DEMOCRACY DIES IN SILICON VALLEY: PLATFORM ANTITRUST AND THE JOURNALISM INDUSTRY

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"[L]ocal journalism is very important."[1]

INTRODUCTION

Newspapers are classic examples of platforms. They are intermediaries between, and typically require participation from, two distinct groups: on the one hand, there are patrons eager to read the latest scoop; on the other hand, there are advertisers offering their goods and services on the outer edges of the paper in hopes of soliciting sales. More than mere examples of platform economics, however, newspapers and the media industry play an irreplaceable role in the functioning of our democracy by keeping us informed. From behemoths such as the Jeff Bezos–owned *Washington Post* to outlets like the *Hungry Horse News* in the small town of Columbia Falls, Montana, the press lets us know what is happening on both the national and local levels. However, the age of the Internet and the corresponding emergence of new two-sided platforms is decimating the media industry.[2] In a world where more users get their news on social media platforms like Facebook than in print,[3] the survival of quality journalism depends in large part on whether the media industry can tap into the flow of digital advertising revenue, the majority of which goes to just two corporations founded around the start of the new millennium.

Facebook and Google, formed respectively in 2004 and 1998, are new

1. Sundar Pichai, Chief Exec. Officer, Google, Testimony Before the United States Senate Committee on Commerce, Science, and Transportation, Hearing on "Does Section 320's Sweeping Immunity Enable Big Tech Bad Behavior?" (Oct. 28, 2020) (transcript available at https://www.rev.com/blog/transcripts/tech-ceos-senate-testimony-transcript-october-28 [https://perma.cc/7J3D-66AM]).

2. Throughout this Note, I refer to the journalism industry also as the "media" industry and the "news media" industry. Although there are undoubtedly nuanced differences between journalism and news media, for the purposes of this Note, I draw no distinction between them.

3. Elisa Shearer, *Social Media Outpaces Print Newspapers in the U.S. as a News Source*, PEW RSCH. CTR. (Dec. 10, 2018), https://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source [https://perma.cc/5MWY-RSTH].

types of platforms aiming to accomplish what newspapers have done for centuries: attract a large consumer base and solicit revenue from advertisers. However, unlike the fungible papers newsies once distributed hot off the presses, Facebook and Google connect advertisers and consumers in a more sophisticated, yet opaque manner. Facebook and Google are free to consumers insofar as users do not pay with money to surf the web or connect virtually with their friends. Instead, the companies collect information about users based on their online activity, and complex algorithms connect those users with targeted advertisements.[4] This new method of connecting Internet users and advertisers has been wildly successful, creating a tech duopoly profiting from nearly sixty percent of all digital advertising spending in the United States.[5]

This rapid growth has not gone unnoticed. Facebook and Google are two of the largest corporations in the world, and the United States government recently filed complaints against both corporations alleging various antitrust violations, including unlawful monopoly maintenance.[6] Neither complaint, however, alleges any wrongdoing in Facebook's or Google's dealings with the media industry.[7] For example, the Department of Justice's complaint against Google alleges that Google engaged in anticompetitive conduct to preserve its monopoly power in the general search services industry in part by paying Apple to make Google the default search engine for iPhones and other devices.[8] Although the House Subcommittee on Antitrust, Commercial, and Administrative Law compiled an extensive report detailing antitrust concerns surrounding Facebook, Google, Amazon, and Apple's activities in various industries, including the journalism industry, the Federal Trade Commission and Department of Justice have, thus far, not concerned themselves with digital advertising revenue and the media industry.[9]

Meanwhile, Facebook and Google continue to experience profound

4. Although I may not be interested in an upcoming Black Friday deal for chainsaws posted in a physical publication of the *Hungry Horse News*, Facebook and Google are—based on my history and activity on the platforms—aware of my affinity for things like antitrust law and coffee, and so their algorithms are likely to present advertisements to me for items such as books written by Herbert Hovenkamp and expensive burr coffee grinders.

5. Felix Richter, *Amazon Challenges Ad Duopoly*, STATISTA (Feb. 21, 2019), https://www.statista.com/chart/17109/us-digital-advertising-market-share [https://perma.cc/4FPT-RYRV].

6. *See generally* Complaint, FTC v. Facebook, Inc., No. 1:20-cv-03590 (D.D.C. Jan. 13, 2021) [hereinafter FTC Facebook Complaint]; Complaint, United States v. Google LLC, No. 1:20-cv-03010 (D.D.C. Oct. 20, 2020) [hereinafter United States Google Complaint].

7. FTC Facebook Complaint, *supra* note 6; United States Google Complaint, *supra* note 6.

8. United States Google Complaint, *supra* note 6, ¶ 45.

9. *See generally* SUBCOMM. ON ANTITRUST, COM. & ADMIN. L. OF THE COMM. ON THE JUDICIARY, INVESTIGATION OF COMPETITION IN DIGITAL MARKETS (2020) [hereinafter INVESTIGATION].

success in the digital advertising market at the expense of others, especially the media industry.[10] As more people read their news on screens rather than paper, the advertising revenue stream that once kept so many newspapers afloat is drying up.[11] From about the time of Facebook's founding in 2004, the United States has lost nearly 1,800 newspapers, many of which served local communities.[12] The news industry has attempted to get a cut of the digital advertising pie and to earn revenue from consumer visits to media websites, such as the popular NYtimes.com, but finding digital readers is not as simple as shouting "Extra! Extra! Read all about it!" In this new digital market, Facebook and Google have disintermediated newspapers; digital media is just a fraction of one side of Facebook and Google's platforms. Before a newspaper can earn revenue from digital advertisements, readers must first find their way to the newspaper's website, which often involves a user browsing Google's search results or Facebook's newsfeed and clicking on the headline for a particular story to take them to the website.[13] If and when users do click on a link to read the full story, "news publishers may receive less than half of every advertising dollar" generated.[14] Thus, Facebook and Google "atomize" individual news stories, placing links to particular stories in search results and newsfeeds relevant to the user's search query or potential interests, and profit from advertisements at every step of the way. The result is an aggregation of various news articles by various news companies: a situation in which journalists not only compete in the

10. Joanne Lipman, Opinion, *Tech Overlords Google and Facebook Have Used Monopoly to Rob Journalism of Its Revenue*, USA TODAY (June 11, 2019, 4:18 PM), https://www.usatoday.com/story/opinion/2019/06/11/google-facebook-antitrust-monopoly-advertising-journalism-revenue-streams-column/1414562001 [https://perma.cc/UT4M-ZPZ5] (noting that Google made over four billion dollars from news content in 2018 despite not paying for news content).

11. *See* INVESTIGATION, *supra* note 9, at 57–58.

12. *Id.* at 61.

13. Google, as a general search engine, accounts for almost ninety percent of all general search engine queries in the United States. *Search Engine Market Share United States of America*, STATCOUNTER (Sept. 2021), https://gs.statcounter.com/search-engine-market-share/all/united-states-of-america [https://perma.cc/RR49-CHPW]; United States Google Complaint, *supra* note 6, ¶ 5. Moreover, thirty-six percent of American adults are presently getting their news through Facebook. 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 [https://perma.cc/QA7P-MWSR]. Thus, unless a user types the URL for a desired news website directly into their browsers, of which another product by Google, the Chrome internet browser, holds the majority market share, Shanhong Liu, *Market Share Held by Leading Desktop Internet Browsers in the United States from January 2015 to September 2021*, STATISTA (Oct. 4, 2021), https://www.statista.com/statistics/272697/market-share-desktop-internet-browser-usa/#:~:text=The%20most%20popular%20current%20browsers,Mozilla%20Firefox%20and%20Apple's%20Safari [https://perma.cc/EA43-VDD3], that user is likely to end up on a newspaper's website by clicking on an article in Google's search results or Facebook's newsfeed.

14. David Chavern, Opinion, *Reward Local Journalism: Support the Journalism Competition & Preservation Act*, SUMMERLAND ADVOC.-MESSENGER (Mar. 11, 2021), https://www.summerlandadvocate.com/story/2021/03/11/opinion/reward-local-journalism-support-the-journalism-competition-andamp-preservation-act/1896.html [https://perma.cc/UHQ8-83WM].

same market for advertising revenue as Facebook and Google but also rely on the tech platforms to get users to visit their websites in the first place. In other words, the *New York Times* and the *Hungry Horse News* compete with Google and Facebook, yet remain in desperate need of them to attract consumers to their websites.

This system is unsustainable and has raised concerns amongst media executives, scholars, and legislators about the decline of the free and diverse press in the United States.[15] A report by scholars at the Stigler Center at the University of Chicago Booth School of Business notes that "[d]igital platforms disintermediate newspapers and monopolize news markets."[16] The House Subcommittee on Antitrust, Commercial and Administrative Law found that "[b]y virtue of functioning as the only viable path to market, dominant platforms enjoy superior bargaining power over the third parties that depend on their platforms to access users and markets" and that this "bargaining leverage is a form of market power, which the dominant platforms routinely use to protect and expand their dominance."[17] Google and Facebook can and do "pick winners" in the media industry by choosing which articles and websites users will see.[18] "For example, an update to Google's search algorithm in June 2019 decreased a major news publisher's online traffic 'by close to [fifty percent] . . . .' "[19] Facebook and Google's large market shares of advertising revenue and capabilities to determine which media outlets receive opportunities to garner user clicks has led to serious concerns of the platforms' possibly unfair business schemes and monopoly power acquired or maintained in violation of the Sherman Antitrust Act of 1890.

This raises the question of whether the Department of Justice or Federal Trade Commission could curb Google and Facebook's power over the media industry if they were motivated to do so. This Note first considers whether antitrust enforcement potentially provides an avenue to help remedy the struggling journalism industry, particularly at the local level. The conclusion this Note reaches is no. Although there are resounding political and ethical reasons for governments to support the free and diverse press, antitrust law

15. For a discussion of these concerns, see generally Efrat Nechushtai, *Could Digital Platforms Capture the Media Through Infrastructure?*, 19 JOURNALISM 1043 (2018).

16. LUIGI ZINGALES & FILIPPO MARIA LANCIERI, STIGLER COMMITTEE ON DIGITAL PLATFORMS POLICY BRIEF 5 (2019), https://research.chicagobooth.edu/-/media/research/stigler/pdfs/policy-brief---digital-platforms---stigler-center.pdf?la=en&hash=AC961B3E1410CF08F90E904616ACF3A3398603BF&hash=AC961B3E1410CF08F90E904616ACF3A3398603BF [https://perma.cc/CA44-3Z7F].

17. INVESTIGATION, *supra* note 9, at 389–90 (footnote omitted).

18. *Id.* at 63 (citations omitted).

19. *Id.* (citations omitted).

"is an economic, not a moral, enterprise."[20] Thus, any solution to the issue of the dwindling press must be framed in terms of competitiveness, efficiency, and reasonableness. This Note concludes that antitrust enforcement is, for better or for worse, not the appropriate means of addressing the issues present in the media industry, despite calls from many in the industry to go after these platform "monopolists."

But what about the opposite of antitrust enforcement? There are rules in antitrust, such as a rule against naked, horizontal price fixing, and some lawmakers and industry players have advocated for Congress to designate an exception to these rules for players in the media industry for a set time. These calls have culminated in the introduction of the Journalism Competition and Preservation Act of 2019, which initially died in subcommittee but was just recently reintroduced by Senator Amy Klobuchar in March 2021.[21] The Act's goal is to provide a "safe harbor" allowing journalists to cooperate in otherwise illegal negotiations to "collectively withhold content from[] or negotiate with" platforms such as Facebook and Google.[22]

Congressional exemptions to antitrust laws are not new. For example, the Clayton Act provides such an exemption to labor unions. It states in part that "[n]othing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations" and that "such organizations, or the members thereof, [shall not] be held or construed to be illegal combinations or conspiracies in restraint of trade."[23] Moreover, there is at least some historical precedent to support the idea that even the serious possibility of legislative action will force a monopolist to change, as happened with Western Union's telegraph monopoly well over a century ago, which is discussed in depth in Part II. This Note considers the merits of a legislative exemption for the media industry and concludes that the passage of legislation like the Journalism Competition and Preservation Act would, at least without further investigation, likely be contrary to the public interest and ultimately hamper efforts to bolster the media industry in the future. However, simply having the discussion, and bringing antitrust and the news media into the spotlight, might be enough on its own to trigger behavioral

20. HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 10 (Harvard Univ. Press paperback ed. 2008).

21. Journalism Competition and Preservation Act of 2019, H.R. 2054, 116th Cong. (2019); Journalism Competition and Preservation Act of 2021, S. 673, 117th Cong. (2021); *Legislative Research: US HN5190, 2021–2022, 117th Congress, US Congress House Bill 5190*, LEGISCAN, https://legiscan.com/US/research/HB5190/2021 [https://perma.cc/36DH-SCNT]; *see also* Taylor Hatmaker, *Lawmakers Want to Empower Publishers to Collectively Negotiate with Facebook*, TECHCRUNCH (Mar. 10, 2021, 7:15 AM), https://techcrunch.com/2021/03/10/journalism-competition-and-preservation-act-reintroduced-cicilline-klobuchar [https://perma.cc/M5GB-E2YY].

22. S. 673 § 2(b).

23. Clayton Act of 1914, 15 U.S.C. § 17.

changes from Facebook and Google.

Finally, this Note briefly considers avenues outside of antitrust law to assist the media industry that have been advocated for by Australia, the European Union, and private economists. France, for example, recently became the first country in the European Union to amend its copyright laws to require Google to pay news publishers a " 'link tax'—effectively a license to display snippets of press articles on Google News" in an effort to divert advertising revenue from Google to the publishers, a move that France's culture minister described as "absolutely essential for our democracy."[24] A thorough analysis of copyright law and other fields outside of antitrust is beyond the scope of this Note, but this Note touches on these topics to emphasize the importance of looking elsewhere and considering alternatives to antitrust enforcement to ensure a vibrant journalism industry in the United States, particularly at the local level.

I. FACTUAL AND PROCEDURAL BACKGROUND

To understand platform antitrust and the current state of affairs surrounding Facebook, Google, and the media industry, it is important to lay the proper foundation. This Part first provides a brief analysis of the relevant history of and topics within antitrust, including the origins of the Sherman Antitrust Act of 1890 and the subsequent common law developments that paved the way for modern platform antitrust, culminating in the recent *AmEx III* decision.[25] Additionally, this Part briefly touches on the current state of affairs for the media industry in the United States, particularly emphasizing the issues that small, local journalists are facing and the large tolls the decline of local journalism is taking on American democracy.

24. Kim Willsher, *France Accuses Google of Flouting EU Copyright Law Meant to Help News Publishers*, L.A. TIMES (Oct. 17, 2019, 4:07 PM), https://www.latimes.com/business/story/2019-10-17/france-accuses-google-ignoring-copyright-law [https://perma.cc/DX27-4NNR]. Although Google initially battled with French lawmakers and regulators over paying publishers for its display of snippets and thumbnails in Google News, Google recently "agreed to a copyright framework for [it] to pay news publishers for content online." Mathieu Rosemain, *Google Seals Content Payment Deal with French News Publishers*, REUTERS (Jan. 20, 2021, 11:48 PM), https://www.reuters.com/article/us-france-google-publishers/google-and-french-publishers-sign-agreement-over-copyright-idUSKBN29Q0SC [https://perma.cc/BPY4-ADSH]; *see also* Joshua Benton, *Google Is Threatening to Kill Google News in Europe if the EU Goes Ahead with Its "Snippet Tax,"* NIEMANLAB (Jan. 22, 2019, 2:37 PM), https://www.niemanlab.org/2019/01/google-is-threatening-to-kill-google-news-in-europe-if-the-eu-goes-ahead-with-its-snippet-tax [https://perma.cc/4MZP-WT9P].

25. *See generally* Ohio v. Am. Express Co. (*AmEx III*), 138 S. Ct. 2274 (2018).

A. THE COMMON LAW FOUNDATION: ANTITRUST PRIOR TO 1890

"Once upon a time, way back in the 1800s, there were several giant businesses known as 'trusts.' "[26] To understand antitrust, it is important to understand the economic conditions, technical developments, and social progress that led to the possibility for and advent of trusts.

Antitrust law is a product of the American Industrial Revolution. In the 1870s, innovations in transportation, communications, and production spurred rapid business growth, and the sole proprietorships and small partnerships that once fueled the United States' agrarian economy took a backseat to the larger firms that served clientele from coast to coast.[27] Indeed, "[b]etween 1870 and 1890, real annual GDP more than doubled . . . for an impressive compound average growth rate of 4.5 percent."[28] As factories replaced artisans, production became much more efficient, and the mechanization and specialization of production processes lowered costs and bolstered output.

Such growth, however, did not come without consequences. The development of economies of scale[29] implied "a concentration of production in the hands of a comparatively small number of large-scale producers and, usually, the elimination of some or all of their smaller competitors."[30] As firms competed in the same market for the same customers, prices were driven lower and lower to stay competitive. This contributed to the rise in "ruinous" or "excessive" competition, driving "prices below a level that permit[ted] the producer to make a fair return on its productive efforts, assuming that it [could] stay in business at all."[31] Such conditions

26. U.S. FED. TRADE COMM'N, FTC FACT SHEET: ANTITRUST LAWS: A BRIEF HISTORY, https://www.consumer.ftc.gov/sites/default/files/games/off-site/youarehere/pages/pdf/FTC-Competition_Antitrust-Laws.pdf [https://perma.cc/E4JJ-Y7BL]. The Federal Trade Commission's fact sheet also contains cartoon personifications of trusts that may prove valuable for visual learners. *Id.*

27. *See* Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 FORDHAM L. REV. 2279, 2282 (2013).

28. *Id.* at 2288.

29. "Economies of scale" are cost advantages realized due to increased output and efficiency. As production increases, the firm realizing an economy of scale is able to offer products at lower prices as a result of "a consolidated network of efficient, cost-conscious, and interrelated operations." Shi-Ling Hsu, *Scale Economies, Scale Externalities: Hog Farming and the Changing American Agricultural Industry*, 94 OR. L. REV. 23, 24 (2015).

30. CHRISTOPHER L. SAGERS, ANTITRUST 6 (Wolters Kluwer 3d ed. 2021).

31. Collins, *supra* note 27, at 2290 (citations omitted). Collins also provides an example of such competition occurring in the nineteenth century. The sugar industry, he notes, consisted of fifty-two firms operating sixty refineries producing 421,000 short tons of refined sugar in 1867. *Id.* at 2290. However, by 1890, advances in production technology increased refining output by a factor of four, causing the supply of sugar to vastly outstrip the demand. *Id.* As the sugar industry competed to sell its product to consumers, profit margins dropped from three cents per pound to 0.685 cents per pound in roughly a decade. *Id.* Despite the increased production, thirty-six refineries closed their doors because they could not keep up with the rampant production of the largest factories. *Id.* As the remaining firms began to

incentivized those firms that survived to cooperate and consolidate to achieve supracompetitive profits.[32] Thus, "[i]n 1879, the Standard Oil combination created the trust proper, which enabled the combination to exercise command and control over its operations much like a corporate holding company."[33] Unilaterally controlling the decisions of its member companies, Standard Oil effectively controlled "some [ninety] percent of the nation's refineries and pipelines," allowing it to function as a monopolist in the oil industry.[34] The result was phenomenal for members of the trust; each could stay in business and not worry about its former competitors. For example, "Standard [Oil] agreed to take certain quantities of refined products . . . in return for which the refiners agreed not to sell to anyone else. A restricted refinery output could be better for all [businesses] concerned."[35] The result of such blatant, or "naked," horizontal cooperation amongst corporations is not, however, beneficial to the consumer, who must then pay more for a given product than he or she would have paid in a competitive market.

The recognition of consumer harm brought about by prevalent horizontal cooperation amongst competitors spurred calls for legislative action. The mere fact that Standard Oil and other trusts were "big" did not matter much to lawmakers; the fact that consumers were paying more, however, did. Shortly before and after the Sherman Act was passed, "there was not a single identifiable case brought under the . . . laws that challenged an organically grown firm simply because it was big."[36] "Rather, the focus was on the combinations of competitors . . . that were able to raise the prices at which they sold their output . . . to an extent regarded as injurious to the public interest."[37] Thus, in 1890, President Harrison signed the "Sherman Anti-Trust Act" into law after it passed the Senate by a vote of 51-1 and the House by a unanimous vote of 242-0.[38]

In sum, the United States looks very different today than it did at the end of the eighteenth century. Yet courts would ultimately apply over-a-century-old law in antitrust cases brought by the journalism industry against

recognize that this excessive competition hindered profits across the board and would inevitably lead to the closure of more factories, the incentives to cooperate grew. *See id.* at 2290–91.

32. *Id.* at 2291.

33. *Id.* at 2292.

34. *John D. Rockefeller*, HISTORY (Oct. 9, 2019), https://www.history.com/topics/early-20th-century-us/john-d-rockefeller [https://perma.cc/T7MP-WZ2D].

35. John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137, 149 (1958).

36. Collins, *supra* note 27, at 2280.

37. *Id.*

38. *Sherman Anti-Trust Act (1890)*, OUR DOCUMENTS, https://www.ourdocuments.gov/doc.php?flash=false&doc=51 [https://perma.cc/2Y3E-7WND].

Facebook and Google. Because the law is so old and so short, it has been significantly developed through the common law into the body of law we know and study today as "antitrust."

B. THE SHERMAN ANTITRUST ACT OF 1890 AND THE BIRTH OF THE "RULE OF REASON"

This Section provides a brief rundown of Sections One and Two of the Sherman Antitrust Act. The text of the Act is notoriously vague, and some background information will help the reader understand where antitrust started and how we managed to go from Standard Oil then to Facebook and Google now.

1. Purposefully Vague: The Act Itself

The Sherman Antitrust Act is surprisingly concise, or at least the literal text of the Act is. It takes no more than a few minutes to read through the first two sections of the Act, which respectively prohibit "restraint[s] of trade" and monopolization.[39] On its face, the Act seems to prohibit any restraint of trade, but that just cannot be the case.[40] Because the Sherman Act is so vague, "federal courts have been tasked with the creation of a federal policy of free competition,"[41] and the common law developments following the passage of the Act make it appear much more reasonable. Indeed, the Sherman Act, as the Supreme Court has held, makes illegal any "contract," "combination," or "conspiracy" "in restraint of trade or commerce"[42] that is "unreasonable,"[43] as well as any attempt or conspiracy to "monopolize" trade.[44] The requirement that a restraint be "unreasonable" is particularly important for Section One of the Act, which we turn our attention to now.

39. Sherman Antitrust Act, 15 U.S.C. §§ 1–2.

40. Nearly every contract signed by two businesses or parties restrains trade in some manner. *See, e.g.*, Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 687–88 (1978) ("[A]s Mr. Justice Brandeis perceptively noted, restraint is the very essence of every contract; read literally, [Section One] would outlaw the entire body of private contract law." (footnotes omitted)). Moreover, "natural" monopolies exist, such as corporations that offer utilities, and their (regulated) existence can actually maximize efficiency and create the lowest prices for consumers. For an in-depth analysis of natural monopolies and the relevant antitrust law, see generally John Cirace, *An Economic Analysis of Antitrust Law's Natural Monopoly Cases*, 88 W. VA. L. REV. 677 (1986).

41. SAGERS, *supra* note 30, at 7.

42. Sherman Antitrust Act § 1.

43. *See, e.g.*, Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768 (1984) (noting that the Sherman Act reaches only "unreasonable restraints of trade").

44. Sherman Antitrust Act § 2.

2. Section One

As discussed above, Section One of the Sherman Antitrust Act prohibits only those restraints of trade that are "unreasonable." This raises the question of what makes a restraint reasonable or unreasonable. How egregious does one firm's conduct need to be before the Department of Justice or the Federal Trade Commission steps in? The Standard Oil trust certainly would not have been as big, powerful, or influential had it consisted of only two companies working together, but should we allow that kind of conduct at all, no matter how small the cooperating former competitors are? In answering these questions, the Supreme Court has created a fork in the road. On the one side, there are "naked" restraints thought to be so egregious that they are considered unreasonable per se. No justification from the defendant, social or economic, can save it; only an exemption from Congress, such as that provided to labor organizations, would suffice. On the other hand, there are restraints that may or may not be unreasonable, and this triggers a burden-shifting framework known as the "rule of reason" analysis. Both analyses are considered in depth below, but it is important to recognize that a court's decision to apply the per se rule or the rule of reason does not follow an exact science; in some cases, reasonable minds could differ on which rule should apply.

The per se rule makes illegal those restrictions the court finds to be "naked restraints of trade with no purpose except stifling of competition."[45] The classic example of such a restraint is price fixing.[46] For example, two coffee shops may explicitly agree with one another to set the price of a cappuccino at thirteen dollars. Even if we were in Seattle, surrounded by a vibrant and competitive coffee market, such an agreement would be per se illegal under Section One of the Sherman Act, and the court would not reach any analysis as to the actual anticompetitive effects, if any, of the agreement in such a blatant case.[47] Another example involves that of market division, which occurs when competing firms strategically carve up the relevant market and agree to stay out of the other's "turf" so that each can act as a monopolist in its allocated portion of the market.[48] Agreements to limit output have also been held per se illegal.[49]

45. United States v. Topco Assocs., 405 U.S. 596, 608 (1972) (quoting White Motor Co. v. United States, 372 U.S. 253, 263 (1963)).

46. *See id.* at 611.

47. *See* United States v. Trenton Potteries Co., 273 U.S. 392, 394–96, 400–02 (1927) (providing an early articulation of the per se rule against price fixing schemes and concluding that it would be inappropriate to submit the scheme's reasonableness to a jury).

48. *See generally* Palmer v. BRG of Ga., Inc., 498 U.S. 46 (1990).

49. *See, e.g.*, United States v. Andreas, 216 F.3d 645, 666–67 (7th Cir. 2000) (defining per se violations as those that "always or almost always tend to restrict competition and decrease output"

However, antitrust is usually not so black-and-white, and per se violations are a breath of fresh air in an otherwise complex academic enterprise. Often, courts must assess the "reasonableness" of a given scheme or contract to determine whether the parties involved have violated the antitrust laws; liability in such cases is not automatic. This raises the question, however, of what constitutes "reasonableness." To the layperson, actions may be "reasonable" for a number of different reasons. We may think it is reasonable for environmental purposes to take reusable grocery bags with us to the store rather; we may also think it is reasonable to invest in small businesses during a global pandemic to keep them afloat. Antitrust, however, does not care about such feel-good notions of reasonableness.[50] *Board of Trade v. United States*, 246 U.S. 231 (1918), suggests that restraint of trade "is reasonable only if it can be defended as being procompetitive."[51] If the restraint is "clearly anticompetitive," despite offering "some social benefits unrelated to competition," it is still illegal.[52]

Under a rule of reason analysis, the plaintiff must prove that the defendant's conduct unreasonably restrains competition. The analysis itself consists of a "multi-stage burden-shifting framework."[53] Within that framework, the plaintiff must first make a prima facie showing of injury to competition within a relevant market; that is, the plaintiff must "merely . . . signal that the antitrust concerns are reasonably sufficient to warrant further scrutiny."[54] If the plaintiff fails to make even this initial showing, the case cannot proceed as the plaintiff will have failed to meet his or her initial burden. However, if the plaintiff does succeed in demonstrating a prima facie case of competitive harm within the defined market, "the burden shifts to the defendant to show that its conduct serves a legitimate procompetitive purpose."[55] If the defendant is successful, "the burden shifts back to the plaintiff to demonstrate a 'less restrictive alternative' . . . that would generate substantially the same procompetitive efficiency, but with a

(quoting Broad. Music, Inc. v. Columbia Broad. Sys, Inc., 441 U.S. 1, 19–20 (1979))).

50. *See, e.g.*, Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679 (1978). In *National Society of Professional Engineers*, the agreement at issue involved several engineers who refused to bid competitively with one another for construction projects. *Id.* at 681. The engineers argued that competition and lower bid prices "would produce inferior engineering work endangering the public safety." *Id.* However, the Court rejected this argument, concluding that "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Id.* at 696.

51. KEITH N. HYLTON, ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION 116 (2003); *see* Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.").

52. *Supra* note 51.

53. Erik Hovenkamp, *Platform Antitrust*, 44 J. CORP. L. 713, 744 (2019).

54. *Id.*

55. *Id.*

milder competitive footprint."[56] However, if the plaintiff cannot do so, the court will then "attempt to balance the apparent pro- and anticompetitive effects of the defendant's conduct."[57] Thus, the rule of reason analysis allows plaintiffs and defendants to shift the burden back and forth before the court ultimately makes a determination as to whether a given restraint is pro- or anticompetitive; the court pays no attention to moral or social justifications surrounding the restraint. To the fullest extent it can be, the rule of reason analysis is cold, calculated economics.

In sum, if an agreement is an explicit, "naked" restraint on trade, courts will simply apply a per se rule and get out of chambers early. However, the more likely scenario involving sophisticated parties backed by economists and large law firms—that is, Facebook and Google—involves a burden-shifting framework in which the plaintiff and defendant go back and forth before the court decides whether a given restraint benefits competition more than it disrupts or hinders it. It is thus unlikely that antitrust journalism plaintiffs would be able to bring an easy per se case against Facebook and Google because large firms are usually quite sophisticated and typically understand not to engage in blatant, "naked" restraints on competition with their competitors. Plaintiffs would thus likely have to bring a suit challenging conduct under the rule of reason, but as discussed below, they would face a very, very steep uphill battle in those cases as well.

3. Section Two

Section Two of the Sherman Antitrust Act states that "[e]very person who shall monopolize, or attempt to monopolize . . . shall be deemed guilty of a felony."[58] Again, just like Section One of the Act, the text here is purposefully vague and has been interpreted and developed through the common law. Although the plain text of the statute appears to prohibit all monopolies, the truth is that "[m]ere bigness . . . is not illegal" under the Sherman Act.[59] Instead, "the monopolization defendant must have *done* something to [wrongfully] acquire or maintain its monopoly position . . . . Even to acquire genuine market power is permissible if . . . the defendant did no more than ensure that it was the most efficient producer of the good or service in question."[60] Thus, while the lay public may cry

56. *Id.*

57. *Id.* Hovenkamp also notes that the process is more fluid in practice, as "many cases do not devote significant attention to the delimitation of these stages, because it is obvious where the relevant tensions lie." *Id.* For example, the only significant issue in a rule of reason analysis may "center[] on whether there is a countervailing procompetitive efficiency." *Id.*

58. Sherman Antitrust Act, 15 U.S.C. § 2.

59. SAGERS, *supra* note 30, at 200.

60. *Id.*

"monopoly!" whenever a large firm appears in a market,[61] antitrust enforcement requires more than sheer size to turn Uncle Sam's head.

The Supreme Court articulated the modern interpretation of Section Two of the Sherman Act in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).[62] The Court held the following:

> [t]he offense of monopoly under [Section Two] of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.[63]

Element one is typically proven through a showing of a defendant's possession of "a very high market share."[64] The second element is typically proven through a showing of "exclusionary conduct," meaning the plaintiff is "called on to prove that the defendant *excluded* competitors from what would otherwise have been normal competition or competitive entry into the monopolist's market."[65]

An in-depth analysis of Section Two of the Sherman Act is beyond the scope of this Note, as neither Facebook nor Google possesses monopoly power in the online advertising market or even enough market power to warrant a Section Two "attempt" claim, at least at the time of writing of this Note.[66] Moreover, even if we redefine the market as something along the

61. For a short, insightful commentary on public misconceptions about large tech platforms, see *Facebook Might Pose Dangers. But It Isn't a Monopoly.*, BLOOMBERG (Dec. 14, 2020, 5:00 AM), https://www.bloomberg.com/opinion/articles/2020-12-14/facebook-might-pose-dangers-it-isn-t-a-monopoly [https://perma.cc/H8GK-25WD].

62. *See generally* United States v. Grinnell Corp., 384 U.S. 563 (1966).

63. *Id.* at 570–71; *see also* SAGERS, *supra* note 30, at 200 (explaining the relevance of *Grinnell* for modern interpretations of Section Two of the Sherman Antitrust Act).

64. SAGERS, *supra* note 30, at 200.

65. *Id.*

66. *See* Emily Bary, *Google's U.S. Ad Revenue Projected to Fall This Year, eMarketer Says, as Facebook, Amazon Gain Share*, MARKETWATCH (June 22, 2020, 12:18 PM), https://www.marketwatch.com/story/googles-us-ad-revenue-projected-to-fall-this-year-emarketer-says-as-facebook-amazon-gain-share-2020-06-22 [https://perma.cc/KTN4-FYYS] (noting that Google possesses 29.4% of the online U.S. advertising market and that Facebook possesses 23.4%); *see also* United States v. Aluminum Co. of America, 148 F.2d 416, 424 (1945) (finding that possession of over 90% of the market is enough to constitute monopoly power but that "it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not"); U.S. DEP'T OF JUST., COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 24 (2008), https://www.justice.gov/sites/default/files/atr/legacy/2009/05/11/236681.pdf [https://perma.cc/4T9U-GWKZ] ("[W]e are aware of no court that has found monopoly power when [the] defendant's share was less than fifty percent . . . ."); DANIEL SWANSON, RICHARD PARKER, THOMAS HUNGAR, CYNTHIA RICHMAN & JANUSZ ORDOVER, GIBSON DUNN, IS IT BAD TO BE BIG? 13 (2019), https://www.gibsondunn.com/wp-content/uploads/2019/05/WebcastSlides-Is-It-Bad-To-Be-Big-An-Antitrust-Update-On-Monopoly-Law-And-Enforcement-23-MAY-19.pdf [https://perma.cc/9545-J4CX] (noting that most courts prefer to see a market share of

lines of "news distributors" or "online forums for published content," the existence of two massive players in the same market, while potentially not great for competition,[67] undercuts the argument that either Facebook or Google possesses a monopoly in the markets relevant for this Note. Thus, this Note will focus on Section One of the Sherman Act, but will briefly discuss the relevant Section Two claims that Facebook and Google are currently defending against, and will flag Section Two attempt claims as a possible future source of antitrust enforcement for Facebook and Google's dealings in the digital advertising market, which may increase in the future and amount to a "dangerous probability of obtaining monopoly power."[68] However, for reasons discussed in the following Section, plaintiffs in the journalism industry are also highly unlikely to succeed in a Section One claim.

C. PLATFORM ANTITRUST AND *AMEX III*

1. What Is a "Platform"?

Before diving into the specific case law most relevant to modern platform antitrust enforcement under the Sherman Act, we must first establish the proper foundation. This Section provides a brief explanation of one- and two-sided platforms that will carry us into a discussion of the Supreme Court's decision in *Ohio v. American Express Co.* (*AmEx III*), 138 S. Ct. 2274 (2018).[69]

What is a "platform"? "[T]he term applies to all firms engaged in two-sided commerce."[70] That is, the umbrella of "platforms" covers more than just tech behemoths like Facebook, Google, and Amazon. Indeed, a classic example of a platform is a newspaper generating revenue from both customers interested in reading the paper's contents and advertisers hoping to appeal to the readers.[71] Two-sidedness, however, "is a matter of degree."[72]

fifty percent or greater to trigger a Section Two attempt claim and that a market share under thirty percent is most likely insufficient).

67. For an in-depth explanation of oligopolies, see Gregory J. Werden, *Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory*, 71 ANTITRUST L.J. 719 (2004).

68. U.S. DEP'T OF JUST., *supra* note 66, at 19.

69. Ohio v. Am. Express Co. (*AmEx III*), 138 S. Ct. 2274 (2018).

70. Hovenkamp, *supra* note 53, at 720.

71. *See id.* ("For instance, even a local newspaper qualifies as a platform, as it caters to both readers and advertisers."); Herbert J. Hovenkamp, *Platforms and the Rule of Reason: The* American Express *Case*, 2019 COLUM. BUS. L. REV. 35, 37 ("A traditional example is the printed periodical, such as a newspaper, which earns revenue by selling both advertising and subscriptions to the paper itself.").

72. Hovenkamp, *supra* note 53, at 720. Here, Hovenkamp means that some platforms require participation from both sides more than others. For example, he notes that Uber is more appealing to riders and drivers when more drivers and riders join, respectively. However, newspaper readers probably do not care too much about the number of advertisements present in the paper; indeed, readers may prefer

Erik Hovenkamp notes that the most obvious two-sided platforms give rise to a "chicken-and-egg" problem; that is, "neither side's users are attracted to the platform unless there are already participating users on the other side."[73] For example, Uber and Lyft are apps that serve as intermediaries between drivers and people in need of rides, and Airbnb serves a similar intermediary position between individuals in need of a place to stay and those looking to make some extra cash by renting out an extra space.[74] With platforms like Uber and Airbnb, the chicken-and-egg problem arises because neither side of the platform has any incentive to participate unless the other side is robust; nobody wants to be an Uber driver in an area where nobody needs a ride, and nobody wants to download an app to look for a place to stay if there are no available places to stay. "Consequently, when new users join on either side, they contribute positive value to participants on the other side . . . ."[75] Thus, platforms are those two-sided firms that intermediate between groups often desiring to interact with one another.

One especially important trait of two-sided platforms is the concept of direct and indirect network effects. "Network effects occur when customer value increases as the volume of transactions increases."[76] One common example is that of a phone. A phone becomes more valuable the more other people have phones; if there was only one single phone owned by one person, the entire purpose of the device would be defeated. But as the number of friends, acquaintances, businesses, and others who own phones increases, the value of the phone to each individual user increases as well. As alluded to above, there are two different types of network effects important for platform economics. "Direct network effects are . . . same-side effects. The value of a service simply goes up as the number of users goes up."[77] The phone example falls within the realm of direct network effects, and so too would Facebook, which becomes more tempting to join as the number of "friends" participating on the platform increases. When the platform becomes more appealing to users on one side as the number of participants on the other side increases, that is known as an "indirect network effect."[78] Consider Uber: nobody would drive for Uber if nobody used the app to fetch rides, and nobody would use the app to fetch rides if nobody was driving for

to have fewer ads cluttering the corners of their crosswords. Thus, we might say that a platform like Uber is "more" two-sided than a newspaper.

73. *Id.*

74. *See id.* at 720–21.

75. *Id.* at 721.

76. Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952, 1992 (2021).

77. Nicholas L. Johnson, *What Are Network Effects?*, APPLICO, https://www.applicoinc.com/blog/network-effects [https://perma.cc/V42D-P3PB].

78. Hovenkamp, *supra* note 53, at 720–21.

Uber.[79] Network effects, particularly indirect network effects in two-sided platform economics, were integral to the Supreme Court's reasoning in the *AmEx III* decision, in which Justice Thomas refused to isolate one side of a two-sided platform due in large part to the existence of indirect network effects.[80]

Facebook and Google, therefore, easily fall within the definition of two-sided platforms; that much is not up for debate.[81] Facebook, because it is free to users, sustains the platform by selling advertisements.[82] Google utilizes a similar revenue-generating practice; the service is free to users like you and me, but we pay with our data, which Google uses to connect us with the targeted advertisements it sells.[83] Facebook in particular experiences profound direct network effects due to the platform's appeal increasing as the number of users grows. Both platforms also experience indirect network effects, at least to the extent that advertisers are more willing to pay for targeted ads.

Going back to the chicken-and-egg problem analysis, it can be difficult to imagine a world without Facebook or Google, but neither platform could have sustained itself without startup revenue. For instance, advertisers would certainly have passed on Facebook at a time it was used only by a handful of Harvard students.[84] The question arises, however, as to why antitrust law cares about platforms. Of course, antitrust law cares about illegal practices and Sherman Act violations in all industries, so why is there a need for a section defining platforms at all? The answer to this lies in the Supreme Court's 2018 decision in *AmEx III*.

79. *See id.* at 724.

80. *See* Ohio v. Am. Express Co. (*AmEx III*), 138 S. Ct. 2274, 2285–86 (2018).

81. Although, similarly to the analysis in note 72, we might debate just how two-sided Facebook and Google really are, especially if both platforms consist of users on one side and advertisers on the other. Like with newspapers, it is not clear how much users of Facebook and Google care about advertisements. On the one hand, the advertisements may be convenient and lead people to products they have been looking for or meaning to buy; on the other hand, targeted advertisements may make platform users feel a bit uncanny, and it seems, for example, that people use Facebook to connect with friends and rant about politics rather than be exposed to targeted ads.

82. For a satirical, yet insightful, take on Facebook's marketing scheme, see T. Herman Zweibel, *I Am Leaving the Bloated Corpse of Journalism Behind for This So-Called 'Sociable-Media' and Its Mountains of Gold*, ONION (June 18, 2018, 10:44 AM), https://www.theonion.com/i-am-leaving-the-bloated-corpse-of-journalism-behind-fo-1826907443 [https://perma.cc/4LFH-8ETM] (noting that Facebook "is ruled by . . . a formidable robber-baron, a personage known as Zuckerberg, who sells ads").

83. *See* Eric Rosenberg, *How Google Makes Money (GOOG)*, INVESTOPEDIA (June 23, 2020), https://www.investopedia.com/articles/investing/020515/business-google.asp [https://perma.cc/YZK6-Q8H9] ("The bulk of Google's 162 billion dollar revenue in 2019 came from its proprietary advertising service, Google Ads.").

84. *See generally* Mark Hall, *Facebook: American Company*, BRITANNICA (Sept. 15, 2021), https://www.britannica.com/topic/Facebook [https://perma.cc/XF2L-4MTZ].

2. The *AmEx III* Decision

AmEx III was a 5-4 decision handed down in the summer of 2018. Justice Thomas wrote for the majority. The United States and seventeen state governments, including the named plaintiff, Ohio,[85] brought an antitrust challenge to the "antisteering" rule that American Express imposed upon merchants accepting its credit cards.[86] The case is significant because of the manner in which Justice Thomas framed the rule of reason analysis for two-sided platforms. Much of Justice Thomas's analysis focused on how to appropriately "define" the market being harmed by anticompetitive practices when the market in question has two sides.[87] Just like how Uber has drivers on one side of the platform and riders on the other, American Express's credit card enterprise consists of merchants on the one side and retail shoppers on the other; American Express serves as an intermediary between buyers and sellers.[88]

To make money, credit card companies charge "swipe" fees, meaning the companies take a percentage of any given sale in which one of its cards is used.[89] MasterCard, Visa, and American Express are the most common names in the credit card industry, and each offers consumer "rewards" for using their credit cards, often in the form of "cash back" or "miles." Some credit cards charge users an annual fee; most charge interest on outstanding account balances, and all charge swipe fees to merchants who accept the cards.[90] Die-hard fans of American Express are constantly on the lookout for

85. Originally, seven states brought suit, and other states were added until Hawaii was dropped from the suit. In total, the seventeen states included Connecticut, Iowa, Maryland, Michigan, Missouri, Ohio, Texas, Illinois, Tennessee, Montana, Nebraska, Idaho, Vermont, Utah, Arizona, Rhode Island, and New Hampshire. *See* Complaint, United States v. Am. Express Co., 88 F. Supp. 3d 143 (E.D.N.Y. 2015) (No. 1:10-4496).

86. *AmEx III*, 138 S. Ct. at 2280. *See generally Am. Express Co.*, 88 F. Supp. 3d 143.

87. *AmEx III*, 138 S. Ct. at 2285.

88. *See id.* at 2280 ("By providing these services to cardholders and merchants, credit-card companies bring these parties together, and therefore operate what economists call a 'two-sided platform.' ").

89. Joe Resendiz, *Credit Card Processing Fees and Costs*, VALUEPENGUIN (Sept. 9, 2021), https://www.valuepenguin.com/what-credit-card-processing-fees-costs [https://perma.cc/2ARY-C2XS] ("In each business transaction involving credit cards, processing fees take a bite out of the total profits."); *see also* source cited *infra* note 94 (noting all credit card processors charge swipe fees). Some credit cards also charge annual fees for cardholders, such as the Chase Sapphire Reserve and the hefty American Express Platinum cards. Consumers pay these annual fees for the benefit of additional card perks, which can include more miles or points per purchase, travel credits, and tow services. *See* Jennifer Doss, *Best Credit Cards with an Annual Fee of November 2021*, CARDRATINGS (Oct. 29, 2021), https://www.cardratings.com/best-credit-cards-for-the-annual-fee.html [https://perma.cc/RPG7-4QD4].

90. Resendiz, *supra* note 89 (writing that MasterCard charges estimated average processing fees ranging from 1.55% to 2.6%, Visa from 1.43% to 2.4%, Discover from 1.56% to 2.3%, and American Express from 2.5% to 3.5%); *see also* Casey Bond, *Why Isn't American Express Accepted Everywhere?*, U.S. NEWS & WORLD REP. (Apr. 17, 2019, 9:35 AM), https://creditcards.usnews.com/articles/why-isnt-american-express-accepted-everywhere [https://perma.cc/M8NK-JQ3S].

signs indicating that merchants accept their precious cards, and for good reason; even Justice Thomas notes that "Amex provides better rewards than the other credit-card companies. . . . But to fund those investments, it must charge merchants higher fees than its rivals."[91]

Of course, merchants only accept American Express cards because they believe it will result in more sales. Due to the higher swipe fees, it is more preferable for a merchant that a store patron uses a Visa or MasterCard credit card or, ideally, pays with cash or a debit card. American Express is aware of this. Thus, "[t]o avoid higher fees, merchants sometimes attempt to dissuade cardholders from using Amex cards at the point of sale—a practice known as 'steering.' "[92] To avoid this, American Express "places antisteering provisions in its contracts with merchants."[93] "Retailers who accept Amex are contractually forbidden to suggest customers use competing credit cards that charge less . . . ."[94] For example, a local purveyor of fine spices and olive oils who has an agreement with American Express to accept its cards cannot incentivize customers to use a Visa or MasterCard credit card by offering discounts, free peppercorns, or complimentary olive oil tastings. The antisteering provisions do not, however, prevent merchants from steering customers toward debit cards, checks, or cash, the processing fees of which are either zero or significantly less than those of credit cards.[95] Thus, the antisteering provisions apply only to American Express's direct competitors: other credit card companies. The spice merchant is free to incentivize customers to pay with cash rather than a credit card, but who pays with cash these days, anyways?

The antisteering provision was at the front and center of the plaintiffs' suit in *AmEx III*. The plaintiffs brought their suit under Section One of the Sherman Antitrust Act, meaning they had the initial burden of establishing competitive harm to the relevant market.[96] Both sides agreed that the antisteering provisions in American Express's contracts with merchants were not "naked" restraints on trade, like blatant horizontal price fixing or carving up market territory, so the question became whether, under a rule of reason analysis, the plaintiffs' case had any merit.[97] Indeed, the Supreme

91. *AmEx III*, 138 S. Ct. at 2277.

92. *Id.*

93. *Id.*

94. Katherine Fan, *The US Supreme Court Handed Amex an Anti-Steering Victory*, POINTS GUY (June 25, 2018), https://thepointsguy.com/news/the-us-supreme-court-handed-amex-an-anti-steering-victory [https://perma.cc/XDB7-8KYJ].

95. *See* Frank Kehl, *The Complete Guide to Debit Card Transaction Fees: Can You Save Money with PIN Debit?*, MERCH. MAVERICK (Oct. 30, 2020), https://www.merchantmaverick.com/cost-of-debit-card-transactions [https://perma.cc/NA5C-BBQN].

96. *AmEx III*, 138 S. Ct. at 2277.

97. *See id.* ("The parties agree that Amex's antisteering provisions should be judged under the rule

Court considered only whether the plaintiffs had satisfied their initial burden, and ultimately concluded they did not.[98]

Justice Thomas's decision quickly turned to the definition of the relevant market. This makes sense; plaintiffs alleging general, abstract harm to some vague, undefined market will have little success asserting antitrust violations in the courts. Justice Thomas noted that "courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market."[99] "Without a definition of [the] market[,] there is no way to measure [the defendant's] ability to lessen or destroy competition."[100] *AmEx III* stands out because of Justice Thomas's unique approach to defining the market for two-sided platforms. Unlike the restraints relating to grain prices in the aforementioned classic *Board of Trade* case, here, the advent of two-sided platforms has potentially expanded the scope of the relevant "market."[101] One question Justice Thomas and the majority considered was whether the relevant "market" the plaintiffs had to show competitive injury to included just one or rather "both sides of the platform"; that is, both merchants and shoppers.[102]

Consistent with Supreme Court precedent, Justice Thomas noted that "the relevant market is defined as 'the area of effective competition' "[103] and must " 'correspond to the commercial realities' of the industry."[104] In defining the "relevant market" of two-sided platforms as necessarily including both sides of the market, Justice Thomas emphasized the indirect network effects that two-sided platforms experience, noting that "[d]ue to indirect network effects, two-sided platforms cannot raise prices on one side without risking a feedback loop of declining demand."[105] He concluded this analysis by stating: "[t]hus, courts must include both sides of the platform—merchants and cardholders—when defining the credit-card market."[106] Although this conclusion may come off as reasonable and even mundane, its implications for antitrust law's goals and antitrust plaintiffs' suits is potentially devastating.

of reason using a three-step burden-shifting framework.").

98. *See id.* at 2278.

99. *Id.* at 2285.

100. *Id.* (alteration in original) (quoting Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965)).

101. *See generally* Bd. of Trade v. United States, 246 U.S. 231 (1918).

102. *AmEx III*, 138 S. Ct. at 2286.

103. *Id.* at 2285 (quoting Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965)).

104. *Id.* (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 336–37 (1962)).

105. *Id.*

106. *Id.* at 2286.

Recall that the issue in *AmEx III* was whether the plaintiffs had sufficiently met their prima facie burden of competitive harm to a relevant market. The Supreme Court frames the plaintiffs' case as "focus[ing] on only one side of the two-sided credit-card market," that is, the side occupied by merchants.[107] Indeed, Justice Thomas notes that "[t]he plaintiffs stake their entire case on proving that Amex's agreements increase merchant fees."[108] The plaintiffs asserted that American Express's antisteering provisions wrongfully increased merchant fees, but the Supreme Court was not persuaded. The Court found that "the evidence that does exist cuts against the plaintiffs' view that Amex's antisteering provisions are the cause of any increases in merchant fees" because Visa and MasterCard's fees increased even at locations where American Express was not accepted; this suggested that merchant fees across the board were increasing and not necessarily because of American Express's antisteering provisions.[109]

Indeed, the Supreme Court went so far as to assert that, merely to get over the hurdle of establishing their prima facie burden, the plaintiffs were required to "prove that Amex's antisteering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market."[110] The plaintiffs failed to do so in large part because of their apparent failure to establish any type of harm to the consumer side of the market; even if merchants were paying higher fees, consumers were, in Justice Thomas's eyes, being rewarded with lavish credit card miles and cardholder perks.[111] The Supreme Court concluded that "[e]vidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power."[112] Thus, without establishing competitive harm to both sides of a two-sided market, plaintiffs seeking to go after conduct by two-sided platforms through a rule of reason

107. *Id.* at 2287.

108. *Id. But see* Hovenkamp, *supra* note 71, at 53 ("The record established unambiguously that the antisteering rule forced a specific buyer and seller to replace a lower price transaction that *both* preferred in favor of a higher cost transaction that injured both of them, as well as rival card issuers. In other words, it established exclusion, harm to the affected parties, and higher prices across the board." (footnote omitted)).

109. *AmEx III*, 138 S. Ct. at 2288.

110. *Id.* at 2287.

111. *See id.* ("Focusing on merchant fees alone misses the mark because the product that credit-card companies sell is transactions, not services to merchants, and the competitive effects of a restraint on transactions cannot be judged by looking at merchants alone."). *But see* Hovenkamp, *supra* note 71, at 52–54 (arguing that the plaintiffs in *AmEx III* did argue anticompetitive effects harming both sides of the market and that increased merchant fees resulted in those higher costs being passed along to the consumers through increased in-store prices).

112. *AmEx III*, 138 S. Ct. at 2287. *But see* Hovenkamp, *supra* note 71, at 55–56 ("[T]he majority opinion ignored numerous explicit fact findings in the district court, all of which took effects on both sides into account but were based on an economically coherent market definition.").

analysis based on Section One of the Sherman Act will find themselves out of luck. This conclusion drastically and unnecessarily altered the rule of reason analysis for two-sided markets, representing a change for the worse and introducing confusion into a rule of reason analysis that had been developed through nearly a century of common law doctrine. This is why it will be so difficult for journalism plaintiffs to bring Section One cases against Facebook and Google, cases which were difficult to prevail on even prior to *AmEx III*. Facebook and Google are only free to consumers because the other side of the platforms—advertising—generates significant revenue. Any case brought would have to show harm to those consumers despite the service being free to them: a difficult, but not impossible, feat.

"By design, the rule of reason framework contemplates that plaintiffs can carry their initial burden without having ruled out offsetting efficiencies."[113] However, in the *AmEx III* decision, Justice Thomas and the majority believed that the outcome of the case depended entirely upon the plaintiffs' prima facie case.[114] Importantly, in a standard rule of reason analysis, a plaintiff meets his or her initial burden by "present[ing] enough evidence of competitive harm to require the defendant to offer an explanation."[115] There is a policy rationale behind this: "[b]ecause the defendant is the creator of its restraint and presumably knows what its motives were, it is in a far better position to provide proof of its rationale and effects," including any potential reductions in cost or product improvements.[116] Instead, however, "the approach prescribed by the majority effectively collapses the entire rule of reason framework . . . into the plaintiff's prima facie case."[117] This approach effectively forces the plaintiff to resolve the merits of the case during the initial pleadings stage, which may not be possible until further discovery is done and which the defendant is in a better position to do anyway; this is the whole point of having a burden-shifting framework.[118]

Indeed, by forcing the plaintiffs in antitrust enforcement actions against two-sided platforms to establish de facto harm to both sides of the market before the defendant even has the burden of providing procompetitive justifications for its actions, the Supreme Court in *AmEx III* altered the rule of reason analysis, carving out a new, more defendant-friendly framework that will make antitrust enforcement against tech behemoths like Facebook

113. Hovenkamp, *supra* note 53, at 750.
114. Hovenkamp, *supra* note 71, at 56.
115. *Id.* at 57.
116. *Id.*
117. Hovenkamp, *supra* note 53, at 750.
118. *See id.* at 750–51.

and Google even more difficult than it would have been before this decision. This is a significant reason why this Note does not advocate for Section One enforcement as a means of "helping" the journalism industry.[119]

D. THE CONTEMPORARY JOURNALISM INDUSTRY AND CONGRESSIONAL RECOMMENDATIONS

This Section provides the policy rationale behind attempting to assist the journalism industry, whether through antitrust enforcement, exceptions to the antitrust laws, subsidies, or some other means. The purpose of this Section is to make the reader care about the free and diverse press, particularly local journalism, by discussing its importance to a functioning democratic society. This Section briefly examines the Journalism Competition and Preservation Act and outlines what a bipartisan coalition in Congress believes is an appropriate solution to the media industry's dire situation.[120]

Local journalism is dying. The advent and surging popularity of television dealt local journalism its first blow, contributing to the decline of weekly and daily publications from a height of 24,000 in the early 1900s to just 9,000 in 2004, despite massive population increases and, therefore, larger audiences for the media.[121] The second blow came partially as a result of the topic of this Note: the rise of tech platforms. Since 2004, the United States has lost 2,100 newspapers, and the country only has 1,260 daily papers remaining.[122] The effects of this go far beyond not having a physical paper delivered to one's home each morning or available for pickup at the local supermarket. Rather, "[a]bout 1,800 of the communities that have lost a paper since 2004 do not have easy access to any local news [source]—such as a local online news site or a local radio station."[123]

Of course, it would be irrational to blame all failing journalism on

119. *See* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828 (2009) (finding that in the decade between 1999 and 2009, plaintiffs failed to establish their prima facie cases for anticompetitive conduct in ninety-seven percent of cases subject to a rule of reason analysis). Now that the analysis makes it even more difficult for plaintiffs to pass the first stage of the burden-shifting framework, we can expect that very few cases brought under Section One of the Sherman Act will have any chance of success. *See* Hovenkamp, *supra* note 53, at 751.

120. *See generally* Journalism Competition and Preservation Act of 2019, H.R. 2054, 116th Cong. (2019).

121. *See* PENELOPE MUSE ABERNATHY, NEWS DESERTS AND GHOST NEWSPAPERS: WILL LOCAL NEWS SURVIVE? 12 (2020), https://www.usnewsdeserts.com/wp-content/uploads/2020/06/2020_News_Deserts_and_Ghost_Newspapers.pdf [https://perma.cc/4D29-E6BS]; *see also* U.S. CENSUS BUREAU, STATISTICS OF POPULATION xix (1900), https://www2.census.gov/library/publications/decennial/1900/volume-1/volume-1-p2.pdf [https://perma.cc/HQX6-V4N6] (finding the total population of United States citizens in 1900 to be just over 76,000,000).

122. ABERNATHY, *supra* note 121, at 12.

123. *Id.*

Facebook and Google. There are a whole host of factors, including a decline in quality, that might contribute to the downfall of a local or national paper. However, it is clear that the shift to online news consumption, due to its ease of accessibility and slew of free content, has altered journalism and the media content we consume. Today, anyone can start a blog, meaning anybody can share insights with an audience nearly anywhere in the world. More impactful in this era, even, is the fact that technology and access to the web have allowed for the emergence of amateur documentary content, more organized protests, and increased accountability for law enforcement. For example, "Twitter, Facebook and . . . Instagram remain[ed] the easiest ways for people to organize and document the mass protests [following the killing of George Floyd]."[124] On the other hand, Facebook has also served as a gathering place for radicalization, granting white nationalists, for example, a place to (at least temporarily) spread hate.[125] The company has also taken heat for the potential role it played in helping organize the pro-Trump rally that led to the January 6, 2021 attack on the United States Capitol.[126] Regardless of the social good or evil that tech platforms are promoting, journalism is changing, and with it, its audience. During a time when more United States citizens get their news from social media than print publications, it is no wonder that baseless conspiracy theories have emerged from the depths of niche, cult groups and spread to large swaths of the population.[127]

As alluded to in the discussion above, the decline of journalism, particularly at the local level, has profound antidemocratic effects. While it is unlikely that today's consumers of media would ever abandon Facebook or Google if local journalism underwent a resurgence, a thriving local journalism industry and Silicon Valley's tech behemoths are not mutually exclusive; rather, Facebook and Google presently serve important roles in disseminating local journalism and could do so to an even greater extent in the future—if quality local content creators are able to survive, that is. Honest, good journalism, whether it be from national players with millions

124. Barbara Ortutay & Amanda Seitz, *How Technology Is Helping George Floyd Protesters Organize, Record Police Violence*, GLOB. NEWS (June 6, 2020, 2:46 PM), https://globalnews.ca/news/7035160/technology-george-floyd-protesters [https://perma.cc/FKP5-D9JR].

125. *See* Julia Carrie Wong, *White Nationalists Are Openly Operating on Facebook. The Company Won't Act*, GUARDIAN (Nov. 21, 2019, 6:00 AM), https://www.theguardian.com/technology/2019/nov/21/facebook-white-nationalists-ban-vdare-red-ice [https://perma.cc/48N3-ZA38].

126. *See* Jenna Amatulli, *Sheryl Sandberg Slammed for Saying Capitol Riot Was Not 'Largely' Planned on Facebook*, HUFFPOST (Jan. 12, 2021, 12:29 PM), https://www.huffpost.com/entry/sheryl-sandberg-capitol-riot-facebook_n_5ffdcc86c5b6c77d85ea8445 [https://perma.cc/5M56-22ZF].

127. *See* Shearer, *supra* note 3; *see also* Ian Haimowitz, *No One Is Immune: The Spread of Q-anon Through Social Media and the Pandemic*, CTR. FOR STRATEGIC & INT'L STUD. (Dec. 17, 2020), https://www.csis.org/blogs/technology-policy-blog/no-one-immune-spread-q-anon-through-social-media-and-pandemic [https://perma.cc/8Y5Y-GHK6].

of subscribers like the *New York Times* or from the small *Hungry Horse News* in Montana, plays an important role in keeping us informed. National newspapers unsurprisingly focus primarily on national news stories, such as the shattering *New York Times* story revealing that then-President Trump had spent years avoiding taxes and concealing his business losses.[128] Such outlets are incredibly important for disseminating news surrounding politics in D.C. and connecting citizens from coast to coast with pressing information about natural disasters, systemic racism, business, and finance.

On the other hand, local journalism plays an easily forgotten but undeniably important role in our democracy. Local journalists "help residents in small and mid-sized communities understand what is going on in their community and also put into local context national issues such as the opioid crisis or the coronavirus pandemic."[129] Moreover, while it is easy to focus one's attention solely on what is happening in D.C., much of the policy that affects our daily lives originates as county ordinances and state legislation; local news is the "community megaphone" that "provide[s] readers with transparency and insights into the decisions made by elected officials."[130] Speaking directly to democratic values and processes, "[a] less-informed public is less likely to vote," and areas that have lost local papers have seen a decrease in voter turnout.[131] Moreover, local journalism tends to mean local accountability for politicians; the paper is "an ideal monitoring agent" and serves as a watchdog in the back of local leaders' minds.[132] For example, in "news deserts"—that is, places no longer supported by a local paper—borrowing costs appear to "increase in statistically significant ways," likely due to the lack of accountability.[133]

All of this is to say that journalism—or rather, good journalism—is an inherent good. The development of the World Wide Web and platforms like Facebook and Google have made it far easier to reach an audience—that is, to become an "armchair" journalist. There are benefits and detriments to this, as noted above with reference to information surrounding the George Floyd protests and groups harboring white nationalist rhetoric. However, for the

128. *See generally* Russ Buettner, Susanne Craig & Mike McIntire, *The President's Taxes: Long-Concealed Records Show Trump's Chronic Losses and Years of Tax Avoidance*, N.Y. TIMES (Sept. 27, 2020), https://www.nytimes.com/interactive/2020/09/27/us/donald-trump-taxes.html [https://perma.cc/T5J2-MPW5].

129. ABERNATHY, *supra* note 121, at 13.

130. *Id.* at 22 (citations omitted).

131. *Id.*

132. Dan Kennedy, *A New Study Measures the Cost of Corruption When the Local Newspaper Dies*, GBH (June 6, 2018), https://www.wgbh.org/news/commentary/2018/06/06/a-new-study-measures-the-cost-of-corruption-when-the-local-newspaper-dies [https://perma.cc/VP5Z-ELBX].

133. *See id.* ("There's no doubt that government officials—especially those who are corrupt—fear the scrutiny of tough, independent journalism.").

past century, we have noticed a decline in journalism, particularly at the local level.[134] The effects of this are real. They are real for democratic participation. They are real for government accountability. And they are real for the millions affected by disinformation in the midst of a global pandemic.[135]

II. ARGUMENT

"It seemed impossible of enforcement. Slowly the mills of the courts ground, and only gradually did the majesty of the law assert itself."[136]

A. THE BIGGEST EVER, BUT NOT MONOPOLIES: WHY A SECTION TWO CLAIM UNDER THE SHERMAN ANTITRUST ACT CANNOT PROCEED–AT LEAST FOR NOW

As mentioned earlier, an in-depth analysis of Section Two of the Sherman Act is beyond the scope of this Note. However, a brief analysis is warranted because so many cry "monopoly" or, rather, "monopolization" at the sight of large corporations when it may in fact be improper to do so.[137] It is worth explaining why a Section Two monopolization claim is likely not an appropriate means of antitrust enforcement against Facebook and Google when it comes to the platforms' relationships and dealings with the journalism industry.[138] It is also worth flagging for future discussion the possibility of a Section Two "attempt" claim. That is, it may be possible to go after a large tech platform like Facebook or Google for possibly anticompetitive conduct with regard to digital advertising and media markets if either company amasses enough market power—hypothetically forty to sixty percent or so—in a relevant market alongside other factors that amount to a "dangerous probability" of successful monopolization.[139]

134. ABERNATHY, *supra* note 121, at 12–13.

135. *See id.* at 18 ("The coronavirus has brought into sharp focus the critical role that a local news outlet can play during an epidemic or emergency—disseminating authoritative information from experts and discrediting misinformation.").

136. *State of the Union Address: William H. Taft (December 5, 1911)*, INFOPLEASE (Feb. 11, 2017), https://www.infoplease.com/primary-sources/government/presidential-speeches/state-union-address-william-h-taft-december-5-1911 [https://perma.cc/M8W9-4N5U]. Here, Taft is speaking of the Sherman Antitrust Act. As noted above, the Sherman Act is incredibly short and necessitated the courts to step in to further develop the common law of antitrust.

137. *See* ZINGALES & LANCIERI, *supra* note 16, at 5 (asserting that Facebook and Google "monopolize" the news media market); Lipman, *supra* note 10 (arguing that Facebook and Google are monopolies that use their power to rob the media industry of advertising revenue).

138. This Note provides no comment on whether a Section Two claim might be successful against Facebook or Google in other contexts.

139. *See* Don T. Hibner, Jr., *Attempt to Monopolize Claim Fails Where Plaintiff Cannot Establish Approach to Monopoly Power in Properly Defined Relevant Market*, ANTITRUST L. BLOG (Jan. 25, 2017), https://www.antitrustlawblog.com/2017/01/articles/private-civil-antitrust-litigation/attempt-monopolize-claim-fails-plaintiff-cannot-establish-approach-monopoly-power-properly-defined-relevant-market [htt

Any Section Two claim brought against Facebook or Google for improper monopoly maintenance in this context would face significant hurdles. As noted above, there are two elements to a claim of monopolization.[140] The first requires a showing by the plaintiff of the defendant's "possession of monopoly power in the relevant market."[141] There are two aspects of this element: (1) a definition of the "relevant market" and (2) a showing of the defendant's "possession of monopoly power" in said market. For better or for worse,[142] it seems that plaintiffs would have to be especially creative to even define a relevant market in a case brought on behalf of or by players in the media industry. Potential markets could include "online advertising," "media distribution," "online content creation," or others, but the issue with all of these is that it does not appear that either Facebook or Google maintains monopoly power in them. Monopoly power requires an immense amount of market power. Recall that market power means that a firm can raise its prices above competitive levels without losing profits.[143] Monopoly occurs when a single firm has so much market power "that [it] is not constrained by competition" in its ability to raise prices above competitive levels.[144] The famous jurist Learned Hand believed that a firm did not possess monopoly power until it controlled somewhere between at least sixty percent of the relevant market.[145] The issue with bringing a suit against Facebook and Google is that there are two of them, and that is not including other key players in the online advertising market such as Amazon and Twitter. Google, Facebook, Amazon, and Apple may each have significant market power in realms such as online advertising or app store platforms, but none is a monopolist in these markets. Of course, markets are most robust and typically better for consumers when there are numerous competitors, but there are high entry barriers to the markets that Facebook and Google occupy; I could not, for instance, set up the

ps://perma.cc/Q4Q3-T5UY] (describing an instance when possession of over fifty percent of the relevant market was insufficient to establish a cause of action under Section Two because additional factors, including a new competitor entering the market, meant that the high market share itself did not establish the necessary "dangerous probability" of monopolization); Bary, *supra* note 66 (noting that Facebook and Google each possess less than thirty percent of the digital advertising market and that Google's share actually decreased in 2020). *See generally* Maxwell M. Blecher, *Attempt to Monopolize Under Section 2 of the Sherman Act: "Dangerous Probability" of Monopolization Within the "Relevant Market*,*"* 38 GEO. WASH. L. REV. 215 (1969).

140. *See* United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

141. *Id.* at 570.

142. Remember: antitrust law does not care about morality or policy objectives; it cares about competitive markets.

143. *See* RICHARD B. MCKENZIE & DWIGHT R. LEE, IN DEFENSE OF MONOPOLY: HOW MARKET POWER FOSTERS CREATIVE PRODUCTION 126 (2008); Thomas G. Krattenmaker, Robert H. Lande & Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 241, 249 (1987).

144. Krattenmaker et al., *supra* note 143, at 249.

145. *See* United States v. Aluminum Co. of America, 148 F.2d 416, 424 (1945).

infrastructure for a search engine or social media platform that could rival Facebook or Google's performance without millions, if not billions, of dollars upfront. On the other hand, if we defined the relevant market as simply "online content creation," plaintiffs would struggle to establish market power, let alone monopoly power, because access to the Internet is so cheap that many can, and do, blog and share their musings for free. So, while competition may not be perfect due to the relatively small number of players in a handful of the possible relevant markets, many of these markets are at most oligopolies, not monopolies, and Section Two of the Sherman Act simply does not provide a reasonable cause of action under these circumstances.[146]

But what about a Section Two claim that requires less than a showing of monopoly power? As mentioned above, Section Two "attempt" claims require some anticompetitive conduct and a "dangerous probability" of monopolization. An "attempt" analysis is beyond the scope of this Note for reasons discussed in the preceding text and footnotes, but it is worth noting for the future that, even if Facebook and Google have not monopolized the news media or news distribution markets, increasing market shares, high entry barriers, and a lack of new competitors in the eventually-defined market could possibly lead to a successful Section Two "attempt" claim

146. SAGERS, *supra* note 30, at 473 ("This supracompetitive equilibrium [of some oligopoly markets] is not healthy . . . on any standard economic argument about healthy markets; it just happens to be a situation for which antitrust provides no remedy."). It is also worth noting that Section Two does prohibit "attempts" at monopolization, and such "attempt" cases often involve players with significant market power engaging in exclusionary conduct to obtain monopoly power. *See, e.g.*, Spectrum Sports v. McQuillan, 506 U.S. 447, 459 (1993) (holding that a firm with significant market power is not guilty of attempted monopolization "absent proof of a dangerous probability that [it] would monopolize a particular market and specific intent to monopolize"). An in-depth examination of possible exclusionary conduct on the part of Facebook or Google that might lead to an "attempt" claim relevant to the journalism industry, however, is beyond the scope of this Note because such an analysis would require a tremendous amount of speculation about what goes on behind the curtains of these Silicon Valley giants. *See* United States v. Am. Airlines, Inc., 743 F.2d 1114, 1116 (5th Cir. 1984) (noting that a phone call between two executives for competing airlines could establish a Section Two "attempt" violation under the Sherman Act). It is worth mentioning, however, a recent *New York Times* article giving vague mention to the contents of so-called "Jedi Blue," an agreement between Facebook and Google that supposedly prevented Facebook from challenging Google's dominance in the online advertising market and allowed the two to cooperate in the realm of digital ad revenue. Daisuke Wakabayashi & Tiffany Hsu, *Behind a Secret Deal Between Google and Facebook*, N.Y. TIMES (Apr. 6, 2021), https://www.nytimes.com/2021/01/17/technology/google-facebook-ad-deal-antitrust.html [https://perma.cc/P9RT-APHP]. Although the article does mention some rather serious allegations, this Note does not dive deeply into them because the technology and code behind digital advertising sales seem at best tangentially related to the plights of the journalism industry. The journalism industry needs advertising sales, but an agreement between Facebook and Google largely seems to be relevant to the other side of the online advertising market: those who purchase ads (as opposed to those players, such as the journalism industry, who sell ads). The *Times* reports that Google offered Facebook a guaranteed "win rate" for auctions to put up online ads that would reach consumers, which seems to be the wrong side of the market for the news media industry to be upset about. *Id.* Journals sell ads to consumers, but they do not likely care all that much about which ad consumers ultimately see; they just want the advertising revenue.

against a large tech platform, but I leave such discussions to be had in the future.

Plaintiffs might have better luck pursuing Section Two claims that go beyond the scope of the "journalism industry." Rather than consider a monopolization claim specific to the journalism industry, Facebook and Google might only be able to bully the news media because of their enormous size and power in other markets, such as "general search services." The Department of Justice, for example, argues Google acted anticompetitively in general search services to create and maintain its enormous market share of around ninety percent.[147] Moreover, the Department of Justice also argues that "search advertising" should be considered a relevant market because "[f]ew advertisers would find alternative sources a suitable substitute for search advertising" without Google Search.[148] Google and Facebook likely do possess significant market power, and possibly even monopoly power, in "general search services" and "personal social networking," as the Department of Justice and the Federal Trade Commission describe the respective markets,[149] and there obviously is a connection between Google and Facebook's flagship products and the news media industry, so perhaps no Section Two claim specifically for dealings explicitly relating to the news media industry is needed at all. Instead, what may be needed is patience. The mills of antitrust grind slowly, and something drastic may eventually come from the United States federal government's suits against Facebook and Google that coincidentally places journalists in a better position to bargain and profit from their work. We can only hope that a few good journalists' heads are still above water if and when such rulings ever do come down.

B. THE DIFFICULTIES IN BRINGING A SECTION ONE CLAIM

Claims brought under Section One of the Sherman Act fall into one of two categories: (1) per se violations or (2) rule of reason cases. For the reasons articulated below, neither is likely an adequate avenue to pursue an antitrust claim against Facebook or Google for their efforts in the advertising or news media industries.

147. *See* United States Google Complaint, *supra* note 6, ¶¶ 88–106.

148. *Id.* ¶¶ 97, 100. On the other hand, this appears to be a weak argument, as Facebook does not offer "search" services like Google but is able to rival Google's market share of online digital advertising revenue because it has the ability to connect those same advertisers with billions of users.

149. *See* FTC Facebook Complaint, *supra* note 6, ¶ 51. *See generally* United States Google Complaint, *supra* note 6.

1. An Absence of "Naked" Restraints: Why a Per Se Rule Cannot Apply

Naked restraints are contracts or combinations whose sole material purpose is to suppress competition. The classic example is, of course, price-fixing cartels. However, the days of blatant price fixing have largely come to an end, and neither Facebook's nor Google's in-house legal department would likely ever permit such an obvious antitrust violation.[150] Although it would certainly be convenient for the Federal Trade Commission, the Department of Justice, and any would-be plaintiffs in the news media industry, it is difficult to imagine what Facebook or Google might plausibly do to trigger a per se violation of Section One of the Sherman Act, rendering this Section brief and largely hypothetical. To trigger Section One at all, there must first be an agreement.[151]

In short, it would be convenient for those publishers who have lost revenue in the digital age to the likes of Facebook and Google to quickly and conveniently go after the tech behemoths for an obvious and naked violation of the Sherman Antitrust Act. However, convenience and expediency seem to be antithetical to antitrust litigation.[152] If there is any antitrust claim to be brought against Facebook or Google for either company's dealings in the advertising or news media industries, it will almost certainly not be pursued as a per se violation of Section One of the Sherman Antitrust Act. Perhaps the answer to the media industry's pangs, however, is not to go after a per se violation committed by Facebook or Google, but instead to seek an exemption to the per se rules for the media industry players themselves, thereby allowing them to cooperate and make horizontal agreements amongst one another that would otherwise be prohibited and struck down as "naked" restraints on trade. At least some well-known Republican and

150. For an example of a price-fixing cartel, see Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 235 (1899) (holding that a naked restraint upon competition, even to prevent "ruinous competition," violates Section One of the Sherman Act).

151. Now, Facebook and Google *could* do plenty of things constituting per se violations. The two could agree amongst one another to begin charging media companies for the privilege of even having a news snippet appear on the Facebook newsfeed or in the Google search results. It is difficult to speculate how the two could carve up a market so that they would not compete, although perhaps it is theoretically possible to divide up news markets via the papers' physical locations or corporate headquarters (perhaps Google takes those publishers located east of the Mississippi River and Facebook takes those to the west), but such a situation is so abstract and implausible that it is unworthy of further discussion. It is thus possible that Facebook or Google may conspire together or with other companies to engage in "naked" restraints of trade, but this Note does not mull over such implausible actions beyond this Section.

152. The infamous antitrust litigation involving Alcoa is a prime example of the painfully slow pace at which antitrust turns its gears. The trial took over five years to complete and resulted in the compilation of 58,000 pages of trial records; it also took the judge nine days to orally read his opinion. Peter, *Law Blog History Lesson: United States v. Alcoa*, WALL ST. J. (May 8, 2007, 10:30 AM), https://www.wsj.com/articles/BL-LB-3779#:~:text=It's%20got%20everything.%22,58%2C000%20pages%20of%20trial%20records [https://perma.cc/FAA6-VL4J].

Democratic members of Congress believe that the creation of (or, rather, the congressional allowance for) a media cartel would result in more successful negotiations and deals for the media industry.[153]

2. The Rule of Reason

If this Section is to provide any meaningful analysis, it must focus on actual known agreements between Facebook, Google, and players in the media industry. Such agreements undoubtedly exist; one issue, however, is that they may not be the agreements local journalists wish to challenge because they often involve Facebook and Google giving money to publishers. This Section explores the deals that Facebook and Google have engaged in with the media industry, considers a handful of possible claims that may be subject to a rule of reason analysis, and ultimately concludes that it would likely be against the journalism industry's best interests to challenge most of these deals as anticompetitive. Even if media plaintiffs did bring claims, the industry would face a steep uphill battle to come anywhere close to getting past even the first stage of a rule of reason analysis, partially due to the precedent established in *AmEx III*.

When considering bringing an antitrust claim, plaintiffs must determine what anticompetitive conduct a defendant has engaged in. A Section One claim in particular requires that the plaintiff find some contract, combination, or conspiracy that the defendant facilitated or participated in that is anticompetitive within a relevant market.[154]

i. Defining the Market

Plaintiffs in a rule of reason case must first make a prima facie showing of injury within a relevant market, which requires signaling to the court that there is a reasonable suspicion of antitrust concerns to warrant further investigation. Typically, plaintiffs want to define the relevant market narrowly so that the defendant appears to have greater market power. Defendants, on the other hand, want to appear as small and insignificant as possible. Antitrust plaintiffs in the news media industry hoping to go after the likes of Facebook and Google would therefore do themselves a disfavor to define the market as broadly as "news distribution," as Facebook and Google are purely digital and do not participate in the distribution of those physical newspapers that remain. Another poor market choice would be "news publishers," as it is not clear that market actually includes Facebook

153. *See U.S. Lawmakers to Introduce Antitrust Bills to Protect News Media*, REUTERS (Mar. 10, 2021, 5:37 AM), https://www.reuters.com/article/tech-antitrust-media/u-s-lawmakers-to-introduce-antitrust-bills-to-protect-news-media-idUSL1N2L72WH [https://perma.cc/3RUT-3U4W].

154. 15 U.S.C.§ 1.

and Google, although it is arguably filled with tens of thousands of papers and armchair journalists blogging from their homes. Perhaps a stronger market definition for the plaintiffs in such a case would be "online media distribution" or, even narrower, "digital news media aggregation." Facebook and Google do not write their own news; rather, they aggregate the news of others. Of course, this market is not limited to Facebook and Google; many platforms aggregate news, including the Associated Press and even Apple, and let us not forget about one of the old guards of news media aggregation: The *Drudge Report*.[155] But we are not outlining a Section Two claim, and the presence of multiple players in the market does not necessarily spell doom for the journalist plaintiffs, especially when other market definitions would be far more vast. Digital news media aggregation is a relatively niche market in which Facebook and Google are profoundly dominant, especially if we proceed looking not just to "Facebook" and "Google" generally, but rather to "Facebook News" and "Google News," which exist to aggregate various news stories and connect users with links that conveniently redirect them from the platforms to sites like the *Wall Street Journal*.[156]

Even if the relevant market is seemingly narrowly defined, the Supreme Court's decision in *AmEx III* presents yet another issue. Because digital platforms are two-sided markets, the *AmEx III* decision compels plaintiffs to demonstrate harm to both sides of a market. This raises the following question: what are the two sides of digital news media aggregation? In *AmEx III*, the markets were relatively easy to define. One side involved retail-shopping cardholders, and the other side was comprised of merchants accepting the credit cards. In our case, Facebook mediates between users on the one side and news publishers on the other. I define both sides of the market in this manner because users go to Facebook News and Google News for news publications, and news publishers register with Facebook and Google to be featured on these platforms.[157] Meanwhile, Facebook and

155. DRUDGE REPORT, https://www.drudgereport.com [https://perma.cc/B8E5-AV3F].

156. *See How Facebook News Works*, FACEBOOK (2021), https://www.facebook.com/news/howitworks#:~:text=Facebook%20News%20delivers%20a%20focused,current%20events%20or%20timely%20information [https://perma.cc/59RA-H8HV]. Statistical studies on the exact market shares that Facebook and Google possess in the digital news media aggregation market likely do not exist at the moment, and this is one reason why antitrust litigation can be so expensive: it is heavily reliant on expensive expert economists and studies of the relevant markets at the time of the litigation. However, based on the hundreds of millions of Americans who get their news from Facebook News and Google News, it can be inferred that the market power of each firm is at the very least substantial. *See* Shearer, *supra* note 3; Lipman, *supra* note 10.

157. To be featured on Facebook News, for example (and not just post content shareable through the typical Facebook newsfeed), publishers must "register" their news pages on Facebook and agree to certain terms and conditions. *See Register Your News Page*, FACEBOOK (2021), https://www.facebook.com/business/help/316333835842972?id=644465919618833&recommended_by=377680816096171 [https://perma.cc/R35R-DCHC]. A similar process exists to be featured in the Google News search results. *See Appear in Google News*, GOOGLE (2021), https://support.google.com/news/publisher-

Google collect advertising revenue while users browse links or snippets or use the platforms in any other way while browsing headlines.

The issue *AmEx III* presents for plaintiffs is that it requires a showing in the prima facie case of harm to both sides of the market, a feat Justice Thomas did not believe was accomplished in that case because the plaintiffs had failed to prove any harm to the actual cardholders as opposed to just merchants. To bring a successful Section One case in the market of digital news media aggregation, the plaintiffs would have to show harm to the news media industry and consumers, and it would be incredibly difficult, but not impossible, to show harm to consumers who pay nothing for the service. To succeed in that respect, plaintiffs would likely have to show harm to consumers in another way, such as through a decline in product quality, innovation, or choice as a result of the alleged anticompetitive conduct.[158] If the anticompetitive conduct can be traced to the mass closures of news outlets across the country, there is a strong argument to be made that consumers are harmed too.

ii. Determining the Anticompetitive Conduct

With a rough draft of a possibly workable market definition in hand, we must determine whether Facebook and Google have engaged in any anticompetitive contracts, combinations, or conspiracies harmful to both sides of the market. There is a lot of room for creativity here, but creativity in antitrust still results in failure in the vast majority of cases filed in federal courts.[159] In *AmEx III*, the alleged anticompetitive conduct involved the antisteering provision that American Express included in its agreements with merchants, which prevented them from steering customers toward using competing credit cards at checkout by offering incentives, such as discounts for those who use Visa cards. This Note focuses on just two of potentially hundreds or even thousands of agreements that could possibly be construed as anticompetitive by a creative litigator. The reason for doing so is to get the ball rolling: that is, to demonstrate what one *could* argue and to show why such arguments will generally fail due to the two-sided nature of tech platforms. Any claim in this realm will have to clear the *AmEx III* hurdle, and the purpose of this Section is to show why that is so implausible through example.

For Facebook, one possible route to look for anticompetitive

center/answer/9607025?hl=en [https://perma.cc/T8YF-Z9UC].

158. Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 548 (2018) (noting that antitrust concerns can stem from changes in "prices, quality, [and] innovation").

159. *See* Carrier, *supra* note 119.

agreements is in its "News Feed Publisher Guidelines," which any news outlet wishing to be featured in Facebook News must comply with, like the agreements that American Express requires merchants to accept before they can accept their cards.[160] One such guideline that sticks out as a potential source of litigation for the creative antitrust plaintiff lies in the seemingly mundane prohibition on clickbait, which requires that news publishers "avoid posting clickbait."[161] Clickbait involves the use of short, exciting titles that "get[] attention and lure[] visitors into clicking on a link."[162] Facebook unilaterally determines what counts as clickbait and reserves the right to restrict publishers and pages frequently sharing such content. Because restriction means fewer views, fewer clicks, and ultimately less advertising revenue, such an outcome could prove devastating. But we need not worry, as Facebook assures us: the company is transparent about what it expects from headlines posted on Facebook by publishers. For example, Facebook suggests "[d]escrib[ing] the story," not "sensationaliz[ing] the topic," and not "[w]ithhold[ing] information in a headline."[163] While this policy may have the effect of limiting annoying articles with titles like "Don't Eat THIS Food in 2021!" on Facebook's newsfeed, there is also a potentially sinister effect resulting from the policy. Because Facebook encourages (or in practice requires) so much to be included in those headlines or snippets posted by publishers on Facebook News, those scrolling through their newsfeeds may feel like they "get" the gist of the article just by reading the headline, meaning they are less likely to click on the article and actually provide any advertising revenue to the publisher. Thus, Facebook's prohibition on "clickbait" may actually serve to keep people on Facebook, debating the merits of a headline or short summary of an article in the "comments" section without ever having visited the publisher's website.[164] Just as the plaintiffs in the *AmEx III* case argued that the antisteering provisions wrongfully increased merchants' fees, so too could news media plaintiffs argue that this provision in the Facebook News agreement

160. *See News Feed Publisher Guidelines*, FACEBOOK (2021), https://www.facebook.com/business/help/872613956197195?id=193136622109756&recommended_by=503640323442584 [https://perma.cc/5RVZ-C3HM].

161. *How to Avoid Posting Clickbait on Facebook*, FACEBOOK (2021), https://www.facebook.com/business/help/503640323442584?id=208060977200861&recommended_by=718033381901819 [https://perma.cc/CGC2-QHLK].

162. *Id.*

163. *See id.*

164. There is also the possibility of getting a succinct summary, sometimes called a "TLDR," of an article in the comments themselves, meaning that the journalist's article is effectively removed from the site, cut to pieces, and restitched in a condensed manner on the platform's website. This happens all the time on Reddit, for example, with the use of the "AutoTLDR" bot, which automatically generates summaries of external articles on the Reddit platform. *See* autotldr (@u/autotldr), *[FAQ] AutoTLDR Bot*, REDDIT (Apr. 3, 2015, 7:34 AM), https://www.reddit.com/r/autotldr/comments/31b9fm/faq_autotldr_bot [https://perma.cc/Y47L-2H87].

wrongfully siphons revenue from news publishers, resulting in fewer publishers, less competition, and poorer quality for consumers.

Google News likewise has a series of content policies that must be followed by publishers wishing to have articles featured in the platform's news-specific search results. One such policy that may be brought to light is Google's prohibition on news publishers having a significant number of advertisements or promotional materials on their sites. Google's policy states that "[a]dvertising and other paid promotional material on . . . pages shouldn't exceed . . . content."[165] However, Google profits from advertising. And media publishers do not get anything from having their links merely featured in Google News—users actually have to click on the links. This prohibition on significant advertising could be argued to wrongfully rob news publishers of advertising revenue if and when users actually do click on the links featured in Google News. By prohibiting news publishers from having many ads, Google limits the revenue news publishers can generate, meaning that the cost for publishers to generate articles is effectively higher. Higher costs for publishers are passed on to consumers through poorer quality journalism, the necessity for subscription fees to sustain the journal, or even the closure of the publisher altogether, potentially leaving the market less competitive.

Neither Facebook nor Google's conduct as outlined above will likely get plaintiffs far in a Section One case, however. In fact, filing such a suit might get them laughed out of court. The *AmEx III* decision effectively requires that plaintiffs, to satisfy their prima facie case, resolve the merits of the case in one step prior to discovery. Unlike a traditional rule of reason analysis, which would allow plaintiffs to proceed if they provided enough of a case to warrant an explanation from the defendant, who is in a better position to understand and explain the conduct at issue, the *AmEx III* decision forces plaintiffs to effectively resolve the merits of the case at hand before any discovery can be performed; this is why it is so difficult for plaintiffs to win under *AmEx III*. Players in the news media industry wishing to bring suit likely do not have the familiarity with contracts that Facebook and Google are engaged in to effectively present a case and balance the procompetitive justifications with the seemingly anticompetitive conduct prior to conducting any discovery. Even if they did, establishing harm to both sides of the market, which includes consumers who are receiving news for free, would be incredibly difficult: imagine the frivolity of actually arguing that prohibitions on clickbait or sweeping advertisements are bad for consumers

165. *Google News Policies*, GOOGLE (2021), https://support.google.com/news/publisher-center/answer/6204050?hl=en&ref_topic=9603441 [https://perma.cc/WEJ8-5CPX].

when Facebook and Google could easily supply mountains of data in response about effective means of quality control. Moreover, those players in the media industry that may have familiarity with such deals, such as Facebook and Google's news partners, likely are not eager to bring suit against the companies partially subsidizing their continued existence. In short, the potential claims outlined above sound frivolous and strange because they frankly are; absent a significant investment into market reports or the discovery process (which plaintiffs are unlikely to get to in the first place), it does not appear that media plaintiffs stand much of a chance at all in the status quo to get past even the first step of the rule of reason analysis. But this does not mean that such possible plaintiffs should cease to be vigilant or give up all hope going forward.

In sum, defining the market, establishing market power, and establishing anticompetitive conduct to both sides of the market each present unique and difficult hurdles for news media plaintiffs to overcome in Section One cases. This challenge is made even more difficult due to *AmEx III*'s requirement that plaintiffs essentially perform a balancing test prior to conducting any discovery. This Note does not comment on whether *AmEx III* was correctly decided. Rather, this Note acknowledges the recent precedent that district courts must now adhere to when deciding whether a plaintiff in a case involving a two-sided platform has succeeded in establishing a prima facie case. Even if a news publisher could fund such a suit, the case likely would not get far.

Maybe, then, the solution to Facebook and Google's domination is not in antitrust enforcement but rather an exemption to antitrust enforcement, such as that made available to labor unions. Even just having the conversation may prove beneficial, as discussed via an empirical example below.

C. CONGRESSIONAL INTERFERENCE

1. Empirical Success? The Western Union Telegraph-News Monopoly

"[T]he power 'of influencing public opinion . . . is possessed by those who control the telegraph.' "[166]

There is nothing novel about Congress granting exceptions to the antitrust laws. Congress has, for example, explicitly authorized the existence of labor unions, which would otherwise violate Section One of the Sherman

166. Menahem Blondheim, *Rehearsal for Media Regulation: Congress Versus the Telegraph-News Monopoly, 1866-1900*, 56 FED. COMMC'NS L.J. 299, 310 (2004) (quoting S. REP. NO. 42-242, at 4 (1872)).

Act.[167] The possibility of a union-like exception for players in the media industry to increase bargaining and negotiation power with Facebook and Google is explored in the following Sections. First, however, this Section takes us back in time. Drawing on eerie parallels between the contemporary struggles of the media industry and those suffered by newspapers in the late nineteenth century decades before the Sherman Act was passed, this Section asks whether the mere threat of congressional action, antitrust-related or not, might put players in the journalism industry in a better position to negotiate with Facebook and Google, just as Congress, "by merely staging the debates," once did to help curtail Western Union's control over the media industry that so desperately relied on its infrastructure and services to reach audiences and disseminate the news.[168]

Long before the Sherman Act and its prohibition of monopolization became law, the Western Union telegraph monopoly dominated the news dissemination business. In a mere twenty years, the telegraph industry, through a series of consolidations and exits beginning in 1851, went from having seventy-five competitive players to one dominant firm: Western Union.[169] By 1870, Western Union had almost 4,000 offices, and two decades later, the company had over 19,000 offices, establishing itself as the de facto monopolist in the telegraph industry.[170]

Like the Internet today, the telegraph allowed for the (relatively) quick dissemination of information, including news. Due to its monopolist status, Western Union was relied on by many businesses, including those in the journalism industry. To get news from New York to California, companies like the Associated Press relied on Western Union's telegraphs.[171] Indeed, "Western Union's vast system sustained the distribution of uniform [Associated Press] telegraphic news reports to the press of the entire country."[172] On the one hand, Western Union's infrastructure allowed for news to spread across the country at unprecedented speeds. On the other hand, Western Union's monopoly power meant that firms like the Associated Press were entirely reliant on it to function, and this created the opportunity for Western Union to abuse its power to disseminate media information.[173]

167. *See* Clayton Act of 1914, 15 U.S.C. § 17.

168. Blondheim, *supra* note 166, at 312.

169. B. Zorina Khan, *Antitrust and Innovation Before the Sherman Act*, 77 ANTITRUST L.J. 757, 780 (2011).

170. *See id.*

171. *See* Blondheim, *supra* note 166, at 309 (noting that "[t]here [was] no industry" that was not at the "mercy" of Western Union).

172. *Id.* at 309–10.

173. *See id.* at 309 ("Thus, monopoly was thought to affect the marketplace of ideas, stifling public debate and bringing about a monolithic public sphere.").

Sound familiar?

These fears were espoused by both the media industry and Congress. Debates on the Senate floor voiced concern that "[a]n unscrupulous person who controlled the wires would become the 'master of the press,' and could 'give to the news of the day such a color as he chose, and thus fatally pollute the very fountain of public opinion.' "[174] Fears of Western Union's potential media takeover were also not unfounded.[175] Western Union bound those media companies relying on its lines to contracts that would not allow journalists "to support any other telegraph company" and "even extended to a dictum not to 'speak in disparaging terms of the Western Union Telegraph Company.' "[176] Ironically, the fears of government suppression of free speech and the news media that inspired the drafting of the First Amendment ended up being realized not by government, but rather by private enterprise.[177]

To "free the press" from private tyranny, Congress began "searching" for solutions.[178] However, the representatives "made no headway in solving the problem of monopoly in news" through the passage of any laws.[179] But their efforts on the Senate and House floors were not in vain. Indeed, those debates on the floors "affected the newswire business significantly."[180] Senator Benjamin Gratz Brown of Missouri had garnered support for a "telegraph reform resolution" that the Senate considered taking up, and that support alone was enough to scare Western Union into abandoning "a plan to venture into the news vending business on its own account."[181] Recognizing Western Union's fear of regulatory legislation and the monopolist's desire to appear supportive of, rather than detrimental to, a free and diverse press, media industry players were able to negotiate better and less restrictive contracts with Western Union.[182] Thus, Congress "had succeeded in defending the press by merely threatening to make laws that

174. *Id.* at 310 (citing S. REP. NO. 42-20, at 4 (1872)).

175. *Id.* at 311 ("[I]ndifference to the danger of Western Union's monopoly was hardly an oversight.").

176. *Id.* at 311–12.

177. *Id.* at 312 ("It was not the government making laws to abridge press freedom for its own interests; it was rather a powerful monopolistic corporation wielding a dominant technology and making business arrangements that restricted freedom of the press."). *See generally* GREGORY A. BORCHARD, A NARRATIVE HISTORY OF THE AMERICAN PRESS 70–73 (2019) (discussing the telegraph industry's impact on journalism).

178. Blondheim, *supra* note 166, at 312.

179. *Id.*

180. *Id.*

181. *Id.* at 312–13.

182. *See id.* at 313 ("It would therefore appear that by the mere threat of wielding regulatory powers, Congress managed to strike a blow for press freedom and against capitalist control.").

would prevent the abridgment of the latter's freedom."[183]

Facebook and Google are in many ways the Western Union telegraph monopoly of the twenty-first century, existing as behemoths that control the infrastructure by which the news is delivered to millions upon millions of consumers.[184] Facebook and Google control if and how a tremendous amount of information in people's lives is presented to them, and, as such, the two have tremendous power. Google, for example, was fined 2.7 billion dollars in 2017 by the European Union after a seven-year investigation into the company's practices for "manipulat[ing] search results" in a manner that gave an "illegal advantage" to its own services while harming others.[185] The Alphabet empire is massive, and Google is venturing into territory that the threat of congressional regulation dissuaded Western Union from going: creating its own content to disseminate over its search engine. In 2006, for instance, Google acquired YouTube, the popular video-sharing platform,[186] and YouTube videos now feature prominently in Google's search results.[187] Such practices are potentially concerning in the news media market as both Facebook and Google partner with news organizations that will feature on users' newsfeeds and in their search results. Facebook, for example, struck deals with Bloomberg and Dow Jones in 2019 to feature stories on the platform's "news page."[188] And the Rupert Murdoch–controlled media company, News Corporation, just recently reached an agreement with Google to develop a subscription platform and share the advertising revenue.[189] Such deals generate obvious concerns that Facebook and Google

183. *Id.* at 313–14.

184. *See* Elisa Shearer & Amy Mitchell, *News Use Across Social Media Platforms in 2020*, PEW RSCH. CTR. (Jan. 12, 2021), https://www.journalism.org/2021/01/12/news-use-across-social-media-platforms-in-2020 [https://perma.cc/3DAV-DN4J] (finding that "[a]bout half of U.S. adults" report getting news on social media "often" or "sometimes" and that "about a third (36%) of Americans" get news from Facebook "regularly"); Kamil Franek, *How Google News Makes Money: Business Model Explained*, KAMIL FRANEK (Dec. 17, 2019), https://www.kamilfranek.com/how-google-news-makes-money/#:~:text=We%20know%20that%20the%20number,(it%20is%20an%20estimate) [https://perma.cc/23JR-7KBG] (estimating that around 280 million people use Google News annually).

185. Tony Romm, *Europe Has Fined Google $2.7 Billion for Manipulating Search Results*, VOX (June 27, 2017, 6:13 AM), https://www.vox.com/2017/6/27/15878980/europe-fine-google-antitrust-search [https://perma.cc/5EF2-37WB].

186. Victor Luckerson, *A Decade Ago, Google Bought YouTube—and It Was the Best Tech Deal Ever*, THE RINGER (Oct. 10, 2016, 8:30 AM), https://www.theringer.com/2016/10/10/16042354/google-youtube-acquisition-10-years-tech-deals-69fdbe1c8a06 [https://perma.cc/4USQ-QQ37].

187. Search for "funny cat videos" using Google's search engine and see how many pages you can go before finding a link to something other than a YouTube video.

188. *See* Anna Nicolaou & Alex Barker, *Facebook Picks Winners and Losers Ahead of News Page Launch*, FIN. TIMES (Oct. 22, 2019), https://www.ft.com/content/ba031844-f3e3-11e9-a79c-bc9acae3b654 [https://perma.cc/QQ5X-2UKY].

189. Helen Coster, *News Corp Signs News Partnership Deal with Google*, FIN. POST (Feb. 17, 2021), https://financialpost.com/pmn/business-pmn/news-corp-signs-news-partnership-deal-with-google-5 [https://perma.cc/ALL6-FWHN].

will suppress journalism not generated in partnership with the tech platforms or even coerce those companies they do contract with: a similar concern voiced by Congress nearly 150 years ago in response to Western Union's dealings with the media industry.

Legislative action is (very slowly) happening, and senators like Amy Klobuchar, a sponsor of legislation to temporarily exempt publishers from antitrust laws, may unknowingly be walking in the dust-filled steps of Senator Gratz Brown. The Western Union monopoly feared regulation, and perhaps Facebook and Google fear the same, especially in light of the antitrust litigation brought by the Justice Department, the Federal Trade Commission, and several states that Facebook and Google are fighting off at the time of this writing, not to mention the battles that Facebook and Google have been fighting in Australia, France, and Spain over paying for news.[190] To avoid further legal battles, Facebook and Google may vow to support the journalism industry further or voluntarily increase transparency in their algorithms that choose the articles presented to consumers. Maybe Facebook and Google will react to apparent legislative action without the need for costly and timely litigation or even a passed bill; they may see it as more cost effective and better for public relations if they simply fund journalism on their own rather than spend resources to fight off laws requiring them to. However, that is unlikely to be the case unless such legislation finds its way into the limelight; Facebook and Google will not be motivated to react unless there is a plausible chance of regulation or, as discussed below, an antitrust exemption. As such, the bipartisan recognition of an issue with the way Facebook and Google currently operate to disseminate the news amongst millions of Americans may itself create some change, but the House and Senate must first have those debates, just as they did in an effort to curtail Western Union and "free the press" way back before the Sherman Act itself was even passed.

2. The Journalism Competition and Preservation Act: What an Exemption to the Antitrust Laws for the Media Industry Might Look Like

In 2019, Republican Senator John Kennedy introduced the Journalism Competition and Preservation Act of 2019, a bill with bipartisan co-

190. *See generally* John D. McKinnon, *These Are the U.S. Antitrust Cases Facing Google, Facebook and Others*, WALL ST. J. (Dec. 17, 2020, 3:17 PM), https://www.wsj.com/articles/these-are-the-u-s-antitrust-cases-facing-google-facebook-and-others-11608150564 [https://perma.cc/B3EA-GVQ3]. Most recently, France's antitrust authorities fined Google 500 million euros "for failing to negotiate in good faith with French publishers in a dispute over payments for their news." Kelvin Chan & Angela Charlton, *Google Fined $592 Million in Dispute with French Publishers*, SEATTLE TIMES (July 15, 2021, 11:46 AM), https://www.seattletimes.com/business/google-fined-592-million-in-dispute-with-french-publishers [https://perma.cc/R8SX-E7XL].

sponsorship from the likes of Amy Klobuchar, Cory Booker, Rand Paul, and Mitch McConnell.[191] A similar bill was introduced in the House of Representatives by Democratic Representative David Cicilline with bipartisan co-sponsorship as well.[192] Both bills died in their respective judiciary committees. The proposed law would grant a four-year exemption or safe harbor from the antitrust laws for "news content creators," which the bill defines as "any print or digital news organization" with "a dedicated professional editorial staff that creates and distributes original news and related content concerning local, national, or international matters of public interest on at least a weekly basis" that "is commercially marketed through subscriptions, advertising, or sponsorship."[193] The exemption would allow publishers to "collectively withhold content from, or negotiate with, an online content distributor regarding the terms on which the news content . . . may be distributed" if "the coordination between the news content creators is directly related to and reasonably necessary for negotiations with an online content distributor."[194] The idea behind the law would be to allow for an exemption to antitrust laws to allow competitors such as the *New York Times* and *Washington Post* to engage in anticompetitive horizontal contracts and agreements in an effort to negotiate better terms with online content distributors like Facebook and Google. In an era rampant with the spread of disinformation in which eighty-six percent of Americans get news from digital devices like smartphones, the bipartisan coalition of lawmakers supporting the bill believes that the only way for good, honest journalism to survive is to allow those publishers to engage in anticompetitive conduct.[195]

Although the proposed law sat dormant in committee for a year and a half, it has recently made a comeback. Senator Klobuchar and Representative Cicilline introduced the Journalism Competition and Preservation Act of 2021 on March 10, 2021.[196] Although both bills were introduced by

191. Journalism Competition and Preservation Act of 2019, S. 1700, 116th Cong. (2019); *Cosponsors: S.1700—116th Congress (2019–2020)*, LIBRARY OF CONG., https://www.congress.gov/bill/116th-congress/senate-bill/1700/cosponsors [https://perma.cc/4B3C-ZCT9].

192. Journalism Competition and Preservation Act of 2019, H.R. 2054, 116th Cong. (2019); *Cosponsors: H.R. 2054—116th Congress (2019–2020)*, LIBRARY OF CONG., https://www.congress.gov/bill/116th-congress/house-bill/2054/cosponsors [https://perma.cc/WEG3-WNBH].

193. S. 1700, § 2.

194. *Id.*

195. *See* Elisa Shearer, *More than Eight-in-Ten Americans Get News from Digital Devices*, PEW RSCH. CTR. (Jan. 12, 2021), https://www.pewresearch.org/fact-tank/2021/01/12/more-than-eight-in-ten-americans-get-news-from-digital-devices [https://perma.cc/VUM4-9QWR]; Lisa Marshall, *Who Shares the Most Fake News? New Study Sheds Light*, CU BOULDER TODAY (June 17, 2020), https://www.colorado.edu/today/2020/06/17/who-shares-most-fake-news-new-study-sheds-light [https://perma.cc/CDY6-L7EY] (reporting that Facebook is a "fertile breeding ground" for the spread of disinformation).

196. *See Factbox: How U.S. Bills Would Help News Media Negotiate with Facebook, Google*,

Democrats, they have bipartisan support, and Republicans John Kennedy and Ken Buck have both stated that they will sponsor the bills.[197] The bill is very similar to its 2019 predecessor and would allow for antitrust exemptions to online content distributors with at least one billion monthly active users, meaning the bill is undoubtedly targeting Facebook and Google.[198]

The bill is especially popular with the News Media Alliance, a trade association representing about 2,000 news organizations in the United States.[199] The News Media Alliance believes the bill would give publishers "a fighting chance with the tech platforms" Facebook and Google, which it terms "the Duopoly."[200] The association has advocated for the passage of such a bill for years, and it believes that, absent such legislation, "news publishers will have no capacity to collectively fight for their futures."[201] David Chavern, the President and CEO of the News Media Alliance, argues that "Facebook and Google exert their dominance over the digital marketplace, setting the rules for news publishers" while simultaneously "captur[ing] the vast majority of all digital advertising dollars."[202] One issue Chavern highlights is that "when users do finally click [on a link], news publishers may receive less than half of every advertising dollar" due to Facebook and Google's ability to "set[] the rules" as a result of the media industry's lack of bargaining power and inability to negotiate at arm's length.[203] "It is simply not possible for most individual news publishers to challenge the basic terms offered by the online behemoths."[204] Chavern says the News Media Alliance and online publishers are not seeking handouts or subsidies but rather "the opportunity to seek better deals . . . and to work with the platforms, rather than against them, to build a better future for news."[205]

As more Americans access the news through digital devices and online platforms, media companies have been forced to adapt. The issue, however, is that many publishers are not in a position to negotiate with Facebook and Google's standard terms, which can rob the media industry of advertising

REUTERS (Mar. 10, 2021, 12:52 PM), https://www.reuters.com/article/us-tech-antitrust-media-factbox-idUSKBN2B22NC [https://perma.cc/FV8M-PMV3].

197. *Id.*

198. *Id.*

199. *About Us*, NEWS MEDIA ALL. (2021), https://www.newsmediaalliance.org/about-us [https://perma.cc/6WC2-LDTY].

200. *News Media Alliance Applauds Members of House and Senate for Reintroducing Journalism Competition & Preservation Act*, NEWS MEDIA ALL. (Mar. 10, 2021), https://www.newsmediaalliance.org/release-news-media-alliance-applauds-members-of-house-and-senate-for-reintroducing-journalism-competition-preservation-act [https://perma.cc/CLD6-SP49].

201. *Id.*

202. Chavern, *supra* note 14.

203. *Id.*

204. *Id.*

205. *Id.*

dollars. A demand for an increased cut of advertising revenue or payment for snippets that Facebook and Google profit from could simply lead to the publisher being blacklisted by the tech platforms. This has created a "Faustian bargain" for news outlets who want to reach the billions of users on Facebook and Google but cannot do so without adhering to terms that may ultimately bleed the publisher dry or result in cheaper, poorer-quality articles intended to draw attention and clicks rather than truly inform the public about significant events in local, national, and international spheres.[206] Perhaps, then, the answer is to allow the *New York Times* and the *Washington Post*, or even small players like the *Hungry Horse News* and the *Whitman Wire*, to come together and refuse to provide content to Facebook and Google without an increased cut of the ad pie. However, though the Journalism Competition and Preservation Act is bipartisan and supported by the News Media Alliance, there are compelling reasons to suggest that its passage may not be the best idea for protecting the free and diverse press.

3. Reasons to Not Grant a "Safe Harbor" from Antitrust Laws for the Media

Any request for exemption from the antitrust laws should be met with stark skepticism. The ABA Section of Antitrust Law has noted that "Congress should grant antitrust exemptions and immunities rarely and only after rigorous consideration of the impact of the proposed exemption or immunity on consumer welfare."[207] Such exemptions should also be drafted very narrowly, so that "competition is reduced only to the minimum extent necessary to achieve the intended goal."[208] This Note does not take the position that antitrust exemptions are inherently bad, but rather that they should be granted only after significantly more research has been done than the amount done in the media industry's case. There are several concerns that possibly warrant curbing the Journalism Competition and Preservation Act at least until further research is completed. The first is that it is unclear such a safe harbor would actually work—that is, actually achieve the ends Congress wishes to bring about—and there is good reason to suspect it would

206. Mathew Ingram, *The Facebook Armageddon*, COLUM. JOURNALISM REV. (2018), https://www.cjr.org/special_report/facebook-media-buzzfeed.php [https://perma.cc/XZN6-G6J5]. In a free and competitive market, there is typically no duty to deal, meaning it is generally okay for a company to choose whom it deals with. However, there are certain instances in antitrust in which such a duty to deal has been recognized. Such a discussion is beyond the scope of this Note, but for a general summary of the law surrounding unilateral refusals to deal, see generally Yongmin Chen, *Refusal to Deal, Intellectual Property Rights, and Antitrust*, 30 J.L. ECON. & ORG. 533 (2014).

207. Letter from Richard M. Steuer, Chair, Section of Antitrust L., to the House Judiciary Comm. 2 (Oct. 20, 2011), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_20111020.authcheckdam.pdf [https://perma.cc/J9FD-Z8CM].

208. *Id.*

not. Second, even though the Bill would allow for exemptions to the antitrust laws for the purpose of negotiating with online content distributors, there is concern that this is not narrowly tailored enough; indeed, publishers might claim that certain contracts and agreements are for the benefit of putting themselves in a better position to negotiate with the likes of Facebook and Google, but that reason may only be ancillary to or part of a broader scheme to engage in anticompetitive conduct that the exemption was not meant to legalize. The difficulty in parsing out a given "reason" for any action would cause trouble for antitrust enforcement against the media industry in areas that Congress never intended to authorize anticompetitive conduct in and could lead to detrimental consequences in publishers' dealings in other industries during the four-year exemption period. Finally, and this is partially tied to the first concern, the Bill would, even if "successful," likely only be so for the largest players—that is, the *New York Times* and *Washington Post*s of the world—who, when combined, actually may have some bargaining power at the table with Facebook and Google. Meanwhile, the small and local *Hungry Horse News* would likely only benefit if those larger players were successful in negotiating broad-sweeping deals that were better for all players in the media industry as opposed to just those big players at the table, and if those big players did not sacrifice the little guys at the bottom to get better particularized treatment from Facebook and Google at the expense of local journalism. Having helped the biggest players, Facebook and Google may feel that their obligations have been met, and the public may also turn a blind eye to the continued struggles of local journalism that may be exacerbated by the very legislation meant to preserve them.

The purpose of a safe harbor exemption for publishers would be to allow players in the media industry to cooperate in their negotiations with Facebook and Google, likely by threatening to withhold content unless the companies provide a greater cut of advertising revenue or sweeten the pot through some sort of direct payment. Although the House Subcommittee on Antitrust, Commercial, and Administrative Law briefly analyzed large tech platforms' concerning relationship with the journalism industry and even recommended the passage of "a narrowly tailored and temporary safe harbor" "[t]o address [the] imbalance of bargaining power," the efficacy of the safe harbor exemption is not discussed within that report.[209] Instead, the exemption appears to be more a last-ditch response to obvious concerns about the decline of the media industry.

There is simply no evidence that an exemption would actually create the opportunity for arm's length negotiations that the media industry seeks

209. INVESTIGATION, *supra* note 9, at 388.

to have. The media industry in general needs Facebook and Google's pipelines to reach readers far more than Facebook and Google need the media industry to keep users on their platforms, especially since the tech platforms began entering into partnerships with select publishers (who likely would not abandon their steady revenue streams and enter into normally-illegal deals for the mere possibility of increased ad revenue) to provide news content to them.[210] The media industry could create a "cartel," but it is difficult to imagine how an industry with thousands of players around the United States could effectively create and maintain a cartel that manages to overcome "the preeminent challenge that cartels face": cheating.[211] Indeed, the relatively low entry barriers to producing journalism might even encourage new players to enter the market, even if all of the biggest players manage to form an enforceable cartel. If the cost for Google and Facebook to pay publishers for content is less than the amount demanded (through increased digital ad revenue over time or otherwise) by the cartel, new media publishers may emerge to capitalize on the cartel's withholding of content. Another possibility is simply that Facebook and Google vertically integrate and create their own in-house publishing enterprises. There is also a stark lack of evidence that allowing even the largest publishers to organize would be enough. Even if the *New York Times*, *Washington Post*, and *Wall Street Journal* all agreed to negotiate with Google and Facebook together, it appears that those advocating for the Journalism Competition and Preservation Act are merely hoping that such joint bargaining power would be enough, whereas Facebook and Google might simply refuse to budge.[212]

Additionally, even if the hypothetical *New York Times* and *Washington Post* agreement allowed them to negotiate better deals with Facebook and Google, it is unlikely that those deals would benefit smaller, local publishers, the importance of which cannot be overstated and which guided much of the House Subcommittee's concerns. The media industry is still full of thousands of competitors, and it seems unlikely that the *New York Times* and *Washington Post* would be so kind as to invest resources into negotiating

210. *See* Sam Shead, *Facebook Pledges to Invest $1 Billion in News After Australia Standoff Ends*, CNBC (Feb. 24, 2021, 12:36 PM), https://www.cnbc.com/2021/02/24/facebook-to-invest-1-billion-in-news-over-next-three-years.html [https://perma.cc/78WW-UZC4].

211. Margaret C. Levenstein & Valerie Y. Suslow, *What Determines Cartel Success?*, 44 J. ECON. LITERATURE 43, 44 (2006).

212. Google and Facebook have in the past refused to serve entire countries when demands have been made for them to pay more for news. *See* Oscar Williams, *Google News Spain to Be Shut Down: What Does It Mean?*, GUARDIAN (Dec. 12, 2014, 6:00 AM), https://www.theguardian.com/media-network/2014/dec/12/google-news-spain-tax-withdraws [https://perma.cc/T7P5-XRCP]; Daniel Van Boom, *Facebook Pulled News in Australia. Here's Why That Matters Everywhere*, CNET (Feb. 17, 2021, 8:43 PM), https://www.cnet.com/news/facebook-pulled-news-in-australia-heres-why-that-matters-everywhere [https://perma.cc/D39B-UKR4].

broad-sweeping deals that would benefit the entire media industry when such a requirement is not in the Journalism Competition and Preservation Act. When faced with a choice between dramatically increased ad revenue for those currently at the table or a mere slight increase across the board for all players in the industry, it would seem contrary to the fiduciary obligations of those at the bargaining table for them to negotiate deals that benefit the entire industry; the *New York Times* is still a profit-seeking entity whose stock trades on the New York Stock Exchange, after all, and if it can throw the *Hungry Horse News* under the bus to further line its shareholders' pockets, why should it not do so?[213]

In short, the hypothetical success of a safe harbor seems more like a Hail Mary than the result of an articulated and well-researched study surrounding the economic consequences and probability of success of such an action. Before a four-year exemption to the antitrust laws is granted, more research must be done. Or, if legislators truly identify the free and diverse press, particularly at the local level, as a necessary public good in society, they may look toward alternative means of ensuring the industry's growth and success in the future.

D. LOOKING ELSEWHERE

If the above Sections demonstrate anything, it is that neither antitrust enforcement targeting Facebook and Google nor a safe harbor exemption favoring the news media industry are likely solutions to the plights of struggling journalists and their communities around the country. However, just because antitrust is likely an inappropriate solution to legitimate issues in the media industry does not mean that there are no other possible avenues for legislators and private parties to pursue. An in-depth discussion of even just some of the possibilities is far beyond the scope of this Note, but it is worth highlighting three possible approaches going forward. The United States could mimic the likes of France and Australia and attempt to alter the copyright laws to force Facebook and Google to pay for those snippets of news articles that they feature on their websites. The government could also recognize the importance of journalism as a public good and create a subsidy system for news publishers, particularly those in currently underserved communities. Alternately, the government could do nothing, relying on

213. Of course, there are arguments regarding corporate social responsibility initiatives and "social license," and those who follow such theories would note that the *New York Times* might benefit from its relationship with local journalists and the public if it acted in the interests of local journalism during these theoretical negotiations, but such a discussion is beyond the scope of this Note. *See generally* Samuel Famiyeh, Disraeli Asante-Darko, Amoako Kwarteng, Daniel Komla Gameti & Stephen Awuku Asah, *Corporate Social Responsibility Initiatives and Its Impact on Social License: Some Empirical Perspectives*, 16 SOC. RESP. J. 431 (2020).

philanthropists or the free market to work things out; Facebook and Google appear to be paying for some news in the status quo, so it does not seem that the behemoths will allow the entire industry to die.

France recently implemented the first copyright rule enacted under a European Union law that requires tech platforms to negotiate with publishers for the use of news snippets appearing in search results and newsfeeds.[214] To comply with the law, Google negotiated with a group of 121 French publishers and agreed to pay seventy-six million dollars to compensate news companies for the snippets of articles that users read, which often convey the main message of an article through a headline coupled with a photo from the article or even a brief summary of some of the article's key points.[215] The argument goes that Google and Facebook would have to pay for the use of snippets of other original materials, such as songs, so they should have to do the same while profiting from the display of news snippets.[216] The law was originally met with hostility, however, and the settlement only comes after a "more than year-long copyright spat," but we may see more countries amending their copyright laws in the future, especially those countries allied with France in the European Union.[217] Whether Google and Facebook will comply with or fight at the spread of this idea, however, has yet to be determined, but it appears that French competition authorities have not been entirely satisfied with Google's negotiation attempts thus far.[218] Perhaps familiar with the costs of fighting laws, Google and Facebook may, like Western Union, eventually cave and begin to fund journalism at the mere sight of possible new legislation or investigations targeting their dealings with the news media industry.

Similarly, Australia passed a law to address the discrepancy in bargaining power between tech platforms and the news media industry. The law, agreed to by Facebook's CEO Mark Zuckerberg, prohibits the tech platforms from "making take-it-or-leave-it payment offers to news businesses for their journalism. Instead, in the case of a standoff, an arbitration panel would make a binding decision on a winning offer."[219] It appears that the law is creating its intended effect, and Facebook and Google

214. Mathieu Rosemain, *Exclusive: Google's $76 Million Deal with French Publishers Leaves Many Outlets Infuriated*, REUTERS (Feb. 12, 2021, 10:06 AM), https://www.reuters.com/article/us-google-france-copyright-exclusive/exclusive-googles-76-million-deal-with-french-publishers-leaves-many-outlets-infuriated-idUSKBN2AC27N [https://perma.cc/2DQ2-7LMS].

215. *Id.*

216. *See id.*

217. *See id.*

218. *See* Chan & Charlton, *supra* note 190.

219. Rod McGuirk, *Australia Passes Law to Make Google, Facebook Pay for News*, ASSOCIATED PRESS (Feb. 24, 2021), https://apnews.com/article/australia-law-google-facebook-pay-news-959ffb44307da22cdeebdd85290c0cde [https://perma.cc/E4M2-ZQVS].

have already reached deals with Australian news businesses such as News Corporation and Seven West Media.[220] There are, however, "concerns that tiny publications outside large cities might miss out."[221] Thus, while the Australian law may help large papers with the resources to even show up to the negotiating table, it is unclear whether it would help those who could not even afford the plane ticket to an arbitration meeting. Given the importance of local news, the Australian government, and those who choose to follow this model, may have to rethink their approach toward local journalism and potentially subsidize the industry.

The Stigler Center at the University of Chicago Booth School of Business published a report on digital platforms in which the authors recognized the ongoing "crisis" affecting democratic journalism in the United States.[222] Their suggested response, however, involved using public funds to support the news. The report notes that "public funding of the press was common in the nineteenth century" in the United States, and "in most developed countries, the government financially supports the media one way or another, while the [United States] is an outlier."[223] Despite being the first country to subsidize the press, the United States has shifted away from such a model, as public funding has "fallen sharply over the past few decades" as the country prioritized spending in other sectors.[224] Quality journalism, especially at the local level, helps keep people informed and active in their communities. It tells people where to vote and what the candidates stand for. It alerts citizens to local corruption and scandals and, serving as a watchdog, helps to prevent those scandals from occurring in the first place. It alerts people to the big game between cross-town rivals, bringing communities together to create a sense of unity in a time of intense national partisanship. If these benefits make local journalism a public good, perhaps the government should fund its publication in one way or another. The report argues for subsidies in the form of "media vouchers," which would give fifty dollars per year to each adult citizen to give to a news outlet, allowing people some choice in determining where their tax dollars are spent and rewarding quality journalism that benefits a community.[225] Whatever form a subsidy might ultimately take, it appears that this would be a rather quick way to

220. *Id.*
221. *Id.*
222. STIGLER COMM. ON DIGIT. PLATFORMS, FINAL REPORT 173 (2019), https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf?la=en&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E [https://perma.cc/NL5S-FFFP].
223. *Id.* at 174; *id.* at 175 fig.
224. *Id.* at 175.
225. *Id.* at 176.

inject stimulus into a declining industry and potentially reopen the doors of some lost papers in so-called "news deserts."[226]

Maybe the preferred solution for some is to continue our current trajectory. The newspaper industry has been declining since the advent of the radio, and yet it has persisted.[227] In 1922, *Radio News* magazine published an article predicting that radio would "kill" the newspaper industry, and yet, in 2021, the industry survives.[228] And just as television killed neither the radio nor the newspaper, or the Internet the television, there is at least a somewhat empirical foundation for believing (or hoping) that America's embracement of digital platforms will not kill the media industry, either. A true demand for news will yield quality journalism, and perhaps the folks in those news deserts simply prefer national news, feel connected enough to their communities already, are illiterate, or just would not read a daily paper even if one were available. If the market cannot sustain news, maybe it should not exist.

On the other hand, there are many public benefits to news, and keeping those who choose to read in a given community informed while simultaneously helping to expose local corruption is potentially a good worth subsidizing. Even if people would not read the *Hungry Horse News*, perhaps its mere existence is a symbol of strong democracy at the local level. The reality is that the industry that keeps us informed is struggling. Many communities no longer have a local paper. Worse even, in light of the coronavirus pandemic, roughly 37,000 workers were laid off, furloughed, or had their pay reduced, and some publishers have closed their doors for good.[229] Perhaps there is no greater time to subsidize quality journalism than a time in which disinformation about a global pandemic is contributing to an already massive death toll.[230]

226. *See* Tom Stites, *About 1,300 U.S. Communities Have Totally Lost News Coverage, UNC News Desert Study Finds*, POYNTER (Oct. 15, 2018), https://www.poynter.org/business-work/2018/about-1300-u-s-communities-have-totally-lost-news-coverage-unc-news-desert-study-finds [https://perma.cc/3Y9R-N3D4].

227. *See* Matt Novak, *1922: Radio Will Kill the Newspaper Star*, GIZMODO (Sept. 23, 2014, 3:00 PM), https://paleofuture.gizmodo.com/1922-radio-will-kill-the-newspaper-star-1638126872 [https://perma.cc/9VGK-A684].

228. *See id.*

229. *See* Marc Tracy, *News Media Outlets Have Been Ravaged by the Pandemic*, N.Y. TIMES (Dec. 4, 2020), https://www.nytimes.com/2020/04/10/business/media/news-media-coronavirus-jobs.html [https://perma.cc/FR2J-YSTU].

230. *See* Amir Bagherpour & Ali Nouri, *COVID Misinformation Is Killing People*, SCI. AM. (Oct. 11, 2020), https://www.scientificamerican.com/article/covid-misinformation-is-killing-people1 [https://perma.cc/6647-AEQ2?type=image].

CONCLUSION

There is a fixation on antitrust amongst legislators and the media. The thought that antitrust might solve the plights of a journalism industry ravaged by decades of declines and a global pandemic is alluring. It is tempting to cry "monopoly!" or "monopolization!" at the sight of large firms such as Facebook and Google, and it is even more tempting to demand that they be held accountable for the role that tech platforms have played in facilitating the decline of quality news publishing, particularly at the local level, and the spread of disinformation. The journalism industry is in trouble; there is no denying that. As a result, the United States and its democracy are in trouble. Quality journalism in national, regional, and local spheres is necessary for a functioning democracy. However, antitrust, be it through enforcement or exemptions, is likely not the appropriate avenue to go down to pressure Facebook and Google into supporting the journalism industry. Antitrust has not been the route that other countries have followed. Antitrust litigation is painstakingly slow, and the use of public funds to pursue litigation against Facebook and Google in this context would likely be far better spent simply subsidizing the industry. It is time for the United States to recognize that the news media industry is a necessary public good rather than a market simply providing a service. Local journalism is very important; it should be treated as such.