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Monopolizing Free Speech

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The First Amendment prevents the government from suppressing speech, though individuals can ban, chill, or abridge free expression without offending the Constitution. Hardly an unintended consequence, Justice Oliver Wendell Holmes famously likened free speech to a marketplace where the responsibility of rejecting dangerous, repugnant, or worthless speech lies with the people. This supposedly maximizes social welfare on the theory that the market promotes good ideas and condemns bad ones better than the state can. Nevertheless, there is a concern that large technology corporations exercise unreasonable power in the marketplace of ideas.

Because "big tech's" ability to abridge speech lacks constitutional obstacles, many litigants, politicians, and commentators have recently begun to claim that the act of suppressing speech is anticompetitive and thus should offend the antitrust laws. Their theory, however, seems contrary to antitrust law. Since antitrust is intended to promote consumer welfare in commercial markets, antitrust liability is typically reserved for firms that have harmed consumers economically. This generally requires showing higher prices or restricted output. As such, the courts have largely declared that speech entails noncommercial activity antitrust has no authority to govern, despite the emergence of rhetoric and lawsuits seeking to do just that.

This Article argues that, contrary to precedent, antitrust law can and should promote commercial speech. The economy has evolved such that firms and consumers depend on information, ideas, and speech even when traded at zero prices—known as the "information economy." In turn, technology firms encounter incentives to suppress types of commercial speech and, when wielding market power, the ability to do so. For example, Apple and Google allegedly bury information, advertising, and other forms of commercial expression about rival products to achieve anticompetitive ends, harming consumers and markets. This Article asserts that in certain

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instances, enforcement should condemn the exclusion of commercial information even when consumers enjoy low prices while resisting the emergence of rhetoric calling for the integration of all types of speech—e.g., expressive, political, and social speech—into antitrust's framework. If antitrust promoted noncommercial speech, it would erode the First Amendment as well as antitrust law.

INTRODUCTION

Modern First Amendment[1] theory likens free expression to a competitive marketplace.[2] This framework, which Justice Oliver Wendell Holmes asserted in *Abrams v. United States*,[3] assumes that abridging free speech tends to inflict greater costs on society than allowing repugnant ideas to proliferate.[4] For historical examples supporting this framework, governments have banned literary treasures,[5] scientific theories,[6] political thought,[7] and exercises of the free press,[8] stunting social and economic growth. To avoid the dangers of improvident regulation, Justice Holmes insisted that the market should determine the value of expression rather than the government.[9] Since market forces should naturally favor good ideas over bad ones, a competitive marketplace of ideas is expected to produce innovative art, music, technology, journalism, research, and political theory, among other forms of expression.

Yet only in the past few years have observers become seriously concerned that powerful corporations—whose conduct lies outside of the First

1. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.").

2. Lucien J. Dhooge, *The First Amendment and Disclosure Regulations: Compelled Speech or Corporate Opportunism?*, 51 AM. BUS. L.J. 599, 604 (2014); *see also* Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 823–24 (2008) (discussing how Justice Oliver Wendell Holmes "revolutionized" First Amendment jurisprudence).

3. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

4. *See* Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 24–29 (1986) (discussing the error costs of overregulating speech).

5. *Banned Books Week: Books That Shaped America*, EAGLE (Sept. 23, 2019), https://www.theeagle.com/gallery/featured/banned-books-week-books-that-shaped-america/collection_e1dc7aa8-a3af-11e7-9825-aba3b5eecab5.html [https://perma.cc/G44S-XCPH] (discussing great literary works that society has at one time banned).

6. Michael Zimmerman, *Yet Another Call to Ban the Teaching of Evolution: Bad for Science, Worse for Religion, and Legally Embarrassing*, HUFFINGTON POST (Aug. 27, 2013, 5:28 PM), https://www.huffingtonpost.com/michael-zimmerman/yet-another-call-to-ban-t_b_3810327.html [https://perma.cc/C2CV-42NE].

7. Rebecca Shapiro, *Arkansas Lawmaker Introduces Bill Banning Howard Zinn Books*, HUFFINGTON POST (Mar. 6, 2017, 5:11 AM), https://www.huffingtonpost.com/entry/arkansas-lawmaker-introduces-bill-banning-howard-zinn-books-from-public-schools_us_58bd2365e4b0b9989418716e [https://perma.cc/8RC2-VNKQ] (discussing a proposed bill by an Arkansas legislator to ban schools from teaching books by the liberal historian Howard Zinn).

8. Editorial Board, *India's Battered Free Press*, N.Y. TIMES (June 7, 2017), https://www.nytimes.com/2017/06/07/opinion/india-freedom-of-press-narendra-modi.html [https://perma.cc/4FVC-BS2E].

9. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Amendment's scope[10]—may threaten free speech.[11] In prior generations, it was generally assumed that private parties lacked the capacity to suppress content[12] and that their right to advocate for or against certain viewpoints was precisely how the market was supposed to determine an idea's merits.[13] Today, though, many worry that telecommunications, media, technology, social media, and other large corporations ("big tech" or "tech giants") can, in exploiting their market power, impede the free trade of ideas.[14] Consider Facebook, Twitter, and other firms that offer users a platform to express opinions, share stories, and debate issues. By controlling a lion's share of the market, critics contend that each company has the power and incentives to suppress ideas and speakers.[15] For example, Google allegedly excludes not only political viewpoints with which it disagrees[16] but also information about commercial goods in competition against its own products.[17] As one observer lamented about Google's ability to alter or censor speech:

> Google has given [its Vice President and Deputy General Counsel] Nicole Wong a central role in . . . decid[ing] what controversial material does and doesn't appear on the local search engines that Google maintains in many countries in the world, as well as on Google.com. As a result, Wong and

10. The current view of the First Amendment is that it applies only to state actors. Halleck v. Manhattan Cmty. Access Corp., 882 F.3d 300, 307 (2d Cir. 2018) ("[W]hether the First Amendment applies to the individuals who have taken the challenged actions . . . depends on whether they have a sufficient connection to governmental authority to be deemed state actors."); *see also* Robert R. Baugh, *Applying the Bill of Rights to the States: A Response to William P. Gray, Jr.*, 49 ALA. L. REV. 551, 555 (1998).

11. *See* TIM WU, THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES 121–23 (2010) (noting that people often mistake the First Amendment as a plenary protection of speech); Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1121 (2005) ("[T]oday private actors wield the vast majority of power over Internet speech—power unchecked by the First Amendment.").

12. *See* Adams v. Am. Bar Ass'n, 400 F. Supp. 219, 223 (E.D. Pa. 1975) (casting doubt on the idea that private parties can even monopolize or suppress an idea).

13. Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1552 (1998).

14. *See, e.g.*, Mark Scott, *Welcome to New Era of Global Digital Censorship*, POLITICO (Jan. 14, 2018, 5:00 PM), https://www.politico.eu/article/google-facebook-twitter-censorship-europe-commission-hate-speech-propaganda-terrorist [https://perma.cc/XR22-5DH3].

15. *See, e.g.*, Kalev Leetaru, *How Twitter's New Censorship Tools Are the Pandora's Box Moving Us Towards the End of Free Speech*, FORBES (Feb. 17, 2017, 12:02 AM), https://www.forbes.com/sites/kalevleetaru/2017/02/17/how-twitters-new-censorship-tools-are-the-pandoras-box-moving-us-towards-the-end-of-free-speech/ [https://perma.cc/5GW2-P936]; Emma Woollacott, *Facebook Reveals Its Secret Rules for Censoring Posts*, FORBES (Apr. 24, 2018, 8:37 AM), https://www.forbes.com/sites/emmawoollacott/2018/04/24/facebook-reveals-its-secret-rules-for-censoring-posts/ [https://perma.cc/25Y5-JSB7].

16. Vivian Salama et al., *Trump Accuses Google of Suppressing Positive News About His Presidency*, WALL ST. J. (Aug. 28, 2018, 3:12 PM), https://www.wsj.com/articles/trump-accuses-google-of-suppressing-positive-news-about-his-presidency-1535459748 [https://perma.cc/E99X-KGVU].

17. Jacob Brogan, *Why the EU Just Slapped Google with a $2.7 Billion Fine*, SLATE (June 27, 2017, 5:20 PM), https://slate.com/technology/2017/06/why-the-european-union-fined-google-2-7-billion.html [https://perma.cc/PQ8P-XANR].

> her colleagues arguably have more influence over the contours of online expression than anyone else on the planet.[18]

To critics then, a mix of technology and market power enables or even encourages powerful corporations to obstruct free speech as a means of attracting consumers and generating revenue.

Curiously, some litigants are beginning to suggest that the Sherman Antitrust Act[19] should condemn efforts to abridge speech[20]—a notion that is seemingly antithetical to antitrust law.[21] Their theory is that, since antitrust's purpose is to protect the competitive process from monopolies and trade restraints,[22] a monopolist who employs anticompetitive tactics to suppress speech should incur antitrust liability.[23] Several recent lawsuits illustrate this approach. In 2018, Gab AI alleged that Google offended antitrust law by excluding specific viewpoints from internet discourse.[24] Gab, a social media company catering to the "alt-right,"[25] claimed it was denied access to Google's Android platform due to its political leanings, resulting in "inhibit[ed] free speech" among other anticompetitive effects.[26] Similar antitrust lawsuits[27] include former candidate Gary Johnson's claim that the

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18. Jeffrey Rosen, *Google's Gatekeepers*, N.Y. TIMES MAG. (Nov. 28, 2018), https://www.nytimes.com/2008/11/30/magazine/30google-t.html [https://perma.cc/XN2J-SSZY].

19. 15 U.S.C. §§ 1–7 (2018).

20. *See* Jeremy Carl, *How to Break Silicon Valley's Anti-Free-Speech Monopoly*, NAT'L REV. (Aug. 15, 2017, 8:00 AM), https://www.nationalreview.com/2017/08/silicon-valleys-anti-conservative-bias-solution-treat-major-tech-companies-utilities/ [https://perma.cc/RUC5-P8U9] (discussing how Google and its subsidiary YouTube have exercised such control over the internet's flow of information that, according to critics, the companies can alter political discourse); April Glaser, *The Alt-Right's Favorite Social Network Has a Point About Google*, SLATE (Sept. 20, 2017, 3:52 PM), https://slate.com/technology/2017/09/gab-is-suing-google-over-antitrust-and-it-has-a-point.html [https://perma.cc/9U8D-FYL2].

21. *See infra* Part II (discussing why antitrust is thought to be unable to govern speech).

22. Jennifer R. Conners, Comment, *A Critical Misdiagnosis: How Courts Underestimate the Anticompetitive Implications of Hospital Mergers*, 91 CALIF. L. REV. 543, 545 (2003) ("The purpose of antitrust law is to protect the consumer by promoting free competition, which fosters lower prices and higher quality.").

23. Johnson v. Comm'n on Presidential Debates, 869 F.3d 976, 979–80 (D.C. Cir. 2017) (ruling that antitrust cannot govern political discourse).

24. Complaint at 42, Gab AI Inc. v. Google, LLC, No. 2:17-cv-04115-AB (E.D. Pa. Sept. 14, 2017), ECF No. 1.

25. Defining "alt-right" is incredibly difficult given the external and internal debates about what constitutes this ideology. According to *The Atlantic*, "[t]he most influential account included in the data set of alt-right Twitter followers was that of Richard Spencer, the avowed white nationalist who coined the term *alt-right*." J. M. Berger, *Trump Is the Glue That Binds the Far Right*, ATLANTIC (Oct. 29, 2018), https://www.theatlantic.com/ideas/archive/2018/10/trump-alt-right-twitter/574219/ [https://perma.cc/9YUY-DB3D].

26. *Id.*; *see also* Harper Neidig, *Social App Popular with 'Alt-Right' Files Antitrust Lawsuit Against Google*, HILL (Sept. 15, 2017, 1:21 PM), http://thehill.com/policy/technology/350885-gab-files-antitrust-lawsuit-against-google [https://perma.cc/W767-NYBW].

27. Other lawsuits include allegations made by documentarians that major television networks colluded to muzzle their works, Levitch v. Columbia Broad. Sys., Inc., 697 F.2d 495, 495–96 (2d Cir. 1983) and the claim that a newspaper monopolized local news by depriving rival outlets of advertising revenue. Lorain Journal Co. v. United States, 342 U.S. 143, 148 (1951).

Commission on Presidential Debates used its monopoly power to exclude third-party viewpoints from the 2016 presidential debates[28] and litigation against the major credit companies alleging that their treatment of WikiLeaks and its affiliates "suppress[ed] the market place [sic] of ideas" in violation of antitrust law.[29]

Moreover, antitrust's relationship with speech has emerged as a salient political issue, gaining traction among both political parties and multiple branches of government. According to Senators Elizabeth Warren and Ted Cruz, platforms like Facebook have created such a chokepoint on information that antitrust regulators should intervene.[30] Also take the debate over regulating the internet: some lawmakers argue in favor of abolishing "net neutrality" on the grounds that antitrust law is the superior guardian of online expression.[31] Recently, in fact, the Antitrust Division of the Department of Justice (DOJ) suggested that antitrust should protect a "greater openness and free speech" as a benefit of competition.[32] Unsurprisingly, it has become commonplace to find editorials and articles in the *New York Times*, *Wall Street Journal*, *Washington Post*, and other news outlets

28. *Johnson*, 869 F.3d at 979–80.

29. DataCell ehf. v. Visa, Inc., No. 1:14-CV-1658 GBL/TCB, 2015 WL 4624714, at *6 (E.D. Va. July 30, 2015) ("Here, DataCell attempts to allege an injury in fact in two ways. First, DataCell alleges that Defendants 'injured the media market by suppressing the market place [sic] of ideas.'").

30. Jessica Guynn, *Ted Cruz Threatens to Regulate Facebook, Google, and Twitter over Charges of Anti-conservative Bias*, USA TODAY (Apr. 10, 2019, 3:41 PM), https://www.usatoday.com/story/news/2019/04/10/ted-cruz-threatens-regulate-facebook-twitter-over-alleged-bias/3423095002/ [https://perma.cc/HZ4T-LDRU]; *see also infra* notes 219–30, 295 and accompanying text.

31. Examples of advocacy in favor of using antitrust law instead of net neutrality include the submissions from an Federal Trade Commission (FTC) commissioner and a representative from Congress. *See generally* Maureen K. Ohlhausen, *Antitrust over Net Neutrality: Why We Should Take Competition in Broadband Seriously*, 15 COLO. TECH. L.J. 119 (2016); Bob Goodlatte, *Use Antitrust Laws, Not Regulations to Protect the Internet*, HILL (Sept. 16, 2014, 12:46 PM), http://thehill.com/special-reports/net-neutrality-september-16-2014/217862-use-antitrust-laws-not-regulations-to [https://perma.cc/23JB-GP5N].

32. Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks at the Antitrust New Frontiers Conference: ". . . And Justice for All": Antitrust Enforcement and Digital Gatekeepers (June 11, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-antitrust-new-frontiers [https://perma.cc/9SR5-TKTQ] [hereinafter Delrahim, Digital Gatekeepers]; *see* Makan Delrahim, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks at the Recording Artists' Coalition: Antitrust Enforcement in the Entertainment and Media Industries (Dec. 18, 2003), https://www.justice.gov/atr/speech/antitrust-enforcement-entertainment-and-media-industries [https://perma.cc/KX5K-UB58] [hereinafter Delrahim, Entertainment Industry Enforcement]; *see also, e.g.*, N.Y. Citizens Comm. on Cable TV v. Manhattan Cable TV, Inc., 651 F. Supp. 802, 818–19 (S.D.N.Y. 1986) (issuing an injunction to promote "more than one speaker" in the monopolized market of pay television); Alec Klein, *A Hard Look at Media Mergers*, WASH. POST (Nov. 29, 2000), https://www.washingtonpost.com/archive/business/2000/11/29/a-hard-look-at-media-mergers/d8380c2d-92ee-4b1b-8ffd-f43893ab0055/ [https://perma.cc/5CS9-HJ9G] (FTC Chairman Robert Pitofsky stated that "[a]ntitrust is more than economics . . . . I do believe if you have issues in the newspaper business, in book publishing, news generally, entertainment, I think you want to be more careful and thorough in your investigation than if the very same problems arose in cosmetics, or lumber, or coal mining.").

discussing whether antitrust regulators should promote free speech against restraints erected by big tech.[33]

Yet there are great reasons to doubt whether antitrust law has any authority to promote free expression, notwithstanding the rise of lawsuits and policy proposals meant to do just that.[34] The obstacle involves antitrust's limited scope. Antitrust law was reformed in the 1970s and 1980s so that, today, it may only promote the *economic* benefits of competition; social and political goals can no longer instigate enforcement.[35] In turn, to state an antitrust claim, plaintiffs must generally show that the challenged act increased prices or restricted output, thereby harming consumer welfare.[36] Perhaps because abridging speech is unlikely to affect consumer prices, courts have ruled that the marketplace of ideas is noneconomic in nature and thus excluded from antitrust's scope.[37] So given antitrust's economic foundation, the modern view is that a firm may freely suppress ideas, speech, and expression without incurring antitrust liability.

In fact, the limited scholarship linking antitrust to free expression has typically highlighted the corollary: the First Amendment is more aptly used to *escape* antitrust liability. A core tenet of the First Amendment is that speakers may discriminate against ideas and expressions with which they disagree.[38] As such, the more natural argument is that the First Amendment

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33. *See, e.g.*, Gerrit De Vynck & David McLaughlin, *Big Tech Is Armed and Waiting to Repel U.S. Antitrust Onslaught*, BLOOMBERG (June 6, 2019, 4:00 AM), https://www.bloomberg.com/news/articles/2019-06-06/big-tech-is-armed-and-waiting-to-repel-u-s-antitrust-onslaught [https://perma.cc/KD65-M85A]; Mark Epstein, Opinion, *Antitrust, Free Speech and Google*, WALL ST. J. (June 9, 2019, 3:31 PM), https://www.wsj.com/articles/antitrust-free-speech-and-google-11560108712 [https://perma.cc/83F7-8PYV]; David Streitfeld, *To Take Down Big Tech, They First Need to Reinvent the Law*, N.Y. TIMES (June 20, 2019), https://www.nytimes.com/2019/06/20/technology/tech-giants-antitrust-law.html [https://perma.cc/H886-F5XD].

34. *See generally* Maurice E. Stucke & Allen P. Grunes, *Why More Antitrust Immunity for the Media Is a Bad Idea*, 105 NW. U. L. REV. 1399, 1400 (2011) (advocating that free speech issues should receive antitrust immunity); *see also infra* notes 110–21 (describing cases in which courts have refused to subject markets of ideas and information to antitrust scrutiny).

35. *See* HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 2 (2005) (asserting that since antitrust's "counterrevolution of the 1970s and 1980s," "[t]he only articulated goal of the antitrust laws is to benefit consumers, who are best off when markets are competitive").

36. *See* Ginzburg v. Mem'l Healthcare Sys., Inc., 993 F. Supp. 998, 1026 (S.D. Tex. 1997) ("To determine the legality of a restraint under the rule of reason, the plaintiff must show that the 'defendant's actions amounted to a conspiracy against the market—a concerted attempt to reduce output and drive up prices or otherwise reduce consumer welfare.'").

37. *See, e.g.*, DataCell ehf. v. Visa, Inc., No. 1:14-CV-1658 GBL/TCB, 2015 WL 4624714, at *7 (E.D. Va. July 30, 2015) (dismissing the plaintiff's antitrust lawsuit because its claim that the defendant's conduct harmed the "market for ideas" fails to state an economic injury and noting that "Congress created antitrust laws to protect free market competition").

38. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573 (1995) (holding that Massachusetts may not, on First Amendment grounds, force a private parade to include messages that the organizers would prefer to exclude). Key was the notion that "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Id.* (quoting Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 16 (1986)).

confers a limited grant of antitrust immunity to exclude content and speakers.[39] This makes antitrust's emergence as a tool to combat censorship especially surprising.

The question of whether antitrust should promote free expression implicates a burgeoning debate over antitrust's purpose.[40] Scholars and observers have begun to criticize antitrust's fixation with prices as the chief indicator of consumer welfare.[41] The courts took the position that free expression is noncommercial and thus beyond antitrust's scope when the economy prioritized physical goods sold at retail prices.[42] This is no longer the case. Today, *intangible* goods, speech, and information[43] exchanged at low prices or for "free"[44] are central to the "information economy."[45] Due to this development, it might be outdated to presume that high prices remain the chief harm of concentrated markets.[46] As one observer argued, antitrust's reliance on prices "fails to capture the architecture of market power in the twenty-first century marketplace."[47] But to most scholars, antitrust law is ill-equipped to remedy the social harms caused by powerful corporations. To them, issues of democracy, equality, and free expression are best excluded from antitrust's scope.[48] It is thus timely and important to question whether promoting speech should entail a component of antitrust's consumer welfare standard.

To foreshadow this Article's argument, antitrust should foster *commercial* speech but not social, political, and other noncommercial expression. Given information's role in modern markets, firms encounter incentives to suppress commercial expression and, when wielding market power, the capability to do so. For example, Amazon and Google allegedly bury information about competing products to promote their own goods, preventing rivals from

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39. *See* Raymond Ku, *Antitrust Immunity, the First Amendment and Settlements: Defining the Boundaries of the Right to Petition*, 33 IND. L. REV. 385, 385–86 (2000) (discussing situations in which the First Amendment immunizes conduct from antitrust scrutiny).

40. *See, e.g.*, Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 716–17 (2017) (questioning whether antitrust's fixation on prices can appreciate the harm Amazon poses to consumers).

41. *Id.* (questioning whether antitrust must evolve to accomplish more than competitive prices).

42. *See, e.g.*, Adams v. Am. Bar Ass'n, 400 F. Supp. 219, 221–22 (E.D. Pa. 1975) (holding that the marketplace of ideas is excluded from antitrust's framework).

43. Kristen Osenga, *Information May Want to Be Free, but Information Products Do Not: Protecting and Facilitating Transactions in Information Products*, 30 CARDOZO L. REV. 2099, 2099 (2009) (defining information goods as "products that are used to organize, provide context, and distribute information").

44. *See* John M. Newman, *The Myth of Free*, 86 GEO. WASH. L. REV. 513, 515–16 (2018) (explaining that free goods are rarely free in actuality).

45. *See* John Perry Barlow, *The Economy of Ideas*, WIRED (Mar. 1, 1994, 12:00 PM), https://www.wired.com/1994/03/economy-ideas [https://perma.cc/XH2L-LGU8] (explaining the economic evolution of ideas).

46. *See* Khan, *supra* note 40, at 716–17 (discussing the obsolescence of prices).

47. *Id.* at 716.

48. *See* Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714, 716 (2018) (arguing against applying antitrust to noneconomic goals and problems).

speaking and competing.[49] Google, in dominating online advertising, faces accusations that it silences the advertisements of competitors.[50] It is important to emphasize the market shares that certain tech giants possess over the contours of information: Google controls 92 percent of the search market,[51] Facebook claims about 64 percent of social media traffic,[52] Amazon dominates e-commerce,[53] 73 percent of video sharing flows through YouTube,[54] Netflix commands the market for movie/television streaming, and some observers consider the combination of AT&T and Time Warner to have a collective monopoly over internet traffic.[55] With their market shares, tech giants could potentially exclude competition and thereby suppress commercial speech and information.

The problem with this landscape, as argued herein, is that markets *and* consumers depend on the free trade of information. According to the U.S. Supreme Court, commercial speech is constitutionally protected because it enables consumers to make informed decisions.[56] Absent sufficient information, economists assert that consumers are likely to misallocate resources in a manner resulting in market failure.[57] Recognizing the economic role of information, competition is essential; as firms vie for consumers, they typically disseminate information about their own products as well as goods pushed by their competitors.[58] Notwithstanding competition's relationship with information, courts have largely ruled that speech is beyond antitrust's scope, which enables firms to abridge expression without fear of antitrust liability.[59] This Article argues that, since the First

49. Joseph Hicks, *Google May Be Favoring Its Own Search Ads over Competitors, Report Says*, FORTUNE (Jan. 20, 2017), https://fortune.com/2017/01/20/google-search-engine-advertising-ads/ [https://perma.cc/PJ3Y-G33K].

50. Matt Binder, *Google Hit with $1.7 Billion Fine for Anticompetitive Ad Practices*, MASHABLE (Mar. 20, 2019), https://mashable.com/article/google-eu-antitrust-fine-ads/ [https://perma.cc/CU4Q-FVY5].

51. Jeff Desjardins, *How Google Retains More Than 90% of Market Share*, BUS. INSIDER (Apr. 23, 2018, 7:35 PM), https://www.businessinsider.com/how-google-retains-more-than-90-of-market-share-2018-4 [https://perma.cc/7BFC-CHUQ].

52. *Social Media Stats Worldwide*, STATCOUNTER, http://gs.statcounter.com/social-media-stats [https://perma.cc/W8YW-L9D2] (last visited Feb. 14, 2020).

53. Angus Loten, *Amazon Owns Nearly Half the Public-Cloud Market*, MARKETWATCH (July 30, 2019, 9:00 PM), https://www.marketwatch.com/story/amazon-owns-nearly-half-the-public-cloud-market-2019-07-30 [https://perma.cc/BUJ4-8Y2U].

54. *YouTube*, DATANYZE, https://www.datanyze.com/market-share/online-video/youtube-market-share [https://perma.cc/HYA9-XKWZ] (last visited Feb. 14, 2020).

55. Tim Wu, Opinion, *Why Blocking the AT&T–Time Warner Merger Might Be Right*, N.Y. TIMES (Nov. 9, 2017), https://www.nytimes.com/2017/11/09/opinion/att-time-warner-merger-fcc.html [https://perma.cc/8YAA-M75V].

56. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 760, 769 (1976).

57. *See* Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713, 727 (1997) (describing imperfect information as "perhaps the most important single market failure"); *infra* notes 201–11 and accompanying text.

58. *See generally* Gregory Day & Abbey Stemler, *Infracompetitive Privacy*, 105 IOWA L. REV. 61 (2019).

59. *See infra* Part II.

Amendment protects commercial speech for the same reasons that antitrust law promotes competition—to benefit consumers and markets—commercial speech should receive antitrust protection as a function of competition.

The following analysis also shows that recent proposals introduced by politicians to condemn forms of social and political censorship are misguided and probably unconstitutional, as private parties must enjoy the right to reject bad, dangerous, and unsavory speech. Also, expanding enforcement into noneconomic realms such as political speech would create unpredictable and devastating liability. If antitrust law promoted noncommercial speech, it would erode the First Amendment as well as the antitrust laws.

This Article proceeds in five parts. Since antitrust law is an economic doctrine, Part I examines free expression as an economic phenomenon. It emphasizes the constitutional limitations placed on the state's ability to abridge speech as well as the lack of counterpart regulations—constitutional or otherwise—relevant to private actors. Part II explores the manner in which antitrust law has been reformed to promote the economic interests of consumers; in light of this narrowing, the courts have determined that free expression lies outside of antitrust's scope. Part III discusses changes to the economic and political landscapes that call into question antitrust's framework. After tracing recent rhetoric that seeks to condemn internet censorship as anticompetitive, this Part shows that practical and constitutional issues cast doubt on whether antitrust has any ability to promote free speech. Part IV proposes a solution that would remedy the consequences of modern monopolies without burdening the First Amendment: enforcement should promote commercial expression while remaining agnostic to political, social, and expressive speech. Incorporating commercial expression into enforcement would 1) update antitrust law to account for zero-priced ideas, information, and speech while retaining antitrust's economic framework; 2) advance antitrust's purpose of promoting efficient markets and consumer welfare; and 3) resist recent efforts by politicians and lawmakers to chip away at the First Amendment. Part V analyzes other antitrust remedies proposed by politicians, commentators, and scholars, which are ostensibly intended to promote free expression.

I. THE MARKETPLACE OF IDEAS IN THEORY AND PRACTICE

The First Amendment prevents the government from regulating, banning, or chilling free expression.[60] Less understood, however, is the manner in which private actors may create the same harms. Because latter parts of this Article rely on economic theory—as antitrust law is an economic doctrine—this Part establishes the market theory of speech in order to shed light on the incentives encountered by private actors to abridge free expression and the consequences thereof.

60. U.S. CONST. amend. I.

A. The Economic Framework of Constitutionally Protected Speech

Justice Oliver Wendell Holmes's dissent in *Abrams* marks one of the first portrayals in Supreme Court jurisprudence of speech as a market phenomenon.[61] Since, prior to World War II, the courts interpreted the Constitution as sheltering far fewer types of expression,[62] Holmes's dissent sought to expand the First Amendment by arguing that bad ideas pose little danger because good ideas should prevail over them.[63] Justice Holmes wrote

> that the ultimate good desired is better reached by free trade in ideas—that *the best test of truth is the power of the thought to get itself accepted in the competition of the market*, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[64]

Given this framework, most laws abridging political, social, or expressive speech today must overcome the formidable hurdle of strict scrutiny—that is, the restriction must be narrowly tailored and advance a compelling government interest.[65]

In light of *Abrams*, a handful of scholars have sought to explore Justice Holmes's metaphor in market terms by probing the benefits of free expression and the costs of restricting it.[66] As for the benefits, unregulated speech should not only reveal the value of ideas but also elevate good ones over bad ones.[67] Joseph Blocher found in referencing neoclassical economic theory that "[b]ad ideas should be no more feared than bad products or services; they will simply lose out to better competitors."[68] Taken a step further, since commodities gravitate to their highest rate of return,[69] participants have incentives to capture this value by offering *actual*

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61. THOMAS HEALY, THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA 3–5 (2013) (explaining that, before Holmes's *Abrams* dissent influenced First Amendment jurisprudence, the belief was that the First Amendment protected only against prior restraints, meaning one had the right to express a viewpoint but could still be punished for it).

62. *See id.* at 3.

63. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

64. *Id.* (emphasis added).

65. *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218, 2231 (2015) ("Because the Town's Sign Code imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny, 'which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'" (quoting Citizens United v. FEC, 558 U.S. 310, 340 (2010))).

66. *See generally* Posner, *supra* note 4, at 8 (placing free expression in an economic framework).

67. *See* Blocher, *supra* note 2, at 829–30.

68. *Id.*

69. *See* Helen A. Garten, *Whatever Happened to Market Discipline of Banks?*, 1991 ANN. SURV. AM. L. 749, 749 n.1 ("Simply put, in a perfect market, investors will choose the alternative offering the highest rate of return for any desired level of risk, or the lowest risk for any given level of return."); *see also* Christine M. Augustyniak, Note, *Economic Valuation of Services Provided by Natural Resources: Putting a Price on the "Priceless*,*"* 45 BAYLOR L. REV. 389, 392 (1993) (describing the common method of determining a good's value in the market).

commodities and services based on superior ideas.[70] Consider the press, for example; pecuniary rewards motivate journalists to uncover government scandals and other noteworthy stories.[71] Free speech is thus expected to foster industries in which ideas trade, spawning superior books, movies, art, scientific theories, and journalism.

As for the dangers, speech regulation can inflict heavy costs on society despite whatever benefits are possible. Each time the government enacts rules meant to limit, ban, or chill types of speech, it may intentionally or accidentally condemn meritorious ideas.[72] Because overregulating expression can generate costs in excess of the benefits, scholars have concluded that "when the state censors information, the results are usually bad."[73] Richard Posner[74] and Ronald Coase[75] have noted that the error term—i.e., the odds of accidentally banning important speech—is significant. For instance, societies have impeded scientific development in the fields of physics, biology, and astronomy by banning ideas in tension with the status quo.[76] Take the Catholic Church, which condemned Galileo for advancing theories in conflict with Psalm 50:1.[77]

However, the application of economic models to speech is not without criticism. Michael Rushton[78] and Darren Bush[79] have each claimed that

70. *See* Michael Rushton, *Economic Analysis of Freedom of Expression*, 21 GA. ST. U. L. REV. 693, 693 (2005) ("To be sure, there are markets in artistic and intellectual products, whether songs, performances, books, or patents; these are true markets in the sense of exchanges taking place between buyers and sellers.").

71. *See generally* JAMES T. HAMILTON, DEMOCRACY'S DETECTIVES: THE ECONOMICS OF INVESTIGATIVE JOURNALISM (2016) (presenting a market-based explanation of journalism and its societal benefits).

72. *See* Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 9 (2011) ("Regulations likely to distort the marketplace of ideas impose particularly heavy costs to First Amendment values, thereby requiring particularly powerful justifications.").

73. Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CALIF. L. REV. 335, 339 (2017).

74. Posner, *supra* note 4, at 24–25 (asserting that political speech, in particular, is likely to be overregulated since judges may be adverse to revolutionary ideas despite their desirability).

75. Ronald Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 3–6 (1964) (noting that the government is thought to be prone to overregulating commercial speech).

76. *See, e.g.*, 1925 Tenn. Pub. Acts 50 (repealed 1967) (a state law banning the teaching of evolution).

77. *See* Alan Cowell, *After 350 Years, Vatican Says Galileo Was Right: It Moves*, N.Y. TIMES (Oct. 31, 1992), http://www.nytimes.com/1992/10/31/world/after-350-years-vatican-says-galileo-was-right-it-moves.html [https://perma.cc/2R39-7UE2]. *See generally* THE GALILEO AFFAIR: A DOCUMENT HISTORY (Maurice A. Finocchiaro trans., 1989).

78. Rushton, *supra* note 70, at 719 ("Coase and Rasmusen's failure to acknowledge that there is more at stake than willingness-to-pay for rights, or even to consider liberal objections, gives a false impression of the mainstream of economic analysis. However, there is a deeper problem: economic analysis alone cannot justify a method of excluding any concerns on which we cannot place an economic value.").

79. Darren Bush, *The "Marketplace of Ideas:" Is Judge Posner Chasing Don Quixote's Windmills?*, 32 ARIZ. ST. L.J. 1107, 1144–46 (2000) (discussing the problematic nature of economics in speech contexts).

traditional cost-benefit analyses fail to capture expression's full utility.[80] It may, in fact, be impossible to measure the true social and economic consequences of repressing speech.

The greater point is that by allowing popular opinion, rather than the government, to strike down repugnant ideas, the First Amendment should incentivize socially valuable ideas while excluding unsavory speech.[81] As Chief Justice William Rehnquist remarked, free speech is analogous "to the commercial market in which a laissez-faire policy would lead to optimum economic decisionmaking under the guidance of the 'invisible hand.'"[82] Notice, however, that this analysis has almost completely focused on the government's restriction of speech. The following section explores the less-discussed role of private actors and emphasizes their incentives to abridge free expression and the resulting market failures.

B. Incentives of Private Parties to Monopolize and Restrain Trade in the Marketplace of Ideas

The ability of private actors to suppress content has received less attention than the government's efforts.[83] While the First Amendment protects speech from state action, no such limitation impedes private firms and individuals: "*Congress* shall make no law . . . abridging the freedom of speech."[84] In fact, firms have incentives to exclude ideas and, when wielding sufficient market power, the capability to do so. This section discusses the ways a monopolist can capture supracompetitive profits by excluding rival ideas and creating market failures identical to when the government bans speech.

Perhaps scholars have ignored the role of private actors because the penchant of individuals to discriminate against viewpoints can *benefit* society, as this is the very process by which the market rejects unsavory ideas or accepts innovative ones. Such freedom "nourish[es] . . . the citizenry's right to choose among competing values."[85] In turn, modern theory of the First Amendment assumes that the government should resist enacting laws against, for example, fascist speech because public opinion tends to condemn these views anyway. To illustrate, media coverage of the white nationalist rallies in Charlottesville, Virginia created such outcry that employers fired many of the participants.[86] Private firms essentially raised the costs of

80. Rushton, *supra* note 70, at 719.

81. *See* Oren Bar-Gill & Gideon Parchomovsky, *A Marketplace for Ideas?*, 84 TEX. L. REV. 395, 424 (2005) (discussing the benefits conferred by the marketplace of ideas on economic efficacy); *see also* Stucke & Grunes, *supra* note 34, at 1400 (noting that the First Amendment is intended to promote a healthy marketplace of ideas by achieving "the widest possible dissemination of information from diverse and antagonistic sources").

82. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 592 (1980) (Rehnquist, J., dissenting).

83. *See generally* WU, *supra* note 11.

84. U.S. CONST. amend. I (emphasis added).

85. Eule & Varat, *supra* note 13, at 1552.

86. *See* Naomi LaChance, *More Nazis Are Getting Identified and Fired After Charlottesville*, HUFFINGTON POST (Aug. 16, 2017, 1:21 PM), https://

espousing racist perspectives.[87] Thus, given the benefits of allowing private parties to engage in censorship in the government's stead, the U.S. legal system places few restrictions—either constitutional or statutory—on the right of private actors to stifle speech.

However, when a firm accrues market power, it can erect artificial barriers to entry, preventing others from introducing viewpoints and products based on ideas.[88] Market power (a term that this Article will use interchangeably with "monopoly power") is defined as the ability to profitably raise a good's price above a competitive level.[89] There are, indeed, numerous instances of firms using their monopoly power to exclude types of speech. To use a current example, critics allege that Google impedes information about rival goods. The *Wall Street Journal* reported that consumers who search Google for commercial items are likely to receive results about goods owned by Google rather than competing products.[90] For instance, a search of "thermostat" is likely to return shopping suggestions for Nest—a Google-owned company that makes thermostats. The search may also display Nest products in Google's "Top Stories," general results, and a section entitled "Best Thermostats,"[91] though information about competing products is often buried. And given the allegations that Google censors political and social expression, the implication is that Google prevents certain actors from disseminating information—essentially impeding their ability to speak.[92]

Consider a more obscure example. It is alleged that dominant players in the art market manipulate the authentication process to suppress certain

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www.huffingtonpost.com/entry/more-nazis-are-getting-identified-and-fired-after-charlottesville_us_599477dbe4b0eef7ad2c0318 [https://perma.cc/K4XP-SWNG].

87. *See, e.g.*, Charlie Warzel, *Read Apple CEO Tim Cook's Email to Employees About Charlottesville*, BUZZFEED NEWS (Aug. 16, 2017, 10:59 PM), https://www.buzzfeed.com/charliewarzel/read-apple-ceo-tim-cooks-email-to-employees-about [https://perma.cc/E9PY-VFYB] (using an example of a corporate policy meant to discourage racism).

88. *See, e.g.*, Lorain Journal Co. v. United States, 342 U.S. 143, 152–54 (1951) (finding that a local newspaper used anticompetitive methods intended to remove a radio station from the market to maintain its monopoly in Lorain, Ohio).

89. *See* Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 97–98 (2d Cir. 1998) ("Monopoly power, also referred to as market power, is 'the power to control prices or exclude competition.'" (citation omitted) (quoting United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956))).

90. *See* Michael Luca et al., *Does Google Content Degrade Google Search?: Experimental Evidence* (Harvard Bus. Sch., Working Paper No. 16-035, 2015), https://dash.harvard.edu/bitstream/handle/1/23492375/16-035.pdf [https://perma.cc/G2YN-5XBM]; Tom Fairless, *Study Suggests Google Harms Consumers by Skewing Search Results*, WALL ST. J. (June 29, 2015, 4:18 AM), https://www.wsj.com/articles/SB11064341213388534269604581077241146083956 [https://perma.cc/9WG4-BF95].

91. GOOGLE, https://www.google.com [https://perma.cc/CA5G-PEXU] (last visited Feb. 14, 2020) (type "thermostat" in the search bar and click "Google Search").

92. *See* Jack Nicas, *Google Uses Its Search Engine to Hawk Its Products*, WALL ST. J. (Jan. 19, 2017, 7:00 AM), https://www.wsj.com/articles/google-uses-its-search-engine-to-hawk-its-products-1484827203 [https://perma.cc/6SSL-KC4X] ("Google searches for 'phones' virtually always began with three consecutive ads for Google's Pixel phones. All 1,000 searches for 'laptops' started with a Chromebook ad. 'Watches' began with an Android smartwatch ad 98% of the time. And 'smoke detector' led with back-to-back ads for internet-connected alarms made by Nest, a company owned by Google parent Alphabet.").

works. A painting's value can hinge on its inclusion in the relevant catalogue raisonné,[93] which is an authoritative listing of works attributed to a specific painter.[94] Because the decision to include a painting in a catalogue raisonné is often made by a council of experts who own paintings by that artist, these experts have incentives to deny authenticity. After all, each time they verify a painting, it decreases the oeuvre's value by increasing supply.[95] For example, the Andy Warhol Foundation was accused of denying the authenticity of valid Warhols so that its members could inflate the values of their personal works—effectively depriving the market of important art.[96] Market power may thus vest actors such as authentication councils with the capacity *and* incentives to suppress forms of expression.

Since the crux of the problem is not necessarily the desire to eliminate competition but rather the monopoly power to do so, some excluded speakers, journalists, and artists have sought to use antitrust law to promote their right to free expression.[97] But as the next Part explains, the evolution of antitrust law has significantly narrowed the practices it considers illegal, leading the courts to determine that they possess no authority to remedy injuries suffered in the marketplace of ideas. This is because antitrust law protects *commercial* markets as opposed to speech markets in which noncommercial goods, such as ideas, trade.

II. THE PREVAILING TREATMENT OF SPEECH UNDER ANTITRUST LAW

In light of recent lawsuits characterizing suppressed speech as anticompetitive, this Part presents the orthodox view that antitrust law lacks authority to govern speech and ideas. To reach this conclusion, the courts have relied on a combination of statutory interpretation, judicial precedent, and legislative history to find that the Sherman Act may only remedy economic injuries arising in commercial markets, excluding the marketplace

93. Thome v. Alexander & Louisa Calder Found., 890 N.Y.S.2d 16, 21 (App. Div. 2009) (noting that the plaintiff sued after the defendant refused to include a painting in an author's catalogue raisonné which essentially signaled that the work was not marketable).

94. *See* Jeffrey Orenstein, Comment, *Show Me the Monet: The Suitability of Product Disparagement to Art Experts*, 13 GEO. MASON L. REV. 905, 914 (2005) ("[C]atalogue raisonné is an authoritative index of an artist's work, covering either the artist's full *oeuvre* or a specific category of his works . . . . [W]hen the authors of a catalogue raisonné omit a work, they cast serious doubt on its authenticity and profoundly affect the work's marketability.").

95. *See* Gareth S. Lacy, Student Article, *Standardizing Warhol: Antitrust Liability for Denying the Authenticity of Artwork*, 6 WASH. J.L. TECH. & ARTS 185, 189–90 (2011) (explaining that antitrust lawsuits have been brought against the boards that validate works for a catalogue raisonné).

96. Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc., No. 07 Civ. 6423 (LTS), 2009 WL 1457177, at *5 (S.D.N.Y. May 26, 2009) ("Plaintiff asserts that the Board is completely dominated and controlled by the Foundation, and that the Foundation uses the Board to remove competing Warhols from the market in an attempt to monopolize the market." (citations omitted)); *see also* Georgina Adam, *Thorny Issues*, FIN. TIMES (Nov. 25, 2011, 10:25 PM), http://www.ft.com/cms/s/2/e079e514-1068-11e1-8010-00144feabdc0.html [https://perma.cc/4EQS-TYCT].

97. *See supra* notes 20–29 and accompanying text (providing examples of antitrust litigation meant to promote free expression).

of ideas from antitrust's purview. The following analysis explores why the courts have found that ideas and speech are fatally noncommercial. This framework is then refuted in significant part as antiquated in latter parts of the Article.

A. Modern Antitrust Law

The courts have generally interpreted antitrust law to find that ideas and viewpoints trade in noncommercial markets and thus lie outside of antitrust's scope. From a textual standpoint, the Sherman Act is limited to condemning practices that harm "trade" or "commerce," as section 1 of the Sherman Act bans "[e]very contract, combination in the form of trust or otherwise . . . *in restraint of trade or commerce*,"[98] while section 2 makes it illegal to "monopolize, or attempt to monopolize . . . *any part of the trade or commerce*."[99] Although the courts and Congress have yet to establish a universally accepted rule to determine whether an act qualifies as trade or commerce,[100] the statutory text indicates that conduct existing outside a commercial market cannot incur antitrust liability.[101]

In fact, over the past forty years, the courts have narrowed antitrust's scope even further so that enforcement may only remedy certain types of economic injuries. A practical problem inspired this development: courts had historically struggled to differentiate shrewd business practices from anticompetitive behavior, as competition *should* threaten the survival of less efficient firms.[102] To make enforcement more predictable and rigorous, beginning in the 1970s, scholars such as Robert Bork[103] sought to limit antitrust's scope to the singular purpose of fostering economic goals.[104] The Supreme Court, in adopting this position, announced that antitrust law may only protect the competitive process for the economic benefit of *consumers*

98. 15 U.S.C. § 1 (2018) (emphasis added).

99. *Id.* § 2 (emphasis added).

100. *See generally* IB PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 262 (3d ed. 2006) (proposing a method to determine commercial conduct in light of the lack of an accepted test).

101. Johnson v. Comm'n on Presidential Debates, 202 F. Supp. 3d 159, 170–71 (D.D.C. 2016) (stating that an entity must exist in a commercial market to implicate antitrust law), *aff'd*, 869 F.3d 976 (D.C. Cir. 2017).

102. Prior to the mid-1970s, enforcement was used to condemn firms that created superior products, generating distinctively *anticompetitive* results. Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division,* 74 YALE L.J. 775, 815 (1965) (explaining that, at one time, antitrust law was unwisely used to protect smaller, oftentimes less efficient firms from their more efficient competitors.).

103. Probably the most important contributor to antitrust's reform was Robert Bork. *See generally* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978); Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966); *see also* Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 840 (2014).

104. Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2405–06 (2013) (explaining that antitrust law has evolved so that, over the past forty years, it has adopted an exclusively economic perspective).

rather than individual competitors.[105] To meet this standard, today, one must generally demonstrate that the defendant abused its market power[106] by raising prices, restricting output,[107] or similarly harming consumers economically.[108] Measuring consumer welfare in economic terms is thus intended to help target and condemn anticompetitive behavior as opposed to vigorous competition.[109]

B. Antitrust's Hostility to the Marketplace of Ideas

In light of this reform, Justice Holmes's metaphor of a marketplace of ideas might not qualify as the type of market required by antitrust law.[110] Consider *Johnson v. Commission on Presidential Debates*.[111] Former presidential candidate Gary Johnson claimed that the Commission on Presidential Debates offended the Sherman Act by excluding third-party speech from the marketplace of political discourse.[112] It is likely that Johnson suffered harm as he had little chance of winning the 2016 election without participating in the debates.[113] The court rejected Johnson's lawsuit, however, because his alleged anticompetitive effect—the restriction of political ideas—was insufficient. To the court, discourse "refer[s] to ideas, not products or services that are traded in a commercial marketplace, and thus this claim does not allege a cognizable antitrust injury."[114] Further, "calling political activity a 'market place' does not make it so. . . . As with

105. Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 333 (1990) (remarking that antitrust laws are meant to prevent harm to markets and competition but not individual competitors); Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977) (replacing the per se rule proscribing vertical restraints of trade with a balancing test to determine whether or not the restraint promotes competition).

106. Market power is an element of a section 1 claim, though it is also typically required in a section 2 lawsuit as an indirect way of proving the anticompetitive effects of a trade restraint. This is because, in the absence of market power, exclusionary conduct is seldom able to injure competition. Menasha Corp. v. News Am. Mktg. In-Store Servs., Inc., 354 F.3d 661, 663 (7th Cir. 2004) ("The first requirement in every suit based on the Rule of Reason is market power, without which the practice cannot cause those injuries (lower output and the associated welfare losses) that matter under the federal antitrust laws."); *see also* Louis Kaplow, *On the Relevance of Market Power*, 130 HARV. L. REV. 1303, 1304–05 (2017) ("Market power is regarded to be the most important determinant of liability in competition law . . . . The importance of market power inquiries is widely endorsed by lawyers and economists alike.").

107. Ginzburg v. Mem'l Healthcare Sys., Inc., 993 F. Supp. 998, 1026 (S.D. Tex. 1997).

108. Wright & Ginsburg, *supra* note 104, at 2406 ("It is difficult to overstate the importance of *GTE Sylvania* as the foundation of the economic approach to antitrust analysis: antitrust would no longer serve multiple masters; economic goals would be exclusive.").

109. Energy Conversion Devices Liquidation Tr. v. Trina Solar Ltd., 833 F.3d 680, 685 (6th Cir. 2016) ("At their core, the antitrust laws are a 'consumer welfare prescription' . . . ." (quoting BORK, *supra* note 103, at 66)).

110. DataCell ehf. v. Visa, Inc., No. 1:14-CV-1658 GBL/TCB, 2015 WL 4624714, at *7 (E.D. Va. July 30, 2015) (ruling that "the marketplace for ideas" is not an economic market under antitrust law).

111. 869 F.3d 976 (D.C. Cir. 2017).

112. *Id.* at 983.

113. *Id.* (ruling that Johnson had failed to establish an antitrust injury).

114. Johnson v. Comm'n on Presidential Debates, 202 F. Supp. 3d 159, 171 (D.D.C. 2016), *aff'd*, 869 F.3d 976 (D.C. Cir. 2017).

holding political office, running for political office is not 'commerce' under antitrust law."[115]

In a similar case, WikiLeaks achieved infamy in 2007 when it released volumes of documents classified by the U.S. government.[116] Due to this, several credit card companies halted payments to and through DataCell—the firm hired to operate WikiLeaks's credit card systems—as punishment.[117] DataCell alleged in response that Visa and MasterCard had inflicted an anticompetitive harm on the market in the form of "suppressing the market place [sic] of ideas."[118] The court dismissed DataCell's claim because, even if DataCell could trace its injury to the defendants, DataCell had failed to allege an injury to a commercial marketplace.[119] Paramount to the court's ruling, antitrust law is intended to promote the economic interests of consumers. Yet the marketplace of ideas is distinguishable from a commercial market.[120] As such, the court ruled that,

> [i]f the products in DataCell's market are ideas, then the antitrust laws cannot help DataCell. Congress created antitrust laws to protect free market competition, not to protect the free exchange of ideas. If the products in DataCell's market are classified State Department documents, then the antitrust laws are an even poorer fit. In either case, DataCell cannot fit its grievances into the framework of [the] Sherman Act.[121]

So why have courts determined that speech and ideas are noncommercial? Notably, academics have criticized the dichotomy of economic and noneconomic behavior as unworkable.[122] Although few, if any, courts have offered a detailed analysis explaining why the marketplace of ideas is per se beyond antitrust's reach, there are clues. In essence, ideas 1) trade freely without prices or scarcity, 2) might not create the type of injury deserving of antitrust liability, and 3) cannot be monopolized or restrained.

1. Ideas Lack Prices

To courts and commentators, the nature of commerce requires a transaction whereby each party gives valuable consideration to the other,[123]

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115. *Id.* at 170.

116. Chris Strohm & Del Quentin Wilber, *Pentagon Says Snowden Took Most U.S. Secrets Ever: Rogers*, BLOOMBERG NEWS (Jan. 9, 2014, 7:54 PM), https://www.bloomberg.com/news/2014-01-09/pentagon-finds-snowden-took-1-7-million-files-rogers-says.html [https://perma.cc/UJU5-EV82].

117. DataCell ehf. v. Visa, Inc., No. 1:14-CV-1658 GBL/TCB, 2015 WL 4624714, at *1 (E.D. Va. July 30, 2015) (noting that elected officials sought to have Sunshine Press declared a terrorist organization).

118. *Id.* at *6.

119. *Id.*

120. *Id.* at *7.

121. *Id.*

122. John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501, 526–29 (2019).

123. *See* Agnew v. NCAA, 683 F.3d 328, 340 (7th Cir. 2012) ("[T]he modern definition of commerce includes 'almost every activity from which [an] actor anticipates economic gain.'" (quoting AREEDA & HOVENKAMP, *supra* note 100, ¶ 1260b)); John M. Newman, *Antitrust in*

as the "quintessential" commercial transaction is the exchange of money for goods or services.[124] A market may thus lie beyond antitrust's reach if the relevant goods lack prices.[125] The leading scholar on nonprice goods found "multiple examples of courts creating de jure antitrust immunity by declining to apply antitrust scrutiny in zero-price contexts . . . . These courts have done so on the grounds that the antitrust laws cannot apply in the absence of prices."[126] For example, since social media accounts are typically offered for free, a restraint of trade in such a market might be incapable of violating antitrust law.[127]

This suggests—and the case law supports—that antitrust law cannot promote speech.[128] Contrary to tangible goods traded in conventional markets, ideas tend to have marginal costs of zero, meaning that an idea can be replicated and traded without a cost or price.[129] In fact, because economic theory predicts that a good's value increases in concert with its scarcity—whereas plentiful goods have little or no value—an idea bearing no marginal cost might lack economic worth.[130] And since information "wants to, or even needs to, be free,"[131] it could be that ideas and viewpoints are inherently noncommercial and thus excluded from antitrust's scope.[132] Recall the failed

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Zero-Price Markets: Foundations, 164 U. PA. L. REV. 149, 160 (2015) ("This understanding—that antitrust laws apply to transactions from which actors anticipate economic gain—accords with the intent of Congress as elucidated by the Supreme Court. Such transactions necessarily involve an exchange, the foundation of economic 'gains from trade.' . . . This behavior is what is contemplated when antitrust courts, enforcement agencies, and commentators refer to 'markets,' or in the statutory parlance, 'trade' and 'commerce.'").

124. United States v. Brown Univ., 5 F.3d 658, 666 (3d Cir. 1993) ("The exchange of money for services, even by a nonprofit organization, is a quintessential commercial transaction.").

125. Todd v. Exxon Corp., 275 F.3d 191, 209 (2d Cir. 2001) (demonstrating that antitrust liability could not be established since the market in question was a free one).

126. Newman, *supra* note 123, at 160; *see, e.g.*, Kinderstart.com, LLC v. Google, Inc., No. C 06-2057 JF (RS), 2007 WL 831806, at *5 (N.D. Cal. Mar. 16, 2007) ("KinderStart cites no authority indicating that antitrust law concerns itself with competition in the provision of free services.").

127. Catherine Tucker & Alexander Marthews, *Social Networks, Advertising, and Antitrust*, 19 GEO. MASON L. REV. 1211, 1211 (2012) (asserting that social networking might not violate antitrust law because such services are typically free); *see also Kinderstart.com*, 2007 WL 831806, at *5.

128. *See supra* notes 111–22 and accompanying text (reviewing cases where courts found that speech cannot support an antitrust claim).

129. *See* Oskar Liivak, *A Crisis of Faith & the Scientific Future of Patent Theory*, 90 ST. JOHN'S L. REV. 639, 651–52 (2016) ("In the conventional reward framing, the 'natural' baseline for ideas has them freely shared with prices set to marginal cost—therefore close to zero.").

130. Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 461 (2015) ("Economics is based on scarcity. Things are valuable because they are scarce. The more abundant they become, the cheaper they become.").

131. Osenga, *supra* note 43, at 2100.

132. *See* Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 UCLA L. REV. 970, 981 (2012) ("Information is understood, in economic terms, as a nonrival good because one person's consumption of it does not limit another person's consumption. As a result, information only needs to be produced once for many people to enjoy it; in other words, its marginal cost of production is zero.").

lawsuit brought by Gab about the exclusion of political speech from the Android app market.[133] Because Gab offered a free venue to discuss politics, it faced the high hurdle of proving that Google violated antitrust law in a priceless market.[134] Even bypassing this issue, a court might find that suppressed speech is improper for antitrust's remedies, which the next section explains.

2. Excluding Ideas Might Not Affect Prices or Output, or Otherwise Harm Consumer Welfare

A further problem is that excluding an idea, expression, or viewpoint is unlikely to generate the type of harm remedied by antitrust law. As just discussed, the typical analysis conditions antitrust liability on evidence that the exclusionary act generated an anticompetitive effect, generally in the form of increased prices or restricted output.[135] Under any theory of consumer welfare,[136] the anticompetitive effect must harm the market from the economic perspective of consumers.[137] So without evidence of elevated prices (as restricted output should naturally result in higher prices),[138] an antitrust lawsuit alleging suppressed ideas, information, or viewpoints would likely struggle to demonstrate a cognizable anticompetitive effect.[139] After all, since firms can copy and distribute ideas at minimal costs, the restriction of an idea's output is unlikely to raise prices.[140] And no court has ever ruled that the mere restriction of ideas entails the type of anticompetitive effect which the antitrust laws may scrutinize or remedy.

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133. *See generally* Complaint, *supra* note 24.

134. *See id.*

135. JamSports & Entm't, LLC v. Paradama Prods., Inc., 336 F. Supp. 2d 824, 834 (N.D. Ill. 2004) ("[S]tatements that antitrust injury is limited to decreased output and increased prices finds support in the Supreme Court's understanding of why Congress created a private right of action in antitrust cases."); Wagner v. Magellan Health Servs., Inc., 121 F. Supp. 2d 673, 681 (N.D. Ill. 2000) ("The antitrust injury doctrine requires that every antitrust plaintiff show that his loss results from actions that reduce output or raise prices to consumers.").

136. There is a longstanding debate about whether antitrust should follow a "consumer welfare" or "total welfare" standard to which this Article does not contribute an opinion. *See* Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 573 (2012).

137. Razorback Ready Mix Concrete Co. v. Weaver, 761 F.2d 484, 488 (8th Cir. 1985) ("[A]ntitrust laws exist for 'the protection of competition, not competitors.'" (quoting Brunswick Corp. v. Pueblo-Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977))).

138. William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 653 (1983) ("The standard economic rationale for making a cartel illegal is not that it charges too high a price or that it redistributes income from consumers to cartel members, but that it restricts output, causing a deadweight or efficiency loss . . .—a loss to consumers without an offsetting gain to producers.").

139. Although it is less common to see a court impose antitrust liability without artificially high prices, courts have cited the promotion of quality, innovation, or even consumer choice as legitimate goals of antitrust law. *See, e.g.*, HM Compounding Servs., Inc. v. Express Scripts, Inc., No. 4:14–CV–1858 JAR, 2015 WL 4162762, at *9 (E.D. Miss. July 9, 2015) (treating reduced consumer choice or variety as an anticompetitive effect under antitrust law); Free FreeHand Corp. v. Adobe Sys. Inc., 852 F. Supp. 2d 1171, 1185 (N.D. Cal. 2012) (declaring diminished innovation to entail an antitrust injury).

140. *See* Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 TEX. L. REV. 789, 794 (2015).

For example, KinderStart alleged that Google violated antitrust law by suppressing information on its search engine.[141] The district court dismissed KinderStart's complaint because consumers do not pay a price to use Google—much less supracompetitive prices—which belies antitrust claim.[142] Likewise, if an internet platform refuses to host a blog espousing certain viewpoints, the prohibition cannot be expected to elevate market prices or decrease output. The blog could simply move to another platform. Even though the exclusion might cause economic harm to that blog, *consumers* are unlikely to pay inflated prices for the relevant content, negating the blog's antitrust claim.[143]

3. Can Firms Even Monopolize Ideas?

The next hurdle concerns whether a monopolist can effectively exclude competition. To allege a plausible section 1 or 2 violation of the Sherman Act, the challenged act must have seriously threatened or harmed the market.[144] However, since ideas are easy to reproduce and almost impossible to exclude—as technology has made information "transmit[table] to others with no loss of quality and at virtually no cost"[145]—a lawsuit brought under section 1 or 2 might struggle to prove that the marketplace of ideas was actually monopolized or harmed.[146] For example, in a case from 1975, the plaintiff alleged that certain actors attempted to monopolize the "free trade of ideas."[147] In rejecting this claim, the court "doubt[ed], in a world which

141. Kinderstart.com, LLC v. Google, Inc., No. C 06-2057 JF (RS), 2007 WL 831806, at *5 (N.D. Cal. Mar. 16, 2007).

142. *Id.* ("It does not claim that Google sells its search services, or that any other search provider does so. . . . KinderStart cites no authority indicating that antitrust law concerns itself with competition in the provision of free services. Providing search functionality may lead to revenue from other sources, but KinderStart has not alleged that anyone pays Google to search. Thus, the Search Market is not a 'market' for purposes of antitrust law."); *cf.* VBR Tours, LLC v. Nat'l R.R. Passenger Corp., No. 14-cv-00804, 2015 WL 5693735, at *15 (N.D. Ill. Sept. 28, 2015) (holding that antitrust is only concerned with prices and output rather than incentives to innovate and commercialize ideas).

143. *See* Howard Shelanski, *Information, Innovation, and Competition Policy for the Internet*, 161 U. PA. L. REV. 1663, 1669–70 (2013) ("Conventional antitrust analysis focuses on the relationship between firms' conduct and market performance, as measured through prices and output levels of relevant products and services.").

144. *See* Agnew v. NCAA, 683 F.3d 328, 335 (7th Cir. 2012) ("Under a Rule of Reason analysis, the plaintiff carries the burden of showing that an agreement or contract has an anticompetitive effect on a given market within a given geographic area."); Nifty Foods Corp. v. Great Atl. & Pac. Tea Co., 614 F.2d 832, 841 (2d Cir. 1980) ("The essential elements of an attempted monopolization claim are (1) a dangerous possibility of success in monopolizing a given market; and (2) a specific intent to destroy competition or build monopoly."); Cohen v. Primerica Corp., 709 F. Supp. 63, 65 (E.D.N.Y. 1989).

145. Lemley, *supra* note 130, at 470 (explaining how ideas are not rivalrous and thus public goods).

146. *See* Ejan Mackaay, *Economic Incentives in Markets for Information and Innovation*, 13 HARV. J.L. & PUB. POL'Y 867, 904–05 (1990) (discussing the ease by which information can be freely and easily replicated).

147. Adams v. Am. Bar Ass'n, 400 F. Supp. 219, 221–22 (E.D. Pa. 1975).

has not yet reached the ominous year of 1984, whether monopolization of ideas is even possible."[148]

The foregoing analysis demonstrates the struggles of establishing an antitrust claim premised on diminished speech. As explained, courts have ruled that ideas do not trade in commercial markets and seldom create the type of injury required by antitrust law. Whether one can even monopolize the marketplace of ideas is a valid question. So, despite the benefits of promoting free speech, the odds of success under the antitrust laws are perilously low. Notwithstanding this framework, the next Part discusses the emergence of political rhetoric asserting that antitrust should condemn tech giants and other monopolists who impede speech.

III. THE RAPIDLY EVOLVING MARKETPLACE OF IDEAS WITHIN ANTITRUST'S LANDSCAPE

Antitrust's approach to speech is at a crossroads due to fundamental shifts in the economic and political landscape. Lawmakers from both sides of the aisle, multiple branches of the federal government, and state governments have recently sought to characterize acts of censorship as products of anticompetitive behavior. Inspiring this movement is the belief that big tech's monopoly power threatens free expression. However, these proposals require a reinterpretation of antitrust law given the obstacles discussed in Part II. And proscribing certain acts of censorship might harm free speech more than benefit it. Indeed, since the First Amendment protects the right to reject repugnant ideas, the courts would likely struggle to discern whether an instance of censorship entails protected speech or constitutes a matter for antitrust enforcement. Based on this conundrum, and despite political rhetoric calling for the integration of speech into enforcement, a belief is emerging that "we're at one of those antitrust moments" whereby the courts or Congress might need to overhaul the antitrust laws.[149]

This Part explores how antitrust's relationship with information has emerged as a hotly contested issue. Since the economic emergence of ideas, speech, and information might enable firms to suppress speech, Part III.A explores whether antitrust's framework may need to evolve. Part III.B traces the manner in which big tech has inspired a diverse group of lawmakers to propose ways of promoting free speech as a function of antitrust enforcement. Part III.C presents the conundrum: in light of mounting sentiments to incorporate speech into antitrust's framework, the ensuing proposals would likely harm free speech more than foster it.

A. Ideas Should Entail Economic Activity

Recent debate about whether antitrust should scrutinize big tech's influence on free speech is rooted in fundamental changes to the economy.

148. *Id.* at 223.
149. Streitfeld, *supra* note 33.

Recognizing that enforcement must further economic goals,[150] courts have perhaps relied on antiquated measures of economic activity to hold that speech is beyond antitrust's scope. The principal goods exchanged in today's markets are not manufactured goods sold at retail prices but rather "free" *intangible* goods, which scholars describe as items receiving their character and value from an underlying idea.[151] As this section explains, the economy's evolution has increased the power that certain companies wield over speech, suggesting that antitrust law might need to modernize for big tech's arrival.[152]

Before weighing the implications for speech, consider the profitability of the platform industry whereby firms offer *free* venues to express views and sell products.[153] In addition to Facebook, whose annual revenue has eclipsed fifty-five billion dollars, the market capitalization of the top six platforms has surpassed one trillion dollars.[154] Animated by a cottage industry of Instagram influencers and public figures, users have likewise capitalized on this technology.[155] Other examples of this business model include commercial blogs[156] and news outlets, such as the Huffington Post, which

150. Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 133–34 (2010) ("[T]he stated instrumental goal of antitrust laws is 'consumer welfare,' which is a defined term in economics.").

151. *See* Rochelle Cooper Dreyfuss, *Information Products: A Challenge to Intellectual Property Theory*, 20 N.Y.U. J. INT'L L. & POL. 897, 897 (1988) ("I define information products to mean items like computer technology (including software programs and computerized data bases), 'designer genes' and semiconductors: products whose information content vastly exceeds in value the cost of the products on which that information is stored." (footnote omitted)).

152. WORLD INTELLECTUAL PROP. ORG., WORLD INTELLECTUAL PROPERTY REPORT: BREAKTHROUGH INNOVATION AND ECONOMIC GROWTH 8–10 (2015), https://www.wipo.int/edocs/pubdocs/en/wipo_pub_944_2015.pdf [https://perma.cc/F3EN-9VAM] (detailing the litany of positive externalities and economic growth derived from innovation); Robert W. Gomulkiewicz, *The Federal Circuit's Licensing Law Jurisprudence: Its Nature and Influence*, 84 WASH. L. REV. 199, 204 (2009) ("The economy has undergone a profound transformation in the past few decades, away from emphasizing the production of hard goods and toward the creation of ideas and information."); *Innovation Union*, EUR. COMMISSION, http://ec.europa.eu/research/innovation-union/index_en.cfm [https://perma.cc/Y6WP-9WWB] (last visited Feb. 14, 2020).

153. Martina Frascona Sochurkova, *Facebook's Revenues in 2017 Exceeded $40 Billion*, NEWSFEED.ORG (Aug. 3, 2018), https://newsfeed.org/facebooks-revenues-in-2017-exceeded-40-billion [https://perma.cc/74T4-VXPY].

154. *Facebook's Annual Revenue and Net Income from 2007 to 2018*, STATISTA, https://www.statista.com/statistics/277229/facebooks-annual-revenue-and-net-income/ [https://perma.cc/VR5V-YK53] (last visited Feb. 14, 2020); Justin Kerby, *Here's How Much Facebook, Snapchat, and Other Major Social Networks Are Worth*, SOC. MEDIA TODAY (May 16, 2017), https://www.socialmediatoday.com/social-networks/heres-how-much-facebook-snapchat-and-other-major-social-networks-are-worth [https://perma.cc/D44S-BKHH].

155. *See, e.g.*, Caroline Moss, *The Huge but Hidden World of High School 'Cheerlebrities' Who Have Hundreds of Thousands of Fans on Instagram*, BUS. INSIDER (Jan. 25, 2014, 8:23 AM), https://www.businessinsider.com/cheerlebrities-of-instagram-carley-manning-2014-1 [https://perma.cc/L2SZ-D929].

156. David Segal, *Arianna Huffington's Improbable Insatiable Content Machine*, N.Y. TIMES MAG. (June 30, 2015), https://www.nytimes.com/2015/07/05/magazine/arianna-huffingtons-improbable-insatiable-content-machine.html [https://perma.cc/9CJT-KULY].

earned $146 million in revenue in 2014 by virtue of supplying zero-priced content.[157]

Given the monopoly power in this industry, observers have grown anxious that platforms can and do censor speech. Recall the allegations that Google manipulates commercial, social, and political forms of expression.[158] Facebook has similarly grappled with issues of censorship, and the company recently circulated an internal memo asking, "What should be the limits to what people can express?"[159] Facebook drew bipartisan scorn when it banned a video by Senator Warren calling for the company's breakup.[160] Criticisms of this vintage are especially fierce where few would consider the deleted content to be dangerous or repugnant, such as Instagram's censorship of breastfeeding[161] or photos of plus-size bodies.[162] Similar controversies include Amazon's and Facebook's decisions to restrict or allow anti-vaccination speech.[163]

As in the platform industry, firms in the tech and communications sectors are generating previously unimaginable revenue—Apple's market capitalization exceeds *one trillion dollars*—while wielding more power over free expression than potentially the government.[164] According to Dan Burk, the manner in which private companies control the channels of information enables them to manipulate and suppress information.[165] Tim Wu remarked in *The Master Switch* that "[w]e sometimes treat the information industries as if they were like any other enterprise, but they are not, for their structure determines who gets heard."[166] The pervasiveness of this fear had led, in

157. *Id.*

158. *See supra* notes 89–93 and accompanying text (describing the concern that large corporations are using their market power to suppress speech).

159. Carlos E. Castaneda, *Mothers to Protest Instagram, Facebook Censorship of Breastfeeding Images*, CBS SF BAY AREA (July 11, 2014, 3:17 PM), https://sanfrancisco.cbslocal.com/2014/07/11/mothers-to-protest-instagram-facebook-censorship-of-breastfeeding-images/ [https://perma.cc/HDK3-2EH6]; Conor Friedersdorf, *The Speech That Facebook Plans to Punish*, ATLANTIC (Dec. 11, 2018), https://www.theatlantic.com/ideas/archive/2018/12/facebook-punish-censorship/577654/ [https://perma.cc/5C8R-4BK3].

160. Cristiano Lima, *Facebook Backtracks After Removing Warren Ads Calling for Facebook Breakup*, POLITICO (Mar. 11, 2019, 6:32 PM), https://www.politico.com/story/2019/03/11/facebook-removes-elizabeth-warren-ads-1216757 [https://perma.cc/CRE3-FUED].

161. Mikelle Street, *Tom Biachi's Instagram Ban Is the Latest in Queer Social Media Censorship*, OUT (Feb. 5, 2019, 10:40 AM), https://www.out.com/photography/2019/2/05/tom-bianchis-instagram-ban-latest-queer-censorship [https://perma.cc/528W-5ZSU].

162. Lora Grady, *Why Women Are Calling Out Instagram for Censoring Photos of Plus-Size Bodies*, CHATELAINE (Oct. 31, 2018), https://www.chatelaine.com/opinion/instagram-censorship-plus-size/ [https://perma.cc/8DJQ-X26G].

163. Cheryl K. Chumley, *Facebook Censorship of Anti-Vaccination Movement Will Backfire*, WASH. TIMES (Feb. 15, 2019), https://www.washingtontimes.com/news/2019/feb/15/facebook-turns-censorship-eyes-toward-anti-vaccina/ [https://perma.cc/6J9D-2HB8].

164. Sara Salinas, *Apple Hangs onto Its Historical $1 Trillion Market Cap*, CNBC (Aug. 2, 2018, 11:48 AM), https://www.cnbc.com/2018/08/02/apple-hits-1-trillion-in-market-value.html [https://perma.cc/9UWU-A2A9].

165. Dan L. Burk, *Patenting Speech*, 79 TEX. L. REV. 99, 100 (2000).

166. WU, *supra* note 11, at 13.

fact, to the now defunct net neutrality,[167] which sought to prevent firms from discriminating against, or excluding, ideas and viewpoints from internet discourse.[168]

Just as important to the economy as the communications sector, innovation is said to rely on free speech.[169] The Supreme Court suggested that aspects of scientific information—such as the "sale, disclosure, and use" of ideas—might implicate the First Amendment.[170] Literature on this subject, albeit sparse, has traced a convincing argument that innovation as well as research and development (R&D) should entail speech.[171] R&D requires inventors to express original ideas in the creation of commodities that display each inventor's artistic or expressive choices.[172] And since innovation is "the single, most important component of long-term economic growth,"[173] it follows that innovation may constitute a form of commercial expression. But setting aside the question of whether innovation qualifies as speech, a credible argument can be made that antitrust should incorporate the marketplace of ideas into enforcement in order to foster innovation and thus economic growth.

The above examples illustrate the emerging value of ideas, speech, and information—even when lacking prices, scarcity, or marginal costs. Because this development might empower firms to suppress speech, the question of whether antitrust law should scrutinize big tech's influence on expression has emerged as a hot-button political issue, detailed in the next section.

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167. *Net Neutrality: President Obama's Plan for a Free and Open Internet*, WHITE HOUSE, https://obamawhitehouse.archives.gov/net-neutrality [https://perma.cc/JR6E-EJH3] (last visited Feb. 14, 2020) (providing the rules and background content of net neutrality during the Obama administration).

168. Corynne McSherry, *An Attack on Net Neutrality Is an Attack on Free Speech*, ELECTRONIC FRONTIER FOUND. (June 22, 2017), https://www.eff.org/deeplinks/2017/06/attack-net-neutrality-attack-free-speech [https://perma.cc/7EVW-HHDS] ("In 2014, that powerful idea motivated millions of Internet users to band together and demand that the FCC enact clear, legally sound rules to prevent broadband providers from taking advantage of their power as gatekeepers to engage in unfair practices like paid prioritization, blocking, and other forms of data discrimination."); Rob Pegoraro, *How to Tell If Net Neutrality Repeal Is Why Your Internet Is Slower*, USA TODAY (Dec. 14, 2017, 10:17 AM), https://www.usatoday.com/story/tech/columnist/2017/11/28/after-net-neutrality-how-tell-if-your-isp-slowing-your-internet/898098001 [https://perma.cc/6KV7-V7RR].

169. *See* Bar-Gill & Parchomovsky, *supra* note 81, at 424 (explaining that ideas are key to innovation); Mackaay, *supra* note 146, at 871 ("Innovation involves gambling, betting on ideas.").

170. Sorrell v. IMS Health Inc., 564 U.S. 552, 557 (2011); Hillary Greene, *Muzzling Antitrust: Information Products, Innovation and Free Speech*, 95 B.U. L. REV. 35, 68 (2015) ("In the absence of controlling or sufficiently instructive precedent regarding First Amendment defenses to antitrust matters involving information providers, widely divergent positions emerged.").

171. Burk, *supra* note 165, at 112–13 ("[M]y automobile, my running shoes, my table cutlery, and essentially every other object that surrounds me in an industrialized society is the embodiment of some artisan's or engineer's design. . . . The designers think carefully about what they are composing. That careful thought, some of which may include very innovative ideas, is translated into embodiments of steel, cloth, or latex.").

172. *Id.* at 100.

173. NATHAN ROSENBERG, OECD, INNOVATION AND ECONOMIC GROWTH 1 (2004), https://www.oecd.org/cfe/tourism/34267902.pdf [https://perma.cc/4CBC-A6JR].

B. Free Speech, Tech, and the Modern Political Climate

The initial rumblings that big tech threatened speech were sparked by reports of platforms censoring news stories and political expression.[174] To many politicians and lawmakers, the fear is that content producers *require* the major online forums to reach the masses, and denials of these forums could stifle speech. As one commentator argued, "The problem here is that certain platforms have monopolized the market for audiences."[175] Compounding this issue, most platforms conceal their algorithms targeting types of speech, which creates a black box of censorship.[176]

Notice that two kinds of censorship are alleged: political and commercial. With respect to the former, critics contend that tech monopolists harbor an agenda which motivates them to censor certain ideological speech. Notably, *both* sides of the aisle have made this claim.[177] The other assertion is that firms, as economic actors, abridge commercial speech to achieve economic objectives. To illustrate, Amazon and Google allegedly reorder search results or bury entries to favor their own products.[178] The implication is that the suppression of commercial information creates an anticompetitive injury suffered by consumers. To critics of Amazon, for example, the strategies of "[l]imiting access by denying space on a platform or pushing down listings in search results are anticompetitive acts."[179]

Given the notion that speech is at risk, politicians have recently proposed both vague and detailed plans to promote free expression under the antitrust laws.[180] Senator Warren, lamenting big tech's ability to censor speech,

174. Mark Epstein, *Google's Effort to Undermine Free Speech Strengthens Case for Regulating Big Tech*, HILL (Aug. 31, 2017, 3:21 PM), https://thehill.com/blogs/pundits-blog/technology/348742-googles-effort-to-undermine-free-speech-strengthens-case-for [https://perma.cc/D83W-WJRM].

175. Paul Blumenthal, *The Problem Isn't Alex Jones' Free Speech, It's Digital Platform Monopolies*, HUFFINGTON POST (Aug. 11, 2018, 8:01 AM), https://www.huffpost.com/entry/alex-jones-first-amendment_n_5b6d9b57e4b0530743c95939 [https://perma.cc/B7TX-39V2].

176. Julia Angwin & Hannes Grassegger, *Facebook's Secret Censorship Rules Protect White Men from Hate Speech but Not Black Children*, PROPUBLICA (June 28, 2017, 5:00 AM), https://www.propublica.org/article/facebook-hate-speech-censorship-internal-documents-algorithms [https://perma.cc/PEP2-6RCZ].

177. *See, e.g.*, Harmeet Dhillon & Matthew Peterson, *Banding Together Against Big Tech*, REAL CLEAR POL. (May 31, 2019), https://www.realclearpolitics.com/articles/2019/05/31/banding_together_against_big_tech_140453.html [https://perma.cc/V922-4HVJ]; *see also* Angwin & Grassegger, *supra* note 176.

178. Hicks, *supra* note 49; Eugene Kim, *Amazon Has Been Promoting Its Own Products at the Bottom of Competitors' Listings*, CNBC (Mar. 18, 2019, 3:48 PM), https://www.cnbc.com/2018/10/02/amazon-is-testing-a-new-feature-that-promotes-its-private-label-brands-inside-a-competitors-product-listing.html [https://perma.cc/LZN2-5VV9].

179. George Anderson, *Amazon Was Wise to Head Antitrust Regulators Off at the Pass*, FORBES (Mar. 21, 2019, 11:42 AM), https://www.forbes.com/sites/retailwire/2019/03/21/amazon-was-wise-to-head-antitrust-regulators-off-at-the-pass/ [https://perma.cc/ELR2-RUH9].

180. Blumenthal, *supra* note 175 ("There is a way to deal with this problem that doesn't make it impossible for platforms to moderate content users post to them. It's called antitrust law. If there weren't one main platform for video distribution and one main platform for social media—and if those platforms didn't also own their biggest competition—an actual market

tweeted, "I want a social media marketplace that isn't dominated by a single censor. #BreakUpBigTech."[181] She also proposed a two-prong approach: 1) unwind anticompetitive mergers of tech giants (e.g., Facebook and Instagram) and 2) label big tech as "platform utilities."[182] The DOJ's antitrust chief, Makan Delrahim, stated in a speech about "digital gatekeepers" that free speech is a reflection of market quality that antitrust should potentially promote.[183] According to Senator Cruz,

> Facebook and Google are both larger than Standard Oil when it was broken up . . . . [T]here's a reason we have the antitrust laws which is to prevent monopolies from abusing their power and abusing consumers. If they're behaving like Big Brother and censoring political speech, I think that raises very serious legal questions.[184]

Although President Donald Trump has expressed support for using antitrust law to foster free speech—his 2016 campaign asserted that big tech is "destroying an American democracy that depends on a free flow of information and freedom of thought"—his agencies have yet to enforce this position.[185]

As for other regulatory attempts to cabin big tech, Senator Josh Hawley introduced the Ending Support for Internet Censorship Act, which would require platforms hosting over thirty million users to obtain certification from the Federal Trade Commission (FTC) that the platform "does not moderate information provided by other information content providers in a manner that is biased against a political party, political candidate, or political viewpoint."[186] A bill was also proposed in Texas that would prohibit forms of online censorship—but as critics note, aspects of the proposed legislation seem to violate the U.S. Constitution.[187]

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for different platforms that hosted varied content could exist instead of one platform overrun with every type of jerk.").

181. Elizabeth Warren (@ewarren), TWITTER (Mar. 11, 2019, 4:59 PM), https://twitter.com/ewarren/status/1105256905058979841 [https://perma.cc/EVW2-X6TK].

182. Michael Hiltzik, *Column: Sen. Warren's Plan to Break Up the Big Tech Companies Is Good, but Too Narrow*, L.A. TIMES (Mar. 21, 2019, 6:00 AM), https://www.latimes.com/business/hiltzik/la-fi-hiltzik-warren-tech-breakup-20190321-story.html [https://perma.cc/252M-M3PT].

183. Delrahim, Digital Gatekeepers, *supra* note 32.

184. Press Release, Ted Cruz, U.S. Senator, Sen. Cruz: We Have an Obligation to Defend the First Amendment Right of Every American on Social Media Platforms (Apr. 12, 2018), https://www.cruz.senate.gov/?p=press_release&id=3723 [https://perma.cc/7UKY-NB7W].

185. Epstein, *supra* note 33 (quoting Donald Trump's 2016 campaign).

186. Ending Support for Internet Censorship Act, S. 1914, 116th Cong. (2019); David French, *Josh Hawley's Internet Censorship Bill Is an Unwise, Unconstitutional Mess*, NAT'L REV. (June 20, 2019, 6:30 AM), https://www.nationalreview.com/2019/06/josh-hawley-internet-censorship-bill-unconstitutional/ [https://perma.cc/5EA6-UQCD]; Corinne Weaver, *Hawley Introduces Bill to Make Big Tech Embrace Free Speech*, MRC NEWSBUSTERS (June 19, 2019, 10:49 AM), https://www.newsbusters.org/blogs/2019/06/19/hawley-introduces-bill-make-big-tech-embrace-free-speech [https://perma.cc/9GA5-94ET].

187. Elizabeth Byrne, *Texas Bill Would Allow State to Sue Social Media Companies Like Facebook and Twitter over Free Speech*, TEX. TRIB. (Apr. 23, 2019, 9:00 AM), https://www.texastribune.org/2019/04/23/texas-senate-bill-lets-state-sue-social-media-companies/ [https://perma.cc/46BX-R5KG].

European authorities have, in fact, already levied antitrust penalties on tech monopolies for inhibiting the flow of information. In 2017, antitrust enforcers in Europe fined Google €2.4 billion for "'abus[ing] its dominant position by systematically favoring' its own shopping comparison service[s]."[188] The complaint's gist was that Google harms competition and consumers in excluding competitors' speech.[189] European authorities then imposed a €1.5 billion penalty on Google for coercing firms into using AdSense, its subsidiary, rather than competing advertisers—again, asserting that Google manipulates how and whether firms can express commercial speech.[190] This momentum has since led European enforcers to initiate similar investigations into Apple's practices.[191]

In the United States, the above rhetoric creates an obvious tension: the will of American politicians to foster speech under the antitrust laws contradicts precedent whereby U.S. courts have held that antitrust lacks authority to promote free expression. And even if the courts reconsider this framework, the incorporation of speech into antitrust's purview might impede free speech more than foster it. The following section explains why, in light of the sentiments detailed above, the goal of promoting speech should perhaps remain beyond antitrust's reach.

C. Antitrust's Speech Conundrum

An important issue must be discussed: the imposition of antitrust liability on those who suppress speech could actually offend the First Amendment. For speech to thrive, private actors must enjoy the right to exclude bad ideas while advancing goods ones.[192] By guaranteeing this freedom, antitrust proposals to govern private speech would likely undermine free expression, as it would pit actors who *both* operate under the First Amendment against each other.

Most laymen conceive of free speech as a positive action—i.e., the physical expression of an idea or viewpoint—but another component of the First Amendment is the right to exclude. Since forced inclusion of content

188. James Vincent, *Google Fined a Record €2.4 Billion by the EU for Manipulating Search Results*, VERGE (June 27, 2017, 5:48 AM), https://www.theverge.com/2017/6/27/15872354/google-eu-fine-antitrust-shopping [https://perma.cc/7TSF-N4HQ].

189. Rich McCormick & James Vincent, *EU Formally Accuses Google of Monopolistic Search Practices*, VERGE (Apr. 15, 2015, 6:06 AM), https://www.theverge.com/2015/4/15/8418577/google-antitrust-eu-monopolistic-search-fines [https://perma.cc/U36H-8KSJ].

190. James Vincent, *Google Hit with €1.5 Billion Antitrust Fine by EU*, VERGE (Mar. 20, 2019, 7:11 AM), https://www.theverge.com/2019/3/20/18270891/google-eu-antitrust-fine-adsense-advertising [https://perma.cc/RHC4-Q4HG].

191. Ryan Browne, *Apple Is Reportedly Set to Face an EU Investigation over Spotify's Competition Complaint*, CNBC (May 6, 2019, 4:35 AM), https://www.cnbc.com/2019/05/06/apple-set-to-face-eu-antitrust-probe-over-spotify-complaint-ft-report.html [https://perma.cc/7TVB-7DFN]; Chris Welch, *Apple's Latest Defense of the App Store Just Shows How Hard It Is to Compete with Apple*, VERGE (May 29, 2019, 10:21 AM), https://www.theverge.com/2019/5/29/18644045/apple-defends-app-store-policies-antitrust-eu-spotify [https://perma.cc/QQ7E-Q9KY].

192. *See supra* Part I.B.

into a speaker's message (known as "compelled speech") is likely to alter that message, the First Amendment vests speakers with discretion to reject another's speech.[193] The right to either accept or disfavor a viewpoint is the very dynamic sought by Justice Holmes and advanced by modern jurists and scholars.[194] As such, private actors must enjoy wide latitude to reject repugnant, erroneous, and dangerous (or even benign) ideas for two reasons: 1) it enables speakers to craft their specific messages and 2) it bestows power on the market to value ideas.

This framework has important implications for antitrust law. Because the government is seldom able to restrict political, social, or expressive speech, the courts have cloaked actors engaging in political expression with antitrust immunity. The *Noerr-Pennington* doctrine,[195] for example, enables firms to lobby or protest legislation even when anticompetitive effects would result.[196] Courts have similarly ruled that political activity is noncommercial and thus beyond antitrust's scope.[197] In *NAACP v. Claiborne Hardware Co.*,[198] activists boycotted white merchants who refused to serve African-Americans. The merchants sued the NAACP to recover losses caused by the boycott and to enjoin future boycott activities.[199] Although the boycott caused economic injury to the merchants, the political context of the movement placed the activists beyond antitrust's reach.[200] This suggests that the restriction of speech is substantially different than the restriction of output

193. R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1212 (D.C. Cir. 2012) ("Courts have recognized a handful of 'narrow and well-understood exceptions' to the general rule that content-based speech regulations—including compelled speech—are subject to strict scrutiny." (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994))).

194. *See supra* Part I.B.

195. *See generally* United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965); E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

196. *Pennington*, 381 U.S. at 662; *In re* Lipitor Antitrust Litig., 868 F.3d 231, 264 (3d Cir. 2017) ("'Rooted in the First Amendment and fears about the threat of chilling political speech,' *Noerr-Pennington* immunity provides 'immun[ity] from antitrust liability' to parties 'who petition the government for redress.' That immunity 'applies to actions which might otherwise violate the Sherman Act because [t]he federal antitrust laws do not regulate the conduct of private individuals in seeking anticompetitive action from the government.'" (citation omitted) (quoting A.D. Bedell Wholesale Co. v. Philip Morris Inc., 263 F.3d 239, 250 (3d Cir. 2001))).

197. Hillary Greene & Dennis A. Yao, *Antitrust as Speech Control*, 60 WM. & MARY L. REV. 1215, 1222 (2019) (stating that the determination that activity is political in nature tends to demand antitrust immunity).

198. 458 U.S. 886 (1982).

199. *Id.* at 889.

200. Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 508 (1988) ("Although the boycotters intended to inflict economic injury on the merchants, the boycott was not motivated by any desire to lessen competition or to reap economic benefits but by the aim of vindicating rights of equality and freedom lying at the heart of the Constitution, and the boycotters were consumers who did not stand to profit financially from a lessening of competition in the boycotted market.").

in product markets. And indeed, when antitrust and the First Amendment collide, antitrust typically loses.[201]

By acknowledging the First Amendment right to discriminate against speech, the political rhetoric outlined in Part III.B runs into problems. Any interpretation of antitrust law that requires platforms and monopolists to forbear suppressing repugnant ideas would likely abridge their right to reject speech. And, indeed, corporations are protected actors under the First Amendment.[202] So while the marketplace of ideas is often economic—and perhaps society would benefit from increased competition among ideas, speakers, and information—it is difficult to square how enforcement could achieve this end without offending the Constitution.

Part IV resolves this conundrum. It argues that information plays such an important role in the modern economy that antitrust should, upon making a distinction between commercial and noncommercial speech, protect the flow of commercial expression from monopolies and trade restraints. This would modestly reinterpret antitrust precedent whereby enforcement could remedy the primary anticompetitive effects of the modern information economy.

IV. ANTITRUST'S MOMENT?

Antitrust can no longer ignore the value of information in today's markets. But rather than advancing all types of speech, antitrust should remedy certain instances of abridged *commercial* expression. To make this case, Part IV.A details the relationship between competition and commercial speech, explaining that competition produces commercial information and that anticompetitive conduct can suppress it. And since the First Amendment protects commercial speech for the same reasons that antitrust law fosters competition—i.e., to enhance market efficiency—antitrust can and should treat commercial speech as a benefit of competition. Part IV.B argues that antitrust is ideal for this task, as its limited scope would impose liability on firms wielding enough monopoly power to deprive the overall market of valuable information. Part IV.C finds support for this position in antitrust's legislative history and case law. The sum of these analyses shows that the antitrust enterprise should modernize to account for the emerging value of commercial information and speech in today's markets, though it should resist rhetoric calling for enforcement to govern social, political, and expressive speech.

201. Jefferson Cty. Sch. Dist. No. R-1 v. Moody's Inv'r's Servs., Inc., 175 F.3d 848, 860 (10th Cir. 1999) ("In our view, the First Amendment does not allow antitrust claims to be predicated solely on protected speech.").

202. Citizens United v. FEC, 558 U.S. 310, 339–40 (2010) (ruling that corporations have the right to free speech under the First Amendment).

A. Commercial Speech as a Benefit of Competition

1. Commercial Speech

Commercial speech, loosely defined as "expression related solely to the economic interests of the speaker and its audience,"[203] lacked constitutional protection until 1976, when the Supreme Court brought it under the First Amendment's umbrella in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[204] The justification for doing so, according to the Court, was that commercial speech "not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest dissemination of information."[205] Although the quintessential type of commercial speech is advertising, the First Amendment potentially shields other types of economic expression such as data, research, and any other speech or information with "plainly commercial nature and effect."[206]

Virginia State Board recognizes the vital role that information plays in the economy.[207] In a competitive market, buyers depend on information to determine how much to pay for a good. After numerous interactions among many buyers and sellers, the good's market price should emerge incorporating all relevant information about that good.[208] Fueling this process is competition; as sellers vie for buyers, they typically disseminate information about their product's utility relative to their competitors' goods.[209] Although the market is expected to vest consumers with enough data to make rational decisions—as it rewards those who uncover and supply valuable information[210]—markets fail when actors are deprived of

203. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980).

204. 425 U.S. 748, 760 (1976).

205. *Cent. Hudson Gas*, 447 U.S. at 561–62 ("In applying the First Amendment to this area, we have rejected the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech." (quoting *Va. State Bd.*, 425 U.S. at 770)).

206. Boelter v. Advance Magazine Publishers Inc., 210 F. Supp. 3d 579, 597 (S.D.N.Y. 2016) (quoting Conn. Bar Ass'n v. United States, 620 F.3d 81, 95 (2d Cir. 2010)).

207. *See* Michelle N. Comeau, Comment, *The Hidden Contradiction Within Insider Trading Regulation*, 53 UCLA L. REV. 1275, 1295 (2006) ("In its purest form, market efficiency is simply a positive description of how a capital market may adapt to information. If a capital market is efficient, stock prices should fully reflect all available information. Furthermore, the price of shares should immediately adjust to new information that is relevant to a stock's value. The value of maintaining an efficient market lies in the market's ability to properly allocate investment resources." (footnote omitted)).

208. *See* Kevin S. Marshall, *Free Enterprise and the Rule of Law: The Political Economy of Executive Discretion (Efficiency Implications of Regulatory Enforcement Strategies)*, 1 WM. & MARY BUS. L. REV. 235, 262–63 (2010).

209. *See generally* Day & Stemler, *supra* note 58.

210. *See* Langford v. Rite Aid of Ala., Inc., 231 F.3d 1308, 1314 (11th Cir. 2000) ("In an open market economy, consumers have the appropriate incentives to obtain information about acceptable cost of consumer goods, and to make purchases from the retailer who most closely matches that price.").

information.[211] This is because uninformed consumers are prone to spend too much on inferior goods while they fail to purchase better ones, causing lackluster firms to flourish while superior businesses flounder. In fact, monopolized markets may result in a lack of firms able to disseminate information.[212] Given this harm, the Supreme Court has stated that commercial speech, representing even an incomplete recitation of the facts, may still enhance consumer welfare.[213]

Nevertheless, commercial expression is considered less important and thus receives less protection than social, political, and expressive speech.[214] For example, the government wields significant authority to abridge false or misleading economic expression since, after all, the utility of commercial speech stems from its ability to inform consumers.[215] In fact, in contrast to unconstitutional types of compelled expressive speech,[216] the government may require firms and individuals to express forms of commercial speech, such as in warning labels, when doing so would increase informational accuracy and prevent harm.[217] But if commercial expression is accurate (or accurate enough), the state may abridge that expression upon overcoming intermediate scrutiny.[218]

2. The Proposal

This section argues that antitrust should treat commercial speech as a virtue of competition, given that, first, the nature of competition generates market information valued by consumers and, second, anticompetitive conduct can suppress it. In fact, much of the criticism targeting big tech stems from the notion that tech firms abuse their market power, resulting in restricted commercial information. According to *The Economist*, "One of the few things that most people in the West agree on is that there is some

211. *See* Thomas L. Greaney, *Competitive Reform in Health Care: The Vulnerable Revolution*, 5 YALE J. ON REG. 179, 205 (1988) (discussing how information asymmetries cause economic inefficiency).

212. Day & Stemler, *supra* note 58, at 105 (explaining how market concentration can deprive markets of information).

213. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562 (1980).

214. Mass. Ass'n of Private Career Sch. v. Healey, 159 F. Supp. 3d 173, 194 (D. Mass. 2016) (explaining that commercial speech restrictions typically receive intermediate scrutiny).

215. *Cent. Hudson Gas*, 447 U.S. at 563.

216. *See supra* notes 193–94 and accompanying text.

217. *Cent. Hudson Gas*, 447 U.S. at 565–66.

218. *Id.* at 564 ("The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.").

kind of problem with the big tech firms."[219] But despite the social and economic benefits of promoting commercial expression, the obstacle is that courts have characterized suppressed speech—commercial or otherwise—as beyond antitrust's scope.[220] The following discussion, in revisiting the economics of speech, rebuts this precedent.

The issue is that cases such as *DataCell ehf. v. Visa, Inc.*[221] and *Kinderstart.com LLC v. Google, Inc.*[222] reject the notion that antitrust must specifically promote commercial speech. In each dispute, the court found that exclusionary behavior cannot offend the antitrust laws so long as the primary effect is only diminished commercial speech.[223] The courts have also ruled that seldom, if ever, does the conduct of suppressing speech (rather than the effect of exclusionary behavior) rise to the level of being anticompetitive, even when consumer welfare suffers. In *Mercatus Group, LLC v. Lake Forest Hospital*,[224] the Seventh Circuit ruled that commercial speech, even when it damages competition, lies "outside the reach of the antitrust laws."[225] According to *Sanderson v. Culligan International Co.*,[226] "Commercial speech is not actionable under the antitrust laws."[227] An earlier Seventh Circuit opinion—cited in *Sanderson*—held that "the remedy is not antitrust litigation but more speech—the marketplace of ideas."[228]

To cast doubt on whether this mindset is still viable—as the modern economy emphasizes ideas, information, and speech as well as the platforms through which ideas travel—contemporary firms compete over quality without affecting prices (which Part III.A detailed).[229] For instance, Facebook overtook the social media sites MySpace and Friendster by offering a superior, yet similarly free, platform on which users could express political, social, and economic views. It is now common for firms to compete over issues of quality, speech, innovation, privacy, and selection rather than

219. *Technology Firms Are Both the Friend and the Foe of Competition*, ECONOMIST (Nov. 15, 2018), https://www.economist.com/special-report/2018/11/15/technology-firms-are-both-the-friend-and-the-foe-of-competition [https://perma.cc/MT2Y-C3FK].

220. Sanderson v. Culligan Int'l Co., 415 F.3d 620, 624 (7th Cir. 2005).

221. No. 1:14-CV-1658 GBL/TCB, 2015 WL 4624714 (E.D. Va. July 30, 2015) (finding that suppressed speech entailed noncommercial activity even though it caused the plaintiff lost profits).

222. No. C 06-2057 JF (RS), 2007 WL 831806 (N.D. Cal. Mar. 16, 2007) (declaring that the suppression of free speech cannot implicate antitrust's framework without a commercial market bearing positive prices).

223. *See, e.g.*, *DataCell*, 2015 WL 4624714, at *7.

224. 641 F.3d 834 (7th Cir. 2011).

225. *Id.* at 850–51 ("Under circuit precedent, such a territorial admonition to a competitor—like other speech made in the commercial context—does not violate the antitrust laws unless it leads to an agreement to restrain trade or is accompanied by some sort of 'enforcement mechanism' designed somehow to coerce or compel that competitor to heed the admonition.").

226. 415 F.3d 620 (7th Cir. 2005).

227. *Id.* at 624.

228. Schachar v. Am. Acad. of Ophthalmology, Inc., 870 F.2d 397, 400 (7th Cir. 1989).

229. *See supra* Part III.A.

prices, implying that antitrust's fidelity to prices must loosen.[230] This landscape has, in fact, increased judicial recognition that antitrust should remedy exclusively nonprice injuries in more instances,[231] even though courts do so infrequently in practice. As such, since a firm can employ anticompetitive tactics resulting in suppressed commercial speech without producing higher prices, it is critical that the quality of information reaching market actors reflects a nonprice element of consumer welfare;[232] "non-price competition is most important . . . where price competition lacks vigor."[233]

Support for this proposition can be found in the FTC opinion *1-800 Contacts, Inc.*[234] In that case, firms in the business of selling contact lenses agreed to forego competition for online advertising space.[235] This conduct, according to the FTC, sought to deprive consumers of information, which resulted in higher prices.[236] Notable was the opinion's remark that "[w]hen information is withheld from consumers, it frustrates their ability to compare

230. For example, market forces have supposedly nudged firms to refuse to carry competing political views. *See, e.g.*, Kalev Leetaru, *Facebook's Deletion of Warren's Ad Reminds Us It Can Silence Debate About Itself*, FORBES (Mar. 12, 2019, 12:23 PM), https://www.forbes.com/sites/kalevleetaru/2019/03/12/facebooks-deletion-of-warrens-ad-reminds-us-it-can-silence-debate-about-itself/ [https://perma.cc/C7HE-PKKL]. They have also excluded information concerning rival products. *See, e.g.*, Anthony Cuthbertson, *Google Uses Bizarre Tactics to Dominate Rivals and Confuse Their Customers, Search Engine Claims*, INDEPENDENT (July 20, 2018, 1:04 PM), https://www.independent.co.uk/life-style/gadgets-and-tech/news/google-alternatives-privacy-duckduckgo-search-engine-browser-chrome-eu-fine-a8455321.html [https://perma.cc/4T89-XG8Q] (explaining how Google allegedly suppresses information in order to gain a competitive edge over rivals).

231. *See, e.g.*, Cobb Theatres III, LLC v. AMC Entm't Holdings, Inc., 101 F. Supp. 3d 1319, 1335 (N.D. Ga. 2015) (stating that "quintessential harm is not higher prices; '[r]ather, consumer welfare'" in the form of "substantially diminished . . . quality" (quoting Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1339 (11th Cir. 2010))).

232. The Third, Fifth, Ninth, Tenth, and Eleventh Circuits state that antitrust law may remedy diminished innovation, quality of goods, and perhaps similar nonprice injuries. *See, e.g.*, W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 100–01 (3d Cir. 2010) (stating that anticompetitive effects include increased prices, diminished output, and diminished quality); HM Compounding Servs., Inc. v. Express Scripts, Inc., No. 4:14–CV–1858 JAR, 2015 WL 4162762, at *8 (E.D. Miss. July 9, 2015) ("Allegations of anti-competitive effects sufficient to state a claim under § 1 of the Sherman Act include the elimination of a market competitor, a decrease in output, reduced consumer choice, and a decline in the quality of goods."); Magnetar Techs. Corp. v. Intamin, Ltd., No. CV 07-1052 GAF (JWJx), 2011 WL 13133973, at *8 (C.D. Cal. May 11, 2011); Ginzburg v. Mem'l Healthcare Sys., Inc., 993 F. Supp. 998, 1015 (S.D. Tex. 1997); *see also* Richard D. Cudahy & Alan Devlin, *Anticompetitive Effect*, 95 MINN. L. REV. 59, 80 (2010) (discussing whether anticompetitive effects such as higher prices or restricted output must be present to establish antitrust liability, or if one must only demonstrate harm to competition). According to the Eleventh Circuit, "[A]ctual anticompetitive effects include, but are not limited to, reduction of output, increase in price, or *deterioration in quality*." Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1339 (11th Cir. 2010) (emphasis added).

233. *See* Brief of Amicus Curiae American Antitrust Institute in Support of Appellants and Reversal of the District Court's Decision at 3, FTC v. Lundbeck, Inc., 650 F.3d 1236 (8th Cir. 2011) (Nos. 10-3458 & 10-3459) ("That is to say, the court found as a fact that *these products compete head to head on the basis of quality*.").

234. F.T.C. No. 9372 (Nov. 7, 2018).

235. *Id.* at 1.

236. *Id.* at 11.

the prices and offerings of competitors."[237] Although this case turned on conventional indicators of exclusionary behavior—i.e., higher prices—it illustrates the manner in which restricting commercial information can generate an anticompetitive effect flowing from exclusionary behavior.

In fact, antitrust is the ideal body of law to promote commercial speech due to its fixation on systemic harms.[238] To establish a claim under either section 1 or 2 of the Sherman Act, as explained earlier, the typical defendant must have exercised market power,[239] excluded competition, *and* generated an anticompetitive effect. By requiring each element, the courts have sought to redress situations where the market cannot self-correct for the monopolist's restraints. The purpose of doing so is to scrutinize monopolists who have caused systemic injuries rather than subjecting small businesses to liability.[240] In turn, to assess whether an act of abridged commercial speech diminished consumer welfare, courts should search for a market failure of ideas.[241] Key is whether consumers would have benefited from certain speech but for the anticompetitive conduct.[242] Implementing this standard would remain faithful to antitrust's framework in requiring evidence not that the individual speaker was injured but that the monopolist deprived *the market* of commercial speech or information valued by consumers.[243] If two platforms suppress information about rival products, this could be an antitrust offense when the deprivation leads consumers to select products they otherwise would not have. Restricting the output of commercial information would, after all, have a conventionally anticompetitive effect—e.g., artificially high prices—or would diminish consumer welfare in ways that affect the market's quality.

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237. *Id.* at 2.

238. La. Wholesale Drug Co. v. Shire LLC (*In re* Adderall XR Antitrust Litig.), 754 F.3d 128, 133 (2d Cir. 2014) (explaining that antitrust liability under the Sherman Act "requires, in addition to the possession of monopoly power in the relevant market, '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'" (quoting Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004))); United States v. Microsoft Corp., 253 F.3d 34, 74–75 (D.C. Cir. 2001) (determining first that the conduct was exclusionary behavior but then stating that, to violate antitrust laws, the conduct must have produced an anticompetitive effect).

239. Market power is a required element of a section 2 claim. Under section 1, restraint of trade does not necessarily require market power. However, due to the difficulty of proving that a restraint harmed consumer welfare, the courts accept evidence that the defendant possessed market power to prove indirectly that the challenged restraint was anticompetitive.

240. *See* Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77, 138 (explaining that remedying anticompetitive conduct that causes decline of systemic economic indicators, or market failure, is the goal of antitrust law).

241. Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 4 F. Supp. 3d 1123, 1137 (D. Ariz. 2014) ("The purpose of antitrust law is not to protect market participants from the market; it is to protect the public from market failure."), *aff'd*, 836 F.3d 1171 (9th Cir. 2016).

242. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 778 (1999) ("Claims about quality or patient comfort would have a procompetitive effect by preventing misleading or false claims that distort the market.").

243. Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 333 (1990).

By doing so, antitrust enforcement could remedy the chief anticompetitive effects of the information economy, which, as critics note, currently lie beyond enforcement's reach.[244] For example, Google allegedly abuses its position in the online advertising market as AdSense's parent company.[245] Critics contend that Google—by controlling the contours of internet advertising such as placement, color, and font—dictates how or whether other firms can speak.[246] This is because the conduct, by shielding Google's market share from competition, deprives consumers of the benefits of commercial information as they navigate online markets. Although antitrust authorities in the European Union have condemned this practice,[247] firms in the United States have so far been able to manipulate advertising without incurring antitrust liability.[248] Indeed, the FTC publicly refused to initiate an action against Google's ad practices.[249]

Or recall that firms may abridge information about rival products in favoring their own goods[250]—a practice that the FTC concluded in 2013 does not violate antitrust law despite its effects. According to the FTC: "Undoubtedly, Google took aggressive actions to gain advantage over rival search providers. However, the FTC's mission is to protect competition, and not individual competitors. The evidence did not demonstrate that Google's actions in this area stifled competition in violation of U.S. law."[251] The FTC's position, though, fails to scrutinize whether consumers were, in fact, injured by Google's conduct, as the agency only accounted for price effects. If the manipulation of commercial information flowing from exclusionary

244. *See generally* Khan, *supra* note 40.

245. Binder, *supra* note 50 (describing the liability incurred by Google in Europe for anticompetitive practices in the advertising market).

246. Bill Chappell, *EU Fines Google $1.7 Billion over "Abusive" Online Ad Strategies*, NPR (Mar. 20, 2019, 1:25 PM), https://www.npr.org/2019/03/20/705106450/eu-fines-google-1-7-billion-over-abusive-online-ad-strategies [https://perma.cc/Z2TH-E24T].

247. Google "denied other companies the possibility to compete on the merits and to innovate—and consumers the benefits of competition." Harper Neidig, *EU Fines Google $1.7B over Advertising Agreements*, HILL (Mar. 20, 2019, 7:41 AM), https://thehill.com/policy/technology/434859-eu-fines-google-17-billion-over-advertising-agreements [https://perma.cc/32SU-JJ4C] (quoting Margrethe Vestager, the European Union's competition commissioner).

248. Chappell, *supra* note 246.

249. Press Release, Fed. Trade Comm'n, Statement of the Federal Trade Commission Regarding Google's Search Practices *In the Matter of Google Inc.* (Jan. 3, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf [https://perma.cc/BU37-8CU6]; Sam Gustin, *U.S. Google Antitrust Probe Spurs Internet-Regulation Debate*, TIME (Oct. 15, 2012), http://business.time.com/2012/10/15/ftc-antitrust-probe-against-google-sets-up-internet-regulation-clash/ [https://perma.cc/VR4J-UV4E] (explaining the weakness in the antitrust case against Google's ad practices).

250. *See supra* notes 88–92 and accompanying text (describing the allegations that Google suppresses commercial speech).

251. Press Release, Fed. Trade Comm'n, Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns in the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search (Jan. 3, 2013), https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc [https://perma.cc/4T2E-F625].

conduct caused consumers to select products they otherwise would not have chosen—essentially creating a qualitatively inferior market for consumers—this indicates that the restriction of commercial information or speech should equate to restricting output in a product market. Or consider that firms in innovation sectors may suppress the R&D of rival companies, conduct which might not offend antitrust law until the R&D generates a tangible good or service.[252] Although most courts and commentators acknowledge that innovation affects consumer welfare, the point is that enforcement should account for early stages of intellectual development before the R&D constitutes "future competition."[253] Enforcement should thus scrutinize whether a monopolist has, in abusing its dominant position, deprived consumers *and* markets of valuable commercial information.

In important part, antitrust's requirement of market power should assuage concerns that enforcement would impose liability on small businesses, individuals, and other nonmonopolists. This is because, without market power, one's effort to suppress speech would lack efficacy, as other forums could carry the content if it bore merit. The proposed test—drawn from the DOJ and FTC's Horizontal Merger Guidelines—considers whether consumers could find the abridged speech on a reasonably interchangeable platform.[254] If, for instance, a minor platform excluded information about a product but a major platform such as Amazon *could* carry it, this should not offend antitrust law, since consumer welfare would likely remain unaffected. This is analogous to a gas station that raises its prices above the market rate—so long as competition exists without exclusionary conduct on behalf of the gas station, no anticompetitive effect would exist because the elevated prices should invite competition. As such, the only firms that could commit the proposed offense would necessarily control a primary forum for speech or ideas, including Facebook, Google, or AT&T. And even if a monopolist excluded competition resulting in suppressed commercial content, a court would still review the exclusionary act under the "rule of reason" test

252. Gregory R. Day & Michael Schuster, *Patent Inequality*, 71 ALA. L. REV. 115, 150 (2019).

253. Government antitrust enforcers have referred to innovation as "future competition." Andre Barlow, *Mergers That Diminish Innovation Present Deal Risk*, ANTITRUST LAW. BLOG (May 7, 2015), https://www.antitrustlawyerblog.com/mergers-that-raise-future-competition-concerns-present-deal-risk/ [https://perma.cc/RH69-CQ6T] ("The Antitrust Division's statement indicates that the transaction was blocked because the combination would have diminished innovation. In other words, the Antitrust Division was concerned about the potential loss of head to head competition in the development of future cutting-edge semiconductor products and made no allegation that the combined firm would have monopolized any existing or actual product market. The Antitrust Division's tough stance against [the merger] indicates that it is willing to scrutinize and challenge deals that raise longer-term anticompetitive concerns related to future competition even if there is no past pricing evidence that may predict that the merger will result in higher prices regarding actual products.").

254. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 7 (2010), https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf [https://perma.cc/38ZF-K483]. The Horizontal Merger Guidelines evaluate market definition based on "consumers' ability and willingness to substitute away from one product to another in response to a price increase." *Id.*

whereby the defendant may present evidence that the conduct was, on balance, procompetitive.[255]

This proposal, however, raises constitutional concerns because one's right to exclude speech is an important element of the First Amendment. The following analysis notes that the distinction between commercial and noncommercial speech resolves this issue.

3. Practical and Constitutional Issues Resolved

The integration of commercial speech into antitrust's framework would avoid burdening the First Amendment while simultaneously advancing antitrust's purpose. Even in light of the protections conferred by the First Amendment, antitrust has authority to promote commercial speech since its value stems from informing consumers in making economic decisions.[256] It can, in fact, compel forms of commercial speech, such as a warning or disclosure labels, when doing so serves important societal functions.[257] But when an act of commercial expression causes consumers to become *less* informed, the speech loses utility and, accordingly, a degree of constitutional protection.[258] In *ES Development, Inc. v. RWM Enterprises, Inc.*,[259] a group of auto dealers argued that their statements persuading manufacturers into entering an anticompetitive pact were shielded by the First Amendment. The Eighth Circuit disagreed, remarking that antitrust may "impose certain restrictions upon the commercial speech of individual entities which have violated the Sherman Act."[260] The implication is that antitrust may promote and govern commercial expression, notwithstanding the right to reject speech under the First Amendment.

Such an embrace of free speech should, however, end at commercial speech. In terms of noncommercial speech, it is important that social, political, and expressive speech remain beyond antitrust's reach because the right to reject unsavory (or even benign) content is a core function of the First Amendment.[261] There is indeed no practical or effective way to condemn censorship while also permitting platforms to ban vile content. Antitrust should remain a strictly economic body of law to avoid unpredictable liability. Otherwise, liability might attach whenever a platform enforces its terms of services against repugnant speech. This suggests again that plans to

255. King Drug Co. of Florence v. Cephalon, Inc., 88 F. Supp. 3d 402, 412 (E.D. Pa. 2015) (explaining the rule of reason test whereby exclusionary conduct does not violate antitrust law if the defendant offers sufficient procompetitive rationales for it).

256. Boelter v. Advance Magazine Publishers Inc., 210 F. Supp. 3d 579, 597 (S.D.N.Y. 2016) (describing the informative utility of commercial speech).

257. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 466 (1978).

258. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 69 (1983) (remarking that the government may regulate "false, deceptive, or misleading" speech notwithstanding the First Amendment).

259. 939 F.2d 547 (8th Cir. 1991).

260. *Id.* at 557.

261. Stuart v. Loomis, 992 F. Supp. 2d 585, 592–93 (M.D.N.C. 2014) (reviewing the importance of allowing speakers to craft their own messages), *aff'd sub nom.* Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014).

incorporate noncommercial speech into enforcement are misguided. The courts and Congress must therefore reject calls to condemn firms that have abridged social or political speech so as to avoid eroding the First Amendment as well as antitrust law.

One can find support for this proposal from antitrust's legislative history and distant case law. Recall that antitrust's scope was defined by its legislative history whereby Congress supposedly had the singular purpose of promoting economic objectives. The next section finds, however, that the protection of commercial speech comports with this record and, as a result, should constitute one of antitrust's goals.

B. Judicial and Historical Support

1. Antitrust's Legislative History

Even if one accepts that antitrust can only redress economic problems, comments by those who drafted the Sherman Act indicate that the drafters sought to condemn a broader array of economic injuries—including diminished commercial speech. Recall that Bork's review of antitrust's legislative history persuaded the courts to narrow antitrust's scope to remedying only certain types of economic injuries such as high prices.[262] In this sense, history is critical to assessing antitrust's boundaries. The following analysis revisits this record, finding that antitrust's drafters enacted the Sherman Act to prevent powerful trusts from imposing undefined harms affecting economic and social inequality. Matters of fairness and justice are essential. So, when considering the role of information in modern markets, these debates indicate that the abridgment of commercial speech should entail an anticompetitive effect even when consumer prices remain low.

Consider the lack of specificity used by the drafters in describing antitrust's remedial goals. According to Senator John Sherman, the hallmark of an illegal arrangement was one that allows the monopolist to "control the market, raise or lower prices, *as will best promote its selfish interests*."[263] The drafters expressed similar concerns that uncompetitive markets generate inequalities of "social order," "condition," and "opportunity" as well as wealth.[264] To them, market power created more injuries involving economic inequality than supracompetitive prices. They described monopolists as exercising a "kingly prerogative" over "the necessaries of life."[265] And since Congress intended antitrust law to govern the widest array of activities qualifying as trade or commerce,[266] legislative history indicates that the

262. *See supra* notes 102–04 (describing the reformation of antitrust law based on Bork's historical analysis).

263. 21 CONG. REC. 2455, 2457 (1890) (emphasis added).

264. *Id.* at 2460.

265. *Id.* at 2457 ("If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life.").

266. *See* Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 569 n.6 (1982) ("Congress intended that the antitrust laws be given broad, remedial effect.").

drafters believed that enforcement should condemn a greater spectrum of economic injuries than it currently does, especially considering the waning relevance of prices.

In fact, even though the Sherman Act can only govern trade and commerce via its literal text, legislative history suggests that enforcement may redress the social ills created by monopolies and trade restraints—especially involving matters of inequality.[267] Consider the broad language used by Senator Sherman in discussing the types of harms that antitrust should proscribe: "If the natural effects of [anticompetitive behavior] . . . produce evil results, if their policy is denounced by the law as against the common good, it may be restrained, [and] punished."[268] Along the same lines, firms acting in concert tend to "encourage immoral and injurious pursuits" but when a company competes "on equal terms," it "can not be dangerous."[269] During their debates, the drafters also said that antitrust law should sanction trusts when "the act to be done has a 'necessary tendency' to 'prejudice the public' or to oppress individuals."[270] Senator Sherman noted further, rather than limiting enforcement to any singular goal, he sought for the courts to define antitrust's parameters.[271] Antitrust was thus motivated by *undefined* principles of social and economic welfare and focused on the power of large corporations to oppress consumers.[272]

Notable scholars have reached this same conclusion. Wu remarked that "[n]o other scholar ever managed to find what Bork did in the Congressional record."[273] According to Maurice Stucke and Allen Grunes's research on speech markets, antitrust's architects were concerned about social and democratic principles as well as prices.[274] Daniel Crane, who sought to defend Bork, nevertheless agreed with detractors that Bork's analysis was "disingenuous."[275] Criticism of Bork's analysis of legislative history has even come from the esteemed Herbert Hovenkamp.[276]

As such, legislative history suggests that the concept of consumer welfare should span more types of economic goals than are currently pursued. Since the drafters enacted a body of law meant to remedy the exploitation of concentrated market power resulting in heightened economic inequalities,

267. 21 CONG. REC. 2455–56 (1890) (statement of Sen. Sherman).

268. *Id.*

269. *Id.* at 2457.

270. *Id.* at 2459.

271. *Id.* at 2460 ("I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles.").

272. *Id.* at 2457 ("It only deals with unlawful combinations, unlawful by the code of any law of any civilized nation of ancient or modern times.").

273. TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 89 (2018).

274. Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249, 258–60 (2001).

275. Crane, *supra* note 103, at 836 (describing problems in Bork's analysis).

276. *Id.* at 841 ("Herbert Hovenkamp has asserted that 'Bork's analysis of the legislative history was strained, heavily governed by his own ideological agenda . . . . Not a single statement in the legislative history comes close to stating the conclusions that Bork drew.'" (quoting Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 22 (1989))).

the anticompetitive effects derived from the suppression of commercial speech should espouse a remedial goal of antitrust enforcement. The next discussion explores case law that also shows that antitrust is equipped to promote commercial speech and that doing so would benefit consumers and markets.

2. Case Law from Antitrust's Prior Era

Precedent established at the time of, and before, antitrust's reformation—when antitrust had the authority to condemn a vaster array of injuries—indicates that consumers would benefit if antitrust promoted commercial speech.[277] Consider the position staked by the Supreme Court in *FTC v. Indiana Federation of Dentists* in 1986.[278] A group of rival dentists entered into an agreement whereby they refused to submit dental x-rays to insurance companies. According to the FTC, this conduct credibly reduced the quality of dental care in the market but seemingly had no effect on prices.[279] Although the Court noted the potential pricing effects, as consumers would likely venture down costly avenues to obtain their x-rays,[280] the opinion asserted that the deprivation of information valued by consumers could potentially erode consumer choice or market quality in violation of the antitrust laws.[281]

A few cases scrutinized business restraints of free speech in general, implying that the narrower topic of commercial speech would benefit from antitrust review. In 1945, the DOJ alleged that the Associated Press (AP) violated sections 1 and 2 of the Sherman Act by forbidding its writers from selling AP stories to outside writers as well as admitting new members into its ranks.[282] Justice Hugo Black, writing for the Court in *Associated Press v.*

277. *See generally* Sandeep Vaheesan, *The Evolving Populisms of Antitrust*, 93 NEB. L. REV. 370 (2014) (explaining the evolution of antitrust from the pursuit of expansive populist goals to a more narrow economic doctrine).

278. 476 U.S. 447 (1986).

279. *Id.* at 459 ("The Federation's policy takes the form of a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire—the forwarding of x rays to insurance companies along with claim forms.").

280. *Id.* ("A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them. Absent some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services.").

281. *Id.*

282. Associated Press v. United States, 326 U.S. 1, 4 (1945) ("The heart of the government's charge was that appellants had by concerted action set up a system of By-Laws which prohibited all AP members from selling news to non-members, and which granted each member powers to block its non-member competitors from membership. These By-Laws, to which all AP members had assented, were, in the context of the admitted facts, charged to be in violation of the Sherman Act.").

United States,[283] ruled that the AP had monopolized the news, which "stifle[d] competition" as well as "restrained" the quality of journalism.[284]

Interestingly, the AP insisted that it had the constitutional right to exclude nonmembers and disseminate content in the manner of its choosing.[285] The First Amendment, according to the AP, precludes laws that interfere with journalistic discretion.[286] The Court rejected this argument, stating that condemning restraints of speech promotes the very ideals sought by the Constitution.[287] Since the First Amendment is intended to foster competition in the marketplace of ideas, Justice Black insisted the Sherman Act *complements* the Constitution:

> [The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.[288]

Similarly, in 1951, the Supreme Court in *Lorain Journal Co. v. United States*[289] reviewed an antitrust lawsuit against a newspaper called the *Lorain Journal*.[290] At issue was the journal's attempt to "destroy" an upstart radio station that threatened its local monopoly.[291] The journal sought to starve the radio station of revenue by prohibiting the journal's advertisers from also advertising with the radio station.[292] Even though this strategy restrained competition, the journal claimed it had the right to do so under the First Amendment.[293] The Supreme Court disagreed, remarking that the journal may not use, in the name of free speech, its market power to eliminate speech and expression.[294] In so many words, the Sherman Act achieves the very goals enshrined by the First Amendment.

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283. 326 U.S. 1 (1945).
284. *Id.* at 11–15.
285. *Id.* at 17–18 (ruling that the AP's practice violated antitrust law).
286. *Id.* at 19 ("Finally, the argument is made that to apply the Sherman Act to this association of publishers constitutes an abridgment of the freedom of the press guaranteed by the First Amendment.").
287. *Id.* at 7 ("The fact that the publisher handles news while others handle food does not . . . afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices.").
288. *Id.* at 20.
289. 342 U.S. 143 (1951).
290. *Id.* at 145.
291. *Id.* at 149.
292. *Id.* at 148–49.
293. *See id.* at 155–56.
294. *Id.* at 156.

This Part traced the economics of commercial speech in today's markets and found that antitrust must consider the dissemination of market information to be a form of competition. Doing so is imperative considering the current inability of antitrust to remedy the consequences of monopoly power in the technology industries. By focusing only on commercial speech, the above proposal would also comport with antitrust's framework while avoiding constitutional tension. Further, the integration of commercial speech into antitrust's scope provides a resolution to recent debates concerning antitrust enforcement of all kinds of speech, which are discussed in greater detail in Part V.

V. ALTERNATIVE PLANS

The notion that powerful technology companies pose a harm to free speech has incensed politicians, commentators, and scholars. The antitrust solutions suggested by them generally involve the government's power to break up trusts, block mergers, and regulate big tech as an essential utility. Given this rhetoric, this Part briefly reviews alternative plans to rein in big tech in light of the instant proposal.

A. Break Up Big Tech?

Threats to free speech have prompted policymakers to demand big tech's breakup. 2020 presidential candidate Senator Warren, for instance, proposes unwinding Amazon, Google, Facebook, and other tech giants who have "bulldozed competition."[295] Former Labor Secretary Robert Reich called for a similar divestiture, observing that tech giants have degraded political discourse by silencing critics.[296] According to Wu, the funneling of speech through a small number of platforms imperils democratic and social welfare and "[t]he simplest way to break up the power of Facebook is by breaking up Facebook."[297] It may thus come as little surprise that editorial spaces are commonly filled with proposals to break up big tech.[298]

Historical examples of trust-busting include the breakups of Standard Oil, AT&T, and J. P. Morgan's Northern Securities Co.[299] In each case,

295. Elizabeth Warren, *How We Can Break Up Big Tech*, ELIZABETHWARREN.COM, https://elizabethwarren.com/plans/break-up-big-tech [https://perma.cc/3QDQ-6UW9] (last visited Feb. 14, 2020); *see also* Rob McLean, *Facebook Took Down, and Then Restored, Elizabeth Warren's Ad Calling for Facebook's Breakup*, CNN BUS. (Mar. 12, 2019, 10:50 AM), https://www.cnn.com/2019/03/11/tech/elizabeth-warren-facebook-ads/index.html [https://perma.cc/JVX6-268K].

296. Robert Reich, *Break Up Facebook (and While We're at It, Google, Apple and Amazon)*, GUARDIAN (Nov. 20, 2018, 3:00 AM), https://www.theguardian.com/commentisfree/2018/nov/20/facebook-google-antitrust-laws-gilded-age [https://perma.cc/GT7C-7QKX].

297. WU, *supra* note 273, at 159.

298. *See, e.g.*, Kevin Roose, *A Better Way to Break Up Big Tech*, N.Y. TIMES (Mar. 13, 2019), https://www.nytimes.com/2019/03/13/technology/elizabeth-warren-tech-companies.html [https://perma.cc/SN7K-A962].

299. *See* Brian Fung, *This 100-Year-Old Deal Birthed the Modern Phone System. And It's All About to End*, WASH. POST (Dec. 19, 2013, 11:37 AM), https://www.washingtonpost.com/

government regulators determined that the monopolist had accrued market power via illegal means and created an anticompetitive landscape.[300] The government then divested the monopolist of discrete business wings so as to increase competition. "Bad conduct, coupled with size, warranted divestiture," which spawned over fifty similar antitrust actions following *Standard Oil Co. of New Jersey v. United States*.[301] But with the government's increasing focus on merger policy, divestures are currently reserved for only the most extreme cases.[302]

Despite calls to "bust" big tech, few detailed plans exist. Senator Warren's plan is an outlier. She would break up tech giants "even if they are generally providing good service at a reasonable price."[303] Her proposal would label a tech firm as a "platform utilit[y]" if it generates more than $25 billion in revenue per year.[304] Companies fitting this description, such as Facebook and Amazon, would be prohibited from owning a platform while also competing on it.[305] For instance, "Google's ad exchange and businesses on the exchange would be split apart, and Google search would have to be spun off."[306]

Policymakers should resist grand-scale breakups in favor of the remedies proposed earlier in this Article. Even Barry Lynn, a leading critic of big tech, asserted that "[t]he answer is not to break Google or Amazon up."[307] The issue is that tech industries are prone to high levels of market concentration given their reliance on network effects.[308] Consumers of a social media platform, for instance, benefit as a platform's network grows with additional users. Once the platform achieves a critical size, it becomes almost impossible for upstart companies to replicate the dominant firm's network—

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news/the-switch/wp/2013/12/19/this-100-year-old-deal-birthed-the-modern-phone-system-and-its-all-about-to-end/ [https://perma.cc/85EF-WJHD] (reviewing classic antitrust breakups).

300. E. Thomas Sullivan, *The Jurisprudence of Antitrust Divestiture: The Path Less Traveled*, 86 MINN. L. REV. 565, 571 (2002) ("In this respect, *Standard Oil* set the tone for the next century of divestiture cases. Where the defendant has engaged in improper conduct and an attempt to monopolize, but has not attained market power, the Court has favored injunctive relief. On the other hand, where the defendant has illegally attained market power, the Court has favored divestiture.").

301. 221 U.S. 1 (1911); *see also* Sullivan, *supra* note 300 at 572.

302. Sullivan, *supra* note 300 at 572.

303. Warren, *supra* note 295.

304. Ryan Broderick, *Here's Elizabeth Warren's Plan to Break Up Huge Tech Platforms Like Facebook, Google, and Amazon*, BUZZFEED NEWS (Mar. 8, 2019, 11:36 AM), https://www.buzzfeednews.com/article/ryanhatesthis/elizabeth-warren-plan-break-up-big-tech [https://perma.cc/DFQ5-PVRA].

305. *Id.*

306. Ted Johnson, *Elizabeth Warren Proposes Plan to Break Up Big Tech*, VARIETY (Mar. 8, 2019, 10:38 AM), https://variety.com/2019/politics/news/elizabeth-warren-big-tech-1203158386/ [https://perma.cc/6FS9-T8WS].

307. Russell Brandom, *The Anti-Monopoly Case Against Google*, VERGE (Sept. 5, 2017, 2:55 PM), https://www.theverge.com/2017/9/5/16243868/google-monopoly-antitrust-open-markets-barry-lynn [https://perma.cc/9BQB-9FWW].

308. *See* SCOTT GALLOWAY, THE FOUR: THE HIDDEN DNA OF AMAZON, APPLE, FACEBOOK, AND GOOGLE 3–8 (2017).

i.e., network effects.[309] As an example, users would likely prefer one Facebook to six smaller platforms equaling Facebook's cumulative size.[310] Thus, since market power is thought to accumulate naturally in communication and technology sectors, it seems unrealistic to expect big tech's breakup to produce lasting benefits.[311] That said, others have arrived at the opposite conclusion.[312]

It seems that the more effective remedy would involve litigating individual instances of suppressed commercial speech under section 1 or 2 of the Sherman Act. Creating liability following an injury should incentivize tech giants to manage their market power responsibly or, otherwise, the remedy proposed herein would be available. Doing so would also avoid condemning a firm by mere virtue of its size—especially considering the consumer benefits of free services—which would allow tech giants to exist so long as they avoid suppressing information that results in market failure. And since market power may naturally arise in the information sectors, it would be shortsighted to break up each monopoly that periodically emerges.

Another reason to forgo breaking up tech giants is that their monopoly power may not be as formidable as currently thought.[313] For instance, commentators doubted whether any company could ever challenge MySpace right before Facebook vanquished it.[314] In fact, Facebook has already lost the attention of millennials and Generation Z to Snapchat and other rising platforms.[315] And given the rapid development of technology, it is perhaps myopic to assume that any tech giant can remain a monopolist for long. In light of this reality, divestiture proposals might serve as better political rhetoric than policy. The superior way to promote consumer welfare would thus entail a targeted remedy under the Sherman Act rather than a seismic

309. The term "network effects" describes a scenario where increased use of a network makes that network more valuable. For instance, part of Facebook's competitive appeal is its large number of users. Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424, 424 (1985); Shelanski, *supra* note 143, at 1679 (The nature of data and its collection is a "strategic asset that allows a platform to maintain a lead over rivals and to limit entry into its market.").

310. *See* Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1, 8 (2001). If the network characteristic of a good is significant, then consumers will be attracted to the firm with the largest market share.

311. *See* Day & Stemler, *supra* note 58, at 74–78 (explaining the competitive advantages arising from network effects, especially in the digital economy).

312. Shelanski & Sidak, *supra* note 310, at 8.

313. *But see* John M. Newman, *Antitrust in Digital Markets*, 72 VAND. L. REV. 1497, 1520 (2019); Frank Pasquale, *When Antitrust Becomes Pro-Trust: The Deformation of U.S. Competition Policy*, CPI ANTITRUST CHRON., May 2017, at 46, 48–49 (describing the unlikelihood that consumers would switch platforms).

314. Victor Keegan, *Will MySpace Ever Lose Its Monopoly?*, GUARDIAN (Feb. 8, 2007, 7:41 AM), https://www.theguardian.com/technology/2007/feb/08/business.comment [https://perma.cc/XL7G-EGPX].

315. *See* Richard Carufel, *Over Half of Millennials Check Snapchat Daily—Are You There?*, AGILITY PR SOLUTIONS (Mar. 5, 2018), https://www.agilitypr.com/pr-news/public-relations/half-millennials-check-snapchat-daily/ [https://perma.cc/LU9F-KC5Z] (reviewing empirical data that shows older generations prefer Facebook and millennials prefer Snapchat).

condemnation of firms offering free services. The next section turns to merger policy under the Clayton Act.

B. Merger Enforcement

This Article, in analyzing free speech under the Sherman Act, has so far sidestepped the Clayton Act's authority to regulate corporate mergers. The Clayton Act[316] vests the FTC and the DOJ with the ability to block mergers that substantially diminish competition.[317] This occurs when two or more companies combine in a manner to create an overly concentrated market.[318] In terms of speech, the debate has concerned whether antitrust regulators should subject media mergers to heightened scrutiny. Presently, however, antitrust enforcers give no primacy to whether or how a proposed combination is likely to affect the marketplace of ideas.[319] It is argued here that promoting commercial speech as a qualitative goal of the Sherman Act, as raised in Part IV, should likewise become a part of merger policy.

For context, Wu argued that merger enforcement has badly veered off course by fixating on prices to the neglect of social issues.[320] To him, few societal benefits arise from combinations among tech giants such as Facebook's acquisition of Instagram or WhatsApp. In fact, AT&T's combination with Time Warner was "the kind of merger the law clearly intended to block." Yet it survived after overcoming questions of whether consumers would pay an additional forty-five cents per month—demonstrating the importance of prices in the typical antitrust review.[321] Stucke and Grunes have similarly argued that, since media acquisitions may reduce the diversity of ideas in communication sectors, merger enforcement should promote competition in this industry even when prices remain stable.[322] After all, the diversity and quality of such services "may be more important to consumers than ordinary price competition."[323] The federal antitrust agencies appear sympathetic to this argument and note that they might consider increasing the scrutiny paid to media combinations.[324]

Considering the modern economic value of ideas and speech, merger enforcement should block combinations that would qualitatively degrade commercial speech in *any* industry—rather than just in media sectors. Note that merger policy under the Clayton Act tends to forecast consumer harms rather than condemn actual injuries as under the Sherman Act. Indeed, while

316. Ch. 323, 38 Stat. 730 (1914) (codified as amended in scattered sections of 15 and 29 U.S.C.).

317. 15 U.S.C. § 18a(b) (2018).

318. *Merger Review: How Mergers Are Reviewed*, FED. TRADE COMMISSION, https://www.ftc.gov/news-events/media-resources/mergers-and-competition/merger-review [https://perma.cc/7YQZ-Q3UY] (last visited Feb. 14, 2020).

319. Stucke & Grunes, *supra* note 274, at 257.

320. WU, *supra* note 273, at 150.

321. *Id.*

322. Stucke & Grunes, *supra* note 274, at 257–58.

323. *Id.* at 297.

324. Delrahim, Entertainment Industry Enforcement, *supra* note 32.

those who control a platform of speech might appear to pose a minor threat to speech—as they provide only the forum—observers contend that tech giants can and do determine which competitors can speak and how loudly.[325] To account for the speculative nature of this task, merger enforcers should treat commercial speech as a qualitative element of competition by focusing on power and incentives: they should review whether the surviving firm would gain not only the power to impair the flow of commercial information but also the incentives to do so. For instance, Google's acquisitions of AdMob and DoubleClick might have vested Google with not only an abundance of power over the display and flow of commercial advertising but also the incentives to exploit this power in a manner favoring the products it sells.[326] This harm remains true even if the merger is unlikely to alter prices, considering the array of firms that offer consumers free services yet claim the power to suppress speech. Merger analysis should thus inquire into whether the combination would reduce the number of platforms of expression, creating incentives for the surviving firms to diminish the quality and diversity of commercial information passing through those channels.

Although this Article has primarily explored the Sherman Act, merger enforcement should likewise consider commercial speech and ideas to entail a qualitative element of competition. Since the agencies must predict a merger's anticompetitive effects, they should analyze whether increased market concentration would encourage, not just empower, the surviving firm to quash commercial speech regardless of industry. The next section reviews similar proposals made with respect to the "essential facilities" doctrine.

C. Essential Facilities

An intriguing means of protecting free speech comes via antitrust's essential facilities doctrine. Although firms seldom have a duty to enhance their rivals' ability to compete, a controversial exception arises when a monopolist denies the use a facility that is necessary for competition in a specific market.[327] A stadium is generally considered an essential facility because its availability is required for one to operate a professional team.[328] The test of whether an actor has violated this doctrine consists of four elements: 1) control of the essential facility; 2) a competitor's inability, practically or reasonably, to duplicate the essential facility; 3) the denial of

325. *See supra* Part III.A.

326. *See* Diane Bartz, *Google Wins Antitrust OK to Buy DoubleClick*, REUTERS (Dec. 20, 2007, 9:44 AM), https://www.reuters.com/article/us-doubleclick-google-idUSN2039512220071220 [https://perma.cc/4MKD-T5NF].

327. Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187, 1191 (1999). *See generally* Allen Kezsbom & Alan V. Goldman, *No Shortcut to Antitrust Analysis: The Twisted Journey of the "Essential Facilities" Doctrine*, 1996 COLUM. BUS. L. REV. 1, 1–2 ("As originally conceived, when a monopolist or near-monopolist controlling what is deemed an 'essential facility' denies an actual or potential competitor access to that facility, where the facility cannot reasonably be duplicated and where there is no valid technical or business justification for denying access, then the doctrine is applied.").

328. Hecht v. Pro-Football, Inc., 570 F.2d 982, 992 (D.C. Cir. 1977).

the use of the facility to a competitor; and 4) the feasibility of providing the facility.[329] Evidence suggests that the courts should apply the essential facilities doctrine to speech platforms.

Courts' increasing hostility to the essential facilities doctrine presents an obstacle.[330] It is considered fairly audacious to require that firms lend their property to rivals for the sake of aiding those rivals.[331] Scholars have even noted that the U.S. Supreme Court has in dicta refused to confirm whether the essential facilities doctrine remains good law.[332] Given this landscape, the odds that lower courts—much less the Supreme Court—might expand the essential facilities doctrine to include platforms of speech is very low.

Nevertheless, scholars, observers, and even a few courts[333] have seized on this doctrine's promise as a mechanism to promote speech.[334] YouTube, for example, so commands the video-sharing market that it can exclude viewpoints and ideas from this medium.[335] As one observer stated, "Google's consistent violations of search neutrality, as well as its abuse of monopoly power, make the essential facilities doctrine the ideal manner in which to regulate Google and better protect consumers."[336] Similar tech firms that may control an essential facility include, but are not limited to, Amazon, Apple, and Facebook.[337] In these circumstances, scholars have argued that the denial of an essential facility involved in the trade of speech or information should violate antitrust law.

This Article joins the skeptics of the essential facilities doctrine in at least the context of speech. The issue, beyond the Supreme Court's hostility to it,

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329. MCI Commc'ns Corp. v. AT&T, 708 F.2d 1081, 1132–33 (7th Cir. 1983).

330. Salil K. Mehra, *Competition Law for a Post-Scarcity World*, 4 TEX. A&M L. REV. 1, 28–29 (2016) ("[T]he United States Supreme Court, if not foreclosing [the essential facilities doctrine] outright, has at least kept a wary distance.").

331. *See* Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 852 (1990) (describing the problems with enforcing the essential facilities doctrine).

332. Khan, *supra* note 40, at 801 ("In 2004, however, the Court disavowed the essential facilities doctrine in dicta, leading several commentators to wonder whether it is a dead letter.").

333. hiQ Labs, Inc. v. LinkedIn Corp., 273 F. Supp. 3d 1099, 1117 (N.D. Cal. 2017).

334. *See, e.g.*, Brett Frischmann & Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 ANTITRUST L.J. 1, 65 (2008); Khan, *supra* note 40, at 802 ("Treating aspects of Amazon's business as 'essential facilities' seems appropriate, given that factors two, three, and four of the *MCI* test are likely to hold for at least one line of business.").

335. Madeline Berg, *Logan Paul May Have Been Dropped by YouTube, but He'll Still Make Millions*, FORBES (Jan. 11, 2018, 11:37 AM), https://www.forbes.com/sites/maddieberg/2018/01/11/logan-paul-may-have-been-dropped-by-youtube-but-hell-still-make-millions/ [https://perma.cc/47XE-WMP5].

336. Lisa Mays, Note, *The Consequences of Search Bias: How Application of the Essential Facilities Doctrine Remedies Google's Unrestricted Monopoly on Search in the United States and Europe*, 83 GEO. WASH. L. REV. 721, 758 (2015).

337. *See* Russell Brandom, *The Monopoly-Busting Case Against Google, Amazon, Uber, and Facebook*, VERGE (Sept. 5, 2018, 8:14 AM), https://www.theverge.com/2018/9/5/17805162/monopoly-antitrust-regulation-google-amazon-uber-facebook [https://perma.cc/SJ4S-AQVD].

is that a speech platform may fail to qualify as "indispensable"[338] for competition.[339] Courts have also sought to apply the doctrine only where the challenged conduct lacks any justification—such as a per se violation of antitrust law. Yet with speech, a court would likely assess the act's procompetitive justification, which makes the doctrine a poor fit.[340] Further, the doctrine depends on whether the monopolist refused to share the facility. Yet a monopolist like Google cannot possibly share the top search result spot.[341] The point is that the essential facilities doctrine presents an initially tempting solution, but its flaws are greater than its promise.

Given these realities, it makes more sense to emphasize tenable solutions. In contrast to the essential facilities doctrine, the argument made in this Article *benefits* from modern inertia. Even though it was traditionally difficult to premise an antitrust violation on reduced quality, the rise of nonprice goods has seemingly caused the courts to rethink whether supracompetitive prices are a de facto requirement of antitrust liability.[342] In light of this movement, and the deterioration of the essential facilities doctrine, the better solution is to foster commercial speech as a qualitative aspect of competition under the Sherman Act.

CONCLUSION

Since private conduct lies outside of the First Amendment, individuals and firms may abridge speech without implicating the Constitution. The issue is that corporations in the information sectors have incentives to manipulate or degrade commercial discourse. This Article argues that the Sherman Act should, contrary to modern precedent, proscribe trade restraints that impair commercial speech. It is key that modern firms in the technology, innovation, media, and platform industries compete over ideas, speech, and information rather than priced, tangible goods. This casts doubt on antitrust's current approach. To improve this framework, antitrust should impose liability when a monopolist has unreasonably deprived consumers of commercial information and created a market failure of ideas. Further, adoption of this proposal would protect the right of private parties to discriminate against repugnant ideas notwithstanding popular calls for antitrust to regulate all types of political and social expression. Thus, in light of the modern value of ideas and speech, antitrust's ability to promote the

338. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004).

339. Kevin Werbach, *The Network Utility*, 60 DUKE L.J. 1761, 1823 (2011) ("Though some of them are now very large companies, no one player dominates the market, and none appears to control an essential competitive input.").

340. Robert Pitofsky et al., *The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70 ANTITRUST L.J. 443, 461 (2002).

341. Marina Lao, *Search, Essential Facilities, and the Antitrust Duty to Deal*, 11 NW. J. TECH. & INTELL. PROP. 275, 278 (2013).

342. *See, e.g.*, Khan, *supra* note 40, at 717 (questioning whether modern monopolies impose other significant harms to consumer welfare, unrelated to supracompetitive prices).

marketplace of ideas would achieve the precise goals sought by modern competition laws.