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# Socially Awkward? Limiting Social Media Companies' Discretion in Determining What Content is

Ashley E. Smith

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# **Socially Awkward? Limiting Social Media Companies’ Discretion in Determining What Content is Appropriate on Business Pages**

*Ashley E. Smith\**

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## I. INTRODUCTION

Jon's Guns, a federally-licensed firearms dealer, has amassed a large following on Facebook,<sup>1</sup> a platform it deems critical for marketing to and keeping in touch with customers.<sup>2</sup> Jon's Guns' Facebook page was unpublished and no longer visible to the public after certain posts allegedly violated the social network's community standards for regulated goods.<sup>3</sup> However, Jon's Guns contends that the content on its Facebook page complied with community standards as it merely advertised firearms for sale at its store location and followed all federal, state, and local regulations.<sup>4</sup> Industry representatives argue that such seemingly random action has deprived companies of key advertising platforms.<sup>5</sup>

Many other companies operating in the firearms industry have also had their Facebook pages unpublished despite adhering to the social network's community standards, with many noting that Facebook has been particularly aggressive in unpublishing firearms dealers' pages.<sup>6</sup> While Facebook ultimately restored Jon's Guns' page and acknowledged its error after being contacted by news media,<sup>7</sup> Jon's Guns' story illustrates the importance of using social media platforms to connect businesses with customers and the impact that social media companies,

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1. Jon's Guns (@jonsgunsva), FACEBOOK, <https://www.facebook.com/jonsgunsva/> (last visited Apr. 5, 2018) (on file with *The University of the Pacific Law Review*).

2. See Justin Soto, *Bristol Gun Store Owner Wants Answers After Facebook Unpublished Page*, NEXSTAR BROADCASTING, INC. (Apr. 4, 2018, 10:01 AM), <http://www.wjhl.com/local/bristol-gun-store-owner-wants-answers-after-facebook-unpublished-page/1099638692> (on file with *The University of the Pacific Law Review*) (quoting Jonathan Hall, owner of Jon's Guns, who noted 95 percent of the company's advertising is through Facebook).

3. *Id.*

4. *Id.*; see also *Community Standards*, FACEBOOK, <https://www.facebook.com/communitystandards/> (last visited Apr. 5, 2018) (on file with *The University of the Pacific Law Review*) (allowing firearms dealers to advertise firearms for sale at store locations if they comply with applicable regulations but prohibiting their use of Facebook's payment tools to conduct transactions).

5. See Soto, *supra* note 2 (quoting Jonathan Hall, owner of Jon's Guns, who noted "sales drop immediately" if the company does not post frequently on its Facebook page).

6. See Bryan Schatz & Alexander Sammon, *Facebook's Ban on Gun Sales is Being Enforced by a Few Dedicated Users*, MOTHER JONES (June 27, 2016, 10:00 AM),

<https://www.motherjones.com/politics/2016/06/gun-sales-facebook-flagged-reported/> (on file with *The University of the Pacific Law Review*) ("Overzealous gun-group flaggers sometimes hit the wrong targets. The gun-sale ban only affects sales between individuals, not sales by federally licensed firearms dealers. . . . [P]ages for brick-and-mortar gun shops have been taken down wrongfully at times."); Mike Monteiro (@monteiro), TWITTER (June 23, 2016, 9:42 AM), [https://twitter.com/monteiro/status/746020715552374784?ref\\_src=twsrc%5Etfw&ref\\_url=https%3A%2F%2Fwww.motherjones.com%2Fpolitics%2F2016%2F06%2Fgun-sales-facebook-flagged-reported%2F](https://twitter.com/monteiro/status/746020715552374784?ref_src=twsrc%5Etfw&ref_url=https%3A%2F%2Fwww.motherjones.com%2Fpolitics%2F2016%2F06%2Fgun-sales-facebook-flagged-reported%2F) (on file with *The University of the Pacific Law Review*) ("Facebook is erratic in following its own guidelines.").

7. Justin Soto, *Facebook Apologizes to Bristol Gun Shop After Mistakenly Removing Page*, NEXSTAR BROADCASTING, INC. (Apr. 4, 2018, 11:27 PM), <http://www.wjhl.com/local/facebook-apologizes-to-bristol-gun-shop-after-mistakenly-removing-page/1102309621> (on file with *The University of the Pacific Law Review*).

as gatekeepers, may have on businesses when determining whether content is inappropriate without any oversight.<sup>8</sup>

The power social media companies have over businesses is not limited to restricting access to their pages.<sup>9</sup> Certain companies have also been affected by YouTube demonetizing<sup>10</sup> content on their business channels.<sup>11</sup> Dave Rubin hosts *The Rubin Report*, a talk show on YouTube, during which he discusses “politics, polarizing issues, current events, and more” with thought leaders and authors.<sup>12</sup> After YouTube lost \$750 million in advertising sales for allegedly playing advertisements on videos containing offensive content, it removed advertisements from *The Rubin Report*’s videos that dealt with controversial topics.<sup>13</sup>

Mr. Rubin expressed concern over YouTube’s decision because it may impact business decisions for companies using its platform.<sup>14</sup> Mr. Rubin noted that the production of content entails significant costs, including studio rentals, transportation, and lodging to accommodate the interviewee, among other costs.<sup>15</sup> When YouTube demonetizes this content, producing the content becomes less profitable or even unprofitable, which is not a sustainable business model.<sup>16</sup> Thus, companies will either be unable to create new content or will be forced to alter their content to appease YouTube.<sup>17</sup>

The Internet, which is constantly evolving and largely unregulated, has transformed the ways in which information is shared, people interact, and business is conducted.<sup>18</sup> The modern development of web-based companies and

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8. See Soto, *supra* note 2 (quoting Jonathan Hall, owner of Jon’s Guns, who noted “sales drop immediately” if the company does not post frequently on its Facebook page); Schatz & Sammon, *supra* note 6 (“Overzealous gun-group flaggers sometimes hit the wrong targets. The gun-sale ban only affects sales between individuals, not sales by federally licensed firearms dealers. . . . [P]ages for brick-and-mortar gun shops have been taken down wrofully at times.”).

9. See Ramona Pringle, ‘De-monetizing’ YouTube: What Does It Mean You Will See?, CBC RADIO-CANADA (Sept. 12, 2016), <http://www.cbc.ca/news/technology/youtube-advertising-demonetization-1.3755626> (on file with *The University of the Pacific Law Review*) (noting social media companies, such as YouTube, may also restrict ad revenue based on a page’s content).

10. *Id.* (defining “demonetizing” as the ability for YouTube to decide “which videos can collect ad revenue, based on whether they are deemed advertiser-friendly”).

11. *The Rubin Report*, *Thoughts on YouTube Demonetization*, YOUTUBE (May 17, 2017), <https://www.youtube.com/watch?v=q4D0TBPd3JU> (on file with *The University of the Pacific Law Review*).

12. *The Rubin Report*, YOUTUBE, <https://www.youtube.com/user/RubinReport/about> (last visited Apr. 4, 2018) (on file with *The University of the Pacific Law Review*).

13. *Thoughts on YouTube Demonetization*, *supra* note 11.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Gawker and Testing the Limits of Free Speech*, CBS NEWS (Mar. 20, 2016, 9:09 AM), <https://www.cbsnews.com/news/gawker-and-testing-the-limits-of-free-speech/> (on file with *The University of the Pacific Law Review*); Zaryn Dentzel, *How the Internet has Changed Everyday Life*, OPENMIND, <https://www.bbvaopenmind.com/en/article/internet-changed-everyday-life/?fullscreen=true> (last visited Apr. 4, 2018) (on file with *The University of the Pacific Law Review*).

their impact on both national and international commerce<sup>19</sup> requires us to rethink the extent to which social media companies should be allowed to control content on their websites in ways that impact business activities and, ultimately, consumers.<sup>20</sup> Some have suggested that this control could violate antitrust regulations.<sup>21</sup> However, the control of content by social media companies does not fit within the existing antitrust regulatory framework because it is not designed to harm the opportunities of competitors.<sup>22</sup>

Instead, new regulations are necessary to regulate social media companies' control of online business activity because these companies have an increasing impact on consumer purchasing activity,<sup>23</sup> and their ability to control content at their discretion impacts the ability of affected businesses to compete in the marketplace.<sup>24</sup> Part II of this Comment first examines the rise in Internet and social media use and its impact on modern businesses.<sup>25</sup> Part III of this Comment then discusses the existing antitrust regulatory framework and its shortfalls in regulating social media companies' control of content on business pages.<sup>26</sup> It then discusses the history of regulation of public utilities and railroads and common law innkeeper obligations, and compares the companies in these industries to social media companies.<sup>27</sup> Part III concludes with a discussion of the market failure relating to social media companies' discretionary control of content on business pages as grounds to introduce new regulations for social media companies.<sup>28</sup> Part IV of this Comment proposes that the Federal Trade Commission ("FTC") publish clear and transparent uniform guidelines concerning the control of content on business pages and establish an independent review board that businesses can appeal to.<sup>29</sup> This is followed by a discussion of the objections to imposing additional regulations on social media companies.<sup>30</sup>

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19. Dentzel, *supra* note 18.

20. See *supra* Part I (highlighting social media companies' role as gatekeepers and the impact their control over content may have on businesses using their websites as a primary advertising platform).

21. Spencer Weber Waller, *Antitrust and Social Networking*, 90 N.C. L. REV. 1771, 1804 (2012).

22. See *infra* Part III.A (discussing that even if a social media company were to achieve monopoly power, its control of content must be anticompetitive in nature to constitute a violation of antitrust laws).

23. See *infra* Part II (discussing the rise in Internet and social media use and its impact on modern businesses).

24. See *infra* Part IV (illustrating the inconsistency in social media companies' control of content and its impact on affected businesses); Soto, *supra* note 2 (quoting Jonathan Hall, owner of Jon's Guns, who noted "sales drop immediately" if the company does not post frequently on its Facebook page); *Thoughts on YouTube Demonetization*, *supra* note 11 (discussing that when YouTube demonetizes content, producing the content becomes less profitable or even unprofitable, which is not a sustainable business model).

25. See *infra* Part II.

26. See *infra* Part III.A.

27. See *infra* Part III.B.

28. See *infra* Part III.C.

29. See *infra* Part IV.A.

30. See *infra* Part IV.B.

II. THE RISE IN INTERNET USE AND ITS IMPACT ON THE FLOW OF COMMERCE

The Internet has become essential to the flow of commerce.<sup>31</sup> In 2017, approximately 54% of the world population used the Internet, an increase of 34% from 2007.<sup>32</sup> Given the rise in Internet use, modern businesses have shifted from print to online advertising<sup>33</sup> and frequently advertise online through business pages created on social media websites.<sup>34</sup> Businesses have also begun selling their products directly to consumers through the Internet.<sup>35</sup> Digital and mobile advertising comprises approximately 41% of advertisers' spending, which is roughly the same as the amount spent on television advertising.<sup>36</sup> In contrast, print advertising only constitutes roughly 10% of advertisers' spending.<sup>37</sup> For businesses with small advertising budgets, the creation of business pages on social media websites, in particular, is "crucial" to create brand awareness as these businesses lack the funds required to produce widespread television and Internet advertising campaigns.<sup>38</sup>

In 2017, there were more than 2.13 billion monthly active users on Facebook worldwide—an increase of 14% over the prior year.<sup>39</sup> In 2015, "Facebook influenced 52 percent of consumers' online and offline purchases, up from 36 percent in 2014."<sup>40</sup> Further, over 50 million small businesses connect with customers through Facebook pages.<sup>41</sup> While Facebook is the market leader of social networking websites, as of January 2018, YouTube, Instagram, and

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31. See Dentzel, *supra* note 18 ("[A]ll sorts of advantages arise from e-commerce, which has become a major distribution channel for goods and services. You can book airline tickets, get a T-shirt from Australia, or buy food at an online grocery store. New applications support secure business transactions and create new commercial opportunities.").

32. *Internet Growth Statistics*, INTERNET WORLD STATS, <http://www.internetworldstats.com/emarketing.htm> (last updated Apr. 3, 2018) (on file with *The University of the Pacific Law Review*).

33. Natasha D. Smith, *Ad Budgets Continue the Shift to Digital*, DMN (Apr. 21, 2016), <http://www.dmnews.com/marketing-strategy/ad-budgets-continue-the-shift-to-digital/article/491451/> (on file with *The University of the Pacific Law Review*).

34. See Soto, *supra* note 2 (quoting Jonathan Hall, owner of Jon's Guns, who noted "sales drop immediately" if the company does not post frequently on its Facebook page).

35. Catalin Zorzini, *How to Create a Facebook Shop Page: A Step-by-Step Guide (April 2018)*, ECOMMERCE PLATFORMS (Dec. 14, 2015), <https://ecommerce-platforms.com/ecommerce-selling-advice/how-to-create-a-facebook-shop-page> (on file with *The University of the Pacific Law Review*).

36. Smith, *supra* note 33.

37. *Id.*

38. Steve Olenski, *Social Media for Small Business: How It's Different from How Big Brands Do It*, FORBES (Oct. 29, 2015), <https://www.forbes.com/sites/steveolenski/2015/10/29/social-media-for-small-business-how-its-different-from-how-big-brands-do-it/#69311d163974> (on file with *The University of the Pacific Law Review*).

39. *The Top 20 Valuable Facebook Statistics*, ZEPHORIA DIG. MKTG., <https://zephoria.com/top-15-valuable-facebook-statistics/> (last updated Apr. 3, 2018) (on file with *The University of the Pacific Law Review*).

40. Liis Hainla, *21 Social Media Marketing Statistics You Need to Know in 2017*, DREAMGROW (Aug. 16, 2017), <https://www.dreamgrow.com/21-social-media-marketing-statistics/> (on file with *The University of the Pacific Law Review*).

41. *Id.*

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Twitter had approximately 1.5 billion, 800 million, and 330 million monthly active users, respectively.<sup>42</sup>

Because a select few social media companies, including Facebook, YouTube, Instagram, and Twitter, dominate the market, it is difficult for small businesses, in particular, to seek out equally effective alternative online platforms should social media companies affect their business pages.<sup>43</sup> Shutting off smaller businesses' access to the marketplace is detrimental as there is "nothing small about the impact [small businesses] have on our economy."<sup>44</sup> Small businesses provide approximately 60% to 80% of all jobs in the United States, and "small businesses produce 13 times more patents than larger firms."<sup>45</sup> Thus, these businesses must have access to the resources they need to grow, including the platforms offered by social media companies.<sup>46</sup> A denial of access to these platforms, in turn, affects the public's access to competitively priced products and services.<sup>47</sup>

### III. THE LIMITATIONS OF THE EXISTING ANTITRUST REGULATORY FRAMEWORK AND JUSTIFICATIONS FOR THE REGULATION OF SOCIAL MEDIA COMPANIES

Federal antitrust laws prohibit business practices that interfere with competition in the marketplace.<sup>48</sup> Thus, when a business feels it has been treated unfairly by a large web-based company, the existing antitrust regulatory framework is likely the first area of law it will look to for protection.<sup>49</sup> After all, a number of large web-based companies have recently been investigated and subjected to litigation under antitrust laws in the United States and Europe.<sup>50</sup>

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42. *Most Famous Social Network Sites Worldwide as of January 2018, Ranked by Number of Active Users (in Millions)*, STATISTA, <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> (last visited Apr. 4, 2018) (on file with *The University of the Pacific Law Review*).

43. *See id.* (ranking the most popular social networking websites worldwide); Olenski, *supra* note 38 (noting that for businesses with small advertising budgets, the creation of business pages on social media websites is "crucial").

44. Rebecca O. Bagley, *Small Businesses = Big Impact*, FORBES (May 15, 2012, 2:08 PM), <https://www.forbes.com/sites/rebeccabagley/2012/05/15/small-businesses-big-impact/#56ced33575cd> (on file with *The University of the Pacific Law Review*).

45. *Id.*

46. *See id.* (discussing the large impact of small businesses on our economy).

47. *See Guide to Antitrust Laws*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws> (last visited Apr. 4, 2018) (on file with *The University of the Pacific Law Review*) (noting that market competition results in lower prices for consumers).

48. *Antitrust Laws and You*, DEP'T OF JUST., <https://www.justice.gov/atr/antitrust-laws-and-you> (last updated Jan. 5, 2017) (on file with *The University of the Pacific Law Review*).

49. *See Waller, supra* note 21, at 1771 (noting several web-based companies, including Google, Twitter, and Facebook, "have been referred to as 'monopolies' in the colloquial sense").

50. *Id.*; *see also Statement of the Federal Trade Commission Regarding Google's Search Practices*, In the Matter of Google Inc., *FTC File No. 111-0163*, FED. TRADE COMM'N (Jan. 3, 2013), available at [https://www.ftc.gov/sites/default/files/documents/public\\_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf) (on file with *The University of the Pacific Law Review*) (describing the FTC's investigation of Google "relating to allegations that Google unfairly preference[d] its own

However, the reach of the existing regulations in the United States is limited and does not capture all conduct impacting competition in the marketplace, including social media companies' control of content on business pages.<sup>51</sup>

Section A outlines the existing antitrust regulatory framework and discusses the shortfalls of this framework in regulating the control of business content by social media companies.<sup>52</sup> Section B then discusses the history of regulation of public utilities and railroads and innkeeper obligations, and compares the companies in these industries to social media companies.<sup>53</sup> Section C concludes with a discussion of the market failure relating to social media companies' discretionary control of content on business pages<sup>54</sup> as grounds to introduce new regulations for social media companies.<sup>55</sup>

#### *A. The Existing Antitrust Regulatory Framework and its Limitations*

The federal government enforces three major antitrust laws:<sup>56</sup> the Federal Trade Commission Act,<sup>57</sup> the Clayton Act,<sup>58</sup> and the Sherman Antitrust Act.<sup>59</sup> This Comment focuses on the shortfalls of Section 2 of the Sherman Antitrust Act ("Section 2") in regulating the control of business content by social media companies.<sup>60</sup> Section 2 prohibits the monopolization of interstate commerce,<sup>61</sup> which is accomplished when "one firm controls the market for a product or service, and it has obtained that market power, not because its product or service is superior to others, but by suppressing competition with anticompetitive conduct."<sup>62</sup> Thus, to constitute illegal monopolization under Section 2, a company must not only obtain market power, but must also engage in anticompetitive conduct.<sup>63</sup> Subsection 1 considers how a social media company

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content on the Google search results page and selectively demote[d] its competitors' content from those results"); European Commission Press Release, *Antitrust: Commission Sends Statement of Objections to Google on Android Operating System and Applications*, EUROPEAN COMM'N (Apr. 20, 2016), [http://europa.eu/rapid/press-release\\_IP-16-1492\\_en.htm](http://europa.eu/rapid/press-release_IP-16-1492_en.htm) (on file with *The University of the Pacific Law Review*) (noting Google was subject to several investigations under the European Union's antitrust laws, including for favorably displaying its own services in search results and restricting advertisers, among other things).

51. See *infra* Part III.A (discussing that even if a social media company were to achieve monopoly power, its control of content must be anticompetitive in nature to violate antitrust laws).

52. See *infra* Part III.A.

53. See *infra* Part III.B.

54. See *infra* Part III.C.

55. See *infra* Part IV.

56. *Antitrust Laws and You*, *supra* note 48.

57. 15 U.S.C.A. § 45 (West 2006) (barring unfair competition practices).

58. 15 U.S.C.A. § 18 (West 1996) (prohibiting mergers and acquisitions that may potentially reduce competition).

59. 15 U.S.C.A. § 1 (West 2004).

60. See *infra* Part III.A.

61. 15 U.S.C.A. § 2 (West 2004).

62. *Antitrust Laws and You*, *supra* note 48.

63. *Id.*; see also HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND

may achieve market power and discusses why even Facebook, the market leader, likely falls short.<sup>64</sup> Subsection 2 differentiates the types of behavior that constitute anticompetitive conduct from the control of business content by social media companies.<sup>65</sup>

### 1. *Achieving Market Power*

Courts assess the first element, the presence of market power, primarily based on a company's market share.<sup>66</sup> Courts have generally held that "a 90% share of a well-defined market" is a monopoly, and some courts have found a 75% share to be sufficient.<sup>67</sup> However, courts are disinclined to find a monopoly power if a company's share of a well-defined market is less than 70%, and several courts have found a share of less than 50% to be insufficient as a matter of law.<sup>68</sup> If a court is confident that the relevant market is accurately defined, it is more willing to find a monopoly power when a company's market share falls on the lower-end of the above ranges.<sup>69</sup> Conversely, courts will require a larger market share "if a market is poorly defined or there is doubt that entry barriers are sufficiently high."<sup>70</sup>

Scholars have suggested at least three measures to calculate the market share for social media companies: user markets, advertising markets, and data markets.<sup>71</sup> Each of these measures is impacted by which subset of websites are determined to fit within the defined product and geographic markets<sup>72</sup> that comprise the relevant market.<sup>73</sup>

User markets are based on users of the social media websites.<sup>74</sup> The measurement of total users may be based on either viewers or registered users of the social media websites, which often merge because viewers must be registered users to view the full website.<sup>75</sup> Despite Facebook's rapid growth in monthly active users over the years, its market share based on website visits has declined

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ITS PRACTICE 296 (4th ed. 2011) ("The framers of the Sherman Act did not intend to condemn someone 'who merely by superior skill and intelligence got the whole business because nobody could do it as well as he could.'").

64. See *infra* Part III.A.1.

65. See *infra* Part III A.2.

66. HOVENKAMP, *supra* note 63, at 293; Waller, *supra* note 21, at 1775.

67. HOVENKAMP, *supra* note 63, at 293.

68. *Id.* at 293–94.

69. *Id.* at 294.

70. *Id.*

71. Waller, *supra* note 21, at 1780–81, 1784.

72. *Id.* at 1776, 1779 (explaining that product and geographic markets encompass the "group of products and services that consumers view as reasonably effective substitutes").

73. See *id.* at 1778 (noting that the product and geographic markets encompassing "social networking websites" is "often overextended to include many . . . interactive websites and software platforms where user content is generated and shared").

74. *Id.* at 1780.

75. *Id.* at 1781.

during the past ten years—from a high of approximately 70% to 39% at the end of 2017.<sup>76</sup> This is due to the increased use of other social networking websites, including YouTube, Twitter, and Instagram.<sup>77</sup> Thus, this measure of market share may vary significantly based on the entry and exit of new social networking websites.<sup>78</sup>

Advertising markets are based on the social media website's share of advertising revenues generated through sales of online display ads to advertisers.<sup>79</sup> Facebook, which includes Instagram,<sup>80</sup> had a digital display ad market share of approximately 35% at the end of 2016.<sup>81</sup> This figure is expected to increase to 44% by the end of 2019.<sup>82</sup>

Data markets are based on “information that users post to their social networking sites or reveal through communications with others on the network, whether other users, advertisers, or application developers.”<sup>83</sup> This measure is based on the premise that a social networking website's true value is in the information it gathers from its users.<sup>84</sup>

Aside from a determination of market share, barriers to entry and exit offer another indication of market power.<sup>85</sup> If the barriers to entry are low, even a company with a dominant market share may lack the ability to control prices.<sup>86</sup> While creating a functioning social media website is relatively easy and inexpensive, there is significant value, and thus a barrier to entry, in the volume of “users, advertisers, and application developers.”<sup>87</sup> For example, Facebook's number of monthly active users significantly outnumbers its competitors,<sup>88</sup>

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76. Pritt Kallas, *Top 10 Social Networking Sites by Market Share Statistics [November 2017]*, DREAMGROW (Dec. 4, 2017), <http://www.dreamgrow.com/top-10-social-networking-sites-market-share-of-visits/> (on file with *The University of the Pacific Law Review*).

77. *Id.*

78. *See id.* (highlighting a drastic decline in Facebook's market share based on website visits as a result of the increasing popularity of new social networking websites).

79. Waller, *supra* note 21, at 1781.

80. *See* Press Release, *Facebook to Acquire Instagram*, FACEBOOK (Apr. 9, 2012), <https://newsroom.fb.com/news/2012/04/facebook-to-acquire-instagram/> (on file with *The University of the Pacific Law Review*) (announcing Facebook's acquisition of Instagram).

81. Ginny Marvin, *Report: Facebook's Display Ad Domination to Grow as US Digital Ad Spend Hits \$83B in 2017*, MKTG. LAND (Mar. 14, 2017, 9:38 AM), <https://marketingland.com/emarketer-facebook-dominate-15-9-pct-digital-ad-spend-growth-2017-209045> (on file with *The University of the Pacific Law Review*).

82. *Id.*

83. Waller, *supra* note 21, at 1784.

84. *Id.* at 1784–85.

85. *Id.* at 1786.

86. *Id.*

87. *Id.* at 1786–88 (“For social networking sites, it is important to quickly achieve, and then maintain, a critical mass of users, advertisers, and application developers.”).

88. *See Most Famous Social Network Sites Worldwide as of January 2018, Ranked by Number of Active Users (in Millions)*, *supra* note 42 (highlighting that Facebook has nearly 700 million more monthly active users than YouTube, the social media website with the second largest number of monthly active users).

making the network “immensely more valuable” than competing networks.<sup>89</sup>

However, Facebook, the market leader of social media websites, has likely not achieved market power under the existing antitrust regulatory framework, despite its rapid growth and unique barriers to entry, as it lacks “the dominant market share of well-defined product and geographic markets with high entry barriers.”<sup>90</sup> Because the suggested measures to calculate market share are volatile, Facebook, or any other social media company, may achieve monopoly power at some point.<sup>91</sup> However, such power may be temporary,<sup>92</sup> and it is not clear which measure, if any, enforcement agencies and courts will find represents a well-defined market.<sup>93</sup>

## 2. *Behavior Constituting Anticompetitive Conduct*

The second element, anticompetitive conduct, includes acts that “are reasonably capable of creating, enlarging or prolonging monopoly power by impairing the opportunities of rivals.”<sup>94</sup> While courts have developed numerous tests to determine whether conduct is anticompetitive, the tests focus on conduct impacting a company’s rivals, not its users.<sup>95</sup> In addition, in *United States v. Colgate & Co.*, the Supreme Court held that, “in the absence of any purpose to create or maintain a monopoly,” Section 2 does not prohibit a private company from exercising its “own independent discretion as to parties with whom [it] will deal.”<sup>96</sup>

When social media companies control content on business pages, their decisions impact users of the website, and users may or may not be competitors of the social media companies.<sup>97</sup> Even if an impacted business is a competitor of the social media company, social media companies are private companies with

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89. Waller, *supra* note 21, at 1788.

90. *Id.* at 1804; *see also Most Famous Social Network Sites Worldwide as of January 2018, Ranked by Number of Active Users (in Millions)*, *supra* note 42 (“The most popular social networks usually display a high number of user accounts or strong user engagement. For example, market leader Facebook was the first social network to surpass 1 billion monthly active users[.]”).

91. *See* Kallas, *supra* note 76 (highlighting a drastic decline in Facebook’s market share based on website visits as a result of the increasing popularity of new social networking websites).

92. *See id.* (noting that as users diversify their social media use, a social media company’s market share may be highly volatile).

93. Waller, *supra* note 21, at 1792.

94. HOVENKAMP, *supra* note 63, at 298; *see, e.g., Statement of the Federal Trade Commission Regarding Google’s Search Practices*, *supra* note 50 (finding that Google’s “display of its own vertical content at or near the top of its search results page” had a valid business justification, despite harming competitors, as “data showing how consumers reacted . . . suggest[s] that users benefitted from these changes”).

95. HOVENKAMP, *supra* note 63, at 298–99; *see, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (holding that the refusal of an owner of three of four major ski areas in Aspen, Colorado to cooperate with its smaller competitor violated Section 2).

96. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

97. *See supra* Part I (discussing Facebook and YouTube’s control of content on users’ business pages).

the option to refrain from providing services to competitors.<sup>98</sup> Furthermore, social media companies' decisions to control content reflect content preferences rather than an attempt to create or maintain a monopoly.<sup>99</sup>

For example, Facebook is a social media website that "enables people to connect, share, discover, and communicate with each other,"<sup>100</sup> while Jon's Guns is a federally-licensed firearms dealer that uses Facebook to advertise firearms for sale at its store location.<sup>101</sup> Facebook did not unpublish Jon's Guns' business page in an attempt to monopolize the firearms industry;<sup>102</sup> Facebook is not in the business of selling firearms.<sup>103</sup> Rather, Facebook has created community standards prohibiting unwanted content on its website, and Jon's Guns' business page was flagged for allegedly violating these standards.<sup>104</sup>

Additionally, YouTube is a platform where content creators can share videos, and its competitors are other similar platforms, not content creators using the platform, such as Dave Rubin.<sup>105</sup> YouTube did not demonetize The Rubin Report's videos to monopolize political talk shows; it did so in an attempt to appease advertisers because the videos dealt with controversial topics.<sup>106</sup>

In contrast, the FTC recently investigated Google for harming competitors by allegedly preferencing its own services on its search results page, including Google shopping and travel services.<sup>107</sup> Although the FTC found a valid business justification for Google's practice, this investigation demonstrates that anticompetitive conduct warranting an investigation under Section 2 requires more than the discretionary removal of content from the social media pages of non-competing businesses.<sup>108</sup>

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98. See *Colgate & Co.*, 250 U.S. at 307 (holding that "in the absence of any purpose to create or maintain a monopoly," Section 2 does not prohibit a private company from exercising its "own independent discretion as to parties with whom [it] will deal").

99. See *infra* Part IV.A (discussing how social media companies, specifically Facebook and YouTube, exercise discretion in determining which content on business pages should be flagged or removed).

100. Facebook, Annual Report (Form 10-K) (Feb. 1, 2018), available at <https://www.sec.gov/Archives/edgar/data/1326801/000132680118000009/fb-12312017x10k.htm> (on file with *The University of the Pacific Law Review*).

101. Jon's Guns, *supra* note 1; Soto, *supra* note 2.

102. See Soto, *supra* note 2 (noting Jon's Guns' Facebook page was unpublished after certain posts allegedly violated the social network's community standards for regulated goods).

103. See Facebook, Annual Report (Form 10-K), *supra* note 100 (noting Facebook is a social media website focused on enabling "people to connect, share, discover, and communicate with each other").

104. *Community Standards*, *supra* note 4; Soto, *supra* note 2.

105. See *Company Overview of YouTube, LLC*, BLOOMBERG, <https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=24603346> (last visited Apr. 6, 2018) (on file with *The University of the Pacific Law Review*) (describing YouTube as a platform where content creators can share videos); *The Rubin Report*, *supra* note 12 (Dave Rubin hosts The Rubin Report, a talk show on YouTube, during which he discusses "politics, polarizing issues, current events, and more" with thought leaders and authors.).

106. *Thoughts on YouTube Demonetization*, *supra* note 11.

107. *Statement of the Federal Trade Commission Regarding Google's Search Practices*, *supra* note 50.

108. See *id.* (describing the FTC's investigation of Google "relating to allegations that Google unfairly preference[d] its own content on the Google search results page and selectively demote[d] its competitors' content from those results").

## 2018 / Determining What Content is Appropriate on Business Pages

As such, even if social media companies achieve monopoly power, their conduct likely will not fall within the ambit of Section 2 as their control of content on business pages is not anticompetitive.<sup>109</sup> Thus, for Facebook and other leading social media companies able to control content in a way that impacts business users, regulation must be achieved through other means.<sup>110</sup>

### B. Analogizing Historical Justifications for the Regulation of Industries to Modern Social Media Companies

Although social media companies are not violating the existing antitrust regulatory framework through their discretionary control of content on business pages,<sup>111</sup> their decisions are still harmful to businesses.<sup>112</sup> Additionally, social media companies are not subject to other regulations that address this behavior.<sup>113</sup> Thus, proposing new regulations to govern this conduct requires examining the rationale for imposing regulations on other types of industries deemed essential facilities.<sup>114</sup>

Access to essential facilities is a contentious area of federal antitrust law.<sup>115</sup> The essential facility doctrine is a “subset of the . . . ‘refusal to deal’ cases” and imposes a “limitation on the general rule that a firm has no obligation to deal with its competitors.”<sup>116</sup> Under the essential facility doctrine, an owner violates Section 2 if he or she refuses to share an essential facility with others.<sup>117</sup> The United States has a long history of applying this doctrine in numerous cases

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109. HOVENKAMP, *supra* note 63, at 298 (defining anticompetitive conduct as acts that “are reasonably capable of creating, enlarging or prolonging monopoly power by impairing the opportunities of rivals”).

110. *See* Waller, *supra* note 21, at 1804 (noting that existing social media companies have not violated Section 2).

111. *See supra* Part III.A (discussing that social media companies’ control of content on business pages is not anticompetitive as they are not controlling the content in an effort to monopolize a particular industry but rather are exercising discretion as to the content posted on their platforms).

112. *See* Soto, *supra* note 2 (quoting Jonathan Hall, owner of Jon’s Guns, who noted “sales drop immediately” if the company does not post frequently on its Facebook page); *Thoughts on YouTube Demonetization*, *supra* note 11 (discussing that when YouTube demonetizes content, producing the content becomes less profitable or even unprofitable, which is not a sustainable business model).

113. *See* Facebook, Annual Report (Form 10-K), *supra* note 100.

[Facebook is] subject to a number of U.S. federal and state and foreign laws and regulations that affect companies conducting business on the Internet. . . . These may involve user privacy, data protection, and personal information, rights of publicity, content, intellectual property, advertising, marketing, distribution, data security, data retention and deletion, personal information, electronic contracts and other communications, competition, protection of minors, consumer protection, telecommunications, product liability, taxation, economic or other trade prohibitions or sanctions, securities law compliance, and online payment services.

*Id.*

114. *See infra* Part III.B (discussing essential facilities and industries that have been regulated as such).

115. Robert Pitofsky, Donna Patterson, & Jonathan Hooks, *The Essential Facilities Doctrine Under United States Antitrust Law*, 70 ANTITRUST L.J. 443, 443 (2002).

116. *Id.* at 446.

117. HOVENKAMP, *supra* note 63, at 336.

involving utilities and railroads.<sup>118</sup> Subsections 1, 2, and 3 discuss the history of and justifications for the regulation of public utilities<sup>119</sup> and railroads<sup>120</sup> and common law innkeeper obligations,<sup>121</sup> respectively, and compares the companies in these industries to social media companies<sup>122</sup> in considering why it is necessary to regulate social media companies' control of content on business pages.<sup>123</sup>

### *1. Public Utilities*

Public utilities generally constitute natural monopolies,<sup>124</sup> which arise in industries where operating only one firm is most efficient.<sup>125</sup> The goods and services provided by such industries, including water, electricity, telephone, and natural gas, typically require large capital investments to create networks to deliver the goods and services.<sup>126</sup> For example, installing water pipes is capital intensive,<sup>127</sup> and it would be inconvenient and wasteful for two different companies to “dig up the road” to install “duplicate set[s] of water pipes.”<sup>128</sup> Thus, a natural monopoly exists.<sup>129</sup>

The goods and services provided by public utilities are generally deemed essential,<sup>130</sup> meaning the goods and services are “indispensable for human life,” and “[s]ociety would be put to severe hardship if [the] services are not made available.”<sup>131</sup> As such, although natural monopolies do not require government regulation, public utilities are regulated to ensure users can access such goods and services and to provide access at a fair price.<sup>132</sup>

Similarly, certain social media websites are becoming essential.<sup>133</sup> The

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118. Pitofsky, Patterson, & Hooks, *supra* note 115, at 445–47.

119. *See infra* Part III.B.1.

120. *See infra* Part III.B.2.

121. *See infra* Part III.B.3.

122. *See infra* Parts III.B.1–3.

123. *See infra* Part IV.

124. *Public Utilities*, ENCYCLOPEDIA.COM, <http://www.encyclopedia.com/social-sciences-and-law/economics-business-and-labor/businesses-and-occupations/public-utility> (last visited Apr. 4, 2018) (on file with *The University of the Pacific Law Review*).

125. Tejvan Pettinger, *Natural Monopoly*, ECONOMICSHelp.ORG (Nov. 28, 2016), <https://www.economicshelp.org/blog/glossary/natural-monopoly/> (on file with *The University of the Pacific Law Review*).

126. *Id.*; *Public Utilities*, *supra* note 124.

127. Pettinger, *supra* note 125.

128. *Id.*; *Public Utilities*, *supra* note 124.

129. *Id.*

130. *Public Utilities*, *supra* note 124.

131. *Public Utility | Meaning | Characteristics | Rights | Duties*, MONEY MATTERS, <https://accountlearning.com/public-utility-meaning-characteristics-rights-duties/> (last visited Apr. 4, 2018) (on file with *The University of the Pacific Law Review*).

132. *Public Utilities*, *supra* note 124.

133. Ambrose Thompson, *Social Media as Public Expectation: The New Public Utility*, N.Y. PUB. LIBR.

creation of social media websites is not as capital intensive as the construction of infrastructure for public utilities, which allows for a more competitive industry.<sup>134</sup> However, high user volume makes certain social media websites essential.<sup>135</sup> This “network effect” makes it nearly impossible for new social media companies to compete with market leaders, and thus leaves businesses with limited online platforms to connect to consumers.<sup>136</sup> In addition, the Internet is becoming more and more vital for consumer purchases.<sup>137</sup> Traditional brick-and-mortar stores are rapidly transitioning to web-based business models, forcing consumers to turn to online options to gain access to goods and services.<sup>138</sup>

## 2. Railroads

The advent of railroads in the United States brought widespread economic expansion in the late nineteenth century as goods could be delivered faster and at a lower cost to a larger subset of the population.<sup>139</sup> As the railroads rapidly expanded, small businesses and farmers alleged the railroads charged higher rates for short hauls than long hauls—essentially favoring large corporations over small businesses.<sup>140</sup> In response, Congress passed the Interstate Commerce Act on February 4, 1887, to regulate railroad rates.<sup>141</sup> The Interstate Commerce Act “limited railroads to rates that were ‘reasonable and just,’ forbade rebates to high-volume users, and made it illegal to charge higher rates for shorter hauls.”<sup>142</sup>

In addition, rail carriers<sup>143</sup> are codified as common carriers<sup>144</sup> and must

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(June 30, 2010), <https://www.nypl.org/blog/2010/06/30/social-media-public-expectation> (on file with *The University of the Pacific Law Review*); Peter Swire, *Should the Leading Online Tech Companies be Regulated as Public Utilities?*, LAWFARE (Aug. 2, 2017, 9:00 AM), <https://www.lawfareblog.com/should-leading-online-tech-companies-be-regulated-public-utilities> (on file with *The University of the Pacific Law Review*).

134. Swire, *supra* note 133.

135. *Id.*

136. *Id.*

137. *Id.*; Hainla, *supra* note 40.

138. Yuki Noguchi, *Retailers Scrambling to Adjust to Changing Consumer Habits*, NPR (May 2, 2017, 4:17 PM), <https://www.npr.org/2017/05/02/526560158/a-rapid-shakeup-for-retailers-as-consumer-habits-change> (on file with *The University of the Pacific Law Review*).

139. *American Railroads in the 20th Century*, SMITHSONIAN, <http://americanhistory.si.edu/america-move/themes/american-railroads> (last visited Apr. 4, 2018) (on file with *The University of the Pacific Law Review*).

140. *The Interstate Commerce Act is Passed*, U.S. SENATE, [https://www.senate.gov/artandhistory/history/minute/Interstate\\_Commerce\\_Act\\_Is\\_Passed.htm](https://www.senate.gov/artandhistory/history/minute/Interstate_Commerce_Act_Is_Passed.htm) (last visited Apr. 4, 2018) (on file with *The University of the Pacific Law Review*).

141. *Id.*

142. *Id.*

143. 49 U.S.C.A. § 10102(5) (West 1995) (defining “rail carrier” as “a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation”).

144. *Common Carrier*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “common carrier” as “a commercial enterprise that holds itself out to the public as offering to transport freight or passengers for a fee . . . [and] is required by law to transport freight or passengers without refusal if the approved fare or charge is

provide “transportation or service on reasonable request.”<sup>145</sup> The status of rail carriers as common carriers imposes statutory duties on both shippers and the public.<sup>146</sup> Thus, rail carriers may not “assert unilaterally a right not to carry certain commodities unless the law permits.”<sup>147</sup>

Railroads were regulated, in part, because they favored large corporations over small businesses and farmers,<sup>148</sup> and, at the time, were the primary means through which businesses could transfer goods to consumers throughout the United States.<sup>149</sup> Much like railroads in the past, social media websites have become a primary platform for businesses to connect to and transact with consumers,<sup>150</sup> in part due to a shift in consumer preferences.<sup>151</sup> Thus, certain social media websites have become critical to the economy,<sup>152</sup> similar to railroads.<sup>153</sup> Furthermore, discriminatory practices by social media companies in the removal of content from business pages are becoming evident,<sup>154</sup> impacting businesses economically similar to railroads’ discriminatory pricing.<sup>155</sup>

Railroads, as common carriers, are required to provide reasonable transportation or service to the public<sup>156</sup> and may not decline to carry certain commodities without legal justification.<sup>157</sup> Social media companies are analogous to common carriers as they offer their websites for use by the general public.<sup>158</sup>

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paid”).

145. 49 U.S.C.A. § 11101(a) (West 1996).

146. *Akron, Canton, & Youngstown R.R. Co. v. Interstate Commerce Comm’n*, 611 F.2d 1162, 1168 (6th Cir. 1979).

147. Michael McBride, *Railroad Transportation of Nuclear Waste and Other Hazardous Materials*, VANNESS FELDMAN LLP (Apr. 2008), <http://www.vnf.com/697> (on file with *The University of the Pacific Law Review*).

148. *The Interstate Commerce Act is Passed*, *supra* note 140.

149. *American Railroads in the 20th Century*, *supra* note 139.

150. Smith, *supra* note 33; Hainla, *supra* note 40.

151. Yuki Noguchi, *supra* note 138.

152. See Dentzel, *supra* note 18 (“[A]ll sorts of advantages arise from e-commerce, which has become a major distribution channel for goods and services. You can book airline tickets, get a T-shirt from Australia, or buy food at an online grocery store. New applications support secure business transactions and create new commercial opportunities.”); see also *supra* Part II (discussing the rise in Internet and social media use and its impact on modern businesses).

153. *American Railroads in the 20th Century*, *supra* note 139.

154. See Schatz & Sammon, *supra* note 6 (“Overzealous gun-group flaggers sometimes hit the wrong targets. The gun-sale ban only affects sales between individuals, not sales by federally licensed firearms dealers. . . . [P]ages for brick-and-mortar gun shops have been taken down wrongfully at times.”); Monteiro, *supra* note 6 (“Facebook is erratic in following its own guidelines.”).

155. *The Interstate Commerce Act is Passed*, *supra* note 140; see also Soto, *supra* note 2 (quoting Jonathan Hall, owner of Jon’s Guns, who noted “sales drop immediately” if the company does not post frequently on its Facebook page); *Thoughts on YouTube Demonetization*, *supra* note 11 (discussing that when YouTube demonetizes content, producing the content becomes less profitable or even unprofitable, which is not a sustainable business model).

156. 49 U.S.C.A. § 10102(5) (West 1995).

157. McBride, *supra* note 147.

158. See *How Do I Create a Facebook Account?*, FACEBOOK, <https://www.facebook.com/help/188157731232424?helpref=topq> (last visited Apr. 4, 2018) (on file with *The University of the Pacific Law Review*).

Thus, the discretionary control of content on business pages is comparable to rail carriers' refusal to carry certain commodities.<sup>159</sup>

### 3. *Innkeepers*

Because hotels provide accommodations to the public,<sup>160</sup> and to ensure “the unhampered flow of commerce” by indiscriminately providing shelter for merchants and travelers, a common law duty evolved limiting innkeepers' rights to exclude guests.<sup>161</sup> An innkeepers' right to deny accommodations varies by state, but is often limited to situations in which the guest is unable to pay, the guest appears to be a danger to themselves or others, or the hotel has no vacancy.<sup>162</sup>

For example, in *Heart of Atlanta Motel, Inc. v. United States*, the appellant owner-operator of the Heart of Atlanta Motel, which hosted a number of out-of-state travelers, refused to accommodate African Americans, arguing he had a right to choose with whom to do business.<sup>163</sup> The appellees countered that the appellant's denial of access frustrated interstate commerce by interfering with interstate travel.<sup>164</sup> The Court agreed, holding that because the motel accommodated interstate travelers, Congress may remove any obstructions to access as permitted under the Commerce Clause.<sup>165</sup>

Similar to the obligation of innkeepers to provide access to accommodations necessary for merchants and travelers,<sup>166</sup> social media websites must be subject to regulation over the discretionary control of content on business pages as these websites are critical platforms for a growing number of businesses<sup>167</sup> and have become increasingly important to commerce.<sup>168</sup>

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(noting that to create a Facebook account, a user need only be at least 13 years old and enter his or her “name, email or mobile phone number, password, date of birth and gender”).

159. See *infra* Part IV.A (discussing how social media companies, specifically Facebook and YouTube, exercise discretion in determining which content on business pages should be flagged or removed).

160. *Legal Rights and Responsibilities of the Innkeeper*, HOSPITALITY ACADEMY, INC., <https://www.hospitalityacademy.net/38-legal-rights-and-responsibilities-of-the-innkeeper/> (last visited Apr. 4, 2018) (on file with *The University of the Pacific Law Review*).

161. *Innkeeper's Right to Exclude or Eject Guests*, 7 *FORDHAM L. REV.* 417, 419 (1938).

162. *Legal Rights and Responsibilities of the Innkeeper*, *supra* note 160; see, e.g., ME. REV. STAT. ANN. tit. 30-A, § 3838 (2013) (“An innkeeper . . . may refuse or deny any accommodations to . . . [a] [p]erson unwilling or unable to pay . . . ; [a] minor . . . ; [a] person the innkeeper . . . reasonably believes is bringing in property that may be dangerous to other[s] . . . ; [if the] limit on occupants [is] exceeded . . . ; or [a person who] [v]iolates laws or rules [or] endangers others.”).

163. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243–44 (1964).

164. *Id.* at 244.

165. *Id.* at 261.

166. *Innkeeper's Right to Exclude or Eject Guests*, *supra* note 161, at 419.

167. See *Soto*, *supra* note 2 (quoting Jonathan Hall, owner of Jon's Guns, who noted “sales drop immediately” if the company does not post frequently on its Facebook page); *Thoughts on YouTube Demonetization*, *supra* note 11 (discussing that when YouTube demonetizes content, producing the content becomes less profitable or even unprofitable, which is not a sustainable business model).

168. See *Dentzel*, *supra* note 18 (“[A]ll sorts of advantages arise from e-commerce, which has become a

C. Market Failure as an Additional Justification for Regulation

Regulation is often justified if there is a market failure.<sup>169</sup> Most companies strive to sell something of value to any consumer who is willing to pay to generate revenue sufficient to carry on the business.<sup>170</sup> However, market failure occurs when companies cannot be relied upon to allocate resources efficiently in a free market.<sup>171</sup> For example, a motel operating under a normal business model would presumably wish to accommodate all paying patrons to maximize revenue.<sup>172</sup> However, this business model failed in *Heart of Atlanta Motel, Inc.* when the owner-operator of the Heart of Atlanta Motel refused to accommodate African Americans—acting on his own personal preferences rather than in the best interests of the business.<sup>173</sup> When this sort of market failure exists, it is not addressed privately but rather through regulation.<sup>174</sup>

Market failure has developed with social media companies.<sup>175</sup> Because many social media companies generate revenue from advertising, they are incentivized to draw more users to their websites.<sup>176</sup> While simply maximizing users is the normal market incentive,<sup>177</sup> the market does not take into account that social media companies censor or remove certain users to appease other users or advertisers.<sup>178</sup> Thus, the normal market incentive for social media companies to attract all possible users fails.<sup>179</sup>

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major distribution channel for goods and services. You can book airline tickets, get a T-shirt from Australia, or buy food at an online grocery store. New applications support secure business transactions and create new commercial opportunities.”); *see also supra* Part II (discussing the rise in Internet and social media use and its impact on modern businesses).

169. Matthew Richardson, *Market Failure Cannot be Resolved Without Regulation*, BIG THINK, <http://bigthink.com/experts-corner/market-failure-cannot-be-resolved-without-regulation> (last visited Apr. 4, 2018) (on file with *The University of the Pacific Law Review*).

170. Josh Kaufman, *Business: Understanding How They Work*, FRESH BUS. THINKING (June 29, 2011), <http://www.freshbusinessthinking.com/business-understanding-how-they-work/> (on file with *The University of the Pacific Law Review*).

171. *Market Failure*, ECONOMICSHelp, <https://www.economicshelp.org/micro-economic-essays/marketfailure/> (last visited Feb. 18, 2018) (on file with *The University of the Pacific Law Review*).

172. *See* Kaufman, *supra* note 170 (suggesting that successful businesses provide products or services that consumers want or need to generate revenue sufficient to continue operations).

173. *Heart of Atlanta Motel, Inc.*, 379 U.S. at 243–44.

174. Richardson, *supra* note 169; *see also Heart of Atlanta Motel, Inc.*, 379 U.S. at 261 (holding that because the motel accommodated interstate travelers, Congress may remove any obstructions to access as permitted under the Commerce Clause).

175. *See infra* Part III.C (discussing the failure of the normal market incentive for social media companies to generate revenue through maximizing users).

176. Jon Russell, *Revenue from Social Networks to Top \$16.9bn in 2012, Advertising Alone Worth \$8.8bn: Report*, TNW (July 25, 2012), <https://thenextweb.com/socialmedia/2012/07/25/revenue-from-social-networks-to-top-16-9bn-in-2012-advertising-alone-worth-8-8bn-report/> (on file with *The University of the Pacific Law Review*).

177. *Id.*

178. *See Thoughts on YouTube Demonetization*, *supra* note 11 (discussing YouTube’s removal of advertisements from The Rubin Report’s videos that dealt with controversial topics to appease advertisers).

179. *See supra* Part III.C (discussing the failure of the normal market incentive for social media

#### IV. A PROPOSAL FOR NEW REGULATIONS

Although the reach of the existing antitrust regulatory framework is limited and does not encompass the discretionary control of content on business pages by social media companies,<sup>180</sup> this discretionary control impacts the ability of businesses, including Jon’s Guns and The Rubin Report, to compete in the marketplace.<sup>181</sup> Regulations governing the discretionary control of content on business pages is justified due to both the similarities between social media companies and companies in other regulated industries and the market failure that exists with social media companies.<sup>182</sup>

Section A discusses the current lack of uniformity and transparency in social media companies’ control of content on business pages, followed by a proposal that the FTC publish uniform guidelines concerning the control of content on business pages and establish an independent review board that businesses can appeal to.<sup>183</sup> Section B then concludes with a discussion regarding the objections to imposing additional regulations on social media companies.<sup>184</sup>

##### A. *Proposal to Enhance Uniformity and Transparency Concerning Social Media Websites’ Control of Content on Business Pages*

Users of Facebook and other social media websites have granted social media companies the power to control their posted content according to community guidelines published on the respective social media websites.<sup>185</sup> However, such guidelines are “vague and confusing” and lack transparency.<sup>186</sup> Facebook, for example, relies principally on Facebook users themselves to report activity on the website that they believe violates the website’s community

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companies to generate revenue through maximizing users).

180. See *supra* Part III.A (discussing that even if a social media company were to achieve monopoly power, its control of content must be anticompetitive in nature to violate antitrust laws).

181. See Soto, *supra* note 2 (quoting Jonathan Hall, owner of Jon’s Guns, who noted “sales drop immediately” if the company does not post frequently on its Facebook page); *Thoughts on YouTube Demonetization*, *supra* note 11 (discussing that when YouTube demonetizes content, producing the content becomes less profitable or even unprofitable, which is not a sustainable business model).

182. See *supra* Parts III.B–C (arguing that the similarities between historically regulated industries and social media companies, combined with the market failure of social media companies to maximize users, serves as grounds to introduce new regulations for the discretionary removal of content on business pages by social media companies).

183. See *infra* Part IV.A.

184. See *infra* Part IV.B.

185. *Community Standards*, *supra* note 4.

186. Ian Sherr, *How Facebook Censors Your Posts (FAQ)*, CNET (Sept. 9, 2016, 9:58 AM), <https://www.cnet.com/news/how-zuckerberg-facebook-censors-korryn-gaines-philando-castile-dallas-police-your-posts-faq/> (on file with *The University of the Pacific Law Review*); see also Schatz & Sammon, *supra* note 6 (“Overzealous gun-group flaggers sometimes hit the wrong targets. The gun-sale ban only affects sales between individuals, not sales by federally licensed firearms dealers. . . . [P]ages for brick-and-mortar gun shops have been taken down wrongfully at times.”); Monteiro, *supra* note 6 (“Facebook is erratic in following its own guidelines.”).

standards.<sup>187</sup> Facebook then has a team of employees who reviews these reports, which leaves the removal of content subject to the discretion of whichever employee is assigned the review.<sup>188</sup> It is not clear how these individuals determine whether content violates community standards, nor is it clear what course of action will be taken if the content is found to violate community standards.<sup>189</sup> “For instance, [Facebook] may warn someone for a first violation, but if [Facebook] continue[s] to see further violations [it] may restrict a person’s ability to post on Facebook or ban the person from Facebook.”<sup>190</sup> Again, the consequences are not clear and are prone to the reviewer’s discretion, which varies depending on the employee reviewing the content.<sup>191</sup>

Demonetization decisions, specifically by YouTube, should also be more uniform and transparent as there is “tension between YouTube’s loyalty to advertisers versus its loyalty to creators.”<sup>192</sup> YouTube advertisers pay to target viewers directly as opposed to “buying ad space on a specific program.”<sup>193</sup> For example, a video game company may target “white male[s] between the ages of 18 and 35” and will want their advertisement shown on any videos that this particular demographic views.<sup>194</sup> However, there may be certain videos this demographic views that the video game company does not want its advertisements associated with.<sup>195</sup> YouTube has responded with algorithms that flag videos as inappropriate, making the videos “unavailable to . . . users, lowering traffic numbers and cutting off creators from potential income.”<sup>196</sup>

This approach has resulted in “bizarre flagging,” leaving content creators with no option but to go through an appeal process with YouTube.<sup>197</sup> Yet “YouTube only reviews appeals from videos that get more than 1,000 views over a seven-day period or from channels with more than 10,000 subscribers.”<sup>198</sup> Thus, businesses with smaller channels are at a disadvantage, losing out on income and the removal of flags from their content.<sup>199</sup> In addition, similar to

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187. *Community Standards*, *supra* note 4; *see also* Schatz & Sammon, *supra* note 6 (“Overzealous gun-group flaggers sometimes hit the wrong targets.”).

188. *Community Standards*, *supra* note 4.

189. Sherr, *supra* note 186; *see also* *Community Standards*, *supra* note 4 (“[T]he consequences for violating [Facebook’s] Community Standards vary depending on the severity of the violation and the person’s history on Facebook.”).

190. *Community Standards*, *supra* note 4.

191. *See id.* (“[T]he consequences for violating [Facebook’s] Community Standards vary depending on the severity of the violation and the person’s history on Facebook.”).

192. Ian Birnbaum, *YouTube is Leaving its Creators in the Dark*, THE OUTLINE (Sept. 18, 2017, 9:23 AM), <https://theoutline.com/post/2258/youtube-is-leaving-its-creators-in-the-dark> (on file with *The University of the Pacific Law Review*).

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

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Facebook's employee review process, YouTube's appeals process again enables the social media company to use its discretion to determine whether content is appropriate.<sup>200</sup>

This seemingly erratic control of content deprives businesses, including Jon's Guns and The Rubin Report, of crucial platforms from which they promote their businesses.<sup>201</sup> Meanwhile, businesses posting similar content may remain unaffected merely because users have not reported the content for review, leaving these businesses with a competitive advantage and depriving consumers of the ability to consider all available product and service offerings.<sup>202</sup>

Thus, social media companies' ability to control content on business pages at their discretion requires checks and balances as it has led to confusing and inconsistent results, causing a disparate impact on businesses.<sup>203</sup> First, the FTC should publish uniform guidelines concerning the control of content on business pages by social media companies so businesses are subject to clear and transparent guidelines.<sup>204</sup> A proposal for specific guidelines is beyond the scope of this Comment. However, when establishing guidelines, the FTC should consult with social media companies and businesses in industries that are heavily impacted by the control of content on business pages.<sup>205</sup> These heavily impacted companies would likely include firearms dealers and producers of controversial news programs.<sup>206</sup>

Additionally, the FTC must determine which social media websites will be

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200. *Id.*; *Community Standards*, *supra* note 4.

201. *See supra* Part II (discussing the rise in Internet and social media use and its impact on modern businesses); Soto, *supra* note 2 (quoting Jonathan Hall, owner of Jon's Guns, who noted "sales drop immediately" if the company does not post frequently on its Facebook page); *Thoughts on YouTube Demonetization*, *supra* note 11 (discussing that when YouTube demonetizes content, producing the content becomes less profitable or even unprofitable, which is not a sustainable business model).

202. Sherr, *supra* note 186; *see also Community Standards*, *supra* note 4 (noting that Facebook has teams of employees reviewing content that has been reported by users for alleged violations of its community standards).

203. Sherr, *supra* note 186; *see also supra* Part IV.A (discussing the consequences of the discretionary inconsistencies applied by employees tasked with determining whether content violates community guidelines).

204. *See id.* (noting Facebook's policies are "vague and confusing"); *About the FTC*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc> (last visited Apr. 4, 2018) (on file with *The University of the Pacific Law Review*) (noting the FTC was established to "protect consumers by preventing anticompetitive, deceptive, and unfair business practices"); Schatz & Sammon, *supra* note 6 ("Overzealous gun-group flaggers sometimes hit the wrong targets. The gun-sale ban only affects sales between individuals, not sales by federally licensed firearms dealers. . . . [P]ages for brick-and-mortar gun shops have been taken down wrongfully at times."); Monteiro, *supra* note 6 ("Facebook is erratic in following its own guidelines.").

205. *See A Guide to the Rulemaking Process*, OFF. OF THE FED. REG., *available at* [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf) (last visited Apr. 7, 2018) (on file with *The University of the Pacific Law Review*) (noting that an agency may "gather information through unstructured processes and informal conversations with people and organizations interested in the issues").

206. *See* Schatz & Sammon, *supra* note 6 ("Overzealous gun-group flaggers sometimes hit the wrong targets. The gun-sale ban only affects sales between individuals, not sales by federally licensed firearms dealers. . . . [P]ages for brick-and-mortar gun shops have been taken down wrongfully at times."); *Thoughts on YouTube Demonetization*, *supra* note 11 (discussing YouTube's removal of advertisements from The Rubin Report's videos that dealt with controversial topics to appease advertisers).

subject to these guidelines.<sup>207</sup> A number of definitions exist as to what constitutes a “social media website,” but these websites generally “allow users to create profiles, connect with friends, post comments, send private messages, and form relationships with other users of the same website who access their profile.”<sup>208</sup> While Facebook clearly has these features, so do Amazon, Groupon, and online dating websites, among others.<sup>209</sup> Thus, “social media website” must be carefully defined.<sup>210</sup>

The FTC should also establish an appeals board to provide an independent review over content controlled by social media companies on business pages.<sup>211</sup> Any content that complies with the FTC’s uniform guidelines should not be removed or demonetized by social media companies,<sup>212</sup> and there should be fines for social media companies who improperly control content to encourage a more thoughtful review of flagged content.<sup>213</sup>

For example, the United States Equal Employment Opportunity Commission (“EEOC”) has a formal complaint process for federal employees or job applicants who allege they have been discriminated against in violation of federal laws and regulations.<sup>214</sup> If the EEOC decides to investigate an individual’s complaint, it has 180 days to issue a final decision, which is likely shorter than the amount of time it would take to litigate.<sup>215</sup> If the individual disagrees with the EEOC’s decision, he or she can “appeal the decision to the EEOC or challenge it in federal district court.”<sup>216</sup>

Because social media websites have evolved into critical platforms for businesses, it is important that the relatively small number of leading social media companies not make decisions concerning content on business pages

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207. See Waller, *supra* note 21, at 1778 (noting that “social networking websites” are “often overextended to include many . . . interactive websites and software platforms where user content is generated and shared”).

208. *Id.* at 1776.

209. *Id.* at 1777–78.

210. *Id.* at 1776–80 (noting that “social networking websites” are “often overextended to include many . . . interactive websites and software platforms where user content is generated and shared”).

211. See *About the FTC*, *supra* note 204 (noting the FTC was established to “protect consumers by preventing anticompetitive, deceptive, and unfair business practices”).

212. See *supra* Part IV.A (discussing the need for clear and transparent uniform guidelines governing social media companies’ control of content on business pages).

213. See *Fine and Punishment: The Economics of Crime Suggests that Corporate Fines Should be Even Higher*, THE ECONOMIST (July 21, 2012), <https://www.economist.com/node/21559315> (on file with *The University of the Pacific Law Review*) (suggesting that regulators should impose penalties large enough to offset the benefit of the offense).

214. *Overview of the Federal Sector EEO Complaint Process*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, [https://www.eeoc.gov/federal/fed\\_employees/complaint\\_overview.cfm](https://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm) (last visited Apr. 7, 2018) (on file with *The University of the Pacific Law Review*).

215. *Id.*; see also *What to Expect – A Lawsuit Chronology*, FINDLAW, <http://litigation.findlaw.com/filing-a-lawsuit/what-to-expect-a-lawsuit-chronology.html> (last visited Apr. 7, 2018) (on file with *The University of the Pacific Law Review*) (noting litigation can “take from as little as six months, to as long as years”).

216. *Overview of the Federal Sector EEO Complaint Process*, *supra* note 214.

without broader accountability.<sup>217</sup> FTC oversight concerning social media companies' control over content on business pages resolves the discretionary problem that occurs and offers businesses the opportunity to appeal to a board of individuals whose positions are obtained through democratic means.<sup>218</sup>

*B. Objections to Regulating Social Media Companies*

The question of how much to regulate is the subject of highly contentious debate over concerns about where to draw the line between not enough and too much.<sup>219</sup> The debate surrounding the regulation of social media companies is particularly polarized.<sup>220</sup> Some are open to the idea of labeling social media websites as public utilities requiring regulation.<sup>221</sup> Others are opposed, arguing that regulations “wreaked havoc” on many industries in the past, including communications and media.<sup>222</sup> Those opposed also argue that “[t]he very act of imposing ‘utility’ status on a service or platform tends to shelter it from competition and lock them in as real monopolies for the long-haul.”<sup>223</sup> In addition, public utilities are “non-innovative”—“[c]onsumers are typically given access to a plain vanilla service at a ‘fair’ rate, but without any incentive to earn a greater return, innovations suffers.”<sup>224</sup>

While these are valid concerns, the proposed regulations do not fix rates, but merely provide for uniform guidelines and an appeals process to limit social media companies' discretion over content on business pages.<sup>225</sup> Thus, it is difficult to argue that innovation will be stifled, unless the threat of fines for social media companies who improperly remove content is found to stifle

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217. See *supra* Part I (highlighting social media companies' role as gatekeepers and the impact their control over content may have on businesses using their websites as a primary advertising platform).

218. See *supra* Part IV.A (discussing the need for clear and transparent uniform guidelines governing social media companies' control of content on business pages); *About the FTC: Commissioners*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/commissioners> (last visited Apr. 7, 2018) (on file with *The University of the Pacific Law Review*) (“The Commission is headed by five Commissioners, nominated by the President and confirmed by the Senate, each serving a seven-year term. No more than three Commissioners can be of the same political party. The President chooses one Commissioner to act as Chairman.”).

219. Eli Combs, Denise Landry & Seth Goldman, *When Does Regulation Work?*, YALE SCH. OF MGMT. (Feb. 6, 2014), <https://insights.som.yale.edu/insights/when-does-regulation-work> (on file with *The University of the Pacific Law Review*).

220. Adam Thierer, *The Danger of Making Facebook, LinkedIn, Google and Twitter Public Utilities*, FORBES (July 24, 2011, 3:31 PM), <https://www.forbes.com/sites/adamthierer/2011/07/24/the-danger-of-making-facebook-linkedin-google-and-twitter-public-utilities/#12baaf967d0d> (on file with *The University of the Pacific Law Review*).

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. See *supra* Part IV.A (discussing the need for clear and transparent uniform guidelines governing social media companies' control of content on business pages and for establishing an independent review board that businesses can appeal to if their content is impacted).

innovation.<sup>226</sup>

Another objection to regulating social media companies is the cost passed to consumers as social media companies adjust to new regulations.<sup>227</sup> Consumers may actually have to pay to access websites.<sup>228</sup> However, this returns to the question of where to draw the line with regulation.<sup>229</sup> Given the increasing economic significance of social media companies, it is unclear whether consumers would discontinue use if required to pay for access.<sup>230</sup> Further, it remains to be determined whether the cost passed to consumers is enough to offset the benefit of providing uniform guidelines and an independent appeals board to protect both businesses and consumers from the widely varying discretion of social media companies.<sup>231</sup>

## V. CONCLUSION

The modern development of social media websites and their impact on both national and international commerce<sup>232</sup> requires us to rethink the extent to which social media companies should be allowed to control content on their websites in ways that impact business activities and, ultimately, consumers.<sup>233</sup> The existing antitrust regulatory framework is limited and does not encompass the social media companies' discretionary control of content on business pages.<sup>234</sup> As a result, business pages have been subject to erratic discretionary control by social media companies, which impacts the ability of businesses to compete in the marketplace.<sup>235</sup>

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226. Thierer, *supra* note 220; *see also supra* Part IV.A (proposing fines for social media companies who improperly control users' content).

227. Thierer, *supra* note 220.

228. *Id.*

229. Combs, Landry & Goldman, *supra* note 219.

230. *See supra* Part II (discussing the rise in Internet use, the importance of using social media websites as advertising platforms to connect with consumers, and the impact of social media websites on consumer purchasing activity).

231. *See supra* Part IV.A (discussing the need for clear and transparent uniform guidelines governing social media companies' control of content on business pages and for establishing an independent review board that businesses can appeal to if their content is impacted).

232. *See supra* Part II (discussing the rise in Internet use, the importance of using social media websites as advertising platforms to connect with consumers, and the impact of social media websites on consumer purchasing activity).

233. *See supra* Part I (highlighting social media companies' role as gatekeepers and the impact their control over content may have on businesses using their websites as a primary advertising platform).

234. *See supra* Part III.A (discussing that even if a social media company were to achieve monopoly power, its control of content must be anticompetitive in nature to violate antitrust laws).

235. *See supra* Part IV.A (discussing the consequences of discretionary inconsistencies applied by employees tasked with determining whether content violates community guidelines); Soto, *supra* note 2 (quoting Jonathan Hall, owner of Jon's Guns, who noted "sales drop immediately" if the company does not post frequently on its Facebook page); *Thoughts on YouTube Demonetization*, *supra* note 11 (discussing that when YouTube demonetizes content, producing the content becomes less profitable or even unprofitable, which is not a sustainable business model).

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Given the similarities between social media companies and companies in other regulated industries and the market failure that exists with social media companies, regulation over their discretionary control of content on business pages is justified.<sup>236</sup> Despite the objections to regulation,<sup>237</sup> it is important to have checks and balances in the form of uniform guidelines and an independent appeals board to limit social media companies' discretionary control over content on business pages and to hold them accountable for improper exercises of control.<sup>238</sup>

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236. *See supra* Parts III.B–C (arguing that the similarities between historically regulated industries and social media companies, combined with the market failure of social media companies to maximize users, serves as grounds to introduce new regulations for the discretionary removal of content on business pages by social media companies).

237. *See supra* Part IV.B (discussing the objections to regulating social media companies).

238. *See supra* Part IV.A (discussing the need for clear and transparent uniform guidelines governing social media companies' control of content on business pages and for establishing an independent review board that businesses can appeal to if their content is impacted).