AN "ESSENTIAL" SOLUTION: REWORKING THE ESSENTIAL FACILITIES DOCTRINE TO ADDRESS BIG TECH'S HARM TO THE MARKETPLACE OF IDEAS

Kaleb Byars[*]

INTRODUCTION 265
I. THE MARKETPLACE OF IDEAS, GOOGLE, AND BIG TECH'S THREAT TO THE MARKETPLACE OF IDEAS 270
A. Google's Business Model and Monopoly Power 270
1. Google's Market Share and the Role of Network Effects 271
2. Google's Business Model and Policies 274
B. Marketplace of Ideas – Historical Importance and Its Home on the Internet Today 278
C. Big Tech's Harms to the Marketplace of Ideas 281
1. Government Criticism of Big Tech Censorship . 281
2. Big Tech's Direct Harm to the Marketplace of Ideas: Affirmatively Shaping Discourse 284
3. Big Tech's Direct Harm to the Marketplace of Ideas: Examples of Censorship 286
4. Big Tech's Indirect Harm to the Marketplace of Ideas: Dying Alternative Sources of News 290
II. MONOPOLIZATION LAW AND ITS FAILURE TO COMBAT MARKETPLACE OF IDEAS HARM IN THE BIG TECH CONTEXT 294

[*] Judicial Law Clerk | Juris Doctor (Class of 2021), University of Tennessee College of Law, Editor-in-Chief of the *Tennessee Law Review* | Bachelor of Science in Business Administration: Economics and Finance, University of Tennessee at Martin (Class of 2018). The author expresses sincere and special thanks to Professor Maurice Stucke for unwavering guidance and support throughout this Article's formation. The author also expresses thanks to the members of the *Mississippi Law Journal* for their outstanding editing support, including Cody Austin, Ally Avant, Mary Anna Brand, C.J. Coleman, Kelsey Davis, Chatham Deprospo, Christian Eaves, Jack Hall, Jacob Hamm, Dallas Martin, Jack McDonald, Marianna Nichols, MaryScott Polk, Lynette Potter, Ashley Pruitt, Matti Reightler, Mackinlee Rogers, Claire Scott, Evan Thomas, Elise Tucker, and Garner Vance. The views expressed in this Article are the author's alone.

A. Monopolization Principles Inside and Outside the Digital Platform Context *295*
B. Why Modern Antitrust and Other Law Insufficiently Combats Big Tech's Harm to the Marketplace of Ideas *301*
1. Modern Antitrust Law's Failure to Protect the Marketplace of Ideas........ 301
a. Traditional Focus on the Price-Centric Consumer Welfare Standard Versus Other Indicators of Competition *301*
b. Section 2's Willful Maintenance Requirement *304*
2. Other Law's Failure to Protect the Marketplace of Ideas 305
III. A SUGGESTED SOLUTION: A CALL FOR A REWORKED ESSENTIAL FACILITIES DOCTRINE FRAMEWORK TO ADDRESS BIG TECH'S THREAT TO THE MARKETPLACE OF IDEAS..... 306
A. Marketplace of Ideas Harm as Cognizable Antitrust Harm........ *307*
B. The Call for Antitrust Law to Address Big Tech Censorship *311*
C. A Modified Essential Facilities Doctrine as a Solution to Big Tech Censorship and Marketplace of Ideas Harm *312*
1. Essential Facilities Doctrine Background.......... 312
2. The Proposed Framework: A Reworked Essential Facilities Doctrine........ 315
3. Case Application: Google........ 319
4. Anticipated Counterarguments 322
a. Why Can't Censored Publishers Simply Access the Marketplace of Ideas by Other Means?............ *322*
b. Isn't the Essential Facilities Doctrine a Dead Letter After Trinko *and Scholars Repudiating It?*. *325*
c. Don't Some Viewpoints Deserve to Be Censored Because They Add Little Value to the Marketplace of Ideas?........ *326*
d. What About the Freedom of Expression of Big Tech?........ *328*
e. What About the Willful Maintenance Requirement? *329*
CONCLUSION 331

INTRODUCTION

> *"Our mission is to organize the world's information and make it universally accessible and useful."*[1]

Google's mission statement is undoubtedly altruistic. The Internet overflows with information, and users could not navigate the Internet if an entity did not logically organize that information. On the other hand, should democratic societies accept the convenience that Google and the other Big Tech[2] firms provide if that convenience impairs the marketplace of ideas?[3]

Big Tech censorship is at the forefront of current news and congressional consideration.[4] At both ends of the political spectrum, parties agree Big Tech censorship harms the marketplace of ideas. Republican congresspersons argue Big Tech supports liberal ideas and censors conservative voices, websites, and advertisements. Democratic congresspersons argue the contrapositive. Both parties express dissatisfaction with fake news and disinformation campaigns. Likewise, both parties recognize the detrimental impact mass extinction of alternative media sources has had on the marketplace of ideas.[5]

Yet traditional antitrust principles and enforcement fail to address these issues. While Big Tech has seen its fair share of antitrust litigation,[6] to date, no serious prosecution of the Big Tech

---

[1] *About*, GOOGLE, https://about.google/ [https://perma.cc/47CT-D9QP] (last visited Nov. 3, 2021) (emphasis added).

[2] For purposes of this Article, "Big Tech" refers to digital platforms with monopoly power that provide information products. "Information products" are products consumers use to access online information.

[3] This Article focuses particularly on harm to the marketplace of ideas as it relates to political speech. Of course, this Article recognizes Big Tech has also manipulated commercial speech and addresses those instances where relevant.

[4] *See How to Deal with Free Speech on Social Media*, ECONOMIST (Oct. 22, 2020), https://www.economist.com/leaders/2020/10/22/how-to-deal-with-free-speech-on-social-media [https://perma.cc/BUJ8-GNGB].

[5] *See infra* Section I.C.

[6] *See, e.g.*, Commission Decision of June 27, 2017 Relating to Proceedings Under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area (Case AT.39740 - Google Search (Shopping)) (EU) [hereinafter Google Search (Shopping)], https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf [https://perma.cc/D4TM-TV2C]; Bundeskartellamt [BKartA] [Federal Cartel Office] Feb. 6, 2019 (Ger.) [hereinafter Bundeskartellamt Facebook Decision], https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Miss

firms has attacked Big Tech's viewpoint-based censorship of ideas. Even the United States and eleven states' most recent antitrust enforcement action against Google filed in October 2020 and separate state actions led by Colorado and Texas filed in December 2020 fail to recognize antitrust principles should address censorship.[7] Instead, these actions rely "solely on traditional antitrust principles and [are] aimed at promoting consumer welfare through robust competition."[8] Likewise, while the Federal Trade Commission ("FTC") and states filed antitrust complaints against Facebook in December 2020,[9] their actions, too, failed to address Big Tech censorship.[10]

Part of the dilemma is that antitrust laws have traditionally focused on remedying harm to price and output in markets.[11] This Article argues, like many others,[12] and as antitrust agencies have at times recognized,[13] a broader definition of antitrust harm is indeed the correct one. This Article does not purport to establish a universal test for determining what harm is antitrust harm.

brauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5 [https://perma.cc/92NK-722R].

[7] *See generally* Complaint, United States v. Google LLC, No. 20-CV-3010 (D.D.C. Oct. 20, 2020), 2020 WL 6152114 [hereinafter DOJ Google Complaint]; Complaint, Colorado v. Google LLC, No. 20-CV-03715 (D.D.C. Dec. 17, 2020), 2020 WL 7405690 [hereinafter Colorado Google Complaint]; Complaint, Texas v. Google LLC, No. 20-CV-957 (E.D. Tex. Dec. 16, 2020), 2020 WL 7382404 [hereinafter Texas Google Complaint].

[8] Press Release, William P. Barr, Att'y Gen., U.S. Dep't of Just., Statement of the Attorney General on the Announcement of Civil Antitrust Lawsuit Filed Against Google (Oct. 20, 2020), https://www.justice.gov/opa/pr/statement-attorney-general-announcement-civil-antitrust-lawsuit-filed-against-google [https://perma.cc/G229-6HMV].

[9] *See generally* Complaint for Injunctive and Other Equitable Relief, Fed. Trade Comm'n v. Facebook, Inc., No. 20-CV-3590 (D.D.C. Dec. 9, 2020) [hereinafter FTC Facebook Complaint]; Complaint, New York v. Facebook, Inc., No. 20-CV-3589 (D.D.C. Dec. 9, 2020), 2020 WL 7348667 [hereinafter New York Facebook Complaint].

[10] *See generally* FTC Facebook Complaint, *supra* note 9.

[11] *See* United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956) ("Monopoly power is the power to control prices or exclude competition.").

[12] *See, e.g.*, Maurice E. Stucke & Allen P. Grunes, *Toward a Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies That Support the Media Sector's Unique Role in Our Democracy*, 42 CONN. L. REV. 101, 140 (2009) ("It is well accepted . . . that price is not the sole measure of competition."). *See generally* John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191 (2008).

[13] *See, e.g.*, FTC Facebook Complaint, *supra* note 9, at 47-49; DOJ Google Complaint, *supra* note 7, at 53.

Instead, it merely recognizes that harm to the marketplace of ideas harms bedrock benefits that flow from competitive markets (e.g., consumer choice, quality products, innovation) and thus is antitrust harm itself. And because harm to the marketplace of ideas is antitrust harm in this context, the consumer welfare standard is unnecessary when a plaintiff can show that a monopolist has caused harm to the marketplace of ideas. Fundamentally, Big Tech information products for consumers are predominantly zero-price, and therefore, considering price under the price-centric consumer welfare standard is uninformative.[14]

True, the recently-filed actions against Google and Facebook and precedent correctly embrace a broader definition of antitrust harm, considering harm to consumer choice, quality products, privacy, and innovation in addition to price and output.[15] But these actions fail to address Big Tech censorship using this broader definition. Moreover, it is questionable whether censorship itself is even remediable by antitrust law as it currently sits. This is so because one may argue that when a Big Tech firm censors a user or advertiser, its conduct is not actionable under monopolization law because the firm is not willfully acquiring or maintaining a monopoly in the market in which the firm itself competes. This Article shows that in the digital platform context, censorship is akin to willful maintenance of a monopoly because censorship prevents the censored entity from competing against the monopolist directly, and even if not, censorship permits the development of monopolies in collateral markets by preventing the censored entity from competing in those markets. Furthermore, even lacking willful maintenance, this Article argues that censorship should still be actionable under antitrust law because censorship of protected speech has significant anticompetitive effects.

Antitrust law should recognize that when Big Tech firms censor viewpoints using their information products, they harm competition by impeding the marketplace of ideas. Under First Amendment free expression theory, information products like those produced by Big Tech must present alternative viewpoints if they are to be of optimal quality. This is so because the marketplace of

---

[14] *See infra* Section II.B.

[15] *See* FTC Facebook Complaint, *supra* note 9, at 47-49; DOJ Google Complaint, *supra* note 7, at 53.

ideas rationale underlying the First Amendment recognizes that individuals may discover the greatest idea only through measuring it against all other ideas.[16] Thus, by censoring content and thereby decreasing access to viewpoints, Big Tech necessarily degrades the quality of its products, causing antitrust harm. Product degradation is only one anticompetitive effect of censorship, of course. Furthermore, because improper censorship causes antitrust harm, antitrust law is particularly suited to address censorship.

Considering harm to the marketplace of ideas as antitrust harm in the information products context, Congress or the courts should adopt a new antitrust framework that will unencumber the marketplace of ideas and provide a voice to those whose speech Big Tech suppresses. A fervently-contested doctrine—the essential facilities doctrine—provides a useful model. This Article posits that a modified essential facilities doctrine focusing on censorship will permit plaintiffs to recover from Big Tech for speech suppression. The benefit is that these plaintiffs can mitigate Big Tech's power to interfere with the marketplace of ideas.

In light of the recent scrutiny of Big Tech and actions against Google and Facebook, this Article's solution is timely and relevant. It is even more timely in light of calls by both sides of the political aisle to cease Big Tech censorship and as compounding evidence of suppression surfaces. Furthermore, the Big Tech censorship problem is not likely to ameliorate itself. The current suits against Big Tech focus on acquisitions and exclusionary restraints.[17] Even if the antitrust agencies obtain the relief they seek—enjoining Google and Facebook from entering future anticompetitive combinations or agreements, undoing past agreements, or even forcing the Big Tech firms to reorganize[18]—Big Tech suppression will persist. The modern Big Tech firms may rise from these actions still possessing monopoly power they may use to continue to suppress speech. Otherwise, the next Google or Facebook may acquire monopoly power it can use to engage in censorship. The only way antitrust law can permanently combat censorship is to tackle

[16] *See infra* Section I.B.

[17] *See* FTC Facebook Complaint, *supra* note 9, at 3-7; DOJ Google Complaint, *supra* note 7, at 36-37.

[18] *See* FTC Facebook Complaint, *supra* note 9, at 51-52; DOJ Google Complaint, *supra* note 7, at 57-58.

it directly. Adopting the essential facilities framework this Article provides is a step in the correct direction.

This Introduction has introduced the topic of this Article and provided its general thesis. This Article proceeds as follows: Part I explains the problem this Article seeks to address in more detail. Big Tech censorship has significantly impaired the marketplace of ideas. Today, the marketplace of ideas exists online, primarily on the Big Tech platforms. Yet rather than hosting platforms hospitable to the marketplace of ideas, Big Tech has continuously censored and affirmatively shaped ideas. At the same time, Big Tech has eradicated alternative sources of news and ideas. Thus, Part I provides alleged and verified examples of Big Tech's censorship, and it demonstrates how this censorship reflects Big Tech firms' monopoly power and constitutes anticompetitive conduct.

Ordinarily, when a monopoly engages in anticompetitive conduct, the legal vehicle is antitrust law. Therefore, Part II considers modern antitrust principles. It describes monopolization law in the United States inside and outside the Big Tech context, and it discusses the approaches of international competition authorities where relevant. However, modern antitrust law and enforcement insufficiently deter Big Tech's censorship, primarily because *Grinnell* requires that a monopolist willfully acquire or maintain its monopoly for liability under Section 2 of the Sherman Act to attach.

Part III provides this Article's thesis. Harm to the marketplace of ideas is antitrust harm, at least insofar as digital markets that offer information products are concerned. Scholars and congresspersons advocate for antitrust law to rein in Big Tech censorship using the essential facilities doctrine. Accordingly, this Article provides a novel essential facilities doctrine framework that courts or Congress may adopt to deter firms from stifling the marketplace of ideas, and it applies Google's case to the proposed framework to illustrate its validity. Finally, Part III addresses anticipated counterarguments.

I. THE MARKETPLACE OF IDEAS, GOOGLE, AND BIG TECH'S THREAT TO THE MARKETPLACE OF IDEAS

This Part establishes that Big Tech's actions have harmed the marketplace of ideas. Section I.A explains that Google possesses monopoly power in the general Internet search and general search advertising markets. It further recognizes that barriers to entry in these markets render Google's monopoly power durable and unlikely to dwindle on its own. Section I.A also describes that Google's business model is multi-sided, and it notes that Google's algorithms and policies empower it to hamper the marketplace of ideas. An understanding of Google's business model is necessary to appreciate the case analysis in Section III.C.3.

From there, Section I.B describes the extreme importance of the marketplace of ideas in democratic societies. Since the framing, the marketplace of ideas has shifted from the public sidewalk to the Internet. Today, Big Tech plays the key role of gatekeeper to the marketplace of ideas because most members of society share their opinions and receive their news from Big Tech's platforms.

Finally, Section I.C demonstrates that Big Tech firms, particularly Google, have used their monopoly power, algorithms, and policies to hamper rather than promote the marketplace of ideas. Both sides of the political aisle highlight instances of Big Tech's suppression. There are numerous examples of Big Tech not only censoring content but also affirmatively shaping individuals' feelings and beliefs. Even more, Big Tech has used its power to cripple alternative news outlets' ability to compete, as demonstrated by the dying newspaper and print media industries.

A. Google's Business Model and Monopoly Power

Section I.A.1 demonstrates that Google is a powerhouse in the general Internet search and online search advertising markets, and it identifies reasons that Google's monopoly power is unlikely to dwindle by market forces alone. Specifically, it discusses Google's monopoly power in these markets, and it explains that these markets are characterized by significant barriers to entry that reinforce Google's monopoly power. Section I.A.2 describes how Google's business model and policies empower it to hamper the marketplace of ideas.

1. Google's Market Share and the Role of Network Effects

Google possesses monopoly power in the general Internet search and online search advertising markets. Over the past decade, Google has held a 90% market share worldwide in general Internet search through use of its zero-price products, including Google Search.[19] In several nations, Google controls nearly 100% of the general Internet search market.[20] On mobile devices specifically, about 95% of all searches occur on Google Search.[21] Google has an equally-substantial market share in general search advertising.[22]

While Google earned its monopoly power by "bec[oming] the darling of Silicon Valley as a scrappy startup with an innovative

---

[19] *See* COMPETITION & MKTS. AUTH., ONLINE PLATFORMS AND DIGITAL ADVERTISING: MARKET STUDY FINAL REPORT 10, 80-81 (2020) (noting Google's market share in the United Kingdom for general Internet search has varied between 89% and 93% for the past decade); Jeff Desjardins, *How Google Retains More than 90% of Market Share*, BUS. INSIDER (Apr. 23, 2018, 6:35 PM), https://www.businessinsider.com/how-google-retains-more-than-90-of-market-share-2018-4 [https://perma.cc/QJY5-9CF3] (90.8% of U.S. market share in February 2018); *see also* Daniel R. Shulman, *What's the Problem with Google?*, 15 SEDONA CONF. J. 17, 23-24 (2014) (explaining that Bing and Yahoo present some (albeit minimal) competition to Google in the United States but that Google controls over 90% of the general Internet search market in European countries). Google's general Internet search market share has varied and is somewhat in dispute. However, commentators and antitrust authorities agree Google's market share in general Internet search is more than substantial. *See* Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Case Against Google*, 34 HARV. J.L. & PUB. POL'Y 171, 221 (2011) (70% of U.S. market share); George N. Bauer, Note, *eMonopoly: Why Internet-Based Monopolies Have an Inherent "Get-out-of-Jail-Free Card,"* 76 BROOK. L. REV. 731, 756 (2011) (80%); *see also* AUSTL. COMPETITION & CONSUMER COMM'N, DIGITAL PLATFORMS INQUIRY: FINAL REPORT 65 (2019) (93 to 95% of Australian market share).

[20] Daniel A. Crane, *Market Power Without Market Definition*, 90 NOTRE DAME L. REV. 31, 73 n.212 (2014) (e.g., Poland = 98.05%).

[21] *More than 90% of the World Uses Google Search*, MOZILLA: INTERNET HEALTH REP. (Apr. 2018), https://internethealthreport.org/2018/90-of-the-world-uses-google-search/ [https://perma.cc/D5EQ-LH8T]; *see also* STAFF OF H. COMM. ON THE JUDICIARY, SUBCOMM. ON ANTITRUST, COM. & ADMIN. L., 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS 77 (2020).

[22] *See, e.g.*, DOJ Google Complaint, *supra* note 7, at 35 (over 70% of U.S. market share); AUSTL. COMPETITION & CONSUMER COMM'N, *supra* note 19, at 95 (96% to 98% in Australia); COMPETITION & MKTS. AUTH., *supra* note 19, at 5 ("Google has more than a 90% share of the £7.3 billion search advertising market in UK, while Facebook has over 50% of the . . . display advertising market.").

way to search the emerging [I]nternet,"[23] network effects have reinforced Google's dominant position. "There are two types of network effects: direct and indirect."[24] Direct network effects refer to the increase of a product's value that correlates with an increase in the number of users of the product.[25] As one Google executive explained, network effects drive Google's success because as Google attracts more users, it acquires more information about those users, which it can use to attract even more users (and the cycle continues).[26] This is because, through machine-learning and trial-and-error, Google's algorithms refine Google Search's accuracy. In other words, when a user completes another search after receiving undesired results from the user's first search, the algorithms receive that feedback and use it to optimize results in the future.[27] Direct network effects also exist between Google Search and Google's online advertising business: the more users Google attracts, the more advertisers Google can attract, and the more advertisers Google attracts, the more revenue Google

---

[23] DOJ Google Complaint, *supra* note 7, at 3.

[24] STAFF OF H. COMM. ON THE JUDICIARY, SUBCOMM. ON ANTITRUST, COM. & ADMIN. L., *supra* note 21, at 40.

[25] United States v. Microsoft Corp., 253 F.3d 34, 49 (D.C. Cir. 2001) (citing Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424, 424 (1985)); STAFF OF H. COMM. ON THE JUDICIARY, SUBCOMM. ON ANTITRUST, COM. & ADMIN. L., *supra* note 21, at 40.

[26] *See* STAFF OF H. COMM. ON THE JUDICIARY, SUBCOMM. ON ANTITRUST, COM. & ADMIN. L., *supra* note 21, at 225; *see also* Daniel A. Hanley, *A Topology of Multisided Digital Platforms*, 19 CONN. PUB. INT. L.J. 271, 291 (2020) (quoting *Fact-Checking Google: Scale Is a Barrier to Entry in Search*, FAIRSEARCH (Nov. 11, 2011), https://fairsearch.org/fact-checking-google-scale-is-a-barrier-to-entry-in-search/ [https://perma.cc/J43D-2LAK]). *See generally* Daisuke Wakabayashi, *Google Dominates Thanks to an Unrivaled View of the Web*, N.Y. TIMES (Dec. 14, 2020), https://www.nytimes.com/2020/12/14/technology/how-google-dominates.html [Perma.cc link unavailable] ("Every search request provides Google with more data to make its search algorithm smarter.").

[27] Maurice E. Stucke & Ariel Ezrachi, *When Competition Fails to Optimize Quality: A Look at Search Engines*, 18 YALE J.L. & TECH. 70, 82-83 (2016). In the social media realm, network effects are incredibly prevalent because "once a firm captures a network it can become extremely difficult to dislodge or replace." STAFF OF H. COMM. ON THE JUDICIARY, SUBCOMM. ON ANTITRUST, COM. & ADMIN. L., *supra* note 21, at 41. For example, a Facebook user is unlikely to switch to another social media platform because the user's friends already use Facebook and are unlikely to switch to another platform for the same reason as the first user. *Id.*

receives, which it can use to attract even more users and their data (and the cycle continues).[28]

On the other hand, indirect network effects arise when greater use of a monopolist's product incentivizes technology developers to create other products compatible only with the monopolist's product.[29] For example, web developers create apps and webpages designed to operate on Google Search because most users use Google Search.[30] As a result, more users use Google Search because webpages and apps work more desirably on it.[31] These network effects are not speculative; worldwide, almost every competition authority considers network effects when determining whether monopoly power is durable in a market once obtained.[32]

Both network effects and other barriers to entry—including switching costs, data-access advantages, and economies of scale—render digital markets "Winner-Take-All markets."[33] In these markets, these high barriers to entry prevent new competitors from entering the market after a dominant player achieves a high market share.[34] Because many digital platform markets are characterized by these high entry barriers, and because Google has already obtained a significant market share in general Internet search and online search advertising, Google's monopoly power in these markets is especially durable.

Beyond these market characteristics, Google has entered into contracts to further cement its monopoly power. For example,

---

[28] STAFF OF H. COMM. ON THE JUDICIARY, SUBCOMM. ON ANTITRUST, COM. & ADMIN. L., *supra* note 21, at 41. Of course, network effects arguably have procompetitive benefits. Namely, the more advertisers Google attracts (due to attracting more users), the more free-services Google can provide to its consumers. *See* Kristine Laudadio Devine, *Preserving Competition in Multi-Sided Innovative Markets: How Do You Solve a Problem Like Google?*, 10 N.C. J.L. & TECH. 59, 82-84 (2008).

[29] STAFF OF H. COMM. ON THE JUDICIARY, SUBCOMM. ON ANTITRUST, COM. & ADMIN. L., *supra* note 21, at 40. Consider a game developer that creates a game exclusively for Google Play because it knows most users use devices compatible with Google Play.

[30] *See id.* at 225; *see also* Wakabayashi, *supra* note 26.

[31] *See* STAFF OF H. COMM. ON THE JUDICIARY, SUBCOMM. ON ANTITRUST, COM. & ADMIN. L., *supra* note 21, at 225.

[32] *See infra* Section II.A.

[33] STAFF OF H. COMM. ON THE JUDICIARY, SUBCOMM. ON ANTITRUST, COM. & ADMIN. L., *supra* note 21, at 37.

[34] *Id.* at 37-38.

Google has acquired many of its competitors[35] and contracted with Apple—in a roughly $10 billion deal, no less—to make Google Search the default engine on Apple products.[36] Similarly, Google enters revenue-sharing agreements with other web browsers wherein those browsers agree to set Google as the default search provider.[37] These deals perpetuate Google's monopoly power; no matter where consumers turn, Google Search awaits.

2. Google's Business Model and Policies

Before understanding how Big Tech, particularly Google, hinders the marketplace of ideas, it is necessary to understand Google's business model, which gives it the power to hinder the marketplace of ideas. Google, like the other platform monopolies, has a complex, multi-sided business model. Principally, Google offers Internet-related products and services on the consumer side, and it offers a forum for online advertisers on the advertising side.[38]

On the consumer side, Google offers zero-price products and services to customers.[39] These products and services vary vastly in scope, but they include the Android mobile phone operating system[40] and corresponding app store Google Play, Google Maps, YouTube, Gmail, Google Chrome browser, Google Drive, and, of course, Google Search.[41] Google also sells hardware consumers may use to access these zero-price products.[42]

---

[35] *See generally* Jennifer Elias, *Google's Acquisitions Are in the Spotlight 15 Years After It Went Public*, CNBC (Aug. 19, 2019, 9:31 AM), https://www.cnbc.com/2019/08/19/googles-best-and-worst-acquisitions-are-in-the-spotlight-15-years-later.html [https://perma.cc/N4FK-CF4M] (discussing Google's acquisition of various companies, including Android).

[36] *See* Daisuke Wakabayashi & Jack Nicas, *Apple, Google and a Deal that Controls the Internet*, N.Y. TIMES (Oct. 25, 2020), https://www.nytimes.com/2020/10/25/technology/apple-google-search-antitrust.html [Perma.cc link unavailable] (discussing Apple's agreement to make Google Search the default engine for searches completed on Apple devices, such as through Siri and in Safari); *see also* Colorado Google Complaint, *supra* note 7, at 7, 37-38.

[37] Colorado Google Complaint, *supra* note 7, at 38.

[38] Google Search (Shopping), *supra* note 6, at 7.

[39] AUSTL. COMPETITION & CONSUMER COMM'N, *supra* note 19, at 7.

[40] *See generally* J. Gregory Sidak, *Do Free Mobile Apps Harm Consumers?*, 52 SAN DIEGO L. REV. 619 (2015) (discussing Google's interest in Android and the operating systems market).

[41] Google Search (Shopping), *supra* note 6, at 8, 13.

[42] *Id.* at 13.

For Google, though, the online advertising side is most important because that is where Google generates its profits. As Google explains, "Our advertising products deliver relevant ads at just the right time . . . . [We] generate[] revenues primarily by delivering . . . advertising."[43] Indeed, Google derives approximately 84% of its revenue from online advertising.[44] Google's zero-price consumer products drive its online advertising demand.[45] Online advertisers pay Google to display search advertisements to consumers whose searches demonstrate their interest in the advertisers' products, and these advertisements appear on Google's zero-price products.[46]

On both sides of the market, Google employs a variety of algorithms. On the consumer side, Google Search algorithms, most notably PageRank, determine the websites that will appear in response to a user's query.[47] PageRank first ranks websites based on a variety of factors, including keywords and the degree to which other sources reference the website.[48] From there, PageRank displays websites in the order of their ranking, displaying the highest-ranked websites in the most prominent positions.[49]

A number of critics have attacked PageRank, alleging Google uses PageRank to inflate the value of its own products.[50] In fact, the European Commission found that Google abused its dominant position in general Internet search by prominently displaying its own comparison shopping service over competitors' shopping

---

[43] Alphabet Inc., Annual Report (Form 10-K) 6 (Feb. 2, 2021).

[44] *Id.* at 33-35 (showing that Google's advertising revenues as a percentage of its total revenues equaled 83.29% and 80.49% for 2019 and 2020, respectively). Ironically, Google's founders vehemently opposed advertising in its early years. *See* Greg Lastowka, *Google's Law*, 73 BROOK. L. REV. 1327, 1331-38 (2008). Other Big Tech firms, such as Facebook, derive their revenues primarily from online advertising as well. *See* Bundeskartellamt Facebook Decision, *supra* note 6, at 59-62.

[45] Sidak, *supra* note 40, at 663.

[46] *Id.* at 663-64; Judy Gedge, Rescuecom v. Google*: Free Riding or Fair Play?*, 24 MIDWEST L.J. 1, 5-6 (2010).

[47] Tansy Woan, *Searching for an Answer: Can Google Legally Manipulate Search Engine Results?*, 16 U. PA. J. BUS. L. 294, 297 (2013); *see* Colorado Google Complaint, *supra* note 7, at 23-24 (explaining Google's algorithms' processes).

[48] Woan, *supra* note 47, at 298.

[49] *Id.*

[50] *Id.* at 299.

services.[51] Of course, the primary harm from this action is deception of consumers who rely on Google to display to them truly relevant sources rather than the sources that Google favors.[52] More importantly, though, commentators argue Google tweaks its search results based on whether Google insiders favor a given website's content.[53]

On the advertising side, Google uses its service Google Ads (previously called AdWords) to maintain dominance in search advertising. Google Ads is a pay-per-click service whereby Google charges advertisers a fee each time a user clicks on an advertiser's search advertisement.[54] Google determines the advertisements that will appear in response to a given search through a complex, three-step process using contextual advertising.[55] First, the advertiser chooses keywords or phrases to associate with its advertisement, and the advertisement will only appear if a user's search query contains a keyword.[56] Second, Google verifies that the

---

[51] *See generally* Google Search (Shopping), *supra* note 6. Google appealed this finding, but it was unsuccessful. *See* Adam Satariano, *Google Loses Appeal of $2.8 Billion Fine in E.U. Antitrust Case.*, N.Y. TIMES (Nov. 10, 2021), https://www.nytimes.com/2021/11/10/business/google-eu-appeal-antitrust.html [Perma.cc link unavailable].

[52] *See* Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1184 (2008) ("[C]onsumers unaware of [the fact that Google assigns higher ranks to its own products] may simply believe that [Google's products are] at the top of the rankings pile . . . merely because of 'disinterested' ranking algorithms and not understand the possibility that some proprietary interest of Google . . . is driving the ranking.").

[53] Brent J. Horton, *Malign Manipulations: Can Google's Shareholders Save Democracy?*, 54 WAKE FOREST L. REV. 707, 723 (2019) (citing Allyson Haynes Stuart, *Google Search Results: Buried if Not Forgotten*, 15 N.C. J.L. & TECH. 463, 502 (2014)). While there is no direct evidence of specific "tweaking" of results by Google insiders, scholars rely on Google's motive and opportunity to tweak its algorithms. *See id.* at 723-26.

[54] *See How It Works*, GOOGLE ADS, https://ads.google.com/intl/en_us/home/how-it-works/ [https://perma.cc/68BQ-7QEU] (last visited Nov. 3, 2021).

[55] *See* MICHAELA D. PLATZER, CONG. RSCH. SERV., R43288, THE SHIFT TO DIGITAL ADVERTISING: INDUSTRY TRENDS AND POLICY ISSUES FOR CONGRESS 14 n.84 (2013). Contextual advertising refers to generating advertisements for users based on their past online activity. *See id.* at 14.

[56] *In re* 1-800 Contacts, Inc., No. 9372, 2017 FTC LEXIS 125, at *45-46 (F.T.C. Oct. 27, 2017). Google also has a broader match option, which allows an advertisement to appear so long as the user's query contains a synonym of the keyword, even if the query does not contain the keyword itself. *See id.* at *46-47. Similarly, advertisers may choose to target certain geographic regions. Lauren Troxclair, Note, *Search Engines and*

advertisement complies with Google's advertisement policies. Third and finally, the advertisement will appear only if it receives a sufficiently high rank under Google's Ad Rank algorithm.[57] Ad Rank ranks the advertisement based on the advertiser's bid (the maximum price the advertiser has suggested it is willing to pay to have its advertisement shown), the relevance of the advertisement, and the impact the advertisement would have in conjunction with other information on the user's interface.[58] Ad Rank also determines the advertisement's positioning.[59]

Before proceeding, a word on the second step—Google's advertisement policies—is warranted because the policies demonstrate Google's authority and indeed intent to impede the marketplace of ideas. Google heavily regulates advertisements' content,[60] and it retains broad discretion to refuse to show advertisements that contain "inappropriate content."[61] Information deemed "inappropriate" includes content that "incites hatred against . . . or disparages an individual or group" on the basis of membership in a number of classifications, such as sexual orientation, veteran status, and religion.[62] Moreover, Google will censor any advertisement that "harasses, intimidates, or bullies an individual or group of individuals."[63] Other relevant content Google will censor includes "shocking content," such as profane language, depictions of animal cruelty, or suggestions that the viewer is likely to "be infected with a disease."[64]

Internet Advertisers: Just One Click Away from Trademark Infringement?, 62 WASH. & LEE L. REV. 1365, 1372 (2005).

57 *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 125, at *45.

58 *Id.* at *50-51; *see also How It Works*, *supra* note 54.

59 *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 125, at *49.

60 *See Google Ads Policies*, GOOGLE: ADVERT. POLICIES HELP, https://support.google.com/adspolicy/answer/6008942?visit_id=637402087951252200-1811857642&rd=1 [https://perma.cc/A29P-B2TJ] (last visited Nov. 3, 2021).

61 *Inappropriate Content*, GOOGLE: ADVERT. POLICIES HELP, https://support.google.com/adspolicy/answer/6015406 [https://perma.cc/C67U-3XMJ] (last visited Aug. 23, 2022).

62 *Id.* Specifically, Google prohibits content that incites "hatred against . . . or disparages an individual or group on the basis of their race or ethnic origin, religion, disability, age, nationality, veteran status, sexual orientation, gender, gender identity, or any other characteristic that is associated with systemic discrimination or marginalization." *Id.*

63 *Id.*

64 *Id.*

B. Marketplace of Ideas – Historical Importance and Its Home on the Internet Today

This Section describes the importance of the marketplace of ideas in the United States and discusses how Big Tech plays a significant role in the marketplace of ideas. The framers considered free expression so foundational that they expressly protected it in the First Amendment.[65] The most important rationale for free expression is the "marketplace of ideas,"[66] where the ensuing competition among ideas causes the most empirically and morally sound ideas to prevail.[67] Justice Oliver Wendell Holmes recognized the marketplace of ideas rationale for the Free Expression Clauses in his famous dissent in *Abrams v. United States*.[68] There, he opined, "[T]he ultimate good . . . is better reached by the free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution."[69] Other democracies equally value public discourse.[70]

While public sidewalks and then print media historically hosted the marketplace of ideas, the Internet is the home of public

[65] *See, e.g.*, James Madison, *Public Opinion*, NAT'L GAZETTE, Dec. 19, 1791 ("Public opinion sets bounds to every government . . . ."); *see also* THE FEDERALIST NO. 84, at 437-38 (Alexander Hamilton) (Buccaneer Books ed., 1992) (arguing that the freedom of the press did not even need to be protected by the First Amendment because the government had no power to regulate it). *See generally* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . .").

[66] There are four leading rationales for the First Amendment's protection of free expression: (1) free expression is necessary for persons to govern themselves; (2) free expression is necessary because persons must hear all ideas before they can determine the most preferable idea (i.e., the "marketplace of ideas" rationale); (3) free expression instills in individuals tolerance; and (4) allowing persons to express themselves is integral to their autonomy. CALVIN MASSEY & BRANNON P. DENNING, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 834-35 (6th ed. 2019). Each of these purposes is as important today as they were at the time of the Framing, but the marketplace of ideas rationale is the most important for purposes of this Article.

[67] *See id.*

[68] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[69] *Id.*

[70] *See, e.g.*, Press Release, Australian Competition & Consumer Comm'n, Response to Google Open Letter (Aug. 17, 2020), https://www.accc.gov.au/media-release/response-to-google-open-letter [https://perma.cc/XLY6-4NMY].

discourse today.[71] About 93% of Americans use the Internet.[72] Of that 93%, 85% of Americans use the Internet at least once per day, and 79% use the Internet at least several times per day.[73] Importantly, 91% of Americans who claim to never use the Internet are over fifty years old,[74] and this statistic demonstrates that the Internet's role as the home of the marketplace of ideas will only continue to strengthen. The Internet's role as the forum of the marketplace of ideas became even more important as individuals began sheltering from the COVID-19 pandemic and communicating more frequently via the web, and post-pandemic, it seems clear that remote communication will linger permanently.[75]

The percentage of Americans who receive their news online is also increasing exponentially, surpassing the number of consumers who receive their news from print media outlets and closely trailing the number of consumers who receive their news from television.[76] Thirty-six percent of Americans receive their news from Facebook, and that percentage increases to 50% when considering both

---

[71] *See* Prometheus Radio Project v. FCC, 373 F.3d 372, 439 (3d Cir. 2004) ("The unique qualities of the Internet provide an unimaginable breadth of accessible information as well as a forum for individual expression."). *See generally* Adam Lamparello, *The Internet Is the New Marketplace of Ideas: Why* Riley v. California *Supports Net Neutrality*, 25 DEPAUL J. ART, TECH., & INTELL. PROP. L. 267 (2015) (arguing the First Amendment should prohibit Internet service providers from refusing to publish speech based on its content). Google itself recognizes that "[t]he Internet is . . . capable of propelling new ideas . . . forward." Alphabet Inc., Annual Report (Form 10-K) 5 (Feb. 2, 2021).

[72] *See* Andrew Perrin & Sara Atske, *About Three-in-Ten U.S. Adults Say They Are 'Almost Constantly' Online*, PEW RSCH. CTR. (Mar. 26, 2021), https://www.pewresearch.org/fact-tank/2021/03/26/about-three-in-ten-u-s-adults-say-they-are-almost-constantly-online/ [https://perma.cc/MS8A-CE4U].

[73] *Id.*

[74] Andrew Perrin & Sara Atske, *7% of Americans Don't Use the Internet. Who Are They?*, PEW RSCH. CTR. (Apr. 2, 2021), https://www.pewresearch.org/fact-tank/2021/04/02/7-of-americans-dont-use-the-internet-who-are-they/ [https://perma.cc/7UFN-97P2].

[75] *See* Ella Koeze & Nathaniel Popper, *The Virus Changed the Way We Internet*, N.Y. TIMES (Apr. 7, 2020), https://www.nytimes.com/interactive/2020/04/07/technology/coronavirus-internet-use.html [Perma.cc link unavailable].

[76] A.W. Geiger, *Key Findings About the Online News Landscape in America*, PEW RSCH. CTR. (Sept. 11, 2019), https://www.pewresearch.org/fact-tank/2019/09/11/key-findings-about-the-online-news-landscape-in-america/ [https://perma.cc/6JMN-UVQQ]; *see also* AUSTL. COMPETITION & CONSUMER COMM'N, *supra* note 19, at 21.

Facebook and its subsidiaries, such as Instagram.[77] Strikingly, almost three-quarters of persons who receive their news from Facebook report not understanding the reason Facebook displays the news they see.[78] Moreover, 26% of Americans obtain news from YouTube, Google's subsidiary,[79] and a comparable percentage of persons receive their news via search engines like Google Search.[80] This is problematic because a Pew Research Center study found most YouTube videos have undisclosed political bias and often result in radicalization.[81] Reliance on Big Tech for news exists internationally as well. The Australian Competition and Consumer Commission (the "ACCC") reports that about 78% of Australians receive their news from social media and search engines; of course, due to Facebook's and Google's high market shares in these markets, this means most Australians receive their news from Google and Facebook.[82]

These statistics demonstrate the key role that Big Tech firms play in the marketplace of ideas. With this power, Big Tech has an ethical responsibility to hospitably host a variety of ideas rather than Big Tech's favorites. But as this Article discusses in the next

---

[77] John Gramlich, *10 Facts About Americans and Facebook*, PEW RSCH. CTR. (June 1, 2021), https://www.pewresearch.org/fact-tank/2021/06/01/facts-about-americans-and-facebook/#:~:text=Around%20four%2Din%2Dten%20U.S.%20adults%20(43%25)%20get,6%25)%20and%20other%20platforms [https://perma.cc/R3M3-GTTL].

[78] *Id.*

[79] Galen Stocking et al., *Many Americans Get News on YouTube, Where News Organizations and Independent Producers Thrive Side by Side*, PEW RSCH. CTR. (Sept. 28, 2020), https://www.pewresearch.org/journalism/2020/09/28/many-americans-get-news-on-youtube-where-news-organizations-and-independent-producers-thrive-side-by-side/ [https://perma.cc/M9UZ-WJ4D].

[80] Kristen Bialik & Katerina Eva Matsa, *Key Trends in Social and Digital News Media*, PEW RSCH. CTR. (Oct. 4, 2017), https://www.pewresearch.org/fact-tank/2017/10/04/key-trends-in-social-and-digital-news-media/ [https://perma.cc/HLZ6-F56M].

[81] Stocking et al., *supra* note 79 ("[A]bout half of YouTube news consumers describe the overall body of news videos about politics . . . as moderate . . . . [32%] see them as liberal and . . . [14%] view them as conservative.").

[82] AUSTL. COMPETITION & CONSUMER COMM'N, *supra* note 19, at 21 ("[A]lgorithm-driven digital platforms are among the most popular sources of journalism for Australian news consumers, with 33[%] reporting accessing news through social media, 25[%] using search engines to find a particular news brand, 20[%] using search engines to find specific news stories, and 12[%] accessing content through news aggregators. By comparison, 30[%] of Australian news consumers accessed online news directly from the websites of news media businesses.").

Section, Big Tech has largely undermined the marketplace of ideas.[83] As Professor Claudio Lombardi argues, Big Tech has destroyed the marketplace for ideas by censoring ideas directly or using its algorithms.[84] This censorship contravenes the interest the Framers had in a marketplace of ideas when they implemented the First Amendment and which is still valuable today. Members of society may not discover, consider, and accept the best ideas when Big Tech conceals them.[85]

C. Big Tech's Harms to the Marketplace of Ideas

With an understanding of the key role that Big Tech plays in the marketplace of ideas in the backdrop, it is possible to understand how Big Tech (and particularly Google) hampers the marketplace of ideas. Section I.C.1 identifies that parties across the political spectrum recognize that Big Tech interferes with the marketplace of ideas. Section I.C.2 recognizes that Big Tech not only censors speech but also affirmatively interferes with public feelings and discourse. Section I.C.3 then provides a non-exhaustive yet extensive list of examples of Big Tech's censorship. Finally, Section I.C.4 explains that Big Tech has also indirectly harmed the marketplace of ideas by eradicating alternative information sources, such as newspapers.

1. Government Criticism of Big Tech Censorship

While the recently-filed antitrust suits against Facebook and Google are the result of bipartisan efforts based on traditional antitrust principles,[86] conservative congresspersons argue Big Tech's suppression of conservative speech provides its own basis for antitrust action.[87]

---

[83] *See generally* Claudio Lombardi, *The Illusion of a "Marketplace of Ideas" and the Right to Truth*, 3 AM. AFFS. 198 (2019).

[84] *See generally id.*

[85] Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 6; *see also* GLENN HARLAN REYNOLDS, THE SOCIAL MEDIA UPHEAVAL 62-63 (2019) ("The danger of monopoly organs like Facebook or Twitter is that they will selectively silence some . . . voices and amplify others.").

[86] *See generally* STAFF OF H. COMM. ON THE JUDICIARY, SUBCOMM. ON ANTITRUST, COM. & ADMIN. L., *supra* note 21.

[87] *See generally* REP. JIM JORDAN ET AL., REINING IN BIG TECH'S CENSORSHIP OF CONSERVATIVES (2020); REP. KEN BUCK, THE THIRD WAY (2020).

In a report authored by United States Representative Jim Jordan and other conservative congressmembers (the "Jordan Report"), House Republicans opine, "Big Tech Is Out to Get Conservatives."[88] The Jordan Report highlights Big Tech's role as providing the primary media outlets for Americans.[89] Moreover, the Jordan Report asserts that Big Tech has harmed the marketplace of ideas through "cancel culture" efforts.[90] The Jordan Report notes this censorship is especially problematic given Big Tech firms' claims that they are unbiased.[91]

Another report authored by United States Representative Ken Buck and other Republican congressmembers (the "Buck Report") stresses similar concerns.[92] The Buck Report emphasizes the findings of the bipartisan Majority Staff Report and Recommendations of the House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law (the "House Report")[93] after the Subcommittee's year-long investigation into competition in digital markets.[94] However, the Buck Report criticizes the House Report's failure to address Big Tech's (and particularly Google's) censorship.[95] The Buck Report explains Big Tech's censorship is "fruit of Big Tech's poisonous and monopolistic tree"[96] and that any discussion of the anticompetitive effects caused by Big Tech's actions is incomplete without considering how those actions have silenced free speech.[97]

---

[88] JORDAN ET AL., *supra* note 87, at 1.

[89] *Id.* at 2.

[90] *Id.* (quoting Rep. Jim Jordan, *Reject the 'Cancel Culture.' Reelect Donald Trump as President*, PLAIN DEALER (Aug. 19, 2020, 9:40 AM), https://www.cleveland.com/opinion/2020/08/reject-the-cancel-culture-reelect-donald-trump-as-president-jim-jordan.html [https://perma.cc/39KT-NRV5]) ("In today's world, opposing views aren't challenged or debated, they're censored . . . .").

[91] *Id.* at 3 ("These concerns might also have less weight if Big Tech companies were more straightforward about acknowledging bias where it exists . . . ."). While the term has a variety of meanings, the Jordan Report uses the term "cancel culture" to refer to the phenomenon of platforms minimizing access to opinions with which they disagree or consider offensive.

[92] *See generally* BUCK, *supra* note 87.

[93] *See generally* STAFF OF H. COMM. ON THE JUDICIARY, SUBCOMM. ON ANTITRUST, COM. & ADMIN. L., *supra* note 21.

[94] BUCK, *supra* note 87, at 2-5. The Jordan Report also responded to the House Report.

[95] *Id.* at 6.

[96] *Id.*

[97] *Id.*

Again though, Big Tech censorship and corresponding harm to the marketplace of ideas is a bipartisan issue. While the Jordan Report provides countless examples of Google's suppression of conservative speech,[98] it also offers examples of suppression that affect both conservatives and liberals. For example, the Jordan Report notes that Google has intentionally censored certain searches that reference abortion or immigration simply because these are sensitive topics.[99]

Moreover, left-leaning congresspersons themselves criticize Big Tech's harm to the marketplace of ideas as well. Senator Elizabeth Warren argues Big Tech firms should be designated "Platform Utilities" and as such required to deal with their customers in a non-discriminatory manner.[100] Senator Warren has voiced particular concerns about Google's improper speech suppression.[101] Similarly, Senator Bernie Sanders has explained

---

[98] *See* JORDAN ET AL., *supra* note 87, at 13-19. For example, the Jordan Report highlighted Google's threats to demonetize *The Federalist* after a user submitted racist comments on *The Federalist*'s website's comment board. *Id.* at 17. This incident led other congresspersons to speak out as well. *See, e.g.*, Letter from Ted Cruz, Senator, United States Senate, to Sundar Pichai, Chief Exec. Officer, Google LLC (June 17, 2020), http://cruz.senate.gov/files/documents/Letters/2020.06.17%20-%20Letter%20to%20Google%20re%20The%20Federalist%20-%20SFV.pdf [https://perma.cc/AL57-NEKF] (arguing Google improperly censored *The Federalist* because Google does not equally censor liberal news outlets or its own subsidiary YouTube for equally offensive comments); Sen. Marsha Blackburn (@MarshaBlackburn), TWITTER (June 17, 2020, 5:00 PM), https://twitter.com/marshablackburn/status/1273359983250255873?lang=en [Perma.cc link unavailable] ("Beware the power of Big Tech to cancel conservative voices.").

[99] JORDAN ET AL., *supra* note 87, at 16 (quoting Kirsten Grind et al., *How Google Interferes with Its Search Algorithms and Changes Your Results: The Internet Giant Uses Blacklists, Algorithm Tweaks and an Army of Contractors to Shape What You See*, WALL ST. J. (Nov. 15, 2019, 8:15 AM), https://www.wsj.com/articles/how-google-interferes-with-its-search-algorithms-and-changes-your-results-11573823753 [https://perma.cc/JMQ2-K9P4]). At the end of the report, Congressman Jordan called for antitrust action or amendments to Section 230 of the Communications Decency Act to stifle Big Tech censorship. *Id.* at 27.

[100] *See* Elizabeth Warren, *Here's How We Can Break Up Big Tech*, MEDIUM: TEAM WARREN (Mar. 8, 2019), https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c [https://perma.cc/X6AX-TTJW].

[101] *See Free Speech Q&A: Elizabeth Warren*, PEN AM. (Feb. 3, 2020), https://pen.org/elizabeth-warren-on-free-expression-in-america/ [https://perma.cc/J63G-6GWD]; *see also* Robby Soave, *Elizabeth Warren Absolutely Wants the Government to Punish Facebook for Spreading Disinformation*, REASON (Feb. 3, 2020, 6:40 PM), https://reason.com/2020/02/03/elizabeth-warren-free-speech-facebook-pen-america/ [https://perma.cc/H8JR-KEKH].

Big Tech has harmed the marketplace of ideas by eradicating local journalists, and during his 2020 presidential campaign, he asserted he would use the administrative state to stifle Big Tech's unfair dealings with local news organizations.[102] Moreover, 2020 Democratic Presidential Candidate Andrew Yang expressed concerns regarding disinformation campaigns on the Big Tech platforms.[103] Likewise, Senator Richard Blumenthal alleged that "misinformation from [President Trump]" posted on social media in November 2020 would undermine the integrity of the 2020 election.[104] These concerns from both sides highlight that Big Tech impedes the marketplace of ideas.

2. Big Tech's Direct Harm to the Marketplace of Ideas: Affirmatively Shaping Discourse

Big Tech harms the marketplace of ideas not only by censoring content but also by affirmatively shaping discourse. Big Tech firms moderate and oversee their platforms' content, and they sometimes do so with neutral motives, such as to ensure content veracity.[105] This is an important objective given that studies show the news individuals see on the Internet can shape their emotions and health.[106]

But experts equally recognize Big Tech's oversight role threatens the marketplace of ideas[107] because it allows Big Tech—when not acting with proper motives—to alter content to

---

[102] *Free Speech Q&A: Bernie Sanders*, PEN AM. (Feb. 3, 2020), https://pen.org/bernie-sanders-on-free-expression-in-america/ [https://perma.cc/RSV8-X853].

[103] *Free Speech Q&A: Andrew Yang*, PEN AM. (Feb. 3, 2020), https://pen.org/andrew-yang-on-free-expression-in-america/ [https://perma.cc/4PPV-AQ5Z].

[104] *Does Section 230's Sweeping Immunity Enable Big Tech Bad Behavior?: Hearing Before the S. Comm. on Com., Sci., & Transp.*, 116th Cong. (2020) [hereinafter *Section 230 Hearing*] (statement of Sen. Richard Blumenthal, Member, S. Comm. on Com., Sci., & Transp.).

[105] *See generally* Lee Rainie et al., *The Future of Free Speech, Trolls, Anonymity and Fake News Online*, PEW RSCH. CTR. (Mar. 29, 2017), https://www.pewresearch.org/internet/2017/03/29/the-future-of-free-speech-trolls-anonymity-and-fake-news-online/ [https://perma.cc/E3ZJ-32G2].

[106] *See, e.g.*, Adam D.I. Kramer et al., *Experimental Evidence of Massive-Scale Emotional Contagion Through Social Networks*, 111 PROC. NAT'L ACAD. SCIS. 8788, 8790 (2014).

[107] Rainie et al., *supra* note 105.

shape individuals' emotions, speech, and even their votes.[108] To provide an example, many of Big Tech's algorithms are designed to keep consumers engaged with Big Tech's products.[109] While this serves Big Tech's agenda by keeping consumers' attention and thereby maximizing advertisement revenue, it harms the marketplace of ideas. These algorithms erect "filter bubbles" and "echo chambers"[110] that impede consumer access to competing viewpoints. For example, Google Search algorithms intentionally expose persons to beliefs they already hold.[111] The same is true for YouTube's recommendation algorithm, which recommends that a viewer watch videos that are similar to yet often more entrenching than the videos the viewer previously watched.[112] As viewers become trapped in these filter bubbles or echo chambers, they become engrained in their beliefs and less receptive to competitive viewpoints due to confirmation bias,[113] yet receptivity to new viewpoints is integral to a working marketplace of ideas. These concerns are not hypothetical: the ACCC released a report (the

---

[108] Robert Epstein, *Not Just Conservatives: Google and Big Tech Can Shift Millions of Votes in Any Direction*, USA TODAY, https://www.usatoday.com/story/opinion/2018/09/13/google-big-tech-bias-hurts-democracy-not-just-conservatives-column/1265020002/ [https://perma.cc/JJ67-GK65] (Sept. 30, 2018, 3:51 PM). *See generally* Joanna Kavenna, *Shoshana Zuboff: 'Surveillance Capitalism Is an Assault on Human Autonomy'*, GUARDIAN (Oct. 4, 2019, 6:00 AM), https://www.theguardian.com/books/2019/oct/04/shoshana-zuboff-surveillance-capitalism-assault-human-automomy-digital-privacy [https://perma.cc/GUJ3-T9PP] (explaining Big Tech's ability to manipulate behavior).

[109] Eli Pariser, *Beware Online "Filter Bubbles"*, TED (Feb. 2011), https://www.ted.com/talks/eli_pariser_beware_online_filter_bubbles/transcript [https://perma.cc/LTK3-ENZY].

[110] The term "filter bubble" "describe[s] a situation where news that we dislike or disagree with is automatically filtered out and [therefore] might have the effect of narrowing what we know." Richard Fletcher, *The Truth Behind Filter Bubbles: Bursting Some Myths*, U. OXFORD: REUTERS INST. (Jan. 24, 2020), https://reutersinstitute.politics.ox.ac.uk/risj-review/truth-behind-filter-bubbles-bursting-some-myths [https://perma.cc/F29G-XDKT]. "Echo chamber" refers to a similar situation where a person is overexposed to information with which the person agrees and underexposed to the opposite viewpoint, where this unbalanced exposure distorts the person's view of reality. *Id.*

[111] *See id.*

[112] *See* AUSTL. COMPETITION & CONSUMER COMM'N, *supra* note 19, at 348; Brett Gossett, Note, *Scrolling, Trolling, and Uploading: YouTube's Impact on Modern Public Discourse, Internet Regulation, and Free Speech*, 38 CARDOZO ARTS & ENT. L.J. 505, 521 (2020).

[113] *See* AUSTL. COMPETITION & CONSUMER COMM'N, *supra* note 19, at 346.

"ACCC Report") that recognizes that filter bubbles and echo chambers cause consumers to adopt escalating, extreme viewpoints in contravention of the marketplace of ideas.[114]

Finally, some commentators argue Google uses its algorithms to display to individuals different information based on suspect characteristics of the viewer, such as race.[115] Of course, this is problematic for the marketplace of ideas because it contributes to the information people see and thus the opinions they form based on suspect classifications.

3. Big Tech's Direct Harm to the Marketplace of Ideas: Examples of Censorship

Big Tech inflicts significant harm to the marketplace of ideas through viewpoint-based censorship. This Section provides a few egregious examples to highlight this harm.

First, Google has repeatedly suppressed websites based on the relatively mild content within those websites. Google's employees have admitted Google suppresses these websites (presumptively by demoting their PageRank ranking) based on their expressed viewpoints.[116] One Google employee disclosed a list of conservative websites Google blacklisted from appearing on Google Android products.[117] In another instance, Google employees admitted to increasing the PageRank ranking of pro-immigration links after the Trump Administration instituted its travel ban.[118]

---

[114] *Id.* at 349.

[115] *See* Nathan Newman, *Racial and Economic Profiling in Google Ads: A Preliminary Investigation (Updated)*, HUFFPOST, https://www.huffpost.com/entry/racial-and-economic-profi_b_970451?guccounter=1 [https://perma.cc/N47V-9UK8] (Dec. 6, 2017); Nathan Newman, *Google – Empowering the 'Tawdry' Side of Capitalism*, LAW360 (Mar. 2, 2012, 1:30 PM), https://www.law360.com/consumerprotection/articles/312861/google-empowering-the-tawdry-side-of-capitalism [https://perma.cc/EQQ8-HV5A].

[116] *See* Leah MarieAnn Klett, *Google 'Blacklisted' the Christian Post, Whistleblower Reveals*, CHRISTIAN POST (Aug. 14, 2019), https://www.christianpost.com/news/christian-post-blacklisted-by-google-whistleblower-reveals.html [https://perma.cc/JYF2-2NWA] (e.g., glennbeck.com, lifenews.com, americanthinker.com).

[117] *Id.*

[118] *See* Horton, *supra* note 53, at 724. Horton explains that Google's employees' actions demonstrate its motives to censor conservative content and that Google has the opportunity to do so. *Id.* at 724-26. On a disparate impact theory, one could argue Google has suppressed conservative news during the pandemic, which is especially problematic given the increase in online traffic during the pandemic. *See id.* at 729 (explaining that Congressman Darrell Issa argued Google's bias against conservatives can be

Sundar Pichai, CEO of Alphabet (Google's parent company), admitted that Google censored the World Socialist Web Site and Priorities USA, left-leaning organizations.[119] He suggested these organizations violated Google's graphic content policy without citing to specific violations.[120] Presumably, Pichai was referring to a 2017 incident when the World Socialist Web Site claimed Google suppressed its and other left-leaning websites' articles expressing anti-war and social inequality sentiment.[121] Shortly after Pichai's statements, the World Socialist Web Site expressed dissatisfaction with Google's censorship and that Google failed to respond to its complaints.[122]

In addition to censoring websites, Google has also used its algorithms to exclude certain suggestions from appearing on Google Search's suggested search function.[123] Just before the 2016 presidential election, *U.S. News* Contributor Robert Epstein reported that when he typed "crooked hill" into Google Search, the suggested search results contained no reference to Hillary Clinton despite that "crooked Hillary" was a common term of rhetoric during the election.[124] Yet when he searched "lying," the first

demonstrated by disparate impact); Koeze & Popper, *supra* note 75 (showing liberal-leaning news websites experienced a massive increase in traffic after COVID-19 became rampant in the United States whereas Fox News viewership increased by only around 10%).

[119] *Section 230 Hearing*, *supra* note 104 (statement of Sundar Pichai, Chief Exec. Officer, Alphabet Inc.). Pichai's comments responded to Senator Mike Lee's question of whether Pichai, Mark Zuckerberg, or Jack Dorsey could name a single high-profile example of liberal speech suppression by their platforms. *Id.* (statement of Sen. Mike Lee, Member, S. Comm. on Com., Sci., & Transp.). Neither Zuckerberg nor Dorsey provided an example. *Id.* (statements of Mark Zuckerberg, Chief Exec. Officer, Facebook, and Jack Dorsey, Chief Exec. Officer, Twitter).

[120] *Id.* (statement of Sundar Pichai, Chief Exec. Officer, Alphabet Inc.).

[121] *See* Andre Damon & David North, *Google's New Search Protocol Is Restricting Access to 13 Leading Socialist, Progressive and Anti-War Web Sites*, WORLD SOCIALIST WEB SITE (Aug. 2, 2017), https://www.wsws.org/en/articles/2017/08/02/pers-a02.html [https://perma.cc/P6DG-JB6Z].

[122] *See* Kevin Reed, *Google Admits to Censoring the World Socialist Web Site*, WORLD SOCIALIST WEB SITE (Nov. 4, 2020), https://www.wsws.org/en/articles/2020/11/04/goog-n04.html [https://perma.cc/BTE6-3QYW].

[123] Robert Epstein, *The New Censorship: How Did Google Become the Internet's Censor and Master Manipulator, Blocking Access to Millions of Websites?*, U.S. NEWS & WORLD REP. (June 22, 2016, 9:00 AM), https://www.usnews.com/opinion/articles/2016-06-22/google-is-the-worlds-biggest-censor-and-its-power-must-be-regulated [Perma.cc link unavailable].

[124] *See id.*

suggested search was "lying Ted," referring to Republican Senator Ted Cruz.[125] By contrast, Epstein reported that typing "crooked" into Bing's search engine resulted in the suggested search "crooked Hillary" immediately.[126] Others assert Google's suggested searches have favored certain religions over others.[127]

Critics also complain that Google has improperly complied with foreign governments' demands to censor certain content as a condition precedent to Google's entry into those foreign markets.[128] Most prominently, Google received criticism in 2018 when insiders alleged Google was developing a search engine for Chinese users.[129] The proposed search engine allegedly would have suppressed anti-Chinese and pro-human rights content at the Chinese government's request.[130] Whatever the precise nature of the project,

---

[125] *Id.*

[126] *Id.* To mediate any suggestion of bias, it is important to note Epstein is a behavioral psychologist and indeed supported Hillary Clinton during the 2016 election. Rachel Alexander, *Leaked Google Document Reveals Shift to Suppressing Free Speech*, STREAM (Oct. 17, 2018), https://stream.org/leaked-google-document-reveals-shift-to-suppressing-free-speech/ [https://perma.cc/XND4-JXSS].

[127] *See, e.g.*, Klett, *supra* note 116. Fox News reported that searching "Christianity is" resulted in derogatory search suggestions related to Christianity whereas searching "Islam is" resulted in no search suggestions. *What's Islam? Don't Ask Google*, FOX NEWS, https://www.foxnews.com/tech/whats-islam-dont-ask-google [https://perma.cc/7L5A-CBGW] (Nov. 4, 2015, 6:34 PM). Others reported derogatory search suggestions associated with the search "Buddhism is." *See, e.g.*, Ryan Singel, *Is Google Censoring Islam Suggestions?*, WIRED (Jan. 7, 2010, 2:23 PM), https://www.wired.com/2010/01/google-islam-censorship/ [https://perma.cc/6VMV-92PC].

[128] *See* Li Yuan & Daisuke Wakabayashi, *Google, Seeking a Return to China, Is Said to Be Building a Censored Search Engine*, N.Y. TIMES (Aug. 1, 2018), https://www.nytimes.com/2018/08/01/technology/china-google-censored-search-engine.html [Perma.cc link unavailable].

[129] *Id.*

[130] *See Suppressing the Truth: Google Must Not Aid Chinese Censorship*, PITT. POST-GAZETTE (Mar. 14, 2019, 7:00 AM), https://www.post-gazette.com/opinion/editorials/2019/03/14/Google-China-censorship-information-suppression-Project-Dragonfly/stories/201903140028 [https://perma.cc/9HDM-N98Q] ("Efforts to suppress access to information are not much different than assisting in the violation of human rights[.]"); Ryan Gallagher & Lee Fang, *Google Suppresses Memo Revealing Plans to Closely Track Search Users in China*, INTERCEPT (Sept. 21, 2018, 1:18 PM), https://theintercept.com/2018/09/21/google-suppresses-memo-revealing-plans-to-closely-track-search-users-in-china/ [https://perma.cc/5QBE-N6S2] (noting that Google suppressed an internal memo discussing removing from Chinese search results information pertaining to "democracy, human rights, and peaceful protest"); Yuan & Wakabayashi, *supra* note 128.

Google abandoned it in 2019.[131] Critics aver Google has engaged in similar censorship upon request by other nations' governments.[132]

YouTube has equally received criticism for viewpoint-based censorship. In 2007, YouTube removed videos of Egyptian police brutality, and human rights activists argued that in so doing, Google suppressed access to videos that could incite needed change.[133] Similarly, LGBTQ activists have complained that YouTube censors LGBTQ content.[134]

Furthermore, Google censors advertisers using its advertising policies described above. For example, Google has censored advertisements for crisis pregnancy centers that provide counseling services and information regarding alternatives to abortion.[135] Google concluded the advertisements were deceptive because the clinics provided these counseling services instead of abortions.[136] Google claims that it expends "substantial resources" to prevent these "bad advertising practices."[137]

While these instances exemplify Google's censorship, the other platforms have also hindered the marketplace of ideas. While votes were tallied during the 2020 presidential election, Twitter and Facebook censored both candidates' social media posts, which suggested each party was leading the race, on grounds that these

---

[131] Johan Moreno, *Google Has Ended Its Plans for a Censored Chinese Search Engine – And May Never Build One Again*, FORBES (July 25, 2019, 12:30 PM), https://www.forbes.com/sites/johanmoreno/2019/07/25/google-has-ended-its-plans-for-a-censored-chinese-search-engine-and-may-never-return/?sh=5b29060388e4 [Perma.cc link unavailable].

[132] *See, e.g.*, Ellyne Phneah, *Google Blocks Access to Anti-Islam Film in Singapore*, ZDNET (Sept. 21, 2012), https://www.zdnet.com/article/google-blocks-access-to-anti-islam-film-in-singapore/ [https://perma.cc/T5ED-L2NT].

[133] Cynthia Johnston, *YouTube Stops Account of Egypt Anti-Torture Activist*, REUTERS (Nov. 27, 2007, 10:45 AM), https://www.reuters.com/article/egypt-youtube/youtube-stops-account-of-egypt-anti-torture-activist-idUSL2759043020071127 [https://perma.cc/G6RZ-8VD7].

[134] *See* Trey Taylor, *Battle of the Bulge: How Streaming Censorship Is Affecting Queer Musicians*, GUARDIAN (Dec. 16, 2016, 8:00 AM), https://www.theguardian.com/music/2016/dec/16/mykki-blanco-censorship-youtube-perfume-genius-lgbt [https://perma.cc/JXC3-KT93].

[135] Hayley Tsukayama, *Google Removes "Deceptive" Pregnancy Center Ads*, WASH. POST (Apr. 28, 2014), https://www.washingtonpost.com/news/the-switch/wp/2014/04/28/naral-successfully-lobbies-google-to-take-down-deceptive-pregnancy-center-ads/?arc404=true [https://perma.cc/FL8R-XVE2].

[136] *Id.*

[137] Alphabet Inc., Annual Report (Form 10-K) 6 (Feb. 2, 2021).

posts were misleading because the race was close.[138] Twitter and Facebook equally faced backlash after censoring a *New York Post* article that alleged Hunter Biden involved himself in nefarious affairs with Ukrainian officials before the 2020 election.[139]

4. Big Tech's Indirect Harm to the Marketplace of Ideas: Dying Alternative Sources of News

In addition to directly shaping discourse and engaging in viewpoint-based censorship, Big Tech has also harmed the marketplace of ideas indirectly. Most predominantly, Big Tech's unfair actions have rendered alternative sources of news (particularly local newspapers and journals) unprofitable, leaving Big Tech as individuals' sole choice to retrieve news stories.

Big Tech has eradicated alternative sources of media worldwide. The ACCC Report describes the detrimental impact Big Tech has had on Australian media and journalism markets.[140] Prominently, the shift from print to online advertising adversely impacted profits in the print media market.[141] The ACCC Report opines that 106 Australian newspapers closed between 2008 and

---

[138] *US Election: Twitter Hides Trump Tweet About 'Disappearing' Lead*, BBC NEWS (Nov. 4, 2020), https://www.bbc.com/news/technology-54809165 [Perma.cc link unavailable]; Catherine Sanz, *Twitter and Facebook Slap Labels on Trump's 'Misleading' Election Posts*, ABC NEWS (Nov. 4, 2020, 5:22 PM), https://abcnews.go.com/Technology/twitter-facebook-slap-labels-trumps-misleading-election-posts/story?id=74020537 [https://perma.cc/DVX4-GQRV].

[139] Shannon Bond, *Facebook and Twitter Limit Sharing 'New York Post' Story About Joe Biden*, NPR (Oct. 14, 2020, 6:49 PM), https://www.npr.org/2020/10/14/923766097/facebook-and-twitter-limit-sharing-new-york-post-story-about-joe-biden [https://perma.cc/F829-L8YG]; *see also* Katie Canales, *Twitter Botched Its Own Moderation Policies by Banning a New York Post Story and Added Fuel to the Right's Baseless Belief that Big Tech is Waging a War Against Conservatives*, BUS. INSIDER (Oct. 18, 2020, 8:18 AM), https://www.businessinsider.com/what-happened-twitter-ny-post-biden-moderation-policies-2020-10 [https://perma.cc/J2KL-WKC5]. Similarly, following the January 2021 Capitol riot, Twitter and Facebook removed a number of President Trump's posts, alleging his posts risked causing additional violence. Siladitya Ray & Rachel Sandler, *Facebook, Twitter Remove Trump Posts Addressing Riots*, FORBES, https://www.forbes.com/sites/siladityaray/2021/01/06/facebook-removes-trump-video-addressing-riots-twitter-blocks-retweets/?sh=38a531d463c8 [https://perma.cc/EQ7L-PBLY] (Jan. 6, 2021, 7:52 PM).

[140] AUSTL. COMPETITION & CONSUMER COMM'N, *supra* note 19, at 17-21, 293.

[141] *Id.* at 17-18.

2018, and as a result, nearly two dozen municipalities were left without a single local newspaper.[142]

Similar concerns exist in the United States, which too has witnessed a significant diminution of its print media industry.[143] During House Judiciary Committee Hearings regarding digital markets' effects on free press, Representative David Cicilline noted that smaller media outlets rely heavily on deals with Big Tech to publish their content online, yet due to their relatively small size, they have little bargaining power.[144] Representative Jerrold Nadler noted that nearly 2,000 local news publishers in the United States have closed since 2007 and that most counties across the United States no longer have a local news outlet.[145] The impact has been particularly burdensome for ethnic news organizations.[146]

Additionally, branding effects render it difficult for alternative sources of news to compete.[147] Globally, many consumers use Google Search due to its established brand name and perceived optimal quality; however, this branding effect erects barriers to entry for potential alternative sources of news. In other words, consumers are less likely to consider other businesses' content when faced with Google—a well-established brand—as an alternative.[148]

The result is that numerous municipalities throughout the world have no access to local news outlets, and the online news sources that remain are inadequate to guarantee a suitable marketplace of ideas.[149] The ACCC Report concedes that consumers

---

[142] *Id.* at 18.

[143] *See generally Online Platforms and Market Power, Part I: The Free and Diverse Press: Hearing Before the Subcomm. on Antitrust, Com. & Admin. L. of the H. Comm. on the Judiciary*, 116th Cong. (2019).

[144] *Id.* at 3 (statement of Rep. David Cicilline, Chairman, H. Subcomm. on Antitrust, Com. & Admin. L.).

[145] *Id.* at 10 (statement of Rep. Jerrold Nadler, Chairman, H. Comm. on the Judiciary). These communities, "either rural or urban, with limited access to the sort of credible and comprehensive news and information that feeds democracy at the grassroots level," are known as "news deserts." *The Expanding News Desert*, U.N.C.: HUSSMAN SCH. JOURNALISM & MEDIA, https://www.usnewsdeserts.com/ [https://perma.cc/8LRV-TZVE] (last visited Nov. 3, 2021).

[146] *See* PENELOPE MUSE ABERNATHY, NEWS DESERTS AND GHOST NEWSPAPERS: WILL LOCAL NEWS SURVIVE? 43-45, 57-61 (2020).

[147] AUSTL. COMPETITION & CONSUMER COMM'N, *supra* note 19, at 72-73.

[148] *Id.*

[149] *Id.* at 19.

benefit from easy access to online news sources, but it expresses concern that the beneficial forms of reporting provided by traditional news outlets are unlikely to exist in the age of online journalism.[150] The ACCC Report asserts news obtained from digital platforms is often less reliable, less trustworthy, and lower quality than news sources provided by alternative outlets.[151] This is so because most online news does not derive from the journalistic process, which is subject to extensive fact-checking.[152] Furthermore, the fact that readers may easily comment on news stories chills preferred journalistic practices. For example, journalists report that readers threaten them in comment forums below their articles and that these threats chill their willingness to provide candid opinions.[153] The ACCC Report further emphasizes that local news is important to dispel corruption in local politics and disseminate knowledge.[154] Moreover, the ACCC Report recognizes the important role that access to multiple "media voices" plays.[155]

Problematically, Big Tech has also engaged in anticompetitive behavior to commandeer the alternative news sources that still exist. Google uses its superior bargaining power to secure favorable terms in deals with smaller news outlets.[156] Senator Richard Blumenthal claims Google has "victimized" local newspapers and collected sensitive information about them.[157] Furthermore, Senator Blumenthal argues Google uses that sensitive information

---

[150] *Id.* at 18; *see also* ABERNATHY, *supra* note 146, at 23 (noting that consumer preference and the convenience of online news have played a role in the shift to online news).

[151] AUSTL. COMPETITION & CONSUMER COMM'N, *supra* note 19, at 21-22.

[152] *Id.* at 299-300, 343.

[153] *Id.* at 344-45.

[154] *Id.* at 19.

[155] *Id.* ("[A] wider range of news sources should also be active in . . . all categories of journalism in order to ensure depth of coverage and broader range of media voices throughout Australia.").

[156] *Id.* at 300-01; *see also* Texas Google Complaint, *supra* note 7, at 3. For example, Google uses its monopoly power to secure a significant percentage of advertising revenue that the online news providers would otherwise receive. AUSTL. COMPETITION & CONSUMER COMM'N, *supra* note 19, at 300-01.

[157] *Stacking the Tech: Has Google Harmed Competition in Online Advertising?: Hearing Before the Subcomm. on Antitrust, Competition Pol'y, & Consumer Rts. of the S. Comm. on the Judiciary*, 116th Cong. (2020) (statement of Sen. Richard Blumenthal, Member, S. Comm. on the Judiciary).

against those newspapers in dealings with those newspapers' consumers.[158]

The mass exodus of alternative sources of news means fewer opinions in a less effective marketplace of ideas. Moreover, for those who prefer local news, there is in many cases no longer access to it. Yet the diversity of opinions and access to wide-ranging news stories is integral to democratic society. As the Supreme Court stated:

> A vigorous and dauntless press is a chief source feeding the flow of democratic expression and controversy which maintains the institutions of a free society. By interpreting to the citizen the policies of his government and vigilantly scrutinizing the official conduct of those who administer the state, an independent press stimulates free discussion and focuses public opinion on issues and officials as a potent check on arbitrary action or abuse. The press, in fact, "serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.["][159]

* * *

This Part has established that Big Tech firms have monopoly power in digital markets. This Part has further established that the marketplace of ideas is vital to a democracy and that Big Tech products are the key gateways to the modern marketplace of ideas. Yet rather than hosting a hospitable marketplace of ideas, Big Tech has hampered the marketplace of ideas by: (1) affirmatively shaping discourse; (2) viewpoint-based censorship; and (3) eradicating alternative sources of opinions and news.

An understanding of these points is important because harm to the marketplace of ideas is antitrust harm as this Article later establishes. Simply stated, Big Tech provides information products,

---

[158] *Id.*

[159] Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 602-03 (1953) (citations omitted) (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

and information products are of optimal quality when they reflect the broadest range of information possible. Therefore, Big Tech's censorship represents Big Tech's choice to degrade its own product, retract consumer choice, and refuse to innovate, all of which are antitrust harms. At the same time, Big Tech's censorship evidences Big Tech's monopoly power because in a competitive market, a firm cannot commandeer its consumers as those consumers would simply obtain their product from another supplier.

The next Part turns to monopolization law and highlights how modern monopolization law fails to adequately address harm to the marketplace of ideas.

II. MONOPOLIZATION LAW AND ITS FAILURE TO COMBAT MARKETPLACE OF IDEAS HARM IN THE BIG TECH CONTEXT

This Part provides antitrust principles necessary to understand that the Big Tech firms possess monopoly power in a cognizable antitrust market. At the same time, it illustrates that while antitrust law is uniquely suited to address Big Tech censorship, certain antitrust principles have prevented antitrust law from reining in Big Tech's impediments to the marketplace of ideas.

Section II.A considers modern monopolization principles. It describes the general requirements for antitrust liability under Section 2 of the Sherman Act; though, it notes the approaches of international competition authorities where relevant. It exemplifies these principles' application in the Big Tech context by utilizing a recent case against Google.

Section II.B argues that antitrust law has insufficiently addressed Big Tech's harm to the marketplace of ideas. It discounts the argument that antitrust law's failure is due to the price-centric consumer welfare standard. However, it recognizes that *Grinnell*'s anticompetitive "willful maintenance" requirement poses a more problematic barrier. It concludes by noting that First Amendment law is equally inadequate to rein in Big Tech censorship.

A. Monopolization Principles Inside and Outside the Digital Platform Context

Section 2 of the Sherman Act provides the primary legal framework that competition authorities use to combat monopoly behavior in the United States.[160] In *United States v. Grinnell Corp.*, the Supreme Court explained that for a firm to be liable for monopolization under Section 2, a court must find that the firm: (1) possesses monopoly power in a relevant antitrust market; and (2) willfully acquired or maintained that monopoly power by anticompetitive means rather than as a result of possessing "a superior product [or] business acumen, or [due to a] historic accident."[161] Even if a plaintiff asserts a prima facie Section 2 violation, the defendant firm may defend by showing "valid business reasons" for its exclusionary conduct.[162]

In a Section 2 claim, the plaintiff must first properly define the relevant market it alleges the defendant monopolized; this requires that the plaintiff define both relevant product and geographic markets.[163] A relevant product market is defined by the high cross elasticity of demand among the products in the market.[164] In

---

160 *See* 15 U.S.C. § 2. Specifically, Section 2 provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." *Id.*

161 Verizon Commc'ns, Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (citing United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966)); *see also* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602 n.28 (1985) (quoting United States v. Aluminum Co. of Am., 148 F.2d 416, 432 (2d Cir. 1945)) ("In order to fall within § 2, the monopolist must have both the power . . . and the intent to monopolize.").

162 Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 483 (1992) (quoting *Aspen Skiing Co.*, 472 U.S. at 605). The European Union follows a similar approach to the United States, first defining the relevant market before determining whether the alleged monopolist has monopoly power in that market and has abused its dominance. *See* UNILATERAL CONDUCT WORKING GRP., INT'L COMPETITION NETWORK, REPORT ON THE RESULTS OF THE ICN SURVEY ON DOMINANCE/SUBSTANTIAL MARKET POWER IN DIGITAL MARKETS 12 (2020) [hereinafter ICN REPORT], https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/07/UCWG-Report-on-dominance-in-digital-markets.pdf [https://perma.cc/8C83-2JN9]. In the digital platform context, where markets are two-sided in that there are both advertiser and consumer markets, the European Union generally considers these markets to be distinct because advertising is not a substitute in the consumer market. *Id.*

163 Brown Shoe Co. v. United States, 370 U.S. 294, 324-28 (1962).

164 *Id.* at 325.

determining the relevant product market, courts consider the following factors: (1) whether the public recognizes the market as a separate economic entity; (2) the product's uses and characteristics; (3) whether there are unique production facilities for the product; (4) whether the product has distinct consumers; (5) whether the product is uniquely priced; (6) the price elasticity of demand of the product; and (7) whether specialized vendors supply the product.[165] The relevant geographic market is the geographic area where customers can reasonably turn for the product.[166]

For example, in *Freedom Watch, Inc. v. Google, Inc.*, the plaintiffs—conservative activist groups—alleged the digital platforms conspired to suppress their content, and the plaintiffs alleged this censorship severed their revenue streams.[167] Accordingly, the plaintiffs alleged the platforms violated Section 2 because they refused to deal with conservative media outlets.[168] The United States District Court for the District of Columbia held the plaintiffs failed to plausibly plead their Section 2 claim.[169] The court held the plaintiffs did not properly allege a relevant antitrust market because the plaintiffs only made conclusory assertions that the relevant product market was the "market for media and news publications" and the relevant geographic market was "nationwide and worldwide" without further support.[170]

After defining a relevant antitrust market, the plaintiff must establish the defendant possesses monopoly power in that market.[171] The Supreme Court has traditionally defined monopoly power as "the power to control prices or exclude competition."[172] There are various methods by which a plaintiff may establish monopoly power. International competition authorities explain that

---

[165] HDC Med., Inc. v. Minntech Corp., 474 F.3d 543, 547 (8th Cir. 2007) (citing *Brown Shoe*, 370 U.S. at 325).

[166] *See* Morton Bldgs. of Neb., Inc. v. Morton Bldgs., Inc., 531 F.2d 910, 918 (8th Cir. 1976).

[167] 368 F. Supp. 3d 30, 33-34 (D.D.C. 2019), *aff'd*, 816 F. App'x 497 (D.C. Cir. 2020) (per curiam), *cert. denied*, 141 S. Ct. 2466 (2021).

[168] *Id.* at 34.

[169] *Id.* at 38-39.

[170] *Id.* at 38.

[171] Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995); *see also* United States v. Microsoft Corp., 253 F.3d 34, 51 (D.C. Cir. 2001) ("[D]irect proof is only rarely available, [so] courts more typically examine . . . circumstantial evidence . . . .").

[172] United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956).

the ability of an online platform to diminish its product quality without causing users to switch to another platform is evidence of monopoly power.[173] Similarly, American courts recognize that a firm's ability to coerce its buyers into taking actions they would not otherwise take in a competitive market is evidence of monopoly power.[174]

Additionally, courts recognize that a firm's market share often suggests whether the firm possesses monopoly power.[175] Courts have debated whether market share alone may be sufficient to support a finding that a firm possesses monopoly power. On one hand, the Third Circuit holds a predominant market share alone is sometimes sufficient to demonstrate monopoly power.[176] On the other hand, the Second Circuit holds even evidence of an extremely high market share alone is never sufficient to establish monopoly power and rather that market share is merely a factor to consider.[177] The Supreme Court has never addressed the validity of per se rules regarding high or low market shares, but it has

---

[173] *See* ICN REPORT, *supra* note 162, at 9 n.52 ("Unlike in markets where price is a significant basis for competition and where substitutability for a product can be measured by considering whether consumers would switch away from a product in case of a small but significant and non-transitory increase in price (SSNIP), in zero-price markets, where price is not typically a major basis of competition, substitutability or the lack of it, can be measured by considering whether consumers would switch away from a product in case of a small but significant non-transitory decrease in its quality (SSNDQ).").

[174] *See* Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, 87 U. CHI. L. REV. 595, 615 (2020) (quoting Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 464 (1992)) ("[M]arket power is coercion, namely, 'the power "to force a purchaser to do something that he would not do in a competitive market."'").

[175] *Eastman Kodak Co.*, 504 U.S. at 464; Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 201 (3d Cir. 1992). When a market has high entry barriers, a large market share demonstrates monopoly power because competitors cannot timely enter the market to challenge the monopolist. Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 196-97 (1st Cir. 1996).

[176] *Fineman*, 980 F.2d at 201.

[177] Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 99 (2d Cir. 1998); *see also* Thompson's Gas & Elec. Serv., Inc. v. BP Am. Inc., 691 F. Supp. 2d 860, 865 n.8 (N.D. Ill. 2010) (citing cases from other circuits). By contrast, in a famous early and since-overturned Second Circuit case, Judge Learned Hand held a greater than 90% share is per se sufficient to demonstrate monopoly power while a 60% to 64% share likely would not be sufficient and 33% or lower share is never sufficient. United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945).

suggested the market structure at issue determines the relevance of market share.[178]

International competition authorities generally follow the Second Circuit's approach in digital markets. Nearly a supermajority of the International Competition Network's ("ICN")[179] member competition authorities recognize that market share is a reasonable (though not sufficient)[180] indicator of monopoly power.[181] Even nations that do not consider market share to be a strong indicator of monopoly power nevertheless consider market share.[182] The fact that all nations consider market share in determining whether a firm in a digital market possesses monopoly power reflects that market share is indeed a vitally-important consideration. Of course, when a plaintiff pleads a firm's market share, it must do so with respect to the pleaded relevant antitrust market.[183] In fact, in *Freedom Watch*, the district court found that even if the plaintiffs had properly pleaded a relevant antitrust market, they failed to plead that any of the Big Tech platforms held a significant market share in that market.[184]

Digital markets are characterized by high barriers to entry, such as significant network effects, high transaction costs, and high

[178] United States v. First Nat'l Bank & Tr. Co. of Lexington, 376 U.S. 665, 672 (1964) (quoting United States v. Columbia Steel Co., 334 U.S. 495, 527-28 (1948)) ("We do not undertake to prescribe any set of percentage figures . . . . The relative effect of percentage command of a market varies with the setting in which that factor is placed."). Though, as a practical matter, the Supreme Court has never held a company possessed monopoly power when its market share was less than 75%. 2 JULIAN O. VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REGULATION § 25.03[3][a], LEXIS (database updated 2022).

[179] The ICN is a forum where international competition authorities develop optimal competition policy. *See generally About*, INT'L COMPETITION NETWORK, https://www.internationalcompetitionnetwork.org/about/ [https://perma.cc/4UC3-S9Y6] (last visited Nov. 3, 2021).

[180] *But see* ICN REPORT, *supra* note 162, at 22 & n.82 (noting that Canada, Israel, Montenegro, and Seychelles presume monopoly power when a company possesses a given market share (generally 40% or 50%)).

[181] *Id.* at 14.

[182] *Id.* ("[N]o agency would dismiss the relevance of market share in the assessment of market power in digital markets, nor is there a[n] agency that would rely solely on market shares.").

[183] *See* Freedom Watch, Inc. v. Google, Inc., 368 F. Supp. 3d 30, 39 (D.D.C. 2019), *aff'd*, 816 F. App'x 497 (D.C. Cir. 2020) (per curiam), *cert. denied*, 141 S. Ct. 2466 (2021).

[184] *Id.* For a discussion of Google's market share, see *supra* Section I.A.1. For a complete explanation of Google's monopoly power in relevant antitrust markets, see *infra* Section III.C.3.

switching costs, and these barriers are an equally important consideration when assessing monopoly power. This is so because high barriers to entry prevent potential competitors from entering the market and competing with the monopolist.[185] Network effects are an especially important factor to consider; indeed, nearly all of the ICN member competition authorities consider a market's network effects when analyzing whether a firm can obtain durable monopoly power in the market.[186] The ICN explained with respect to the network effects between the general Internet search market and the general search advertising market:

> The higher the number of users of a general search service, the greater the likelihood that a given search advertisement is matched to a user and converted into a sale. This in turn has increased the price that a general search engine can charge advertisers if their search advertisements are clicked on. The general search engine can then reinvest that revenue in seeking to attract new users of its general search service.[187]

Turning to *Grinnell*'s second prong, the monopolist must willfully create or maintain its monopoly power in the relevant market.[188] It is true that good-faith, aggressive conduct is permitted under Section 2 while exclusionary, monopolistic conduct is condemned; however, the line between these extremes is difficult to identify.[189] In *Freedom Watch*, the court noted that even if the plaintiffs had properly pleaded a relevant antitrust market and monopoly power, their claims still would have failed because the plaintiffs failed to plead that the platforms willfully maintained

---

[185] *See* ICN REPORT, *supra* note 162, at 23-25 (explaining the importance of considering barriers to entry when determining the durability of a firm's monopoly power); *see also* United States v. Microsoft Corp., 253 F.3d 34, 54-56 (D.C. Cir. 2001). *See generally* Kenneth A. Bamberger & Orly Lobel, *Platform Market Power*, 32 BERKELEY TECH. L.J. 1051, 1070 (2017) (discussing barriers to entry caused by network effects); Stucke & Ezrachi, *supra* note 27, at 81-89 (same).

[186] ICN REPORT, *supra* note 162, at 7, 9.

[187] *Id.* at 9.

[188] Lorain J. Co. v. United States, 342 U.S. 143, 155 (1951) (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919)) ("In the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.") (emphasis omitted).

[189] *See* Frank H. Easterbrook, *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 COLUM. BUS. L. REV. 345, 345.

their monopoly power.[190] While the plaintiffs pleaded that the platforms suppressed their conservative content, they did not plead that the platforms "conspired to acquire or maintain monopoly power."[191]

There are several established methods by which a plaintiff can show an alleged monopolist willfully maintained its monopoly. Pertinently for this Article, courts have imposed upon firms a duty to deal in particular cases and held defendants engaged in anticompetitive conduct when they refused to deal. Ordinarily, firms have no duty to deal with competitors or customers under the Sherman Act.[192] Though, when a monopolist's refusal to deal harms competition, the refusal violates Section 2.[193] Thus, in *Aspen Skiing Co.*, the Court held that a company that owned three of four ski resorts in Aspen could not suddenly discontinue its relationship with the owner of the fourth resort because the sudden decision to discontinue the relationship prevented consumers from conveniently accessing all mountains in the area as they had in the past.[194] Other nations require duties to deal in certain contexts as well.[195]

In one specific context, a firm has a duty to deal with its competitors when the firm possesses a "facility" essential to competing in the market. Because this Article discusses its modified essential facilities framework in Section III.C.2, it reserves a detailed discussion of the essential facilities doctrine for Section III.C.1.

---

[190] Freedom Watch, Inc. v. Google Inc., 816 F. App'x 497, 500 (D.C. Cir. 2020) (per curiam), *cert. denied*, 141 S. Ct. 2466 (2021).

[191] *Id.*

[192] Verizon Commc'ns, Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004). Courts are hesitant to impose duties to deal because the competitive advantages a firm derives by developing a superior product are precisely what incentivizes that firm to innovate. *See id.* at 407-08.

[193] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601-02 (1985); *see* Ioannis Drivas, Comment, *Liability for Data Scraping Prohibitions Under the Refusal to Deal Doctrine: An Incremental Step Toward More Robust Sherman Act Enforcement*, 86 U. CHI. L. REV. 1901, 1916-17 (2019) (citing *Aspen Skiing Co.*, 472 U.S. at 605-11).

[194] *See Aspen Skiing Co.*, 472 U.S. at 605-07.

[195] *See* EINER ELHAUGE & DAMIEN GERADIN, GLOBAL ANTITRUST LAW AND ECONOMICS 522-23 (3d ed. 2018) (e.g., South Korea, Australia, New Zealand, China, Venezuela, Peru, Saudi Arabia, South Africa, Turkey, Singapore, Brazil, Israel, Russia, Egypt, Canada).

B. Why Modern Antitrust and Other Law Insufficiently Combats Big Tech's Harm to the Marketplace of Ideas

Section II.B.1 first recognizes reasons why antitrust law has failed to address Big Tech's harm to the marketplace of ideas. From there, Section II.B.2 notes that other law is equally insufficient to address Big Tech's harm to the marketplace of ideas.

1. Modern Antitrust Law's Failure to Protect the Marketplace of Ideas

This Section explains that current antitrust law does not adequately address Big Tech's manipulation of the marketplace of ideas. There are two possible explanations for this result: (1) antitrust principles have traditionally been price-centric, and Big Tech's products are generally zero-price products; and (2) monopolization jurisprudence requires a monopolist's willful creation or maintenance of monopoly power in the monopolist's market. In light of the fact that antitrust officials have recently considered indicators of competition other than price, this Section concludes the latter reason prevents current antitrust law from addressing Big Tech censorship.

a. Traditional Focus on the Price-Centric Consumer Welfare Standard Versus Other Indicators of Competition

Courts and antitrust agencies have historically focused on harm to price and output (i.e., the price-centric consumer welfare standard) when determining whether there is harm to competition remediable by antitrust law.[196] Thus, antitrust scholars, including Professor Gregory Day, note that it is questionable whether antitrust law has authority to promote free speech because Big Tech suppression of ideas has no effect on price or output, especially considering that Big Tech firms offer zero-price products.[197]

---

[196] *See supra* note 172 and accompanying text.

[197] Gregory Day, *Monopolizing Free Speech*, 88 FORDHAM L. REV. 1315, 1321 (2020) (citing Maurice E. Stucke & Allen P. Grunes, *Why More Antitrust Immunity for the Media Is a Bad Idea*, 105 NW. U. L. REV. 1399, 1400 (2011)) ("[T]here are great reasons to doubt whether antitrust law has any authority to promote free expression . . . . [T]o state an antitrust claim, plaintiffs must generally show that the challenged act increased prices or restricted output, thereby harming consumer welfare."); *see also* Harris S.

Professor Robert Picard agrees and argues harm to the marketplace of ideas cannot provide a basis for antitrust liability because censorship of ideas neither raises price nor causes other anticompetitive harms and because firms cannot monopolize ideas.[198]

While these arguments have some merit, they are insufficient to explain why antitrust law has yet to remedy Big Tech censorship. Indeed, antitrust agencies around the world and even in the United States have held harm outside of the price-centric consumer welfare standard constitutes antitrust harm.[199] In fact, the DOJ, FTC, and nearly every state Attorney General in the recently-filed actions against Google and Facebook note that harm to consumer choice, innovation, and product quality are all cognizable antitrust harms.[200]

Similarly, editorial competition (e.g., competition among newspapers) jurisprudence recognizes that harm to the

---

Rothman, *Operationalizing the Third Prong of the Federal Trade Commission's 2015 Statement Regarding "Unfair Methods of Competition"*, 52 COLUM. J.L. & SOC. PROBS. 85, 128 n.211 (2018) ("[M]arket power is often viewed as the ability to raise price above the competitive level. Yet a simple cost-price difference of the free good will not provide any useful information. Rather, its application might lead to the conclusion that no market power exists at all . . . .") (emphasis omitted); Michal S. Gal & Daniel L. Rubinfeld, *The Hidden Costs of Free Goods: Implications for Antitrust Enforcement*, 80 ANTITRUST L.J. 521, 548-49 (2016); Bauer, *supra* note 19, at 733 (explaining the traditional consumer welfare standard does not apply well to zero-price goods).

[198] Robert G. Picard, *Limits of the First Amendment and Antitrust Law in Platform Governance and Media Reform*, 18 FIRST AMEND. L. REV. 94, 102-03 (2020); *see also* Day, *supra* note 197, at 1322. At least two courts have suggested harm to the marketplace of ideas by censorship of free expression alone is not antitrust harm, at least in the absence of a properly-pleaded antitrust market. *See* Johnson v. Comm'n on Presidential Debates, 202 F. Supp. 3d 159, 171 (D.D.C. 2016); DataCell ehf. v. Visa, Inc., No. 14-CV-1658, 2015 WL 4624714, at *7 (E.D. Va. July 30, 2015) ("Congress created antitrust laws to protect free market competition, not to protect the free exchange of ideas.").

[199] *See infra* note 222 and accompanying text.

[200] *See* FTC Facebook Complaint, *supra* note 9, at 47-49; DOJ Google Complaint, *supra* note 7, at 7, 54; Colorado Google Complaint, *supra* note 7, at 70-73; New York Facebook Complaint, *supra* note 9, at 67-70; Texas Google Complaint, *supra* note 7, at 92-94. Equally, it cannot be convincingly argued that the Big Tech firms do not possess monopoly power in any relevant market merely because they offer zero-price products. This is so because European competition officials have indeed found Google possesses monopoly power in general Internet search despite that Google Search is free to users. Google Search (Shopping), *supra* note 6, at 56-57.

marketplace of ideas is antitrust harm.[201] Of course, courts have explained that editorial competition is cognizable under the antitrust laws because, like other competition, it involves competition among businesses for profit and correspondingly offers to consumers competitive benefits.[202] More relevantly, though, as Justice Frankfurter noted in his concurring opinion in *Associated Press v. United States*, harm to editorial competition is antitrust harm because of the fact that it dampens the marketplace of ideas alone.[203] Justice Frankfurter explained that the Sherman Act broadly prohibits unreasonable restraints on trade, and he explained that which restraints are "unreasonable" depends on the industry at issue.[204] He explained that in the editorial competition context, restraints are unreasonable when they dampen the freedom of the press because the press is "indispensable to the workings of our democratic society."[205] Indeed, editorial competition contributes to the marketplace of ideas by allowing different content developers to express different viewpoints.[206] Thus, Justice Frankfurter reasoned that antitrust intervention is warranted where there is harm to editorial competition because First Amendment interests of the public in the press render harm to the marketplace of ideas antitrust harm.[207] Accordingly, Justice

---

[201] *See generally* Las Vegas Sun, Inc. v. Adelson, No. 19-CV-1667, 2020 WL 7029148, at *6-7 (D. Nev. Nov. 30, 2020); United States v. Daily Gazette Co., 567 F. Supp. 2d 859, 869-71 (S.D.W. Va. 2008); Stucke & Grunes, *supra* note 12, at 140-42 (explaining that harm to editorial competition is cognizable antitrust harm).

[202] *See* Associated Press v. United States, 326 U.S. 1, 7, 13-14 (1945). Notably, editorial competition has not necessarily been on the basis of price historically; instead, newspapers competed on the basis of, inter alia, quality and innovation to attract users and in turn advertisers. Stucke & Grunes, *supra* note 12, at 140.

[203] *See Associated Press*, 326 U.S. at 27-29 (Frankfurter, J., concurring).

[204] *Id.* at 27.

[205] *Id.* at 28.

[206] Stucke & Grunes, *supra* note 12, at 141 n.188 (quoting United States v. Vill. Voice Media, LLC, No. 03-CV-164, 2003 WL 21659092, at *16 (N.D. Ohio Feb. 12, 2003) (quotation from Competitive Impact Statement, which was not part of the court's opinion)).

[207] *See Associated Press*, 326 U.S. at 28-29 (Frankfurter, J., concurring) ("[T]he freedom of enterprise *protected by the Sherman Law necessarily has different aspects in relation to the press than in the case of ordinary commercial pursuits*. The interest of the public is to have the flow of news not trammeled by the combined self-interest of those who enjoy a unique constitutional position precisely because of the public dependence on a free press. A public interest so essential to the vitality of our democratic government

Frankfurter's concurrence recognizes that marketplace of ideas harm can be antitrust harm. Though, antitrust agencies—outside of newspaper mergers, anticompetitive market allocation agreements between alternative newsweeklies, and anticompetitive behavior involving newspaper joint operating agreements—have not broadly relied on harm to the marketplace of ideas as a basis for enforcement.

While on the topic, it should be noted that editorial competition jurisprudence alone is grossly insufficient to protect the marketplace of ideas. The censorship this Article criticizes is not remediable by editorial competition jurisprudence because while Big Tech organizes information and provides a platform to access news, it does not produce news itself.[208]

b. *Section 2's Willful Maintenance Requirement*

A more likely reason the current monopolization regime fails to address Big Tech censorship is *Grinnell*'s second requirement: that a firm willfully acquire or maintain its monopoly power by anticompetitive means.[209] For a monopolist's conduct to satisfy this requirement, the anticompetitive conduct generally must be directed at the monopolist's competitors and thus injure competition in the monopolist's market rather than some collateral market.[210] Consequently, Big Tech censorship seems at first glance irremediable by a Section 2 challenge because Big Tech firms do not willfully acquire or maintain monopoly power in their markets (e.g., general Internet search, social networking) when they censor

may be defeated by private restraints no less than by public censorship.") (emphasis added).

[208] There is an argument that Big Tech competes with newspapers and other media as an editor when it censors content. But for the most part, Big Tech simply organizes and displays sources of media rather than producing its own. It does not, for example, own its own newspaper that competes with other newspapers. Therefore, it seems unlikely Google's censorship is remediable under an editorial competition theory.

[209] Verizon Commc'ns, Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (citing United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966)); *see also* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602 n.28 (1985) (quoting United States v. Aluminum Co. of Am., 148 F.2d 416, 432 (2d Cir. 1945)) ("In order to fall within § 2, the monopolist must have both the power . . . and the intent to monopolize.").

[210] Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1356-57 (Fed. Cir. 1999) (requiring the plaintiff to be a competitor of the monopolist).

speech and advertisements. This is so primarily because the Big Tech firms are not often competitors of the entities they censor.

2. Other Law's Failure to Protect the Marketplace of Ideas

Outside antitrust law, plaintiffs have sought to hold Big Tech accountable for harm to the marketplace of ideas under the First Amendment.[211] Unfortunately, under the state action doctrine, plaintiffs may not allege violations of the First Amendment against private individuals or firms.[212] Litigants have asserted that Big Tech firms perform a public function by disseminating information, but courts have rejected that argument.[213]

Because of the limited likelihood of success when challenging harm to the marketplace of ideas directly, litigants have challenged Google's suppression of commercial speech. For instance, Google has been held liable in the European Union for manipulating organic search results in Google Search by unfavorably placing Google's competitors' products.[214] The European Commission found that Google violated the Treaty on the Functioning of the European Union Article 102 (the European Union's Sherman Act Section 2 analog)[215] by favorably positioning its own comparison shopping service over competitors' shopping services in Google Search's results[216] and by demoting the ranking of other competitors' shopping services using PageRank.[217] The Commission explained Google abused its dominant position in the search engine market to obtain dominance in the comparison shopping services market.[218] Interestingly, the FTC had refused to bring charges against Google in the United States for the same conduct.[219] The FTC admitted

---

[211] *See, e.g.*, Prager Univ. v. Google LLC, 951 F.3d 991, 996-99 (9th Cir. 2020).

[212] *Id.* at 996-97.

[213] *See, e.g.*, *id.* at 997-98.

[214] *See generally* Google Search (Shopping), *supra* note 6.

[215] Article 102's abuse of dominance jurisprudence overlaps but is not coextensive with Section 2. *See* Ariel Katz & Paul-Erik Veel, *Beyond Refusal to Deal: A Cross-Atlantic View of Copyright, Competition, and Innovation Policies*, 79 ANTITRUST L.J. 139, 147-48 (2013).

[216] Google Search (Shopping), *supra* note 6, at 7.

[217] *Id.* at 78.

[218] *Id.* at 196.

[219] *See generally Statement of the Federal Trade Commission Regarding Google's Search Practices - In the Matter of Google Inc.*, FED. TRADE COMM'N (Jan. 3, 2013),

Google favorably placed its comparison shopping service, but it concluded that Google's choice to do so could have represented a business judgment with a plausible justification—such as maximizing the quality of search results—rather than being anticompetitive conduct to acquire monopoly power in another market.[220]

* * *

This Part has established that modern antitrust principles fail to adequately address Big Tech's harm to the marketplace of ideas. This result is possibly due to the price-centric consumer welfare standard but more likely due to Section 2's willful maintenance requirement. Under current jurisprudence, Section 2 can address Google's harms to rivals that indirectly affect the marketplace of ideas (such as favoring its YouTube platform over rival video platforms). But it cannot likely address many of the acts of censorship identified earlier, such as blacklisting particular content providers or altering search suggestions based on viewpoint. This Part further recognized that resorting to other law—including First Amendment challenges—equally fails to address Big Tech's injury to the marketplace of ideas.

The next Part explains that antitrust law is uniquely suited to fill the void. This is so because when dominant private companies like the Big Tech firms hinder the marketplace of ideas by engaging in censorship, they cause anticompetitive effects, which are remediable by antitrust law.[221]

III. A SUGGESTED SOLUTION: A CALL FOR A REWORKED ESSENTIAL FACILITIES DOCTRINE FRAMEWORK TO ADDRESS BIG TECH'S THREAT TO THE MARKETPLACE OF IDEAS

Parties on both sides of the political spectrum agree Big Tech censorship and corresponding harm to the marketplace of ideas are major issues. Yet traditional antitrust doctrine fails to address the

---

https://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtofcomm.pdf [https://perma.cc/LPJ3-ZXRY].

[220] *Id.* at 3-4.

[221] *See* Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249, 252 (2001). *See generally* Hillary Greene & Dennis A. Yao, *Antitrust as Speech Control*, 60 WM. & MARY L. REV. 1215 (2019) (discussing the relationship between various types of speech and antitrust law).

issues primarily because under the current regime, firms must willfully maintain their monopolies to be liable under Section 2.

This Part advances this Article's thesis: as international competition authorities and Congress recognize, harm to the marketplace of ideas constitutes antitrust harm, at least where Big Tech's information products are at issue. Considering harm to the marketplace of ideas as antitrust harm, this Part further provides a useful framework for reining in Big Tech's censorship by drawing from the essential facilities doctrine.

Section III.A first recognizes that harm to the marketplace of ideas is cognizable antitrust harm. Section III.B identifies that scholars and congresspersons have called for an end to Big Tech censorship and that they have suggested the essential facilities doctrine provides a useful framework to achieve this goal. Section III.C provides background on the essential facilities doctrine, posits a modified essential facilities doctrine that is uniquely suited to address Big Tech's harm to the marketplace of ideas, applies this framework to Google's case to demonstrate its workability, and considers counterarguments.

A. *Marketplace of Ideas Harm as Cognizable Antitrust Harm*

Harm to the marketplace of ideas by digital platforms is antitrust harm. This is so because when a firm harms the marketplace of ideas, it necessarily causes other anticompetitive harms: most notably, diminished product quality.[222]

---

[222] International competition authorities and commentators recognize the ability of a company—due to its monopoly power—to degrade the quality of its product is competitive harm. *See* Stucke & Ezrachi, *supra* note 27, at 90-93. While American courts have traditionally followed the price-centric consumer welfare standard, antitrust officials have recently recognized that other types of harm constitute antitrust harm, especially in zero-price markets where price is not a proxy for competition. *See generally* STAFF OF H. COMM. ON THE JUDICIARY, SUBCOMM. ON ANTITRUST, COM. & ADMIN. L., *supra* note 21, at 37 ("The benefits of robust competition in the digital economy go beyond innovation and productivity. It can also spur firms to compete along other dimensions such as privacy and data protection. As a general matter, inadequate competition not only leads to higher prices and less innovation in many cases, but it can also reduce the quality of goods and services. Given that many digital products do not charge consumers directly for services, these firms often compete on quality.") (footnote omitted); Ariel Ezrachi & Maurice E. Stucke, *The Curious Case of Competition and Quality*, 3 J. ANTITRUST ENF'T 227 (2015) (noting quality is particularly important where zero-price products are at issue); Stucke & Grunes, *supra* note 12, at 140 ("It is well accepted, and

Under First Amendment theory, the quality of an information product (like Big Tech firms' products) depends on its presentment of a wide variety of viewpoints. The First Amendment reflects an understanding that the marketplace of ideas—that is, the process of testing viewpoints against other viewpoints—is the best process to determine what information is the most optimal. Therefore, to provide high-quality information and thus a high-quality information product, an information product must present a wide variety of ideas. Accordingly, when Big Tech firms decrease access to varying viewpoints by affirmatively shaping discourse or censoring viewpoints, the firms necessarily degrade their own product quality. And product degradation in this context is antitrust harm because consumers cannot easily switch to competitors' products due to network effects and other barriers to entry prominent in digital platform markets.

While product degradation in this context is itself anticompetitive harm, product degradation causes other cognizable antitrust harms as well. In the search engine market, Google's product degradation via censorship leads to increased transaction costs because consumers spend more time searching for the censored viewpoints and it is more difficult for content providers to reach consumers.[223] Of course, as a compromise, Google may charge these content providers a premium advertising price based on their viewpoints, but this is a premium that content providers will likely shift to consumers in the long run. Additionally, when firms can degrade their product without adverse consumer response, they have less incentive to innovate to produce better-quality products[224]

a matter of everyday experience, that price is not the sole measure of competition. Companies can, and often do, compete on other dimensions, such as quality, service, and innovation."); Kirkwood & Lande, *supra* note 12. At least one federal court disapproved of a firm limiting consumer access to information because such undermines the Internet's ability to serve as the marketplace of ideas. *See* hiQ Labs, Inc. v. LinkedIn Corp., 273 F. Supp. 3d 1099, 1119 (N.D. Cal. 2017) (explaining that permitting LinkedIn to deny other companies access to public profiles "could pose an ominous threat to public discourse and the free flow of information promised by the Internet.").

[223] *See* Stucke & Ezrachi, *supra* note 27, at 92. Along similar lines, censorship can cause efficiency losses because the censored information might have permitted a viewer to more efficiently operate its business. *See* Greene & Yao, *supra* note 221, at 1247-49 (explaining that free speech creates economic efficiency).

[224] *See* DOJ Google Complaint, *supra* note 7, at 53; Stucke & Ezrachi, *supra* note 27, at 92; Google Search (Shopping), *supra* note 6, at 180-81 (explaining that harm to

or to protect consumer data and privacy.[225] What is more, the Supreme Court[226] and antitrust authorities[227] more broadly recognize that less consumer choice is an anticompetitive harm, and when Big Tech decreases access to viewpoints, it per se lessens consumers' ability to access different perspectives that some desire to see.

Of course, this Article also argues that censorship in fact adversely affects prices and therefore constitutes antitrust harm under the traditional price-centric consumer welfare standard. Consider when Google censors an advertisement based on its content. If the advertiser loses customers and eventually exits the market because customers do not have access to the advertisement, fewer firms will exist in the market, and those fewer firms will charge higher prices.[228] This is especially problematic if the censored advertiser is a maverick firm in an oligopolistic market. Moreover, some Big Tech firms possess two-sided monopolies, and a firm's monopoly on one side of the market may give it power to charge higher prices or decrease output on the other side of the market. For example, while Google Search is a free product, Google's monopoly power in general Internet search allows it to

---

innovation and quality are anticompetitive harms); *The Role and Measurement of Quality in Competition Analysis*, at 5, OECD (Oct. 28, 2013), http://www.oecd.org/competition/Quality-in-competition-analysis-2013.pdf [https://perma.cc/A7HV-H5W2] (explaining that quality is a key indicator of competition in many markets and that a decrease in quality can be as harmful to consumer welfare as an increase in price). *See generally* Stucke & Grunes, *supra* note 221 (identifying markets where quality plays a uniquely important role).

[225] *See* STAFF OF H. COMM. ON THE JUDICIARY, SUBCOMM. ON ANTITRUST, COM. & ADMIN. L., *supra* note 21, at 37.

[226] *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 890 (2007) (explaining that interbrand competition is important because it provides consumers choice of the types of products they may purchase).

[227] DOJ Google Complaint, *supra* note 7, at 53; *see also* Press Release, William P. Barr, *supra* note 8.

[228] To provide a more specific example, Section I.C.3 discusses a case in which Google censored a crisis pregnancy center's advertisement. *See supra* notes 135-137 and accompanying text. In so doing, Google harmed that center's ability to compete. Thus, per se, Google made the market for reproductive services less competitive and likely gave other firms power to charge higher prices. This anticompetitive harm is maximized in concentrated markets and markets that rely on its online advertisements to reach customers.

charge advertisers a higher price to advertise.[229] And those advertisers in turn charge higher prices to its consumers (i.e., Google's Search users).[230]

It is also important to note that Big Tech censorship interferes with free-market forces by eliminating efficient and consumer-desired firms. Some businesses' speech is critical to their success in a market, particularly when they offer products with inferior intrinsic quality.[231] When Big Tech censors those businesses' speech because it is "inappropriate" or "shocking," those businesses may lose customers and eventually be forced to exit the market. Moreover, at least some consumers may prefer the businesses' speech; therefore, the businesses' departure further impedes consumer choice.

Finally, drawing from Justice Frankfurter's concurrence in *Associated Press*, marketplace of ideas harm caused by a dominant firm is antitrust harm per se. As Justice Frankfurter explained, the Sherman Act broadly prohibits unreasonable restraints of trade.[232] He explained that significant harm to editorial competition is an unreasonable restraint of trade because it impedes the marketplace of ideas.[233] Following this reasoning, all restraints of trade by firms with monopoly power that impede the marketplace of ideas are unreasonable and thus create antitrust harm. As Justice Frankfurter explained, "[a] public interest so essential to the vitality of our democratic government may be defeated by private restraints no less than by public censorship."[234] When Big Tech firms refuse to allow viewpoint publishers to use their products on account of the viewpoint expressed, they restrain trade

---

[229] Dietrich Vollrath, *There's No Limit to Google's Market Power*, N.Y. TIMES: ROOM FOR DEBATE, https://www.nytimes.com/roomfordebate/2016/04/28/is-google-a-harmful-monopoly/theres-no-limit-to-googles-market-power [https://perma.cc/92BU-YKRA] (Apr. 28, 2016, 3:21 AM).

[230] *Id.*

[231] Consider restaurants—such as Hooters or Dick's Last Resort—that have consumers who visit their establishments for the experience rather than the dining. What if, for example, a regulatory agency informed Dick's it could no longer be rude to its customers because it considered Dick's behavior toward its customers offensive? It seems Dick's would lose its primary marketing advantage.

[232] *See* Associated Press v. United States, 326 U.S. 1, 27 (1945) (Frankfurter, J., concurring).

[233] *See id.* at 28.

[234] *Id.* at 29.

unreasonably, violating the Sherman Act and causing cognizable antitrust harm.

Because marketplace of ideas harm constitutes antitrust harm, especially when a monopolist is causing that harm through anticompetitive restraints, antitrust law provides a useful vehicle for reining in Big Tech's harm to the marketplace of ideas.

B. The Call for Antitrust Law to Address Big Tech Censorship

In the House Report, the House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law recommended approaches to stifle Big Tech's monopolistic tendencies.[235] For example, the Subcommittee recommended increasing the resources available to antitrust agencies.[236] Most pertinently, the Subcommittee recommended strengthening Section 2 of the Sherman Act by, inter alia, revamping the essential facilities doctrine.[237] The Buck Report agrees that a revitalized essential facilities doctrine may combat Big Tech's dominance.[238] In suggesting Big Tech firms are essential facilities, the Buck Report states, "Big Tech firms maintain vitally important platforms for digital commerce."[239] Likewise, Senator Warren called for legislation designating Big Tech companies as "Platform Utilities" and for the law to require Big Tech to deal with its customers and competitors evenhandedly.[240] International sources call for monopolization law reform in the Big Tech context as well.[241]

---

[235] *See* STAFF OF H. COMM. ON THE JUDICIARY, SUBCOMM. ON ANTITRUST, COM. & ADMIN. L., *supra* note 21, at 376-405. However, the Subcommittee did not intend for its recommendations to address Big Tech censorship. *Id.* at 9 (noting the limited purpose of the investigation).

[236] *Id.* at 403.

[237] *Id.* at 397.

[238] *See* BUCK, *supra* note 87, at 12-13.

[239] *Id.* at 12. Though, Congressman Buck did warn that conservatives should be hesitant to expand agency regulatory authority. *Id.* at 12-13.

[240] Warren, *supra* note 100.

[241] *See, e.g.*, Press Release, Dep't for Bus., Energy & Indus. Strategy et al., New Competition Regime for Tech Giants to Give Consumers More Choice and Control over Their Data, and Ensure Businesses Are Fairly Treated (Nov. 27, 2020), https://www.gov.uk/government/news/new-competition-regime-for-tech-giants-to-give-consumers-more-choice-and-control-over-their-data-and-ensure-businesses-are-fairly-treated [Perma.cc link unavailable] (discussing the Competition and Markets Authority Code of Conduct, which governs competitive conduct and ethics of the dominant platforms); *Questions and Answers: Digital Markets Act: Ensuring Fair and Open Digital*

Scholars and congresspersons equally advocate for antitrust law to address Big Tech's (particularly Google's) censorship of speech and corresponding harm to the marketplace of ideas.[242]

Consistent with these requests, this Article offers a reworked essential facilities doctrine that is designed specifically to combat Big Tech's harm to the marketplace of ideas. Specifically, this Article argues that Big Tech platforms are essential facilities that entities must access if they are to meaningfully participate in the marketplace of ideas. Utilizing the framework this Article posits, future plaintiffs can rein in Big Tech's harm to the marketplace of ideas by holding the Big Tech firms accountable under Section 2 for their censorship.

C. A Modified Essential Facilities Doctrine as a Solution to Big Tech Censorship and Marketplace of Ideas Harm

This Section proposes a revitalized essential facilities doctrine that Congress and the courts should adopt to rein in Big Tech's harm to the marketplace of ideas. Section III.C.1 discusses the essential facilities doctrine. Section III.C.2 provides a modified essential facilities framework that is uniquely suited to address Big Tech's harm to the marketplace of ideas. Section III.C.3 applies Google's case to this framework to demonstrate its workability. Section III.C.4 considers counterarguments.

1. Essential Facilities Doctrine Background

Competition authorities around the world recognize forms of the essential facilities doctrine.[243] In the United States, the

---

Markets, EUR. COMM'N (Apr. 23, 2022), https://ec.europa.eu/commission/presscorner/api/files/document/print/en/qanda_20_2349/QANDA_20_2349_EN.pdf [https://perma.cc/MW5K-NRY6] (discussing the proposed Digital Markets Act, which would "prevent[] gatekeepers from imposing unfair conditions on businesses and end users and . . . ensur[e] the openness of important digital services").

[242] *See* BUCK, *supra* note 87, at 6; REYNOLDS, *supra* note 85, at 50-54, 63-64; Picard, *supra* note 198, at 119-20; *see also supra* Section I.C.1.

[243] *See* ELHAUGE & GERADIN, *supra* note 195, at 522-23 (e.g., South Korea, South Africa, Turkey, Singapore). *See generally* Mehmet Bilal Ünver, Essential Facilities Doctrine Under EC Competition Law and Particular Implications of the Doctrine for Telecommunications Sectors in EU and Turkey (Sept. 2004) (M.S. Thesis, Middle East

essential facilities doctrine is nested within Section 2 of the Sherman Act's refusal to deal jurisprudence.[244]

As explained in Section II.A, firms have a duty to deal with other firms in limited circumstances, including in the essential facilities context. An "essential facility" is "a service or network that is entirely unique and possesses few (or no) good alternatives."[245] A plaintiff can show a defendant monopolist violated Section 2 by demonstrating the defendant denied its competitors access to an essential facility in the monopolist's relevant market and that such denial caused harm to competition in the market.[246] The essential facilities doctrine is broader in the European Union because it extends into collateral markets. For example, in the European Union, possessors of essential facilities may not withhold a facility essential for the plaintiff to create a new product.[247]

When proving an essential facilities claim, the plaintiff must allege and prove harm to competition.[248] Courts have identified four specific elements plaintiffs must establish: (1) the monopolist controls an essential facility; (2) competitors cannot practically or

---

Technical University) (on file with author and the Mississippi Law Journal) (discussing the essential facilities doctrine under United States, European, and Turkish law).

[244] *See* Twin Lab'ys, Inc. v. Weider Health & Fitness, 900 F.2d 566, 568-70 (2d Cir. 1990). *See generally* 2 KALINOWSKI ET AL., *supra* note 178, § 25.04[3][b]. The Supreme Court has questioned—but neither accepted nor rejected—the essential facilities doctrine. Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 410-11 (2004) ("We have never recognized [the essential facilities doctrine], and we find no need either *to recognize it or to repudiate it* here.") (emphasis added). In any event, all circuits except the First and Fifth Circuits have explicitly accepted the doctrine. *See Twin Lab'ys, Inc.*, 900 F.2d at 568-70; Kerwin v. Parx Casino, 802 F. App'x 723, 727 (3d Cir. 2020); Laurel Sand & Gravel, Inc. v. CSX Transp., Inc., 924 F.2d 539, 544 (4th Cir. 1991); Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co., 833 F.2d 606, 612 (6th Cir. 1987); Flip Side Prods., Inc. v. Jam Prods., Ltd., 843 F.2d 1024, 1032 (7th Cir. 1988); City of Malden v. Union Elec. Co., 887 F.2d 157, 160 (8th Cir. 1989); MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1128-29 (9th Cir. 2004); Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1519-21 (10th Cir. 1984), *aff'd on other grounds*, 472 U.S. 585 (1985); Morris Commc'ns Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1294 (11th Cir. 2004); Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1088 (D.C. Cir. 1998).

[245] Adam Thierer, *The Perils of Classifying Social Media Platforms as Public Utilities*, 21 COMMLAW CONSPECTUS 249, 267 (2013).

[246] *See Twin Lab'ys, Inc.*, 900 F.2d at 568.

[247] *See* James Turney, *Defining the Limits of the EU Essential Facilities Doctrine on Intellectual Property Rights: The Primacy of Securing Optimal Innovation*, 3 NW. J. TECH. & INTELL. PROP. 179, 188-89 (2005).

[248] *Twin Lab'ys, Inc.*, 900 F.2d at 568.

reasonably duplicate the essential facility; (3) the monopolist denied a competitor access to the essential facility; and (4) it would have been feasible for the monopolist to provide the essential facility.[249] Of course, if the plaintiff has access to the essential facility, the doctrine does not apply.[250]

In 2006, the United States District Court for the Northern District of California applied the essential facilities doctrine to Google.[251] The plaintiff provided online educational resources for young children.[252] After successful operations for a few years, the plaintiff's revenue plummeted after Google decreased the plaintiff's website's PageRank.[253] The plaintiff alleged Google censored the plaintiff and that, inter alia, Google violated Section 2 by manipulating search results because Google Search is an essential facility for websites to compete online.[254]

The court held the plaintiff failed to sufficiently allege Google Search is an essential facility.[255] The court reasoned that a facility controlled by a firm will be deemed an essential facility only when the firm's ability to control that facility allows the firm "to eliminate competition in the downstream market."[256] The court also reasoned the plaintiff admitted other search engines, such as MSN and Yahoo, did not alter the plaintiff's rankings and thus Google Search was not an essential facility because the plaintiff could switch to those search engines.[257]

Interestingly, South Korea utilizes a broader essential facilities doctrine framework. Specifically, South Korea holds that a firm with a market share over 10% may not refuse to deal with other firms if: (1) (A) its purpose is to make operating more difficult for the buyer or to illegally coerce the buyer; or (B) the refusal

---

[249] trueEX, LLC v. MarkitSERV Ltd., 266 F. Supp. 3d 705, 723 (S.D.N.Y. 2017).

[250] Morris Commc'ns Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1294 (11th Cir. 2004) (quoting Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004)).

[251] *See generally* Kinderstart.com LLC v. Google, Inc., No. C 06-2057, 2006 WL 3246596 (N.D. Cal. July 13, 2006).

[252] *Id.* at *1.

[253] *Id.* at *3.

[254] *Id.* at *9.

[255] *Id.*

[256] *Id.* (quoting Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 544 (9th Cir. 1991)).

[257] *Id.*

makes it difficult for the buyer to compete because the denied product was essential to the buyer's operations; and (2) the seller had no reasonable justification for the refusal.[258]

It is worth noting commentators argue the essential facilities doctrine is uniquely suited to address the problem of network effects in the digital platform context.[259] When an online platform has already been developed and its brand is widely accepted by users, development and marketing to compete with the developed platform is often too costly for new entrants.[260] Consequently, requiring monopolists to provide access to their information products on a nondiscriminatory basis mitigates the massive barriers to entering digital markets.

2. The Proposed Framework: A Reworked Essential Facilities Doctrine

Antitrust officials might desire to utilize the modern essential facilities doctrine to rein in anticompetitive behavior by Big Tech, but the doctrine is currently insufficient to address harm to the marketplace of ideas. This is so because courts require that the defendant monopolist be a competitor of the plaintiff for the doctrine to apply.[261] Though, viewpoint-providers are often not competitors of the platform-providers. In other words, advertisers and website-creators create content whereas Big Tech merely provides a platform for that content.

Nevertheless, Big Tech's harm to the marketplace of ideas is antitrust harm that antitrust law can deter along with other laws. Thus, this Article provides a modified essential facilities doctrine that focuses on the importance of a monopolist's product in the marketplace of ideas. Namely, antitrust law should deem the Big Tech platforms' products essential facilities for accessing the marketplace of ideas and impose upon Big Tech a duty not to refuse to deal with publishers based solely on the viewpoints expressed in their content.

---

[258] ELHAUGE & GERADIN, *supra* note 195, at 522.

[259] *See, e.g.*, Marissa A. Piropato, Comment, *Open Access and the Essential Facilities Doctrine: Promoting Competition and Innovation*, 2000 U. CHI. LEGAL F. 369, 391.

[260] *Id.* at 391-92.

[261] Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1357 (Fed. Cir. 1999).

As in any antitrust action, under this framework, a plaintiff must establish the defendant firm possesses monopoly power in a relevant antitrust market. This framework leaves that requirement unaltered, but as a limiting principle, it would require the relevant market to have some nexus with the marketplace of ideas.

Regarding *Grinnell*'s second prong, though, this framework focuses on the monopolist's harm to the marketplace of ideas (rather than the monopolist's conduct that willfully maintains its monopoly). Accordingly, this framework's second prong requires only that a plaintiff demonstrate the firm has used its monopoly power to substantially lessen competition in the marketplace of ideas. To do so, plaintiffs must rely on the following four-part, modified essential facilities framework:

> (1) The plaintiff must show the monopolist's market is one where the product is essential to participating in the marketplace of ideas. The market need not be the sole gateway to the marketplace of ideas, but by nature of "essentiality,"[262] the market must be one that a significant number of individuals use to view and publish speech. Because the modern marketplace of ideas exists primarily online, markets that meet this definition will likely be markets for online information products, such as those produced by the Big Tech firms (i.e., social media platforms and search engines). Because the plaintiff will have already established the defendant's monopoly power in that market, by making this first required showing, the plaintiff will necessarily show the monopolist's product is an essential facility to participating in the marketplace of ideas.
>
> (2) The plaintiff must show the facility is not subject to easy duplication and that there are no alternative products in the market on which the plaintiff can publish its speech to a significant audience. Thus, this element requires a plaintiff to show it cannot easily participate in the marketplace of ideas

[262] Essentiality is broader in this context than under the ordinary essential facilities doctrine. This is so because marketplace of ideas harm by a dominant firm is per se antitrust harm, so harm to a product that is a gateway to the marketplace of ideas necessarily causes antitrust harm and should be actionable under Section 2.

without using the monopolist's facility due to, for example, high barriers to entry such as network effects or switching costs.

(3) The plaintiff must show the monopolist denied the plaintiff access to the facility based on the views expressed in the plaintiff's content. To make this showing, the plaintiff would likely need to demonstrate the monopolist expressed dissatisfaction with the plaintiff's viewpoint. Alternatively, a plaintiff could show the monopolist denied access to the facility to other entities that sought to publish content with a similar viewpoint.

(4) The plaintiff must show it is feasible for the monopolist to provide access to the essential facility. This element serves the same goal that the fourth element of the traditional essential facilities doctrine serves: it prevents firms that cannot reasonably provide access to the facility or that have "legitimate business reasons" not to provide the facility from suffering an undue burden.[263] This element further ensures firms that will be held liable yield substantial economic profit and monopoly power. To make this showing, a plaintiff could demonstrate the monopolist would not suffer an unreasonable financial burden by or would actually benefit from providing access to the essential facility.

Comments explaining why this framework is consistent with modern antitrust principles are in order. First, this framework is consistent with the current antitrust framework's requirement of finding monopoly power in a defined market. Like the current framework, a plaintiff will likely need to demonstrate the defendant possesses a substantial market share in the defined market to demonstrate the defendant's monopoly power. More importantly, though, globally accepted antitrust principles suggest a firm's ability to coerce its buyer into taking action the buyer would not otherwise take in a competitive market is evidence of monopoly power.[264] In fact, South Korea's essential facilities doctrine

[263] ELHAUGE & GERADIN, *supra* note 195, at 490.

[264] *See* Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 464 (1992) (quoting Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 14 (1984)) ("Market power is the power 'to force a purchaser to do something that he would not do in a competitive market.'").

explicitly lists coercion as a ground for invoking the doctrine.[265] In the digital markets context, the fact that a platform censors its users without retaliation evidences monopoly power because in a competitive market, those users would switch to alternative platforms.

Second, this framework is arguably consistent with Section 2's second requirement that monopolists willfully maintain their monopoly power by anticompetitive means. A monopolist's censorship of certain viewpoints creates anticompetitive effects for the reasons already explained: it lessens consumer choice, increases transaction costs, lessens product quality, and raises prices and decreases output in collateral markets. Moreover, when Big Tech censors content because Big Tech disagrees with its viewpoint, that censorship prevents potential competitors from accessing and using that content to compete with Big Tech.[266]

Even if this framework is not consistent with Section 2's willful maintenance requirement, it should nevertheless be adopted because Big Tech censorship has anticompetitive effects in collateral markets. Consider an example where Google censors a retail business's advertisement due to the advertisement's viewpoint on a political issue. If that business competes in a concentrated market, and if the censorship causes the business to lose customers, the censorship necessarily permits the business's competitors to acquire or maintain monopoly power in the business's market.[267]

This approach is also consistent with international antitrust authorities' anticompetitive conduct prong. The European Union requires that a possessor of an essential facility not withhold the facility if doing so would prevent the creation of a new product.[268] In the information products market, a search engine or social network that incorporates all viewpoints is a wholly different product than one that reflects only one viewpoint.

---

[265] *See* ELHAUGE & GERADIN, *supra* note 195, at 522.

[266] *See* Lorain J. Co. v. United States, 342 U.S. 143, 155 (1951) (explaining that a duty to deal may be imposed only when the monopolist engages in anticompetitive conduct).

[267] This Article anticipates some readers will be skeptical of this proposal. *See infra* Section III.C.4.

[268] *See* Turney, *supra* note 247, at 188-89.

Finally, this framework is consistent with modern antitrust principles because it adopts Section 2's valid business justification defense in its fourth element. There is no competitive reason a firm would censor certain customers. Indeed, if Big Tech did not censor certain content, it would publish more content. By publishing more content, Big Tech would attract more consumers. Correspondingly, Big Tech would attract more advertisers and thus increase its own revenue. The fact that Big Tech firms have this option yet forego it is telling of Big Tech's monopoly power.

3. Case Application: Google

This Section applies this Article's proposed framework to Google Search as used in the general Internet search market.

Of course, it is first necessary to define a relevant market where consumers need access to the relevant product to participate in the marketplace of ideas. As the recent complaints against Google recognize, general Internet search in the United States is a "relevant antitrust market."[269] General Internet search is a relevant product market because—unlike specialized search engines that relate to specific subject matter (e.g., Amazon, Expedia, Yelp)—general search engines allow consumers to perform searches related to any subject matter.[270] And thus, users would not find specialized search engines to be reasonably substitutable for general search engines.[271] Likewise, the United States is a relevant geographic market because Google optimizes search results for United States consumers based on their location within the United States, and Google analyzes its market share in general Internet search in the United States separately from its market share in other nations.[272] Finally, general Internet search has a close nexus with the marketplace of ideas given that most consumers and businesses today receive their news and share their opinions on the Internet.[273]

Additionally, Google possesses monopoly power in the market for general Internet search in the United States. Google's share of

---

[269] DOJ Google Complaint, *supra* note 7, at 28.
[270] *Id.* at 28-29.
[271] *Id.* at 29.
[272] *Id.*
[273] *See supra* Section I.B.

the United States general Internet search market totals about 90%.[274] Moreover, the fact that Google freely censors search results without retaliation demonstrates Google's monopoly power. The same is true of the fact that Google has stifled innovation, halted consumer choice, and degraded its product without backlash. Of course, the barriers to entry in general Internet search are extremely high in light of network effects and research and development expenditures. While these barriers to entry are characteristics of the general Internet search market generally and are therefore not specific to Google, they nonetheless demonstrate that Google's monopoly power in general Internet search is durable and unlikely to decay on its own.[275]

Turning to the final element, Google Search satisfies all prongs of the proposed four-part essential facilities test. First, the general Internet search market is essential to participating in the marketplace of ideas. General Internet search is a major gateway to the marketplace of ideas because a large percentage of Americans and businesses use search engines to gather news and publish their opinions. The vast majority of searches in the United States (like most nations) are completed using Google Search specifically.[276] Moreover, a large number of consumers in the United States receive their news via Google Search or Google's subsidiary, YouTube, both of which not only passively censor content but also affirmatively shape discourse by erecting filter bubbles and echo chambers.[277] A skeptic may argue DuckDuckGo and Bing present alternative search engines and thus Google Search is not an essential facility in the general Internet search market. But these competitors of Google are competitors only nominally given Google's growing market share due to network effects, participation in mergers, and agreements with other firms that ensure Google Search is the default search engine on mobile devices.[278]

Second, consumers and businesses cannot reasonably duplicate Google Search or create a new platform to publish content to a significant audience, primarily due to network effects. The

---

[274] *See supra* note 19 and accompanying text.
[275] *See supra* Section I.A.1.
[276] *See supra* note 19 and accompanying text.
[277] *See supra* Section I.C.2.
[278] *See, e.g.*, Wakabayashi & Nicas, *supra* note 36.

quality of Google Search's algorithms increases exponentially as more users complete searches on Google Search. As Google Search's algorithms improve, it becomes less likely users will switch to an existing or new search engine. Of course, research and development and marketing costs needed to create and market a new search engine deter potential search engine developers. Consequently, it is practically impossible for viewpoint publishers to access the marketplace of ideas in the general Internet search market without access to Google Search.

Third, many potential plaintiffs can demonstrate Google denied them access to Google Search by censoring their content based on the content's viewpoints. These plaintiffs may do so by highlighting Google's dissatisfaction with their particular viewpoints. For example, a plaintiff could identify a Google policy statement that disavows a particular viewpoint. Specifically, a publisher could allege Google blacklisted its content for containing "shocking" or "inappropriate" content because the content expressed a position on the seriousness (or lack thereof) of a disease, such as COVID-19, or a social issue, such as abortion.[279] The plaintiffs could also show that Google has historically censored content reflecting the plaintiffs' particular viewpoint. For instance, a conservative content publisher, such as *The Federalist*, could show a pattern by Google of suppressing right-leaning content by other publishers.[280] Likewise, a liberal news outlet, such as the World Socialist Web Site, could demonstrate that Google has continuously censored websites containing anti-war material.[281]

Fourth and finally, it is feasible for Google to provide equal access to its platform to publishers of content irrespective of their viewpoints. Google expends more resources policing content than it would expend if it simply allowed publishers to publish content freely. Moreover, Google could increase its advertising revenue by freely publishing content. Were Google to cease censoring publishers, Google's algorithms would improve through machine learning as more users complete searches. And these better-quality algorithms would attract new users and thus new advertisers to strengthen Google's revenue stream.

---

[279] *See Inappropriate Content*, *supra* note 61.
[280] *See supra* note 98 and accompanying text.
[281] *See supra* notes 119-122 and accompanying text.

Therefore, under this Article's framework, a plaintiff could hold Google liable for a Section 2 violation. Consequently, this case analysis demonstrates the proposed framework mitigates Big Tech's ability to harm the marketplace of ideas.

4. Anticipated Counterarguments

This Section addresses a number of anticipated counterarguments to this Article's thesis.

a. Why Can't Censored Publishers Simply Access the Marketplace of Ideas by Other Means?

A skeptic may argue consumers and advertisers who disavow Big Tech's censorship can simply use other means to access the marketplace of ideas.[282] In an oft-cited article, Professors Bork and Sidak make this exact argument.[283] Moreover, Thierer argues social media platforms are not essential facilities because competitors can create their own platforms due to the low cost of creating a new platform.[284]

First and foremost, these arguments ignore the problem of network effects. Big Tech's scale and market share have rendered its monopoly power insurmountable. Because of Big Tech's scale and current market share, it is extremely costly for consumers to switch from the Big Tech firms' products to other, less superior online products. Of course, antitrust law should encourage businesses to develop superior products. However, while Big Tech firms earned their monopoly power developing superior products, they have not sustained their monopoly power by competitive means. Rather, Big Tech firms have done so by relying on network effects. Accordingly, Big Tech firms have no incentive to increase the platforms' quality.[285] Thus, the only means by which antitrust

---

[282] *See, e.g.*, Adam Candeub, *Behavioral Economics, Internet Search, and Antitrust*, 9 I/S: J.L. & POL'Y FOR INFO. SOC'Y 407, 422 (2014).

[283] *See* Robert H. Bork & J. Gregory Sidak, *What Does the Chicago School Teach About Internet Search and the Antitrust Treatment of Google?*, 8 J. COMPETITION L. & ECON. 663, 667 (2012).

[284] Thierer, *supra* note 245, at 274-76.

[285] Vollrath, *supra* note 229 ("Why waste the money [innovating to] try[] to attract new customers when you already have all of them?"); *see also* Colorado Google Complaint, *supra* note 7, at 70-71.

officials can protect innovation in digital markets and the marketplace of ideas is to directly require that Big Tech firms provide equal access to publishers of different viewpoints.

These skeptics also ignore switching costs and the power of defaults. Consumers generally continue to use products they already use. Moreover, through exclusionary agreements, Google has ensured all key access points to the Internet begin with its search engine.[286] Therefore, it is unlikely a user will switch to another web browser as a practical matter.[287] Even more, users often save key information on digital platforms for convenience, such as posts or photographs on Facebook. And because users cannot easily transfer their information to other platforms, this factor dissuades users from switching to other platforms.

Network effects and switching costs in the social media context are particularly burdensome. When every user already uses Facebook, a single user is unlikely to switch to a new social media platform because no other users (or at most only a few users) use the alternative outlet.[288] Thierer questions the role of network effects in social media markets, reasoning that social media is not an essential product and, inevitably, a greater platform will come along to replace its predecessor, such as when Facebook ultimately replaced MySpace.[289] But network effects that exist today are more severe and burdensome than those that existed during MySpace's peak because Myspace's user base, even at its prime, pales in comparison to Facebook's user base today.[290] German competition authorities recognize this fact,[291] and indeed, the FTC's recent complaint against Facebook recognizes that even superior social media platforms cannot effectively compete against Facebook due to overwhelming network effects.[292]

---

[286] Colorado Google Complaint, *supra* note 7, at 36-37.

[287] *See* Andrew Langford, Note, *gMonopoly: Does Search Bias Warrant Antitrust or Regulatory Intervention?*, 88 IND. L.J. 1559, 1576 (2013).

[288] *See supra* note 29 and accompanying text.

[289] *See* Thierer, *supra* note 245, at 275.

[290] *See* DIGIT. COMPETITION EXPERT PANEL, UNLOCKING DIGITAL COMPETITION 39 (2019) (footnotes omitted) ("[T]he number of monthly unique global visitors to Myspace peaked at around 100 million, and it was valued at $580 million when it was purchased . . . . Facebook reportedly has over [2] billion monthly active users . . . and was valued at more than $470 billion in February 2019.").

[291] *See* Bundeskartellamt Facebook Decision, *supra* note 6, at 59-63.

[292] FTC Facebook Complaint, *supra* note 9, at 3, 19, 27.

Considering Google specifically, due to agreements between Google and hardware providers, most devices use Google Search as the default search engine.[293] And economic literature reflects that consumers overwhelmingly accept default options even if they would prefer an available alternative option that requires only minimal effort to adjust.[294] Thus, Google Search's placement as the default search engine on many devices renders it unlikely consumers will switch to an alternative search engine.

In another line of critique, Professors Bork and Sidak argue Google Search is per se not an essential facility because users can navigate directly to the site they wish to view using a URL.[295] Respectfully, this contention ignores pragmatism. Few users navigate directly to websites by typing long, unwieldy URLs. Moreover, it is doubtful most users even know the full URLs of the sites to which they desire to navigate. Even when users do know the URLs, it is likely because they saved them the last time they used Google Search to reach the websites. More menacingly though, Colorado's recent action against Google asserts Google specifically acted to degrade access to vertical search providers so that consumers must use Google's general search services.[296]

Hearing this rebuttal, a skeptic may argue publishers and users can turn more broadly to non-digital information sources to participate in the marketplace of ideas. However, around the globe, Big Tech's massive scale and low marginal costs have essentially eradicated many non-digital information sources, such as newspapers, magazines, and radio and television programs.[297] Of

---

[293] DOJ Google Complaint, *supra* note 7, at 16-17.

[294] *See, e.g.*, Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q.J. ECON. 1149 (2001) (explaining employees overwhelmingly participate in 401(k) plans when enrollment is automatic).

[295] *See* Bork & Sidak, *supra* note 283, at 669-71.

[296] *See* Colorado Google Complaint, *supra* note 7, at 57-62.

[297] *See* Statista Rsch. Dep't, *Reasons for Decline in Radio Listening in the U.S. and Canada 2021*, STATISTA (July 26, 2021), https://www.statista.com/statistics/750084/radio-decline-reasons/ [https://perma.cc/48JY-PZLF] (describing the decline in radio consumption caused in part by online streaming options); Katerina Eva Matsa, *Fewer Americans Rely on TV News; What Type They Watch Varies by Who They Are*, PEW RSCH. CTR. (Jan. 5, 2018), https://www.pewresearch.org/fact-tank/2018/01/05/fewer-americans-rely-on-tv-news-what-type-they-watch-varies-by-who-they-are/ [https://perma.cc/H33Y-HKNK]; Sydney Ember & Michael M. Grynbaum, *The Not-So-Glossy Future of Magazines*, N.Y. TIMES

course, the few surviving information sources that have switched to online distribution must comply with Big Tech's demands if they desire for their content to be uncensored.

Accordingly, there is no alternative information source for consumers dissatisfied with Google's censorship to access the marketplace of ideas.

b. Isn't the Essential Facilities Doctrine a Dead Letter After Trinko *and Scholars Repudiating It?*

A skeptic may argue any essential facilities doctrine framework is unacceptable because the Supreme Court in *Trinko* questioned the doctrine.[298] It is true scholars criticize the essential facilities doctrine, reasoning the Supreme Court in *Trinko* stated it was a creature of the lower courts and that the Court has never explicitly recognized it.[299]

This argument's weakness, though, is the fact that nearly every circuit court has adopted the essential facilities doctrine.[300] Moreover, the Court in *Trinko* explicitly refused to repudiate the doctrine.[301] Thus, regardless of normative opinions of the veracity of the doctrine or its future, the doctrine currently applies in full force. And even if the Court were to repudiate the doctrine, it would not necessarily repudiate it in every context, including the one this Article addresses.

Additionally, when the Court decided *Trinko* in 2004, the digital platforms were not nearly as powerful and network effects were not nearly as strong as they are today. While there may have been a reasonable argument that the ability to display content on Big Tech platforms at the time of *Trinko* was not essential to participating in the marketplace of ideas, that argument is

(Sept. 23, 2017), https://www.nytimes.com/2017/09/23/business/media/the-not-so-glossy-future-of-magazines.html [Perma.cc link unavailable].

[298] *See* Verizon Commc'ns, Inc. v. Law Offs. Of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004).

[299] *See, e.g.*, Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1028-29 (2019); Langford, *supra* note 287, at 1579-80; Manne & Wright, *supra* note 19, at 241 n.239 (citing articles that argue the essential facilities doctrine should be abandoned).

[300] *See supra* note 244 and accompanying text.

[301] *Trinko*, 540 U.S. at 411.

untenable in today's climate. Indeed, some academics have called specifically for the doctrine's application in the platform context.[302]

Most importantly, though, in the House Report, Congress—which inherently possesses the authority to overturn judicial opinions and promulgate antitrust law—suggested it might enact legislation to explicitly overrule *Trinko* and other judicial decisions that have criticized the essential facilities doctrine.[303] Courts should give the House Report great deference in light of the fact that Congress enacted and has the power to amend the Sherman Act.

c. Don't Some Viewpoints Deserve to Be Censored Because They Add Little Value to the Marketplace of Ideas?

This Article concedes some content deserves censorship because it adds little value to the marketplace of ideas. However, the platforms should not have the authority to decide what speech is or is not valuable. Instead, the Court's First Amendment jurisprudence delineating protected and unprotected speech should provide the standard. Indeed, this jurisprudence is presumptively—if not specifically—based on the marketplace of ideas rationale. Consequently, where the Court has deemed a category of speech protected under the First Amendment, platforms should presumptively be unable to censor it.

This approach is consistent with this Article's thesis denoting harm to the marketplace of ideas as antitrust harm because unprotected speech has little value in the marketplace of ideas. Accordingly, when a platform censors unprotected speech, it does not degrade its information product's quality and therefore does not create antitrust harm. The inverse is true as well. When a platform censors speech the First Amendment protects, the platform decreases the quality of its information product because an information product of optimal quality provides access to valuable viewpoints.

---

[302] *See, e.g.*, Lisa Mays, Note, *The Consequences of Search Bias: How Application of the Essential Facilities Doctrine Remedies Google's Unrestricted Monopoly on Search in the United States and Europe*, 83 GEO. WASH. L. REV. 721, 724-25 (2015).

[303] STAFF OF H. COMM. ON THE JUDICIARY, SUBCOMM. ON ANTITRUST, COM. & ADMIN. L., *supra* note 21, at 397-98.

To exemplify this concept, consider the Court's jurisprudence holding the following are unprotected categories of speech: utterances likely to incite violence,[304] obscenities,[305] and fighting words.[306] These categories of speech have little value in the marketplace of ideas, so when Google excludes them, the exclusion does not harm the marketplace of ideas and thus does not cause antitrust harm. For example, Google would have no duty to deal with pornographers because obscenity is not protected speech. On the other hand, protected speech—such as depictions of cruelty[307] and merely offensive speech[308]—should be presumptively un-censorable.[309] Undoubtedly, some protected speech will offend perhaps even most listeners. However, as the Supreme Court has explained, the fact that speech offends often demonstrates that the speech is important in the marketplace of ideas.[310]

---

[304] *See generally* Brandenburg v. Ohio, 395 U.S. 444 (1969).

[305] *See generally* Miller v. California, 413 U.S. 15 (1973).

[306] *See generally* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[307] *See generally* United States v. Stevens, 559 U.S. 460 (2010).

[308] *See generally* Cohen v. California, 403 U.S. 15 (1971).

[309] Of course, this Article does not condone depictions of cruelty or hate speech. This Article merely acknowledges the Court's First Amendment jurisprudence recognizes the value of these forms of speech in the marketplace of ideas. For example, in *Cohen*, the appellant wore apparel that exhibited the phrase "F[***] the Draft" to express his opposition to selective service during the Vietnam War. *Id.* at 16. The Court explained while the language on the defendant's apparel was offensive, he could not be held liable for disturbing the peace, which was defined to include behavior that has a tendency to provoke others. *Id.* at 17-18. The Court reasoned that the fact the language was offensive demonstrated its value: it provoked emotion and thought about the draft. *See id.* at 23-26. Consider *Cohen* in light of Google's policy that defines "shocking" (and thus censorable) content to include content with profane language. *Inappropriate Content*, *supra* note 61. Again, this Article does not condone the inappropriate use of profane language. But *Cohen* demonstrates that sometimes, undesirable speech is important in the marketplace of ideas. *Stevens* demonstrates the same point in the animal cruelty context. *See generally* 559 U.S. 460. What if an animal shelter sought to display an advertisement demonstrating animal cruelty with the hope that the advertisement would put an end to the practice? Or what if an advertiser sought to display an advertisement suggesting individuals who fail to wear masks during a pandemic contravene public safety efforts? These forms of speech are important in the marketplace of ideas; however, Google's advertisement policies license it to censor them.

[310] *See Cohen*, 403 U.S. at 23-26. Certainly, persons are slighted when they hear the unpleasant nature of late-term abortions or alternatively the permanent trauma childbirth has on a mother's body, but these unpleasant feelings force individuals to decide for themselves the most optimal viewpoint. It is not aesthetically pleasing, and it does not purport to be. But it is the marketplace of ideas working as intended.

d. What About the Freedom of Expression of Big Tech?

Another anticipated counterargument is that imposing upon Big Tech a duty not to refuse to deal with publishers on the basis of viewpoint violates Big Tech's freedom of expression as a private entity. Professors Eugene Volokh and Donald Falk make this precise argument.[311] Several courts have considered this theory, and at least some courts have recognized it.[312]

The better argument, though, is courts have explicitly recognized that when a firm engages in anticompetitive behavior that harms the marketplace of ideas, it waives its First Amendment protections. As a general matter, First Amendment freedoms do not extend to private entities that hamper others' First Amendment freedoms.[313] This is true in the Sherman Act context as well. The Supreme Court has recognized protecting the First Amendment is a legitimate purpose for antitrust enforcement.[314] Furthermore, courts have explicitly recognized that when a firm engages in anticompetitive behavior that itself impinges the marketplace of ideas, the firm's First Amendment rights are not a defense. As the United States District Court for the Central District of California noted:

> [T]he Sherman Act's incidental restriction on free speech is no greater than is essential to protect the competitive marketplace . . . . Put another way, the Sherman Act interferes only with those decision-makers who themselves seek to muzzle the marketplace of ideas. . . . [T]he First Amendment will not safeguard, nor should it, anti-competitive . . . decisions.[315]

---

[311] *See generally* Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Search Results*, 8 J.L., ECON. & POL'Y 883 (2012).

[312] *See, e.g.*, E-Ventures Worldwide, LLC v. Google, Inc., 188 F. Supp. 3d 1265, 1273-75 (M.D. Fla. 2016); Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568, at *2-4 (W.D. Okla. May 27, 2003).

[313] Citizen Publ'g Co. v. United States, 394 U.S. 131, 139-40 (1969) (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).

[314] Stephen F. Varholy, Comment, *Preserving the Public Interest: A Topical Analysis of Cable/DBS Crossownership in the Rulemaking for the Direct Broadcast Satellite Service*, 7 COMMLAW CONSPECTUS 173, 178 (1999) (citing *Citizen Publ'g Co.*, 394 U.S. at 139-40).

[315] Sunbelt Television, Inc. v. Jones Intercable, Inc., 795 F. Supp. 333, 336 (C.D. Cal. 1992).

Thus, it is clear that First Amendment protections do not extend to private entities that hinder others' First Amendment protections, at least when those entities engage in anticompetitive conduct. As this Article establishes, Big Tech censorship has anticompetitive effects because it hampers the marketplace of ideas. Accordingly, the First Amendment presents Big Tech no defense for its censorship.

It is worth noting that this Article does not suggest Big Tech must publish every viewpoint with which it disagrees. Indeed, as explained above, unprotected speech should be presumptively censorable. But a key monopoly should not be able to abuse its dominance and degrade the quality of its product by hiding information that citizens desire and would have the power to access in a competitive marketplace. Therefore, this Article's proposal does not completely or unreasonably strip Big Tech of its freedom of expression.

e. What About the Willful Maintenance Requirement?

A skeptic may argue this Article's proposal unreasonably extends antitrust law's scope by eliminating the anticompetitive conduct requirement under *Grinnell*'s second prong. This is so, this skeptic may aver, because when a firm censors speech, it is not willfully maintaining or acquiring monopoly power in its market.

First, the framework this Article provides preserves the anticompetitive conduct requirement. When Big Tech censors a viewpoint because it disagrees with it, Big Tech censors speech that potential competitors could use to compete with Big Tech in its market. Consider, for example, if Big Tech censored a Bing advertisement that attacked environmental preservation because Google is pro-environment and disagrees with the advertisement. That censorship would prevent Bing from competing against Google. Even if the censored entity was not a direct competitor of Google, the censorship could prevent the censored entity from developing power that it could use to enter the search engine market.

If these arguments are unconvincing, as a matter of policy—at least in cases where Big Tech censorship is at issue—the anticompetitive conduct requirement must give way to an anticompetitive effects requirement because Big Tech censorship

causes anticompetitive effects in collateral markets.[316] Consider an instance where Google censors an advertisement because Google disagrees with its viewpoint. True, when Google censors the advertisement, it does not harm competition in the search advertising market. At the same time, though, the censorship certainly provides no competitive benefit in the search advertising market. At best, then, censorship has no positive effect on the search advertising market.

Meanwhile, the censorship causes anticompetitive harm in the censored advertiser's market because the censorship prevents the advertiser from competing in its market. At minimum, then, Google's censorship slightly harms competition in the advertiser's market. At worst, the censorship could maroon the advertiser from the collateral market and permit another firm in that market to acquire a monopoly power and charge monopoly prices. Accordingly, in the collateral market, there will be, at minimum, some anticompetitive effect.

Considering the effects in both markets (i.e., no competitive effect in the search advertising market and anticompetitive effects in the advertiser's market), Big Tech censorship causes net anticompetitive effects. Surely, antitrust law is the proper vehicle to address these anticompetitive effects.

Moreover, other antitrust frameworks recognize anticompetitive effects are sufficient for liability.[317] For example, in Section 1 cases under the rule of reason, anticompetitive effects can warrant antitrust liability even when there is no specific anticompetitive conduct.[318] Moreover, under the European Union's abuse of dominance framework, anticompetitive conduct is merely a factor to consider in determining whether a firm has abused its dominance; anticompetitive conduct is not required in every case.[319]

---

[316] There is authority suggesting that courts may consider anticompetitive effects in collateral markets when considering Sherman Act challenges, at least in Section 1 cases. *See In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1267-69 (9th Cir. 2020) (Smith, J., concurring).

[317] *See* Alpha Distrib. Co. of Cal., Inc. v. Jack Daniel Distillery, 454 F.2d 442, 452 (9th Cir. 1972) ("The critical inquiry . . . [is] whether the refusal to deal . . . is so anticompetitive, *in purpose or effect, or both*, as to be an unreasonable restraint of trade.") (emphasis added).

[318] *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018).

[319] *See* Google Search (Shopping), *supra* note 6, at 75-76.

Justice Frankfurter's concurrence in *Associated Press* provides final support. He suggested antitrust law should prohibit anticompetitive conduct that harms the marketplace of ideas.[320] Because Big Tech's products are essential to participating in the marketplace of ideas, Big Tech censorship—which is anticompetitive conduct that harms the marketplace of ideas—equally should be prohibited, regardless whether Big Tech intends to further its own monopoly with the censorship.[321]

CONCLUSION

Free speech is a fundamental right in the United States and many nations. Nations value free speech because society can only determine the best viewpoints after receiving and considering all viewpoints. However, as parties on both sides of the political spectrum recognize, Big Tech censorship hinders the marketplace of ideas by preventing members of society from receiving competing viewpoints. Meanwhile, the law provides no framework to hold Big Tech accountable.

At the call of scholars and congresspersons, this Article provides an antitrust tool sufficient to stifle Big Tech's censorship. This Article recognizes Big Tech's censorship creates antitrust harm because it harms the marketplace of ideas and causes product degradation, less consumer choice, and higher transaction costs in digital markets. To address this harm, legislators or the courts should adopt the revitalized essential facilities framework this Article proposes. Using this framework, Big Tech will no longer be permitted to refuse to deal with publishers on account of the publishers' viewpoints. Therefore, this framework will preserve vital First Amendment interests and increase competition as society continues its journey through the information age.

[320] *See* Associated Press v. United States, 326 U.S. 1, 27-28 (1945) (Frankfurter, J., concurring).

[321] After all, the purpose of antitrust law is to prevent harm to "competition, not competitors." Am. Cricket Premier League, LLC v. USA Cricket, 445 F. Supp. 3d 1167, 1177 (D. Colo. 2020) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).