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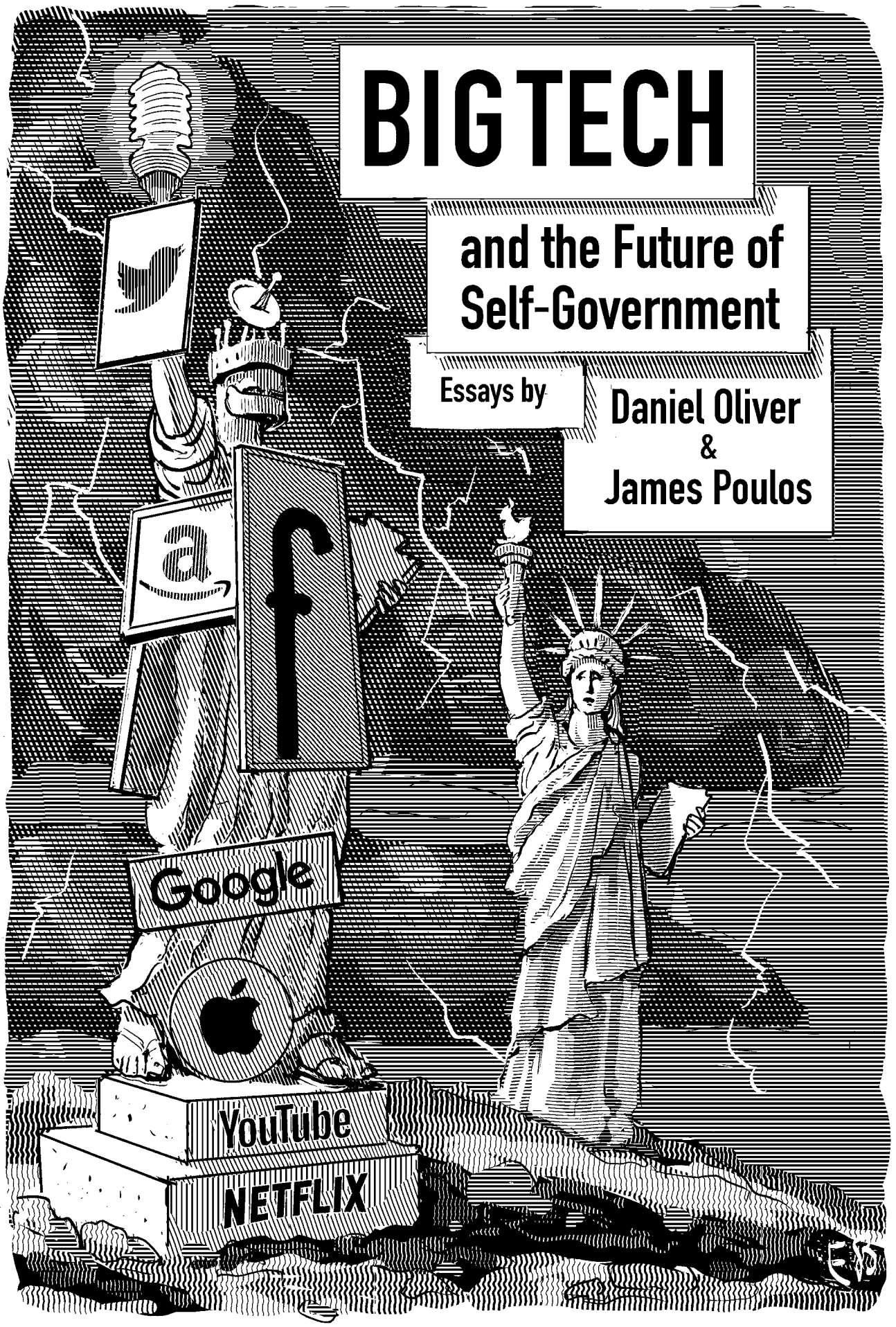

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Essay by Daniel Oliver

From Big Tech to Big Brother

The problem of monopoly in a digital age.

Tech monopolies have been under scrutiny for years—though some might object that describing them as "monopolies" is already stealing a base. Technicalities aside, however, complaints have been pouring in about the practices of tech mega-companies, especially the big four: Amazon, Google, Facebook, and Twitter. It has become impossible to avoid taking a serious look at reforming them.

Last October, the Department of Justice brought a long-awaited antitrust suit against Google. The suit will take ages. But whether the DOJ wins or loses, the publicity for Google and its Big Tech buddies should be awful—assuming there is any publicity. The suit followed a report on tech monopolies, almost two years in the making, from the House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law (ACAL). The ACAL's majority report recommended, *inter alia*, "structural separations and prohibition of certain dominant platforms, from operating in adjacent lines of business." Four Republican members wrote a response to the majority ("The Third Way"), largely agreeing with the report's findings but dissenting from some of its recommended legislative solutions.

Political watchers may have been shocked to find bipartisanship going on in Washington. But the tech mega-companies are equal-opportunity predators: they treat all sorts of ordinary, non-media-oriented businesses abysmally. And those businesses' Washington representatives include, obviously, both Republicans and Democrats. They want whatever relief the antitrust statutes can provide—and if they can't provide any, then they want legislation that can.

During the presidential campaign, Facebook refused to allow dissemination of information purportedly gleaned from Hunter Biden's laptop. This high-profile, high-tech sin prompted a major statement from then-Federal Communications Commission (FCC) Chairman Ajit Pai: "Social media companies have a First Amendment right to free speech," he said. "But they do not have a First Amendment right to a special immunity denied to other media outlets." That was big. But Pai is gone now, and the new head of the antitrust division at the Justice Department is likely to be either a Silicon Valley superstar attorney, or, if that won't fly, an attorney who is at least not hostile to the tech magnates that made President Joe Biden's victory possible. Still, even those who tend to benefit politically from Facebook's actions may be thinking twice about entrusting them with so much power. Then-candidate Biden undoubtedly profited from censorship of the Hunter Biden story—perhaps enough

to win the election. But can the Democrats be sure it will work for them next time? It's possible, even if not likely in a Biden Administration, that high tech could be in trouble.

It is widely believed that America's antitrust laws were enacted in order to prevent companies from getting too big. But the late Judge Robert Bork argued in *The Antitrust Paradox* (1978) that this is simply not true. For years, Bork's views on antitrust, put into general circulation by President Reagan's antitrust chief William Baxter, have been accepted wisdom in antitrust circles. Bork explained that Section 2 of the 1890 Sherman Act outlaws only the *process* of monopolizing, not monopolies themselves. Even complete monopolies should be lawful, he wrote, so long as they are gained by superior efficiencies—so long, that is, as they reflect a real value that can only be provided by aggregating all the business into one place. As Harvard Law School Professor Donald Turner said, "Mergers are an important mechanism in the creation of social wealth"—in the provision of more than merely financial benefits to society.

That's fine. Maybe. But when Bork wrote *The Antitrust Paradox*, he was closer to the golden age of radio than to the internet age we live in now. What is social wealth in our time? When Amazon's venture capital fund makes an investment in a company, it gains valuable confidential information. The artificial intelligence training company DefinedCrowd Corp. says that four years after investing in it, Amazon launched its own A.I. product that does almost exactly what DefinedCrowd Corp.'s product does. As for Facebook: a couple of years ago, a number of child welfare groups complained to it that

> a growing body of research demonstrates that excessive use of digital devices and social media is harmful to children and teens.... They are not old enough to navigate the complexities of online relationships, which often lead to misunderstandings and conflicts even among more mature users.

Social wealth? The police reports suggest otherwise.

All the News That's Fit to Click

Above all, though, we have to factor in the enormous social cost of leaving our entire public discourse in the hands of a censorious few. There may be tremendous social advantages provided by, e.g., Amazon: with the click of a button, a shopper can satisfy almost any want. But is this social wealth enough to offset every other drawback? Who says? If what you want is a conservative book, a click on Amazon may not bring satisfaction. In February, Ryan T. Anderson's empathetic and well-researched book on transgenderism, *When Harry Became Sally* (2018), was stripped from the online shelves. And last October, Amazon Prime rejected Shelby Steele's documentary on race relations in America, *What Killed Michael Brown?* (2020). Anderson is president of the Ethics and Public Policy Center; Steele is a senior fellow at Stanford University's Hoover Institution; neither is a bigot. You can look them both up on Google—before Google stuffs them, too, down the memory hole.

The same discriminatory behavior, *mutatis mutandis*, exists at Google, Facebook, and Twitter. Last June, under massive pressure from both advertisers and employees, Facebook majority stockholder Mark Zuckerberg formed a committee to decide what is acceptable for publication. According to the *New York Post*, there may be at least half a dozen Chinese nationals at Facebook working in this "Hate-Speech Engineering" group. You can't make this stuff up—unless you're George Orwell. So Facebook users will read only the truth...as Facebook understands it. Or perhaps, as they want *you* to understand it. But truth, most notably scientific truth, has proved elusive recently. At first, the World Health Organization said the Chinese flu could not be transmitted from person to person. At first, the Centers for Disease Control and Prevention advised against wearing face masks—until they were for it. Now there is, again, serious doubt about the efficacy of masks. Throughout, Facebook has decided which studies are licit and which must be suppressed. How does the public benefit from such diktats?

Then there's Google, the planet's biggest search engine. Alphabet, Google's parent company, also owns YouTube, the video streaming company. Google and YouTube routinely censor conservative information and commentary. Dennis Prager—the head of Prager University, which creates political, economic, and philosophical videos—wrote in August 2019 that YouTube had put 56 of PragerU's 320 videos on its restricted list. The list of censored videos is shocking: it includes "Israel's Legal Founding" by Harvard Law Professor Alan Dershowitz, "Are the Police Racist?" by the Manhattan Institute's Heather Mac Donald, and "Why Is Modern Art So Bad?" by artist Robert Florczak. (Incidentally, why *is* modern art so bad?)

Google performs its own disappearing magic as well: after then-President Donald

Trump expressed enthusiasm for hydroxychloroquine (HCQ) as a treatment for COVID-19, a scientific paper considering the drug's possible effectiveness was zapped from the search pages. But in December of last year (with the nation miraculously saved by Trump's defeat), the American Medical Association rescinded its previous recommendation against HCQ. Does anyone have any idea how many people died in the interim from the novel coronavirus when HCQ could have helped? Does anyone care?

Daily Caller editor-in-chief Geoffrey Ingersoll recently showed that Google hid one of his website's articles criticizing the World Health Organization's advocacy of abortion. Even searches of the exact title didn't produce the article before page ten of the search, whereas pro-abortion articles appeared on all the earlier pages. Robert Epstein, senior research psychologist at the American Institute for Behavioral Research and Technology, wrote in September 2018 that he and his team inspected 13,207 online searches from the 2016 election and the 98,044 web pages to which the search results linked. Epstein, who supported Hillary Clinton, said his research showed Google's search results favored Clinton "in all 10 positions on the first page of search results—enough, perhaps, to have shifted two or three million votes in her favor." He added last September that Google could, and probably would, swing up to 15 million votes in 2020.

But the true poster company for censorship is Twitter. There, not only was the *New York Post*'s story on Hunter Biden's laptop banned, but the *Post* itself was silenced, and people attempting to retweet the news—including the Trump reelection campaign and Trump's White House Press Secretary Kayleigh McEnany—were locked out of their accounts until they deleted the story. Whether or not Joe Biden ultimately turns out to have been selling out the American people to China, Hunter did eventually admit that he was in fact under federal investigation—so the *Post*'s reporting was at least as reliable and newsworthy as the scandalous stories spread, for more than four years, about Donald Trump. Yet following the election, Twitter cancelled Trump's account, too. He moved to Twitter competitor Parler, which was the most-downloaded app in the U.S. during the week after the election. You know what happened next, and if you don't, you can guess: Parler was delisted from Google's and Apple's app stores, and Amazon kicked it off its web hosting services. Parler completely disappeared, and didn't resurface until mid-February. There may be thousands—even hundreds of thousands—of such actions by the tech mega-companies we aren't aware of. Many more examples can be found at "reclaimthenet.org."

Lascivious Conservatism

Though some of the four mega-companies' business practices may well be illegal, those practices are not actually the primary concern of those who oppose viewpoint discrimination. The Justice Department's suit against Google, assuming it is continued under Biden, looks to some like a long shot. George Priest, a law professor at Yale and a director of the Bork Foundation, says the Justice Department's argument "rests on a misconception about the creation and operation of network industries, which will condemn this case—and future ones like it—to failure under sensible interpretations of U.S. antitrust laws." Still, others, practitioners rather than professors, are not so sure. Trump's DOJ was clever enough to include causes of action that mirror the theories successfully relied upon in *United States v. Microsoft Corp.* (2001). So the DOJ may prevail at least in part.

> We need either new legislation requiring the breakup of the companies, or a law prohibiting them from engaging in viewpoint discrimination. Or both.

But even a successful suit against Google for its monopolizing practices may do little to make conservative commentary (or any non-woke commentary) available. Making some limited space for an economic competitor is not likely to allow the emergence any time soon of a *serious* competitor in the search business. Another problem is the pervasive discrimination against conservative views on the part of the other three tech mega-companies. So the real question is *not* how to break up Google's financial monopoly, but how to eliminate the "viewpoint discrimination" perpetrated by all four.

The four tech mega-companies have relied on Section 230 of the 1996 Communications Decency Act, which former FCC Chairman Pai said needs reconsideration. According to the Act, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The point was to encourage internet companies to allow people to post material without first vetting it themselves for truth or legality—there being no way the internet companies could possibly verify the content of the billions of posts on their sites.

In return for this immunity, internet companies were to "publish" everything. Even material they didn't like. Even material that was conservative. Even material that could promote a constitutional government of limited powers, for the good of a God-fearing people; even material that might be advantageous to that notoriously racist and homophobic Russian stooge, Donald Trump. But that's not what has happened. Section 230 also says that internet platform companies, acting in good faith, can censor anything they find "obscene, lewd, lascivious, filthy, excessively violent, harassing, *or otherwise objectionable*, whether or not such material is constitutionally protected" (emphasis added). Internet companies rely on the phrase "otherwise objectionable" to justify their censorship. They can claim that conservative views are RACIST, and therefore obviously objectionable and worthy of suppression. That's absurd, of course: the phrase "otherwise objectionable" is meant only to elucidate the preceding list of objectionable speech (e.g., speech that is "obscene, lewd, lascivious," etc.)—not to create a new category.

The FCC should, but with a new Democratic majority probably will not, issue a regulation clarifying that point. The Biden Administration, midwifed by Big Tech interference, is unlikely to bruise the hand that has fed it. So the big internet companies will continue to discriminate incessantly—until it becomes too expensive. That may be a while, even if the FCC does get involved. The four mega-corporations can afford armies of lawyers to do battle with whoever attacks them, and they can pay their lawyers multiple times what government or private plaintiff lawyers receive. Facebook has already hired a Washington mega-firm to prepare for an antitrust assault.

The Limits of Antitrust

Some conservatives seem unmoved by Big Tech's threat to free speech and the free flow of information. They say: let the market work. But that, perhaps, is the essence of the problem. The tech companies didn't achieve their monopoly positions in a *free* market. The U.S. government created a legal and regulatory environment that gave

tech companies a massive advantage over their non-tech competitors. All of them received Section 230 protection, and Amazon had the extra benefits of tax-free internet sales, subsidized distribution through the post office, and exemption from liability for counterfeit and/or harmful products.

Writing in the *Wall Street Journal* this January ("The Constitution Can Crack Section 230"), Columbia Law School Professor Philip Hamburger observed that Section 230 may well be unconstitutional because of the advantages it gives tech companies:

> The First Amendment protects Americans even in privately owned public forums, such as company towns, and the law ordinarily obliges common carriers to serve all customers on terms that are fair, reasonable, and nondiscriminatory. Here, however, it is the reverse. Being unable to impose the full breadth of Section 230's censorship, Congress protects the companies so they can do it.... Some Southern sheriffs, long ago, used to assure Klansmen that they would face no repercussions for suppressing the speech of civil-rights marchers. Under the Constitution, government cannot immunize powerful private parties in the hope that they will voluntarily carry out unconstitutional policy.

Now that the market has been controlled for years by the Big Four, the public gets only that information that those companies think proper (i.e., woke). Low prices and innovation, the traditional goals of antitrust, aren't the *only* goals in a free society—and certainly not in *this* free society, whose foundational document guarantees free speech. But some conservatives are locked into seeing all commercial activity in free-market economic terms. Their position seems to be that Big Tech's marginally lower prices (though sometimes they are not lower at all) are worth more than the free flow of information. A better rule is that if, for example, breaking up or chastising an efficient but information-restricting monopoly leads to a slight increase in the price of some books or documentaries, that price is worth paying.

The best solution to the current problem is competition—competition that is clearly lacking today. Most of today's television is ultra-woke. But: there is Fox. Fox may not be your preferred station, but it offers a different product. The market works for Fox, and for the conservatives who watch it. The same can be true for search, for books, for videos—for anything the internet offers. But the job of breaking up the tech mega-companies should not be attempted using the current antitrust laws. Those laws were designed for a different time and, as Bork made clear, for a different purpose.

It is true that the antitrust laws have been treated like a half-baked pretzel: stretched and twisted this way and that to accomplish whatever goal was in fashion at the time. In *United States v. Vons Grocery Co.* (1966), the Supreme Court disallowed a merger of two supermarket firms that produced a single firm with a market share of grocery sales in Los Angeles of—wait for it—7.5%! The decision prompted Justice Potter Stewart's famous remark: "The sole consistency that I can find is that in litigation under [Section] 7 [of the Clayton Antitrust Act] the Government always wins."

But time marched on, and antitrust enforcement changed—in no small part because of Bork's influence. Two cases in particular define antitrust law today. In *United States v. Grinnell Corp.* (1966), the Supreme Court announced what has become the principal standard for evaluating claims of monopolization:

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

But the court has gone farther. In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP* (2004), the Court quoted the

Grinnell passage above and then actually endorsed possession of monopoly:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" [the *Grinnell* standard] in the first place.

Those cases, as well as Bork's influence, are likely to live loudly within the more than 200 judges President Trump appointed to the federal district courts and circuit courts of appeal. Bringing a case to break up Amazon, Google, Facebook, or Twitter under current antitrust laws is not likely to get the desired result.

Lawfare

Even *if* DOJ's action against Google were more or less successful, what would the remedy be? Historically, divestiture has been seen as the most effective and efficient remedy for illegal monopolization. But divestiture hasn't been ordered in a Section 2 case in a long time. And divesting any one of the tech mega-companies wouldn't solve the overall viewpoint discrimination problem.

All people who care about strict interpretation of laws should ask if we even want to stretch antitrust law even further so it applies to size alone. Do we want laws to be infinitely malleable? If there is a problem that needs fixing, should it be fixed by activist judges or by legislation from the people's representatives? The conservative's answer should be obvious. We need either new legislation requiring the breakup of the companies, or a law prohibiting them from engaging in viewpoint discrimination. Or both.

Congress could legislate the requirement that the big four be broken up and then appropriate, say, ten or 20 million dollars, to be awarded by the Justice Department to the business school (or anyone else) that comes up with the best plan for the breakup.

Alternatively, or additionally, Congress could prohibit viewpoint discrimination itself, perhaps adding a provision to an existing civil rights anti-discrimination law. It would apply only to huge companies, not to mid-size companies or to the smaller intellectual magazines and websites (e.g., the *Federalist*, the *Claremont Review of Books*, *First Things*) which exist solely to make available a distinct point of view. The First Amendment can restrict private organizations from "abridging the freedom of speech" only when government has intervened to help them do so, as described by Hamburger above. This is the case with Big Tech, but not with those smaller, more traditional publications.

A law prohibiting viewpoint discrimination (Missouri Senator Josh Hawley has introduced one such bill) would be just as constitutional as the Fairness Doctrine, an FCC policy which adjusted the overall balance of broadcast programming, or the Equal Time Rule, which first emerged in the Radio Act of 1927 and was established by the Communications Act of 1934. Under such a law, a plaintiff could sue for viewpoint discrimination. That plaintiff would be someone whose message had been suppressed by a tech company or whose account had been blocked or cancelled: Shelby Steele, Ryan Anderson, or Dennis Prager; the *New York Post* or Kayleigh McEnany. The decision to prosecute can't be left to the U.S. attorney general, because he might be as woke as the Big Tech companies.

It's important to note that removing Big Tech's Section 230 exemption might eliminate the option of viewpoint discrimination lawsuits. Without Section 230, the tech mega-companies would be just as free to manufacture fake news and squelch alternative views as the rest of the mainstream media. They might be more vulnerable to lawsuits brought on the grounds of libel, but the courts would probably accord them the same near-blanket deference when it comes to public figures as they currently grant the press under *New York Times Co. v. Sullivan* (1964). Suits by private individuals will be defended by armies of high-paid lawyers, and no financial judgment, should Big Tech lose (after years of expensive appealing), is likely to make a serious dent in their essentially unlimited fortunes. With Section 230 in place, on the other hand, any company sued under a viewpoint discrimination law would have to hope for a jury that agreed with its (clearly ridiculous) characterization of the statements in question (by, for example, Shelby Steele) as "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."

To be effective, a law prohibiting viewpoint discrimination would have to impose a punishment severe enough to discourage the offense—e.g., a fine for every day the viewpoint discrimination continued after the fifth day of being notified of it by the plaintiff. The fine could be set at a million dollars for the first day, doubling every day thereafter that the discrimination continued. The legislation could specify that the plaintiff and his, her, or its attorneys would each receive half of the award up to $6 million dollars (that smacking sound you hear is the lips of trial lawyers). Of any amount assessed in excess of $12 million dollars, the first $30 million would be split among the historically black colleges and universities (remember, this provision would be added to a civil rights law), and the balance would be paid into the Social Security trust fund (assuming the government can borrow the key to the lockbox from Al Gore). The fine may seem high, at first, but Mark Zuckerberg is worth something like $95 billion. He might decide to sit on a story about oh, say, a presidential candidate's son's laptop. If the fine were only a million dollars a day and the news story were suppressed for a whole year, the total fine would be only $366 million—probably less than Zuckerberg spends on aftershave.

America's constitutional government is in trouble. A small band of high-tech billionaires, in league with one political party, clearly censored information during the four years of the last administration and the 2020 election campaign, in order to influence the vote. Given the closeness of the race, that influence was likely decisive. Now Americans have to decide whether or not to give democratic power back to the citizens by enacting legislation that will curtail the power of the Big Tech companies. That will almost certainly not be done by the party that benefitted from the high-tech censorship. But it can be done by the other party. There are details to be worked out, of course. There always are. But the idea that the project is too complex is absurd. Congress should just proceed to do it.

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