DEBUNKING THE "BIG IS BAD" BOGEYMAN

HOW FACEBOOK BENEFITS CONSUMERS

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"Ever since Congress overwhelmingly passed and President Benjamin Harrison signed the Sherman Act in 1890, 'protecting consumers from monopoly prices' has been 'the central concern of antitrust.'" [1]

Not quite. Although that more or less captures today's understanding of Congress's landmark legislation, it sweeps decades of muddled thinking about antitrust under the rug. Truth is, the federal government and the United States Supreme Court struggled to apply the Sherman Act for nearly 80 years. During that time, neither had a sound method for uncovering unlawful business practices. So they relied instead on their gut instinct—that big is bad.[2] As it turns out, that I-know-it-when-I-see-it approach led to scattershot enforcement decisions and astonishing results like higher prices and fewer goods for consumers.[3]

That all changed in the 1970s. Led primarily by the Chicago School of Economics and Robert Bork, economists persuaded the government, courts, scholars, and practitioners that antitrust laws should be rooted in empirical evidence.[4] After some finetuning, that idea became a bipartisan agreement: Antitrust laws should protect consumers and the benefits they receive from a competitive marketplace—lower prices, higher-quality goods, innovative products, increased productivity, and so on.[5]

Known as the "consumer welfare standard," this understanding still enjoys widespread support today.[6] But that support is not universal. As the United States grapples with growing concerns over headline issues like income inequality, a movement for a new approach is brewing.[7]

[1] Apple, Inc. v. Pepper, 139 S. Ct. 1514, 1525 (2019) (citation omitted).
[2] *Id.* at 299.
[3] *Id.* at 300.
[4] *Id.* at 303-05.
[5] *Id.* at 364.
[6] Wright, *supra* note 2, at 308; see also John Kwoka, *Mergers, Merger Control, and Remedies 1* (2015); Michael Vita & F. David Osinski, *John Kwoka's Mergers, Merger Control, and Remedies: A Critical Review, 82 Antitrust* L.J. 361, 362–63 (2018).
[7] *See*, e.g., Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 Geo. L.J. Online 1, 24 (2015) ("[A]ntitrust law and regulatory agencies could address inequality more broadly by treating the reduction of inequality as an explicit antitrust goal."), https://scholarship.law.georgetown.edu/facpub/1462/.

Except the approach isn't new. It's a return to the antitrust "doctrines" of yesteryear—when the government thought big is bad, small is good, and inefficiency and higher prices are sometimes worth it ("it" often left undefined).[8] To be sure, some scholars would tweak the old approach here and there.[9] At bottom, though, they'd have the government return to using the blunt instrument of antitrust enforcement to pursue policy goals beyond protecting consumers. This approach has even seeped into the political arena, catching the eye of the contemporary left and the populist right.[10]

But this new-old approach is still an outlier. So much so that it's been derisively dubbed "Hipster Antitrust."[11] (More charitably, it might be called "Neo-Brandeisian Antitrust," after Supreme Court Justice Louis Brandeis, who believed big really was bad.)[12] Whatever the name, it comes with considerable baggage: decades-worth of evidence and experience proving that the consumer welfare standard works remarkably well.

Savvy sympathizers of the movement realize this. Rather than call for full-scale reform, they market

[8] *See Wright, supra* note 2, at 299-302.
[9] *See, e.g.*, Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710 (2017), https://www.yalelawjournal.org/note/amazons-antitrust-paradox.
[10] Daniel A. Crane, *Antitrust's Unconventional Politics*, 104 Va. L. Rev. Online 118, 118 (2018) ("To the bewilderment of many observers, the ascendant pressures for antitrust reforms are flowing from both wings of the political spectrum, throwing into confusion a conventional understanding that pro-antitrust sentiment tacked left and antitrust laissez faire tacked right."), https://www.virginialawreview.org/volumes/content/antitrusts-unconventional-politics.
[11] Ganesh Sitaraman, *Unchecked Power: How Monopolies Have Flourished—and Undermined Democracy*, The New Republic (Nov. 29, 2018), https://newrepublic.com/article/152294/unchecked-power.
[12] Kristian Stout, *Big Tech and the Regressive Project of the Neo-Brandeisians*, Law & Liberty (June 1, 2020), https://lawliberty.org/forum/big-tech-and-the-regressive-project-of-the-neo-brandeisians/.

their ideas as mere "updates" to antitrust doctrine.[13] Even savvier scholars claim their desired policy goals are achievable under existing doctrine—no changes necessary.[14] But with just a little digging, their shallow treatment of case law and shoehorning of evidence gives it all away: their arguments rest on substituting "social welfare" (as they envision it) for "consumer welfare" and "subjective" for "standard."[15] These scholars are also able to advance their big-is-bad thinking under the cloak of reasonableness—the louder and more radical their peers are, the more moderate their ideas seem.

Such is the case in a series of recent papers written by Fiona M. Scott Morton and David C. Dinielli.[16] The duo has so far published three under the title "Roadmap for an Antitrust Case Against . . ." Google, Facebook, and Google again.[17] As I explained last month in a response to their first paper against Google, there is no antitrust case against either company.[18] This paper, though, focuses solely on debunking Scott Morton and Dinielli's claims that Facebook is a monopoly and that it harms users, advertisers, and publishers. It instead shows the opposite to be true: Facebook faces fierce competition.

[13] See, e.g., Kevin Caves & Hal Singer, *When the Econometrician Shrugged: Identifying and Plugging Gaps in the Consumer Welfare Standards*, 26 Geo. Mason L. Rev. 395, 396 (2018) (advocates for "innovation-based" theories of harm to "plug" gaps left by the consumer welfare standard), http://georgemasonlawreview.org/wp-content/uploads/2019/10/3.-CavesSinger_Final.pdf; C. Scott Hemphill & Nancy L. Rose, *Mergers That Harm Sellers*, 127 Yale L.J. 2078, 2091 (2018) (arguing that, when it comes to monopsony harms, a "trading partner welfare" standard should be used), https://www.yalelawjournal.org/pdf/HemphillRose_m2dfkbhr.pdf; Suresh Naidu, Eric A. Posner & E. Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 Harv. L. Rev. 536, 587 (2018) (arguing that, in merger reviews, a "worker welfare" standard should be used instead of the consumer welfare standard), https://harvardlawreview.org/wp-content/uploads/2018/12/536-601_Online.pdf.

[14] *See, e.g., Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt: Hearing Before the Subcomm. on Antitrust, Competition & Consumer Rights of the U.S. Comm. on the Judiciary*, 115th Cong. 8 (2017), https://www.judiciary.senate.gov/imo/media/doc/12-13-17%20Moss%20Testimony.pdf (statement of Diana Moss, President, American Antitrust Institute).

[15] *See infra* Part II.

[16] Fiona M. Scott Morton & David C. Dinielli, *Roadmap for a Digital Advertising Monopolization Case Against Google*, Omidyar Network (May 2020) https://www.omidyar.com/sites/default/files/Roadmap%20for%20a%20Case%20Against%20Google.pdf; Fiona M. Scott Morton & David C. Dinielli, *Roadmap for an Antitrust Case Against Facebook*, Omidyar Network (June 2020), https://www.omidyar.com/sites/default/files/Roadmap%20for%20an%20Antitrust%20Case%20Against%20Facebook.pdf; Fiona M. Scott Morton & David C. Dinielli, *Roadmap for a Monopolization Case Against Google Regarding the Search Market*, Omidyar Network (June 2020), https://www.omidyar.com/sites/default/files/Roadmap%20for%20a%20Monopolization%20Case%20Against%20Google%20Regarding%20the%20Search%20Market.pdf.

[17] For clarity, this article will use "*Roadmap*" to reference Scott Morton and Dinielli's *Roadmap for an Antitrust Case Against Facebook*. See Fiona M. Scott Morton & David C. Dinielli, *Roadmap for an Antitrust Case Against Facebook*, Omidyar Network (June 2020), https://www.omidyar.com/sites/default/files/Roadmap%20for%20an%20Antitrust%20Case%20Against%20Facebook.pdf.

[18] Christopher Marchese, *Is Google Search an Advertising Goliath? Think Again—Competition in Digital Advertising is Strong & Growing Stronger*, NetChoice (June 2020), https://netchoice.org/googlenotgoliath/

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SETTING THE SCENE

THE SOCIAL NETWORK

In 2004, Mark Zuckerberg and other Harvard students launched TheFacebook.[19] The platform initially allowed only Harvard students to join.[20] But within a year, TheFacebook dropped the the and opened to students from other colleges.[21] By 2006, Facebook was open to anyone 13 or older with an email address.[22] Today, roughly two-thirds of Americans have joined the site, as have 2 billion people worldwide.[23]

Safe to say, Facebook is the social network—at least for now. Even as the platform attracts billions of users, adapts to changing consumer tastes, innovates and improves, Facebook faces fierce competition.[24] It is neither as dominant as its critics claim, nor as safe as it would prefer.[25] The platform that has attracted nearly 70% of Americans has also seen younger Americans jump to competitors.[26] The platform that has made billions in advertising revenue has also seen those advertisers boycott it.[27] And the platform that was once heralded as an American success story has also been raked over the coals by American politicians.[28]

Facebook's founding motto was "move fast and break things."[29] That it did. The platform quickly expanded from the elite halls of Harvard to the American mainstream.[30] In doing so, it broke MySpace's dominance in social

[19] History.com Editors, *Facebook Launches* (last updated Oct. 24, 2019), https://www.history.com/this-day-in-history/facebook-launches-mark-zuckerberg.
[20] *Id.*
[21] Mark Hall, *Facebook*, Encyclopedia Britannica (May 29, 2019), https://www.britannica.com/topic/Facebook.
[22] *Id.*
[23] Sarah Aboulhosn, *18 Facebook Facts Every Marketer Should Know in 2020*, Sprout Social (May 4, 2020), https://sproutsocial.com/insights/facebook-stats-for-marketers/.
[24] *See infra* Part II.
[25] *See* Facebook, Inc., Form 10-K for FY Ended Dec. 31, 2019, 7 ("We face significant competition in every aspect of our business, including from companies that facilitate communication and the sharing of content and information, companies that enable marketers to display advertising, companies that distribute video and other forms of media content, and companies that provide development platforms for applications developers.). http://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/45290cc0-656d-4a88-a2f3-147c8de86506.pdf (last accessed July 2, 2020).
[26] *See* Mary Hanbury, *Gen Z Says Facebook is the Number One Social-Media Platform They've Abandoned*, Bus. Insider (July 8, 2019), https://www.businessinsider.com/gen-z-abandons-facebook-kik-skype-survey-2019-7; Matt Rosoff, *Facebook Exodus: Nearly Half of Young Users Have Deleted the App From Their Phone in the Last Year, Says Study*, CNBC (Sept. 5, 2018), https://www.cnbc.com/2018/09/05/facebook-exodus-44-percent-of-americans-age-18-29-have-deleted-app.html.
[27] Nancy Scola, *Inside the Ad Boycott That Has Facebook on the Defensive*, Politico Magazine (July 3, 2020), https://www.politico.com/news/magazine/2020/07/03/activists-advertising-boycott-facebook-348528; see also Rick Santorum, *Why Corporations Should Not Bow to the Mob*, Spectator USA (July 2, 2020), https://spectator.us/dont-bow-mob-advertisers-pressuring-social-media-censor-conservatives/.
[28] *See, e.g.*, Pete Schroeder, *Facebook's Zuckerberg Grilled in U.S. Congress on Digital Currency, Privacy, Elections*, Reuters (Oct. 23, 2019), https://www.reuters.com/article/us-facebook-congress/facebooks-zuckerberg-grilled-in-u-s-congress-on-digital-currency-privacy-elections-idUSKBN1X2167.
[29] Samantha Murphy, *Facebook Changes Its "Move Fast and Break Things" Motto*, Mashable (Apr. 30, 2014), https://mashable.com/2014/04/30/facebooks-new-mantra-move-fast-with-stability/.
[30] Hall, *supra* note 21.

networking—a feat once thought unimaginable.[31] And it broke the comfortable channels of news, commentary, and thought that traditional media, and the political class reliant on it, controlled.

Facebook gave all Americans a stage, a microphone, and an audience, all the while connecting those Americans to their friends and family, matching consumers with businesses large and small, and mixing silly with serious, professional with personal. It became, in other words, whatever each of us wanted it to be.

With the decades-old status quo extinguished, Facebook forever changed how we interact online. But despite all this breaking—of limits, expectations, possibilities—Facebook could not break one truism in technology: innovation and the competition it unleashes are always lurking, be it in a spare garage in Silicon Valley, the halls of Harvard, or a bookstore that once had no brick-and-mortar stores.

Facebook faces pressure from outside the marketplace, too. Like its competitors, Facebook finds itself in the crosshairs of this decade's culture wars.[32] The left criticizes the platform for not removing enough content that it believes is dangerous to American democracy[33]; the right says the opposite, that it removes too much content and that any such censorship undermines American values like free speech.[34] Implicit in both criticisms is a recognition of Facebook as an institutional force that needs to be reckoned with, lest it (i.e., its users) continue to compete with society's gatekeepers (e.g., traditional media, the political class, elites).

[31] *See* Victor Keegan, *Will MySpace Ever Lose Its Monopoly?*, Guardian (Feb. 8, 2007); Ryan Bourne, *Is This Time Different? Schumpeter, the Tech Giants, & Monopoly Fatalism*, Cato Institute (June 17, 2019) (recounting reports of MySpace's alleged monopoly in social media), https://www.cato.org/publications/policy-analysis/time-different-schumpeter-tech-giants-monopoly-fatalism#_ednref25.
[32] *See, e.g.*, McKay Coppins, T*he Billion-Dollar Disinformation Campaign to Reelect the President*, The Atlantic (Mar. 2020), https://www.theatlantic.com/magazine/archive/2020/03/the-2020-disinformation-war/605530/; Kate Conger & Sheera Frenkel, Dozens at Facebook United to Challenge Its "Intolerant" Liberal Culture, N.Y. Times (Aug. 28, 2018), https://www.nytimes.com/2018/08/28/technology/inside-facebook-employees-political-bias.html
[33] *See, e.g.*, Dean DeChiaro, *Democrats Increase Pressure on Facebook Over Content Policies & Trump Posts*, Roll Call (June 16, 2020), https://www.rollcall.com/2020/06/16/democrats-increase-pressure-on-facebook-over-content-policies-and-trump-posts/.
[34] *See*, e.g., David Shepardson, *Facebook, Google Accused of Anti-Conservative Bias at U.S. Senate Hearing*, Reuters (Apr. 10, 2019), https://www.reuters.com/article/us-usa-congress-socialmedia/facebook-google-accused-of-anti-conservative-bias-at-u-s-senate-hearing-idUSKCN1RM2SJ.

This recognition has led some on the left and right to rediscover an old tool: use of antitrust to pursue political ends.[35] That some politicians, bureaucrats, and scholars wish to use the blunt force of antitrust to achieve their desired ends is unfortunate—but not new.[36]

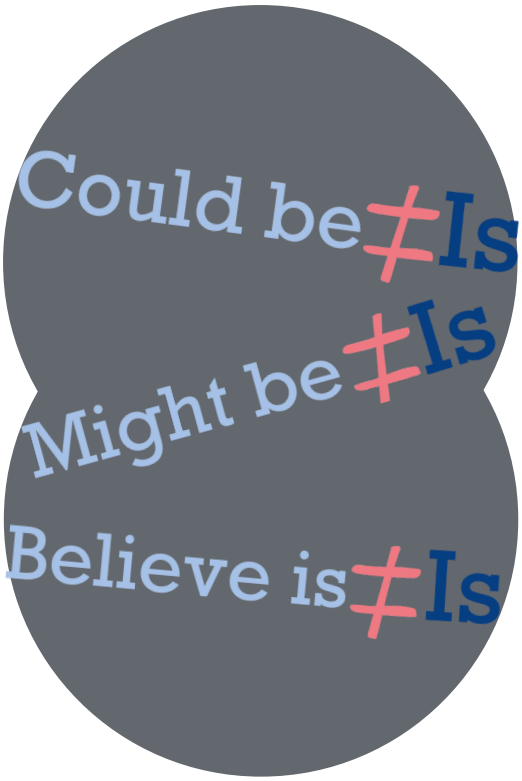
SCOTT MORTON, DINIELLI, & THEIR ROADMAP

Scott Morton and Dinielli have now penned three Roadmaps, each of which relies on flawed preliminary analysis conducted by the United Kingdom's Competition and Markets Authority (CMA).[37] The CMA has since released its final report on competition in digital advertising, concluding that Facebook and Google dominate separate digital advertising markets and that that dominance harms consumers, including users and advertisers.[38] Relying on its final report, the CMA has pleaded with the U.K. government for more power, including the ability to break up industries without having to abide by existing protections that ensure such an upheaval in the marketplace is justified.[39]

Even setting aside the fact that the CMA's data and analysis are not focused on the United States, neither Scott Morton and Dinielli nor any government should rely on the CMA's advertising reports—preliminary, final, or otherwise. Despite spanning hundreds of pages, the CMA's reports are built on a foundation of sand.

For starters, even the final report is full of speculation—and that's about it. First, the CMA failed to uncover any actual harms. Instead, it merely speculates about how consumers "might" be worse off because of Big

[35] *See, e.g.*, Mark Jamison, *Are Regulatory Attacks on Big Tech Politically Motivated?*, Am. Enter. Inst. (Sept. 30, 2019), https://www.aei.org/technology-and-innovation/are-regulatory-attacks-on-big-tech-politically-motivated/; Kevin O'Connor, *The Political Attack on Big Tech*, Wall St. J. (Sept. 23, 2019), https://www.wsj.com/articles/the-political-attack-on-big-tech-11569279637?mod=MorningEditorialReport&mod=&mod=djemMER_h; Eric Boehm, *The Justice Department's "Big Tech" Antitrust Investigation is Unnecessary Political Theater*, Reason (July 24, 2019), https://reason.com/2019/07/24/the-justice-departments-big-tech-antitrust-investigation-is-unnecessary-political-theater/.
[36] *See, e.g.*, Alan Reynolds, *The Return of Antitrust*, 41 Reg. 24 (2018);Wright, *supra* note 2, at 294.
[37] *Roadmap, supra* note 17, at 2 (citing Competition & Markets Authority, Online Platforms & Digital Advertising: Market Study Interim Report (2019)) ["CMA Interim Report"].
[38] Competition & Markets Authority, Online Platforms & Digital Advertising Market Study Final Report 5 (July 3, 2020), https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf ["CMA final report"].
[39] Sam Bowman, *The UK has Badly Missed the Mark on How to Regulate Big Tech*, The Telegraph (July 3, 2020), https://www.telegraph.co.uk/technology/2020/07/03/uk-has-badly-missed-mark-regulate-big-tech/.



Tech.[40] Crucially, the report does not cite proof that consumers actually are worse off. No wonder the CMA couches its "findings"—more accurately called hypotheses—in wishy-washy language: "could be" appears 91 times; "we believe," 27 times; and "might," 76 times.[41] Indeed, those phrases mirror what one might expect to see in a press release announcing the start of an investigation, not in a final report after concluding a year-long process. This is especially true given the stakes: breaking up some of the most successful companies in history.

Second, the report snubs antitrust analysis. To be sure, the CMA feels different. It contends that advertising prices are higher than they ought to be, which it takes as evidence of anticompetitive markets and consumer harms.[42] But the CMA fails to explain how it knows this. It doesn't even bother to give a ballpark number on what prices would be in the hypothetical competitive market they constructed for the analysis they do not share with readers.[43]

Even worse, the CMA dismisses most of the benefits Google and Facebook have brought to the digital advertising market. There is no mention, for example ofprice reductions—which amount to about 40% in the United

[40] *See, e.g., id*. at 69 ("In a more competitive market, consumers might not need to provide so much data in exchange for the services they value.") (emphasis added); *id*. at 180 ("The net effect in terms of consumer harm is that a large proportion of consumers may make decisions about platforms that they might not otherwise make—that is they may use platforms despite their concerns because they feel they have little choice.") (emphasis added); *id.* at 198 ("As we note above, from the evidence available to us, it is clear that few consumers engage with privacy policies on sign-up to platforms. We consider the same is likely to be true for consumer engagement with terms and conditions.") (emphasis added); *id.* at 201 ("As a result, it is likely that at least some consumers sign up to platforms and share data when they might not otherwise have done so had they been informed of the consequences.") (emphasis added).
[41] The author calculated these numbers by performing a key word search of the CMA's final report. Although the CMA sometimes uses these words in a manner unrelated to its investigation or findings, the majority relate directly to the report's bottom-line conclusions.
[42] CMA Final Report, *supra* note 38, at 8 ("These costs are *likely to be higher than they would be in a more competitive market,* and this will be felt in the prices that consumers pay for hotels, flights, consumer electronics, books, insurance and many other products that make heavy use of digital advertising.") (emphasis added).
[43] Instead, the CMA merely repeats time and again that prices would be lower if Google and Facebook competed in competitive digital advertising markets. *See, e.g., id.* at 314 ("[W]e have also shown that the weak competition in both search and display advertising allows the large platforms to exploit their market power by earning higher prices in the advertising market than would be expected in a more competitive market.");

States since 2010.[44] It also waves away targeted advertising's benefits, which allow small- and medium-sized businesses to reach consumers across the country.[45] Indeed, for less money than ever before, these businesses no longer must rely on their local markets for consumers; now, they can reach consumers.[46]

The CMA's report and Scott Morton and Dinielli's Roadmap give shallow treatment to actual evidence. They ignore or downplay evidence of benefits to consumers while hyping speculative evidence of harm that accords more with their preferences than with consumers'. All in all, then, their arguments boil down to this: we know what consumer harms look like, we don't see any evidence of those harms, but we have a hunch such harms exist, so we will speculate about those harms, and cast them as conclusions based on facts.

This response is thus meant to be a rebuke of both Scott Morton and Dinielli's Roadmap and the CMA's final report. While Scott Morton and Dinielli are scholars, not government officials, and while the CMA's jurisdiction does not extend to the United States, their ideas are so far astray, so unglued from antitrust doctrine, that they must be called out for what they are: a return to "big is bad" no matter the evidence.

PRIMER ON ANTITRUST LAWS & DOCTRINES

Before jumping headfirst into the Roadmap's analytical defects, it's worth getting a feel for antitrust law and its doctrines. Although this section will sound

[44] Michael Mandel, *The Declining Price of Advertising: Policy Implications*, Progressive Pol'y Inst. 2 (July 2019), https://www.progressivepolicy.org/wp-content/uploads/2019/07/Advertising2019_Mandel.pdf.
[45] *See Top 26 Benefits of Facebook Advertising: How Facebook Ads Help!*, Lyfe Marketing (July 29, 2019), https://www.lyfemarketing.com/blog/facebook-advertising-benefits/.
[46] Mandel, *supra* note 44, at 13.

familiar to antitrust aficionados, much of its content is conspicuously missing from the Roadmap's narrative.what they are: a return to "big is bad" no matter the evidence.

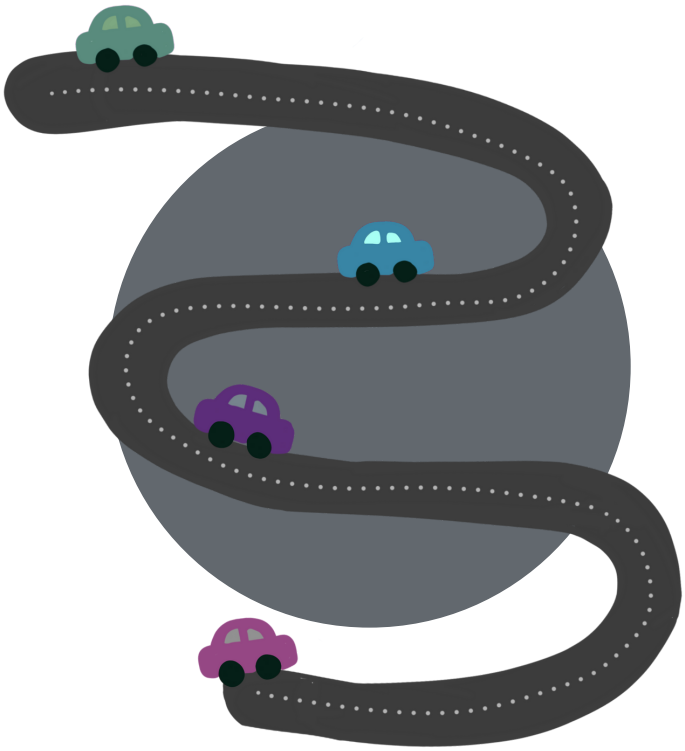
OVERVIEW

Congress passed the Sherman Antitrust Act in 1890.[47] And it did so in response to mounting unrest brought on by the country's rapid transformation into an industrial giant after the Civil War.[48] This period witnessed factories displace farms, cities overshadow towns, and corporate America edge out local business.[49] But it was the great trusts of the day—the Standard Oils—that cast the darkest shadow over the country.[50] Their seemingly endless combinations and consolidations of industries stirred Congress to enshrine in law the country's "national values of free enterprise and economic competition."[51]

But, like other national values, free enterprise and economic competition invited disagreement among Americans.[52] It also bedeviled the U.S. Supreme Court. In its first antitrust case, the Court severely narrowed the Sherman Act's reach by exempting manufacturers, rendering most of the economy outside the bounds of the government's enforcement power.[53] That controversial decision soon gave way to an antitrust "doctrine" that bobbed and weaved from one social concern to some other economic concern and back again.

[47] Wright, *supra* note 2, at 298.
[48] Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 Ford. L. Rev. 2279, 2282 (2013).
[49] *See generally id.* at 2281-87.
[50] Wright, *supra* note 2, at 298.
[51] N.C. State Bd. of Dental Examiners v. FTC, 135 S. Ct. 1101, 1110 (2015).
[52] See Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, & Rebirth of the U.S. Antitrust Movement*, Harv. Bus. Rev. (Dec. 15, 2017) (contrasting antitrust approaches from different eras), https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement.
[53] United States v. E. C. Knight Co., 156 U.S. 1, 15 S. Ct. 249, 39 L. Ed. 325 (1895).

Along this zig-zagging path, the federal government was able to:



- prevent bigness,' that is, to preserve the small, localized businesses that characterized early America;" [54]
- protect "small dealers and worthy men" from their competitors even if doing so raised prices for consumers; [55]
- block "great industrial consolidations [because they] are inherently undesirable, regardless of their economic results;"[56] and
- shield "viable, small, locally owned business" from competition even if that meant "higher costs and prices might result from the maintenance of fragmented industries and markets." [57]

Ripped from any objective standard, these antitrust cases transmogrified a law meant to champion competition and protect consumer welfare into doctrines that shielded the status quo and handed out corporate welfare.

These were bad days for antitrust, business, and consumers. As former Federal Trade Commissioner Joshua Wright put it, "[t]he result of this approach was that consumers were made worse off by preventing the very competition from which they would benefit and which the competition laws were supposed to

[54] Wright, *supra* note 2, at 299.
[55] United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 323 (1897).
[56] United States v. Aluminum Co. of America, 148 F.2d 416, 428-29 (2d Cir. 1945).
[57] Brown Shoe Co. v. United States, 370 U.S. 294, 333, 344 (1962).

promote."[58] "In the name of defending helpless individuals," he adds, "the Court decreased the purchasing power of individual consumers—by preserving inefficient firms with higher prices and lower output—and issued opinions that explicitly chose to foster corporate welfare over consumer welfare." [59]

Another problem: No one knew what conduct was permissible and what wasn't. Without clear, objective standards for the government to apply equally, regardless of a business's size, the business community was left to guess—and to litigate should the government decide that business was that year's antitrust target.[60] As Justice Potter Stewart of the Supreme Court once remarked: "The sole consistency that I can find is that in litigation under § 7 [of a related antitrust act], the Government always wins." [61]

Once the consumer welfare standard entered the scene, however, antitrust improved. Today, antitrust focuses on promoting the benefits that come from national values like free enterprise and market competition:[62] lower prices for consumers, lower costs for businesses, higher productivity for both, and greater innovation across the board. [63]

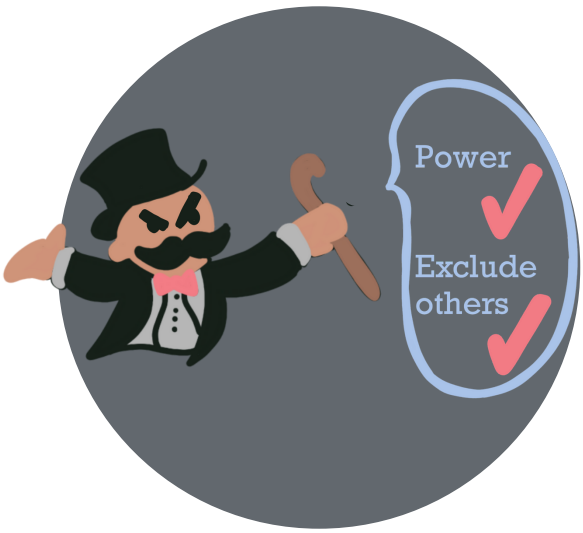
And today, we know that antitrust laws are not meant to protect a business's competitors but instead the competitive process. "The purpose of the [Sherman Antitrust] Act," the Supreme Court has said, "is not to protect businesses from the working of the market; it is to protect the public from the failure of the market."[64] And because "[c]ompetition is a ruthless process," U.S. antitrust doctrine tolerates aggressive conduct even when "[a] firm that reduces cost and expands sales injures rivals—sometimes fatally."[65] In fact, even when a firm has monopoly power—what most people think of when they hear antitrust—the law applies only when that firm takes illegal steps to entrench its monopoly power.[66]

"[S]ize does not determine guilt." [67]

[58] Wright, *supra* note 2, at 300.
[59] Wright, *supra* note 2, at 300.
[60] Ryan Young, *Antitrust Basics: Rule of Reason Standard vs. Consumer Welfare Standard*, Competitive Enter. Inst. (July 8, 2019), https://cei.org/blog/antitrust-basics-rule-reason-standard-vs-consumer-welfare-standard.
[61] United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).
[62] Ohio v. Am. Express Co., 138 S. Ct. 2274, 2290 (2018).
[63] *Id.*
[64] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993).
[65] Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325, 1338 (7th Cir. 1986) (Easterbrook, J.).
[66] Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 10 (1911).
[67] United States v. Aluminum Co. of America, 148 F.2d 416, 429-30 (2d Cir. 1945) (Hand, J.).

SHERMAN ANTITRUST ACT § 2: MONOPOLIES

Against this backdrop, we turn next to the Sherman Act's text. Under Section 2 of that law, no business may "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations"[68] A business violates this law only when it:



- Has monopoly power; and
- Uses exclusionary practices to obtain, maintain, or increase its monopoly power.[69]

Step 1: Show Monopoly Power

Monopoly power means a business has "the power to control prices or exclude competition" from the market.[70] Plaintiffs can show monopoly power through direct evidence that the defendant business charged prices significantly higher than what they would be if the relevant market were competitive.[71] More often, though, they rely on indirect evidence that shows a business:

- Has a dominant share of the relevant market in operates in; and
- Is protected by barriers to entry into that market.[72]

[68] 15 U.S.C. § 2.
[69] United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).
[70] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956)
[71] *See, e.g.*, Geneva Pharm. Tech. Corp. v. Barr Lab. Inc., 386 F.3d 485, 500 (2d Cir. 2004)
[72] *See, e.g.*, Broadcom Corp. v. Qualcomm, Inc., 501 F.3d 297, 307 (3d Cir. 2007).

No matter the evidentiary route plaintiffs take, they must show that the business has monopoly power.[73] Plaintiffs thus have an incentive to define the market narrowly (fewer competitors, more dominance); defendants, the opposite (more competitors, less dominance). The Supreme Court has sought to avoid these subjective pitfalls by defining the relevant market as including the product or service at issue and anything "reasonably interchangeable" with it.[74]

Whether a product or service is reasonably interchangeable turns on whether a price increase for Product "A" would lead consumers to buy Product "B" instead.[75]

Although the Supreme Court's definition dates to 1962, the Department of Justice and the Federal Trade Commission—the plaintiffs in many monopoly cases—also use demand substitution to define the relevant market.[76] Their "hypothetical monopolist" test asks whether a monopolist would profit from imposing a "small but significant and non-transitory increase in price" (SSNIP) of about 5% on the product in question.[77] If it would, then that is the relevant market; if not, then the market is expanded until buyers have no substitutes left.[78]

But there's a wrinkle in this case: Facebook is free. Although some lower courts have held that free products or services are exempt from antitrust enforcement[79] , some scholars[80] have argued that nonprice factors—for instance, personal data shared—can substitute for price. For purposes of this article, I'll take the latter approach as well.

Once plaintiffs make it past this hurdle, they must show the defendant business has monopoly power.[81] There is no magic number that declares dominance, but the Supreme Court has never found monopoly power when the market share is below 75%.[82] Some circuit courts have tried to flesh this analysis out with rebuttable presumptions: in the Tenth Circuit the market share must usually

[73] *See* Eastman Kodak Co. v. Imagine Tech. Servs., Inc., 504 U.S. 451, 481 (1992).
[74] Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).
[75] *Id.*
[76] U.S. Dep't of Justice & FTC, Horizontal Mergers Guidelines § 4 (2010).
[77] *Id.*
[78] *Id.*
[79] *See, e.g.,* Kinderstart.com, LLC v. Google, Inc., No. C-06-2057-JF(RS), 2007 WL 831806, at *5 (N.D. Cal. Mar. 16, 2007) (dismissing a Section 2 complaint against Google Search because the service is free to consumers).
[80] *See, e.g.,* John M. Newman, *Antitrust in Zero-Price Markets: Applications*, 94 Wash. U. L. Rev. 49, 166-70 (2016).
[81] Kodak Co., 504 U.S. at 481.
[82] Kolon Indus., Inc. v. E.I. DuPont de Nemours & Co., 748 F.3d 160, 174 (4th Cir. 2014).

be at least 70%;[83] in the Second Circuit, usually 90%;[84] and in the Third, "significantly larger" than 55%. [85]

Other circuits require plaintiffs to produce evidence showing market share dominance and evidence showing that the market share is durable.[86] Like with market dominance, there is no definitive proof indicating a business's market share is enduring. But courts often look for evidence indicating barriers to entry—long-run costs new firms must pay that the defendant skirts—that would keep new competitors out of the relevant market.[87] Of relevance in the social media and social networking world are:

Multi-Homing: Scott Morton and Dinielli (and others[88]) claim that consumers are unlikely to switch from one social media platform to another and are less likely to use both Facebook and other platforms.[89] They believe that it is too burdensome for consumers to make the switch because all of their content and contacts are housed on Facebook already.[90] So as Facebook grows, more consumers become stuck on the platform, which in turn makes it difficult for a new competitor to attract users.

Network Effects: Scott Morton and Dinielli (and others[91]) likewise claim that social media platforms increase in value as they grow more popular.[92] The increase in users means an increase in content and contacts, which serves to attract even more users. The more people you know on Facebook, the more likely you are to join the site.

[83] Colo. Interstate Gas Co. v. Nat'l Gas Pipeline Co. of Am., 885 F.2d 683, 694 n.18 (10th Cir. 1989).
[84] United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945) (adding that 60-64% market share is "unlikely" to be sufficient).
[85] United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187-88 (3d Cir. 2005).
[86] *See, e.g., id.* at 188-89 ("[I]t is not market share that counts, but the ability to maintain market share."); Colo. Interstate Gas Co., 885 F.2d at 695-96 ("If the evidence demonstrates that a firm's ability to charge monopoly prices will necessarily be temporary, the firm will not possess the degree of market power required for the monopolization offense.").
[87] LA Land Co. v. Brunswick Corp., 6 F.3d 1422, 1427-28 (9th Cir. 1993
[88] Comm. for the Study of Digital Platforms, Market Structure and Antitrust Subcomm., Chicago Univ. Booth Bus. Sch. 18-21 (May 15, 2019).
[89] *Roadmap, supra* note 17, at 12.
[90] *Id.* at 11.
[91] Michael A. Cusumano et al., The Business of Platforms: Strategy in the Age of Digital Competition, Innovation, & Power 16 (2019).
[92] *Roadmap, supra* note 17, at 11.

Data Collection: Scott Morton and Dinielli (and others[93]) also claim that because Facebook and its peers can collect user data, they are able to improve their products and services based on consumer insights others do not have, and are able to attract ever-increasing revenues from advertisers, who value the data as a tool to target ads.[94]

Step 2: Show Exclusionary Conduct

Even with this evidence in hand, plaintiffs are only halfway there. After they show monopoly power, they must show the defendant business acted in some exclusionary way to benefit their monopoly power.[95] In other words, plaintiffs must show conduct indicating "the willful acquisition or maintenance" of monopoly power that cannot be explained by "growth or development as a consequence of a superior product, business acumen, or historic accident."[96] Distinguishing between illegal exclusionary conduct and legal competitive conduct requires analyzing harms to the competitive process itself.[97] Common harms include predatory pricing,[98] exclusive dealing,[99] refusals to deal,[100] tying,[101] and the like. (None of these traditional harms show up in the Roadmap.)

FACEBOOK ISN'T A "NEAR-MONOPOLY" OR ANYWHERE CLOSE TO IT

Section 2 of the Sherman Act, you'll recall, makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons,

[93] Study of Digital Platforms, *supra* note 93, at 21-28.
[94] Roadmap, *supra* note 17, at 18.
[95] United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001).
[96] United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).
[97] *Id.*
[98] Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 117 (1986).
[99] Interface Group, Inc. v. Mass. Port. Auth., 816 F.2d 9, 11 (1st Cir. 1987).
[100] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601 (1985).
[101] Int'l Salt Co. v. United States, 332 U.S. 392, 396 (1947).

Several States."[102] Although Section 2 creates three separate offenses,[103] only monopolization is relevant here. Under that offense, plaintiffs must prove both (1) "possession of monopoly power in the relevant market," and (2) "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[104]

Put another way, the Sherman Act doesn't outlaw monopoly power as understood in everyday language; it outlaws only monopoly power "accompanied by an element of anticompetitive conduct."[105] According to Scott Morton and Dinielli, though, this is a difference that makes no difference: "Facebook," they write, "has a monopoly in social media and/or social networks, whether considered in lay or legal or economic terms."[106] In support of this conclusion, they first point to Facebook's 75% market share in the "communications-focused" social media market.[107] Next, they give a laundry list of Facebook's business decisions that are, from their vantage point, anticompetitive.[108]

Neither argument can succeed. First, Scott Morton and Dinielli analyze Facebook under the wrong market—a market they artificially narrowed to exclude Facebook's competitors. Second, even under their market definition, Facebook's conduct has been procompetitive, not exclusionary.

FACEBOOK'S RELEVANT MARKET

The first step is to define Facebook's relevant market. At first glance, that task seems straightforward enough: Facebook is a social media platform so the market must be social media platforms.

[102] 15 U.S.C. § 2 (2018).
[103] The offenses include: (1) monopolization; (2) attempted monopolization; and (3) conspiracy to monopolize.
[104] United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).
[105] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).
[106] *Roadmap*, *supra* 17, at 36.
[107] *Id.* at 9.
[108] *See id.* at 20–29.

Yes and no. For starters, Facebook is what economists call a "two-sided platform."[109] This means Facebook "offers different products or services to two different groups who both depend on the platform to intermediate between them."[110] In English, that means Facebook plays matchmaker between users and advertisers, and competes for both in at least two different markets. So, yes, one market is social media; the other is digital advertising.

This follows from the rule that the market must include Facebook and all products or services that are "reasonably interchangeable" with it.[111] Other products or services are reasonably interchangeable when customers have the "ability and willingness" to turn to them following a price increase or "non-price change such as a reduction in [Facebook's] product quality or service."[112] Market definition is thus "focuse[d] solely on demand substitution factors."[113]

So, what is Facebook and what are its products or services? In its legally required SEC filings, Facebook describes itself as:

- "build[ing] useful and engaging products that enable people to connect and share with friends and family through mobile devices, personal computers, virtual reality headsets, and in-home devices;"[114] and
- "help[ing] people discover and learn about what is going on in the world around them, enabl[ing] people to share their opinions, ideas, photos and videos, and other activities with

[109] *See, e.g.*, Iakovos Sarmas, *Market Definition for Two-Sided Platforms: Why Ohio v. American Express Co. Matters for the Big Tech*, 19 Fla. St. U. Bus. Rev. 199 (2020).
[110] Ohio v. Am. Express Co., 138 S. Ct. 2274, 2280 (2018).
[111] Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).
[112] Horizontal Mergers Guidelines, *supra* note 81.
[113] *Id.*
[114] Facebook, Inc., Form 10-K for FY Ended Dec. 31, 2019, 7, http://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/45290cc0-656d-4a88-a2f3-147c8de86506.pdf (last accessed July 2, 2020).

audiences ranging from their closest family members and friends to the public at large, and stay connected everywhere by accessing [its] products."[115]

The products Facebook mentions include: [116]

- Facebook: a platform that "enables people to connect, share, discover, and communicate with each other on mobile devices and personal computers. There are a number of different ways to engage with people on Facebook, including News Feed, Stories, Marketplace, and Watch."[117]

- Instagram: a separate platform that "is a place where people can express themselves through photos, videos, and private messaging, including through Instagram Feed and Stories, and explore their interests in businesses, creators and niche communities."[118]

- Messenger: a "messaging application for people to connect with friends, family, groups, and businesses across platforms and devices."[119]

- WhatsApp: a "secure messaging application that is used by people and businesses around the world to communicate in a private way."[120]

[115] *Id.*
[116] This list is not exhaustive; it merely recites the products Facebook chooses to highlight in its required legal filings to the Securities and Exchange Commission. On its website, Facebook lists other, less-well-known products like Spark AR Studio and Audience Network. *See* "What Are the Facebook Products?" Facebook, https://www.facebook.com/help/1561485474074139 (last accessed July 6, 2020).
[117] Facebook, Inc., *supra* note 130.
[118] *Id.*
[119] *Id.*
[120] *Id.*

> Oculus: the company's "hardware, software, and developer ecosystem [that] allows people around the world to come together and connect with each other through [Facebook's] Oculus virtual reality products."[121]

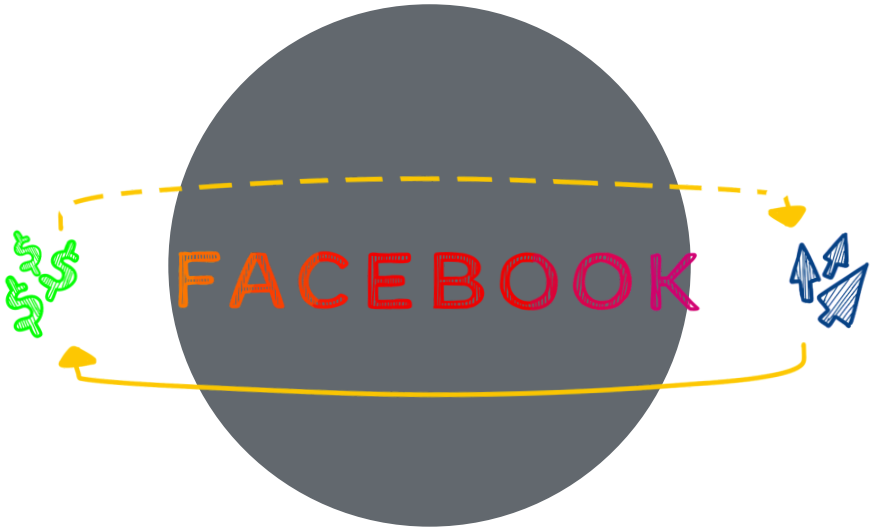
From this bird's-eye view, Facebook sounds a lot like a communications company. After all, its resume and product descriptions are chock full of industry buzzwords— "communicate," "connect," "messaging." In fact, this language may have been on Wall Street's mind when it recently revamped its Global Industry Classification System (the method used to match stocks with stock indexes) and bounced Facebook out of the "information technology" category into an expanded communications services" category.[122] In its new home, Facebook joins the likes of AT&T, Verizon, and Comcast, as well as the also-reclassified Google, Twitter, Snapchat, Netflix, and Walt Disney.[123]

At first blush, this curious grouping may seem like Wall Street's equivalent of the kitchen junk drawer. But with trillions of dollars on the line, the decision wasn't made haphazardly; instead, it came after expert study of changes these companies have made.[124] As it turns out, though, one doesn't need to be an expert to see what they see.

Think first of the broad similarities these companies share. In some form or another, each facilitates communication, distributes content, or does both. Now think of Facebook. As noted, the company's products undeniably facilitate communication. But they also all distribute or help distribute content. Facebook lets users share and interact with user-made content (photos of the family vacation; videos of the new puppy; posts about almost everything), as well as content from third parties (a link to a GoFundMe page; a news clip from CNN's Facebook page). Instagram likewise lets users do the same. For most people none of this is groundbreaking news—under the (unofficial) American Common Sense Classification System, Facebook is simply known as a social media platform.[125]

[121] *Id.*
[122] Lu Wang, *It's Official: Google & Facebook are Communications Companies*, Bloomberg (Jan. 12, 2018), https://www.bloomberg.com/news/articles/2018-01-12/it-s-official-google-and-facebook-are-communications-companies.
[123] Noel Randewich, *Facebook, Alphabet Shifted in Sector Classification System*, Reuters (Jan. 11, 2018), https://www.reuters.com/article/us-s-p-sectors/facebook-alphabet-shifted-in-sector-classification-system-idUSKBN1F037G.
[124] *Id.*
[125] "Social media platform" is often used interchangeably with "social network." *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 L.J. 39, 40 (2019) (calling the relevant market "social network" and Facebook as "the reigning platform" in it); Roadmap, *supra* note 17, at 5-7 (separating "Social Media Sector" from "Online Social Networks" but still describing Facebook as a "social media platform[]," "social network," and "social network platforms").

But there is an important difference between the companies—their revenue streams. AT&T, Verizon, Comcast, Netflix, and Disney all have subscription-based services.[126] In other words, users must pay to hit "play" or "send." Facebook, Twitter, Snapchat, and Google, on the other hand, are free for users to use. To be sure, advertising revenue is neither unique to these platforms nor shunned by their subscription-based peers. In fact, some offer multiple-tiered subscription packages that offer lower prices on subscriptions but with more advertisements on their platform.[127]



Free-to-use platforms rely so heavily on advertising, however, that they are said to have two sets of consumers: users and advertisers. As mentioned, because Facebook provides services to both, and thereby enables interactions between them, it is a two-sided market.[128] Two-sided markets have direct and indirect network effects.[129] Direct network effects are when a product's value increases with the number of people using it.[130] Indirect network effects, on the other hand, are when the product's value to one group increases the more the other group uses it.[131]

In plain terms that means Facebook operates in distinct, though overlapping, markets at the same time. First, it competes for users in the social media market. And second, it competes for advertisers in what's known as the digital display ads market. Facebook's legal filings recognize this too: "We compete with companies

[126] Reuters, *Netflix Shares Drop After Verizon Reveals Disney Streaming Promotion*, N.Y. Post (Oct. 22, 2019), https://nypost.com/2019/10/22/netflix-shares-drop-after-verizon-reveals-disney-streaming-promotion/.
[127] For example, Hulu, which is owned by The Walt Disney and Comcast Corporation, offers multiple subscription plans: basic Hulu costs $5.99 per month and displays ads; Hulu (No Ads) costs $11.99 per month and displays no ads. *See* Hulu, *What Are the Costs & Commitments for Hulu?* (May 29, 2020), https://help.hulu.com/s/article/how-much-does-hulu-cost?language=en_US.
[128] *See infra* at 16.
[129] *Id.*
[130] *Id.*
[131] *Id.*

that sell advertising, as well as with companies that provide social media, and communication products and services that are designed to engage users on mobile devices and online."[132]

Why does any of this matter? Well, if Facebook is a two-sided market with direct network effects, then the relevant market must be defined so as to include both Facebook's social media market and its digital display market.[133] But if Facebook has only indirect network effects, it may not be necessary to combine the markets.

Scott Morton and Dinielli assume the latter. They note early on that Facebook has "at least two types of customers," and that advertisers "may have a location to display ads that is a substitute for social media."[134] But without much explanation, Scott Morton and Dinielli analyze Facebook as having only indirect network effects. This is a curious decision given statements they make throughout their report. In their section about entry barriers, for example, Scott Morton and Dinielli note that Facebook has strong "network effects," explaining that the platform's value increases the more users who use it.[135] They note also that Facebook's value to advertisers increases with more users.[136] This all sounds like direct network effects.

To be sure, Facebook may not have direct network effects. Although Facebook's value to advertisers undoubtedly increases with the number of users who use the site (a bigger audience for them to reach), it is not entirely clear whether the same is true for users. As the Scott Morton and Dinielli point out, Facebook's value to users may even decrease as the number of ads increase.[137]

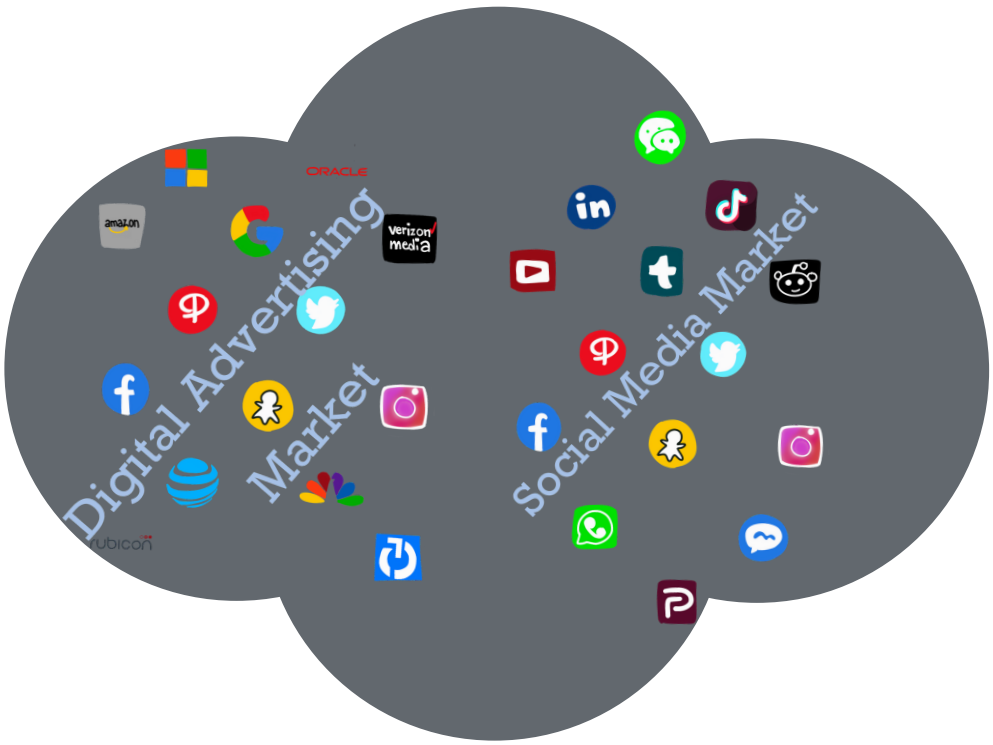
Fair enough. But that makes sense only if users must know the "how" or "why" behind Facebook's business decisions in order to benefit from them. As a general matter, Facebook grows more valuable to users the more Facebook improves and innovates its products. Because Facebook's revenue comes almost

[132] Facebook, Inc., *supra* note 130.
[133] See Ohio v. Am. Express Co., 138 S. Ct. 2274, 2280 (2018).
[134] *Roadmap*, *supra* note 17, at 6.
[135] *Id.* at 15.
[136] *Id.* at 19.
[137] *Id.* at 35.

entirely from advertising revenue, ads are what fuel the company's efforts to improve the user experience.[138] They also allow Facebook to remain free for users.[139] So although users may not know how advertisers benefit them, or why more ad revenue for Facebook can benefit them, they would feel the adverse effects if ads declined.

Because it is likely that Facebook has direct network effects, the relevant market must encompass both social media platforms and digital display advertising. Here, there can be little doubt that Facebook is not a monopoly. Not only does Facebook compete against platforms like Twitter and Snapchat, it also competes against Google, Amazon, and a whole host of other platforms that place ads on their sites.[140]

But even if Scott Morton and Dinielli are right that Facebook has only indirect network effects, the company is not a monopoly in either the social media or digital advertising market. To name but a few— Twitter, Snapchat, YouTube, and newcomer Parler—all compete with Facebook in the social media market. And, as just mentioned, Google, Amazon, and others all compete with Facebook in the digital advertising market.



[138] Trefis Team, *What is Facebook's Revenue Breakdown?*, Nasdaq (Mar. 28, 2019), https://www.nasdaq.com/articles/what-facebooks-revenue-breakdown-2019-03-28-0.
[139] Greg DePersio, *Why Facebook is Free to Use (FB)*, Investopedia (Dec. 3, 2015), https://www.investopedia.com/articles/markets/120315/why-facebook-free-use.asp.
[140] *See* Marchese, *supra* note 18, at 11-12; 3 Lauren Feiner, *Facebook and Google's Dominance in Online Ads is Starting to Show Some Cracks*, CNBC (Aug. 2, 2019), https://www.cnbc.com/2019/08/02/facebook-and-googles-ad-dominance-is-showing-more-cracks.html.

Scott Morton and Dinielli try to circumvent this reality. Although they concede that Facebook operates in the social media market, they go on to define the relevant market so narrowly that their definition might as well be "Facebook and only Facebook." In their telling, social media platforms "differentiate themselves from one another in various ways," which means they actually occupy distinct markets.[141] One market includes "content-focused" platforms that "facilitate the distribution and consumption of content."[142] Here, they lump YouTube and TikTok together because their content "can be enjoyed by users with a wide range of relationships to the person posting, including complete strangers."[143] Not only is this absurd, it doesn't match the facts, as users of TikTok, YouTube, Snapchat, and many others, like Facebook, allow public and private postings.

The other market includes "communication-focused social networks."[144] This, we're told, is where Facebook belongs because it "primarily facilitate[s] communication (including the sharing of third-party content) among groups of friends who choose each other and enjoy content in large part because of those relationships."[145] But even under this narrow definition, Facebook still faces competition from Snapchat and Twitter.[146]

Here, any difference actually makes no difference. First, Scott Morton and Dinielli's justification underscores that these platforms all operate in the same market. Why would the platforms need to "differentiate themselves from one another"—in one way or "in various ways"—if they didn't compete against each other? Second, any validity the distinction between communication-focused and content-focused platforms may once have had no longer exists. As Scott Morton and Dinielli and the CMA point out, social media has blurred the lines between video-sharing, messaging, blogging, and other services.[147] Their Roadmap implicitly acknowledges that Facebook is just as much about content as it is about communication. As discussed later, the Roadmap is full of criticisms about the content users see on Facebook's platform.[148] In fact, Scott Morton and Dinielli go so far as to paint Facebook as parading ever-more harmful content before users to keep them engaged and ad revenue flowing.[149]

[141] *Roadmap, supra* note 17, at 6.
[142] *Id.* at 6-7.
[143] *Id.* at 6.
[144] *Id.*
[145] *Id.*
[146] *See CMA Final Report, supra* note 38, at 122.
[147] *Roadmap, supra* note 17, at 5.
[148] *See infra* Part III.
[149] *Roadmap, supra* note 17, at 5.

In fact, the relevant market is probably even larger than just social media platforms. As Scott Morton and Dinielli unwittingly prove elsewhere in their paper, the relevant market should include all websites that compete for users' attention.[150] After all, logic suggests that advertisers run ads on Facebook precisely because they expect Facebook users to see those ads. It therefore follows that if those users are on other websites, then those websites compete with Facebook (and its advertisers) for users' attention.

So, it seems that Scott Morton and Dinielli are trying to have their cake and eat it too. As they would have it, Facebook is conveniently a communications-based platform when it comes to defining the relevant market. But when it comes to consumer harms, it is a content cesspool. Of course, two things can be true at once. Facebook can be a communications-based platform that also contains harmful content. But that observation serves only to further weaken their arbitrary dividing line—if anything, it shows that Facebook is both communication- and content-focused.

Regardless of Scott Morton and Dinielli's intent, their market definition ignores market realities. Facebook and its competitors have all evolved since their launch dates—a fact reflected in Wall Street's decision to group these companies under the umbrella of "communication services."[151] They also assume, without justification, that social media is static, that tomorrow's platforms will look, feel, and act largely like today's do. But it's exactly that kind of thinking that led analysts, scholars, and the press to believe that Yahoo! Search was so dominant that it would never be beat.[152] Ditto for MySpace.[153]

In short, Facebook is a two-sided platform that must compete for users and for advertisers. Whether it has direct or indirect network effects, and whether defined as a social media platform or a communications-based platform, Facebook still faces competition.

[150] *See infra* Part II.B.
[151] Wang, *supra n*ote 122.
[152] Keenan, *supra* note 31.
[153] *Id.*

MARKET SHARE

With the relevant market defined, we turn next to Facebook's share of that market. As you'll recall, the Supreme Court has never found monopoly power when a company's market share is below 75%.[154] Fortuitously, Scott Morton and Dinielli's analysis of Facebook's market share happens to be exactly 75%.[155] But, like their definition of the relevant market, their analysis of Facebook's market share is a game of analytical Twister.

First, a note about Scott Morton and Dinielli's methodology. In traditional markets, market share is typically calculated by comparing a company's sales (or the value of those sales) to all sales in the relevant market for a single year.[156] But because Facebook operates in a two-sided market and because it is free for users, another method is needed. So, Scott Morton and Dinielli and the CMA calculate market share based on the number of minutes a user spends on a particular platform divided by the number of minutes the user spends on social media in total.[157] They justify this metric on the grounds that companies "want to keep eyeballs on their platforms for as long as possible in order to sell more ads."[158]

This observation about platforms' business model reinforces that Facebook operates in an integrated, multi-sided market. As a practical matter, the relevant market is broadly about attention—Facebook and other platforms all compete for users' attention, which is what they sell to advertisers.[159] One way of keeping users' attention is by making it as easy as possible for them to visit the platform—by, say, making it free to use. And although large financial outlays to attract and maintain customers are not unheard of in business, it is often unsustainable in the long-term. Thus, Facebook depends on advertisers to keep users' attention, which in turn keeps advertisers interested.

This feedback loop reveals that Facebook's rivals are other online businesses that draw user attention through free products or services and that rely on digital advertising. Because user time is a scarce good—everyone alive gets the same 24

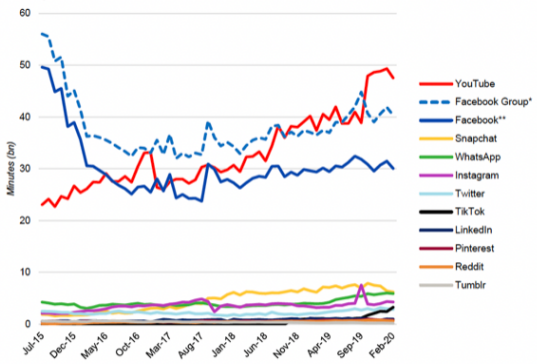
[154] Kolon Indus., Inc. v. E.I. DuPont de Nemours & Co., 748 F.3d 160, 174 (4th Cir. 2014).
[155] *Roadmap, supra* note 17, at 9.
[156] Jonathan Baker, Market Definition: An Analytical Overview, 74 Antitrust L.J. 129, 129 (2007).
[157] *Roadmap, supra* note 17, at 9.
[158] *Id.*
[159] *See* David S. Evans, *Attention Rivalry Among Online Platforms*, 9 J. Competition L. & Econ. 313 (2013); David S. Evans, *The Economics of Attention Markets* (Apr. 15, 2020) (unpublished manuscript), https://ssrn.com/abstract=3044858.

hours in a day—any time spent on another website is time not spent using Facebook's products.

Second, given this reality, the market must include all social media platforms that operate like Facebook does. So, for example, Facebook's share of user attention would be compared to that of Pinterest, Twitter, TikTok, Snapchat, YouTube, and other platforms. Scott Morton and Dinielli, however, define the market narrowly and exclude YouTube, even though it's one of Facebook's largest competitors for user attention and digital display advertisers.[160] With that competitor gone, Scott Morton and Dinielli peg Facebook's market share—in the United Kingdom, remember—at 75%.[161] To arrive at this number, they added Facebook.com's, Instagram's, and WhatsApp's market shares together.[162]

Catch all that? First, Scott Morton and Dinielli choose a metric—eyeballs on ads—that directly undercuts their narrowly defined market. Unfazed by this bait and switch, they plow ahead with their formula—subtract YouTube and add a heaping of Facebook-owned products. And voila, they get 75% market share!

Figure 3.8: Total user time spent on social media platforms from July 2015 to February 2020 (including YouTube)



Source: Comscore MMX Multi-Platform, Total Digital Population, Desktop aged 6+, Mobile aged 13+, July 2015 – February 2020, UK Notes: In November 2018, Comscore altered its methodology which contributes to the discontinuities in the data around this date.
*Including Facebook, Messenger, Instagram and WhatsApp.
** Including Messenger

This makes little sense. If YouTube, which competes with Facebook for advertising dollars is out, then why is WhatsApp, which doesn't run ads, in? And in what universe is Instagram more communication-based than content-based? Even worse, Scott Morton and Dinielli aren't even using market shares for the right year. The CMA's own chart, which is reproduced here, shows that Facebook—even when all its products are combined—has seen a dramatic decline in market share since 2015. And looking at one year, the chart shows that Facebook's combined market share hovers around 40%.

[160] *Roadmap, supra* note 17, at 9.
[161] *Roadmap, supra* note 17, at 9.
[162] *Id.*

Perhaps recognizing that this formulais too removed from common sense, Scott Morton and Dinielli try to buttress their finding. Their additional points include:

- Citing the CMA's finding that the market gained only two new competitors—Snapchat andInstagram—over the last few year [163]; and
- Claiming that no competitor "has achieved significant market share." [164]

Even under their narrowly defined market, the first point is not sound. Microsoft's LinkedIn has seen massive growth;[165] so, too, with the newly launched Parler platform.[166] And, under a properly defined market, TikTok must be added to the list. The second point also misses the mark. Even if that were true, antitrust law doesn't require competitors to achieve "significant" market shares to count as competitors.[167]

Next up, Scott Morton and Dinielli note that "[m]any people use more than one social network," which is called "multi-homing."[168] That's certainly true. But they contend that this supports, rather than undermines, their argument that Facebook has a "near" monopoly on social media.[169] For proof they cite these statistics:

- 97% of Instagram's users visit Facebook.com, but only 66% of Facebook.com's users visit Instagram;[170]
- 95% of Snapchat users visit Facebook.com, but only 68% of Facebook.com's visit

[163] *Id.*
[164] *Id.*
[165] Andrew Hutchinson, *LinkedIn's up to 690 Million Members, Reports 26% Growth in User Sessions,* Social Media Today (Apr. 30, 2020), https://www.socialmediatoday.com/news/linkedins-up-to-690-million-members-reports-26-growth-in-user-sessions/577067/.
[166] Jefferson Graham, *Done with Facebook? Consider MeWe, Parler or Old Standbys such as LinkedIn,* USA Today (last updated July 4, 2020) ("The app, which has been called the 'Twitter for conservatives,' is on a roll thanks to the presence of the politicians, and has grown to 1.5 million members from 1 million in just a week, the company recently told CNBC."), https://www.usatoday.com/story/tech/2020/06/30/facebook-alternatives-mewe-and-parler-old-linkedin-reddit/3280386001/.
[167] What matters is whether the competitor's product or service is reasonably interchangeable with the defendant business's product or service. *See* Brown Shoe, 370 U.S. at 325; Horizontal Mergers Guidelines, supra note 81.
[168] *Roadmap, supra* note 17, at 12.
[169] *Id.* at 11.
[170] *Id.* at 12.

Snapchat;[171] and

- 70%of TikTok users visit Facebook.com.[172]

These statistics, we're told, "confirm" that Facebook is "likely to have market power," and that because TikTok's users, who "skew young," still use Facebook, users "do not view this platform as a substitute for Facebook.com." [173]

But these statistics, picked by Scott Morton and Dinielli themselves, reveal that Facebook does not have a near-monopoly on social media. Instead, they show that a majority of Facebook's users use other social media platforms, which seems to undercut their narrative that Facebook holds an undue sway over users' attention. And although the multi-homing rates may not be perfectly reciprocal, they don't have to be. Indeed, there are many reasons the proportion is not one to one—and none of them is reflects anticompetitive or illegal behavior. For example:

- As Scott Morton and Dinielli note, TikTok's users "skew young[er]" than Facebook's users.[174] So if these users want to keep in touch with older relatives, they might turn to Facebook for that sole purpose.

- TikTok is also, as Scott Morton and Dinielli also note, "the new kid on the block," whereas Facebook opened to the general public in 2006.[175] Perhaps like Facebook in its early years, TikTok is embraced first by the young and later adopted by older users too.

- The same variables apply to Snapchat. It's been around since 2011, and 73% of 18 to 24 year olds use it, but only 9% of 50 to 64 year olds do.[176] By contrast, 68% of the latter group use Facebook but only 51% of the younger group do.[177]

[171] *Id.* at 12.
[172] *Id.* at 13.
[173] *Id.*
[174] *Id.*
[175] Although Facebook launched in 2004, it was originally limited to select colleges and universities. It did not open to the general public—defined as anyone who was at least 13 years old and had an email address—until 2006.
[176] Jenn Chen, *2020 Social Media Demographics for Marketers*, Sprout Social (May 5, 2020), https://sproutsocial.com/insights/new-social-media-demographics/.
[177] *Id.*

Generational differences are worthy of elaboration. Facebook is popular among all age brackets, but it is most popular among those aged 18 to 29 and 30 to 49; it is least popular among those over 65 and under 18.[178] With these facts in mind, we can observe the following:

- Someone who is 29 today would have been 15 when Facebook launched in 2006. Back then, the only other major social media platform was MySpace, which was then thought to be so dominant that Facebook stood no chance.[179]

- Today, someone who is 15 can choose between or among Facebook, Twitter, TikTok, YouTube, and Snapchat—to name just a few.

For added context, remember that Facebook launched during President George W. Bush's second term; TikTok launched in the United States in 2018.[180] Facebook allows for the sharing of political content; TikTok intentionally limits political content.[181] TikTok had around 20 million monthly users in late 2018; it boasts more than 65 million today.[182] Based on these data points, we can speculate that perhaps TikTok is more popular than Facebook with young Americans because it's new (and therefore intriguing) or because it's not saturated with political content. And maybe TikTok is less popular among older Americans precisely because it's new (and therefore relatively unknown or not appealing) and not saturated with politics.

[178] *Id.*
[179] Keegan, *supra* note 31.
[180] Paige Leskin, *Inside the Rise of TikTok, the Viral-Video Sharing App that US Officials are Threatening to Ban Due to its Ties to China*, Bus. Insider (July 13, 2020), https://www.businessinsider.com/tiktok-app-online-website-video-sharing-2019-7.
[181] TikTok, *Community Guidelines* (last updated Jan. 2020), https://www.tiktok.com/community-guidelines?lang=en.
[182] Brandon Doyle, *TikTok Statistics: Updated July 202*0 (last updated July 13, 2020), https://wallaroomedia.com/blog/social-media/tiktok-statistics/.

Put simply, different generations of Americans have different tastes. It is thus unremarkable that rates of reciprocity are uneven—and, in fact, that suggests competition in the marketplace. If everyone used all social media platforms in equal numbers, then no platform would have as strong an incentive to innovate. Instead, TikTok has every incentive to eat into Facebook's market share and to win over older Americans while cementing its popularity among the young. Conversely, Facebook must remain attractive to older Americans and try to compete with TikTok for younger ones.

To state the obvious, younger Americans are future consumers. Facebook must therefore win them over, or risk dissolving into irrelevancy. To be sure, younger Americans may switch to Facebook as they age. Perhaps they will come to desire more political content once they graduate high school. Or perhaps they'll use Facebook solely for the purpose of reading political content while keeping TikTok as their main social media platform. Or maybe they'll use Facebook, TikTok, Twitter, and other platforms for different purposes.

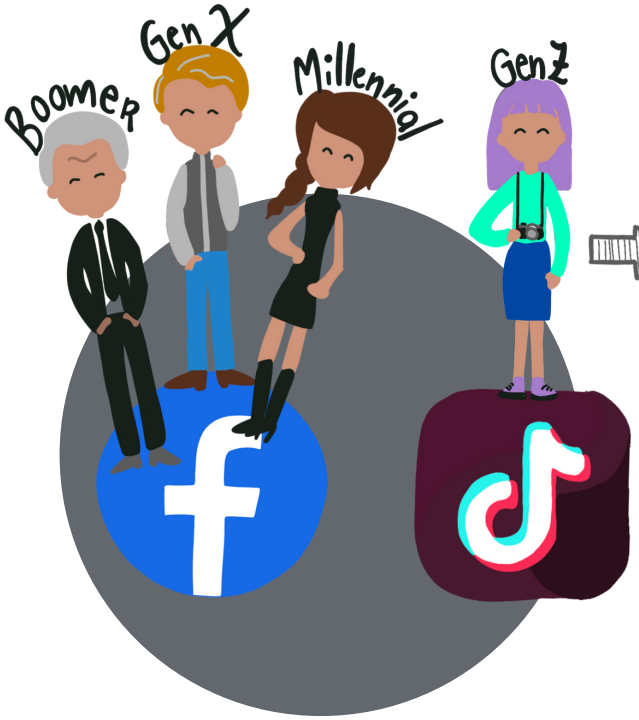
Whatever they may do, it is wrong to believe that social media platforms must resemble Facebook in order to be viewed as an alternative to Facebook. Scott Morton and Dinielli argue that although the market for social media includes platforms like YouTube, Facebook's relevant market is actually narrower than that—it includes only "communication-focused" platforms that are, in all relevant respects, like Facebook. That narrow focus wrongly assumes, however, that American consumers view Facebook as the preferred "model" for social media. Seen this way, Facebook is of course going to dominate the market, just as Apple would be seen as dominating the smartphone market if we defined that market by features unique to iPhones.

Scott Morton and Dinielli argue, for example, that "[a] significant reason that Facebook has market power is that a user cannot change platforms and expect to be able to stay in contact with her friends. Because social networks are not compatible, a user's friends would have to change platforms with her for her to be able to continue to see their feeds."[183] That observation is true only if one

[183] *Roadmap, supra* 17, at 11.

defines "stay in contact with her friends" to mean "to stay in contact with her friends in exactly the same way as they stayed in contact on Facebook." As a practical matter, it is true that if a user left Facebook, she would, well, leave Facebook. But why Facebook's unique features should be available on Facebook's competitors' platforms is never explained.

And, as it were, Americans don't necessarily want social media to resemble Facebook. The mere existence of "multi-homing" suggests Americans don't rely on Facebook for their social-media needs, nor wish to confine themselves to Facebook even if it is the largest platform. Indeed, Scott Morton and Dinielli seem to discount factors outside Facebook's control for the platform's success. Facebook is older than most of today's platforms.[184] And it has specific features that appeal to broad swaths of Americans—a little of something for everyone.[185]



For many Americans, especially older Americans, Facebook is familiar. Given the ever-evolving nature of social media platforms, older demographics may use Facebook simply because they know it best. That's not a result of any anticompetitive behavior; that's just good luck from timing.

Facebook is also an old platform, at least relative to its competitors. Again, this timing probably matters: Generation Z came of age with many social media platforms, including TikTok, which is dominate among that demographic.[186] By contrast, Millennials, Generation Xers, and Boomers all largely came of age when Facebook was not only new but really the only option.[187] Their sustained use of the platform is probably driven by comfort, convenience, and familiarity.

[184] One notable exception: YouTube, which launched in 2005. William L. Hosch, *YouTube*, Encyclopedia Britannica (Mar. 13, 2020), https://www.britannica.com/topic/YouTube.
[185] For example, it lets users communicate privately and publicly, create and share their own content, as well as share third-party content, create or join groups, create or RVSP to events, and interact with other users on all this content.
[186] Doyle, *supra* note 182.
[187] See Keegan, *supra* note 31.

That some platforms focus heavily on certain forms of communication—like photos or videos—and Facebook offers more diversity does not mean Facebook represents what social media will look like in two, five, or ten years. Instead, it means that Facebook has a model that works for most of its current users. The key will be whether Facebook is able to attract new, younger users—and so far, it has been far less successful.[188]

So, if we were to follow Scott Morton and Dinielli's assumptions, we'd calcify the social media market such that all options more or less looked like Facebook. That may be fine for many consumers, but the clear majority of Americans like the variety they have now. In any event, Facebook does not have dominant market share, let alone monopoly power.

EVIDENCE OF MARKET POWER

Direct Evidence

No matter the size of a company's market share, plaintiffs must still prove that the share amounts to monopoly power.[189] One way of doing that is through direct evidence that shows a company charges prices far and above what a competitive market would support.[190] Scott Morton and Dinielli allege two pieces of direct evidence to show Facebook has monopoly power: (1) "social networks have strong direct network effects"; and (2) "Facebook has a near-monopoly share and enormous reach."[191] Because Facebook is free for users, Scott Morton and Dinielli substitute qualitative factors like privacy protections and content type for price.[192]

[188] *See* Mary Hanbury, *Gen Z Says Facebook is the Number One Social-Media Platform They've Abandoned*, Bus. Insider (July 8, 2019), https://www.businessinsider.com/gen-z-abandons-facebook-kik-skype-survey-2019-7; Matt Rosoff, *Facebook Exodus: Nearly Half of Young Users Have Deleted the App From Their Phone in the Last Year, Says Study*, CNBC (Sept. 5, 2018), https://www.cnbc.com/2018/09/05/facebook-exodus-44-percent-of-americans-age-18-29-have-deleted-app.html.
[189] Eastman Kodak Co., 504 U.S. at 481.
[190] *See, e.g.*, Geneva Pharm. Tech. Corp. v. Barr Lab, Inc., 386 F.3d 485, 500 (2d Cir. 2004).
[191] *Roadmap, supra* 17, at 11.
[192] *See id.*

Turning to their first argument, Scott Morton and Dinielli claim that "[a] very significant reason that Facebook has market power is that a user cannot change platforms and expect to be able to stay in contact with her friends."[193] Their logic boils down to this: social media platforms lack interoperability, which deters users from abandoning Facebook, which forces users "to put up with Facebook's fake news, or exploitation of privacy, or any other increase in quality-adjusted price."[194] Scott Morton and Dinielli further allege that these costs compound when the users looking to leave are members of a large group—if one member refuses to switch, he can block the group's move.[195]

That would be news to the 9% of Americans who deleted their Facebook accounts in 2018,[196] the 35% who reported using the site less and less,[197] and the 49% of young Americans who forgo Facebook altogether.[198] Those who left the site entirely gave several reasons similar to Scott Morton and Dinielli's suggestions, including the Cambridge Analytica scandal, the site's echo-chamber nature, and the desire to be more productive—in other words, they were not forced to remain.[199]

Moreover, Facebook already lets users export their data, including a list of their friends. Scott Morton and Dinielli highlight a user's Facebook contacts as the most valuable asset on Facebook,[200] so this criticism seems misplaced. But to the extent that the list may not match another platform's—for example, a friend that goes by one name on Facebook and another on Twitter—that is a problem not easily remedied by Facebook. Indeed, if Facebook were to allow users to export detailed identifying data on a user's friends, Scott Morton and Dinielli would likely criticize the move as hurting user privacy.

On the matter of user privacy, Scott Morton and Dinielli's quality-adjusted price arguments are too subjective to use as proof of direct evidence. To be sure, U.S. antitrust doctrine recognizes that non-price factors can stand in for price increases.[201] But Scott Morton and Dinielli do not make the case that fake news and privacy policies are such costs, let alone that they are above market level.

[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] Lynne Anderson, *Why People Leave Facebook—And What it Tells Us About the Future of Social Media*, The Conversation (last updated Jan. 8, 2020), https://theconversation.com/why-people-leave-facebook-and-what-it-tells-us-about-the-future-of-social-media-128952.
[197] *Id.*
[198] Chen, *supra* note 176.
[199] Anderson, *supra* note 213.
[200] *Roadmap*, *supra* 17, at 11.
[201] Horizontal Mergers Guidelines, *supra* note 81 (citing, for example, decreases in quality as a non-price factor).

Take fake news first. Scott Morton and Dinielli cite it as a harm so widely understood as a harm that it needs no elaboration. But their discussion of fake news does not enjoy the de facto [SC1] consensus Scott Morton and Dinielli assert: Republicans and Democrats don't even agree on the definition of fake news.[202] Even if there were a common definition, many instances of fake news are in the eye of the beholder—what is fake to some is another's alternative facts and is another's reality. Practical problems aside, some users may also believe that, consistent with values of free speech, it is better for Facebook to allow more speech than less speech. Whatever the case may be, fake news is not objective enough to qualify as a cost forced down users' throats.

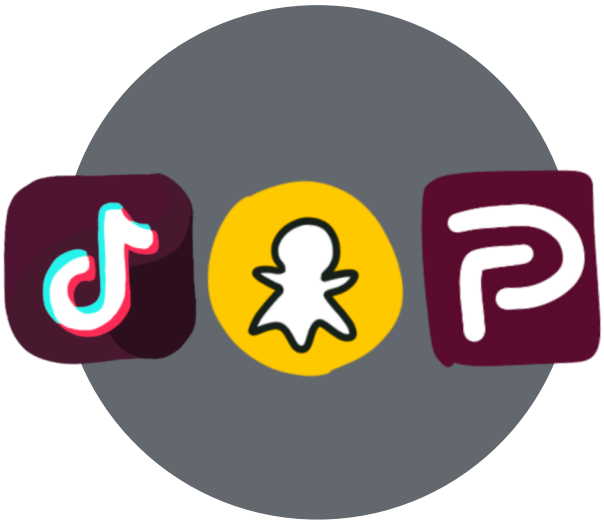
The same is true of alleged privacy concerns. Polling reveals that Americans are worried about their digital privacy,[203] and evidence shows that Facebook has responded by giving users more control over their data privacy.[204] If Facebook had monopoly power, it would not need to respond to these concerns at all. Plus, privacy operates on a sliding scale—some users want total privacy; others are content with sharing some or all data in return for free services.

Indirect Evidence

Of course, plaintiffs may show monopoly power through indirect evidence of entry barriers. Scott Morton and Dinielli provide many reasons why Facebook is protected from competition.[205] But, like the direct evidence they allege, these facts do not support their claim.

First, Scott Morton and Dinielli claim network effects are a "significant" barrier to entry for new firms.[206] Network effects, you'll recall, occur when a product's value grows proportionally with the number of people who use it.[207] Some scholars, including Scott Morton and Dinielli and the CMA, believe that when a platform's network effects "tip"—meaning, it has so many users that it becomes the default and only real option for users—the market closes its doors to new entrants.[208]

[202] *See* Mark Epstein, *Memo to the New York Times: Definitions of "Fake News" Are Subjective,* Nat'l Rev. (Dec. 23, 2016), https://www.nationalreview.com/2016/12/fake-news-facebook-new-york-times-hate-speech-social-media-political-diversity/.
[203] Greg Sterling, *Nearly all Consumers are Concerned About Personal Data Privacy, Survey Finds*, MarketingLand (Dec. 4, 2019), https://marketingland.com/nearly-all-consumers-are-concerned-about-personal-data-privacy-survey-finds-272129.
[204] *See, e.g.,* Audrey Conklin, *Facebook Gives Users More Control Over "Off-Facebook" Activity Tracking*, Fox Bus. (Jan. 28, 2020), https://www.foxbusiness.com/technology/off-facebook-activity-launch-us; Sarah Perez, *All Users Can Now Access Facebook's Tool for Controlling Which Apps and Sites Can Share Data for Ad-targeting,* TechCrunch (Jan. 28, 2020), https://techcrunch.com/2020/01/28/all-users-can-now-access-facebooks-tool-for-controlling-which-apps-and-sites-can-share-data-for-ad-targeting/; *Reuters, Facebook to Give Users More Control Over Personal Information*, CNBC (last updated Mar. 28, 2018), https://www.cnbc.com/2018/03/28/facebook-is-making-data-settings-and-privacy-tools-easier-for-users-to-find.html.
[205] *See Roadmap, supra* note 17, at 15-19.
[206] *Id.* at 16.
[207] *See infra* Part I.B.
[208] *Roadmap, supra* note 17, at 16.



At best, this is an unproven-but-possible problem. To date, there is no empirical evidence that social media platforms have "tipped."[209] But there is evidence that it does not currently plague the market. Just this year, for example, a start-up platform called Parler entered the market and immediately attracted thousands of new users—many of them conservatives who feel Facebook, Twitter, and other platforms moderate too strictly.[210] TikTok, meanwhile, entered the market in 2018 and is now the most popular app among young Americans.[211]

What's more, only 51% of young Americans use Facebook,[212] but supermajorities of them use other platforms like Snapchat and TikTok.[213] If the network effects posed an actual barrier to entry, we'd expect to see these young consumers use both Facebook and its competitors—indeed, that's the argument Scott Morton and Dinielli make for Americans in general.

[209] David S. Evans & Richard Schmalensee, *Debunking the "Network Effects" Bogeyman*, 40 Reg. 36, 39 (Mar. 28, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3148121.
[210] Graham, *supra* note 166.
[211] Doyle, *supra* note 182.
[212] Chen, *supra* note 176.
[213] *See id.;* Doyle, *supra* note 182.

Second, Scott Morton and Dinielli claim that Facebook makes it difficult to multi-home because, relatedly, it does not offer full API access to all its competitors.[214] This argument is false. Facebook makes its API accessible to competitors and is used by direct competitors such as Tinder, Viber, TikTok, Zoom, and Pinterest. [215]

This argument also falls apart under common sense. Americans multi-home all day: many check Twitter, Instagram, TikTok, Pinterest, and Reddit regularly. Indeed, even Scott Morton and Dinielli acknowledge this. As they report, many Americans use multiple digital platforms. [216]

Their complaint, however, is that multi-homing is not "necessarily easy."[217] In support of this, Scott Morton and Dinielli again cite the alleged lack of inoperability; this time claiming that Facebook does not allow users of products other than its own to simultaneously post content on another platform and on Facebook's platforms. [218] Of course, as they recognize, this is in part "intrinsic to the fact that most platforms are, indeed, run independently from one another."[219] Part of that independence includes content-moderation policies. Facebook may think that such simultaneous posting could cause more headaches than it is worth. Two points jump to mind: first, Facebook already has billions of pieces of content to worry about. Adding even more, especially when the platform is already under scrutiny from the left and right, would likely require the platform to hire even more employees to review flagged content and handle disputes. Second, it could lead to even more politicized attacks. Suppose someone's tweet posts on Twitter and Facebook, but Twitter removes it for violating its policy. If Facebook decides not to remove the content from its platform, it will surely invite even more criticism from certain corners. The same is true in reverse.

Facebook also works with third parties to help them use its APIs in ways that respect users' expectations.[220] Despite Scott Morton and Dinielli's claim to the contrary,[221] thousands of publishers, websites, and competitor platforms have

[214] *Roadmap, supra* note 17, at 24.
[215] Assoc. Press, *Facebook's Software Kit to Blame for Popular Apps Crashing*, Spectrum News (Jul. 11, 2020), https://spectrumlocalnews.com/tx/san-antonio/news/2020/07/11/facebook-s-software-kit-to-blame-for-popular-apps-crashing.
[216] *Roadmap, supra* note 17, at 16 ("Despite the fact that many consumers cross-visit' between different platforms, as described above, doing so is not necessarily easy.").
[217] *Id.*
[218] *Id.* at 25.
[219] *Id.* at 17.
[220] Facebook, *Facebook for Developers: Facebook Platform Policy*, https://developers.facebook.com/policy/ (last visited July 5, 2020).
[221] *Roadmap, supra* note 17, at 24.

access to the site's APIs.[222] But even if that were not the case, Scott Morton and Dinielli do not explain why Facebook must share its technology with its competitors. Facebook is not an essential facility, even if they believe that it is.

Third, Scott Morton and Dinielli claim Facebook's data collection and use practices gives it a massive leg-up on its advertising competitors.[223] Data is neither finite nor incapable of being shared with one entity at any given time. In other words, Facebook may have data useful to its advertisers, but that data is not Facebook's alone. Indeed, as Scott Morton and Dinielli reported in their first Roadmap, Google also has useful data for advertisers to capitalize on.[224] So too, with Amazon. Both Google and Amazon are Facebook's largest competitors in the digital advertising space.[225]

Recent news also debunks Scott Morton and Dinielli's claim. Some of Facebook's largest advertisers have recently boycotted the platform in an effort to pressure the platform to change its moderation policies.[226] If these advertisers were forced to use Facebook's advertising tools, as Scott Morton and Dinielli believe,[227] surely these boycotts would not happen—especially during coronavirus when retailers and manufacturers are already relying on online sales to compensate for declining in-person sales.[228]

Fourth, Scott Morton and Dinielli claim that Facebook's reach makes it too valuable for advertisers to pass up.[229] This is a particularly silly argument. The platform's reach is valuable to advertisers—and that's a benefit, not a barrier to entry. That advertisers can reach millions of potential consumers is a good thing, as discussed above.[230] But, again, that does not mean Facebook has monopoly power. And, in fact, Facebook does not have monopoly power.

[222] *See* Devin Coldewey, *Facebook is Shutting Down Its API for Giving Your Friends' Data to Apps*, TechCrunch (Apr. 28, 2015), https://techcrunch.com/2015/04/28/facebook-api-shut-down/.
[223] *Roadmap*, *supra* note 17, at 18.
[224] *See, e.g.*, Fiona M. Scott Morton & David C. Dinielli, *Roadmap for a Digital Advertising Monopolization Case Against Google*, Omidyar Network 3 (May 2020), https://www.omidyar.com/sites/default/files/Roadmap%20for%20a%20Case%20Against%20Google.pdf
[225] Marchese, *supra* note 18, at 12.
[226] Scola, *supra* note 27.
[227] *Roadmap*, *supra* note 17, at 14.
[228] Katie Evans, *As Pandemic Pushes On, Online Sales Grew 76% in June*, Digital Commerce 360 (July 13, 2020), https://www.digitalcommerce360.com/article/coronavirus-impact-online-retail/.
[229] *Roadmap*, *supra* note 17, at 19.
[230] *See infra* Introduction.

FACEBOOK'S CONDUCT IS PROCOMPETITIVE & CONSUMERS BENEFIT FROM IT

DISTINGUISHING COMPETITIVE CONDUCT FROM ANTICOMPETITIVE CONDUCT

Competition is a ruthless process."[231] So ruthless, in fact, that it has reduced to ruins even household names like Blockbuster, Borders, Circuit City, and Radio Shack.[232] Once ever-present, these companies have since closed up shop or filed for bankruptcy.[233] But the Sherman Act stomachs[234]—even cheers—these outcomes because "[a]ggressive, competitive conduct by any firm, even one with market power, is beneficial to consumers."[235] Harder to digest, however, is "[a]ggressive, exclusionary conduct [that] is deleterious to consumers."[236]

But spotting the difference between procompetitive and exclusionary conduct is difficult.[237] This is so because the two are often brewed in the same barrel and thus look alike: conduct that benefits consumers also tends to exclude competitors.[238] Difficult though this may be, the Supreme Court uses mechanisms to help courts make sense of the evidence.

[231] Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325, 1338 (7th Cir. 1986) (Easterbrook, J.).
[232] *See* Rory Van Loo, Digital Market Perfection, 117 Mich. L. Rev. 815, 847 (2019).
[233] *Id.*
[234] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-68 (1984).
[235] Frank H. Easterbrook, *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 Colum. Bus. L. Rev. 345, 345 (2003).
[236] *Id.*
[237] *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458-59 (1993).
[238] *Id.*

One such mechanism is the requirement that a firm have monopoly power, which screens out businesses that are, because of their size, unable to harm the competitive process for long.[239] As Justice Scalia put it, "[b]ehavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist." [240]

Because Facebook is not a monopoly, its actions do not have anticompetitive effects. Indeed, its aggressive business tactics underscore that it faces fierce competition and that it's eager to avoid MySpace's fate. But even if it did have monopoly power, Facebook's actions are procompetitive, not exclusionary.

Scott Morton and Dinielli see things differently. To be sure, they seem to channel Justice Scalia when they write that "[c]onduct that might be relatively harmless in a different sort of market—the acquisition of a small, nascent competitor or complement, for example—might be dangerously anticompetitive in the social network market."[241] And they caution that Facebook could be popular "even in the absence of any anticompetitive conduct." [242] But they remain certain that the evidence shows Facebook "has chosen not to compete on the merits." [243]

Chief among Scott Morton and Dinielli's criticisms are Facebook's acquisitions, specifically Instagram.[244] Their Roadmap casts the sensible business decision as Facebook running scared—rather than compete on its own merits, it just buys out its rivals. [245] Although there are a whole host of reasons Facebook may have acquired Instagram, we need not probe its intent. Instead, we can dismiss of this concern easily: Facebook's acquisition made Instagram better,[246] which thereby increased consumer welfare. Once it joined Facebook, the platform went from being a small player with few users to one of the most popular in the country.[247]

[239] *See* Brooke Group Ltd. V. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993); Eastman Kodak Co., 504 U.S. at 488 (1992) (Scalia, J., dissenting); *see also* Dentsply Int'l, Inc., 399 F.3d at 187 ("Behavior that otherwise might comply with antitrust law may be impermissibly exclusionary when practiced by a monopolist.").
[240] Eastman Kodak Co., 504 U.S. at 488 (1992) (Scalia, J., dissenting)
[241] *Roadmap*, *supr*a note 17, at 20.
[242] *Id.*
[243] *Id.* at 1; *see id.* at 21, 25.
[244] *See id.* at 20-23.
[245] *Id.* at 20.
[246] When Facebook bought Instagram in 2012, the photo-sharing app had about 30 million users, a handful of employees, and no revenue streams. See Evelyn M. Rusli, *Facebook Buys Instagram for $1 Billion*, N.Y. Times (Apr. 9, 2012), https://dealbook.nytimes.com/2012/04/09/facebook-buys-instagram-for-1-billion. Since then, Instagram has grown into a social media platform that boasts nearly a billion users worldwide and over 116 million in the United States. Jenn Chen, I*mportant Instagram Stats You Need to Know for 2020*, SproutSocial (May 6, 2020), https://sproutsocial.com/insights/instagram-stats/. Increased output is generally recognized as a procompetitive effect that benefits consumer welfare. See, e.g., Herbert J. Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. Corp. L. 101, 113 (2019) ("The choice of a consumer welfare test will tend to favor mergers or other antitrust activities that tend toward increased output.").
[247] *Id.*

Not only did Facebook improve its features, including its security apparatus, but it also transformed the platform into a channel for people to stay connected and even to make money.[248] Both small and large businesses, as well as "influencers," can use the platform to connect with potential customers and audiences anywhere in the world.

Turning next to Scott Morton and Dinielli's secondary arguments, we again see that their so-called evidence of exclusionary conduct lacks support in case law and in common sense.

First, they claim that Facebook has an incentive to collect as much data as possible because data improves ads and improved ads nets more revenue.[249] Although it is sometimes true that higher-quality products can demand higher prices, even high-quality products must contend with market forces that keep prices in check. Start with the most obvious. If Facebook raises prices beyond what the market will bear, advertisers will shift their advertising dollars elsewhere or will reduce their ad spending on Facebook. And with so many competitors, Facebook has little room to raise prices without risking a decline in demand.

To be sure, Facebook and its competitors do have a financial incentive to improve their ads. But Scott Morton and Dinielli's observation of this incentive underscores a reality their paper seeks to discredit: the digital ads market is competitive.[250] If Facebook were a monopoly, it could raise prices without improving quality. Instead, Facebook has a financial incentive both to improve quality and to cut prices.

Although Scott Morton and Dinielli correctly observe the existence of a financial incentive to collect data,[251] they pay short thrift to how that incentive works in practice. Because ads generally benefit from data, it follows that the more data Facebook has the higher quality its ad may be. On that point, we agree. But that correlation does not exist in perpetuity.

[248] *See* Nicole Nguyen, *Facebook is Turning Instagram into the New Facebook*, Buzzfeed News (Apr. 30, 2019), https://www.buzzfeednews.com/article/nicolenguyen/facebook-is-turning-instagram-into-facebook
.[249] *Id.* at 4 ("First, Facebook can raise the price of its ads if it can improve their quality by targeting. This means Facebook has a financial incentive to gather as much data about its users as it can.")
[250] Marchese, *supra* note 18, at 12.
[251] Roadmap, *supra* note 17, at 4.

First, the law of diminishing returns kicks in—more is not always better. Put simply, each data point is less valuable than the one that came before it. So, as Facebook processes data, it eventually reaches a point when the data it collects is not worth the price or effort associated with that data. Moreover, the data is often temporally limited. The information about a user's preferences collected five years ago is likely of minimal use in predicting today's preferences. In otherwords, Facebook has no incentive to collect and use data beyond a certain point. Where that point lies is beyond the scope of this paper. But that principle refutes Scott Morton and Dinielli's elementary claim that "Facebook has a financial incentive to gather as much data about its users as it can."[252]

Second, Scott Morton and Dinielli pay no attention to Facebook's more important financial incentive: keeping its users happy and meeting their data-privacy expectations. For starters, Facebook must be responsive to concerns about data privacy and security. Although consumers may not fully understand data policies, they have general expectations—ones that Facebook can ignore only at its own peril. In fact, as they note, "[c]onsumers can experience harm when they are surveilled."[253] Facebook must therefore balance its data collection with user satisfaction. After all, Facebook would fail if it lost its users.

Politicians, producers, platforms—anyone with a basic understanding of persuasion—promote messages that they think will resonate with their target audiences.[254] And one way of doing that is to appeal to a consumer's emotions, values, or principles. Some companies prominently feature "American-Made" labels to signal to American consumers that they are buying products that are, well, American-made; others use imagery to stir consumers to buy their product over their competitors' products; still others align themselves with specific values or social movements so that consumers associate buying their product with supporting certain principles—the list goes on and on.

Of course, advertising tied to emotions is nothing new—that is advertising. Commercials for food trigger your hunger. Commercials for non-profits trigger your empathy. And commercials for movies trigger your adrenaline. The use of emotions in advertising is not new or novel and it is certainly not unique to

[[252] *Roadmap*, *supra* note 17, at 4.
[253] *Id.*
[254] *Id.* at 5 ("Second, as we learned from revelations about political research conducted by Cambridge Analytica, Facebook can gather, analyze, and sell information about its users . . . These [data-collection practices] allow Facebook to exploit its knowledge of the user with advertising or other content that accentuates or provokes emotions such as hate or fear. Facebook can exploit these emotions to enable advertisers to sell products they otherwise would not, e.g., makeup to depressed teenagers. Facebook gains from the ability to create and sell such emotions to advertisers, but consumers may not.")

Facebook, its advertisers, or social media more broadly. Scott Morton and Dinielli surely understand this, because they themselves use emotion to sell their paper to the reader. Consider their example of "makeup to depressed teenagers."[255] As an initial matter, it is hard to see how targeted advertising proves Facebook violated antitrust laws. It is harder still to see how their example is at all relevant to their paper.

Scott Morton and Dinielli's complaint is that Facebook is uniquely problematic because its data may let advertisers create ads that are uniquely persuasive.[256] Even if that were true, it rests on the premise that targeted ads harm consumers. That is a dubious proposition because it, as described above, interest based advertising is not new and has existed since the days of the Sears catalog. Although there is no denying that advertising influences consumer decisions—if it didn't, no one would bother advertising—it's a stretch to claim that, somehow, in some way, persuasive ads are related to antitrust.

And the claim that Facebook can "exploit" data to help advertisers sell products "they otherwise would not" is not an antitrust complaint.[257] If an ad resonates particularly well with a consumer, then that suggests the consumer was particularly predisposed to that product to begin with. An ad can, of course, alert consumers of a product's existence—and it may even convince people to buy something they really don't need—but that is true of all forms of advertising.

Turning next to the alleged harms targeted ads "may" cause, we see that the Scott Morton and Dinielli's argument is even weaker. First, they suggest that Facebook "accentuates or provokes emotions such as hate or fear."[258] Although no one doubts that these are negative emotions, they are not, by themselves, harmful. What if targeted ads provoke the public's fear of a deadly disease and thereby prompts people to exercise precaution, potentially saving lives? Alternatively, what if the target ads inspire Americans to hate injustice? If we are to believe that targeted ads are potentially harmful because they inspire negative emotions, we need to know what those emotions are about.

Second, Scott Morton and Dinielli suggest that targeted ads may prey on

[255] *Roadmap, supra* note 17, at 5.
[256] *See id.*
[257] *Id.*
[258] *Id.*

vulnerable consumers, like "depressed teenagers."[259] Here, their argument seems valid, even if unrelated to antitrust: few among us would say it is appropriate for politicians, producers, or platforms to exploit someone's struggles. But the dataFacebook offers advertisers is neutral. If some advertisers use it for unseemly ends, then the problem will not be resolved through antitrust. And, in fact, Facebook has standards and policies that are meant to push advertisers to act honorably.[260] More importantly, consider targeted ads that help vulnerable people. Consider ads related to suicide helplines, sobriety programs, and psychiatrists—if possible, don't we want these ads displayed before those who would benefit most from the services they offer?

Like other social media platforms, Facebook has an incentive to promote content that its users find relevant.[261] This insight is fundamentally what bothers some people because it means that the best—and worst—of social media is just a reflection of the best—and worst—of society. Before addressing the normative implications of Scott Morton and Dinielli's point, consider the legal. Antitrust law is meant to promote consumer welfare. But how, exactly, should antitrust law evaluate content that is "addictive"? Or even "outrageous"? (To say nothing of content that is merely "arousing.")

Think about how this might work in practice. Is Facebook addictive if I spend at least six hours per day on it? What if Facebook is a proxy for things we couldn't do offline—like connecting with sick relatives who live too far to visit in person? Or what if Facebook merely substitutes for things we'd do regardless, like reading the news for a few hours every day? Because we can't answer these questions descriptively, we can't even begin to answer them normatively. That's because what works for each of us, and what addiction looks like for each of us, is so subjective that it can never truly be captured in an objective measurement, which makes it a poor candidate for antitrust analysis.

Speaking of subjectivity, think about "outrageous" and "arousing"—how would you define them? What seems outrageous or arousing to you? Do you think your definitions would match those of federal regulators? Even if everyone had the

[259] *id.*
[260] *See, e.g.*, Salvador Rodriquez, *Zuckerberg: Facebook Will Prohibit Hate Speech in its Ads*, CNBC (June 26, 2020), https://www.cnbc.com/2020/06/26/zuckerberg-facebook-will-prohibit-hate-speech-in-its-ads.html.
[261] *Id.* at 5 ("Third, because the business model depends on selling ads, a user is more valuable if she stays on the platform longer. Thus, Facebook has an incentive to promote content that causes users to stay on the platform and is addictive. Some engaging content consists of displaying images in a high-quality way, making it easy to locate friends, and so forth, and thereby contributing to consumer welfare. But another type of content that holds users on the platform is that which is outrageous and arousing.").

same definitions, we're left to wonder how outrageous or arousing content is, by itself, a harm. If the outrageous content is, say, a news story that stuns the nation and awakes its moral conscience, is that harmful? And if photos of food—even of objectively unhealthy food—arouse our appetites, is that bad?

Now, if they use these terms to cover content that some might find objectionable, other issues arise. Take political speech. Some Democrats—and advertisers—want Twitter to remove or otherwise address President Trump's social media posts. Republicans, by contrast, want Twitter to do less. If some find the president's tweets objectionable and others find them meaningful, who is right and why? To be clear, platforms can decide for themselves when content violates their standards—when it is objectionable. Even more: users can decide for themselves, either by leaving a platform whose moderation policies they dislike or by advocating for change. What cannot happen—not under the First Amendment—is for the government to use its antitrust powers to decide which content is "addictive," "outrageous," or "arousing." Because the First Amendment trumps any antitrust law Congress may pass, that ends the matter.[262]

Suppose we ignore the existence of the First Amendment and we also assume that Scott Morton and Dinielli are right that Facebook promotes content that is so outrageous or so arousing that we become addicted to the platform. Without knowing more, they still fail to establish why this is a harm to consumers. Do Scott Morton and Dinielli presume that but for Facebook, we'd use our time more productively or more beneficially? Or that we'd be happier? Or would we find other means of entertainment? Taken to its logical conclusion, Scott Morton and Dinielli would leave it up to the government, acting under its antitrust powers, to determine what is "good" and "bad" content.

Their Roadmap concludes with an overview of alleged harms against users, advertisers, and publishers. Many of the claims track arguments already covered. So here, we'll conclude with these points:

[262] *See* Hillary Greene, *Antitrust as Speech Control*, 60 Wm. & Mary L. Rev. 1215 (2019).

- Facebook is not immune to criticism or market forces. If it were, it would not changeits privacy policies, for example.

- Facebook, along with its competitors, have developed data-backed tools that give advertisers more bang for less buck. Indeed, digital advertising rates are down 40% from a few years ago.[263]

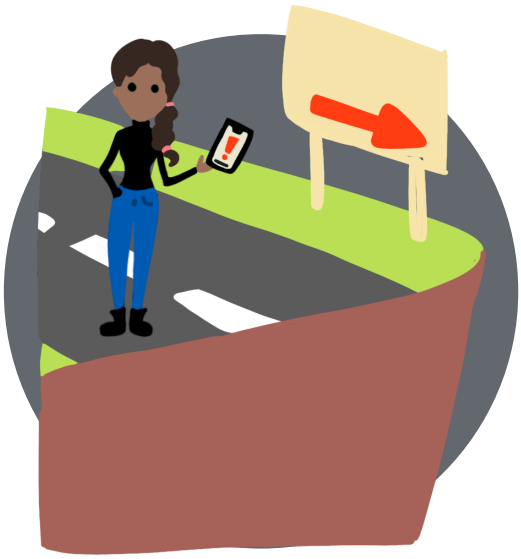
- Facebook's products give publishers more exposure than they otherwise might have. Indeed, when users share third-party content, publishers post their own content, or the products push the content themselves, publishers attract eyeballs to their own websites. With more web traffic, publishers can attract more advertising dollars themselves. It also means smaller publishers who aren't household names are able to compete against more established publishers.

CONCLUSION

Clocking in at 36 pages, the Roadmap fails to make any credible antitrust case against Facebook. Indeed, even with antitrust enforcement as its destination, the Roadmap goes off course time and again. To be sure, it makes stops and speaks the language of antitrust—"market power," "monopoly," "anticompetitive," "consumer harm," and the like. But it does not give those concepts their

[263] *See* Michael Mandel, *The Declining Price of Advertising: Policy Implications*, Progressive Pol'y Inst. 2 (July 2019), https://www.progressivepolicy.org/wp-content/uploads/2019/07/Advertising2019_Mandel.pdf.

due. To the contrary: the Roadmap takes irrelevant detours into subjective harms that clearly bother Scott Morton and Dinielli, but that are not illegal or harmful under antitrust doctrine.



Rather than making the compelling antitrust argument, the Roadmap instead advances policy arguments while advocating for antitrust reform. Under the cloak of the consumer welfare standard, the Roadmap tries to turn back the clocks to when big meant bad. In the process, it reminds all readers that the the revolution in antitrust that began in the early 1970s must once again be defended.

Facebook may be big—indeed, it may be very big. But it is no monopoly. Its products are among the most valued in the world precisely because they add so much value—for users, advertisers, and publishers. Their Roadmap looks like a clear path for antitrust enforcement against Facebook but in the end leads readers over the cliff.