



THE CONTRADICTIONS OF PLATFORM REGULATION

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Everyone wants to regulate the big tech companies. The desire to regulate the private actors that control so much of our lives is understandable, and some ideas for regulation make sense. But the political consensus around regulating the tech industry is illusory. While everyone wants to regulate big tech, it turns out that they want to do so in very different, indeed contradictory, ways.

These contradictions of platform regulation mean that it will be very hard to turn anti-tech popular sentiment into actual regulation, because the actual regulations some people want are anathema to others. They suggest caution in imposing regulation and an awareness of the difficult tradeoffs that are involved. But they also suggest a way forward: introducing competition to reduce the influence the tech giants have over our lives.

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INTRODUCTION

Everyone wants to regulate the big tech companies—Amazon, Apple, Facebook, and Google.¹ Companies that were darlings of the media and government a decade ago are now under attack from all sides. Scholars and politicians on all sides are proposing to remove their immunity from liability, require them to take certain acts, prevent them from taking others, or even break them up entirely.² Governments have filed numerous antitrust suits against them,³ and the UK has set up a whole new agency just to regulate tech platforms.⁴

These new efforts to rein in big tech represent a confluence of many different factors: the rise of antitrust after decades of dormancy, the entrenched nature of big tech platforms⁵ in an industry that is used to seeing established monopolists quickly

¹ Microsoft and Netflix sometimes make this list, but most of the challenges are directed at the four companies listed in text.

² See, e.g., Editorial Board, *Joe Biden Says Age Is Just a Number*, N.Y. TIMES, Jan. 17, 2020 (President Biden saying Section 230 should be revoked “immediately”); see also Christopher Mims, *Republicans and Democrats Find a Point of Agreement: Big Tech Is Too Powerful*, WALL ST. J., Jul. 30, 2020. Europe is proposing new rules that would require structural separation of the big tech companies. Natalia Drozdiak, *Tech Giants Risk Breakup Under Strict EU Digital Rules*, BLOOMBERG LAW NEWS, Dec. 15, 2020.

³ The U.S. Justice Department and almost every state has sued Google in three different lawsuits. See, e.g., Mark Bergen, *Google’s ‘Star Wars’ Facebook Pact is Latest Antitrust Target*, BLOOMBERG LAW NEWS, Dec. 17, 2020; Tony Romm, *Justice Department Sues Google, Alleging Multiple Violations of Federal Antitrust Law*, WASH. POST, Oct. 20, 2020; Tony Romm, *Nearly 40 States Sue Google Alleging Search Manipulation, Marking the Third Antitrust Salvo Against the Tech Giant*, WASH. POST, Dec. 17, 2020. The FTC and 48 states and territories have sued Facebook. Cecilia Kang & Mike Isaac, *U.S. and States Say Facebook Illegally Crushed Competition*, N.Y. TIMES, Dec. 9, 2020.

⁴ Leo Kelion, *Competition and Markets Authority Plans Tailored Rules for Tech Giants*, BBC NEWS, Dec. 8, 2020.

⁵ I use the term “platforms” in this paper as a convenient shorthand. It should not obscure the fact that each of the companies that have drawn attention have different business models, and that many of them are not platforms on which others build. Some, like Google, enable access to content. Others, like Amazon, may be better thought of as aggregators of products. See Thibault Schrepel, *Platforms or Aggregators: Implications for Digital Antitrust Law*, 12 J. EUR. COMP. L. & PRACTICE 1 (2021). And many companies, including Google and Apple, have platforms as part but not all of their business.

displaced by a new generation of upstarts,⁶ the rise of hate speech and misinformation online, growing fears about the loss of privacy, and instances of aggressive behavior by incumbents designed to disadvantage competitors, among others. Most of all, though, the focus on regulating or breaking up big tech reflects the outsized influence these companies have come to have on almost all aspects of our lives. We spend much of our lives online—even more today in the wake of the pandemic. And most of us spend most of that online time interacting with the tech giants.

The desire to regulate the private actors that control so much of our lives is understandable, and some ideas for regulation make sense. But the political consensus around regulating the tech industry is illusory. While everyone wants to regulate big tech, it turns out that they want to do so in very different, indeed contradictory, ways. These contradictions of platform regulation mean that it will be very hard to turn anti-tech popular sentiment into actual regulation, because the actual regulations some people want are anathema to others.

I identify some of the contradictions of platform regulation in Part I. In Part II I consider some implications of this conundrum and whether there is a way forward.

I. REGULATE WHAT, EXACTLY?

Everyone wants tech companies to do (or not do) something, and they want government to require it. Fair enough; when any company has that large an influence over people's lives, people have an interest in how they use that influence. But dig a little deeper, and the demands are not just diverse, but often flatly contradictory. While everyone may want to regulate big tech, they don't agree on what government should require it to do (or forbid it from doing). Here are some examples of the contradictions of platform regulation.

A. *Contradictory Proposals*

Some proposals are simply at odds with each other: One group wants to require tech companies to do something while a different group wants to forbid them from doing it.

⁶ See Mark A. Lemley & Andrew McCreary, *Exit Strategy*, 101 B.U. L. REV. 1 (2021) (showing how venture capital-backed IPOs have declined sharply since the turn of the century, while acquisitions have increased, and the result has been to stifle Schumpeterian competition in the tech industry).

Free speech vs. hate speech. The Internet is the most extraordinary category of information ever assembled in human history. Much of that information is true, and the fact that people have access to all the world's information on demand is a truly remarkable force for good. But there is also a lot of misinformation on the Internet. Similarly, while the Internet has allowed people unprecedented freedom to speak their minds on political, social, and personal issues, it has also given rise to an alarming wave of hate speech, particularly directed at women and minorities. More recently, it has become a repository of misinformation about COVID-19, the 2020 election, and the QAnon lunacy—misinformation that in combination has led to unprecedented attacks on our country.

At the heart of all this good and bad speech is section 230, the provision of the Communications Decency Act that immunizes Internet platforms and others from most legal liability for speech posted on their site by others.⁷ The provision was originally passed to encourage Internet platforms to be “good Samaritans.” It gave them freedom to remove content from their websites without being deemed a publisher of all the content on that website (and therefore responsible for anything tortious that was there).⁸ But that limited liability also gives companies the power *not* to remove offensive content.

Because of section 230 immunity, Internet companies do not have to vet and preapprove content posted by others. It is that freedom that has allowed the Internet to scale. It is impossible to imagine Facebook or YouTube processing the incredible amount of data they do if they had to get lawyers to check and approve the content in advance. Nor could those sites function if they couldn't use automatic filtering to weed out the astounding number of bots and fake accounts they face.⁹ Section 230 is truly the law that “made Silicon Valley.”¹⁰

But it is also the law that is the biggest target of regulatory reform. Senators on

⁷ 47 U.S.C. § 230. Section 230's immunity from liability has important limitations: It does not apply at all to criminal liability or intellectual property (IP) infringement. *Id.*

⁸ *Id.* § 230(c)(1) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”)

⁹ Facebook blocked 4.5 billion fake accounts in the first six months of 2020 alone. Jack Nicas, *Why Can't the Social Networks Stop Fake Accounts?*, N.Y. TIMES, Dec. 8, 2020, at B3. But of course, more slipped through the net.

¹⁰ Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639, 650–57 (2014); JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* (2019).

both sides have proposed to repeal or revise section 230 to remove or condition the immunity of platform providers from liability.¹¹ Both candidates in the 2020 presidential election called for repealing section 230.¹² In a country where people don't seem to agree on anything political, eliminating section 230 seems to be the one thing that unites people of all political stripes.

Until, that is, you take a closer look at what those political parties want out of section 230 reform. For Democrats, the problem with section 230 is that it has allowed platforms to let misinformation and hate speech persist on their sites without doing much about it. The goal of Democratic section 230 reform is to encourage platforms to more closely police the content of their sites, removing false information and hate speech.¹³ Holding platforms liable for misstatements and attacks by their users, the argument goes, will encourage the platforms to do more to find and take down that bad speech.¹⁴ Democrats have also sought to ban microtargeting of political advertising because it is more likely to contain misinformation.¹⁵ It's not at all obvious that abolishing sections 230 would get the sorts of content restrictions the Democrats want,¹⁶ but there is no question that's why they want it.

¹¹ See EARN IT Act of 2020, S. 3398, 116th Cong.; PACT Act of 2020, S. 4066, 116th Cong.

¹² Editorial Board, *supra* note 2; Tony Romm, *Trump Threatens to Veto Major Defense Bill Unless Congress Repeals Section 230, a Legal Shield for Tech Giants*, WASH. POST, Dec. 1, 2020.

¹³ Danielle Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 *FORDHAM L. REV.* 401, 418–23 (2017).

¹⁴ To be clear, large platforms already go to considerable effort to find and police false information and hate speech. Facebook labeled 167 million posts containing misinformation about COVID in the first ten months of 2020. Kurt Wagner, *Facebook Labeled 167 Million User Posts for Covid Misinformation*, BLOOMBERG LAW NEWS, Nov. 19, 2020. Google employs 10,000 people just to review and flag content. Casey Newton, *Google and YouTube Moderators Speak out on the Work that Gave Them PTSD*, THE VERGE (Dec. 16, 2019), <https://www.theverge.com/2019/12/16/21021005/google-youtube-moderators-ptsd-accenture-violent-disturbing-content-interviews-video>. More recently, Facebook, YouTube, and Twitter have banned some of the worst providers of misinformation, including Donald Trump. But they aren't obligated to do so, and some smaller sites pride themselves on engaging in no policing whatsoever. Sites like AutoAdmit and reddit long had an anything-goes attitude towards statements made by users, true or not. They have been joined more recently by Parler and Gab, where many of those banned by mainstream sites for repeated falsehoods have moved.

¹⁵ Banning Microtargeted Political Ads Act, H.R. 7014, 116th Cong. (2020).

¹⁶ Tim Wu points out that political propaganda, election disinformation, and crazy conspiracy theories aren't illegal, but things like defamation are, so the effect of repealing section 230 might be

For Republicans, by contrast, the problem is that the platforms already engage in too much policing on the Internet. Republican efforts to reform section 230 want to condition immunity from liability on platforms acting as common carriers who don't block any third-party content on their sites.¹⁷ Those efforts predate the removal of several white supremacist commentators from Twitter and Facebook,¹⁸ and by Twitter's periodic flagging of Donald Trump's false statements as false¹⁹ and its ultimate decision to ban him from the site, but those actions have only strengthened Republican fervor on the issue. Republican legislative proposals would treat the platforms as government actors subject to the First Amendment and liable for removing content unless it was not constitutionally protected.²⁰ It may be too facile to say Republicans want more hate speech and disinformation online,²¹ but it is fair

to suppress legitimate criticism of people, but not to suppress the QAnon crazies. Tim Wu, *Liberals and Conservatives Are Both Totally Wrong about Platform Immunity*, MEDIUM (Dec. 3, 2020), <https://superwuster.medium.com/liberals-and-conservatives-are-both-totally-wrong-about-section-230-11faacc4b117>.

¹⁷ See, e.g., Makena Kelly, *Internet Giants Must Stay Unbiased to Keep Their Biggest Legal Shield, Senator Proposes*, THE VERGE (Jun. 19, 2019); Alex Ebert, *Ohio Top Cop Sues to Regulate Google Like 'Public Utility'*, BLOOMBERG LAW NEWS, Jun 8, 2021. Ironically, the Republican effort to apply the First Amendment or common carrier rules to private parties may itself violate the First Amendment. See Lily A. Coad, *Compelling Code: A First Amendment Argument Against Requiring Political Neutrality in Online Content Moderation*, 106 CORNELL L. REV. 457 (2021).

¹⁸ Kurt Wagner, *Facebook Removes Network of White Supremacist Accounts*, BLOOMBERG.COM (Mar. 25, 2020); Kim Lyons, *Twitter Permanently Suspends White Supremacist David Duke*, THE VERGE (July 31, 2020).

¹⁹ Neil Vigdor, *Twitter Flags Posts by Trump that Made Premature Claims of Victory or Baseless Ones about Election Fraud.*, N.Y. TIMES, Nov. 4, 2020.

²⁰ See, e.g., Ending Support for Internet Censorship Act, S. 1914, 116th Cong. (2019). Some unsuccessful court cases have tried to apply the First Amendment to Facebook. See *King v. Facebook, Inc.*, No. 19-cv-01987-WHO, 2019 WL 4221768 (N.D. Cal. Sept. 5, 2019). They failed because tech platforms are private actors, and the First Amendment applies only to the government.

Ironically, Republican efforts to apply the First Amendment to private actors through legislation may themselves violate the First Amendment rights of the platforms, which have a constitutional right not to be compelled to speak. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that a student couldn't be compelled to recite the Pledge of Allegiance).

²¹ Both liberals and conservatives spread disinformation online, though the evidence shows that liberals stop doing it when the error is pointed out, but conservatives don't. YOCHAI BENKLER ET AL., *NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS* (2018).

to say they don't want tech companies in the business of deciding what can be shared on their platforms.²²

Ironically, when it comes to a closely related form of tech industry regulation—net neutrality—the positions are reversed. Democrats, who are fine with platform intermediaries deciding what content can go on their sites, also tend to support net neutrality rules that prevent carriers at the physical layer from discriminating among Internet traffic based on source or content.²³ Republicans, by contrast, have repealed net neutrality rules, paving the way for cable and wireless companies to discriminate on the basis of content even as they insist that Twitter and Facebook be forbidden from doing so.²⁴ There is a way to square the Democratic position; one might reasonably believe that platform hosts are both more capable of moderating content and posters and more directly responsible for what goes on their sites, while any filtering done at the physical layer is likely to be extremely coarse.²⁵ By contrast,

Ironically, Republicans were traditionally the ones who wanted to regulate protected speech, whether it was indecency, cursing, or flag-burning. One way to characterize the Republican shift here is that the socially acceptable range of speech has moved to the center at the same time the Republican party has moved to the right, meaning that more and more things Republicans say tend to be outside the mainstream. I am indebted to Nik Guggenberger for this point.

²² At least until they do. Any proposal to apply the First Amendment to platforms should probably be called the Mandate Online Receipt of Extreme Pornography (MORE PORN) Act, because if it passed, platforms like Facebook and Twitter would be forced to allow anyone to post or send pornography that wasn't legally obscene. And as many false Trump tweets and COVID misinformation posts there are out there on the Internet, there is far more porn. See Nicholas Kristof, *The Children of Pornhub*, N.Y. TIMES, Dec. 4, 2020, at SR4 (just one porn site, Pornhub, "attracts 3.5 billion visits a month, more than Netflix, Yahoo or Amazon."). I suspect the idea that they were promoting more pornography online would horrify many of the conservatives who support this approach.

²³ Jon Reid & Rebecca Kern, *FCC Democrats Set to Move on Net Neutrality, Broadband Subsidies*, BLOOMBERG LAW NEWS, Jan. 7, 2020.

²⁴ Restoring Internet Freedom Order, 83 Fed. Reg. 7852 (2018).

²⁵ The traditional argument for net neutrality—that diverse nodes at the ends of the network could each make their own decisions, and we needed to avoid central chokepoints in between—is right, but the traditional distinction between the ends and the middle becomes less clear as the ends become more concentrated and also start to control what we traditionally thought of as the middle parts of the network. If an internet service needs to use AWS or one of a few other hosting services to survive, arguably those hosting services should now be viewed as part of the middle of the network subject to neutrality rules.

I can't think of any principled justification for holding both the Republican positions. But there is certainly a tension in the Democratic positions on regulating speech, and a flat-out contradiction in the Republican positions.²⁶

Both parties want to eliminate or restrict section 230 in order to change how platform intermediaries filter content. But they want that change to have diametrically opposed effects. Whatever does happen, someone isn't going to get what they want.

Algorithm-free algorithms. Closely related to section 230 and platform regulation of hate speech is Senator Thune's proposed response to his discovery that (gasp!) search engines use algorithms to deliver people the content they want to see. He introduced a bill to require that Internet companies offer non-algorithmic alternatives to algorithmic decisions.²⁷ Google, for example, would have to give you the choice of tailoring search results using an algorithm or preferring an "algorithm-free" search experience. The bill's definition of "algorithm"?: "Such term shall include actions taken through an algorithm or other automated process."²⁸

His concern is that individual targeting of search results means that different people see different things on the Internet depending on their past behavior. Taken in the abstract, that is a reasonable concern. Others have worried that the proliferation of different news sources means that America has lost a shared set of knowledge and experience.²⁹ The Trumpist escape into fantastical election conspir-

²⁶ Annemarie Bridy, *Remediating Social Media: A Layer-Conscious Approach*, 24 B.U. J. SCI. & TECH. L. 193 (2018).

²⁷ Ben Brody, *Republican Senator Wants Google and Facebook to Have Algorithm-Free Options*, BLOOMBERG NEWS, Jun. 25, 2019, <https://www.bloomberg.com/news/articles/2019-06-25/thune-wants-google-and-facebook-to-have-algorithm-free-options>.

²⁸ For discussion, see John D. McKinnon, *Legislation Would Force Google and Rivals to Disclose Search Algorithms*, WALL ST. J., Oct. 31, 2019.

²⁹ CASS R. SUNSTEIN, *TOO MUCH INFORMATION: UNDERSTANDING WHAT YOU DON'T WANT TO KNOW* (2020).

acy theories certainly seems to bear that out, as do the number of false stories circulating about the pandemic.³⁰ I have expressed similar concerns about the Balkanization of the Internet across national boundaries.³¹ But it is a worry that seems directly at odds with the efforts by the same conservative senators to demand that false content stay up and encourage the splintering of news sources.

In any event, Senator Thune’s solution to this problem is remarkably unworkable. An Internet search result not dictated by algorithms would be, at best, a blind leap to a random website.³² But in fact even randomness in computers is carefully controlled by algorithms.³³ Asked to imagine any aspect of the Internet that didn’t involve an “automated process,” one expert quipped: “I picture a computer that is turned off.”³⁴

Antitrust, advertising, and data privacy. A second cluster of contradictory regulatory impulses centers around the use of consumer data by platform intermediaries. There are three related regulatory impulses here, and they interplay in interesting ways. Those who would regulate platforms around data generally take one or more of the following positions:

- Platform intermediaries are monopolies that are violating the antitrust laws

³⁰ Sarah E. Needleman, *Facebook Says It Is Removing All Content Mentioning ‘Stop the Steal,’* WALL ST. J., Jan. 11, 2021; Rachel Lerman, *Facebook Says It Has Taken down 7 Million Posts for Spreading Coronavirus Misinformation*, WASH. POST, Aug. 11, 2020.

³¹ Mark A. Lemley, *The Splinternet*, 70 DUKE L.J. 1397 (2021).

³² In the early days of the Internet you could actually take a “random leap” to a randomly selected website, via <http://yahoo.com/bin/ryl>. The site no longer exists, but the link is documented in Michael Froomkin’s 1990s-era web page, <http://personal.law.miami.edu/~froomkin/>. Simpler days. I’m not sure anyone would want to be taken to a random page on the Internet today, even for fun. And it certainly wouldn’t be a way to find what you were looking for.

³³ DONALD KNUTH, *ART OF COMPUTER PROGRAMMING, VOLUME 2: SEMINUMERICAL ALGORITHMS*, ch. 3 (1997); George Marsaglia et al., *Toward a Universal Random Number Generator*, 9 STATISTICS & PROBABILITY LETTERS 35 (1990); P. A. W. Lewis et al., *A Pseudo-Random Number Generator for the System/360*, 8 IBM SYSTEMS J. 136 (1969).

³⁴ Christian Sandvig (@niftyc), TWITTER (June 26, 2019, 1:26 PM), <https://perma.cc/J5FG-83A8>. For discussion, see Bryan Casey & Mark A. Lemley, *You Might be a Robot*, 105 CORNELL L. REV. 287, 320 (2020).

by charging high prices in the advertising market, and with antitrust enforcement those prices will come down;³⁵

- Platforms collect too much data about us and share it too widely with advertisers, and in a competitive market we would have more privacy;³⁶ and
- Platforms are stealing ad revenue from worthy sources like newspapers, and in a competitive market websites that display ads would generate more revenue.³⁷

Some propose privacy legislation to restrict access to data directly; more on that below.³⁸ But most of the regulatory proposals in this category focus on antitrust enforcement. The canonical argument is that if we broke up the platforms, or restricted their market power in some other way, we would have a more competitive market, and reducing their concentrated control over our data would serve the substantive goals of data privacy and/or funding newspapers.³⁹

It's hard to argue that at least some tech giants—Google in particular—don't

³⁵ Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710 (2017); Justus Haucap & Ulrich Heimeshoff, *Google, Facebook, Amazon, eBay: Is the Internet Driving Competition or Market Monopolization?*, 11 INT'L ECON. & ECON. POLICY 49 (2014).

³⁶ See, e.g., Dina Srinivasan, *The Antitrust Case against Facebook: A Monopolist's Journey towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 BERKELEY BUS. L.J. 39 (2019); Nathan Newman, *Search, Antitrust, and the Economics of the Control of User Data*, 31 YALE J. ON REG. 401 (2014).

³⁷ Complaint, HD Media Co. v. Google LLC, No. 21-cv-77 (S.D. W.Va. filed Jan. 29, 2021); Mike Leonard, *Google Sued by The Nation, Other Publishers Alleging Ad Monopoly*, BLOOMBERG LAW NEWS, Dec. 17, 2020; Josh Constine, *How Facebook Stole the News Business*, TECHCRUNCH (Feb. 3, 2018), <https://social.techcrunch.com/2018/02/03/facebooks-siren-call/>.

³⁸ See *infra* notes 84–90 and accompanying text.

³⁹ See Complaint, FTC v. Facebook Inc., No. 1:20-cv-03590 (D.D.C. filed Dec. 9, 2020). See also Nicholas Economides & Ioannis Lianos, *Privacy and Antitrust in Digital Platforms* (working paper 2021).

Notably, the U.S. government's 2020 antitrust case against Google doesn't take any of these approaches, though a coming state suit may. Complaint, *United States v. Google LLC*, No. 1:20-cv-03010 (J.P.M.L. filed Nov. 6, 2020). The Justice Department suit focuses on the fact that Google pays to be the default search engine on various platforms. That suit has its own problems—given that someone has to be the default and that the browsers are auctioning the position, it seems reasonable for Google to participate in that auction—but it doesn't trigger the contradictions I describe in the text.

have market power.⁴⁰ But the case for monopoly on the part of others is less clear-cut. Apple, Amazon, and Facebook have no more than 60% of their respective markets, and in Apple's case considerably less.⁴¹ What Facebook and Apple do have are strong network effects, which lock in their customers and arguably justify treating their ecosystem as a separate market.⁴²

Even if they are monopolies, however, none of these companies charge the high consumer prices we expect from traditional monopolies. Indeed, Google and Facebook provide their consumer services for free, and the antitrust objections to Amazon have centered on the argument that its prices are too *low*.⁴³ As a result, most antitrust complaints have focused on the place platforms make most of their money—advertising.⁴⁴ They argue that Google and Facebook (and sometimes others as well, though it's a bit awkward to point to multiple “monopolists” in a single

⁴⁰ At the time of the DOJ's lawsuit, Google had about 82% of the desktop and 95% of the mobile search engine markets. *Infographic: Google's Search Dominance*, STATISTA INFOGRAPHICS (Oct. 2020), <https://www.statista.com/chart/23250/search-market-share-in-the-united-states/>. *But cf.* Alexander Krzepicki, Joshua D. Wright, & John M. Yun, *The Impulse to Condemn the Strange: Assessing Big Data in Antitrust*, 2:2 CPI ANTITRUST CHRON. 16 (2020) (challenging the argument that access to better data creates a barrier to entry).

⁴¹ See Nikolas Guggenberger, *Essential Platforms* 24 STAN. TECH. L. REV. 237 (2021) (discussing market share and market power among the tech platform incumbents).

⁴² Christopher S. Yoo, *When Antitrust Met Facebook*, 19 GEO. MASON L. REV. 1147, pt. I (2012) (discussing network effects as a source of Facebook's market power); Damien Geradin & Dimitrios Katsifis, *The Antitrust Case Against the Apple App Store* (working paper 2021) (arguing that Apple is a monopolist within the iOS market); *see generally*, Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479 (1998).

The Supreme Court's recent—and deplorable—decision in *Ohio v. American Express*, 138 S. Ct. 2274 (2018), complicates the market power analysis considerably. The Court held that a platform can't have market power on only one side of a two-sided market; rather, courts must find market power when considering both sides of the market. That makes it much more difficult to argue, for instance, that Apple has market power over the customers locked into the use of its operating system and app store. For a discussion of the two-sided market problem, see Thomas B. Nachbar, *Platform Effects* (working paper 2021).

⁴³ Khan, *supra* note 35 (discussing Amazon). One novel antitrust theory is that Facebook is a monopsony buyer of user information, paying an artificially low price (zero) for user data. John W. Brooks, *The Dilemma of “Free”: Facebook's Monopsony Power and the Need for an Antitrust Renaissance*, ___ TEXAS TECH. L. REV. ___ (forthcoming 2021). *See also* John Newman, *The Myth of Free*, 86 GEO. WASH. L. REV. 513 (2018) (discussing the ways prices are disguised on the Internet).

⁴⁴ *See, e.g.*, Complaint, United States, v. Google LLC, No. 1:20-cv-03010, at 7 (J.P.M.L. filed

market) dominate the market for online advertising. They do this because they collect data about their users—the price of free Internet goods⁴⁵ -- and use that data to target more effective ads to consumers. The most common objection is that this invades our privacy.⁴⁶ But others—notably news outlets—also object that the Google-Facebook dominance of digital advertising leaves no room for them to make money from advertising of their own.⁴⁷ And all this is styled as an antitrust problem—it is the dominance Google and Facebook exert over advertising that leads them to collect too much data and drive out competitors who also want to host ads.

The problem is that that theory makes no sense as an antitrust matter. Google and Facebook are selling advertising space. If they dominate that market⁴⁸—whether because their access to consumer data gives them an edge in targeting the ad space or because they reach so many people they are viewed as must-place destinations for advertisers—they should be able to charge advertisers a premium for that space above a competitive market price for advertising space. That might be a

Nov. 6, 2020) (arguing Google has monopolies in both “the markets for search advertising and general search text advertising”); Complaint, *FTC v. Facebook Inc.*, No. 1:20-cv-03590 (D.D.C. filed Dec. 9, 2020).

⁴⁵ Newman, *supra* note 43, at 558–59.

⁴⁶ See, e.g., Srinivasan, *supra* note 36; Asunción Esteve, *The Business of Personal Data: Google, Facebook, and Privacy Issues in the EU and the USA*, 7 INT. DATA PRIVACY L. 36 (2017); Josh Blackman, *Omniveillance, Google, Privacy in Public, and the Right to Your Digital Identity: A Tort for Recording and Disseminating an Individual’s Image over the Internet*, 49 SANTA CLARA L. REV. 313 (2009).

⁴⁷ See *supra* note 37.

⁴⁸ I’m not at all sure they actually dominate a digital advertising market. Facebook in particular tends to lack the sort of big-box and consumer product advertisers that spend so much money in other media spaces. But I assume for the sake of argument that regulation advocates have made the case that there is a sort of joint monopoly here. Cf. John M. Newman, *Antitrust in Attention Markets: Objections and Responses*, 59 SANTA CLARA L. REV. 743 (2020) (arguing that there is no single overall market for attention online).

Some recent evidence suggests that Facebook and Google may have colluded to control the digital advertising market. See Complaint, *Texas v. Google LLC*, No. 4:20-cv-00957 (J.P.M.L. filed Dec. 16, 2020); Daisuke Wakabayashi & Tiffany Hsu, *Why a Clash of Internet Titans Never Happened*, N.Y. TIMES, Jan. 18, 2021, at B1. If true, that is a much stronger antitrust claim, because antitrust law condemns horizontal agreements between competitors much more harshly than single-firm conduct and doesn’t require that the conspirators have market power.

bad thing if you're an advertiser: you're paying more money than you would in a competitive advertising market. But those higher prices would drive advertisers (and sites that host advertising) to competitors unless Google and Facebook are significantly better at targeting those ads than competitors are.⁴⁹

But even if they are dominating the market and increasing prices for digital advertising, many of the people actually complaining about the dominance of digital advertising are likely to be helped, not hurt, by that dominance. If Google and/or Facebook are advertising space monopolists, they are charging more money for ad space than they would in a competitive market and offering fewer ads as a result. That means they are selling your consumer data to fewer people at a higher price than they and others would if the advertising market were competitive. Advertisers might not like that, but most consumers probably would. Intervening to bring competition to digital advertising—whether by breaking up the platform giants or opening up their data troves to competitors—means that more companies will compete to sell more of your personal data to advertisers for less money. Indeed, the Texas attorney general, who recently filed an antitrust complaint against Google, has argued that it should be forced to share its data about users with rivals.⁵⁰ That might well be a good thing from an antitrust perspective, but it is the opposite of what most people complaining about platform dominance of data and advertising actually want.⁵¹

⁴⁹ On the tradeoffs between price and quality, see Peter J. Hammer, *Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs*, 98 MICH. L. REV. 849 (2000).

⁵⁰ Victoria Graham, *Google's Data Hoarding May Inhibit Rival Access, Texas AG Says*, BLOOMBERG LAW NEWS, Apr. 22, 2020; see also Fiona M. Scott Morton & David C. Dinielli, *Roadmap for a Digital Advertising Monopolization Case Against Google*, OMIDYAR NETWORK, May 2020, at 18 (arguing that Google is unfairly disadvantaging its display search competitors “by withholding results and output from Google search campaigns that advertisers have designed and bought . . .”).

⁵¹ Other moves may disrupt this, like Apple's decision to allow Do Not Track to actually work on its phones, a decision that prompted Facebook to run full-page ads with the title “Apple vs the free internet”. See, e.g., *Apple vs. The Free Internet*, N.Y. TIMES, Dec. 17, 2020, at A24. But Apple's approach wouldn't create a competitive market in digital advertising. Indeed, it might promote privacy precisely by reducing competition in digital advertising.

John Newman argues that competition for attention may actually be problematic for society. Newman, *Attention Markets*, *supra*, note 48, at section IV.B. Even if that is true, it is not an antitrust argument. Antitrust categorically rejects arguments of the form that competition itself is bad. See, e.g., *Nat'l Soc'y of Prof. Engineers v. United States*, 435 U.S. 679 (1978).

Similarly, news organizations compete with Google and Facebook to sell advertising space to those who come to their websites. If Google and Facebook are charging more than the competitive rate for advertising space, that presents an opportunity for others—like news organizations—who compete with them to sell advertising space. Either they can charge a competitive price and take sales away from their overpriced “monopoly” competitors or they can shield under the Google-Facebook price umbrella and charge more for their advertising space. In either case, a competitive market is the last thing they want. It will reduce their advertising revenue further.⁵²

There may be good reason to think Google and Facebook dominate digital advertising, raising prices to advertisers and reducing the output of ads based on personal data. There may be good reason to think Google and Facebook sell too much of our data too cheaply to advertisers. And it may be possible that Google and Facebook are unfairly taking ad revenue away from news outlets that depend on it. But it is not possible to coherently think all those things at once. And regulation designed to fix one of those perceived problems—say, bringing more competition to digital advertising—is likely to make the other problems worse.

None of this is to say that there isn’t an antitrust problem with big tech; indeed, I suggest below that there is.⁵³ Nor is it to suggest that there is no problem with their control over digital advertising. If the allegations various states have made that Google and Facebook have secretly colluded to prevent competition,⁵⁴ or that Google manipulates advertising auction results to disadvantage competitors,⁵⁵ turn

⁵² News outlets may actually have one of two other objections to Google and Facebook advertising.

First, the problem may be that Google and Facebook are better at targeting ads, so advertisers choose them instead. But if so, that’s not monopolization—that is more efficient competition.

Second, news organizations may be upset that part of the way Google and Facebook attract users—and therefore advertisers—to their own sites is by providing links to the very news stories they offer. I discuss the factual and legal problems with that objection *infra* notes 84–90 and accompanying text.

⁵³ See *infra* section II.C.

⁵⁴ Complaint, Texas v. Google LLC, No. 4:20-cv-00957, at 63–74 (J.P.M.L. filed Dec. 16, 2020).

⁵⁵ Complaint, Colorado v. Google LLC, No. 1:20-cv-03715, at 11–14 (D.D.C. filed Dec. 17, 2020); Dina Srinivasan, *Why Google Dominates Advertising Markets: Competition Policy Should Lean on the Principles of Financial Market Regulation*, 24 STAN. TECH. L. REV. 55 (2020).

out to be true, those are problems the law should address. But antitrust isn't capable of giving everyone everything they seem to want from it, because some of what they want is self-contradictory.

Breaking up data monopolies. A similar problem affects the widespread concern about data monopolies. Privacy advocates worry that dominant Internet platforms know too much about us, aggregating data from a variety of sources to build an accurate profile of our needs and desires.⁵⁶ But this is actually two different worries coupled together. Many worry that too much information about us is readily available on the Internet. They seek to reduce the flow of personal information on the Internet generally. Others focus on the concentration of personal information into a few hands, giving dominant platforms an information edge no one else can match.

While both concerns focus on consumer privacy, they have different, even contradictory, solutions.⁵⁷ Those concerned about the widespread flow of personal information generally want to make it harder for companies to sell or otherwise share that information. Restrictions on sale of personal data or cookies that track people across websites can reduce the flow of information among companies. But because it is easier to regulate the flow of information than to force companies to “unlearn” information they already have,⁵⁸ these proposals tend to reinforce the dominance of existing Internet platforms by making sure that they will always have an edge over potential new competitors. For those concerned with the concentration of private information in the hands of a few companies, these changes may make the world worse, not better.⁵⁹

⁵⁶ See, e.g., *Online Behavioral Tracking*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/online-behavioral-tracking>; *Online Tracking and Behavioral Profiling*, ELECTRONIC PRIVACY INFO. CTR., <https://epic.org/privacy/consumer/online-tracking/>.

⁵⁷ See Erika M. Douglas, *The New Antitrust/Data Privacy Interface*, 130 YALE L.J. 647 (2021) (acknowledging this tension and suggesting that it is fundamental, like the tension between antitrust and IP rights).

⁵⁸ While it's not impossible to require companies to purge information—see the “Right to Erasure” in Article 17 of the GDPR—it is hard to purge the effects of data a company once had and used to target advertising or content. And the unfortunate history of Europe's right to be forgotten shows that forcing companies to “unlearn” information selectively can be abused. See Daphne Keller, *The Right Tools: Europe's Intermediary Liability Laws and the EU 2016 General Data Protection Regulation*, 33 BERKELEY TECH. L.J. 287 (2018) (discussing how the GDPR could incentivize Internet platforms to over remove information).

⁵⁹ That assumes that there is an alternative under which competitors might get access to the

Conversely, those concerned with concentration of data on the Internet may want to break up the big data monopolies, if not the companies themselves. Doing so may reduce the dominance of incumbent Internet platforms, but it is likely to do so by broadening, not restricting, the flow of private information. That is most clearly true of efforts to break up the Internet monopolies outright. But even efforts to combat the control those dominant firms have over personal data involve making sure that they don't end up with more access than their competitors, for instance by regulating exclusive deals among firms or by allowing user data portability or efforts to scrape sites to build interoperable ones.⁶⁰ Each of these approaches, however, is likely to involve more personal data in the hands of more companies, since new entrants will be unable to compete effectively against incumbents without access to the same data they have. That may be a good thing, but it is unlikely to be what privacy advocates want. Indeed, Google had to put off its Privacy Sandbox initiative to phase out third-party cookies—something privacy advocates would like—because UK antitrust authorities thought that interfering with third-party cookies could cement Google's market dominance.⁶¹

Encryption and access to data. Another cluster of contradictory efforts to regulate the Internet relates to cybersecurity and law enforcement. Cybersecurity is a real problem, as the recent Russian hack of major U.S. government and private systems shows.⁶² But government cybersecurity policy wants contradictory things from the Internet. On the one hand, we want to stop hacks and data breaches. Numerous states have passed laws imposing obligations on companies that are subject to a data breach, and courts have punished companies that ran insecure systems or allowed private user information to be exposed.⁶³ And an important centerpiece of

information they need. I discuss such an alternative in Part II.C., *infra*.

⁶⁰ For a discussion of the privacy risks to data portability and interoperability, see Gus Hurwitz, *Digital Duty to Deal, Data Portability, and Interoperability* (working paper 2021).

⁶¹ Bryan Koenig, *Google Delays Putting Lid on Third-Party Cookie Jar*, LAW360, June 24, 2021.

⁶² David E. Sanger et al., *Scope of Russian Hacking Becomes Clear: Multiple U.S. Agencies Were Hit*, N.Y. TIMES, Dec. 15, 2020.

⁶³ The National Conference of State Legislatures keeps an updated list of the security breach notification laws in every U.S. state and territory. *Security Breach Notification Laws*, NCSL, <https://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx>. See also Joseph F. Yenouskas & Levi W. Swank, *Emerging Legal Issues in Data Breach Class Actions*, 73 BUS. LAW. 475 (2018) (discussing how courts have recently been more willing to find standing and deny motions to dismiss in data breach class action lawsuits.).

government cybersecurity policy is deterring and limiting harm from foreign government cyberattacks like Russia's recent SolarWinds attack that breached many public and private systems.⁶⁴

Effective cybersecurity means strong, end-to-end encryption.⁶⁵ But when tech companies responded to security threats by securely encrypting communications platforms like Apple phones and WhatsApp,⁶⁶ the government objected. Law enforcement, it turns out, wants to make sure it has a back door into our phones and our text messages,⁶⁷ and if there isn't one it has even tried to force tech companies to build it.⁶⁸ This is a battle that has been continuing for a quarter century, since the government tried to build a backdoor into digital phone technology in the 1990s.⁶⁹ The issue then was secret communications supporting terrorism, while more recently it tends to be child sexual abuse or, even more recently, white supremacy. But the claim is the same: People will use encryption to hide the bad things they are doing, so law enforcement must have the power to break encryption.

The problem is that we can't have it both ways. Building insecure systems means those systems are more likely to be hacked. And building insecure systems so the government can collect data from them just increases the likelihood that hackers will get that information from the government, as the Russians likely did

⁶⁴ Jody Westby, *Russia Has Carried Out 20-Years of Cyberattacks that Call for International Response*, FORBES, Dec. 20, 2020.

⁶⁵ That's not all it means. Many other things are required for effective cybersecurity. See generally WILLIAM STALLINGS, *EFFECTIVE CYBERSECURITY: A GUIDE TO USING BEST PRACTICES AND STANDARDS* (Addison-Wesley Professional Jul. 2018); Alan Z. Rozenshtein, *Wicked Crypto*, 9 UC IRVINE L. REV. 1181 (2018–2019). But encryption is a vital first step.

⁶⁶ Both WhatsApp and Apple's iMessage feature end-to-end encryption. *WhatsApp FAQ - About End-to-End Encryption*, WHATSAPP.COM, <https://faq.whatsapp.com/general/security-and-privacy/end-to-end-encryption/?lang=en> (last visited Jan. 16, 2021); *iMessage and FaceTime & Privacy*, APPLE SUPPORT, <https://support.apple.com/en-us/HT209110> (last visited Jan. 16, 2021).

⁶⁷ See Lawful Access to Encrypted Data Act, S. 4051, 116th Cong. (2020); David Uberti, *Cybersecurity Experts Take Aim at Senators Over Encryption*, WALL ST. J., July 8, 2020.

⁶⁸ The FBI tried and failed to force Apple to unlock the phone of a suspect in the 2015 San Bernardino terrorist attack. Eric Lichtblau & Katie Benner, *Apple Fights Order to Unlock San Bernardino Gunman's iPhone*, N.Y. TIMES, Feb. 17, 2016; *The FBI Wanted a Backdoor to the iPhone. Tim Cook Said No*, WIRED (Apr. 16, 2019), <https://www.wired.com/story/the-time-tim-cook-stood-his-ground-against-fbi/>.

⁶⁹ Steven Levy, *Battle of the Clipper Chip*, N.Y. TIMES, Jun. 12, 1994.

in 2020.⁷⁰

B. Contradictory Rules

The contradictions of platform regulation aren't limited to proposals to regulate in different directions. Sometimes the contradictions show up in laws that themselves require inconsistent things, or at least things in considerable tension with each other. Many of these instances come from the EU, which has done much more than the US to regulate the Internet, and has therefore exposed more of the latent contradictions of platform regulation.

Retaining and Destroying Data. In an effort to protect privacy online, the European Union has adopted a number of rules that prevent Internet companies from retaining personal data beyond a certain period⁷¹ and require them to remove accurate information from both private databases and the public record under the so-called “right to be forgotten.”⁷² Refusing to let companies keep data is a defensible if controversial policy choice, one that will make research and data targeting harder but may also further the goal of protecting individual privacy.⁷³

The simplest way to comply with this rule is also the most privacy protective: A site could just not keep personal information at all. Some sites, for instance, don't require registration under a real name and don't log IP addresses.⁷⁴ The EU quickly discovered, however, that while it wanted information about people to be forgotten it also wanted access to that very information for a variety of purposes, including law enforcement. So the EU not only required Internet companies to delete data after a certain period, it also required them to collect that same data in the first place and keep it for a minimum period! Starting in 2006, the EU Data Retention Directive required companies to collect and keep electronic communications data for

⁷⁰ For discussion, see Lemley, *Splinternet*, *supra* note 31.

⁷¹ *Data Retention Across the EU*, EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (Jul. 13, 2017), <https://fra.europa.eu/en/publication/2017/data-retention-across-eu>.

⁷² *See supra* note 58.

⁷³ The right to be forgotten furthers the more dubious purpose of allowing people to escape their past by not letting anyone find out about past misdeeds.

⁷⁴ Gmail, Parler, AutoAdmit, and (until recently) reddit all allow anonymous accounts that cannot be traced to IP addresses.

no less than 6 months and no more than 24 months.⁷⁵

The contradiction reflects two legitimate but opposing policy goals: Governments want to track people online for what they consider good purposes but don't want others to track people online for purposes we don't like.

Geoblocking. EU rules forbid various types of content that other countries permit, such as the sale of Nazi flags and memorabilia and access to truthful news stories challenged under the right to be forgotten. While European courts have tried at various points to impose those restrictions on the world at large,⁷⁶ they have generally not succeeded. Instead, they have settled for a regime in which Internet companies deliver different content and search results to European citizens than to Americans.⁷⁷ The EU was one of the first to require American Internet companies to engage in geoblocking—identifying the location of an Internet user and refusing to serve them certain data based on that location.⁷⁸ And the 2020 *Schrems* decision from the EU imposes geoblocking on a truly massive scale, striking down the US-EU Privacy Shield agreement and requiring that every company that communicates information about any EU citizen determine the geographic location of the recipient and ensure that the data isn't going to the US.⁷⁹ Geoblocking changes the Internet from a shared experience to one tailored to the laws and norms of any given country. That can sometimes be justified, but it can also be a way to foment censorship and dash the connective promise of the Internet.⁸⁰

⁷⁵ *Data Retention across the EU*, *supra* note 71. That requirement was modified by a CJEU decision in 2016, *Digital Rights Ireland*. Retention of data is now optional, not required, except in the UK. *See id.*

⁷⁶ *See* Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 145 F. Supp. 2d 1168 (N.D. Cal. 2001); Olivia Goldhill, *France is Now Censoring Your Google Search Results, Wherever You Are*, QUARTZ (Sept. 21, 2015), <https://qz.com/507040/france-is-now-censoring-your-google-search-results-wherever-you-are/>; *but see* Google LLC v. CNIL, 2019 EUR-Lex CELEX No. 62017CJ0507 (Sept. 24, 2019) (finding GDPR's Right to be Forgotten did not apply outside EU);

⁷⁷ *Glawischnig-Piesczek v. Facebook Ireland*, C18/18 (CJEU 2019).

⁷⁸ *Geo-Blocking*, EUROPEAN COMMISSION, <https://ec.europa.eu/digital-single-market/en/geoblocking>.

⁷⁹ *Data Protection Commissioner v. Facebook Ireland Ltd and Maximilian Schrems*, 2020 EUR-Lex CELEX No. 62018CJ0311 (July 16, 2020).

⁸⁰ Lemley, *Splinternet*, *supra* note 31; Peter Yu, *A Hater's Guide to Geoblocking*, 25 B.U. J. SCI. & TECH. L. 503 (2019).

Ironically, the EU, which was a leader in pushing geoblocking, was also the first government to seek to ban geoblocking, at least within Europe. The European Commission in 2018 forbade “unjustified geoblocking” of copyrighted or other online content.⁸¹ It did so in part to target price discrimination, but also to encourage free movement within the EU. Under this rule, companies had to allow users to access the content they could reach in their home country, even if they didn’t have copyright licenses that extend to transmission outside that home country, and can’t discriminate based on price.⁸² Geoblocking, then, is both required of US companies who wish to comply with EU law and potentially illegal when done to comply with national copyright rights in the EU.⁸³

As with data retention, geoblocking rules reflect legitimate but opposing goals: Governments want to tailor the regulation of the Internet to meet different national norms so it doesn’t simply default to the most restrictive national regime, but they don’t want any of the disadvantages of having their citizens treated differently than those in other countries.

Linking to news sites. Article 15 of the EU Digital Single Market directive, enacted in 2017, aims to direct more money from Internet companies to news sites.⁸⁴ The target of its ire is Google News, which uses algorithms to identify and link to news content that news organizations have voluntarily made available for free online. Google News copies the headline from those articles so users can see what

⁸¹ *Geo-Blocking*, *supra* note 78.

⁸² *Id.* For a discussion of the copyright issues, see Juha Vesala, *Geoblocking Requirements in Online Distribution of Copyright-Protected Content: Implications of Copyright Issues on Application of EU Antitrust Law*, 25 MICH. ST. INT’L L. REV. 595 (2017).

⁸³ The Court of Justice of the European Union annulled the Commission’s order in December 2020, but it did so on the basis that the order violated the principle of proportionality by nullifying existing contracts that drew geographic boundaries around licenses, leaving open the possibility that a prospective rule would be upheld. *Groupe Canal + v. European Commission*, 2020 C-132/19 P. And the Commission has fined gaming platforms for engaging in geoblocking even after the *Groupe Canal* decision. Wesley Yin Poole, *European Commission fines Valve and five publishers €7.8m for geo-blocking Steam games*, EUROGAMER, Jan. 20, 2021, <https://www.eurogamer.net/articles/2021-01-20-european-commission-fines-valve-and-five-publishers-7-8m-for-geo-blocking-steam-games>.

⁸⁴ Directive (EU) 2019/790, 2019 EUR-Lex CELEX No. 32019L0790 at Art. 15; *What is the New Copyright Directive About?*, EUROPEAN COMMISSION, https://ec.europa.eu/commission/press-corner/detail/en/MEMO_19_1151.

they are being linked to. Article 15 declares the use of the headline to identify the linked story to be an act of copyright (or possibly quasi-copyright) infringement.⁸⁵

Google makes no profit off Google News, which runs without the ads that power and monetize the rest of its site. So when the EU declared that a search engine linking to publicly-available news stories was an act of copyright infringement, Google complied with the new law, dropping its links to European news sites covered by the law.⁸⁶

The news sites that supposedly benefited from the new law were aghast. They almost all provide news content online for free, generating revenue from advertising on the site. And as much as half of the traffic on those news sites comes from Google News links.⁸⁷ Once Google complied with the new law, removing the headlines and news snippets, their site traffic—and their advertising revenues—dropped precipitously.⁸⁸

No problem. The European news organizations promptly went to court to get an order *requiring Google News to link to them*, even though that act was now—at their insistence—copyright infringement. And since it was copyright infringement, well, Google should have to pay for its (now required) act of infringement. The EU rule under article 15 is now “don’t use our stuff without paying, but you must use our stuff.” But it gets worse. Google entered into an agreement with news media to pay them for promoting their articles for free. Whereupon France decided that Google wasn’t paying *enough* money to the people who agreed to accept the pay-

⁸⁵ For criticism of the article at the time, see Lionel Bently et al., *Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive: A Study Commissioned by the European Parliament* (2017).

⁸⁶ Julia Horowitz, *Google Will Remove News Previews Rather than Pay News Publishers in Europe*, CNN (Sept. 25, 2019), <https://www.cnn.com/2019/09/25/tech/google-france-copyright-news/index.html>.

⁸⁷ Adam Sherk, *How Much Google News Traffic Do Publishers Get? Here’s Data on 80 News Sites*, ADAM SHERK (Dec. 9, 2014), <https://www.adamsherk.com/seo/google-news-traffic-for-news-sites/>.

⁸⁸ Abner Li, *Google Reveals 45% Traffic Decline to News Sites w/ Snippet-less Search Results Due to EU’s Article 11*, 9TO5GOOGLE (Feb. 6, 2019), <https://9to5google.com/2019/02/06/google-traffic-decline-eu-article-11/>. Article 11 was renumbered Article 15 in the final version of the European Copyright Law.

ment. French authorities held that Google was not only required to infringe copyrights and required to pay for doing so, but that not paying enough is an antitrust violation.⁸⁹ France fined Google \$593 million for not paying enough money and required them to negotiate a sweeter deal with the news organizations than the one those organizations had already agreed to.

Unlike the other contradictions I have discussed, this one isn't animated by legitimate interests on both sides. It is arguably "the dumbest shakedown in the history of dumb shakedowns."⁹⁰ It is, perhaps, motivated by the laudable goal of supporting news organizations, but it does so by demanding that they get to have their cake and eat it too. I include it here because it demonstrates most overtly what is actually behind a lot of the contradictions I have discussed—the desire to have the benefits of a regulatory policy without paying the costs.

II. IS THERE A WAY FORWARD?

What are we to make of these fundamental contradictions in basic efforts to regulate the Internet? Are contradictions inherent in the very idea of regulating the Internet? Does it mean we should give up the idea of regulation altogether?

I wouldn't go that far. But I do think the fact that serious efforts to regulate the Internet tend to contradict each other should make us wary about rushing into regulation. Real regulation of technology platforms is likely to require difficult tradeoffs, giving some people what they want but making things worse in other respects. Sometimes the right response to that is to forebear from regulation altogether. Other times regulation may be necessary, but we need to go into it with eyes open, understanding the harm it will likely cause. Finally, the nature of these tradeoffs, and the demand for contradictory things from platform regulation, may ironically point the way towards the kind of regulation we do need. I elaborate each of these points below.

A. *Don't Just Do Something! Stand There!*

Sometimes the contradictory nature of demands for platform regulation should

⁸⁹ See Gaspard Sebag, *Google Fined \$593 Million in French Warning to Pay for News*, BLOOMBERG LAW NEWS, July 13, 2021; Giuseppe Colangelo, *Enforcing Copyright Through Antitrust? A Transatlantic View of the Strange Case of News Publishers Against Digital Platforms* (working paper 2021).

⁹⁰ Said by George Clooney, in *Out of Sight* (Universal Pictures 1998).

cause us to step back and reconsider whether we need regulation at all. That is particularly true when the regulations don't just create tensions, but affirmatively demand that Internet platforms act in opposite ways.

Section 230. Section 230 reform is the best example here. Section 230 gives Internet platforms immunity from liability for content posted on their site by someone else. That gives those platforms the freedom to decide whether and to what extent they want to police content on their sites, and to do so in different ways. Some, like Facebook, ban nudity, try to weed out false factual claims on certain high-profile political issues, and demand that people post under their real names. YouTube, by contrast, allows nudity but not pornography.⁹¹ Others, like Twitter, impose some of the same limits but allow anonymous posting. Still others impose little or no restriction at all on what people (or bots) can say on their platforms.⁹² Section 230 allows companies to make those different choices.⁹³

Perhaps there is a “right” model of what should be allowed on the Internet, but if there is, we certainly haven't agreed on it as a society.⁹⁴ And even if we did agree, it isn't likely to be something the government itself could constitutionally implement outside of limited circumstances.⁹⁵ The fact that people want platforms to do

⁹¹ *Nudity & Sexual Content Policies*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2802002?hl=en>. The goal here is to allow nudity in educational but not salacious contexts, and to avoid some of the controversies Facebook ran into for banning pictures of women breastfeeding and the like. That seems a reasonable goal, though I wish them good luck drawing that line.

⁹² Parler is a notable example here, though at this writing it is mostly inaccessible.

⁹³ On the complexity of modern content moderation, see TARLETON GILLESPIE, *CUSTODIANS OF THE INTERNET* (2018).

⁹⁴ There may be broader consensus on certain restrictions on speech that go beyond what the law already prohibits. Congress amended section 230 to strip immunity from sites that were hosting sex trafficking, for instance. FOSTA/SESTA, 132 Stat. 1253 (2018). And perhaps there is a similar consensus against revenge porn. See Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014). But section 230 already denies immunity for criminal activity.

⁹⁵ *Reno v. ACLU* struck down portions of the Communications Decency Act that regulated offensive content online. 512 U.S. 844 (1997). Section 230 was also enacted as part of that Act, but wasn't challenged in *Reno v. ACLU*. The current Democratic proposal to strip section 230 immunity from certain forms of protected speech but not others (the SAFE TECH Act), Rebecca Kern, *Senate Democrats Renew Tech Liability Shield Overhaul Effort*, BLOOMBERG LAW NEWS, Feb. 5, 2021, seems constitutionally suspect to me, since it is at least content-based and likely viewpoint-based. See

fundamentally contradictory things is a pretty good reason we shouldn't mandate any one model of how a platform regulates the content posted there—and therefore a pretty good reason to keep section 230 intact.⁹⁶ As Eric Goldman notes, we already have—and use—an amazing array of different tools to moderate content to a greater or lesser extent.⁹⁷ That flexibility is a good thing.

Of course, that assumes that there will *be* different models. Many of the frustrations people feel about platform content regulation stem from the fact that a few platforms have enormous power over what people see and read. That power is indeed an issue; more on that below.⁹⁸ But I worry that even the more moderate pro-

Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 2021 J. FREE SPEECH L. 97 (2021); Christopher Yoo, *The First Amendment Rights of Common Carriers: Net Neutrality, Privacy, and Beyond*, 2021 J. FREE SPEECH L. 463 (2021); Daphne Keller, *Amplification and Its Discontents: Why Regulating the Reach of Online Content Is Hard*, 2021 J. FREE SPEECH L. 227, 259–60 (2021); Berin Szóka, *Antitrust, Section 230 & the First Amendment*, 2 CPI CHRONICLE 49 (Spring 2021). *But see* Eugene Volokh, *Treating Social Media Platforms as Common Carriers?*, 2021 J. FREE SPEECH L. 377 (2021) (suggesting that a must-carry law for content might be constitutional). *Cf.* Julie E. Cohen, *From Lex Informatica to the Control Revolution*, 36 BERKELEY TECH. L.J. ___ [draft at 9-10] (forthcoming 2022) (noting political shifts in who is willing to regulate speech based on changes in who deplatforming targets; “none of these arguments reckons adequately with underlying transformation in the structure of speech environments”).

⁹⁶ See Eric Goldman, *Dear President Biden: You Should Save, Not Revoke, Section 230*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3765247; Eric Goldman, *How the Latest Section 230 Proposal Could Reshape the Online Ecosystem*, RECORDER, Feb. 10, 2021 (arguing that enacting restrictions like the SAFE TECH Act will discourage the posting of user-generated content). *Cf.* Ashutosh Bhagwat, *The Law of Facebook*, 54 U.C. DAVIS L. REV. 2353 (2021) (pointing to tensions between privacy and content moderation and arguing that the contradictions suggest a hands-off attitude towards Facebook altogether).

Others have suggested different, more modest changes to section 230. Congress enacted a limited exemption in 2018 that creates liability for sites that promote sex trafficking. Stop Enabling Sex Traffickers Act, codified at 47 U.S.C. §230. Greg Dickinson would target Internet companies that actually generate content rather than hosting content produced by someone else. Gregory M. Dickinson, *Rebooting Internet Immunity*, 89 GEO. WASH. L. REV. 347 (2021). My view is that section 230 already draws the distinction he suggests. But a further discussion of these narrower proposals is beyond the scope of this article.

⁹⁷ Eric Goldman, *Content Moderation Remedies*, ___ MICH. TECH. L. REV. ___ (forthcoming 2021) (documenting “dozens of remedies that Internet services have actually imposed” and explaining how different responses balance competing interests differently).

⁹⁸ See *infra* notes in II.C.

posals to limit section 230 immunity will end up entrenching rather than undermining the power of incumbent networks. Facebook and Google already employ tens of thousands of people full time reviewing content.⁹⁹ Changes in the law might force them to employ more. But no new competitor is likely to be able to match that number. A law that requires them to do so makes it harder to break into the already-concentrated tech markets.

Newspaper link tax. The European newspaper link tax is another example where the self-contradictory nature of the proposed regulations indicate that regulation is not a good idea at all. The fact that Europe felt the need to change copyright law to declare it illegal to link to a public web page, and then to demand that Google do the very thing it has just declared illegal so that it could force Google to pay for the privilege, strongly suggests that the point of this regulation wasn't to enforce copyrights at all. Europe wanted to transfer money from tech companies (which have it) to news media. That might or might not be a desirable goal. But it is properly the goal of a tax system, not a justification for creating a new regulation and then demanding that tech companies (1) violate that new regulation and (2) pay the price for that mandatory violation.

It is also likely to be counterproductive if the goal is to promote high-quality traditional media. Arguably the biggest problem with online news is the “clickbait” nature of headlines. An advertising-based system rewards impressions, and lurid, outlandish, often misleading headlines draw the most impressions. A tax based on click-throughs to “news” sites is likely to reward those who write the most click-bait-y headlines, not those who do the most serious reporting. This will make the problem worse, not better.

In both cases, those behind these regulations may or may not have legitimate interests in getting tech companies to behave differently. But the contradictory nature of their approaches suggests regulation is not the way to achieve those interests.

B. Tough Choices

Not all contradictory platform regulation proposals offer good reason to reject regulation altogether, however. Sometimes the contradictions in platform regulation proposals reflect, not the futility or absurdity of the idea of regulation, but the

⁹⁹ April Glaser, *Want a Terrible Job? Facebook and Google Might be Hiring*, SLATE (Jan. 18, 2018), <https://slate.com/technology/2018/01/facebook-and-google-are-building-an-army-of-content-moderators-for-2018.html>.

fact that regulating complex industries like online intermediaries involves tough policy tradeoffs. Sometimes there are good policy arguments on both sides. But the contradictions of these regulatory proposals mean that we can't just say "regulate" and get the best of all possible worlds. We need to choose one benefit at the expense of the other, or balance the two, accepting, for instance, less privacy in order to have more competition or vice versa.

The debate over encryption and government access to data is a good example of these tradeoffs. Governments have legitimate (though also illegitimate) reasons to want to access private data in the hands of individuals and tech platforms. But those platforms and their users also have good reason to want secure encrypted communications. We can't have both. The more we weaken encryption with limits, backdoors, or chokepoints, the easier it is for law enforcement to get the information it wants—but the easier it is for hackers to do the same. If we want the strongest possible cybersecurity, we need to accept that that means that no one—including law enforcement—may have access to encrypted data and communications. If we want more effective law enforcement tools, by contrast, we need to accept that we are making it easier for hackers to get access to our sensitive data, either from the user themselves or from the central government collection points. We might choose one side or the other, but there are also many different places in between we could strike the balance.

Data retention reflects a similar tradeoff. The European Union doesn't want companies to keep too much data about their customers for too long, because they fear the privacy intrusion reliance on that data will entail. But they also want tech companies to keep the same data so they can access it for law enforcement purposes. The result has been a curious compromise in which companies are required to keep data for a certain period but forbidden from keeping it for much longer.¹⁰⁰ That doesn't fully satisfy the interests of law enforcement or the interests of privacy advocates. But given that they want incompatible things, it might be the best compromise possible.

In other circumstances, compromise may not be possible, and regulators will have to choose among competing policy goals. I think this is likely true of data monopolies and the advertising market. There are reasons to think those markets are being monopolized, resulting in a less competitive advertising market and higher

¹⁰⁰ See *supra* note 75 and accompanying text.

prices to advertisers and giving incumbents a structural advantage over those who lack access to users' personal data. That seems something we might want to correct. But doing so would make other problems worse. Advertisers could place ads more cheaply in a competitive market, but that would probably mean passing less money on to news organizations and others who depend on that revenue (and who have been behind things like Europe's newspaper link tax).¹⁰¹ To be fair, a competitive market might reduce the intermediary charge a Google or Facebook can take, potentially allowing cheaper advertising rates without reducing how much gets passed on to the sites where the advertising is placed. On the other hand, in a competitive intermediary placement market each intermediary would have less information with which to effectively target ads, reducing their efficacy and therefore the revenue they would generate.¹⁰² Predicting which of these effects would predominate is hard.

Breaking up data monopolies presents a clearer choice. Today we have a few dominant companies who know us intimately and can deliver us the information (and ads) we want. But we are beholden to them. We could solve the dominance problem by mandating the sharing of our data, perhaps introducing effective competition in the platform market but also reducing our privacy significantly by allowing many different companies to know everything about us.¹⁰³ Allowing what some have called "adversarial interoperability"¹⁰⁴ would permit the development of effective competitors to companies like Facebook, for instance, by requiring it not to close off its APIs to potential competitors,¹⁰⁵ allowing consumers to port their

¹⁰¹ Directive (EU) 2019/790, 2019 EUR-Lex CELEX No. 32019L0790 at Art. 15.

¹⁰² It's hard to know how much better contextual advertising is than the traditional, untargeted kind; studies point in different directions. But the Internet has made hundreds of billions of dollars on the belief that it is.

¹⁰³ See *supra* note 50 (citing proposals for such forced sharing).

¹⁰⁴ Thomas Kadri, *Digital Gatekeepers*, 99 TEX. L. REV. 951 (2020); Cory Doctorow, *Adversarial Interoperability: Reviving an Elegant Weapon from a More Civilized Age to Slay Today's Monopolies*, ELECTRONIC FRONTIER FOUND. (Jun. 7, 2019), <https://www.eff.org/deeplinks/2019/06/adversarial-interoperability-reviving-elegant-weapon-more-civilized-age-slay>. See also Thomas E. Kadri, *Platforms as Blackacres*, 68 UCLA L. REV. ___ (forthcoming 2021) (arguing that public websites should not be able to impose contractual restrictions on public access to their data).

¹⁰⁵ For an argument along these lines, see Michael Kades & Fiona Scott Morton, *Interoperability as a Competition Remedy for Digital Networks* (working paper Sept. 2020); Fiona M. Scott Morton & David C. Dinielli, *Roadmap for an Antitrust Case Against Facebook*, OMIDYAR NETWORK, June

data to other platforms.¹⁰⁶ But doing so would mean less privacy, as more companies obtained our data and competed to use and sell.¹⁰⁷

Alternatively, we could prevent incumbents from selling or sharing our data with third parties, protecting what privacy we have left but ensuring that the incumbents have a major advantage over any challengers. Favoring privacy may mean less competition, locking in the incumbent tech companies indefinitely.¹⁰⁸

Or we could—perhaps—prevent the incumbents from using the information they already have about us, enhancing privacy and perhaps even leveling the playing field, but at the cost of making their products far less useful to us (and, as just noted, reducing revenues to sites like news organizations that depend on their targeted advertising platforms).¹⁰⁹ I have preferences among these options;¹¹⁰ others might have different preferences. But they all involve difficult choices, and we can't all get what we want.

C. *The Outsized Footprint of Tech Giants*

Finally, I think there are lessons to be learned from thinking about *why* there

2020, at 24–25, <https://www.omidyar.com/wp-content/uploads/2020/06/Roadmap-for-an-Antitrust-Case-Against-Facebook.pdf>. The FTC's antitrust case against Facebook is based on part on its selective refusal to open APIs to companies it views as a competitive threat. Complaint, FTC v. Facebook Inc., No. 1:20-cv-03590 (D.D.C. filed Dec. 9, 2020).

¹⁰⁶ The European GDPR, which in general strengthens consumer privacy protections, also gives consumers a right to data portability. GDPR Article 20, recital 68. That is a good idea, but it is not one that is going to reduce the access tech platforms have to consumer data. Quite the contrary. For a discussion of the competition law effects of the right to data portability, see Michal S. Gal & Oshrit Aviv, *The Competitive Effects of the GDPR*, 16 J. COMP. L. & ECON. 349 [draft at 25] (forthcoming 2020).

¹⁰⁷ See Hurwitz, *supra* note 60, [draft at 1054-55]. Kadri argues that some privacy regulation can nonetheless work under an interoperability regime, with states imposing limits on the uses competitors make of the data they obtain. Kadri, *supra* note 104.

¹⁰⁸ Michal Gal, *Do Our Privacy Laws Strengthen the Already Strong?*, CONCURRENTIALISTE (Mar. 9, 2021), <https://leconcurrentialiste.com/gal-privacy-competition>; Gal & Aviv, *supra* note 106, at 30 (“limitations on data sharing may reduce competition and lead to more concentrated market structures.”) (emphasis in original); Noah Joshua Phillips, *Should We Block This Merger? Some Thoughts on Converging Antitrust and Privacy* (speech given Jan. 30, 2020 at Stanford Law School) (noting that Google's effort to block third-party cookies is good for privacy but bad for competition).

¹⁰⁹ For a discussion of these tensions, see Douglas, *supra* note 57.

¹¹⁰ See *infra* section II.C.

are so many contradictory efforts to regulate big tech. The answer, I think, has to do with the outsized role these companies play in our lives. They are private companies, but for most people their decisions may as well be government mandates, given the lack of control we have over them.¹¹¹ Yes, you can quit Facebook and Instagram, or decide to use DuckDuckGo rather than Google for all your searches. Maybe you can avoid both Apple and Google, though that probably means you won't have a smartphone.¹¹² But making those choices means making fundamental alterations in your lifestyle.¹¹³ The dominant tech firms are private companies, but they have been so dominant for so long that they feel more like institutionalized monopolies, the kind we used to regulate as public franchises. And so people who don't like the way they do something naturally react by thinking not "I'll switch to an available alternative in a competitive market" but "someone should do something, and the government is the only one who can." And that means that whatever people want from tech giants, they increasingly turn to regulation to get it.

That's not good. We treat private companies differently than governments precisely because we think markets give consumers choice and the risk of consumer exit gives companies an incentive to respond to consumer demands. When that isn't true for some structural reason, as with natural monopolies, we generally declare the company a public franchise, give it exclusive rights to provide a particular service, and subject it to price and quality regulation. That seems to be the rationale for many, though not all, of the proposed regulations of the tech industry.

But public franchise regulation should be a last resort, for a number of reasons. First, governments aren't very good at promoting efficient and cheap products, and cost-plus regulation often leads to bloat in regulated industries.¹¹⁴ Further, regulated industries tend to rest on their laurels, insulated from competitive threats and

¹¹¹ Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, pt. III (2018) (describing the control intermediaries have over what we can post and see).

¹¹² The collective global market share of all non-Apple, non-Google/Android phones is well less than 1%. *Mobile Operating System Market Share Worldwide*, STATCOUNTER GLOBAL STATS, <https://gs.statcounter.com/os-market-share/mobile/worldwide> (June 2021 data).

¹¹³ Kashmir Hill, *I Tried to Live Without the Tech Giants. It Was Impossible*, N.Y. TIMES, July 31, 2020.

¹¹⁴ David Newbery, *Rate-of-Return Regulation versus Price Regulation for Public Utilities*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 3 (1998); Byron E. Fox & Henry C. Su,

unlikely to reap extra profits for innovating. Regulated industries from telephones to electric power to taxicabs spent decades making few significant improvements to their products until they were deregulated or faced outside competitive threats.¹¹⁵ Regulations are also subject to industry capture, with the regulators benefiting the very industries they are supposed to scrutinize.¹¹⁶ And once government creates a comprehensive set of regulations for an industry, it makes it harder for others to break into that industry, since they don't have the experience dealing with those complex regulations.¹¹⁷

Many of the industries we viewed as natural monopolies in a prior era (including telephones, airlines, railroads, and even electric power generation) turned out to be potentially competitive markets.¹¹⁸ But regulation tends to perpetuate itself even when competition becomes feasible. And regulation imposes significant costs. That's not to say there is no room for traditional public franchise regulation. There is, just as there are services (education, police, etc.) best provided by the government rather than private parties. But we should treat an industry as a public franchise only if we really have no other choice.

A better alternative is to try to inject real competition into a tech industry that has been lacking it in recent years. Andrew McCreary and I have made one suggestion along these lines: Make it harder for incumbents to buy startups that might otherwise grow into competitive threats.¹¹⁹ But if the goal is to open tech markets

Franchise Regulation—Solutions in Search of Problems?, 20 OKLA. CITY U. L. REV. 241 (1995); Oliver E. Williamson, *Franchise Bidding for Natural Monopolies—in General and with Respect to CATV*, 7 BELL J. ECON. 73 (1976).

¹¹⁵ See generally Mark A. Lemley & Mark P. McKenna, *Unfair Disruption*, 100 B.U. L. REV. 71 (2020); Stacey L. Dogan & Mark A. Lemley, *Antitrust Law and Regulatory Gaming*, 87 TEX. L. REV. 685 (2009).

¹¹⁶ Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POLICY 203 (2006); Michael Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J. L. ECON. & ORG. 167 (1990). That is a particular risk when the processes by which those industries operate are complex and opaque, as is true of tech platforms. See Cohen, *supra* note 95, [draft at 21]. Regulators in that context may have little choice but to rely on the expertise of the very companies they are regulating

¹¹⁷ Lemley & McKenna, *supra* note 115, at pt. III.

¹¹⁸ Thomas J. DiLorenzo, *The Myth of Natural Monopoly*, 9 REV. AUSTRIAN ECON. 43 (1996); Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548 (1969).

¹¹⁹ See Lemley & McCreary, *supra* note 6. See also Geoffrey Parker, Georgios Petropoulos &

to competition so that competition can obviate the need for much proposed regulation, more will be required, at least in the short term.

This suggests that when we face hard policy choices, we should generally come down on the side of competition and interoperability that can open markets to new competitors rather than conduct-related regulation that entrenches incumbents and makes it harder for newcomers to compete.¹²⁰ That means favoring antitrust enforcement that demands structural separation, or at least imposes nondiscrimination rules on self-dealing by vertically integrated monopolists,¹²¹ over efforts to lock in data monopolies to protect privacy or mandate supracompetitive payments to newspapers and the like. It means favoring interoperability at the expense of privacy, turning away contract and Computer Fraud and Abuse Acts claims that dominant sites have used to prevent third parties from offering products or services that interconnect with dominant firm sites¹²² and perhaps using antitrust or other tools

Marshall Van Alstyne, *Platform Mergers and Antitrust* (working paper 2021) (making a similar argument); Steven C. Salop, *Dominant Digital Platforms: Is Antitrust Up to the Task?*, 130 YALE L.J. FORUM 563 (2021).

¹²⁰ For arguments in favor of requiring interoperability, see Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. ___ (forthcoming 2021); Kadri, *supra* note 89; Kades & Morton, *supra* note 105; Harry First & Eleanor M. Fox, *We Need Rules to Rein in Big Tech*, CPI ANTITRUST CHRON., Oct. 27, 2020, at 5. For more skeptical views, see Hurwitz, *supra* note 60. For an argument that the development of middleware through open APIs is an important step to resolving problems of platform content moderation as well as market power, see Francis Fukuyama et al., REPORT OF THE WORKING GROUP ON PLATFORM SCALE 30–31, 37 (Stanford Program on Democracy and the Internet 2020).

¹²¹ Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973 (2019). The problem of discriminatory refusals to deal by vertically integrated monopolists is particularly stark when the monopolist excludes access to a competitor. Apple, for instance, has made it difficult for competing music services like Spotify to run on its phones, and has banned “side-loading” altogether, requiring that all apps on the phone be sold through the app store, taking a whopping 30% of all their revenue, and refusing to allow apps that might circumvent that monopoly. Complaint, *Epic Games v. Apple Inc.*, No. 4:20-cv-05640-YGR, ¶ 3 (N.D. Cal. Filed Aug. 13, 2020); see also Seth Schiesel, *Apple Rejects Facebook’s Gaming App, for at Least the Fifth Time*, N.Y. TIMES, Jun. 18, 2020; Geradin & Katsifis, *supra* note 42.

¹²² *E.g.*, *Facebook v. Power Ventures*, 844 F.3d 1058 (9th Cir. 2016); Jonathan Mayer, *Cyber-crime Litigation*, 164 U. PA. L. REV. 1453 (2016). More recently, courts have declined to apply the CFAA to crawling of a public web page in violation of terms of service. *HiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985 (9th Cir. 2019); *Sandvig v. Barr*, 451 F. Supp. 3d 73 (D.C. Cir. 2020). The Supreme Court significantly cut back on abuse of the CFAA this term in *Van Buren v. United States*,

to force interoperability.¹²³ It likely means opposing geoblocking and the effort to splinter the Internet along national lines, since incompatible national networks are easier for governments to control and less likely to face effective competition.¹²⁴ And it means preserving laws that give tech companies the freedom to decide what content to allow on their site over alternatives that either mandate detailed scrutiny of content or forbid that scrutiny and treat tech platforms like government actors.¹²⁵ Those laws protect content decisions, but they arguably should not extend to anti-competitive acts designed to block a competitor from interconnection.¹²⁶

These are, as I noted above, hard choices. Privacy advocates, newspapers, and

593 U.S. ___ (2021). And one court allowed a third party to proceed with a claim that it was allowed to collect data from Facebook despite Facebook's terms of service. *Facebook v. BrandTotal Ltd.*, No. 20-CV-07182-JCS, 2021 WL 2354751 (N.D. Cal. June 9, 2021).

Without terms of service and CFAA laws standing in the way, social media companies could help users port their friends and history to a new platform, making competing platforms more realistic. Charles Duan, *Hacking Antitrust: Competition Policy and the Computer Fraud and Abuse Act*, 19 COLO. TECH. L. J. (working paper Oct. 2020); Mike Masnick, *Protocols, Not Platforms: A Technological Approach to Free Speech*, KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIV. (Aug. 21, 2019), <https://knightcolumbia.org/content/protocols-not-platforms-a-technological-approach-to-free-speech>; Corynne McSherry, *Want More Competition in Tech? Get Rid of Outdated Computer, Copyright, and Contract Rules*, ELECTRONIC FRONTIER FOUND., <https://www EFF.ORG/deeplinks/2018/12/want-more-competition-tech-get-rid-outdated-computer-copyright-and-contract-rules>; Kadri, *Blackacres*, *supra* note 104.

¹²³ Chinmayi Sharma, *Concentrated Digital Markets, Restrictive APIs, and the Fight for Internet Interoperability*, 50 U. MEMPHIS L. REV. 441 (2019); Bennett Cyphers & Cory Doctorow, *Privacy Without Monopoly: Data Protection and Interoperability*, ELECTRONIC FRONTIER FOUND. (2021). For an argument that interoperability is necessary but not sufficient to open tech markets to competition, see Cory Doctorow, *Tech Monopolies and the Insufficient Necessity of Interoperability*, LOCUS (July 5, 2021), <https://locusmag.com/2021/07/cory-doctorow-tech-monopolies-and-the-insufficient-necessity-of-interoperability/>.

¹²⁴ Lemley, *Splinternet*, *supra* note 31.

¹²⁵ In addition to central control, we should also worry about the problem of coordination among tech platforms—what Evelyn Douek calls “content cartels.” Evelyn Douek, *The Rise of Content Cartels*, KNIGHT FIRST AMENDMENT INST. AT COLUMBIA UNIV. (Feb. 11, 2020), <https://knightcolumbia.org/content/the-rise-of-content-cartels>. Competition is not a sufficient solution to the problem of centralized regulation of content. But it may be a necessary one.

¹²⁶ Thus, I take the unpopular (among Internet academics) position that the Ninth Circuit was right to exclude anticompetitive exclusion from the scope of section 230. See *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir. 2019).

both the people who want more content removals on the Internet and those who want less all have reasons for their policy preferences. And there may be ways to achieve some of those goals (like strengthening consumer privacy rights or funding local newspapers) directly, without using the regulation of tech companies to achieve that goal. But in the long run, regulatory choices that impose obligations on incumbents to do the things we want them to do as a matter of social policy are likely to entrench those incumbents, making it harder and more costly for someone to compete with them and eliminating the possibility of competing by offering a different set of policies.¹²⁷ Effective antitrust enforcement that opens tech markets to competition may, by virtue of that competition, get people many of the things they seek today from regulation—a choice of Internet platforms with more privacy versus more free services, more content restrictions versus less, etc. It may also reduce the perceived need for regulation because consumers will have more choice and therefore more voice. The reverse will not be true. If we lock in detailed policy requirements for privacy, content regulation, linking to newspapers, and many more things, we are likely resigning ourselves to a long reign of continued dominance by the current incumbents, and a future of governments deciding what those dominant firms can and can't offer. That is something we should avoid if we can. Conversely, a warning to tech companies: if we can't promote effective competition through interoperability, detailed, often contradictory regulation may be the alternative.

CONCLUSION

Tech platforms have an enormous influence on our lives, and they are not much constrained by competition today. Those facts have led to calls for their regulation from across the political spectrum. Many of those calls demand contradictory things, a sign that we increasingly want tech regulation (and tech platforms) to be all things to all people. Regulation can't serve that need. At a minimum, regulating the tech industry will require hard choices between competing goals.

But it may also suggest that our instinct that regulation will solve the problems with the tech industry is misguided. Regulation seems like the only option we have because competition hasn't been a realistic option in the tech industry of late. It is

¹²⁷ Cory Doctorow, *Regulating Big Tech Makes Them Stronger, So They Need Competition Instead*, *ECONOMIST*, June 6, 2019. Notably, Facebook has affirmatively asked to be regulated. See *Facebook Supports Updated Internet Regulations*, *N.Y. TIMES*, Sept. 12, 2020, at A28 (full-page ad by Facebook).

that latter problem we need to solve. A focus on reintroducing competition into tech platforms will obviate the need for some regulation altogether, and it should guide us in deciding how to make the tough choices that tech platform regulation entails.