the FTC could restrict much surveillance advertising just by evoking its broad authority, under Section 5 of its enabling legislation, to restrict unfair methods of competition.[165]

As Al Franken observed in 2017 during his service as a U.S. senator, "No one company should have the power to pick and choose which content reaches consumers and which doesn't. And Facebook, Google, and Amazon—like ISPs—should be 'neutral' in their treatment of the flow of lawful information and commerce on their platforms." [166]

II. Restore Structural Separation between Communications Networks and Lines of Business that Depend on Their Platforms—Especially Publishing

As we have seen, for most of the history of the United States, Americans enforced a strict and thoughtful separation of ownership between adjacent businesses. This includes communications infrastructure companies and firms engaged in journalism and advertising.

But as we saw in Chapter 3, libertarian attacks on regulation and antitrust enforcement, combined with liability exemptions for internet platforms created by Section 230, dismantled this carefully balanced policy regime. Separations between communications utilities and publishers were allowed to collapse.[167] Minimally, law enforcers should use existing antitrust law to dismantle common ownership of corporations engaged in content creation and corporations engaged in the provision of essential online communications and commercial infrastructure, in much the same way the antitrust laws were long used to ensure that railroads focused solely on providing transportation services and AT&T focused solely on providing phone service.[168]

This means, bluntly, that enforcers should seek to keep all owners of essential infrastructure, including Amazon, Facebook, and other digital platforms, out of adjacent lines of business. This should include control of businesses that are horizontally adjacent, such as when Facebook purchased the rival social media platform Instagram. And it should include control of businesses that are vertically adjacent, such as Google's takeover of the ad tech firm DoubleClick.

Fortunately, this is essentially the strategy that is already being adopted by law enforcers in the United States and around much of the world. In Washington, D.C., for instance, the Department of Justice is suing Google to break up its control of digital advertising markets[169] and dominance in search engines,[170] while the FTC has charged Meta with illegal acquisitions of key competitors.[171] Similar antitrust suits against the platform monopolies have also been filed by the European Commission, the United Kingdom's Competition and Markets Authority, and regulators in Germany, Korea, India, and elsewhere.[172]

New legislation is also playing an increasingly helpful role in empowering enforcers and persuading the courts to enforce traditional structural separations between adjacent lines of business. Examples include the European Union's Digital Markets Act, which limits self-dealing and surveillance by platforms,[173] and the Data Act, which limits the power of platforms by giving individuals and businesses more control over how their data is used by third parties.[174]

> ***New legislation is also playing an increasingly helpful role in empowering enforcers and persuading the courts to enforce traditional structural separations between adjacent lines of business.***

In the United States a bipartisan proposal before Congress would target the end-to-end control that Big Tech platforms have in intermediating ad sales for news publishers.[175] The Advertising Middlemen Endangering Rigorous Internet Competition Accountability (AMERICA) Act prohibits the largest tech companies from operating in multiple parts of the ad tech stack and bans them from owning more than one part of the digital ad ecosystem, similar to the restrictions imposed on trading in the financial sector. Meanwhile, the American Innovation and Choice Online Act, would empower gfederal antitrust agencies the authority to issue civil penalties against platforms that engage in discrimination, self-dealing, and misuse of personal data.[176]

III. Additional Measures for Rebuilding an Open and Competitive Market for Advertising

Enforcing principles of non-discrimination and structural separation will disrupt much of the foundation upon which Google and other platform monopolies have built their politically dangerous and socially and economically destructive business models. But other policy levers can also be used to reenforce and accelerate such efforts. These include:

Pass the Banning Surveillance Advertising Act

Reps. Anna G. Eshoo of California and Jan Schakowsky of Illinois, joined by Sen. Cory Booker of New Jersey, have introduced legislation that would do just that. In the words of an accompanying press release, the bill "prohibits advertising networks and facilitators from using personal data to target advertisements." The bill also "prohibits advertisers from targeting ads based on protected class information, such as race, gender, and religion, and personal data purchased from data brokers." Advertisers could still target ads based on geographic location or the context, such as searching a specific term in a search engine.[177]

Enact an Amended American Data Privacy and Protection Act (ADPPA)

Based on laws already in place in Europe and California, this proposed federal legislation does not ban surveillance advertising *per se* but requires companies to provide a clear way to opt out from receiving tracking-based ads. An even better solution would be to require that the default be set so that users have to give their proactive consent, or "opt in," before their data can be monetized or traded by third parties.

Enable Cooperative Among Publishers in Negotiating with Platforms

Though more fundamental reforms are needed to restore the advertising-based business model for journalism, it is increasingly urgent that news publishers in the near term be able to demand fair compensation for the use of their content. This is especially true as platforms increasingly allow users to read news articles without clicking on the original source and as AI companies scrape vast amounts of copyrighted content from news outlets. The bipartisan Journalism Competition and Preservation Act (JCPA) currently being debated in Congress would help by allowing publishers to collectively negotiate remuneration with Big Tech firms without fear of being prosecuted for illegal collusion.

Similarly, the California Journalism Preservation Act would require large tech platforms like Google and Meta to pay news publishers in California a fee for using their content.[178] Unlike the JCPA, which allows news publishers to form "joint negotiation entities," the California bill sets specific arbitration periods where platforms are compelled to negotiate with all newsrooms that give notice of their right to receive compensation.

By allowing publishers to collectively bargain without violating antitrust laws and/or by requiring designated platforms to negotiate for the use of news snippets or the use of news content in AI systems, these bills help reconfigure the playing field so that even small publishers can benefit.

CONCLUSION

None of the policies taken by themselves are sufficient to fix our broken information environment. But in combination, they can significantly address the threats to freedom speech and of the press posed by monopolists. And in so doing, they can significantly improve our chances of keeping—and even in key ways, improving—our democratic republic.

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