JOHN MILTON PROJECT

FOR DIGITAL FREE SPEECH

CHOKEPOINT:
Solving Big Tech's Grip over Free Speech

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NRB

SPECIAL REPORT

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Executive Summary

- The impact from the big technology companies that dominate the internet today is the modern equivalent to the revolution caused with the movable type printing press of ages past; however, unlike the explosive expansion in the 50 short years after the Gutenberg Bible where more than 1000 printing presses sprang up across Europe, in the several decades since the World Wide Web's founding there are still only a handful of Silicon Valley tech companies that control vast amounts of the digital landscape, and whose platforms are seemingly monopolistic, and ubiquitous. Pages 3-5.
- 500 years ago, John Milton spoke out against the system that used *private printing press guild members* to control the viewpoints being printed on printing presses. Against that, Milton presented a classic appeal for the liberty of free expression, a model for free speech today. Pages 3-5.
- The coupling of Big Tech's monopoly power today in *private companies* like Facebook, Google, Amazon, and Apple, with their troublesome pattern of viewpoint suppression of user-generated content, has created a serious free speech crisis. Pages 3-5.
- A case can be made for a constitutionally sound regulatory scheme for Big Tech companies regarding their content moderation practices, based on the *Turner II* Supreme Court case involving "must-carry" regulations implemented by the FCC. Key to that court ruling was the threat of monopolistic *chokepoint control* over certain modes of mass information distribution that could choke off other expressive voices. Pages 6-8.

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- Even "private" communication platforms like Facebook, Google, Amazon, and Apple may reasonably and constitutionally be regulated if they have unfairly used their monopoly power to harm consumers, particularly where they are not content creators themselves but are mere conduits for the distribution of the expressive content created by their users. Pages 6-8.
- The monopoly market power and dominance of Facebook, Google, Amazon, and Apple is apparent. Pages 8-12.
- Big Tech's monopoly power is compounded by the highly complex world of computer engineering in which they operate, decreasing the chances of newer entrants into the innovational markets to challenge them and entrenching their continued dominance. Pages 12.
- More and more evidence is mounting regarding Big Tech's viewpoint bias. Page 13.
- In addition to Big Tech's antagonism toward conservative political views, there is abundant evidence that Big Tech companies have unfairly suppressed orthodox Christian viewpoints. Pages 13-16.
- There are sound reasons to believe that reasonable regulations of Big Tech content practices could satisfy the "intermediate scrutiny" standard for constitutional validity outlined in the Supreme Court's *Turner I* "must-carry" case. Pages 17-20.
- Section 230 of the Communications Decency Act that granted legal immunity to Big Tech companies has been abused; but that rule can be part of a solution if we return to the original intent of the legislation. Pages 21-24.
- Senator Josh Hawley's bill, Ending Support for Internet Censorship Act, which would amend section 230, is a hopeful beginning. Pages 25-26.
- One legislative approach could define the reasonableness of Big Tech's content suppression decisions by measuring them against the free speech exceptions that the Supreme Court has crafted over the decades. Pages 27-28.
- In the debate over possible regulation of Big Tech in order to restore free speech to users of such platforms, there are three flawed arguments that distract us from more serious discussion. They need to be dismantled: (1) Big Tech has used "hate speech" as a poorly defined, aggressive bludgeon against expression it disagrees with; it is time that it is abandoned. (2) Regulation of Big Tech viewpoint suppression practices <u>would not</u> be another version of the tragically flawed "fairness doctrine" that NRB opposed and which has long been abandoned, because Big Tech platforms, unlike broadcasters that create their own content, are mere conduits to distribute the content generated by their users. (3) For the same reason, Big Tech platforms are <u>not</u> like newspapers that have First Amendment protection under the Free Press clause by reason of their creating their own news and information content; by contrast, Big Tech platform leaders admit that they exist to simply distribute (or in the case of Google, curate and distribute) the content created and written by all of its users. Pages 28-30.

I. A Lesson From History: the Printing Press and Big Technology

Today, only a very few giant technology platforms control vast aspects of the digital universe that all of us frequent. Even more troublesome, they do so in a way that imposes a type of "prior restraint" on certain forms of lawful, legitimate free expression of internet users, a practice that would never be tolerated or permitted if it were government officials who were the ones doing it. How to resolve the issue of online viewpoint discrimination when it is committed by "private" technology platforms - rather than by agencies and actors of the government - especially when those companies have achieved monopoly status, is the question this paper addresses.

For answers, we begin with that great teacher – history. In the 17th century, the printing press was that era's primary information distribution platform. It was to them, what the internet is to us today. In 1644, in response to a proposal that would have continued imposing a prior restraint screening process on printed speech, the famous English poet essayist John Milton penned one of the most influential defenses of free expression in the English language; his Areopagitica - A Speech For The Liberty Of Unlicensed Printing To The Parliament Of England. [1]

Milton, like his contemporaries, realized that the movable type printing press was the world's most revolutionary platform for the quick, publicly accessible spread of literature and ideas. But Milton also recognized that printing innovation could, at the same time, be a *chokepoint* for suppression of viewpoints if left to the total discretion of a small band of opinion police who could exert absolute content control over print content decisions. In his apologetic, Milton urged a wider and more open marketplace of ideas through uncensored printing.

Those "opinion police" in Milton's day were rewarded with licensing power over printing by the English Parliament in return for stopping politically inconvenient opinions from appearing in print. Even more importantly, they were members of the *private printers guild*, which controlled the licensing of printing presses and would impose suppression, in advance of publication, on problematic viewpoints. [2] Today, it is Silicon Valley, like the private printer's guild of old, that decides whether certain viewpoints will, or will not, be distributed on their all-encompassing platforms. So far, they have been rewarded by the federal government with immunity from most legal liability under Congress' section 230 exemption, a fact we will analyze in section V. below.

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[1] John Milton, *Areopagitica: A Speech For The Liberty Of Unlicensed Printing To The Parliament Of England* (Jan. 21, 2006).
http://intersci.ss.uci.edu/wiki/eBooks/BOOKS/Milton/Areopagitica%20Milton.pdf
[2] Kevin R. Davis, *Printing Ordinance of 1643*, The First Amendment Encyclopedia.
https://www.mtsu.edu/first-amendment/article/1033/printing-ordinance-of-1643

It is interesting that in the middle of Milton's lengthy, archaic prose in the Areopagitica, we find this strikingly modern statement about the need for free expression of viewpoints and opinions. It is a motto we would do well to remember:

> "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties."

By Milton's time, the technological development of the movable type printing press had already achieved a profound impact on the affairs of culture, religion, and politics. Over the 200 years prior to Milton's essay, Guttenberg's invention, that produced a Bible that was publicly available in mass quantities, had helped to spawn the Renaissance, had created more a literate population, and thus fertilized the intellectual environment throughout Europe for the later rise of democratic institutions. It is not surprising that the advent of the internet in the 20th century and the digital transformation of communications in the 21st century has been compared to the innovation of the printing press in the 15th century. [3]

But it wasn't just the invention of the movable type printing press that made such a profound impact. It was the incredibly rapid spread thereafter of multiple hundreds of similar printing presses throughout Europe that created the impact. As one commentator notes: "In the 50 years after Gutenberg started printing, an estimated 500,000 books were in circulation, printed on about 1,000 presses across the continent." [4]

Today, with the rise of titanic technology companies that control the most used portions of the digital space, we have just the opposite situation: We do not have 1000 Facebooks, Googles, Amazons, or Apples. In fact, unlike the more simplistic engineering of the printing press, the unique complexities of computer engineering along with market forces have created a situation where there are not even 10 close competitors to these tech giants. Meanwhile, their information platforms and services have become as ubiquitous and essential to culture, to the institutional world of ideas and learning, and to the operations of government, transportation, and commerce, as are our telephone services, radio and television transmissions, electric utilities, and interstate highways.

In the media and in online commentary, these Silicon Valley titans are referred to as "Big Tech." For that reason, and for ease of reference, I will use that identifier as

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[3] Christopher McFadden, *How Did Tim Berners-Lee Change the World with the World Wide Web*? Interesting Engineering (June 8, 2019). https://interestingengineering.com/how-did-tim-berners-lee-change-the-world-with-the-world-wide-web

[4] Heming Nelson, *A History of Newspaper: Gutenberg's Press Started a Revolution*, The Washington Post (Feb. 11, 1998). https://www.washingtonpost.com/archive/1998/02/11/a-history-of-newspaper-gutenbergs-press-started-a-revolution/2e95875c-313e-4b5c-9807-8bcb031257ad/?noredirect=on

well. No disrespect is intended. After all, they are "tech" companies, and they are big. Very big. Their success, both financial and innovational, is to be applauded.

But with much power and influence comes great responsibility. That is especially true considering that the informational content in which Big Tech companies trade, and with which they make their billions, is not content that they have created. This distinguishes them from newspapers and magazines that exist to produce and disseminate their own news, opinion, and informational content.

By contrast, Big Tech has created platforms – a limited number of mammoth communication conduits in effect – for citizens to post, share, blog, video record, search, and opine by using those digital platforms. At the same time these Big Tech companies have the power to, and occasionally do, shape national opinion with hidden algorithms that operate with lightning speed and with human content moderators who operate, not surprisingly, with personal and corporate biases. This is coupled with an absence of any third-party oversight of their content decisions; the single exception being Facebook. Its leadership hand-picked a review panel of "auditors" to review their practices, but whose professional expertise, curiously, has been focused on areas *other than* in free speech. [5]

Yet, the apparent monopoly dominance of a small handful of technology companies is just one part of the dilemma. The other part is how these information platforms have used their market power. They have exhibited a disturbing pattern of viewpoint discrimination and suppression of otherwise lawful opinions and expression.

Before delving into this censorious appetite that Big Tech has for suppressing politically incorrect opinions, we will look, first, at the reality of their market dominance and the antitrust and free speech implications that arise from that monopolistic power. After all, if there were hundreds of close competitors to choose from, incidental viewpoint suppression committed by a few of them would not present the information chokehold problem that we now face.

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[5] Google and its subsidiary, YouTube, have refused outside analysis of its content moderation practices. https://www.cnsnews.com/news/article/susan-jones/so-sad-google-exec-refuses-commit-independent-audit-its-moderation. Twitter turned its back on the offer from Forbes to have a panel of outside experts review the fairness of their content moderation practices. https://www.forbes.com/sites/kalevleetaru/2018/01/12/is-twitter-really-censoring-free-speech/#6191ed2265f5 On the other hand, Facebook hand-picked Yale Law School's Justice Collaboratory to "audit" its practices. But that project specializes in criminal justice reform and the study of social violence *rather than First Amendment law*. https://law.yale.edu/yls-today/news/initial-statement-facebook-data-transparency-advisory-group. We address another anomaly in Facebook's "audit" at page 29, n. 74, *infra.*

II. How Big Tech Antitrust Monopolies Endanger Free Speech

A Constitutional Basis for Regulation: The "Must-Carry" Supreme Court Cases

In the second of two Supreme Court cases that pitted the Turner Broadcasting System against the Federal Communications Commission (FCC), the U.S. Supreme Court ruled on the merits of Congress' "must-carry" mandate that had authorized the FCC to implement the law in order to avoid potential free speech damage to local broadcast stations. That Supreme Court decision has a clear application to the subject of this paper.

In that case, dubbed the "*Turner II*" opinion, the Court held that the First Amendment was not violated by the requirement that cable companies carry broadcast content from local broadcast stations, despite the burden that it might place on the First Amendment rights of private cable companies regarding their own programming preferences.

A significant factor in the Court's decision to uphold the law was Congress' legislative goal; the Court found that it was a good fit with the well-established "basic tenet of national communications policy that 'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'" [6]

A number of commentators who support the idea of an entirely autonomous and unregulated Big Tech industry point out that such companies are "private," not governmental entities, and therefore are not bound to respect the free rights of private citizens who use their digital platforms. Such arguments miss a critical point: that the dynamic in the legal landscape changes when private information platforms become "chokepoint" monopolies.

In *Turner II*, the Supreme Court affirmed the concern of Congress that cable companies and their monopoly position in many locations could suppress a significant amount of local broadcasting content, and could well damage, or silence completely, the voices of local stations.

This paper sees a similar – and even more troubling – scenario: a handful of monopoly tech platforms silencing on their internet platforms the voices of countless Americans merely because their lawful views are ones that Big Tech rejects.

Antitrust laws exist to prevent powerful private companies from using their monopoly power in their commercial markets in an anticompetitive way to unfairly harm American consumers. That harm can take forms beyond just price or availability of products. Companies that produce and sell products like designer

[6] *Turner Broadcasting v. FCC*, 520 U.S. 180, 192 (1997) (*Turner II*).

clothing, kitchen appliances or automobiles provide goods that are valued, and even found essential, by American citizens. On the other hand, Big Tech companies that hold sway over modern communication platforms deal in the transmission of information and opinions that are generated by individual citizens as well as news media and advocacy groups. That information, and those opinions, are a commodity necessary to an informed electorate and to our constitutional republic.

The Supreme Court has noted that the strangling of information and news sources by *private media companies* through monopolistic behavior, as the Court noted in the *Associated Press* case, can cause public injury to a degree just as significant as any that might be meted out by government censorship. The Court wrote:

> "The interest of the public is to have the flow of news not trammeled by the combined self-interest of those who enjoy a unique constitutional position precisely because of the public dependence on a free press. A public interest so essential to the vitality of our democratic government may be defeated by private restraints no less than by public [i.e. government] censorship." [7]

The question is whether privately owned Big Tech companies pose a similar threat to free speech and a free press.

The Myth of Absolute Autonomy for "Private" Tech Companies

One of the assumptions made by those that oppose any regulation of Big Tech information platforms, is that "private" business enterprises should be immune. [8] To argue that such "private" businesses, because they are privately owned, should be shielded from government oversight is a mistake of mythical proportions; even more so, when those businesses are engaged in the information business.

This is not to say that private technology companies do not, themselves, possess protected rights, and even First Amendment rights of their own. However, we have antitrust laws to establish guardrails, ensuring that private information enterprises do not use monopoly power to harm consumers and substantively restrict the free flow of information. It will be important to see whether this concern will also play a role in the antitrust investigations of Big Tech by the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) that were recently announced.

If Big Tech possesses market dominance over significant information sectors, as we will show below that they do, then there are serious free speech issues at play. An

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[7] *Associated Press v. United States*, 326 U.S. 1, 28-29 (1945).

[8] Daniel Ortner, *Government Regulation of Social Media Would Kill the Internet-and Free Speech*, The Hill (Aug. 12, 2019). https://thehill.com/opinion/technology/456900-government-regulation-of-social-media-would-kill-the-internet-and-free

author in the *Wall Street Journal* expanded on the same *Associated Press* Supreme Court case that we quoted above, and applied it to Silicon Valley platforms this way:

> Special statutes apply to these industries, but there is also precedent to address similar concerns under the broader antitrust laws. In *Associated Press v. U.S.* (1945), the Supreme Court held that the Sherman Antitrust Act of 1890 complemented the First Amendment, which "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."
>
> Antitrust law has evolved since *Associated Press* to focus solely on consumer welfare. But as Maureen Ohlhausen, then a member of the Federal Trade Commission, argued in 2016, the consumer-welfare standard applies to "values like openness and free speech" because "consumers care about a host of qualities for Internet access, not just price." [9]

The next question, then, is whether, and to what extent, Big Tech has a monopoly grasp on the most utilized and relied-upon platforms for information distribution on the internet.

The Fact of Big Tech's Monopoly Power

We have witnessed, to a stunning degree, an increasing trend for Americans to seek their news first from internet-based sites. According to Pew Research, citizens consume news stories more frequently from digital sources than from any others, including both radio and television; with readers going "often" to social media 20% of the time, and news websites 33% of the time, creating a combined 53% internet share, compared to television (49%) and radio (26%), with print newspapers (only a 16% share) now losing their readers to social media. [10]

This paper focuses mainly on the information tech Goliaths – Facebook, Google, Amazon, and Apple. Yet, companies with a smaller market share like Twitter have nevertheless exhibited patterns of viewpoint bias as well, including allegations of "shadow banning" a conservative journalist with The Federalist, [11] and also shutting down a post by Republican Senate Majority Leader Mitch McConnell when he

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[9] Mark Epstein, *Antitrust, Free Speech and Google: The Justice Department has some authority over the marketplace of ideas*, The Wall Street Journal (June 9, 2019). https://www.wsj.com/articles/antitrust-free-speech-and-google-11560108712

[10] Elisa Shearer, *Social media outpaces print newspapers in the U.S. as a news source*, Pew Research Center (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/

[11] *Twitter admits error in "shadow banning" journalists*, Fox Business (Mar. 21, 2019). https://www.youtube.com/watch?v=OmcVMz2UbKM

documented online protest activities outside his home. [12] Though smaller tech companies like Twitter may lack market impact over the general population, in Twitter's case it has created a strong monopoly niche within the news business: it is the major social media site that is relied on by 83% of all journalists. [13]

But, news consumption is only part of the story. As we look at individual Big Tech companies, and their control over large information markets, we see an even clearer picture of total digital market dominance by just a few enterprises.

FACEBOOK

One of the most telling proofs of the monopoly power of Facebook comes from none other than Chris Hughes, who co-founded that social media site along with Mark Zuckerberg. In a May 9, 2019 op-ed in the *New York Times*, Hughes made a convincing argument that Facebook was not only a monopoly, but that it also deserves to be broken up under antitrust law. [14]

Hughes is not alone in his assessment of Facebook's market dominance. During congressional testimony before a House of Representatives committee, Matt Perault, Facebook's chief of global policy development, verified that among the world's six largest social media services, four of the six – Facebook, WhatsApp, Messenger, and Instagram – are all owned by Facebook. [15] That led Rep. Joe Neguse (D-Colo.) to conclude that the company is either a "monopoly" or possesses "monopoly power." [16] As PC magazine notes, the sheer numbers of users of Facebook versus its closest competitors (which are anything but "close") makes a "compelling" case that it is a monopoly. [17]

Total domination of the social media market had clearly been Mark Zuckerberg's goal for years. At one time he was very open about it – at least before the current

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[12] Kalev Leetaru, *Twitter's Ban of McConnell Shows Tech's Censorship Power*, Real Clear Politics (Aug. 10, 2019).
https://www.realclearpolitics.com/articles/2019/08/10/twitters_ban_of_mcconnell_shows_techs_censorship_power.html

[13] Hana Muasher, *New Muck Rack survey: How journalists find their news, use social media and work with PR teams in 2019*, Muck Rack (July 1, 2019). https://muckrack.com/blog/2019/07/01/2019-muck-rack-journalist-survey-results

[14] Chris Hughes, *It's Time to Break Up Facebook*, The New York Times (May 9, 2019).
https://www.nytimes.com/2019/05/09/opinion/sunday/chris-hughes-facebook-zuckerberg.html

[15] *The Latest: Facebook denies that it's a monopoly*, Federal News Network (July 16, 2019).
https://federalnewsnetwork.com/government-news/2019/07/the-latest-trump-says-us-will-take-a-look-at-google-china/

[16] Id.

[17] Bob Marvin, *Is Facebook a Monopoly?* PC Magazine (June 25, 2018).
https://www.pcmag.com/news/362023/is-facebook-a-monopoly

spotlight in Washington zeroed-in on Facebook's practices. The CEO would regularly enter internal Facebook meetings with the cry, "Domination!" [18]

GOOGLE

Google arguably controls up to 95% of the world's online search activity, and because of the way in which its secret ranking system works regarding word-searches, it appears to be rigged against smaller enterprises and startups, leading one industry insider to conclude that "Google is killing small businesses." [19] The significance of Google's search engine dominance is heightened by the fact that scientific studies are now showing the massive impact that Google has on the minds of potential voters because of bias in its search ranking system. [20]

YouTube, which is owned by Google, has 2 billion monthly users (there are only 4.4 billion internet users in the entire world), is used by at least 73% of U.S. adults, and was the most downloaded iOS app by online users in 2018. [21]

AMAZON

While Amazon has slowed slightly in national online "CPG" sales (consumer packaged goods) over the last two years, from controlling 43% of all such e-commerce in America in 2017 to 39% now, its five closest competitors all combined only account for 27% of that market. Amazon's closest rival is only responsible for 8% of CPG sales this year. [22] Amazon is still America's monster e-commerce leader. More pertinent to the issue of information control, Amazon has been very close to controlling half of the sales of all print books nationally, compared to other publishers. [23]

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[18] Evan Osnos, *Can Mark Zuckerberg Fix Facebook Before it Breaks Democracy?* The New Yorker (Sept. 10, 2018). https://www.newyorker.com/magazine/2018/09/17/can-mark-zuckerberg-fix-facebook-before-it-breaks-democracy

[19] Gene Marks, *Google's monopoly is killing small Business*, The Hill (Aug. 7, 2019). https://thehill.com/opinion/finance/456543-googles-monopoly-is-killing-small-business

[20] Robert Epstein and Ronald E. Robertson, *A Method for Detecting Bias in Search Rankings, with Evidence of Systematic Bias Related to the 2016 Presidential Election*, American Institute for Behavioral Research and Technology (June 1, 2017). https://aibrt.org/downloads/EPSTEIN_&_ROBERTSON_2017-A_Method_for_Detecting_Bias_in_Search_Rankings-AIBRT_WP-17-02_6-1-17.pdf

[21] Mansoor Iqbal, *YouTube Revenue and Usage Statistics (2019)*, Business of Apps (Aug. 8, 2019). https://www.businessofapps.com/data/youtube-statistics/

[22] *Amazon Share is Declining Amid Online CPG Sales Growth…Is Now the Time to Double Down?* Nielsen (July 29, 2019). https://www.nielsen.com/us/en/insights/article/2019/amazon-share-declining-amidst-online-cpg-sales-growth-is-now-the-time-to-double-down/?utm_source=sfmc&utm_medium=email&utm_campaign=newswire&utm_content=8-14-19

[23] Mike Shatzkin, *A changing book business: it all seems to be flowing downhill to Amazon*, The Idea Logical Company (Jan. 22, 2018). https://www.idealog.com/blog/changing-book-business-seems-flowing-downhill-amazon/

Other researchers give Amazon an even larger market share of online retail sales, concluding that "… Amazon does dominate online. Market research company eMarketer expects Amazon to account for 52% of all online sales in the U.S. this year, up from 48% last year." [24]

This becomes even more relevant when we consider examples of Amazon's refusal to list books for sale on its mammoth book site that offend its social agenda, including one author, a former lesbian, whose book was banned because it advanced an orthodox Christian position regarding same-sex relationships. [25]

APPLE

Apple is already facing an antitrust lawsuit. The Supreme Court has ruled that the legal claim against Apple's ubiquitous App Store has enough *prima facie* basis to proceed. [26] That case is significant because it will open the door to discovery against Apple regarding its alleged App Store monopolistic activity. Note the implications of the opening paragraph in this recent Supreme Court opinion authored by Justice Kavanaugh:

> In 2007, Apple started selling iPhones. The next year, Apple launched the retail App Store, an electronic store where iPhone owners can purchase iPhone applications from Apple. Those "apps" enable iPhone owners to send messages, take photos, watch videos, buy clothes, order food, arrange transportation, purchase concert tickets, donate to charities, and the list goes on. "There's an app for that" has become part of the 21st-century American lexicon." [27]

That popular lexicon among Americans about "apps" is a direct result of Apple's phenomenally successful dominance in the apps marketplace. As the *Wall Street Journal* notes, "Rankings from search results in Apple's store can make or break an app." [28] Considering the fact, as the article indicates, that Apple has 900 million iPhones in use worldwide, this gives that Big Tech company a considerable dominance in the mobile app market.

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[24] *Facebook, Google, Amazon, Apple: Is Big Tech headed for a big breakup?* USA Today (July 24, 2019). https://www.usatoday.com/story/tech/2019/07/24/facebook-google-amazon-apple-face-antitrust-probe-big-tech-breakup/1814480001/

[25] See, *infra,* section III, page 13.

[26] Joe Rossignol, *Supreme Court Allows App Store Monopoly Lawsuit Against Apple to Proceed*, MacRumors (May 13, 2019). https://www.macrumors.com/2019/05/13/supreme-court-lets-app-store-monopoly-suit-proceed/

[27] *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1519 (2019).

[28] Tripp Mickle, *Apple Dominates App Store Search Results, Thwarting Competitors*, The Wall Street Journal (July 23, 2019). https://www.wsj.com/articles/apple-dominates-app-store-search-results-thwarting-competitors-11563897221

Apple is now generating $11.46 billion annually from its Apple services sector alone, which includes iTunes and its App Store, and it expects to hit $14 billion per year by 2020. [29]

Some Reasons for Big Tech's Market Dominance

Market theories regarding why some tech companies have become monopolistic and monolithic while others have failed are beyond the scope of this paper. But there is one common sense explanation that we can all recognize: the effect that the increasingly complex world of digital engineering may have on competition. The niche of engineering professionals who manage the cyber-sphere we all utilize is a very small, discrete computer world. Yet, even within that very small community there are both winners and losers, high-lamas of tech knowledge versus the other brilliant but failed Silicon Valley innovators.

Just one example suffices. It involves Apple's attempt to challenge Google's nearly universally-used Google Maps and GPS system. Apple is one of the world's leading high-tech companies. But when it attempted to construct its own geo-mapping system for users to compete with Google's, it ended, as one technology author notes, in a "fiasco." [30]

In the 16th century, printing presses could be constructed by clever carpenters and metal workers. In our 21st century, none of us reading this paper would ever be able to create our own internet distribution platform coming anywhere close to what the Big Tech leaders are currently working on. That fact, on the one hand, is a celebration of America's free enterprise and innovational spirit. But it is also something else; it is a cautionary tale that reminds us that a handful of Silicon Valley leaders are controlling, not the production of widgets, but America's marketplace of ideas, values, and opinions.

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[29] Juli Clover, *Apple's Services Revenue Hits New All-Time High of $11.46 Billion*, MacRumors (July 30, 2019). https://www.macrumors.com/2019/07/30/apple-services-revenue-all-time-record-q3-2019/

[30] Jordan Crook, *The Apple iOS 6 Maps Fiasco Explained In 3 Minutes*, Tech Crunch (Sept. 26, 2012). https://techcrunch.com/2012/09/26/the-apple-ios-6-maps-fiasco-clarified-in-3-minutes/?_ga=2.183348326.1722593478.1530105519-1352618727.1511719279

III. Examples of Viewpoint Censorship & Anti-Christian Bias

Silicon Valley Admits Its Bias

During congressional hearings, and thereafter in the media aftermath, much was made of the anti-conservative political bias exhibited by Big Tech, including, as an example, statements from a Google executive promising to keep the 2020 election from mirroring the 2016 result, an apparent reference to Donald Trump's election victory. [31]

Mark Zuckerberg, Facebook's CEO and founder, admitted in his congressional testimony that Silicon Valley was "extremely left-leaning" in its views and values, although he emphasized that he tries to keep that from affecting the operations of Facebook. [32] Even *Commentary* magazine, generally considered a mainstream liberal publication, has recognized the anti-conservative drift in the way in which Big Tech handles conservative ideas and articles, including the down ranking of right-leaning ones; Commentary also cited the recent Pew Center poll that found that 72% of Americans are noticing the same thing, believing that Silicon Valley information tech companies "censor political viewpoints they find objectionable." [33]

However, less has been written in the media or online about anti-Christian viewpoint discrimination on Big Tech platforms. For that reason, and because NRB exists to make sure that Christian communicators will continue to receive access to communication platforms, we focus here on that aspect of Big Tech censorship.

Examples of Anti-Christian Suppression

NRB's John Milton Project for Free Speech has, for years, been cataloguing and giving public voice to the pattern of viewpoint discrimination committed by Big Tech's content moderation practices. NRB's Viewpoint Censorship on the Internet chart gives a quick glimpse of the consistent reality of those practices in years past. [34]

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[31] Valerie Richardson, *Big Tech Anti-Conservative Bias Raises Alarm About 2020 Election Meddling*, The Washington Times (June 26, 2019). https://www.washingtontimes.com/news/2019/jun/26/google-youtube-anti-conservative-bias-raises-alarm/

[32] *Zuckerberg Faces House in Second Day of Facebook Testimony—Live Analysis*, The Wall Street Journal (Apr. 12, 2018). https://www.wsj.com/livecoverage/facebook-mark-zuckerberg-live-coverage/card/1523392437

[33] Noah Rothman, *Silicon Valley Is Right to Worry About Its Liberal Bias*, Commentary Magazine (Aug. 30, 2018). https://www.commentarymagazine.com/american-society/silicon-valley-social-media-worry-about-its-bias-problem/

[34] *John Milton Project For Free Speech*, The National Religious Broadcasters (2019). http://nrb.org/jmp/

Yet stunningly, even in the face of Capitol Hill's recognition of the problem, and congressional hearings that have hailed the Big Tech founders and executives to Washington, requiring them to give account, very little seems to have changed.

This past July, Facebook suppressed a post because it contained a quote from Augustine, one of the most influential Christian theologians in history, apparently for the reason that content moderators thought it constituted "hate speech;" when the posting person appealed within the Facebook system, that viewpoint censorship was upheld. [35]

Around the same time, Amazon banned from its ubiquitous book site a work by Anne Paulk – a former lesbian whose Christian ministry is an NRB member – because her book about sexual issues from an orthodox Christian position violated Amazon's overly proscriptive guidelines against "intolerance." [36]

Below are just a few more examples (or at least the ones that have been reported) of Big Tech's viewpoint suppression over the last 24 months against Christian orthodoxy, and against authors and sites that promote traditional Christianity and biblical values:

- A **Google** insider "delivered roughly 950 pages of documents to the Department of Justice's Antitrust Division demonstrating that Google manipulated its algorithms in a way that biased its search engine against conservative media, Christian media and nonprofit groups, and Republicans." [37] One of the publications blacklisted by Google was the *Christian Post*.
- On Good Friday, **Facebook** blocked an ad by a Catholic college that depicted an iconic image of Jesus on the cross because it violated guidelines against "shocking, sensational, or excessively violent content." [38] Publicity about the incident forced Facebook to apologize.

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[35] Aaron Benavides, *Facebook labels St Augustine quote as 'hate speech'*, Catholic Herald (July 16, 2019). https://catholicherald.co.uk/news/2019/07/16/facebook-labels-st-augustine-quote-as-hate-speech/

[36] Craig Parshall, *Sheriff Needed for Silicon Valley's Wild West Censorship?* The National Religious Broadcasters (July 11, 2019). http://nrb.org/index.php?cID=10319&fbclid=IwAR3zBrYPzzvRsdygDPjIfEqkMpWT378OZQ4y1LmZnliNnacxLfCxgQedxvM

[37] Leah MarieAnn Klett, *Google 'blacklisted' The Christian Post, whistleblower reveals*, The Christian Post (Aug. 14, 2019). https://www.christianpost.com/news/christian-post-blacklisted-by-google-whistleblower-reveals.html?uid=f9dc1d0877&utm_source=The+Christian+Post+List&utm_campaign=11b5af76ec-EMAIL_CAMPAIGN_2019_08_15_04_19&utm_medium=email&utm_term=0_dce2601630-11b5af76ec-2544209

[38] Caleb Parke, *Facebook apologizes for blocking Catholic university's ad of Jesus on the cross*, Fox News (Apr. 4, 2018). https://www.foxnews.com/us/facebook-apologizes-for-blocking-catholic-universitys-ad-of-jesus-on-the-cross

- During the last Christmas season, **Instagram** (owned by **Facebook**) blocked an image of Santa Claus kneeling before the manger of the infant Jesus, dubbing it "violent content." [39]
- **Google** refused a benign ad from the publishing arm of the Lutheran Church – Missouri Synod regarding Vacation Bible School because, inexplicably, Google decided that it had violated its rules on "religious affiliation." [40]
- **Facebook** banned an account that posted a commemoration of the sacrifice of a number of Coptic Christians at the hands of ISIS because it violated Facebook's rules on "exceedingly graphic content" (the posting did not show the beheadings, just the familiar image of the line-up of Copts kneeling before their executioners). [41]
- **Amazon** has blocked several Christian ministry and policy groups, a number of them members of NRB, from participating in its "Smile" charity program that permits buyers to designate a portion of their sale to go to a specific non-profit group. Amazon's action relied on the fact that the groups had been listed in the Southern Poverty Law Center's (SPLC) notoriously flawed "hate group" list, even though the blocked groups are nonviolent, law abiding, and their only offense appears to be their politically incorrect Christian orthodoxy and traditional values that the SPLC and Amazon both reject. [42] At the same time, Amazon continues to allow openly anti-Semitic groups to participate in its Smile program. [43]
- **Facebook** blocked on several occasions the account of Christian family advocate and blogger "Activist Mommy," alleging violation of Facebook's "hate speech" rules. [44] The site had garnered some 600,000 followers and publicized the pattern of viewpoint discrimination, finally receiving an apology from Facebook after widespread publicity about the incidents.
- The video presentations of Christian author and pastor Dr. Michael Brown, which made the case that same-sex relationships were contrary to Biblical

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[39] Doug Mainwaring, *Facebook censors image of Santa kneeling before baby Jesus, calls it 'violent content'*, Life Site News. https://www.lifesitenews.com/news/facebook-censors-image-of-santa-kneeling-before-baby-jesus-calls-it-violent

[40] Joy Pullmann, *Christian Publisher Says Google Banned It Over 'Faith We Express'*, The Federalist (Apr. 23, 2018). https://thefederalist.com/2018/04/23/christian-publisher-says-google-banned-faith-express/

[41] Tyler O'Neil, *Facebook Bans Human Rights Activist for Commemorating Christians Slaughtered by ISIS*, PJ Media (Feb. 19, 2019). https://pjmedia.com/trending/facebook-bans-human-rights-activist-for-commemorating-christians-slaughtered-by-isis/

[42] Bob Paulson, *Amazon Excludes Evangelical Group Based on Hate List Designation*, Billy Graham Evangelistic Association (Jan. 15, 2018). https://billygraham.org/decision-magazine/january-2018/amazon-excludes-evangelical-group-based-hate-list-designation/

[43] Peter Hasson, *Prominent Christian Legal Group Barred From Amazon Program While Openly Anti-Semitic Groups Remain*, Daily Caller (May 5, 2018). https://dailycaller.com/2018/05/05/amazon-smile-liberal-splc-anti-semitic-groups/

[44] Brandon Showalter, *Facebook Bans Activist Mommy Again for 'Hate Speech,' Claims It Was 'Mistake'*, The Christian Post (Aug. 18, 2018). https://www.christianpost.com/news/facebook-bans-activist-mommy-again-for-hate-speech-claims-it-was-mistake.html

teachings, were blocked from advertising on **Google's YouTube**; an HR official within Google denouncing them as "very counter to our mission." [45]

- **Facebook** blocked a video by "vlogger" Graham Allen, calling on people to pray for President Trump, labeling it "hate speech." [46]
- When we at NRB launched the John Milton Project for Free Speech in 2010, we did so because of the *potential* threat of viewpoint discrimination that seemed apparent from the community standards and terms of use employed by Big Tech companies, forbidding, among other things, vague, poorly defined types of expression like "hate speech." Shortly thereafter, **Apple** banned from its iTunes app store The Manhattan Declaration, a statement of orthodox Christianity authored by Chuck Colson and Dr. Robert George. [47] More recently, Apple CEO Tim Cook has publicly promised to banish from **Apple** anything that might "violate the values of the company," with an emphasis on blocking expressions of "hate," which Apple has still not clearly defined. [48]
- **Facebook** recently blocked posts by former New Testament professor Robert Gagnon for using politically incorrect references to sexual orientation and gender identity. [49]

[45] Tyler O'Neil, *Whistleblower: Google HR Slammed Christian YouTube Ads as 'Homophobic'*, PJ Media (Mar. 13, 2019). https://pjmedia.com/faith/whistleblower-google-hr-slammed-christian-youtube-ads-as-homophobic/

[46] Steve Warren, *Blaze TV Host's Video Banned from Facebook: His Call to Pray for President Trump Labeled as 'Hate Speech'*, The Christian Broadcasting Network (June 26, 2019). https://www1.cbn.com/cbnnews/entertainment/2019/june/blaze-tv-hosts-video-banned-from-facebook-after-issuing-call-to-pray-for-president-trump-nbsp-nbsp-nbsp

[47] Jim Daly, *Does Apple Think Christianity is Offensive?* Daly Focus (Jan. 6, 2011). https://jimdaly.focusonthefamily.com/does-apple-think-christianity-is-offensive/

[48] Steve Warren, *Apple's CEO Promises to Discriminate Against Views He Doesn't Like - That May Include Franklin Graham's Biblical Response*, The Christian Broadcasting Network (Dec. 12, 2018). https://www1.cbn.com/cbnnews/us/2018/december/apples-ceo-promises-to-discriminate-against-views-he-doesnt-like-that-may-include-franklin-grahams-biblical-response

[49] Robert Gagnon, *Facebook Shuts Down Christian Ideas While Letting Others Post Threats*, The Federalist (July 3, 2018). https://thefederalist.com/2018/07/03/facebook-shuts-christian-ideas-facebook-letting-others-post-threats/

IV. The Supreme Court's "Must-Carry" Decision: a Constitutional Approach to Big Tech Regulation to Prevent Viewpoint Suppression

The question is this: can Big Tech's moderation practices be regulated in a way that expands the free speech rights of citizen users and content creators, yet without violating the Constitution?

In 1994, in the first of the two cases pitting the Turner cable company against the FCC ("*Turner* I"), the U.S. Supreme Court considered Congress' mandated "must-carry" law implemented by FCC regulations that required cable television companies to set aside a portion of their channels for the transmission of the content of local, over-the-air broadcast television stations. [50] In that first decision the Court didn't rule on the validity of the regulation, but focused instead on an important preliminary question: how high a legal standard must the FCC rule meet in order to be affirmed?

The Turner cable enterprise attacked the FCC rule on First Amendment grounds, arguing for the application of "strict scrutiny," the highest legal standard that a government mandate must meet when it threatens free speech. Instead of applying that high legal bar for review, however, the Court in *Turner I* imposed a lesser standard: the "intermediate" standard of scrutiny, a result that in essence helped forecast the eventual upholding of the FCC rule. The Court's reasoning in that case informs to a great degree the Big Tech issue addressed in this paper.

The Supreme Court noted that the "must-carry" rule would pass muster if it satisfied the lower – not the higher - legal standard of judicial scrutiny. In that regard, three aspects of the ruling in *Turner I* are pertinent to the issue of potential regulation of Big Tech platforms:

- The court affirmed the lower legal standard despite the fact that that it was clear the FCC must-carry rule would, to some extent, "interfere with cable operators' discretion . . ." [51] Any federal regulation that deals with viewpoint suppression by Big Tech will meet similar objections from Silicon Valley companies. Yet as the Court made clear, mere interference alone with the business decisions of communications technology companies does not render such regulations unconstitutional.

- Such interference will be justified, the Court in *Turner I* stated, when the rules imposed are "content neutral …" [52] That is to say, when the rules

[50] *Turner Broadcasting System Inc. v. FCC*, 512 U.S. 622, 640 (1994) (*Turner I*).
[51] *Turner I*, at 643-44.
[52] The Congressional Research Service (CRS), in its report, "Free Speech and the Regulation of Social Media Content," March 27, 2019, concluded that, " … if social media sites present distinct problems that threaten the use of the medium for communicative or expressive purposes, courts might approve of regulations intended to solve those problems—particularly if those regulations are content-neutral." CRS report, at page 32, citing the Supreme Court's *Turner II* decision.

imposed by a federal agency are not a mere subterfuge for an effort to subtly impose a mandatory "preference" for specific content. [53]

Now let's apply that standard to this scenario: a regulation that imposes adverse consequences on Big Tech companies if they practice invidious viewpoint discrimination against otherwise lawful opinions of users of their platforms.

Imagine further, that our hypothetical regulation defines "viewpoint discrimination" according to the First Amendment standards articulated by the Supreme Court. Wouldn't such regulations then, by definition, be "content neutral" under the *Turner I* requirement if they simply impose a viewpoint neutrality rule derived from Supreme Court rules of free speech neutrality?

After all, those Supreme Court standards have been honed after careful constitutional scrutiny involving decades of cases. The result is a fairly clear set of legal rules requiring all viewpoints and expressions to be protected unless they fall within a limited number of well-worn exceptions. [54] The Supreme Court's First Amendment jurisprudence is not designed to pick viewpoint "winners and losers," but to create instead a level playing field for all expression except for those few categories that are incompatible with a safe, functioning society or that would be destructive to the ordered liberty rights of other citizens. What better starting point is there to establish a "gold standard" for judging Big Tech's content practices than that?

- Lastly, the Court in the *Turner I* opinion emphasized, as a rationale for favoring a lower bar for the "must-carry" regulation to overcome, the fact of the *monopoly chokehold* that cable companies maintained at that time over the transmission of the content of traditional broadcast stations. Because this aspect harkens so closely to the *monopoly chokehold* that Big Tech companies possess over user-generated content, this is a critical factor that warrants the further discussion that follows below.

Before his elevation to the Supreme Court, then appeals Judge Brett Kavanaugh had occasion to comment on the role that regulation of communication platforms can play when their monopoly power constricts the breadth of free speech. In a case before the U.S. Court of Appeals, his concurring opinion explained the significance that such a monopoly market power element played both in the reasoning of the Supreme Court in *Turner I* as well as in the later Supreme Court ruling that ultimately upheld the "must-carry" rule in *Turner II*:

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[53] *Turner I*, at 645.

[54] Those limited exceptions, and the feasibility by which Big Tech companies could apply them, is discussed, *infra* at page 28 of this paper.

> "In its 1994 decision in Turner Broadcasting, the Supreme Court ruled that the Cable Act's must-carry provisions might satisfy intermediate First Amendment scrutiny, but the Court rested that conclusion on '*special characteristics of the cable medium: the bottleneck monopoly power* exercised by cable operators and the dangers this power poses to the viability of broadcast television…' *When a cable operator has bottleneck power, the Court explained, it can 'silence the voice of competing speakers with a mere flick of the switch'* … In subsequently upholding the must-carry provisions, the Court reiterated that cable's bottleneck monopoly power was critical to the First Amendment calculus … The Court stated that 'cable operators possess[ed] a local monopoly over cable households …'" [55]

As we have seen earlier in this paper, the monopoly power of Facebook, Google, Amazon, and Apple as an example, is monolithic, ubiquitous, and dominant. Moreover, like the cable companies addressed in the *Turner I* opinion twenty five years ago, they *can threaten to silence the voice of competing speakers* (i.e. citizen users in the case of Big Tech platforms) *with a mere flick of the switch*, to use the phrase employed by the Supreme Court in *Turner I* and aptly reemployed by then Judge Kavanaugh.

Lastly, there was a fourth factor utilized by the Court in *Turner I* that forecasts the likely constitutionality of a carefully crafted, light-touch regulation of Big Tech communication platforms:

- The Supreme Court recognized that while cable companies did provide some of their own content, they were <u>not</u> substantially engaged in the business of generating content, but rather, *were engaged in distributing the video content of others*. As the Court stated, "Once the cable operator has selected the programming sources, the cable system functions, in essence, *as a conduit for the speech of others,* transmitting it on a continuous and unedited basis to subscribers." [56]

The Big Tech companies that are the subject of this paper, similar to the cable companies that were regulated by "must-carry" rules analyzed in the Supreme Court's *Turner I* decision and later upheld in the *Turner II* decision, <u>are not content providers</u>, but rather, are a <u>platform for distribution of the content of their users</u>, a fact that Big Tech concedes. [57]

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[55] *Comcast Cable Communications, LLC v. F.C.C.*, 717 F.3d 982, 993 (D.C. Cir. 2013) (Kavanaugh, J. concurring) (emphasis added).
[56] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 629 (1994) (*Turner I*) (emphasis added).
[57] Charles Arthur and Jemima Kiss, *Publishers or platforms? Media giants may be forced to choose*, The Guardian (July 29, 2013). https://www.theguardian.com/technology/2013/jul/29/twitter-urged-responsible-online-abuse

Along the same lines, Mark Zuckerberg, founder and CEO of Facebook, admitted as much in his follow-up written answers to a congressional hearing question posed by Senator Ted Cruz, where Zuckerberg answered:

> We are, first and foremost, a technology company. Facebook *does not create* or edit the content that our users published on our platform. [58]

This similarity in function between Big Tech as a conduit for user generated content, and the cable companies as a conduit for the content from third-party content providers regulated by the FCC in the *Turner* cases, is another significant predictor that appropriate and reasonable regulation of Big Tech companies regarding their content moderation practices and their pattern of viewpoint suppression could well be upheld as constitutional.

But in addition, the fact of Big Tech acting as mere "conduits" for the expression of others (and <u>not</u> as content creators) is important for another reason; it obliterates meritless arguments constructed by those who oppose any type of regulation, who wrongly warn that regulating Silicon Valley would create a new version of the FCC's fatally misguided (and long abandoned) "Fairness Doctrine," or arguments that mistakenly treat Big Tech platforms as if they were First Amendment-protected newspapers, positions whose flaws are addressed on pages 26-28 of this paper.

Next, we will address a congressional statute that lies at the center of the issues addressed in this paper.

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[58] *Questions from Chairman Thune* (et al.), U.S. Senate (June 8, 2018). https://www.commerce.senate.gov/public/_cache/files/9d8e069d-2670-4530-bcdc-d3a63a8831c4/7C8DE61421D13E86FC6855CC2EA7AEA7.senate-commerce-committee-combined-qfrs-06.11.2018.pdf

V. Section 230 of the CDA – a Problem in Search of a Solution

In 1996 Congress passed the Communications Decency Act of 1996 (CDA), which was signed into law by President Bill Clinton. The primary purpose was to regulate pornographic and other offensive content over the internet. However, in 1997 the U.S. Supreme Court ruled in *Reno v. ACLU* that the anti-indecency provisions of the Act were unconstitutional. What the Supreme Court left untouched, however, was section 230 of that law.

Section 230 is currently at the epicenter of the debate over whether Big Tech information platforms should be regulated at all, and if so, how.

The Congressional Research Service has provided a concise summary of what section 230 is all about, and I cite that office's description of it below. However, it must be remembered that the Big Tech companies that are the focus of this paper – Facebook, Google, Amazon, and Apple – all qualify as the "interactive service providers" that are referenced in the following quote, (or, as the actual statute calls them, "provider[s]" "of an interactive computer service"]. Each of such companies are, and have been, protected by the provisions of section 230:

> Section 230 contains two primary provisions creating immunity from liability. First, Section 230(c)(1) specifies that interactive service providers and users may not "be treated as the publisher or speaker of any information provided by another information content provider." Second, Section 230(c)(2) states that interactive service providers and users may not be held liable for voluntarily acting in good faith to restrict access to objectionable material. Section 230 preempts state civil lawsuits and state criminal prosecutions to the extent that they are "inconsistent" with Section 230. It also bars certain federal civil lawsuits, but, significantly, not federal criminal prosecutions. Section 230(e) outlines a few exemptions: for example, Section 230 immunity will not apply in a suit "pertaining to intellectual property" or in claims alleging violations of certain sex trafficking laws. [59]

The benefits of section 230 to Big Tech companies are obvious. Under (c)(1), they can't be sued for libel or defamation, or for providing things on their platforms like child pornography or obscenity, as long as the troublesome content placed on their sites was generated by a third-party.

Likewise, under (c)(2) of section 230, Big Tech is protected from lawsuits that challenge their decisions about content removal, as long as their decisions are "taken in good faith." It is interesting that, in the court cases addressing section 230

[59] "Free Speech and the Regulation of Social Media Content," Congressional Research Service, March 27, 2019, page 11 (footnotes omitted).

immunity, I have found no substantive discussion by courts about this "good faith" requirement.

Section 230 has been broadly applied by courts to protect Big Tech decisions regarding what they allow, or what they prohibit, on their sites, and even when 230 didn't apply, courts have dismissed those claims on other grounds. Here are just a few of the more recent cases:

- *Marshall's Locksmith Service Inc. v. Google, LLC et al.,* (D.C. Cir. 2019) (lawsuit by locksmiths against Google, Microsoft, and Yahoo for allegedly listing blatantly false information from their competitors barred under section 230).

- *Brittain v. Twitter* (U.S. District Court, N.D. California, 2019) (A candidate for U.S. Senate, who had his four Twitter accounts suspended by Twitter, brought claims under the First Amendment, federal election law, breach of contract, conversion, negligent infliction of emotional distress, and tortious interference; those claims were all held to be barred under section 230; the remaining antitrust claim was dismissed on other grounds, including the conclusion that the adverse action by Twitter and resulting loss of Twitter followers does not constitute an antitrust injury).

- *Ebeid v. Facebook, Inc*. (U.S. District Court N.D. California 2019) (claims dismissed, section 230 barred all claims except fraud, breach of contract, breach of implied covenant of good faith, and those were dismissed on other grounds).

- *Freedom Watch, Inc. v. Google Inc., et al*. (U.S. District Court D.C. 2019) (claims of antitrust, violation of D.C. Human Rights Act, and infringing the First Amendment dismissed in their entirety, though section 230 was specifically not addressed).

- *Song Fi, Inc. v. Google, Inc.* (U.S. District Court, N.D. California 2018) (Rather than section 230 grounds, other reasons were the basis for the dismissal of the entire case here; 230 was previously referenced as <u>not</u> applicable to the tort and contract claims, yet those were still dismissed on other grounds in the earlier decision at 108 F. Supp. 3d 876 (D.D. Cal. 2015).

As the reader will deduce, lawsuits against Big Tech companies regarding their acts of viewpoint censorship will likely fail, in large part because section 230 of the Communications Decency Act has provided a distinct legal defense (and benefit) to those companies. Beyond that, however, courts have also routinely found other grounds to dismiss such suits even when they do not fit within section 230's broad immunity provisions.

For instance, in some of the above cases, where social media users complained that their rights were violated under the First Amendment, the courts dismissed their claims because private tech companies are not "state actors," and therefore they are not bound by the First Amendment. The offensive (rather than defensive) use of those First Amendment arguments are all but doomed in light of the Supreme Court's decision a few months ago that a New York public access channel operated by a private company is not a "state actor," and can't be sued for banning a particular program. [60]

However, there is nothing stopping Congress from enacting a provision reasonably regulating monopolistic technology platforms and applying the principles of the Supreme Court's free speech cases to them as a legislative matter. That is very similar to what the Congress did when it passed the Religious Freedom Restoration Act (RFRA), which the Supreme Court has faithfully upheld; the difference being that with RFRA, the law incorporated the Court's free exercise of religion jurisprudence rather than its free speech rulings.

In section VII below, I address how the Supreme Court's free speech rules might be incorporated by Congress into legislation applicable to monopoly technology platforms.

If reform is to occur, it likely will have to begin where it started: in Congress. Under the protective umbrella of section 230, Big Tech has, to a great degree, arrogated to itself the power of absolute autonomy over who shall speak and who shall not, resulting in the suppression of lawful, legitimate information and opinions. Those unintended consequences of the CDA are particularly distressing when we compare them with the law's original purposes.

From the start, there were two primary congressional purposes behind the CDA. First, "consistent with the CDA's effort to protect children from access to obscene or explicit materials, Congress sought to 'encourage telecommunications and information service providers to deploy new technologies and policies to block or filter offensive material.'" [61]

Some positive results in terms of limiting online pornography have been achieved, perhaps because of section 203's legal protection for Big Tech companies that screen porn off their sites. On the other hand, those same companies could have made their decisions for purely commercial reasons. Yet, while Google and Facebook do not permit pornography on most of their platforms, a study recently

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[60] *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019). https://www.supremecourt.gov/opinions/18pdf/17-1702_h315.pdf

[61] Mary Graw Leary, "The Indecency and Injustice of Section 230 of the Communications Decency Act," Harvard Journal of Law & Public Policy, vol. 41, no 2 (Spring 2018), page 561, citing S. Rep. NO. 104-23 (1995).

revealed that Google tracks some 74% of all porn sites, and Facebook tracks about 10% of them, all for reasons entirely unclear to researchers. [62]

The second congressional purpose behind the CDA, and particularly section 230, speaks directly to the subject matter of this paper, namely that, "On the other hand, [Congress] did not want companies to over-screen, as Congress recognized the desire for the Internet to reach its full potential as 'a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.'" [63]

By now the reader may sense, as I do, that this second purpose of the CDA and of section 230 has been hijacked. But that is not the only negative outcome. One of the abuses of the immunity granted to Big Tech was the proliferation of human trafficking online. That led to a recent amendment to section 230, the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 that was signed into law by President Trump on April 11, 2018. The law allows legal liability of tech companies if they *knowingly* allow third-party content to be posted on their platforms if it promotes or facilitates sex trafficking. [64]

That amendment had been ferociously, though unsuccessfully opposed by Silicon Valley defenders. Yet, since the enactment of that law the sky has not fallen, and the earth has not swallowed up Big Tech companies, or any other online platforms for that matter. It may well be time for other legislation to be proposed to iron out the problem discussed in this paper: namely, Big Tech's autonomy over online viewpoints and information, and its near standard-less discretion in blocking opinions they do not like.

This brings us to one piece of legislation in particular that has been proposed, which is discussed next.

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[62] Charlie Warzel, "Facebook and Google Trackers Are Showing Up on Porn Sites," New York Times.com, July 17, 2019. https://www.nytimes.com/2019/07/17/opinion/google-facebook-sex-websites.html?login=email&auth=login-email

[63] Leary, *supra*, citing *Zeran v. Am. Online, Inc*. 129 F. 3d 327, 330 (4th Cir. 1997), quoting 42 U.S.C. § 230(a)(3) (2012).

[64] Jeffrey Neuburger, *FOSTA Signed into Law, Amends CDA Section 230 to Allow Enforcement against Online Providers for Knowingly Facilitating Sex Trafficking*, New Media and Technology Law Blog (Apr. 11, 2018). https://newmedialaw.proskauer.com/2018/04/11/fosta-signed-into-law-amends-cda-section-230-to-allow-enforcement-against-online-providers-for-knowingly-facilitating-sex-trafficking/

VI. The Hawley Bill

This year, Senator Josh Hawley (R-Mo.) introduced his Ending Support for Internet Censorship Act. The legislation is aimed at amending section 230 in several significant ways.

The bill is aimed at amending the Communications Decency Act (CDA) to encourage providers of interactive computer services to provide content moderation that is viewpoint non-discriminatory regarding political matters.

Under the Act, section 230 of the Communications Act of 1934 (47 U.S.C. 230) would be amended specifically regarding Big Tech companies, or in the words of the bill, to those companies that within the last twelve months had more than 30 million US monthly users or 300 million worldwide users, or more than $500 million in global income.

In order to keep their legal immunity under section 230, such technology companies would have to avoid politically biased content moderation in the operations of their platforms. In other words, content moderation practices must not be designed to negatively affect a political party, candidate or viewpoint or disproportionately promote or restrict any of those. There are exceptions built in for "business necessity," or where no other viable means of content moderation exist, or where the content that is suppressed is of a type not protected by the First Amendment.

Big Tech companies' compliance with the above standard would be determined by the Federal Trade Commission (FTC).

There are several things to commend this bill. First, it is not aimed at every technology company. It directly protects startups and fledgling innovation companies by targeting only the truly biggest of the technology platforms that distribute user-generated information. In that way, it does not impede, and arguably could result in a stimulation of digital competition.

However, so far the bill is limited only to protecting political speech. As this paper has argued, there has also been a practice of online viewpoint discrimination aimed at conservative Christian content as well. There are also indications that Big Tech has continued to expand its appetite for content suppression. Google has apparently added the words "Federal Reserve" to its *blacklist* of search terms that it will deliberately down-rank, regardless of the popularity of the subject matter or the number of persons searching for it. [65] Meanwhile, Facebook has decided not only to

[65] Allum Bokhart, *New Whistleblower Allegation: Youtube Manipulated "Federal Reserve" Search Results In Response to MSNBC Host's Complaint*, Breitbart (July 30, 2019). https://www.breitbart.com/tech/2019/07/30/new-whistleblower-allegation-youtube-manipulated-federal-reserve-search-results-in-response-to-msnbc-hosts-complaint/

block content that it feels has violated its rather vague standards, but will throttle content that merely gets near to, but doesn't actually cross, those blurry lines. [66]

This increasing morass of discretionary but confusing content decisions by Big Tech is crying out for a clear standard to be advocated, and to be followed. In this final section below, I suggest one.

[66] Josh Constine, *Facebook will change algorithm to demote "borderline content" that almost violates policies*, Techcrunch (Nov. 15, 2018). https://techcrunch.com/2018/11/15/facebook-borderline-content/

VII. Using the First Amendment as the Northern Star

A Few Ground Rules

If digital information platforms are to be regulated, it only makes sense that those regulations aim only at Big Tech companies that possess market domination. This is true for several reasons.

First, it would foster competition for other tech companies. Second, it could stimulate technology innovation from unregulated newcomers to the digital market as a byproduct of that. Thirdly, it would increase the likelihood that such a regulation would withstand constitutional scrutiny, particularly if the *Turner I* and *Turner II* Supreme Court cases are used as guidance.

Those cases recognized the harmful "*chokepoint*" power that some communication gatekeepers possess to close off other avenues of speech. Antitrust considerations, then, can be an important antecedent justification for reasonable regulatory reform of communications industries, like those that have been spawned from Silicon Valley. Harkening even further back to the *Associated Press* case, as we discussed at page 7 above, we see the Supreme Court recognizing how monopoly power, when it is unfairly used by *private* communication companies, even those with their own First Amendment rights, can jeopardize the free speech rights of others just as extensively as the government can when it suppresses free expression.

The next question is what standard should be employed in any legislation by Congress, or implemented by any regulatory agency authorized by Congress, to judge the reasonableness of the content moderation (and speech suppressing) activities of Big Tech companies.

Using the Free Speech Rules of the Supreme Court

Over the years the U.S. Supreme Court has fashioned a set of rules regarding the limited types of expression that are owed little or no First Amendment protection. [67]

The reasoning and factual application of those rules are set out in Supreme Court opinions. They provide a handy guide for use by Big Tech companies and their lawyers, and by federal agency overseers, if faced with deciding the types of expression that should be banned by Big Tech, and those that should be permitted. Because the Supreme Court Justices shaping those interpretations of the First Amendment over the decades were nominated by elected Presidents, and confirmed by members of the Senate who were elected by the people, that approach has the benefit of a certain democratic process in its favor – a representative government value – as opposed to simply permitting Big Tech companies and their computer engineers to concoct guidelines that injure the value of public discourse.

[67] *U.S. v. Stevens,* 559 U.S. 460, 468-69 (2010).

One legislative approach could be to grant a presumption of correctness to content moderation rules of regulated Big Tech companies if they can demonstrate they are hewing in good faith to Supreme Court jurisprudence; namely, that they are excluding *only* that expression that the Supreme Court has labeled as having little or no free speech value or protection.

That list is easy to identify from Supreme Court cases:

- Obscenity; [68]
- Indecent content, including sexually explicit expression, that is uniquely or openly accessible to minors; [69]
- Expression that amounts to fraud; [70]
- Incitement to violence, and true threats of violence, including threats intended to intimidate and cause fear; [71]
- Expression in furtherance of activities that are criminal or unlawful (which, by extension, would include any uses of the internet that are already illegal). [72]

The Supreme Court has refused to expand these limited categories of expression that can be censored, despite pleas to include other types of forbidden speech. [73] Likewise, Big Tech moderation practices should not be deemed to be reasonable if they are allowed to indiscriminately include categories outside of this list (as they have in the past in their terms of use or community guidelines). The only exception to that approach might be, if additional banned categories can be justified by the necessary limitations of the complex computer systems used by Big Tech companies, and the fact that other, feasible and less free-speech inhibiting alternatives to blocking are not available.

Three Final Caveats

There are three *red herrings* that inevitably arise when regulation of Big Tech's anti-free speech practices is debated.

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[68] *Roth v. U.S.*, 354 U.S. 476, 483 (1957); *Ashcroft v. ACLU*, 535 U.S. 564 (2002).
[69] *U.S. v. American Library Association*, 539 U.S. 194 (2003); *FCC. V. Pacifica Found.*, 438 U.S. 726 (1978); *FCC v. Fox TV Stations, Inc.* , 556 U.S. 502 (2009); *FCC v. Fox TV Stations, Inc.*, 132 S. Ct. 2307 (2012); *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 684 (1986); *Ginsberg v. New York*, 390 U.S. 629 (1968).
[70] *Virginia Bd. of Pharmacy v. Citizens Council, Inc.*, 425 U.S. 748, 771 (1976).
[71] *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969)(per curiam); Virginia v. Black, 538 U.S. 343 (2003).
[72] *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 498 (1949); see also: Stored Communications Act, 18 U.S.C. § 2701 et seq., and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030.
[73] *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2010).

The first involves one of the categories most abused and misused by Big Tech companies; namely, their obsession with the elusive species of extreme expression called "hate speech." [74] The Supreme Court has stated plainly that such a category does not justify censorship, even despite the annoying or outright offensive nature of that kind of content. [75] In the hands of Big Tech content moderators, however, "hate speech" has come to mean any viewpoint that is sufficiently out of line with the world-view of either the moderator, or the social agenda of the digital platform.

It is interesting that in 1993 the National Telecommunications and Information Agency (NTIA), after being tasked by Congress to study "hate speech" and its possible linkage to hate crimes, rendered a report that was woefully unable to create a meaningful definition of hate speech. The best it could come up with as a definition was this: that "hate speech" would "encompass speech that creates a climate of hatred or prejudice …" [76] Such a definition is, essentially, an empty tautology, useless in application, and one that provides no guidance to either Big Tech content moderators or government officials who are investigating them.

Given that the use of "hate speech" labels have become a bludgeoning tool for suppression of unpopular or politically incorrect opinions, particularly by Big Tech companies, it may be time to abandon that phrase altogether, and come up with a lexicon that has more precision when we discuss what categories of expression should – or should not – be suppressed.

The second distraction in the debate over Big Tech is the misguided argument that regulation of those technology giants would be like reinstituting the "fairness doctrine," the now happily abandoned FCC rule that used to require broadcasters to provide reasonable air-time opportunity for opposite viewpoints on issues of public concern. [77]

NRB was one of the most vocal opponents against that rule until it was finally reversed. The flaw in this argument that likens the fairness doctrine to regulation of Big Tech, is simply this: that broadcasters are content creators, and in that regard, should possess a healthy degree of First Amendment control over their broadcast content. As I have repeatedly shown in this paper, the Big Tech companies – by their own admission and by obvious fact – are not content creators, but function as conduits, or platforms for your content, and mine, and every other American citizen who uses those platforms. That fact should cause the value of our user-generated

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[74] "Hate speech" cited in Facebook "audit" 49 times, "free speech" only once: Sheryl Sandberg, *A Second Update on Our Civil Rights Audit*, Facebook Newsroom (June 30, 2019). https://newsroom.fb.com/news/2019/06/second-update-civil-rights-audit/

[75] *Snyder v. Phelps,* 131 S. Ct. 1207 (2011).

[76] Report to Congress: The Role of Telecommunications in Hate Crimes (U.S. Dept. of Commerce) December, 1993. https://www.ntia.doc.gov/legacy/reports/1993/TelecomHateCrimes1993.pdf

[77] Emily McPhie, *Part III: The GOP Wants to Kill the Fairness Doctrine, Then Applies It to the Internet*, Broadband Breakfast (Aug. 21, 2019). http://broadbandbreakfast.com/2019/08/part-iii-the-gop-wants-to-kill-the-fairness-doctrine-then-applies-it-to-the-internet/

content to be of greater free speech weight than the mere internet pipelines (or, putting it another way, today's digital *printing presses*) that simply distribute our created content.

Lastly, I have often encountered the argument that Big Tech platforms are like newspapers or magazines, whose editorial control over content should be respected and protected. [78] Indeed, it is true that the Supreme Court has had occasion to recognize the Free Press rights of print publications from unwarranted government control or censorship. But once again, the supporters of this analogy make the same mistake as those trying to label Silicon Valley regulation as just another form of "fairness doctrine." They forget the undeniable reality that Big Tech platforms are no more engaged in the primary business of *creating* – as opposed to simply *distributing* expressive content - than are the paperboys and papergirls who toss the morning newspaper on your front step.

These kinds of distinctions are not hyper-technical points; they are the very basis of prior Supreme Court decisions on free speech, and free press guarantees. Yes, at present, the First Amendment does not apply to private companies like Facebook, Google, Amazon, and Apple, who are not government actors. But that does not mean that lawmakers cannot glean from the First Amendment wisdom of the Supreme Court those principles that should guide their decisions when they consider the chokepoint power of Silicon Valley titans over free speech, and what should be done about it.

Lastly, any legislative proposal should undoubtedly be as narrow as feasible, using the least restrictive means to accomplish the highest restoration of basic free speech values over the digital landscape for citizen users. Such an approach can only increase the likelihood of any legislation being upheld when the inevitable court challenges occur. [79]

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[78] Dick Lilly, *Regulate social-media companies like news organizations*, The Seattle Times (Aug. 19, 2019). https://www.seattletimes.com/opinion/regulate-social-media-companies-like-news-organizations/

[79] Attention should be paid to the Supreme Court's recent unanimous decision in *Packingham v. North Carolina,* 137 S. Ct. 1730 (2017), where it referred to the forces and directions of the internet and social media as being "protean" and "far-reaching."

JOHN MILTON PROJECT
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