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# MUZZLING ANTITRUST: INFORMATION PRODUCTS, INNOVATION AND FREE SPEECH

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## INTRODUCTION

How well does the American legal system balance the diverse values society espouses? Courts must often navigate values that are not consistent, commensurate, or subject to ordinal ranking. The challenge of incommensurate values arises at the interface between legal regimes whose respective values may be in tension or within a single regime espousing multiple values. But even legal regimes that nominally serve a single value may still encounter incommensurability issues regarding its implementation.

This article examines the confluence of incommensurate values within the important and increasingly frequent context of antitrust challenges to information product<sup>1</sup> redesigns. When addressing antitrust challenges to search engine modifications, for example, the courts must account for free speech—a value exogenous to antitrust—as well as competition and innovation, two goals often considered in tandem within an antitrust framework. Navigating speech and consumer welfare considerations—the dominant value of antitrust—presents a classic incommensurability problem. Moreover, even competition and innovation have proven to be largely incommensurate in practice, notwithstanding their shared consumer welfare orientation. Despite antitrust’s ostensible facility with more nuanced tradeoffs, the courts have been largely unwilling or unable to transcend binary “all-or-nothing” outcomes when either speech or innovation-based defenses are implicated. Courts have tried to avoid tradeoffs between values by designating one value as controlling, using all-or-nothing approaches that can do injustice to one or more competing values. This Article explains why legal middle grounds, while potentially difficult, can and must be established to deal with speech and innovation.

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<sup>1</sup> See CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 3 (1999) (defining information as “anything that can be digitized. . . . [B]aseball scores, books, databases, magazines, movies, music, stock quotes, and Web pages are all *information goods*”).

The article analyzes a number of cases, involving firms that dominate their respective information product markets, characterized by speech and/or innovation-based defenses. The plaintiff in *Kinderstart*, which operated a website that provided a search engine and directory for content associated with young children, sued search engine giant Google.<sup>2</sup> Kinderstart alleged that Google engaged in anticompetitive conduct, including the manipulation of its PageRank system to deflate the ranking of Google's own competitors in niche markets.<sup>3</sup> Google maintained that the "antitrust claims [were] barred by the First Amendment."<sup>4</sup> Similarly, Sunbeam Television, a local broadcaster, sued the dominant television audience ratings company Nielsen; Sunbeam alleged that Nielsen had hastily introduced a flawed modification to its system of measuring audience size to exclude potential competitors in the ratings market.<sup>5</sup> Nielsen responded that "[its] ratings are opinions that are protected by the First Amendment and, thus, cannot give rise to antitrust liability."<sup>6</sup> Although the Supreme Court has ruled in *Sorrell v. IMS Health, Inc.*,<sup>7</sup> a case that involved direct government restrictions on speech rather than more indirect restrictions operating via the antitrust laws, that an information product was speech entitled to strong First Amendment protections (the product in question was data regarding physician pharmaceutical prescribing practices)<sup>8</sup>, and despite vigorous advocacy of this First Amendment-based defense to alleged anticompetitive product design in recent years, no court has ruled on the viability or contours of such a defense.<sup>9</sup>

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<sup>2</sup> Complaint at 1, 4, *KinderStart.com LLC v. Google, Inc.*, No. C 06-2057 JF (RS), 2006 WL 3246596 (N.D. Cal. July 13, 2006).

<sup>3</sup> *See id.* at 5-6, 19 (arguing that Google exercised "[b]lockage" to "effectively choke[] off search-driven traffic into the multitude of Websites owned and managed by such Class members").

<sup>4</sup> Motion to Dismiss Second Amended Complaint at 17 n.7, *KinderStart.com, LLC v. Google, Inc.*, No. C 06-2057 JF (RS), 2007 WL 831806 (N.D. Cal. Mar. 16, 2007).

<sup>5</sup> *See Sunbeam Television Corp. v. Nielsen Media Research, Inc.*, 763 F. Supp. 2d 1341, 1345 (S.D. Fla. 2011), *aff'd*, 711 F.3d 1264 (11th Cir. 2013).

<sup>6</sup> Motion to Dismiss the Complaint and Supporting Memorandum at 15, *Sunbeam Television Corp. v. Nielsen Media Research, Inc.*, 763 F. Supp. 2d 1341 (S.D. Fla. 2011) (No. 09-60637-CIV).

<sup>7</sup> 131 S. Ct. 2653 (2011).

<sup>8</sup> *Id.* at 2659 (2011) ("Speech in aid of pharmaceutical marketing . . . is a form of expression protected by the Free Speech Clause of the First Amendment.")

<sup>9</sup> Just prior to publication of this article, *S. Louis Martin v. Google* (Superior Court of Cal., County of San Francisco) (No. CGC-14-539972) was decided (Nov. 13, 2014). Coastnews.com filed what appeared to be a pro se antitrust complaint alleging, among other things, anticompetitive search bias. The plaintiff argued that Google's biased search results are "Owellian [sic] and it is perjury for profit. Google should be ashamed but clearly it is not." *Id.* at 5. The complaint concludes with a section entitled, "Corroboration of Experts" that consists of quotations that are largely unrelated or tangentially related to the ostensible legal issues. Google met its burden in demonstrating that the claims arose from

Within the Google search engine and Nielsen ratings contexts, innovation-based arguments also arise. Google's greatest antitrust challenge to date within the United States arguably occurred outside of the private litigation context and, instead, in a hearing and an investigation by Congress and the Federal Trade Commission, respectively.<sup>10</sup> Google defended its modifications of its search engine algorithm as innovations undertaken to enhance the quality of its product and consumer experience.<sup>11</sup> Nielsen has also defended its own product redesigns as increasing their television ratings' quality, more specifically their accuracy.<sup>12</sup> Nielsen has further argued that antitrust is "not supposed to be in the business of policing the . . . the quality [of a monopolist's] services."<sup>13</sup> In comparison to the relative novelty of speech-based defenses to alleged predatory design, the law regarding innovation-based defenses with that antitrust context is better developed, albeit substantively problematic.

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"constitutionally protected activity" and, thereby, the burden shifted to Martin to "demonstrate a probability of prevailing on the merits." *Id.* Martin filed no opposition to this motion and "produced no evidence supporting a probability of success." The court dismissed the complaint without leave to amend pursuant to Cal. Civ. Pro. Code 425.16.

<sup>10</sup> The actual proceedings of the FTC's investigation are not public. Though the FTC did issue a statement upon closing the matter without taking further action. Fed. Trade Comm'n, FTC File No. 111-0163, Statement of the Federal Trade Commission Regarding Google's Search Practices 1 (2013), *available at* [http://www.ftc.gov/sites/default/files/documents/public\\_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf](http://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf) (addressing the closure of the FTC's "investigation relating to allegations that Google unfairly preferences its own content on the Google search results page and selectively demotes its competitors' content from those results"). However, Google Executive Chairman Eric Schmidt's written testimony submitted to the Senate Subcommittee on Antitrust, Competition Policy, and Consumer Rights explicitly addresses the FTC investigation. *See The Power of Google: Serving Consumers or Threatening Competition: Hearing Before the S. Subcomm. on Antitrust, Competition Policy & Consumer Rights of the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Eric Schmidt, Executive Chairman, Google, Inc.), *available at* [www.gpo.gov/fdsys/pkg/CHRG-112shrg71471](http://www.gpo.gov/fdsys/pkg/CHRG-112shrg71471), at 238-39.

<sup>11</sup> *Id.* at 234. The FTC's assessment, notwithstanding its closing the investigation, was more mixed. Chairman Leibowitz observed that "some evidence suggested that Google was trying to eliminate competition" by modifying its search engine algorithm. Chairman Jon Leibowitz, Opening Remarks re. Google Press Conference, [http://www.ftc.gov/sites/default/files/documents/public\\_statements/opening-remarks-federal-trade-commission-chairman-jon-leibowitz-prepared-delivery/130103googleleibowitzremarks](http://www.ftc.gov/sites/default/files/documents/public_statements/opening-remarks-federal-trade-commission-chairman-jon-leibowitz-prepared-delivery/130103googleleibowitzremarks) at 5.

<sup>12</sup> Motion to Dismiss the Complaint and Supporting Memorandum at 1, *Sunbeam Television Corp. v. Nielsen Media Research, Inc.*, 763 F. Supp. 2d 1341 (S.D. Fla. 2011) (No. 09-60637-CIV).

<sup>13</sup> *See* Transcript of Hearing on Defendant's Motion to Dismiss at 39-41, *Sunbeam Television Corp. v. Nielsen Media Research, Inc.*, 763 F. Supp. 2d 1341 (S.D. Fla. 2011) (No. 09CV60637), 2010 WL 858232, at \*22 (citing *Pacific Bell Tel. Co. v. LinkLine Commc'ns, Inc.*, 129 S.Ct. 1109, 1121 (2009)).

While such speech and innovation-based defenses to antitrust actions involving information product redesign are distinctive in their provenance and operation, they both implicate incommensurate values and within this context both defenses currently yield polar outcomes. If such redesigns are deemed protected speech, then a financially and socially significant sector of the economy would be effectively shielded from the antitrust laws. If such redesigns are not so protected by the First Amendment, then conventional antitrust analysis applies with no speech solicitude. This all-or-nothing approach does not support a legal middle ground wherein the First Amendment influences but does not trump the antitrust analysis. In a roughly analogous manner, if the redesign is deemed a nonpretextual innovation, it is essentially immunized regardless of its anticompetitive effect. The courts neither assess the magnitude of any bona fide innovation, nor consider its overall competitive consequences. Either consideration would have indicated a more nuanced approach.

Jointly considering these speech and innovation issues is important not only because they may both be argued in information product cases, but also because both raise fundamental questions regarding how to navigate incommensurate values along the interface between the First Amendment and antitrust, as well as along the dynamic and static efficiency interface within antitrust.<sup>14</sup> The difficulties associated with making tradeoffs across incommensurate values have led both legal regimes towards de facto, and arguably flawed, polar treatment in which legal determinations depend on the existence, rather than the levels, of protected speech or nonpretextual innovation, respectively.

This Article rejects these approaches as overly simplistic. Approaches that would effectively immunize all anticompetitive speech or innovation so long as those characteristics are not pretextual. By advocating a middle ground for the protection of speech and the evaluation of innovation in the antitrust context, the Article significantly departs from analyses of potentially anticompetitive conduct involving information products offered by the antitrust community.<sup>15</sup> All-or-nothing positions fail to protect either First Amendment

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<sup>14</sup> Additionally, the information product context introduces a different type of incommensurability challenge even within the comparatively more straightforward context of *merely* applying the antitrust laws. While antitrust law unambiguously embraces the importance of broadly assessing competitive effects in terms of both price and innovation effects, antitrust's ability to actually identify and, as necessary, trade off between those effects lags considerably.

<sup>15</sup> See, e.g., Robert H. Bork & J. Gregory Sidak, *What Does the Chicago School Teach About Internet Search and the Antitrust Treatment of Google?*, 8 J. COMPETITION L. & ECON. 663, 663 (2012) (conducting economic analysis on behalf of Google, but failing to mention any First Amendment concerns); Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Case Against Google*, 34 HARV. J.L. & PUB. POL'Y 171, 171-72 (2011) (arguing against antitrust intervention against Google, but without identifying free speech issues).

rights or antitrust values; to the contrary, they openly encourage outcomes that would undermine them. This Article introduces two complementary analytical frameworks that directly grapple with the defining and complicating features of speech and innovation-based defenses to antitrust actions. These frameworks are motivated by and discussed within the context of information products, but they have more wide-ranging application to speech and innovation defenses in other antitrust settings.

Part I introduces the parallel and increasingly intertwined problems plaguing the treatment of speech and innovation in the context of potentially anticompetitive redesigns of information products. Recent litigation and/or investigations involving Google and Nielsen provide illustrative examples. Part II examines the defining features of antitrust's traditional treatment of speech-based issues and its treatment of innovation as one class of legitimate business justifications.<sup>16</sup> Presently, both speech and innovation analyses are characterized by de facto polar outcomes. Part II argues that the challenges associated with speech and innovation issues within antitrust settings can be addressed by recognizing the perils associated with such polar thinking and embracing and further developing those strands of First Amendment and innovation-related jurisprudence amenable to more nuanced analysis. Part III recommends changes to the treatment of both speech and innovation within antitrust settings. It stakes out a more modest approach that falls between immunization from antitrust liability and no recognition in the case of speech, and per se legality and no recognition of legitimate business purpose concerns in the case of innovation. The Article concludes by revisiting the Google and Nielsen examples and applying the recommended analytical framework to them.

#### I. SPEECH AND PRODUCT REDESIGN BY PURVEYORS OF INFORMATION

Recent cases involving Google and Nielsen as information product purveyors exemplify settings in which the speech and innovation-based aspects of a product redesign allow for defenses against antitrust actions brought under section 2 of the Sherman Act and section 5 of the FTC Act.<sup>17</sup> Given each firm's market power, product redesigns that generate Google's PageRank listings and Nielsen's television audience share ratings have the potential to affect competition.<sup>18</sup> Both companies argue, in essence, that their allegedly

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<sup>16</sup> See *infra* notes 195-197 and accompanying text (discussing antitrust proscription of "unreasonable" restraints of trade.)

<sup>17</sup> See 15 U.S.C. §§ 2, 45 (2012) (authorizing government action to prevent monopolization and unfair methods of competition, respectively).

<sup>18</sup> See *Sunbeam Television Corp. v. Nielsen Media Research, Inc.*, 711 F.3d 1264, 1267 (11th Cir. 2013) ("Neither party disputes that Nielsen exercises monopoly power over the television audience measurement services industry, both nationally . . . and for 210 local markets."); Jessica Lee, *Google's Search Market Share Shoots Back to 67%*, SEARCH ENGINE WATCH (Aug. 16, 2013), <http://searchenginewatch.com/article/2289560/Googles->

anticompetitive redesigns are effectively immunized from antitrust scrutiny because they are speech-based innovations. Either speech or innovation, the companies claim, provides ample justification for such protection.<sup>19</sup> The legal matters embroiling these companies provide both a specific focus for this Article and a starting point for broader examination of more fundamental policy questions.

#### A. *Google*

Countless businesses depend heavily on website traffic that flows to them from Google's basic search engine. An algorithm at the core of Google's search engine, known as PageRank, lists web pages to reflect their relevance to a search query.<sup>20</sup> The algorithm is revised continually to improve the search engine's performance.<sup>21</sup> Google is the dominant firm in the search engine market with an estimated market share of nearly seventy percent in the United States.<sup>22</sup> The anticompetitive potential of Google's PageRank system is fairly direct. Numerous web-based competitors of many of Google's vertically integrated businesses have alleged that Google has both the incentive and the ability to injure competition by biasing its search engine to favor Google's own interests.<sup>23</sup> Furthermore, even in markets in which Google does not directly

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Search-Market-Share-Shoots-Back-to-67, *archived at* <http://perma.cc/N92F-NAUB> (indicating that Google "remains the uncontested top search engine in the U.S.>").

<sup>19</sup> Sunbeam Television Corp. v. Nielsen Media Research, 763 F. Supp. 2d 1341, 1345 (S.D. Fla. 2011); KinderStart.com, LLC v. Google, Inc., No. C 06-2057 JF (RS), 2007 WL 831806, at \*13 (N.D. Cal. Mar. 16, 2007); Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568, at \*4 (W.D. Okla. May 27, 2003).

<sup>20</sup> Malia Wollan, *The Google Algorithm as Extinction Model*, N.Y. TIMES, Dec. 13, 2009, (Magazine), at 42 ("Google's search engine uses an algorithm called PageRank to identify the most important Web sites on a given topic by analyzing links: a Web page is important if other important pages link to it.").

<sup>21</sup> See L. Gordon Crovitz, *Information Age: Google Search: Regulation Leads to Innovation*, WALL ST.J., Oct. 7, 2013, at A15.

<sup>22</sup> See Lee, *supra* note 18 (reporting that Google has a market share of 67%, while competitors Bing and Yahoo respectively hold 17.9% and 11.3%). *But see* Mark R. Patterson, *Google and Search-Engine Market Power*, HARV. J.L. & TECH. OCCASIONAL PAPER SERIES (July 2013) (providing a valuable analysis of the challenges associated with assessing the market power of information intermediaries).

<sup>23</sup> See *The Power of Google: Serving Consumers or Threatening Competition?: Hearing Before the S. Subcomm. on Antitrust, Competition Policy, & Consumer Rights of the S. Comm. on the Judiciary*, 112th Cong. 28 (2011) (statement of Sen. Michael S. Lee), <http://www.gpo.gov/fdsys/pkg/CHRG-112shrg71471/pdf/CHRG-112shrg71471.pdf>, *archived at* <http://perma.cc/RA6H-4A2T> ("No other specialized business or search site can hope to compete on anything close to a level playing field when Google uses its significant market power to disadvantage online competitors, [creating a] clear and inherent conflict of interest."); FAIR SEARCH, GOOGLE'S TRANSFORMATION FROM GATEWAY TO GATEKEEPER: HOW GOOGLE'S EXCLUSIONARY AND ANTICOMPETITIVE CONDUCT RESTRICTS INNOVATION AND DECEIVES CONSUMERS 2 (2011), *available at* <http://www.fairsearch.org/wp->

compete, it may have an incentive to bias its PageRank to favor firms paying for special listings over firms that do not.<sup>24</sup> Competitive concerns regarding “search bias” have resulted in antitrust investigations across the globe, including by Brazil, the FTC, and the European Commission.<sup>25</sup> Numerous private parties have also sued Google on multiple grounds, including antitrust. Each of the Google matters addressed herein<sup>26</sup> illustrates a different aspect of the intersections of antitrust, speech, and innovation.

The FTC undertook a “wide-ranging” and “comprehensive investigation” to examine “whether Google manipulated its search algorithms and search results page in order to impede a competitive threat posed by vertical search engines.”<sup>27</sup> In January 2013, a unanimous FTC closed its “search bias” investigation without launching a formal complaint.<sup>28</sup>

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content/uploads/2011/11/Googles-Transformation-from-Gateway-to-Gatekeeper-Edited.pdf, archived at <http://perma.cc/AT9Y-6G5V> (“Google’s competing vertical and information content services sites give it the incentive – and its dominance in search and search advertising gives it the ability – to exclude competition from independent sites.”).

<sup>24</sup> See, e.g., David Hatch, *Google’s Dominance*, 21 CQ RESEARCHER 953, 960 (2011).

<sup>25</sup> Trade Reg. Rep. (CCH) Rpt. Ltr. No. 1331, at 10 (Oct. 23, 2013) (discussing activities of the Brazil Council for Economic Defense); 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), available at <http://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc>, archived at <http://perma.cc/H4JQ-AGZH>. The European Commission’s investigation into Google’s conduct opened in November 2010:

The Commission will investigate whether Google has abused a dominant market position in online search by allegedly lowering the ranking of unpaid search results of competing services . . . (so-called vertical search services) and by according preferential placement to the results of its own vertical search services in order to shut out competing services. The Commission will also look into allegations that Google lowered the ‘Quality Score’ for sponsored links of competing vertical search services. The Quality Score is one of the factors that determine the price paid to Google by advertisers.

Press Release, European Comm’n, Antitrust: Commission Probes Allegations of Antitrust Violations by Google (Nov. 30, 2010), available at [http://europa.eu/rapid/press-release\\_IP-10-1624\\_en.htm](http://europa.eu/rapid/press-release_IP-10-1624_en.htm), archived at <http://perma.cc/UKG6-BWKA>. After four years, the European Union’s competition authority’s investigation remains ongoing under newly appointed Competition Commissioner Margrethe Vestager. Google had tried three times, all were unsuccessful, to arrive at a settlement with her predecessor Joaquín Alumina. James Kanter, *European Antitrust Regulators Ask for More Information in Google Investigation*, N.Y. TIMES, Dec. 11, 2014, at B1.

<sup>26</sup> That is, *FTC, KinderStart*, and *Search King*.

<sup>27</sup> FED. TRADE COMM’N, *supra* note 10, at 2.

<sup>28</sup> *Id.* at 1; Edward Wyatt, *U.S. Ends Inquiry on Web Search; Google is Victor*, N.Y. TIMES, Jan. 4, 2013, at A1 (“The Federal Trade Commission on Thursday handed Google a major victory by declaring, after an investigation of nearly two years, that the company had not violated antitrust or anticompetition statutes in the way it arranges its Web search results.”).



Most important for instant purposes is the FTC's treatment of innovation—which received substantial attention in its public statement. The investigation's focus was whether a plausible procompetitive justification (i.e., consumer benefit) in the form of “innovation,” broadly defined, existed for the algorithm modifications at issue.<sup>29</sup> The FTC noted that Google's search algorithm modifications at times demoted the websites of vertical competitors while elevating the rankings of its own offerings.<sup>30</sup> Nonetheless, the FTC was satisfied that Google's justifications for those modifications, such as improved customer experience, were “supported by ample evidence.”<sup>31</sup> Additionally, the FTC had “not found sufficient evidence” of manipulation to “unfairly disadvantage” vertical competitors.<sup>32</sup>

The primary connective tissue linking the FTC's general findings regarding the pro- and anticompetitive effects with the ultimate legal outcome was the agency's reluctance to “second-guess a firm's product design decisions” given the existence of amply supported procompetitive justifications.<sup>33</sup> Unfortunately, the FTC's statement lacks any meaningful nuance regarding the magnitudes of the various pro- or anticompetitive effects and their nexus with the search engine modifications.<sup>34</sup>

The FTC's statement does not acknowledge any First Amendment or speech-based issues.<sup>35</sup> It would seem, however, that Google probably would have advocated, or at least raised, a First Amendment defense to the FTC's antitrust investigation. Assuming Google raised such issues, perhaps the FTC declined to address them because the case was disposed of on other grounds. And, in fact, that was the legal outcome to a private action KinderStart instituted against Google; KinderStart's antitrust action was dismissed and the First Amendment claims therein were never resolved.<sup>36</sup> However, in contrast to

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<sup>29</sup> See FED. TRADE COMM'N, *supra* note 10, at 2-3 (“[C]hanges to Google's search algorithm could reasonably be viewed as improving the overall quality of Google's search results . . .”).

<sup>30</sup> See *id.* at 2. This demotion was justified in part as a response to strategies of the vertical sites in question, which were seen to be employing tactics to manipulate the search algorithm. See Frank Pasquale, *Internet Nondiscrimination Principles: Commercial Ethics for Carriers and Search Engines*, 2008 U. CHI. LEGAL F. 263, 283-85 (describing the “black hat” search optimization tactics and the “Google Death Penalty”).

<sup>31</sup> FED. TRADE COMM'N, *supra* note 10, at 3.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* (conceding that “[r]easonable minds may differ as to the best way to design a search results page . . .”).

<sup>34</sup> See Frank Pasquale, *Paradoxes of Digital Antitrust: Why the FTC Failed to Explain Its Inaction on Search Bias*, HARV. J.L. & TECH. OCCASIONAL PAPER SERIES 14-16 (July 2013) (providing thoughtful criticism regarding the FTC's investigation of Google and the shortcomings of its public statement regarding its search bias investigation).

<sup>35</sup> FED. TRADE COMM'N, *supra* note 10 (reviewing only innovation-based defenses).

<sup>36</sup> *KinderStart.com, LLC v. Google, Inc.*, No. C 06-2057 JF (RS), 2007 WL 831806, at \*1 (N.D. Cal. Mar. 16, 2007) (dismissing case without leave to amend).

the secrecy surrounding the FTC's investigation, the developments in private litigation are typically public.

KinderStart's antitrust lawsuit against Google constitutes a variation of the FTC's inquiry. Its primary allegation was that Google removed KinderStart's website from Google's search engine results and assigned it a PageRank of zero.<sup>37</sup> The result, KinderStart alleged, was a "cataclysmic fall of 70%" in its web traffic.<sup>38</sup> Ultimately, the district court dismissed both KinderStart's first and second amended complaints for failing to state a cause of action on any basis, including antitrust.<sup>39</sup> Though the court repeatedly reserved judgment regarding Google's First Amendment defense, its treatment of the issue still warrants closer consideration.

Google claimed that First Amendment-based immunity "shielded [it] from all liability," including any antitrust liability.<sup>40</sup> More specifically, Google sought to analogize its conduct to that of Moody's in *Jefferson County School District v. Moody's Investor's Services, Inc.*,<sup>41</sup> wherein the Tenth Circuit found that Moody's ranking of bonds did not constitute an "intentional interference with contractual relations . . . [and] publication of an injurious falsehood" because its ratings were found to be a "constitutionally protected expression of opinion" and "immune from Sherman Act liability."<sup>42</sup> The court's decision dismissing KinderStart's first amended complaint with leave to amend reserved judgment regarding the speech-based defense but suggested a degree of skepticism.<sup>43</sup> The court commented in a footnote that "*Jefferson County* may be distinguishable because (a) Google is not a media defendant and (b) website rankings may be of little or no public concern in comparison with municipal bond ratings."<sup>44</sup> The court's decision dismissing KinderStart's

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<sup>37</sup> Complaint at 11, *KinderStart.com LLC v. Google, Inc.*, No. C 06-2057 JF (RS), 2006 WL 3246596 (N.D. Cal. July 13, 2006) ([T]he PageRank for Plaintiff . . . was at all pertinent times calculated and assigned by Defendant Google's Toolbar as '0'.")

<sup>38</sup> *Id.* at 7.

<sup>39</sup> See *KinderStart.com, LLC*, 2007 WL 831806, at \*24 ("Under these circumstances, the Court concludes that there is no reasonable likelihood that KinderStart will cure the defects in the [Second Amended Complaint] by further amendment.")

<sup>40</sup> Defendant Google Inc.'s Motion to Dismiss Plaintiff's Second Amended Complaint, *supra* note 10, at 2 (arguing for complete immunity for "Google's editorial decisions themselves").

<sup>41</sup> 175 F.3d 848 (10th Cir. 1999).

<sup>42</sup> *Id.* at 851; see also *KinderStart.com, LLC*, 2006 WL 3246596, at \*10 n.6 (discussing *Jefferson Cnty. Sch. Dist.*, 175 F.3d at 851).

<sup>43</sup> See *KinderStart.com LLC*, 2006 WL 3246596, at \*16 ("KinderStart has not alleged facts tending to show that Google's search engine, encompassing its index, web search form, Results Pages and PageRank scores, [was] the 'functional equivalent of a traditional public forum.'").

<sup>44</sup> *Id.* at \*10 n.6. Dismissing the second amended complaint, the District Court stated that because it was dismissing on other grounds it did not address Google's arguments that it was immune from suit based on either general First Amendment principles or the

second amended complaint merely reserved judgment regarding whether the page rankings were protected speech.

The court's reservation regarding the comparability of Google's website rankings and Jefferson County's bond ratings is reasonable, though the court's particular distinction regarding the protections afforded the press as opposed to other speakers runs counter to a longstanding principle in American jurisprudence that members of the press are not entitled to greater First Amendment protection *per se*.<sup>45</sup> It would seem that the more pointed and direct divergence between *KinderStart* and *Jefferson County* concerns other, more fundamental, features of the speech at issue.

Though not within the antitrust context, Google's argument that the First Amendment immunized its PageRanks has enjoyed some success, for example, in *Search King, Inc. v. Google Tech., Inc.*,<sup>46</sup> in which Google was sued for tortious interference with contractual relations and antitrust violations. The district court's primary reference point regarding the tort claims was an Oklahoma case involving tortious interference with prospective business advantage.<sup>47</sup> The Oklahoma court's decision turned on whether or not the holding in one tortious interference context applied to the other. The key holdings were whether the rankings constituted opinions, and then the extent to which being deemed an "opinion" rendered the rankings *per se* legal and thus immune from the interference claim.<sup>48</sup> The court found that Google's PageRanks constituted "opinion."<sup>49</sup> What is important here is the nuance with which the court assessed the speech at issue. In particular, the use of the term "opinion" can have potentially profound ramifications for legal outcomes, because the expression of opinion receives substantial protection under the First Amendment.

These recent examinations regarding arguably anticompetitive changes to Google's search engine algorithm raise important questions whose answers may have potentially profound antitrust implications. Under what circumstances do information products constitute speech, and what measure of First Amendment solicitude does, and should, such speech deserve?<sup>50</sup> How

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Communications Decency Act. *KinderStart.com, LLC*, 2007 WL 831806, at \*21 (citing the Communications Decency Act, 47 U.S.C. § 230(c)(2)(A) (2012)).

<sup>45</sup> See 3 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH §22.11 (2013) (characterizing the judiciary's general refusal to provide the press with either advantages or disadvantages not borne by non-media speakers).

<sup>46</sup> See *Search King, Inc. v. Google Tech., Inc.*, No. CIV-02-1457-M, 2003 WL 21464568, at \*1-2 (W.D. Okla. May 27, 2003).

<sup>47</sup> See *id.* at \*3 (discussing *Gaylord Entm't Co. v. Thompson*, 958 P.2d 128, 149-50 (Okla. 1998)).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Google rivals may claim, for example, that Google's (incorrectly low) page ranking of their sites constitutes disparagement of their products or services. Disparagement as an antitrust cause of action has received unequal treatment in federal courts. See generally

should the antitrust system handle the tension between possible pro- and anticompetitive effects often associated with product redesign and innovation? These issues will be further discussed as an application of the proposed recommendations in Part III.

B. *Nielsen*

Not unlike Google, Nielsen's redesign of its own information product prompted antitrust lawsuits in which First Amendment and innovation matters figured prominently. Nielsen generates television audience ratings that advertisers and broadcasters use when buying and selling time slots.<sup>51</sup> Nielsen's audience measurement system reflects two key methodologies: how to develop audience samples, and how to extrapolate ratings from those samples.<sup>52</sup>

In 2008, Nielsen replaced its older meter-diary system with its local people meter ("LPM") system to evaluate audience size.<sup>53</sup> In *Sunbeam Television Corp. v. Nielsen Media Research, Inc.*,<sup>54</sup> Sunbeam, an owner of a local television station that broadcasts news and entertainment programs, alleged that its advertising revenues decreased by \$1 million per month after Nielsen introduced its LPM system.<sup>55</sup> Sunbeam claimed that Nielsen recognized the new system's substantial defects but, nonetheless, rushed it to market in order to preempt competition.<sup>56</sup> In particular, Sunbeam claimed, Nielsen "removed" the incentive for cable operators to "develop a competing technology by

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ABA Section of Antitrust Law, *Antitrust Law Developments* 301-03 (7th ed. 2012). *See, e.g.,* L-3 Comm'ns Integrated Sys., L.P. v. Lockheed Martin Corp., No. 3:07-CV-0341-B, 2008 WL 4391020, at \*7 (N.D. Tex. Sept. 29, 2008) (denying defendant's summary judgment motion in part due to defendant's failure to rely upon a presumption of de minimis effect of disparagement); *David L. Aldridge Co. v. Microsoft Corp.*, 995 F. Supp. 728, 749-51 (S.D. Tex. 1998) (stating that plaintiffs must extensively rebut a presumption of a de minimis disparagement effect, and finding that plaintiff's claim here failed (citing *Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 108 F.3d 1147, 1151, 1152 (9th Cir. 1997); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 288 n.41 (2d Cir. 1979))).

<sup>51</sup> *See* *Television*, NIELSEN, <http://www.nielsen.com/us/en/solutions/measurement/television.html>, archived at <http://perma.cc/832N-2MCR> (last visited Oct. 12, 2014) (describing the role of Nielsen's metrics in marketing and programming decisions).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* ("We measure viewing using our national and local people meters, which capture information about what's being viewed and when, and in the major U.S. markets, specifically who and how many people are watching."). *See generally* KAREN BUZZARD, *TRACKING THE AUDIENCE: THE RATINGS INDUSTRY FROM ANALOG TO DIGITAL* (2012).

<sup>54</sup> 711 F.3d 1264 (11th Cir. 2013).

<sup>55</sup> *Id.* at 1268.

<sup>56</sup> *See Sunbeam Television Corp. v. Nielsen Media Research, Inc.*, 763 F. Supp. 2d 1341, 1352 (S.D. Fla. 2011).

promising in advance that [LPMs] would lead to higher cable ratings.”<sup>57</sup> Sunbeam’s lawsuit alleged state and federal antitrust violations and other various business torts against Nielsen.<sup>58</sup>

Nielsen did not dispute that it had market power. Instead, it argued that the audience ratings constituted protected opinion and, as such, the ratings should be immunized from antitrust action.<sup>59</sup> The judge rejected this position during oral argument. He did, however, leave open the possibility of reconsidering it should the matter proceed beyond the motion to dismiss.<sup>60</sup> The judge’s general skepticism of this First Amendment-immunization defense reflected his discomfort characterizing the ratings as opinions rather than as measurements and his concern that a ruling that immunized Nielsen based on protected opinion grounds would sweep too broadly.<sup>61</sup>

The court did not revisit or resolve Nielsen’s First Amendment defense because it granted summary judgment for Nielsen on the antitrust claims.<sup>62</sup> Of particular interest here is the court’s analysis of the information product redesign at issue, the LPM technology, as an exclusionary act. The court did characterize the record as “reflect[ing] that Nielsen viewed the cable operators as a potential competitive threat” and acknowledged that “[t]here is some ambiguous evidence suggesting that Nielsen implemented [LPM] to stave off that threat.”<sup>63</sup> Ultimately, the court’s ruling turned on its conclusion that Sunbeam was unable to support its claim of the LPM’s “inferiority” to the predecessor meter-diary system.<sup>64</sup>

The court couched its specific rejection of Sunbeam’s antitrust claims based on Nielsen’s product redesign in terms suggesting a more general position that largely rejects antitrust liability associated with arguably innovative product redesigns. The court’s reluctance to meaningfully acknowledge anticompetitive innovation as the basis for an antitrust action reflects two pervasive and legitimate concerns. The first concern involves the system’s

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<sup>57</sup> *Id.* at 1353.

<sup>58</sup> See *Sunbeam Television Corp.*, 711 F.3d at 1268. A closely related case involved *erinMedia*, which claimed to be a potential entrant into the audience rating market. *ErinMedia, LLC v. Nielsen Media Research, Inc.*, 401 F. Supp. 2d 1262 (M.D. Fla. 2005).

<sup>59</sup> See Transcript of Hearing on Defendant’s Motion to Dismiss at 39-41, *Sunbeam Television Corp.*, 763 F. Supp. 2d 1341, 2009 WL 8595918, at \*37-39; Nielsen’s Motion to Dismiss the Complaint and Supporting Memorandum, *Sunbeam Television Corp.*, *supra* note 6, at 15 (“Those ratings are opinions that are protected by the First Amendment and, thus, cannot give rise to antitrust liability.”).

<sup>60</sup> See Transcript of Hearing on Defendant’s Motion to Dismiss, *Sunbeam Television Corp.*, *supra* note 59, at 41-42.

<sup>61</sup> *Id.*

<sup>62</sup> *Sunbeam Television Corp.*, 763 F. Supp. 2d at 1343.

<sup>63</sup> *Id.* at 1353.

<sup>64</sup> *Id.* (stating that while Nielsen “proffered evidence supporting the claimed superiority of [its newly introduced technology], no Sunbeam witness, fact or expert was willing to testify that is inferior to the pre-existing [technology]”).

relative ability or inability to adjudicate such matters. As a related matter, the second concern involves disincentivizing innovation more generally. The question is how to *apply* antitrust law in a manner that accounts for these concerns while still ensuring the protection of competition policy values. Part II critically assesses the manner in which antitrust has navigated those concerns both in theory and practice.

## II. ANTITRUST TREATMENT OF SPEECH AND OF INNOVATION

Part I identified important and unsettled legal questions that implicate competition policy, speech, and legitimate business purposes in the form of innovation. It also critiqued antitrust's ability to navigate the noneconomic and dynamic efficiency considerations raised within the context of high-tech information products. Given antitrust's inherent common law nature,<sup>65</sup> it is particularly important to understand the modern evolution of antitrust's treatment of speech and innovation.

American antitrust law derives largely from the Sherman Act's two primary provisions, sections 1 and 2, which proscribe collusion and monopolization, respectively.<sup>66</sup> For many decades, antitrust law has evinced an increasing willingness to balance the pro- and anticompetitive effects of challenged conduct and, as a corollary of sorts, a decreasing tolerance for rules determining conduct to be illegal *per se*.<sup>67</sup> There are, however, two aspects—oftentimes with varying magnitudes—of the information product cases at issue whose respective analysis within antitrust cases arguably lack nuance. They are speech and innovation.

In the information product redesign matters that Part I discussed, the First Amendment-based defenses were raised but not resolved owing to the

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<sup>65</sup> See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978) (“Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition.”).

<sup>66</sup> See 15 U.S.C. § 1 (2012) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”); *id.* § 2 (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.”). Another important antitrust provision, for instant purposes, is section 5 of the FTC Act, which proscribes “unfair methods of competition.” 15 U.S.C. § 45 (2012). While the Federal Trade Commission does not have direct Sherman Act authority, it can bring actions against conduct that would violate the Sherman Act under section 5 of the FTC Act.

<sup>67</sup> See *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (stating that the Supreme Court “presumptively applies rule of reason analysis” and has “expressed reluctance to adopt *per se* rules . . . “where the economic impact of certain practices is not immediately obvious.”” (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997))).

dismissal of the investigation or the lawsuit on antitrust grounds. Those First Amendment questions remain largely unanswered. To begin answering those questions, Part II analyzes the historic protection of First Amendment interests specifically within antitrust settings—precedent that is found to be somewhat lacking. Fortunately, by expanding its discussion of First Amendment precedent beyond the narrow confines of antitrust matters to include defamation and commercial speech, Part II provides a more complete foundation for the analysis.

Under the mantle of innovation, information products are designed and redesigned. Not all product redesigns are, however, necessarily welcomed as procompetitive innovations. In fact, a body of precedent exists in which purported innovations have been challenged under the antitrust laws. Despite antitrust’s longstanding commitment to protecting innovation, its treatment of the issue remains extremely rudimentary in many regards. Towards that end, Part II explores the tension between innovation and consumer welfare and, in particular, the notion that innovation may have both pro- and anticompetitive effects.

This Part’s examination of antitrust law reflects several organizing principles. First, it independently examines antitrust law’s distinctive relationships with speech and with innovation-related matters. Second, while the speech and innovation-related discussions are separate, each reflects antitrust law’s strong propensity towards polar outcomes (i.e., effective immunization or no recognition at all) when the value at issue (whether speech or innovation) is not readily addressed by the price efficiency considerations that dominate antitrust law. Third, this Part explains that despite the increasingly default polar treatment of speech and/or innovation defenses within antitrust contexts, substantial but underappreciated precedent exists in both First Amendment and antitrust law that supports the more nuanced treatment of speech and innovation within antitrust cases.

#### A. *Speech-Based Considerations*

The First Amendment states, “Congress shall make no law . . . abridging the freedom of speech.”<sup>68</sup> In so doing, it articulates a very powerful yet cabined constitutional right that protects speech from government interference, but not from private restrictions.<sup>69</sup> Nonetheless, even antitrust cases brought by private parties embody the requisite government action, in the form of the underlying antitrust legislation and the operation of the judiciary, such that a First Amendment defense can be raised regardless of its ultimate merit.

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<sup>68</sup> U.S. CONST. amend. I.

<sup>69</sup> See, e.g., Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 234 (1992) (“The Constitution is concerned only with the limits on government, even though a person’s autonomy may be assaulted as much if an employer, a neighbor, or a family member silences or stops his access to speech.”).

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This Section first discusses Supreme Court precedent addressing First Amendment challenges to the Sherman Act. These cases hold that no First Amendment solicitude at all is accorded to communications that have no purpose other than supporting illegal activity. Additionally, the First Amendment fully immunizes political speech when petitioning the government regardless of any anticompetitive effects ultimately associated with it. However, as even these seminal cases reveal, the political character of speech interests can be ambiguous. The Court's failure to acknowledge this reality raises significant questions regarding the appropriate constitutional protection for more complicated speech interests. Moreover, even if such speech complexity does not translate into more nuanced levels of constitutional protection, it still must be channeled within a simplistic, all-or-nothing system.

In contrast to the polar outcomes typifying the First Amendment and antitrust intersection, this Section then examines two non-antitrust contexts in which First Amendment rights are protected through more of a middle ground approach. The commercial advertising and defamation rulings discussed herein illustrate both the value and viability of more nuanced approaches to First Amendment protections. Collectively, these examples further suggest that the legal treatment of speech within antitrust actions is arguably amenable to greater nuance than historically applied.

This Section concludes with an examination of whether information products constitute speech that the First Amendment protects. Two differing viewpoints regarding whether Google's search engine results are protected speech are contrasted. This discussion is followed by an examination of the Supreme Court's 2011 ruling that treats data about physician drug prescribing practices as speech. Although this case regards the sale and use of information products as protected speech in the context of government restrictions, the recognition of such a First Amendment defense against antitrust actions regarding information products is an open question.

#### 1. First Amendment and Antitrust Interface

Since its enactment in 1890, the Sherman Act has withstood numerous speech-based challenges. More specifically, with only one exception, the First Amendment has never been successfully invoked to modify antitrust assessment of allegedly anticompetitive conduct. That one exception involves political speech in the form of petitioning the government and, when present, the antitrust laws are inapplicable.<sup>70</sup> While most Supreme Court precedent at

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<sup>70</sup> This exception is known as the *Noerr-Pennington* Doctrine. See *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961) (“[N]o violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws.”); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965) (“Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.”).



issue either withholds any speech-based solicitude or confers outright immunity within a given antitrust action, the limitations inherent in such a polar approach have emerged over time.<sup>71</sup>

a. *No Speech Solicitude*

With regard to the Sherman Act's proscription of concerted or unilateral conduct, the use of speech solely as a means to advance anticompetitive ends will not shield the speaker from an unvarnished application of the antitrust laws.

In *Giboney v. Empire Storage & Ice Co.*,<sup>72</sup> the Court easily rejected a First Amendment challenge to a Missouri statute mirroring section 1 of the Sherman Act.<sup>73</sup> The Court acknowledged that anticompetitive agreements were generally "brought about through speaking or writing."<sup>74</sup> Nonetheless, it declined to find that restrictions on those agreements violate freedom of speech. To hold otherwise, the Court determined, would render it "practically impossible ever to enforce laws against agreements in restraint of trade . . ."<sup>75</sup> *Giboney* and subsequent cases hold that the use of speech solely as an instrumental mechanism to violate the law does not constitute speech warranting First Amendment protection.<sup>76</sup>

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<sup>71</sup> James Hurwitz offers an alternative to the Court's polar approach. See James D. Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 GEO. L.J. 65, 119-20 (1985) ("First amendment interests are not absolute, nor are they all of the same magnitude. . . . Competition policy, therefore, merits substantial weight in the resolution of any policy conflict, even where first amendment interests are involved."). Hurwitz advocates for five "progressive screens" for navigating the interface between government petitioning and antitrust law. *Id.* at 122-26.

<sup>72</sup> 336 U.S. 490 (1949).

<sup>73</sup> It is quite telling that the Supreme Court had not deemed it necessary to expressly address the "argument" that the Missouri statute's prohibition on anticompetitive refusals to deal constituted a violation of the colluding parties' First Amendment rights. Eventually, litigants made this rationale explicit in antitrust cases wherein plaintiffs brought a constitutional challenge to the Sherman Act owing to what the defendants viewed as a distinguishing feature (which, in the case of *Giboney*, was the labor union context).

<sup>74</sup> *Id.* at 502.

<sup>75</sup> *Id.*

<sup>76</sup> See, e.g., *Giboney*, 336 U.S. at 502 ("[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 697-98 (1978) (Though injunctive relief may "impinge rights that would otherwise be constitutionally protected," the First Amendment does not prevent the court from remedying the antitrust violations.). See *infra* notes 303-307 and accompanying text for a more extensive discussion of First Amendment constraints on remedial measures within the context of *Nat'l Soc'y of Prof'l Eng'rs*.

The First Amendment has also been invoked unsuccessfully to challenge section 2's prohibition on monopolization. *Lorain Journal Co. v. United States*<sup>77</sup> concerned the *Lorain Journal's* policy of denying advertising space to any company that also advertised through a radio station serving the same region as the journal.<sup>78</sup> The Supreme Court affirmed the district court's decision that this policy violated section 2, and the *Lorain Journal* was enjoined from engaging in such conduct in the future.<sup>79</sup>

Several aspects of *Lorain Journal* deserve emphasis. First, without more, the mere presence of speech within the context of unilateral activity (as with concerted activity) confers no First Amendment protection from the antitrust laws. Second, not all conduct, even when it involves content-oriented communication or media such as newspapers, necessarily warrants First Amendment protection.<sup>80</sup> The Court emphasized that the *Lorain Journal's* proffered justifications were all wholly anticompetitive.<sup>81</sup> More specifically, the newspaper offered no speech-based defense (e.g., substantive editorial discretion exercised when reviewing advertisements for possible publication).<sup>82</sup> In doing so, however, the Court implicitly suggested a messier reality, albeit lacking in *Lorain Journal*, in which potentially protected speech could be commingled with alleged anticompetitive conduct. The Court did not further develop this analysis as dicta in *Lorain Journal*, nor has it significantly done so in subsequent decades.

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<sup>77</sup> 342 U.S. 143 (1951).

<sup>78</sup> *Id.* at 145.

<sup>79</sup> *Id.* at 144.

<sup>80</sup> Technically, the *Lorain Journal* sought immunization from antitrust liability under the First Amendment's Press Clause rather than Free Speech Clause. *Id.* at 155. The two arguments are interchangeable herein. The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. Notwithstanding the Constitution's specific reference to "the press," it does not appear substantially different from First Amendment rights (whether greater or lesser) that are accorded to speakers outside the press context. SMOLLA, *supra* note 45, §§ 22:10, 22:12-13. The one context in which the existence of a separate Press Clause may have some "jurisprudential significance" concerns the frequently asserted, but not yet judicially accepted, "reporter's privilege" that reporters raise when trying to avoid revealing confidential information. *Id.* §§ 22:13, 22:17. *See also* Edward J. Imwinkelried, THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES § 7.5 (2014) (discussing the widespread adoption of "so called shield laws for reporters" and noting that a reporter shield law has been pending before Congress intermittently for more than a half dozen years).

<sup>81</sup> *See also* *United States v. Lorain Journal Co.*, 92 F. Supp. 794, 798 (N.D. Ohio 1950).

<sup>82</sup> *Id.* at 798, 800-01. The newspaper tracked who advertised on the radio and then summarily canceled their contracts to advertise in the newspaper. *Id.* The newspaper not only acknowledged its anticompetitive motivation, but also sought to justify it. *Id.*

b. *Speech-Based Immunization*

Political speech, in the form of petitioning the government, constitutes the one context in which even unlawful anticompetitive conduct receives First Amendment-based immunization from the antitrust laws. This Section examines the essential constitutional values underlying this category of speech. It also reveals that while the application of First Amendment immunization is routinely straightforward and sufficiently protective of core First Amendment values, when rigidly applied it lacks the capacity to navigate more complex circumstances including those wherein ostensibly political speech occurs outside the context of directly petitioning the government.

*Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*<sup>83</sup> provides the seminal articulation regarding First Amendment protection of anticompetitive petitioning.<sup>84</sup> The lawsuit was part of a larger struggle between the railroad and trucking industries for economic advantage in the “long-distance transportation of heavy freight.”<sup>85</sup> The crux of the truckers’ Sherman Act claims against the railroads was the latter’s “publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business.”<sup>86</sup>

The Court summarily dismissed the antitrust action as violating the First Amendment, specifically the right to petition the government.<sup>87</sup> It held that the Sherman Act does not prohibit individual or collective efforts to persuade the government to enact legislation or take action “that would produce a restraint or a monopoly.”<sup>88</sup> Moreover, the presence of economic self-interest on the part of the petitioners was deemed irrelevant for purposes of First Amendment protection. The Court concluded that to hold otherwise would be perverse. If economic self-interest disqualifies one from taking public positions, then the government would be deprived of “a valuable source of information” and the people would be deprived of “their right to petition in the very instances in which that right may be of the most importance to them.”<sup>89</sup>

But what if the speech at issue in an antitrust action was part of a government boycott? Such political speech is closely related to petitioning in that the target of the speech is the same, though the speech’s operation may be more indirect. An important line of cases concerning political speech and antitrust involves economic boycotts ostensibly organized to influence legislators, but not necessarily directed at them. The issue became whether, and ultimately which, boycotts warrant immunization from antitrust scrutiny.

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<sup>83</sup> 365 U.S. 127 (1961)

<sup>84</sup> For a thoughtful discussion of *Noerr*, see generally Hurwitz, *supra* note 71.

<sup>85</sup> *Noerr*, 365 U.S. at 128.

<sup>86</sup> *Id.* at 129.

<sup>87</sup> *Id.* at 139-40.

<sup>88</sup> *Id.* at 136.

<sup>89</sup> *Id.* at 139.

These indirect political boycotts cases delineate a binary outcome system for judicial decisionmaking in which fact patterns are divided into two outcome categories.<sup>90</sup> Namely, when boycotters' interests are deemed political, they are immunized. When the boycotters are economically self-interested, their interests are not considered political and, therefore, they are subject to the full force of the antitrust laws. But the Supreme Court's rulings themselves suggest, and perhaps even explicitly raise, the insufficiency of this simplistic approach. Due to its extreme terms, the Court's polar approach cannot accommodate more complex realities in which the boycotters' mixed motives include economic self-interests as well as noneconomic or political interests.<sup>91</sup>

*Noerr* and its progeny conferred antitrust immunity for political speech in the form of direct government petitioning whether the targeted audience was the legislature (as in *Noerr* itself), or the judiciary,<sup>92</sup> the executive,<sup>93</sup> or administrative agencies.<sup>94</sup> An important challenge regarding the boundaries of this immunization category concerned "economically tooled" boycotts as illustrated by *Missouri v. National Organization for Women (NOW)*.<sup>95</sup> The National Organization for Women organized a boycott of Missouri's convention industry to pressure the state to support adoption of the then

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<sup>90</sup> In a binary outcome system, the assignment of a fact pattern to one or the other category determines the outcome for that fact pattern. This system contrasts with one in which assignment of a fact pattern to a category determines the appropriate analysis for the fact pattern, but not the ultimate outcome. The constitutionality of a specific government restriction on speech, for example, is analyzed under different criteria depending on whether the speech is classified as commercial or political.

<sup>91</sup> See generally Hillary Greene, *Antitrust Censorship of Economic Protest*, 59 DUKE L.J. 1037 (2010) [hereinafter Greene, *Antitrust Censorship*]; Kay P. Kindred, *When First Amendment Values and Competition Policy Collide: Resolving the Dilemma of Mixed-Motive Boycotts*, 34 ARIZ. L. REV. 709 (1992).

<sup>92</sup> See, e.g., *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 57 (1993) (holding that "an objectively reasonable effort to litigate cannot be sham regardless of subjective intent" and thus such litigation is entitled to antitrust petitioning immunity); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) ("[T]he right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition.").

<sup>93</sup> *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 671 (1965) ("The conduct of the union and the operators did not violate the Act, the action taken to set a minimum wage for government purchases of coal was the act of a public official who is not claimed to be a co-conspirator, and the jury should have been instructed, as UMW requested, to exclude any damages which Phillips may have suffered as a result of the Secretary's Walsh-Healey determinations.").

<sup>94</sup> *Cal. Motor Transp. Co.*, 404 U.S. at 510 ("The same philosophy [underlying the Court's decision in *Noerr*] governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) . . .").

<sup>95</sup> 620 F.2d 1301 (8th Cir. 1980).

pending Equal Rights Amendment to the U.S. Constitution.<sup>96</sup> *NOW* constituted a case of first impression because the circumstances at issue differed so substantially from the more direct government petitioning that had historically received immunization from the antitrust laws.<sup>97</sup>

In *NOW*, the Eighth Circuit held that First Amendment immunity fully protected the boycott as political petitioning; the court also heavily emphasized the organizer's absence of economic self-interest in the boycott.<sup>98</sup> The court's reliance on "government petitioning" to immunize the conduct was inconsistent with its intense focus on parsing the presence or absence of economic interests of the boycotters. As the Supreme Court held unequivocally in *Noerr*, government petitioning is immunized from the antitrust laws regardless of economic self-interest.<sup>99</sup>

The *NOW* ruling reflected the desire to subsume government boycotts within the category of speech immunized from antitrust; but, in contrast to direct governmental petitioning, boycotts would be subject to further analysis regarding motivation (the presence or complete absence of economic self-interest). As it applied to economic boycotts with ultimately political targets, the availability of First Amendment protection entailed a more searching inquiry, but it retained an all-or-nothing character. In sum, *NOW* expanded the category of immunized speech, but this immunity still retains an all-or-nothing character.

*NOW* implicitly raised a critical question: What, if any, First Amendment solicitude extends to defendants in antitrust actions whose alleged anticompetitive activity is a boycott in which the defendants arguably harbor a combination of political (non-economic) and economic interests? The Supreme Court addressed this question in *FTC v. Superior Court Trial Lawyers Ass'n*.<sup>100</sup> The Court rejected the First Amendment defense of a boycott undertaken by a group of the trial lawyers, because the Court deemed the action to be an economically motivated effort by market participants to increase their compensation.<sup>101</sup> While no member of the Court advocated immunizing the boycotters, the Justices strongly disagreed as to whether the First Amendment required some form of solicitude or no solicitude at all in the application of the antitrust law. The majority held, in effect, that the boycotters' economic self-interest stripped them of any First Amendment protection at all, and thus their conduct was condemned after a traditional application of the antitrust laws.<sup>102</sup>

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<sup>96</sup> *Id.* at 1302.

<sup>97</sup> *Id.* at 1304.

<sup>98</sup> *Id.* at 1314 ("[T]he crux of the issue is that *NOW* was politically motivated to use a boycott to influence ratification of the ERA. [The boycott] was not a mere sham to cover up an attempt to interfere with the business relationship of a competitor.").

<sup>99</sup> *E. R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 139 (1961).

<sup>100</sup> 493 U.S. 411 (1990).

<sup>101</sup> *Id.* at 426.

<sup>102</sup> *Id.* at 432.

Several aspects of *Superior Court Trial Lawyers* are particularly noteworthy. The majority's decision to withhold any First Amendment solicitude appeared to heavily reflect its concern regarding the inability of establishing any viable intermediate treatment. More specifically, the majority held that to offer some First Amendment solicitude would "create a gaping hole in the fabric" of the antitrust laws.<sup>103</sup> This all-or-nothing approach clearly reflects factors other than the absence of a reasonable alternative given the dissent's recommendation of applying a traditional antitrust analysis with the rule of reason.<sup>104</sup> Such a rule of reason analysis, in contrast to per se illegality, would obviously entail the more searching legal inquiry which typifies virtually all other antitrust questions, but the underlying antitrust analysis would not have incorporated any First Amendment solicitude. Boycotts found to be unlawful anticompetitive conduct under the rule of reason would then be condemned. As such, owing to the unique facts characterizing *Superior Court Trial Lawyers*, the First Amendment solicitude could have taken the form, as the dissent advocated, of merely applying traditional competitive analysis rather than a truncated form under a per se rule.<sup>105</sup> The majority's decision, therefore, is particularly revealing in its persistent reluctance to meaningfully address some of the difficult questions attendant to speech-based defenses to antitrust actions.

While the outcome in *Superior Court Trial Lawyers* was arguably substantively misguided, it was in other regards consistent with the Court's antitrust approach regarding noneconomic factors including First Amendment considerations.<sup>106</sup> Stated alternatively, there was arguably an inability, as well as an abiding reluctance, to generate an outcome representing a middle ground that would accommodate both First Amendment and antitrust values.<sup>107</sup>

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<sup>103</sup> *Id.* at 431-32.

<sup>104</sup> *Id.* at 438-39 (Brennan, J., concurring in part and dissenting in part) ("[W]hen applying the antitrust laws to a particular expressive boycott, the government may not presume an antitrust violation under the *per se* rule, but must instead apply the more searching, case-specific rule of reason.").

<sup>105</sup> *Id.* at 437 ("Because I believe that the majority's decision is insensitive to the venerable tradition of expressive boycotts as an important means of political communication, I respectfully dissent from Part V of the Court's opinion.").

<sup>106</sup> For a more comprehensive and critical analysis of the Court's treatment of noneconomic factors in antitrust cases including, specifically, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), and *Superior Court Trial Lawyers*, see Greene, *Antitrust Censorship*, *supra* note 91, at 1052-54 (arguing that "noneconomic considerations have fallen into disregard").

<sup>107</sup> Costs are also created when a particular type of case shapes the treatment the law or key prosecutors give to a class of cases that may differ significantly from this "archetypical" case. See, e.g., Hillary Greene, *Patent Pooling Behind the Veil of Uncertainty: Antitrust, Competition Policy, and the Vaccine Industry*, 90 B.U. L. REV. 1397, 1448 (2010) (discussing that acceptable characteristics for patent pools were determined by standard-setting pool, which have quite different characteristics than patent pools that do not involve

Perhaps no case better illustrates the consequences of the Court's stark all-or-nothing approach than understanding what would have been its implications for the Court's earlier decision in *NAACP v. Claiborne Hardware Co.*,<sup>108</sup> which it decided just eight years before *Superior Court Trial Lawyers*. *Superior Court Trial Lawyers* holds that political boycotts are immunized. By contrast, non-political boycotts receive no First Amendment solicitude at all. Notably, political boycotts are defined, in significant part, by the absence of economic self-interest.<sup>109</sup>

*Claiborne Hardware Co.* involved a boycott organized largely by the NAACP against white merchants in Claiborne County to pressure local officials to accede to "demands for racial equality and integration."<sup>110</sup> The white merchants sued, claiming, among other things, that the boycott violated Mississippi's antitrust statute.<sup>111</sup> The Mississippi Supreme Court held that "boycotts to achieve political ends are not a violation of the Sherman Act, after which [Mississippi's] statute is patterned."<sup>112</sup> Though the antitrust issue itself was *not* raised in the ensuing appeal, the U.S. Supreme Court issued a seminal ruling affirming the boycotters' First Amendment immunity.

The U.S. Supreme Court discussed at great length the political and non-economic character of the boycotters' motivations. It noted, for example, "[t]here is no suggestion that" any of the defendants competed with the "white businesses" being boycotted or that they were motivated by "parochial economic interests."<sup>113</sup> Such statements were incorrect and, it would seem, the Court would have understood their inaccuracy even at the time.<sup>114</sup> Perhaps the Court's over-simplification of some boycotters' interests reflected its concern that acknowledging economic interests would undermine the First Amendment solicitude available including, of course, immunization.<sup>115</sup>

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standard setting).

<sup>108</sup> 458 U.S. 886 (1982).

<sup>109</sup> Greene, *Antitrust Censorship*, *supra* note 91, at 1066.

<sup>110</sup> *Id.* at 889.

<sup>111</sup> *Id.* at 889-92.

<sup>112</sup> *NAACP v. Claiborne Hardware Co.*, 393 So.2d 1290, 1301 (Miss. 1980) (citation omitted).

<sup>113</sup> *Claiborne Hardware*, 458 U.S. at 915.

<sup>114</sup> Greene, *Antitrust Censorship*, *supra* note 91, at 1061-62 (discussing the information before the Court regarding the boycotters' varied economic interests).

<sup>115</sup> *Id.* at 1063. *See, e.g.*, 1B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 191 (3d ed. 2006) (arguing that a First Amendment defense "should be denied in the *Claiborne Hardware* situation," wherein a merchant involved in the boycott benefits directly from a decreased business of the boycott targets). Elaborating upon this position, Hovenkamp argues that a presumptive denial of First Amendment protection "should be defeated only when the economic motives appear trivial in comparison with clearly established political motives." *Id.* at 194. Willard K. Tom arguing before the Court, on behalf of the Superior Court Trial Lawyers Association, ostensibly concluded that the *Claiborne Hardware* boycotters would

While the boycotts themselves were very different, the defendants in both *Claiborne Hardware* and *Superior Court Trial Lawyers* invoked a First Amendment-based defense to antitrust complaints. The challenge for courts when evaluating this defense stems from the presence of political and economic motives amongst at least some, if not all, of the boycotters. In particular, when a court applies a binary approach to facts that reveal a significantly more complex reality, and when the availability of a legal middle ground is undeniable, as in *Superior Court Trial Lawyers*, the cost imposed on society would seem unnecessary.

This Section began with ostensibly straightforward cases in which, given the purely instrumental nature of the speech interest, First Amendment rights were not implicated and, therefore, straightforward applications of the antitrust laws were warranted. *Lorain Journal* in particular, however, implicitly raises questions regarding the role of the First Amendment when more complicated speech interests are at issue. Similar questions arose within the context of the First Amendment's immunization of political speech in the form of traditional government petitioning. The limits of this all-or-nothing approach were apparent within the context of boycotts wherein the Court's adherence to a polar approach appears to require either disregarding bona fide speech interests (*Superior Court Trial Lawyers*) or immunizing speech interests only by consciously disregarding certain complicating characteristics (*Claiborne Hardware*). Either outcome is clearly sub-optimal, and either has the potential to undermine the legal discourse regarding these matters more broadly. Particularly when a legal decision rule is all-or-nothing and applies to complex values and rights that do not neatly correspond to the rule's binary nature, more nuanced decisions are necessarily taking place. Unfortunately, such nuance remains unacknowledged to avoid triggering an outcome that the court disfavors. It is unclear that courts fully take that reality into account when dismissing imperfect legal middle grounds as replacements to all-or-nothing analysis.

## 2. First Amendment Interfaces in Non-Antitrust Contexts

The foregoing discussion identified non-immunized speech such as price fixing (no First Amendment solicitude) and immunized speech such as government petitioning (absolute First Amendment protection) as two extreme points on the First Amendment and antitrust spectrum. This Section examines two non-antitrust contexts in which the Supreme Court created more nuanced legal standards to better protect the First Amendment as well as other, potentially conflicting, values. The first example concerns commercial speech, i.e., advertising, for which the Court explicitly adopts an "intermediate"

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not receive First Amendment solicitude under the FTC's position that the Court ultimately adopted. Transcript of Oral Argument, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (No. 88-1198), available at [http://www.oyez.com/cases/1980-1989/1989/1989\\_88\\_1198/argument](http://www.oyez.com/cases/1980-1989/1989/1989_88_1198/argument), archived at <http://perma.cc/8473-GJ4G>.



approach. More specifically, government restrictions on commercial speech are subject to a unique level of constitutional review, intermediate scrutiny, in contrast to either strict or rational basis scrutiny. The second example concerns defamatory speech and the adoption of a “conditional privilege” if a certain condition is met, i.e., no actual malice by the speaker. This approach to defamation contrasts with recognizing an absolute privilege or no privilege at all. While these two examples differ from the antitrust circumstances at issue herein, they represent important examples wherein the Court transcended unduly simplistic approaches to protecting speech.

a. *Commercial Speech*

Throughout much of the twentieth century, “commercial speech” received little or no direct First Amendment solicitude in the context of government restrictions. In particular, earlier in the century, several Supreme Court cases expressly rejected any such constitutional protection.<sup>116</sup> Over time, even though the Court did not champion First Amendment protection for commercial speech, it avoided reaffirming the exclusion of commercial speech from protection. In 1976, the Court explicitly held in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>117</sup> that commercial speech, in the form of unadorned advertising, deserved some measure of First Amendment protection. The case invalidated a state law prohibiting certain advertising by pharmacies.<sup>118</sup>

*Virginia State Board of Pharmacy* introduced several key themes that would receive further amplification in later years. The Court recognized that the economy’s operation is clearly a matter of vital importance and political significance to society, and that the exchange of commercial information is critical to the functioning of economic actors.<sup>119</sup> It observed, moreover, that individuals may at times find information regarding commercial goods to be as important as, or more important than, political discourse.<sup>120</sup> The importance of commercial speech is a function of multiple interests: the speakers (sellers), the

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<sup>116</sup> See, e.g., *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (“[T]he streets are proper places for the exercise of the freedom of communicating information and disseminating opinion . . . . [T]he Constitution imposes no such restraint on government as respects purely commercial advertising.”).

<sup>117</sup> 425 U.S. 748 (1976).

<sup>118</sup> *Id.* at 773.

<sup>119</sup> See *id.* at 765 (“So long as we preserve a predominately free enterprise economy, . . . [i]t is a matter of public interest that [the allocation of economic resources], in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.”).

<sup>120</sup> See *id.* at 763 (“As to the particular consumer’s interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”).

potential audience (buyers), and society as a whole.<sup>121</sup> While acknowledging the immense importance of commercial speech, the Court also established its subordinate position in the First Amendment hierarchy. The First Amendment provided a basis for “insuring that the stream of commercial information flow[s] cleanly as well as freely,” but such speech receives a different, lesser, standard of protection.<sup>122</sup>

The commercial speech standard received its seminal articulation in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.<sup>123</sup> The majority further emphasized many of the general themes characterizing *Virginia State Board of Pharmacy*.<sup>124</sup> *Central Hudson*’s most important contribution, however, lay in its delineation of an intermediate scrutiny framework.

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.<sup>125</sup>

Intermediate scrutiny is an additional treatment category applicable to the constitutional analysis of government restrictions on speech. Through development of this category, the Court recognized that commercial speech can be vital to society, and at the same time imposed some limits on when that speech enjoys First Amendment protection. The success of this intermediate approach would depend on developing a workable definition of “commercial speech” and a workable form of intermediate scrutiny.<sup>126</sup>

As always, the lines drawn within one case almost invariably spawn further litigation to identify where the line falls in more ambiguous cases.<sup>127</sup> What

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<sup>121</sup> See *id.* at 762-65.

<sup>122</sup> *Id.* at 772.

<sup>123</sup> 447 U.S. 557 (1980).

<sup>124</sup> *Id.* at 561-62. It should be noted that the Court’s ruling was fractured—resulting in a majority opinion by Justice Blackmun, two concurring opinions (Burger, C.J. and Stewart, J.), as well as a dissent (Rehnquist, J.).

<sup>125</sup> *Id.* at 566.

<sup>126</sup> See Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 7 (2000) (“[T]he impossibility of specifying the parameters that define the category of commercial speech has haunted its jurisprudence and scholarship.”).

<sup>127</sup> An example of such a case is *State University of New York v. Fox*, 492 U.S. 469 (1989). This case involved a prohibition on commercial speech in state university dormitories. The speech at issue, essentially Tupperware parties, involved both commercial and noncommercial speech. Notwithstanding the presence of both types of speech, the Court applied the commercial speech legal standard to the speech in its entirety. *Id.* at 474 (rejecting that “pure speech and commercial speech are ‘inextricably intertwined,’ and that

would become a long-simmering debate regarding what constitutes a “substantial government interest” (the second prong of intermediate scrutiny) arose with regard to severe restrictions on truthful and non-deceptive information undertaken for what is deemed paternalistic purposes. This Article will discuss the intermediate scrutiny standard subsequently when considering the Supreme Court’s 2011 ruling in *Sorrell v. IMS Health, Inc.*

b. *Defamatory Speech*

A second context that exemplifies the amenability of even the most strongly held First Amendment rights to protection through middle ground schemes concerns defamation. It has long been recognized that “[f]reedom of speech is, as it always has been, freedom to tell the truth and comment fairly upon facts . . . .”<sup>128</sup> But the laws of libel underscore the reality that some speech falls woefully short of those standards. Typically, statements were actionable if the speech was a “defamatory false statement of fact” that “causes the plaintiff loss of reputation.”<sup>129</sup> But what if that defamation occurs within the context of speech regarding the conduct of a public official and his execution of his public duty? Should that speaker receive no First Amendment solicitude and be subjected to the unvarnished application of libel law? Should that speaker be fully immunized by the First Amendment? Or, does the First Amendment permit the application of libel law subject to certain additional restrictions?

The seminal case regarding defamation is *New York Times Co. v. Sullivan*.<sup>130</sup> This case is particularly instructive for instant purposes because the Court not only introduced a new legal standard that represented a middle ground between immunization and no solicitude, but also it did so on what the Court described as a “clean slate.”<sup>131</sup> Between the Court’s majority and concurring opinions and the Alabama Supreme Court’s decision, three very different positions on the spectrum were explored.

While *Sullivan*’s impact has been far-reaching, for instant purposes, a focus upon the particulars of the case itself is necessary. The plaintiff, L. B. Sullivan, was the Commissioner of Public Affairs, an elected position, and his duties included supervising the police department.<sup>132</sup> A one-page advertisement, run in the *New York Times*, was found to be “libelous per se,” and as such, the trial court instructed the jury that general damages were presumed.<sup>133</sup> The trial court did not charge the jury that malice, in the sense of “actual intent,” was required for an award of punitive damages, nor did the court require the jury’s

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the entirety must therefore be classified as noncommercial”).

<sup>128</sup> See *Sweeney v. Schenectady Union Pub. Co.*, 122 F.2d 288, 290-91 (2d Cir. 1941).

<sup>129</sup> SMOLLA, *supra* note 45, § 23:1.

<sup>130</sup> 376 U.S. 254 (1964).

<sup>131</sup> *Id.* at 299.

<sup>132</sup> *Id.* at 256.

<sup>133</sup> *Id.* at 262.

verdict to distinguish punitive from compensatory damages.<sup>134</sup> The Alabama Supreme Court affirmed the lower court in all respects.<sup>135</sup>

The U.S. Supreme Court reversed Alabama's high court. It held that the First Amendment prohibits public officials from "recovering damages for a defamatory falsehood relating to his official conduct" unless the official proves it was made "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."<sup>136</sup> In so doing, the Court established a "conditional privilege" because it served to "immuniz[e] honest misstatements of fact."<sup>137</sup> Moreover, the Court placed the burden of establishing both falsity and malice on the plaintiff and not the defendant. Having articulated the proper rule of law, the majority then applied that law and found, as a matter of law, there was no basis for finding actual malice.<sup>138</sup>

Despite the precedential strength that *Sullivan* has acquired over the decades, it is useful to recognize the dissension in the Court when the case was first decided. The Court's decision included two concurrences (endorsed by three Justices collectively). Each of the two concurrences rejected the majority's "actual malice" standard.<sup>139</sup> More specifically, all of the concurring Justices advocated immunization rather than a conditional privilege for the defendants who they believed enjoyed "absolute, unconditional constitutional right[s]" with regard to the speech that criticized the city's agencies and officials.<sup>140</sup>

Before further addressing disagreement between the Supreme Court's majority and concurring Justices, the one central point of agreement warrants recognition: "[E]rroneous statement is inevitable . . . [I]t must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"<sup>141</sup> As a practical matter, of course, this means that false and even defamatory speech regarding governmental figures made without malicious intent is protected. A speaker is not found guilty of defaming public figures if the speaker believed, albeit erroneously, that his or her speech was truthful and the speaker did not evince a reckless disregard for the truth.<sup>142</sup> This reflects the Court's concern that aggressively punishing false speech would chill non-false speech, and that in certain circumstances, the benefits of ensuring a less constrained public debate exceed the costs of non-malicious false speech.<sup>143</sup>

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<sup>134</sup> *Id.* at 262-63.

<sup>135</sup> *Id.* at 263.

<sup>136</sup> *Id.* at 280.

<sup>137</sup> *Id.* at 298, 282 n.21.

<sup>138</sup> *Id.* at 286.

<sup>139</sup> *Id.* at 267.

<sup>140</sup> *Id.* at 293 (Black, J., concurring).

<sup>141</sup> *Id.* at 271-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

<sup>142</sup> *Id.*

<sup>143</sup> *See id.* at 284-85.

This compromise position, which creates another treatment category for speech in the defamation context, underscores the need for a comprehensive understanding of a liability rule's effect on speech, including potential chilling effects, and shows that the Court recognizes some hierarchy of speech protection even in the most protected category of political speech. But without conditional privilege, this treatment category receives a polar analysis.

The key dispute among the Justices was whether the majority's position was sufficiently protective of the speech at issue. One virtue of polar outcomes is simplicity. And, depending upon how one defines the relevant categories, one can easily guide the law toward being more or less protective of a given value. The difficulty is that almost by necessity, middle grounds demand more nuanced analysis. In *Sullivan*, the requirement of malice provided that additional nuance. Justice Black's concurring opinion, joined by Justice Douglas, opined, "'Malice,' even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove."<sup>144</sup> As a practical matter, they did not believe that the majority's legal formulation of malice that was intended to protect the First Amendment would in fact do so.<sup>145</sup> As Justice Black stated: "Stopgap measures like those the Court adopts are in my judgment not enough."<sup>146</sup> Justice Goldberg, joined by Justice Douglas, forcefully echoed this criticism, rejecting the notion that "freedom of speech which all agree is constitutionally protected can be effectively safeguarded by a rule allowing the imposition of liability upon a jury's evaluation of the speaker's state of mind."<sup>147</sup>

The adoption of these legal middle grounds regarding restrictions on advertising and defamation of public officials demonstrates the viability of more nuanced positions that transcend an all-or-nothing approach. These examples also highlight that developing any particular approach is an art as much as a science, and that any test developed will continue to be plagued by some of the same tensions that gave rise to its development in the first place. As such, the value of an intermediate approach is a function of a determination regarding the harm of a polar approach coupled with the practical contribution of the intermediate approach.

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<sup>144</sup> *Id.* at 293 (Black, J., concurring).

<sup>145</sup> *Id.* at 295.

<sup>146</sup> *Id.* (advocating "granting the press absolute immunity for criticism of the way public officials do their public duty").

<sup>147</sup> *Id.* at 300 (Goldberg, J., concurring). Justice Goldberg accepted that any legal standard would contain "a gray area"; however, he sought to distinguish between shades of gray, as it were. For example, he would only extend immunity to speech regarding official conduct but not to that of a government official's private conduct. He believed the public-private distinction to be fundamentally different and less difficult than drawing distinctions between malicious and non-malicious states of mind. *Id.* at 302 n.4.

### 3. First Amendment and Information Products

Legal precedent regarding the First Amendment and antitrust interface has not directly addressed the questions associated with the information product redesigns this Article addresses. Moreover, the core holdings within that precedent cannot be easily imported and unambiguously applied to this different context. Perhaps nothing better reinforces these two assessments regarding the limitations of existing legal precedent than a review of some of the most prominent arguments that, whether explicitly or implicitly, reveal the shortcomings of that precedent. The first claim, the absence of direct judicial guidance, is buttressed by the inability of others to identify directly applicable case law. The second claim, the existence of significant limitations to merely importing and readily applying what relevant precedent does exist, is reflected in the shortcomings in arguments by advocates seeking to do just that. Towards that end, this Article examines two thoughtful white papers advocating very different positions regarding First Amendment-based defenses within the context of antitrust treatment of search engine bias. Each suggests the presence of controlling precedent that clearly, if not inexorably, leads to their respective positions. Both of these white papers are misguided and, unfortunately, potentially misleading.

Part II concludes with a discussion of the 2011 Supreme Court ruling that directly addressed whether information that identifies users of a product (medical doctor prescribing patterns), a quintessential information product as defined herein, constitutes speech. While constituting an important First Amendment point of reference, the decision ultimately raises as many questions as it resolves for the purposes of antitrust law.

#### a. *A View from the Trenches*

Professor Eugene Volokh and attorney Donald M. Falk, in a Google-sponsored white paper, argue that “search engines are speakers” whose decisions are entitled to First Amendment immunity.<sup>148</sup> The white paper specifically addresses competition policy considerations in a section whose title summarizes the authors’ conclusion: “The First Amendment Protects Search Engine Results Against Antitrust Law.”<sup>149</sup>

What support do Volokh and Falk offer for their position that “antitrust law . . . may not be used to control what speakers say or how they say it”?<sup>150</sup> They begin by invoking the *Noerr-Pennington* Doctrine and citing Supreme Court rulings to support relatively general notions, including the unexceptional proposition that the Sherman Act should be interpreted “in the light of the First Amendment[.]”<sup>151</sup> As discussed, *Noerr* concerns core political speech, namely,

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<sup>148</sup> Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Search Results*, 8:4 J.L. ECON. & POL’Y 883, 884 (2011-2012).

<sup>149</sup> *Id.* at 895.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* (citation omitted).

the right to petition the government. It immunizes an entire speech category, government petitioning, from the antitrust laws even when the speech is blatantly anticompetitive.<sup>152</sup> The doctrine neither illustrates nor invites legal nuance. It reflects a categorical determination and, depending upon whether the speech falls inside or outside the category, the speech receives immunization or no speech solicitude. Unfortunately, Volokh and Falk only reinforce such a polar approach and, more importantly, they fail to explain why the speech at issue should fall into the “all” or immunization category.

The white paper’s treatment of two seminal antitrust cases involving newspapers is equally unavailing. In both *Associated Press v. United States*<sup>153</sup> and *Lorain Journal Co. v. United States*, the Supreme Court unequivocally held that decisions by newspapers regarding content are subject to antitrust scrutiny and, ultimately, condemnation. In *Associated Press*, for example, the bylaws of the news-gathering organization “hindered and restrained the sale of interstate news to non-members who competed with members.”<sup>154</sup> The Court concluded that “[i]t would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom.”<sup>155</sup>

The Court squarely addresses and rejects the appeal to unfettered editorial discretion to invalidate the remedial measure on First Amendment grounds. While the newspapers’ substantive editorial discretion regarding the generation of news stories warrants First Amendment protection, no such protection extends to anticompetitive conduct cloaked under the mantle of legitimate discretion. Similarly, in *Lorain Journal*, as discussed previously, the Court applied the antitrust laws without any First Amendment solicitude owing to the *Lorain Journal*’s failure to proffer any defense reflecting editorial discretion.<sup>156</sup> Both of these cases represent straightforward examples of strictly anticompetitive undertakings. Neither case supports the proposition that if just *any* editorially based justification had been proffered, then it would have constituted a speech interest warranting First Amendment solicitude if not immunization.<sup>157</sup>

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<sup>152</sup> See *supra* notes 90-91 and accompanying text.

<sup>153</sup> 326 U.S. 1 (1945).

<sup>154</sup> *Id.* at 13.

<sup>155</sup> *Id.* at 20.

<sup>156</sup> *Supra* note 82 (discussing the *Lorain Journal*’s non-defense).

<sup>157</sup> Two additional First Amendment cases, also involving newspapers, are still more inapposite. Though each is only briefly discussed, Volokh and Falk note that the newspapers were alleged to have considerable market power (“a virtual monopoly” or “substantial monopoly”). Volokh & Falk, *supra* note 148, at 896. One concerned the rejection of the proposition that a newspaper allegedly holding a local monopoly could be considered to be essentially a quasi-governmental organization whose speech-restricting actions could then be challenged under the First Amendment. *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971). The second case carried only narrow significance because,

Attorney Kurt Wimmer, whose clients include Microsoft, wrote what is effectively a response to Volokh and Falk's white paper.<sup>158</sup> Wimmer rejects the position that speech generated by search engines is immunized from the antitrust laws.<sup>159</sup> He argues that such speech is "commercial speech" and, consistent with intermediate scrutiny, that it is both properly subject to the antitrust laws and, moreover, as a practical matter it warrants no First Amendment solicitude.<sup>160</sup> What, if any, legal precedent does Wimmer claim as support? Unfortunately, like Volokh and Falk, Wimmer neither acknowledges nor grapples with the limitations of existing precedent, and the positions he advocates suffer accordingly.

While Wimmer notes the ambiguity surrounding what constitutes "commercial speech," he nonetheless concludes that "Google's search results are plainly commercial speech."<sup>161</sup> The basis for this assertion is unclear. By its very terms, Wimmer's own discussion of relevant precedent reveals the de facto equation of "commercial speech" with advertising. However, the core antitrust allegation against Google is that it biases non-sponsored search results to advantage itself and to disadvantage its competitors.<sup>162</sup> Wimmer merely asserts that such competitive manipulation "also constitutes a form of commercial speech."<sup>163</sup> He does not cite any authority, nor does he extrapolate from any holding that "commercial speech" should be interpreted to include the alleged information manipulation. This is an important point to address, because the contours of the commercial speech doctrine need to be established with reference to the more complex realities characterizing the matters this Article discusses.

The significance of Wimmer's characterization of the speech as "commercial" flows from the consequences of such a designation for First Amendment protection. As discussed, the constitutionality of governmental

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among other features, the alleged anticompetitive conduct was protected under the Newspaper Preservation Act. *Newspaper Printing Corp. v. Galbreath*, 580 S.W.2d 777 (Tenn. 1979). The white paper itself reveals the absence of legal precedent when both speech and competition policy interests are present. Volokh & Falk, *supra* note 148, at 896.

<sup>158</sup> Kurt Wimmer, *The Proper Standard for Constitutional Protection of Internet Search Practices* (Jan. 17, 2014), <http://www.mediacompolicy.org/wp-content/uploads/sites/296/2012/06/First-Amendment-Issues-in-Search-and-Antitrust-6-2.pdf>, archived at <http://perma.cc/V9BE-78TU> (arguing that Google's search practices do not deserve First Amendment protection under the intermediate scrutiny standard appropriate for commercial speech).

<sup>159</sup> *Id.* at 20 ("[T]he First Amendment . . . cannot be played as a trump card to insulate [manipulation of search results] from scrutiny.").

<sup>160</sup> *Id.* at 1. Wimmer does, however, argue that imposing liability for proven antitrust violations "would support rather than undermine First Amendment values." *Id.*

<sup>161</sup> *Id.* at 13.

<sup>162</sup> *Id.* Google has been criticized for practices associated with its "sponsored search results," which Wimmer characterizes as "unquestionably advertisements." *Id.*

<sup>163</sup> *Id.* (emphasis added).



restrictions on commercial speech is subject to “intermediate scrutiny.” Wimmer restates the appropriate *Central Hudson* standard and argues that the antitrust regulation of Google’s allegedly anticompetitive search practices meets this standard.<sup>164</sup> He refers to no instances in which the courts have analyzed antitrust law’s constitutionality in terms of either commercial speech or intermediate scrutiny. Moreover, his own application of the intermediate scrutiny test is oddly truncated. Despite having restated the multi-prong test, Wimmer only addresses the first prong: whether the restriction at issue reflects a “substantial government interest.”<sup>165</sup> Moreover, he references no precedent addressing this first prong notwithstanding the fact that this “intermediate scrutiny” standard was introduced in 1980.<sup>166</sup>

Further, assuming *arguendo* the existence of a significant government interest, it does not then follow that the traditional application of antitrust is warranted. Intermediate scrutiny entails further analysis including consideration of whether “the restriction is proportional to the interest . . .”<sup>167</sup> The speech at issue may warrant limited First Amendment protection, and the antitrust laws may reflect a substantial government interest, but it may also be that the appropriate outcome is a heretofore absent middle ground, which this Article proposes.

Of course, many scholars advocate still different positions regarding the First Amendment issues associated with search engines or software algorithms more generally.<sup>168</sup> The white papers discussed, however, are unique in their treatment of the First Amendment as a defense to antitrust actions. Consider, for example, Professor Stuart Benjamin, who, albeit with apparent reluctance, concludes that “algorithm-based outputs” such as Google’s search engine constitute protected speech under the First Amendment.<sup>169</sup> To conclude

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<sup>164</sup> Wimmer, *supra* note 158, at 13 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 (1980)).

<sup>165</sup> *See id.*

<sup>166</sup> Wimmer relies upon two quotations, from President Barak Obama and FCC Chairman Julius Genachowski, discussing, respectively, the central importance of the Internet to “small businesses and individual entrepreneurs” and that “no central authority, public or private” should control the outcome of that marketplace. *Id.* at 14.

<sup>167</sup> *Id.* at 13.

<sup>168</sup> Professor Dan Burk’s *Patenting Speech* constitutes one of the earliest and most thoughtful examinations of whether software constitutes speech entitled to First Amendment protection. Dan L. Burk, *Patenting Speech*, 79 TEX. L. REV. 99 (2000). It warrants specific attention herein owing to Burk’s treatment of the interplay between the consequences of First Amendment protection for different legal regimes (patent and copyright). In his article’s penultimate paragraph, Burk thoughtfully concludes, albeit without further elaboration, that a “sensible” approach to navigating the hybrid nature of software (functional and expressive) would be to provide software its “own novel brand of intellectual property protection” and its “own category of protection” under the First Amendment. *Id.* at 161.

<sup>169</sup> Stuart Minor Benjamin, *Algorithms as Speech*, 161 U. PA. L. REV. 1445, 1471 (2013).

otherwise, he argues, would require “upending existing case law” and require radical changes to First Amendment doctrine.<sup>170</sup> He finds no principled basis upon which to do so under current law, although he does recognize that “an enormous and growing amount of activity” will receive strong First Amendment protection “absent a fundamental reorientation of First Amendment jurisprudence.”<sup>171</sup> He proposes one possible category of algorithm-based speech that might be excluded from First Amendment protection in the future, namely, “outputs that do not reflect human decisionmaking.”<sup>172</sup>

Benjamin’s valuable discussion, however, is devoid of any antitrust treatment. In fact, to date nearly all academic treatments have addressed First Amendment issues regarding search engines or algorithms with a “rights for robots”<sup>173</sup> framework of analysis. One consequence of that perspective appears to be that antitrust matters fall beyond the scope of their inquiry or, at most, are merely noted in passing.<sup>174</sup> Moreover, this lack of any meaningful engagement with antitrust issues within this speech context is not a function of the commentator’s position regarding the availability of First Amendment protection. Those commentators who essentially argue that no speech protection extends to Google’s search engine do not themselves meaningfully engage the significant questions associated with the anticompetitive use of information products as commercial expression.<sup>175</sup>

b. *A View from the Supreme Court*

In the absence of controlling or sufficiently instructive precedent regarding First Amendment defenses to antitrust matters involving information providers, widely divergent positions emerged. The foregoing two viewpoints disagreed regarding the character of the speech at issue and, consequently, the extent of First Amendment protection. If *either* interpretation were adopted, the antitrust laws would obviously receive their traditional applications. The Supreme

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<sup>170</sup> *Id.* at 1472.

<sup>171</sup> *Id.* at 1446.

<sup>172</sup> *Id.* at 1479.

<sup>173</sup> Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495, 1496 (2013).

<sup>174</sup> See, e.g., James Grimmelman, *Speech Engines*, 98 MINN. L. REV. 868 (2014). Grimmelman examines “what a search engine is” and concludes that one’s assessment of search engine bias depends upon whether search engine operators are viewed primarily as conduits, editors, or, as he proposes, advisers. *Id.* at 871, 873. His discussion of the FTC’s inquiry into search engine bias does not substantively engage antitrust law, though he notes in conclusion that his advisor theory can “provide insights into antitrust case against Google.” *Id.* at 950.

<sup>175</sup> See, e.g., Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1199 (2008) (arguing that the likely absence of First Amendment protections extending to search engines “does not mean that any attempt to regulate search engines will be categorically immune from First Amendment review”).

Court's sole foray into this realm addressed whether restrictions on the "sale, disclosure, and use" of an information product constitutes speech worthy of First Amendment protection.<sup>176</sup> At a minimum, this ruling underscores the serious need to address First Amendment-based defenses to antitrust actions involving information products.

In *IMS Health*, the Supreme Court held that a Vermont law prohibiting the use of prescriber-identifiable information by marketers violated the First Amendment.<sup>177</sup> As described by the Court, medical doctors prescribe pharmaceuticals to their patients and pharmacies fill those prescriptions.<sup>178</sup> Consequently, the pharmacies have become repositories for extensive information regarding doctors' prescription practices.<sup>179</sup> Pharmacies frequently sell that information to data aggregators or intermediaries, such as the named plaintiff IMS Health.<sup>180</sup> IMS Health removes patient related information, as HIPAA requires, and repackages or restructures the information.<sup>181</sup> Ultimately, pharmaceutical companies purchase and mine the data, a practice known as detailing, to better understand the prescribing practices of individual doctors.<sup>182</sup> The marketing departments then use this information to enable their companies' drug representatives to more effectively target physicians.<sup>183</sup>

The Court held that the "sale, disclosure, and use" of this prescribing information was speech.<sup>184</sup> Moreover, the Court determined that the Vermont statute evinced speaker- and content-based discrimination.<sup>185</sup> The majority focused repeatedly, during both oral argument and in its opinion, upon the fact that the legislation was expressly enacted to influence the marketplace for ideas.<sup>186</sup> The directed marketing, facilitated by detailing practices, was

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<sup>176</sup> See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2659 (2011).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* ("Pharmacies as a matter of business routine and federal law, receive prescriber-identifying information when processing prescriptions.")

<sup>180</sup> *Id.* ("Many pharmacies sell [prescriber-identifying information] to . . . firms that analyze [it] and produce reports on prescriber-behavior.")

<sup>181</sup> *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 53 (1st Cir. 2008), *abrogated by IMS Health*, 131 S. Ct. 2653 ("To protect patient privacy, prescribers' names are encrypted, effectively eliminating the ability to match particular prescriptions with particular patients.")

<sup>182</sup> See *IMS Health*, 131 S. Ct. at 2659-60.

<sup>183</sup> *Id.*

<sup>184</sup> See *id.* at 2663.

<sup>185</sup> See *id.*

<sup>186</sup> See *id.* at 2661; Transcript of Oral Argument at 14-16, *IMS Health*, 131 S. Ct. 2653. The Supreme Court entertained considerable debate regarding the legislation's purpose, effect, and motivation. *Id.* at 7-15. The majority questioned the candor of Vermont regarding the privacy-based purpose alleged, to wit, protecting the prescribing physicians' privacy. See *IMS Health*, 131 S. Ct. at 2661-67. With regard to privacy protection, the notion was that the pharmacies needed to acquire this information owing to the requirements under the law, but that the doctors themselves retained an individual interest in this

“effective speech” in that it influenced prescribing patterns and increased costs.<sup>187</sup> The legislature sought to combat those cost increases by weakening the associated speech.<sup>188</sup> The Court held that the legislative response to speech with which it disagreed should be to promote greater social discussion rather than to legally disadvantage such speech.<sup>189</sup>

Two aspects of *IMS Health* are particularly relevant for instant purposes. First, the case examined the fundamental question of whether or not a speech interest adhered in the “sale, disclosure, and use” of information.<sup>190</sup> Precedent regarding commercial speech addressed advertising restrictions rather than constraints on information as a product itself, specifically a product whose conveyance to a buyer or user constitutes the core market activity of information provision firms.<sup>191</sup> Nonetheless, the Court was unanimous in its finding that the First Amendment protected speech in the “sale, disclosure, and use” of information.<sup>192</sup> Second, notwithstanding the foregoing point of agreement, the majority and dissent diverged widely regarding not only how intermediate scrutiny applies to commercial speech, but also the parameters and, indeed, the fate, of the intermediate standard more broadly.<sup>193</sup> Unfortunately, *IMS Health* provides scant guidance regarding how to apply an “intermediate” scrutiny test within antitrust settings, both because the legal setting is quite different and because the Justices diverged widely in their views regarding the implementation of an intermediate standard.

First Amendment jurisprudence necessarily examines the constitutionality of government restrictions on speech and necessarily results in polar outcomes—

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information as well. *Id.* at 2669. The majority found the privacy argument to be pretextual and concluded that if the goal had truly been privacy protection for the physicians then the state would have enacted legislation that more meaningfully protected those interests. *Id.*

<sup>187</sup> *IMS Health*, 131 S. Ct. at 2671 (considering the State’s argument that “pharmaceutical marketing has a strong influence on doctors’ prescribing practices”).

<sup>188</sup> *Id.* at 2670 (“The State seeks to achieve its [cost-related] policy objectives through the indirect means of restraining certain speech by certain speakers . . .”).

<sup>189</sup> *Id.* at 2671 (“[I]nformation is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.” (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976))).

<sup>190</sup> *See id.* at 2663.

<sup>191</sup> *See, e.g.*, 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 (1996) (advertising prohibitions regarding the “retail price of alcoholic beverages”); *see also Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 558 (1980) (ban regarding “promotional advertising by an electrical utility”); *Va. State Bd. of Pharmacy*, 425 U.S. at 752 (effectively forbidding the advertising of prescription drug prices).

<sup>192</sup> *IMS Health*, 131 S. Ct. at 2663.

<sup>193</sup> *Compare id.* at 2667 (“[The law at issue] imposes a speaker- and content-based burden on protected expression, and that circumstance is sufficient to justify application of heightened scrutiny.”), *with id.* at 2673 (Breyer, J., dissenting) (“The First Amendment does not require courts to apply a special ‘heightened’ standard of review . . .”).

constitutional or unconstitutional. Intermediate scrutiny, as applied to commercial speech, adjusts the constitutional standard based on a weighing of various pertinent considerations. Defamation, in contrast, provides a “conditional privilege” whose successful assertion modifies the legal showing required of the plaintiff. In the circumstances this Article addresses, speech, regardless of variety, is not the only issue; competition policy concerns must also be assessed and respected. This difference opens up the possibility of a middle ground treatment of speech, which feeds into the antitrust analysis itself and will be one of the centerpieces of the recommendation made in Part III.

#### B. *Innovation-Based Considerations*

Polar outcomes characterize the antitrust and First Amendment interface. This reflects, among other attributes, the practical difficulty in incorporating *noneconomic* considerations such as speech into competition policy’s prevailing economic efficiency-based framework. This Section analyzes how polar outcomes may also arise despite antitrust’s fundamental interest in incorporating innovation-based considerations into the legal analysis. Although the speech and innovation matters at issue differ substantially, both give rise to polar outcomes because the logic of antitrust’s legal approaches to those two considerations is similar.

As Part I illustrated, antitrust actions entailing design modifications to information products may generate novel speech-based defenses as well as defenses that assert a legitimate business purpose, i.e., that the redesign in question incorporates improvements and/or innovations that benefit consumers and, therefore, is procompetitive. Given the close connection between the redesigns at issue and innovation, this Article focuses on innovation rather than the full range of potential legitimate business justifications.

Section 2 of the Sherman Act addresses unilateral anticompetitive conduct.<sup>194</sup> Such conduct is evaluated under the rule of reason standard that condemns “unreasonable” restraints of trade. Though first articulated in the seminal 1911 decision in *Standard Oil Co. of N.J. v. United States*,<sup>195</sup> courts face a considerable challenge in the analysis of allegedly predatory design, as with all rule of reason matters, in developing workable standards for determining what constitutes *unreasonable* restraints of trade. *United States v. Grinnell Corp.*<sup>196</sup> provides the seminal articulation of unlawful monopolization under section 2, “the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”<sup>197</sup> The generality and flexibility associated with the underlying legislation and the key legal precedents constitutes both a strength and weakness of antitrust law.

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<sup>194</sup> See 15 U.S.C. § 2 (2012).

<sup>195</sup> See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 66 (1911).

<sup>196</sup> 384 U.S. 563 (1966).

<sup>197</sup> *Id.* at 570-71.

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This Section briefly delineates the key antitrust doctrines and case law applicable to innovation matters. After introducing the governing antitrust law, it explores the difficulties associated with the statute's application to allegedly predatory innovation and how those challenges manifest themselves in the case law. This discussion concludes by briefly addressing the law surrounding "monopoly broth," which, in the information provision context, allows for the possibility that product redesign which generally does not independently constitute an antitrust violation might do so in conjunction with anticompetitive conduct apart from redesign.

### 1. Predatory Redesign

The application of section 2 case law to information products is complicated both by the speech-based nature of information products and by the fact that any product changes arguably involve innovation, which is broadly defined here to include improvements that do not necessarily embody technological advances. This Section reviews the law regarding section 2 conduct involving product innovations that have both anticompetitive effects and procompetitive benefits. Because none of the key cases in this jurisprudence involves speech, the law has developed independently from the additional speech considerations frequently raised within information product contexts.

Changes to products themselves are among the most common allegations of unlawful, predatory product redesign.<sup>198</sup> One common allegation is that the redesign creates intentional, and potentially unnecessary, incompatibilities with rival products.<sup>199</sup> Unfortunately, the courts have failed to carry over important nuances from the articulation of the legal theory of the anticompetitive product design to that theory's practical application. This lack of nuance has arguably led to the uncritical overprotection of such anticompetitive product redesigns under the mantle of fostering innovation and avoiding the substitution of the court's judgment for that of the businesses themselves. This Article will argue subsequently that the incorporation of further nuance is not precluded by practical considerations.

Some of the most thoughtful guidance for assessing predatory design resides in high-tech judicial rulings from years ago, sometimes decades ago, involving

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<sup>198</sup> Predatory design constitutes product change that may, or may not, incorporate innovation. A product change might not involve innovation when, for example, both the components and systems of the product have been employed previously. Other categories of anticompetitive conduct include: refusals to deal, predatory pricing, and tying.

<sup>199</sup> See, e.g., *C.R. Bard, Inc. v. M3 Sys. Inc.*, 157 F.3d 1340 (Fed. Cir. 1998) (finding new design of biopsy needle gun made competitor replacement needles incompatible); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979) (finding that monopolist does not need to pre-notify competitors of changes to new format film); *Abbott Labs. v. Teva Pharms. USA, Inc.*, 432 F. Supp. 2d 408 (D. Del. 2006) (arguing that monopolist reformulated drug and withdrew previous versions of drug to impede generic drug entry).

industry giants such as Microsoft and IBM.<sup>200</sup> Consider, for example, the predatory design found in *United States v. Microsoft Corp.*,<sup>201</sup> in which the plaintiffs alleged that Microsoft's monopoly operating system was designed to integrate its own Internet browser in ways that disadvantaged browser rivals.<sup>202</sup> The D.C. Circuit's ruling acknowledged that, "as a general rule, courts are properly very skeptical about claims that competition has been harmed by a dominant firm's product design change."<sup>203</sup> But the court held that "[j]udicial deference to product innovation, however, does not mean that a monopolist's product design decisions are per se lawful."<sup>204</sup> The court's guiding legal principles were clear, as it required the establishment of anticompetitive harms and procompetitive benefits, and then balancing them to determine overall competitive effects.<sup>205</sup> Anticompetitive harms include increases in price (adjusting for quality changes) or reductions in quality, variety, or innovation, while procompetitive benefits include lower prices or increases in quality, variety, or innovation.<sup>206</sup> The plaintiff bears the burden to establish the requisite harm.<sup>207</sup> As such, the plaintiff must allege that a monopolist has undertaken exclusionary conduct with anticompetitive effect. If a prima facie case is established, then the monopolist can aver a procompetitive benefit for its conduct. The plaintiff can then attempt to rebut by demonstrating that the justification is pretextual.<sup>208</sup> Finally, if both bona fide pro- and anticompetitive effects are demonstrated, balancing is required. "[T]he plaintiff must demonstrate that the anticompetitive harm of the conduct *outweighs* the procompetitive benefit."<sup>209</sup>

a. *Anticompetitive Effect*

The first step in the predatory design analysis delineated in *Microsoft* is whether the plaintiff has established a prima facie showing of anticompetitive conduct, though much earlier cases, including *In re IBM Peripheral EDP Devices Antitrust Litigation*,<sup>210</sup> offer valuable exposition on this issue:

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<sup>200</sup> *E.g.*, *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001); *Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377 (9th Cir. 1983); *Cal. Computer Prods. v. IBM Corp.*, 613 F.2d 727 (9th Cir. 1979); *Telex Corp. v. IBM Corp.*, 510 F.2d 894 (10th Cir. 1975).

<sup>201</sup> 253 F.3d 34 (D.C. Cir. 2001).

<sup>202</sup> *Id.* at 60.

<sup>203</sup> *Id.* at 65.

<sup>204</sup> *Id.* (citations omitted).

<sup>205</sup> *Id.* at 58-59.

<sup>206</sup> See U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 2 (2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>, archived at <http://perma.cc/82TN-HHHT>.

<sup>207</sup> See *Microsoft*, 253 F.3d at 58.

<sup>208</sup> *Id.* at 59.

<sup>209</sup> *Id.* (emphasis added).

<sup>210</sup> 481 F. Supp. 965 (N.D. Cal. 1979), *aff'd sub nom.* *Transamerica Computer Co. v.*

If the design choice is *unreasonably* restrictive of competition, the monopolist's conduct violates the Sherman Act. This standard will allow the factfinder to consider the effects of the design on competitors; the effects of the design on consumers; the degree to which the design was the product of desirable technological creativity; and the monopolist's intent, since a contemporaneous evaluation by the actor should be helpful to the factfinder in determining the effects of a technological change.<sup>211</sup>

Identifying and then proving anticompetitive conduct can be challenging. Neither the acquisition of monopoly power nor the maintenance or expansion of monopoly power are, without more, unlawfully anticompetitive.<sup>212</sup> In contrast to per se illegal price-fixing activity, for example, the conduct at issue in section 2 cases is facially unobjectionable. Monopolists or would-be monopolists, like other market participants, must decide what products they will sell, determine those products' key features, set prices, establish terms regarding whether or how to deal with other market participants, and frequently seek to innovate in their product designs, manufacturing processes, and sales policies. This underlying reality has heavily informed the evolution of the law regarding anticompetitive innovation or product design, and is reflected in a very strong concern with obtaining false positives in enforcement activity as well as chilling the legitimate, often beneficial, business of market participants more generally.

b. *Procompetitive Effect*

Procompetitive benefits, i.e., benefits to consumers, are generally addressed in terms of whether one or more legitimate business justifications underlies the conduct in question.<sup>213</sup> The legal consequences of such justifications have been subject to varying judicial interpretations. Certain points of broad consensus exist, however; for example, cases and commentators generally agree that merely increasing profits does not suffice to constitute a legitimate business justification. The reason is straightforward: some of the most blatantly illegal anticompetitive conduct will redound to the economic benefit of those undertaking the actions. Instead, a legitimate business justification must also reflect some consumer welfare benefit.<sup>214</sup> If the defendant asserts such a

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IBM Corp., 698 F.2d 1377 (9th Cir. 1983).

<sup>211</sup> *Id.* at 1003 (emphasis added).

<sup>212</sup> *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

<sup>213</sup> Determining whether a challenged practice has "a legitimate business justification" is a "key factor" in assessing whether a dominant firm's unilateral conduct was "unreasonable" and, thereby, violated the antitrust laws. An FTC Guide to the Antitrust Laws, <http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct>, archived at <http://perma.cc/TGL4-H49H>. See *supra* notes 195-197 and accompanying text (discussing antitrust proscription of "unreasonable" restraints of trade).

<sup>214</sup> It should also be noted that there is some question about the uncertainty associated with innovation. For example, defendants may introduce a product change fully anticipating



benefit or justification, the plaintiff may then try to rebut the justification proffered as pretextual.

The most common legitimate business justification for a product redesign is that the change incorporates improvements or innovations that will benefit at least some customers.<sup>215</sup> The difficulties associated with determining the significance of a purported innovation are manifest. Probably for this reason, most prevailing legal analysis probes whether the claimed innovation is pretextual rather than attempting a more searching assessment of the degree of innovation. Under this approach, if the justification for the claimed innovation is deemed pretextual, balancing is unnecessary. Even with such an all-or-nothing approach, this Article argues, unacknowledged, and oftentimes dispositive, balancing may be occurring. Depending upon how broadly or narrowly “legitimate business justification” and “pretext” are defined, the court may avoid the ultimate balancing contemplated in the final stage of the rule of reason analysis.<sup>216</sup>

c. *Balancing*

Given a contested design change for which both pro and anticompetitive effects are alleged, some courts would require balancing of those effects. That approach is forcefully articulated in *Caldera, Inc. v. Microsoft Corp.*:<sup>217</sup>

Particularly offensive to the Court is the [defendant’s] assertion that . . . [its] conduct violates §2 of the Sherman Act only if the “design changes had *no purpose and effect* other than the preclusion of . . . competition.” This is simply not true . . . . The standard actually . . . contemplates the effect the design choice has on competition. It does not impose the much heavier burden on a plaintiff of

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that the change will constitute an improvement that consumers value, when in fact it does not. Or, only some customers may view the change as an improvement, when the company thought that most would value it. Both of these situations are distinguishable from one in which no consumer benefit was contemplated or could have been contemplated. This of course leads to the associated question of intent that is often a critical issue in an attempted monopolization case, or in determining whether or not there is a bona fide legitimate business justification for the design change. Intent can be helpful, but is insufficient, in assessing in a competitive effect.

<sup>215</sup> See, e.g., *In re Apple iPod iTunes Antitrust Litig.*, 796 F. Supp. 2d 1137, 1144 (N.D. Cal. 2011) (“Plaintiffs’ expert presents testimony that iTunes 4.7 ‘introduced a radically different’ encryption technology which was ‘much more resistant to attack’ than previous versions of the software.”).

<sup>216</sup> “A more generalized standard, one applicable to all types of otherwise legal conduct by a monopolist . . . must be applied to the technological design activity here.” *Caldera, Inc. v. Microsoft Corp.*, 72 F. Supp. 2d 1295, 1313 (D. Utah 1999) (quoting *IBM Peripheral EDP Devices Antitrust Litig.*, 481 F. Supp. at 1003).

<sup>217</sup> *Id.*

demonstrating that a design choice is entirely devoid of technological merit.<sup>218</sup>

Nearly a decade later, another court not only restated the same legal principle, but also similarly chided the defendant's antitrust counsel for its flawed characterization of the law.<sup>219</sup>

Contrary to Defendant's assertion, Plaintiffs are not required to prove that the new formulations were absolutely no better than the prior version or that the only purpose of the innovation was to eliminate the complementary product of a rival. . . . [I]f Plaintiffs show anticompetitive harm from the formulation changes, that harm will be weighed against any benefits presented by Defendants.<sup>220</sup>

But other courts have rejected the balancing of pro- and anticompetitive effects as unworkable. They hold that unless an innovation-based justification for the alleged anticompetitive innovation is entirely pretextual, no antitrust liability should adhere.<sup>221</sup> In *Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP*,<sup>222</sup> the Ninth Circuit held that such balancing is both "unwise" and "unadministrable."<sup>223</sup>

There are no criteria that courts can use to calculate the "right" amount of innovation, which would maximize social gains and minimize competitive injury. . . . Absent some form of coercive conduct by the monopolist, the ultimate worth of a genuine product improvement can be adequately judged only by the market itself.<sup>224</sup>

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<sup>218</sup> *Id.* at 1312-13 (citations omitted).

<sup>219</sup> See *Abbott Labs. v. Teva Pharms. USA, Inc.*, 432 F. Supp. 2d 408 (D. Del. 2006).

<sup>220</sup> *Id.* at 422 (citations omitted).

<sup>221</sup> An earlier line of cases suggests the use of a less restrictive alternative approach to avoid the need to balance pro- and anticompetitive effects. This approach would essentially negate an innovation's claimed value if that value could have been achieved with a reasonable alternative design that had a less anticompetitive effect. "[I]n scrutinizing design conduct, [section] 2 would merely require the monopolist's design to be 'reasonable', rather than to be the design alternative least restrictive of competition. Thus, the 'reasonableness' of the design of a monopolist's new products (vis-a-vis competitors' products which were technically linked to or dependent upon the monopolist's product) may be scrutinized under [section] 2 in cases in which 'market forces cannot operate' that is, in cases in which a single firm controls the entire market or in which a monopolist engages in coercive conduct to affect consumer choice." *GAF Corp. v. Eastman Kodak Co.*, 519 F. Supp. 1203, 1228 (S.D.N.Y. 1981).

<sup>222</sup> 592 F.3d 991 (9th Cir. 2010).

<sup>223</sup> *Id.* at 1000.

<sup>224</sup> *Id.* Similarly, in *Apple iPod iTunes Antitrust Litigation*, the district court dismissed the antitrust claim concerning Apple's adoption of iTunes 4.7 for its iPod because the plaintiff's expert acknowledged some procompetitive effect. More specifically, "[b]ecause iTunes 4.7 was a genuine improvement, the [c]ourt may not balance the benefits or worth of iTunes 4.7 against its anticompetitive effects." *In re Apple iPod iTunes Antitrust Litig.*, 796

Notwithstanding the foregoing examples wherein courts strongly guarded their prerogative to engage in balancing, no court has done so (or acknowledged doing so) to any meaningful extent.<sup>225</sup> This disagreement regarding the appropriate analysis of alleged predatory design has been largely sidestepped in practice.

In nearly all cases, the judges have deemed balancing to be unnecessary because they found the evidence to be unambiguously one-sided. This extreme evidentiary imbalance reflects that either the claimed innovation is found to be pretextual, or the plaintiffs do not argue against the existence or size, magnitude, or benefit of the claimed innovation. The D.C. Circuit's ruling in *Microsoft* illustrates the latter situation. The court held that although Microsoft made general claims about the value of integrating the browser and the operating system, it "neither specifies nor substantiates those claims."<sup>226</sup> Microsoft argued that it had "valid technical reasons" for this integration and

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F. Supp. 2d 1137, 1144 (N.D. Cal. 2011) (citing *Allied Orthopedic Appliances, Inc.*, 592 F.3d at 1000). Several high-profile efforts to formally truncate the rule of reason have been unsuccessful. For example, the courts have properly rejected the argument that the fact that one has been able to patent the allegedly predatory innovation effectively renders that product design itself immune to antitrust liability. *See, e.g., C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340 (Fed. Cir. 1998).

<sup>225</sup> James D. Hurwitz and William E. Kovacic describe similar tensions and tradeoffs characterizing predatory design cases decided in the late 1970s and very early 1980s. *Judicial Analysis of Predation: The Emerging Trends*, 35 VAND. L. REV. 63 (1982) [hereinafter *Emerging Trends*]. They specifically reference the following sequence of judicial rulings albeit in a more comprehensive manner. *Id.* at 113-23. In 1978, Judge Conti, in *ILC Peripherals Leasing Corp. v. IBM Corp.*, held that "when the approach chosen was at least as justifiable as the alternative, . . . courts should not get involved in the second guessing of engineers." 458 F. Supp. 423, 440-411 (N.D. Cal. 1978), *aff'd per curiam sub nom.*, *Memorex Corp. v. IBM Corp.*, 636 F.2d 1188 (9<sup>th</sup> Cir. 1980), *cert. denied* 452 U.S. 972 (1981). A year later, in 1979, Judge Schnacke, in *Transamerica Computer Co. v. IBM Corp.*, 481 F. Supp. 965 (N.D. Cal. 1979), *aff'd* 698 F.2d 1377 (9<sup>th</sup> Cir. 1983), *cert. denied* 464 U.S. 955 (1983) rejected Conti's approach as "overprotective" because it suggested that, "where there is a valid engineering dispute over a product's superiority the inquiry should end." *Id.* at 1003. Hurwitz and Kovacic conclude that while Schnacke's "test potentially is more flexible and less deferential" regarding innovation-based defenses, as a practical matter "the court's ultimate holding was that a product change must lack virtually any redeeming qualities to result in antitrust liability." *Emerging Trends, supra*, at 120 (citations omitted). For a thoughtful and more current analysis that highlights the ongoing challenges posed by such matters and condemns the judicial treatment, in all its varied forms, as "unsatisfactory," *see generally* Alan Devlin & Michael Jacobs, *Anticompetitive Innovation and the Quality of Invention*, 27 BERKELEY TECH. L.J. 1, 10-21 (2012) ("In the past fifteen years, three circuit courts of appeals have announced three very different standards for analyzing claims of predatory innovation. All three are unsatisfactory, though for different reasons.").

<sup>226</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 66 (D.C. Cir. 2001).

for overriding the user's choice of a default browser.<sup>227</sup> The plaintiffs appeared to have neither rebutted the proffered justification nor demonstrated that the anticompetitive effect outweighed the proffered procompetitive justifications. In particular, during the appeal itself, the "plaintiffs offer[ed] no rebuttal whatsoever. Accordingly, Microsoft may not be held liable for this aspect of its product design."<sup>228</sup>

Taken at face value, the absence of cases undertaking explicit balancing<sup>229</sup> could be explained by a distribution of pro- and anticompetitive effects in section 2 predatory design cases, which rarely includes small or modest innovation in the face of a demonstrable anticompetitive effect. This explanation strains credulity, however. More likely, either the courts that espouse balancing so heavily weigh innovation that they effectively follow the Ninth Circuit approach in *Allied Orthopedic*, or they expand the category of pretext to include small innovations as well as non-innovations.

This expansion-of-category explanation suggests that courts may eschew the difficult task of balancing procompetitive and anticompetitive effects and, instead, opt to determine whether the claim of a legitimate business purpose was, or was not, pretextual. When courts discount or reject defendants' "general" or "abstract" justifications of redesigns, they may be implicitly stating that the procompetitive effects are substantially weaker than the anticompetitive effects. Conversely, when innovation is "found," it almost invariably suffices to overcome whatever anticompetitive effect may be present. This interpretation suggests that courts may be somewhat disingenuous in explaining their determinations. It is broadly consistent, however, with the espoused principle supporting balancing, and it is made easier as more and more rulings seemingly take this indirect approach.

The Ninth Circuit approach to predatory design is arguably extreme in that the court elevates innovation and business judgment values over anticompetitive effects. While the wisdom of this position is clearly debatable, it is unambiguous and transparent. A more subtle problem emerges in the use of the alternative "balancing" approach in practice. There is no problem, of course, where the actual facts fully preclude any balancing. But if balancing occurs under the guise of determinations regarding pretextual claims of innovation, the evolution of predatory design law would likely be biased against the use of balancing in the future. Proponents of the innovation-trumps-all-anticompetitive-effects position gain additional support from the ostensible

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<sup>227</sup> *Id.* at 67.

<sup>228</sup> *Id.*

<sup>229</sup> Despite having espoused such balancing in theory, these courts do not appear to have done so in practice. See *Allied Orthopedic Appliances, Inc. v. Tyco Health Care Grp.*, 592 F.3d at 1000 (9th Cir. 2010) (citing *Microsoft*, 253 F.3d 34 (D.C. Cir. 2001) ("Although one federal court of appeals has nominally included a balancing component in its test, it has not yet attempted to apply it.")).

outcomes of such cases, while discourse regarding how to make nuanced assessments of the various effects and how to balance them remains stunted.

In summary, most observers believe that courts have responded quite favorably to legitimate business purpose defenses involving innovation as long as they are non-pretextual. This appears to reflect a general skepticism towards allegedly anticompetitive design and an apparent unwillingness to second-guess business decisions, especially those associated with innovation. While some courts maintain that balancing is necessary, in practice these same courts typically find either the existence of a plausible procompetitive rationale for the product change or that the proffered rationale was pretextual. Either way, current precedent has effectively resulted in a polar outcome regarding the innovation and antitrust interface: the existence of a nonpretextual innovation justification is sufficient to overcome claimed anticompetitive effects.

## 2. Monopoly Broth

The antitrust analysis, thus far, has examined anticompetitive redesign as an independent section 2 cause of action. As a practical matter, however, plaintiffs alleging predatory design also typically allege other anticompetitive conduct. Given the challenges associated with a predatory redesign-based cause of action and the fact that it is often alleged as part of more complex misconduct, the “monopoly broth” doctrine may uniquely contribute in such contexts. Monopoly broth provides a mechanism by which different acts of alleged misconduct that do not individually constitute an antitrust violation, nevertheless, may be key elements in an overall course of conduct that does constitute an antitrust violation.<sup>230</sup>

More than fifty years ago, the Supreme Court articulated the key dynamic underlying what would become the monopoly broth doctrine. The Court instructed that “plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.”<sup>231</sup> In practice, this meant that the allegedly anticompetitive conduct is “not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.”<sup>232</sup> Monopoly broth case law reflects concerns about the under-inclusiveness of section 2 given varied factual allegations while remaining cognizant about avoiding overcompensation in the other direction. This tempered approach is reflected in the admonition “to look at conduct in the aggregate because ‘[i]t is the mix of the various ingredients of utility behavior in a monopoly broth that produces

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<sup>230</sup> See, e.g., *City of Mishawaka v. Am. Elec. Power Co.*, 616 F.2d 976, 986 (7th Cir. 1980) (“It is the mix of the various ingredients . . . in a monopoly broth that produces the unsavory flavor.”); *Tele Atlas N.V. v. NAVTEQ Corp.*, No. C-05-01673 RS, 2008 WL 4911230, at \*2 (N.D. Cal. Nov. 13, 2008) (“To appreciate the effect of otherwise lawful acts, the jury must consider the acts’ aggregate effect.”).

<sup>231</sup> *Cont’l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

<sup>232</sup> *Id.*

the unsavory flavor.’ . . . [However, c]ourts and juries must be careful in ‘tasting’ the broth because the consequence is to throw out perfectly good soup.”<sup>233</sup>

While the monopoly broth theory has been successfully invoked only infrequently, it remains good law. For example, the court in *Free Freehand Corp. v. Adobe Sys. Inc.*<sup>234</sup> opined:

[T]his Court need not decide whether a plaintiff can survive a motion to dismiss by alleging a series of procompetitive acts that, in the aggregate, combine to violate the antitrust laws. The allegations of anticompetitive acts, and their alleged aggregated anticompetitive effect, fall squarely within the bounds of established monopoly broth theory.<sup>235</sup>

Consideration of the monopoly broth theory is most appealing, of course, when various challenged activities, viewed separately and individually, are insufficient to find antitrust liability. However, a polar approach to liability, such as in determinations regarding redesign, undermines the aggregate approach that is essential to monopoly broth theory.<sup>236</sup> That is, perhaps one unintended consequence of the arguably polar approach to predatory design is that it effectively removes predatory design as an ingredient from a monopoly broth argument.

### III. RECOMMENDATIONS AND ANALYSIS

Part II revealed an unfortunate parallel between the treatments of innovation and speech within antitrust contexts. Antitrust rulings suffer from the reluctance to meaningfully acknowledge that legitimate innovation or speech interests might warrant some legal solicitude short of de facto immunization. Part II also identified important precedent that, this Article argues, militates against such polar treatment. Transcending that polar treatment is increasingly important in antitrust matters concerning information products often characterized by uncertain innovations and modest speech interests. Towards that end, Part III proposes two analytical frameworks that establish a legal middle ground for the treatment of both innovation and speech interests within antitrust.<sup>237</sup> It then applies those frameworks to examples of antitrust challenges that focus on product redesigns by Google and Nielsen.

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<sup>233</sup> *Tele Atlas N.V.*, 2008 WL 4911230, at \*2 n.1 (citations omitted).

<sup>234</sup> 852 F. Supp. 2d 1171 (N.D. Cal. 2012).

<sup>235</sup> *Id.* at 1184.

<sup>236</sup> See generally Daniel A. Crane, *Does Monopoly Broth Make Bad Soup?*, 76 ANTITRUST L.J. 663 (2010). The use of monopoly broth theory in practice is significantly affected by the placement and magnitude of the burden of proof/persuasion. The fact that a cause of action may be made more or less difficult to allege or, if successfully alleged, more or less difficult to rebut, is part and parcel of varying underlying tensions.

<sup>237</sup> Recall that this Article defines innovation broadly to include product improvements that do not necessarily embody technological change.

### A. *Recommendations*

The recommended frameworks propose, as a baseline matter, a more nuanced treatment of innovation and speech-based defenses to antitrust actions. In the context of innovation, the recommendation replaces a polar approach with one that is quite literally more balanced, as it weighs the procompetitive and anticompetitive effects of the conduct at issue. Similarly, this Article rejects a polar approach to the intersection of the First Amendment and antitrust. Such a polar approach is exemplified by some antitrust defendants' increasingly vigorous advocacy that their commerce-related speech is immunized from antitrust liability. Though the judiciary has not yet squarely addressed this issue, it is notable that the judiciary may have become increasingly sympathetic to expanding strong First Amendment protection to commerce-related speech within other contexts. At a minimum, the recommendations contained in the proposed framework do not permit commerce-related speech to immunize otherwise unlawful product redesigns from antitrust law.

The recommendations regarding antitrust's interface with speech and innovation-based defenses receive separate treatment initially within this Part. The implications of the commingling of speech and innovation in information product redesign for those recommendations are then discussed. In particular, this Article considers how the current polar treatment of innovation, which arguably immunizes conduct involving nonpretextual innovation from antitrust liability, ultimately impacts protection accorded to speech. The extreme nature of the protection given innovation means that if speech and nonpretextual innovation coexist in a product redesign, then the speech is protected as well, albeit inadvertently. However, if the antitrust case law reduced the protections accorded nonpretextual innovation, e.g., if the procompetitive effects of small innovations are balanced against anticompetitive effects, then the spillover protection of speech is diminished. And, in those instances wherein innovation does not accompany speech, forthright protection of speech values is necessary. Thus, even given the current legal treatment of innovation defenses in antitrust actions, the treatment of speech and innovation in information product antitrust actions warrants reconsideration that specifically accounts for the spillover or lack of spillover protection one regime provides to the other.

#### 1. Treatment of Innovation

How should antitrust assess allegedly anticompetitive changes to information products in which there is no speech interest? This Article recommends that courts actually undertake the admittedly difficult task of balancing pro- and anticompetitive effects. Benefits to consumers resulting from a product redesign in the form of lower prices or increased quality or variety of offerings are procompetitive effects. Increases in innovation that might, for example, result from redesigns that encourage additional development of complementary products, are also procompetitive, though the effect is indirect. Conversely, increases in prices and decreases in quality,

variety, or innovation harm consumers and are anticompetitive effects.<sup>238</sup> Although balancing pro- and anticompetitive effects is central to most antitrust analyses, courts are divided regarding whether and how to assess product changes involving nonpretextual innovation. As discussed, courts that reject balancing typically deem it unworkable, while those endorsing balancing, through their own inaction, have failed to demonstrate its workability.<sup>239</sup> This issue is clearly an instance illustrating the proverbial “devil in the details.”

With regard to innovation, this recommendation identifies discrete competitive effects amenable to at least first-order balancing. It also demonstrates the potential antitrust significance of even such limited information and identifies pathways for its expansion including some proposed tests that sometimes reduce the complexity involved in balancing. Finally, it underscores the folly associated with ignoring important, but complex, realities in favor of unrealistic shortcuts. To the extent that a business justification, unrelated to innovation, also receives polar outcome treatment, the general approach recommended for innovation would also apply.

More specifically, because this recommendation would require courts to identify and assess the relative size of the pro- and anticompetitive effects, this Section first illustrates how these effects can be estimated. The problem of balancing is considered with additional discussion regarding questions about the antitrust standard and its implications for chilling innovation. The viability of balancing competitive effects depends on, first, whether absolute and relative measures of their magnitude can reasonably be estimated and, second, the extent to which differing competitive effects can be compared. To facilitate the latter comparison, particularly when estimates regarding the magnitude of the innovation at issue are quite uncertain, a presumption favoring innovation over price effects is adopted.

*Anticompetitive Effects.* Identifying and assessing anticompetitive effects pervades antitrust analysis generally.<sup>240</sup> Normally, this analysis entails considering direct evidence of the effects through comparisons of price, quality, or variety changes before and after the product redesign. Because of the complexities associated with product redesigns, however, such market-level changes are alone unlikely to be determinative, though they may still reveal evidence of anticompetitive effects.<sup>241</sup> A redesign’s consequences for a

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<sup>238</sup> See U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, *supra* note 206, at 2.

<sup>239</sup> See *supra* Part II.B.1.c.

<sup>240</sup> Jonathan Jacobson, Scott Sher & Edward Holman, *Predatory Innovation: An Analysis of Allied Orthopedic v. Tyco in the Context of Section 2 Jurisprudence*, 23 LOY. CONSUMER L. REV. 1, 33 (2010) (balancing the effects of alleged antitrust conduct in predatory innovation cases involves “fundamentally the same test that the courts and agencies apply almost every day in determining whether a merger violates Section 7 of the Clayton Act”).

<sup>241</sup> In theory, one could avoid weighing pro- and anticompetitive effects, for example, through simple before-and-after price comparisons to determine the net effect of allegedly offending conduct on consumer welfare. Such price comparisons require adjusting the prices for quality. This is particularly difficult in product design contexts wherein the qualitative



rival's ability to compete would also be relevant. Anticompetitive redesigns that involved ostensibly intentional incompatibilities or redesigns that increased the customer switching costs would constitute evidence of a defendant's attempt to raise a rival's costs or to deter entry; both of those circumstances are linked to decreases in competition and increases in market price.<sup>242</sup> If evidence of anticompetitive intent exists, then it may also inform estimates of competitive effects by indicating the expected qualitative effect of the redesign.

*Procompetitive Effects.* The most relevant procompetitive effect for product redesigns is the benefit consumers receive from increased quality. Assessment of the increased quality of the redesign, i.e., the magnitude of the innovation, is therefore key.<sup>243</sup> A logical starting point for assessing an innovation's

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value of a given innovation may engender significant debate. Further complicating such assessments is the fact that the products as redesigned and as earlier designed may target somewhat different markets.

<sup>242</sup> Mark S. Popofsky, *Charting Antitrust's New Frontier: B2B*, 9 GEO. MASON L. REV. 565 (2001), provides a hypothetical example of a potentially anticompetitive redesign in the business-to-business ("B2B") context. He posits a dominant B2B marketplace that introduces an "innovative technology" that changes the marketplace from an open to a closed procurement system. This change increases the switching costs of those using the marketplace and, in turn, raises rivals' costs. *Id.* at 582-84. *See also* Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311 (2006) for a discussion of calculating and comparing pro- and anticompetitive effects in the context of an incompatible product design change and where the exclusionary actions involve the maintenance of the monopoly.

<sup>243</sup> The time and resources firms devote to new product development ("NPD") are enormous and are reflected in an extensive business literature. NPD concepts apply, in differing ways, to the full range of new products: "new-to-the world products," "new-to-the company products," market extensions, line extensions, product improvements, and cost improvements. THE PDMA HANDBOOK OF NEW PRODUCT DEVELOPMENT 374 (Kenneth A. Kahn et al. eds., 2d ed. 2005). While the presence or absence of a "formal process for conducting new product development" previously served as "a differentiator between the best performers and other companies, companies now view having a process as a necessary aspect of product development." *Id.* at 549.

At the risk of vastly oversimplifying the process, several factors warrant particular emphasis. First, typically there are numerous developmental stages each followed by a review process in which the gatekeepers determine whether the project will proceed or be terminated. Critical review periods include initial screen, business case evaluation, and launch. *Id.* at 337-38. Ultimately, whether a new product "launch can reasonably be justified" requires a multifaceted "final business evaluation" whose dimensions include market share, market attractiveness, product evaluation, cost forecast, and sales forecast. EDWIN E. BROBROW, THE COMPLETE IDIOT'S GUIDE TO NEW PRODUCT DEVELOPMENT 181 (1997). Forecasts "are normally in dollars" and constitute an "elemental part" of "most, if not all, go/no-go decisions" within NPD. PMDA HANDBOOK, *supra* at 362. A survey of companies post-launch regarding the accuracy of their new product forecasts revealed that cost improvements (72%) and product improvement forecasts (65%) were the most accurately forecasted categories, and new-to-the-world (40%) and new-to-the-company

magnitude is to estimate the value a consumer receives from the change.<sup>244</sup> Estimating such procompetitive effects involves standard marketing techniques that firms typically undertake as part of their product development and launch.<sup>245</sup> More specifically, the actual price that consumers were willing to pay and the sales response more generally provide information that facilitates an ex post estimate of consumer valuation of the innovation. While the most appropriate metric would be a firm's expected response rather than the response it actually received, the latter information is still useful.<sup>246</sup> The greater challenge involves products that represent significant breaks from previous offerings. However, incremental redesign is relatively common in information product settings, and it constitutes the easiest setting to analyze because previous market experience provides a good basis for extrapolation.<sup>247</sup> Along similar lines, another way to assess relative innovation is to compare the innovation at issue to that which is commonplace with product redesigns in the industry or by the firm itself.

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(47%) were the least accurate forecasts. *Id.* at 374.

<sup>244</sup> Given a specific redesign, it is also possible to directly compare the features between the new product at issue and the product it replaced. One problem with this approach is that redesigns typically involve a "mixed bag." Daniel A. Crane, *Legal Rules for Predatory Innovation*, CONCURRENCES: COMPETITION L.J., no. 4, 2013, at 4, available at <http://www.concurrences.com/Journal/Issues/No-4-2013/Doctrines-1492/Legal-rules-for-predatory?lang=fr>, archived at <http://perma.cc/8CJF-77C5>.

<sup>245</sup> See generally Elie Ofek & V. Srinivasan, *How Much Does the Market Value an Improvement in a Product Attribute?*, 21 *MARKETING SCI.* 398, 399 (2002) (proposing and applying an econometric method through which firms can estimate the "market's value for an attribute improvement (MVAI)"). See also THE PDMA TOOLBOOK FOR NEW PRODUCT DEVELOPMENT 89 (Paul Belliveau et al. eds., 2002) ("Customer-perceived value ["CPV"] is the result of the customer's evaluation of all the benefits and all the costs of an offering as compared to that customer's perceived alternatives."). It entails addressing three questions whose answers are generally complex, relative, and dynamic: "1. How will the CPV attributes be judged in the marketplace? 2. What alternatives to the potential offering exist? 3. How might competitors offering alternatives attempt to influence the customer's balance scale?" *Id.* at 90, 101.

<sup>246</sup> Richard Gilbert, *Holding Innovation to an Antitrust Standard*, 3 *COMPETITION POL'Y INT'L* 47, 52 (2007) ("If the goal of antitrust enforcement is to promote socially desirable conduct and deter undesirable conduct, then the conduct should be evaluated based on the information that was available when it occurred.").

<sup>247</sup> There are a number of other complicated considerations that are important in some, but arguably not all, circumstances. For example, how is the innovation in question related to other innovations and, if it is, how does one estimate the innovation's value? Gilbert notes, for example, that many innovations build on one another, and he therefore cautions that focusing too narrowly on a particular innovation does not account for the full value of the innovation. *Id.*; see also Suzanne Scotchmer, *Standing on the Shoulders of Giants: Cumulative Research and the Patent Law*, 5 *J. ECON. PERSP.* 29, 31 (1991) (observing, in the context of a discussion about allocating patent rights, that "[p]art of the first innovation's social value is the boost it gives to later innovators").

In some cases a question arises as to the scope of the redesign at issue. More specifically, is the redesign more appropriately analyzed as a bundle of relatively unrelated innovations, or should it be analyzed as an integrated whole? In *Microsoft*, the product redesigns appeared to reflect different degrees of integration between their constituent parts.<sup>248</sup> If one can establish that the conduct at issue can be isolated to a portion of the redesign that is functionally separable from other segments of the redesign, a court may narrow its focus accordingly. In so doing, an innovation-based defense would then require the defendant to demonstrate the existence and size of the innovation associated with the component, rather than rely on innovation that characterizes the redesign as a whole.

In extreme cases this redefinition may effectively eliminate an innovation-based defense if no innovation is associated with the specific change at issue. Essentially, this argument requires the court to compare the actual redesign to viable “less restrictive” redesign alternatives. This inquiry seems particularly relevant to information products, which often consist of multiple changes, some of which are integrated and some of which may be viewed as relatively separable from the other changes (e.g., changes to the underlying software code). Evidence suggesting that the defendant was both aware of potential anticompetitive effects and considered design alternatives with very similar (or even superior) innovative qualities but without the anticompetitive effect would weigh against the defendant.<sup>249</sup> This “less restrictive alternative” type of screen, if sufficiently cabined in its application, could be a useful mechanism to assess the relative size of the innovation at issue and has value, at a minimum, as a tie-breaking factor.<sup>250</sup>

*Balancing.* Balancing the pro- and anticompetitive effects of design changes presents additional challenges. Although innovation and anticompetitive effects both are linked to consumer welfare, these effects will generally be, or appear to be, relatively incommensurate. Such incommensurability complicates balancing these competitive effects, as balancing requires at least some reliance on what this Article terms a metaphorical “conversion factor.” This complication is not, however, fatal. Courts routinely make judgments involving incommensurate factors. When courts rule that a given innovation trumps any anticompetitive effect, they are making this difficult decision. The benefit, then, in an approach that crucially depends on the presence or absence

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<sup>248</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 65 (D.C. Cir. 2001).

<sup>249</sup> *See, e.g., Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997) (finding that plaintiff can overcome a showing that the challenged conduct has a net procompetitive effect by identifying an alternative means of achieving the same effect).

<sup>250</sup> *See* Dennis A. Yao & Thomas N. Dahdouh, *Information Problems in Merger Decision Making and Their Impact on Development of an Efficiencies Defense*, 62 ANTITRUST L.J. 23, 38-40 (1994) (discussing, in the context of merger analysis, the informational problems associated with the use of less restrictive alternatives test); *see also* Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1067 & n.44 (1979) (discussing the use of political concerns as tie-breakers in merger analyses).

of innovation, is its relative ease of implementation and not its avoidance of a difficult tradeoff.

As discussed, current antitrust law regarding product redesign largely adopts a conversion factor in which the presence of innovation trumps any anticompetitive effect. For example, the Ninth Circuit explicitly eschews any substantive balancing.<sup>251</sup> The D.C. Circuit has embraced balancing in theory, but it only finds antitrust liability when innovation is pretextual.<sup>252</sup> Given the implausibility that product redesign is almost never both pro- and anticompetitive, two reasonable interpretations of such rulings seem most plausible: either no balancing is occurring, or balancing occurs but it is obscured by a finding that innovation is pretextual when, in fact, it is not. If stealth balancing is occurring, such opacity is undesirable both as a matter of legal process and because it undermines discourse that is critical to developing the court's ability to make these difficult determinations.

The difficulties with assessing and then comparing the pro- and anticompetitive effects of exclusionary conduct involving innovation have led some scholars and practitioners to recommend tests that assess the challenged conduct's net impact.<sup>253</sup> Two of the most prominent tests are the "no economic sense" and the "consumer welfare" tests. The "no economic sense" test, a descendent of the "profit sacrifice" test, essentially asks whether the conduct at issue would have been undertaken if there was no expectation of anticompetitive effect.<sup>254</sup> If the anticompetitive consequences were essential to

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<sup>251</sup> See *Allied Orthopedic*, 592 F.3d at 1000 ("There is no room in this analysis for balancing the benefits or worth of a product improvement against its anticompetitive effects.") and *supra* notes 226-228 and accompanying text (discussing *Allied Orthopedic*).

<sup>252</sup> See *Microsoft*, 253 F.3d at 59 (explaining that once a monopolist asserts "a nonpretextual claim that its conduct is indeed a form of competition on the merits," the burden then shifts to the plaintiff to "demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit") and *supra* notes 200-213 and accompanying text (discussing *Microsoft*).

<sup>253</sup> But see Jacobson et al., *supra* note 240, at 3-4 (arguing that the *Microsoft* court's balancing test is superior to the "profit sacrifice test" and the "no economic sense test" for determining liability in predatory innovation cases).

<sup>254</sup> A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles?*, 73 ANTITRUST L.J. 375, 391 (2006) (indicating that "the test depends, not on the timeline, but rather on the nature of the conduct—on whether it would make no business or economic sense but for its likelihood of harming competition"); Janusz A. Ordover & Robert D. Willig, *An Economic Definition of Predation: Pricing and Product Innovation*, 91 YALE L.J. 8, 9 (1981) ("Assuming that businessmen know how their actions affect their profitability and the profitability of their rivals, predatory objectives are present if a practice would be unprofitable without the exit it causes, but profitable with the exit."); Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 ANTITRUST L.J. 413, 414 (2006) (explaining that the essential question is "whether challenged conduct would have been expected to be profitable apart from any gains that conduct may produce through eliminating competition").

motivate the conduct at issue, it would be condemned. The “no economic sense” test focuses on the firm and does not directly address the *net* benefit to the consumer. In contrast, the “consumer welfare” test compares the change in benefit to the consumer and the change in the price the consumer actually pays, and condemns conduct in which the consumer is made worse off.<sup>255</sup> These tests constitute alternatives through which decisions regarding antitrust liability can be evaluated, and each offers potentially useful input to the approach recommended herein.<sup>256</sup> However, problems with both approaches concern the estimation of consumer benefit, discussed previously, and the difficulties associated with estimating unobservable effects.

		Innovation Size		
		small	unsure	large
Anticompetitive Effect Size	small	no	no	no
	unsure	no	no	no
	large	yes	no	no

*Workability and Chilling Innovation.* The judgment that *any* level of innovation should trump *any* anticompetitive effect reflects two debatable premises. First, the courts always have great difficulty distinguishing between very small innovations and larger innovations. Second, the overall effect on innovation decreases when one moves towards balancing and away from completely favoring innovation over any anticompetitive effect.

The first premise raises questions regarding the availability and reliability of evidence underlying key decision inputs. Innovation, as defined herein, includes product changes that may not embody technological advances, and one should be careful not to think of innovation solely in terms of such advances. Firms routinely redesign products and undertake marketing studies predicting the effects of such redesigns. Some of these changes are substantial, others are clearly incremental, and some may be so marginal that they would not seem worthy of special treatment. Internal documents as well as expert

<sup>255</sup> Salop, *supra* note 242, at 325 (“The consumer welfare effect test compares the additional performance benefits to consumers . . . to the additional price they must pay . . . . It is obvious that rational consumers would have preferred the old product at the old price.”).

<sup>256</sup> The evaluation of these tests is beyond the scope of this Article. *See generally* Gilbert, *supra* note 246, at 77 (concluding that the “no economic sense” test best provides “a wide berth for innovation”); Jacobson et al., *supra* note 240, at 33 (advocating use of the “consumer welfare” test); Salop, *supra* note 242, at 313-14 (discussing the same).

assessments can guide the court in making these distinctions. Furthermore, the difficulties in making such assessments may be overstated: administrative agencies, for example, have been making many such judgments in this and related contexts.<sup>257</sup>

The second premise raises questions regarding the full range of long-term effects, including chilling effects on future innovation. One concern is that antitrust interventions in these settings are counterproductive, because they reduce the global *ex ante* incentives for innovation.<sup>258</sup> While antitrust interventions reduce a potential monopolist's incentive to innovate in theory, questions remain regarding the size and overall impact of the interventions in practice. Many observers, for example, believe that the effect of small antitrust policy changes has no appreciable effect on innovation incentives and, in any event, has not been empirically established.<sup>259</sup> Furthermore, anticompetitive effects also affect the innovation by their rivals, either by suppressing rivals' actual innovation or by reducing rivals' incentives to innovate.<sup>260</sup> The innovation embodied in the product redesign, therefore, is not the only innovation effect at issue. Thus the link between anticompetitive conduct and

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<sup>257</sup> Within the Google context, for example, an assessment of the relevant innovation effects would seem implicit in the various remedies explored by the European Commission regarding alleged anticompetitive manipulation of search engine results. Presumably, these remedies attempt to address the underlying harm without unduly interfering with Google's freedom to innovate. Joaquín Alumina, Statement on Google Investigation, Press Conference, Feb. 5, 2014, *available at* [http://europa.eu/rapid/press-release\\_SPEECH-14-93\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-93_en.htm). Within the context of merger reviews, for example, comparisons of the prospective effects of innovation versus price are frequently made. Gilbert, *supra* note 246, at 75 ("In merger analysis, competition authorities engage in a rule of reason balancing of likely pro-competitive effects of a merger against any likely competitive harm, and take into account both potential benefits for innovation and possible harm from a reduction of innovation.").

<sup>258</sup> See, e.g., *id.* at 76 ("Rule of reason analysis, whether based on consumer or total economic welfare, generally fails to measure the spillover effects from innovation . . . and, perhaps most importantly, does not account for the chilling effect of antitrust scrutiny on incentives to innovate.").

<sup>259</sup> Tracy R. Lewis & Dennis A. Yao, *Some Reflections on the Antitrust Treatment of Intellectual Property*, 63 ANTITRUST L.J. 603, 609 (1995) ("In summary, there is disagreement over whether minor changes in antitrust policy matter for inducing innovation. If they do, there still remains the question of whether the joint effect of current patent and antitrust policies results in too little or too much innovation.").

<sup>260</sup> Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft*, 7 GEO. MASON L. REV. 617, 664 (1999) ("However, this recommendation loses force because of the likely adverse impact of exclusionary conduct on innovation competition by actual and potential rivals in those markets. If a market is driven more by innovation than price competition, then entrants also must have an open environment in order to challenge the monopolist. An overly permissive antitrust regime may reduce aggregate innovation, as innovation by entrants and small competitors is reduced by more than innovation by the monopolist increases.").

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rival innovation suggests that assessments regarding innovation effects that focus solely upon the defendant's innovations may be incomplete.<sup>261</sup>

While the unworkability and chilling innovation arguments against a balancing approach may be overstated, there is clearly some merit to these criticisms. The recommendations mitigate these concerns by adopting a presumption favoring innovation over anticompetitive effects. Balancing only occurs when innovation magnitude assessments can be made confidently and, there, balancing would seem to offer a clear improvement over the status quo.

A period of transition will be necessary to migrate from a relatively simple to a more complex decision rule. Success requires both immediate adaptation and ongoing learning. As the courts gain experience identifying and balancing innovation effects and anticompetitive effects, overcoming the presumption may become easier, or the presumption could be modified. It is crucial, however, that the courts do not recreate the unacknowledged balancing strategy, albeit at a different pivot point, that arguably has been used by some courts that simultaneously espouse balancing while avoiding it through aggressively dismissing innovation as pretextual. When transparency is lacking, it not only undermines the discourse needed to improve legal outcomes, but it may also prompt other courts and observers to incorrectly perceive a trend or even a precedent against balancing.

## 2. Treatment of Speech

Speech is the expression or communication of ideas.<sup>262</sup> This definition arguably encompasses the sale or use of information products; the information product itself is content that is then conveyed through its sale or use. While the foregoing recommendation regarding innovation assumed *arguendo* the absence of any speech interest associated with the information product design, this Section offers recommendations regarding how to identify and, as warranted, to protect speech-based interests consistent with the First Amendment. This analysis is particularly important given the increasing frequency with which antitrust challenges to information products will likely encounter First Amendment-based defenses. Significantly, this Section advocates speech-based solicitude that is consistent with First Amendment protection and does not unnecessarily sacrifice competition policy values. Even if information products constitute speech, it does not follow that all forms of allegedly anticompetitive conduct involving such products warrant First

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<sup>261</sup> *But see* Gilbert, *supra* note 246, at 76 (arguing that innovation effects are sometimes underestimated because they do not account for the impact of innovation on complementary markets).

<sup>262</sup> *See generally* Thomas Scanlon, *A Theory of Freedom of Expression*, in *THE PHILOSOPHY OF LAW* 155, 153-71 (R.M. Dworkin ed., 1977) (defining “acts of expression” very broadly to include any speech, publication or other act “linked with proposition or attitude which it is intended to convey”).

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Amendment protection or that, when solicitude is warranted, it applies in a singular manner regardless of the specific facts.

The challenge attendant to establishing a legal middle ground that transcends all-or-nothing protection for speech within an antitrust context reflects, in part, the difficulty with decisions that seek to integrate noneconomic and economic values. Antitrust law, particularly in recent decades, has grown increasingly hostile to recognizing any noneconomic values. Noneconomic values whose antitrust significance has been debated within this context historically, include the role of small businesses and business influence on political power. While the specifics vary considerably, the terms of the debate do not. To what extent, if at all, is a given noneconomic value reflected in the antitrust regime's laws, their legislative history, and their common law development?

The speech within this context can be broadly understood as a "noneconomic value" that poses challenges to the economic thinking that largely undergirds antitrust law today. Significantly, the speech values at issue in this Article are derived from and protected by the First Amendment. The antitrust laws cannot be applied in a manner that violates the First Amendment. But, that does not mean that the antitrust laws cannot be applied to speech in a manner consistent with the First Amendment. The recommendations focus upon legal middle grounds in which the First Amendment modifies a law's application without conferring immunity from the law or declaring the law unconstitutional.

a. *Definition*

The information products at issue herein constitute "speech" as colloquially defined.<sup>263</sup> Whether such expression warrants any First Amendment solicitude and if so, how much, requires more refined consideration than whether or not something is political speech and, therefore, receives immunization or no solicitude accordingly. Towards that end, this Article proposes two additional categories: cognizable speech and nominal speech. The antitrust actions at issue allege anticompetitive changes to information products. Rather than attempting to classify the speech solely with reference to the information product itself, this recommendation examines whether the basis for the cause of action implicates the substantive content of the speech as opposed to non-substantive matters (e.g., purely logistical aspects). When the cause of action rests on changes to the information product's content, the speech at issue is classified as cognizable speech and receives solicitude in the antitrust analysis.<sup>264</sup>

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<sup>263</sup> See *id.* at 155 (offering a more formal definition).

<sup>264</sup> Obviously, when speech is solely the instrument for illegal activity, e.g., price fixing, no First Amendment solicitude exists. See *supra* note 76 and accompanying text.



Consider a matter wherein the plaintiff alleges that the defendant increased the plaintiff's relative cost of attracting business by altering the ranking of the plaintiff's product. That legal action targets a change in content and, therefore, implicates cognizable speech. Other changes to an information product's content that would also implicate cognizable speech include measurement metrics that make it difficult to compare products.

An allegedly anticompetitive modification to an information product interface with which complementary products connect illustrates a possible antitrust challenge that would not implicate cognizable speech. Such a change involves how the content is conveyed and, therefore, implicates only nominal speech. Purely functional changes to information products would not receive speech-based solicitude within the context of an antitrust action. As such, a potentially anticompetitive redesign that merely entails a different mechanism by which to convey the same content would constitute conventional, non-speech-related, innovation. Examples of ostensibly functional modifications include changes in processing speed, support, reliability, and user interfaces.

The determination of whether speech is cognizable or nominal depends on whether or not the cause of action implicates questions regarding content. Hence, the same information product may receive different treatment depending on the causes of action stated in the complaint. In a manner somewhat similar to the distinction made in *Lorain Journal*, which distinguished actions by a newspaper regarding content and business activities that were ancillary to the content,<sup>265</sup> this proposal does not extend speech solicitude to all aspects of an information-provider's conduct merely because some of its unchallenged conduct merits some speech solicitude.

Nominal speech receives no First Amendment solicitude and, as such, constitutes an "outcome category" because the same legal outcome results for all speech falling within the category. Antitrust law would receive its traditional application notwithstanding the presence of nominal speech, an outcome that is fully consistent with the First Amendment. The second category, cognizable speech, includes a broad range of speech interests. To ensure that the First Amendment protection conferred corresponds sufficiently to the interest present, this Article proposes two dimensions along which to distinguish the nature and strength of such speech interests. As such, cognizable speech constitutes a "treatment category" because even though all such speech is analyzed similarly, the legal outcomes may vary. The challenge is to identify dimensions along which cognizable speech, as embodied in information products, can be distinguished.

*Sliding Scale.* Distinguishing between nominal and cognizable speech constitutes a necessary first step to creating a middle ground category for speech protection. All cognizable speech receives a base level of solicitude in the antitrust analysis. The next step is to develop treatment criteria that would

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<sup>265</sup> United States v. Lorain Journal Co., 92 F. Supp. 794, 799 (N.D. Ohio 1950).

facilitate distinctions within that category. Such distinctions, in turn, support increases to the base level of solicitude.

Given the general dearth of fully litigated cases within this context, legal precedent offers few insights regarding the dimensions along which to draw distinctions among cognizable speech. Nonetheless, two dimensions are recommended as the starting points for the sliding scale: transparency and independence.<sup>266</sup> The protection accorded the speech at issue increases as content of the speech is (1) more *transparent* regarding speaker biases or motivations that are relevant to the content of the speech at issue, and (2) more *independent* of financial or nonfinancial interests. Speech content is more transparent if the speaker, for example, discloses its biases, or if the receivers of the speech generally know that information. Speech content is independent if no direct link exists between the content of the speech and the revenues of the speaker firm. The transparency and independence dimensions attempt to capture the value of the speech to listeners and, therefore, its contribution to the marketplace of ideas or, in this case, the actual marketplace.<sup>267</sup> While speech is generally understood to constitute a non-economic value, the solicitude it receives is adjusted with reference to antitrust law's consumer welfare goal. The speech is commerce-based and is valued in terms of the context of the primary cause of action, antitrust.

*Consumer Reports* exemplifies the traits of transparency and independence. Its content is transparent as the magazine makes clear its objectives and the absence of advertising influences, and it is also independent because its

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<sup>266</sup> An alternative approach, rejected herein, is a pure sliding scale based on transparency and independence as dimensions. This Article's recommendation relies primarily on the cognizable speech category and then employs those two dimensions as a secondary adjustment. However, transparency and independence, while very important, may not exhaust the set of potentially relevant dimensions along which commerce-related speech can be usefully distinguished. Reliance on the general category is a cautious first step that recognizes the possibility of other important, but as yet unidentified, dimensions relevant to valuing this speech in the antitrust context.

<sup>267</sup> The proposed transparency and independence criteria are similar to requirements used in consumer protection settings to reduce consumer deception. *See, e.g.*, FED. TRADE COMM'N, .COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING 6 (2013), available at <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>, archived at <http://perma.cc/V5NP-W2ME> (requiring online advertising disclosures to be "clear and conspicuous"); *see also* Press Release, Fed. Trade Comm'n, FTC Consumer Protection Staff Updates Agency's Guidance to Search Engine Industry on the Need to Distinguish Between Advertisements and Search Results (June 25, 2013), available at <http://www.ftc.gov/news-events/press-releases/2013/06/ftc-consumer-protection-staff-updates-agencys-guidance-search>, archived at <http://perma.cc/HE4Y-S4BK> ("[F]ailing to clearly and prominently distinguish advertising from natural search results could be a deceptive practice."). The possible value of such criteria has been widely discussed in the academic literature as well. *See, e.g.*, Bracha & Pasquale, *supra* note 175, at 1183.

revenues come from reader subscriptions as opposed to advertising by the firms whose products are evaluated.<sup>268</sup> In contrast, a rating of a financial instrument that is paid for by the subject of the rating is clearly not independent speech, nor, if the source of revenues is not disclosed, is it transparent.

One virtue of transparency as a dimension of analysis is its value neutrality regarding the substantive content. If the listener is aware of relevant interests that might motivate particular speech, then the listener can calibrate her or his reliance on its message accordingly.<sup>269</sup> Transparency is typically achieved through disclosures, though such disclosures are necessarily imperfect and frequently depend on the listeners' characteristics. Further solicitude is appropriate for "independent" speech, which in this context indicates the absence of any relevant interests to disclose. Independence can be thought of as a characteristic of the speaker, whereas transparency concerns how listeners receive disclosures. This is the rationale for treating independence of the relevant content from strong financial or nonfinancial interests as a separate dimension.<sup>270</sup>

The recommended treatment of speech content in terms of these characteristics contrasts with the traditional role of speech in First Amendment cases that disfavor content-based restrictions as a matter of law.<sup>271</sup> In the antitrust setting, speech-based questions do not challenge the antitrust laws themselves as per se violating the First Amendment, but rather question their application in a specific case. The focus thus shifts to whether a speech interest is invoked and to what extent the speech can be reasonably evaluated by the listeners.<sup>272</sup>

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<sup>268</sup> See Randall Stross, *A Shopper's Companion, Still Going Strong*, N.Y. TIMES, Dec. 11, 2011, at BU3 ("[The fact that subscribers pay for a] consistent policy of not allowing advertisements has helped Consumer Reports protect a reputation for clear-sighted recommendations, untainted by commercial considerations.").

<sup>269</sup> In practice, transparency matters only in the presence of underlying bias. In theory, if there is no bias, then transparency and independence are not relevant. If there is bias, the biased speech is arguably better understood by listeners if the bias is disclosed.

<sup>270</sup> Another thorny problem involves changes to product "content" associated with repositioning information products in the marketplace (e.g., to serve a somewhat different consumer segment). Such content changes may also have anticompetitive effects. The recommendation does not accord still greater speech-based solicitude to such content changes largely because such motivations seem to provide easy sanctuaries for intended anticompetitive conduct. Repositioning, as a legitimate business justification, would be recognized within a standard antitrust analysis.

<sup>271</sup> See, e.g., John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1104 (2005) ("Under current law, content-based speech regulations are highly disfavored and are presumptively unconstitutional." (citing *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 660 (2004))).

<sup>272</sup> Arguably, speaker-based discrimination characterizes application of the antitrust laws as firms with market power are treated differently than those without market power. The

This Article's examination of First Amendment interests has focused upon the speech of firms with information products. Ironically, to the extent such speech interests exist, it is likely that additional and potentially competing speech interests also warrant consideration. In the information products sector, if the defendant's information products embody cognizable speech, then so too would the information products of the defendant's competitors. This Article designates speech interests other than the defendant's as "secondary speech interests," that is, speech interests of those other than the defendant that are oftentimes held by the defendant's competitors. Deterrence of entry, for example, may involve some suppression of secondary speech. Where there are very few or no effective competitors (no effective "speakers"), this suppression has potentially profound implications for speech in the relevant market. The First Amendment does not directly protect these secondary speech interests, because no government restriction of that speech would be involved with the application of the antitrust laws. Within the context of this recommendation, however, consideration of secondary speech interests is not only legitimate, but also required. However, under this proposal, secondary speech interests are recognized only as potential offsets to the defendant's primary speech interest.

b. *Protection*

Given the foregoing mechanisms to distinguish between cognizable and nominal speech and to calibrate the strength of the former along at least two dimensions, the recommended speech-based protection can be addressed. This Article recommends treating cognizable speech, invoked as a defense to an antitrust action, as an offset to anticompetitive effects proven in the relevant antitrust analysis, one that includes the innovation analysis discussed previously. In effect, cognizable speech constitutes a "minus factor" that "reduces" the level of anticompetitive harm. Such an offset is analogous to the role of "plus factors" in a price-fixing analysis.<sup>273</sup>

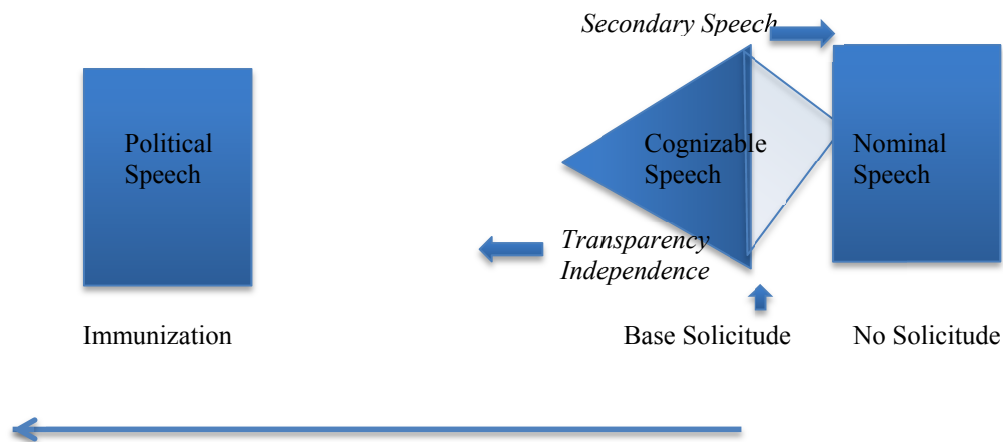
Cognizable speech is a treatment category that contains a sliding scale. All speech in the category receives a base level of solicitude sufficient only to reverse close calls that would otherwise result in antitrust liability. This base level of solicitude can be increased when strong evidence exists that the speech is independent, or when the speech is not independent but is quite transparent. In contrast, secondary speech interests reduce the level of solicitude. The solicitude conferred is capped at a level below that necessary to offset a moderate anticompetitive effect. Hence, a given cognizable speech interest can never rise to the level sufficient to effectively confer immunization from

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latter are less restricted in their information product-based speech. Of course, this differential treatment ultimately reflects whether a party can violate the antitrust law or not.

<sup>273</sup> See William E. Kovacic, *The Identification and Proof of Horizontal Agreements Under the Antitrust Laws*, 38 ANTITRUST BULL. 5, 31-55 (1993), for a discussion of the role of plus factors in establishing horizontal agreements.

antitrust action as advocated by Volokh and Falk and others.<sup>274</sup> The level of net solicitude also has a floor at zero, so the maximum effect allowed the secondary speech interest is to fully offset the primary speech interest.



The criteria proposed for assessing the speech interest strength and the concept of a secondary speech interest offset constitute analytical starting points. It is expected that additional criteria to gauge the strength of both primary and secondary speech interests will be identified as experience, particularly on the part of the judiciary, increases. More generally, the balancing and middle ground approaches for both innovation and speech are

<sup>274</sup> See generally Volokh & Falk, *supra* note 148. Volokh and Falk advocate for speech defenses to antitrust actions and appear to desire that courts treat the speech at issue in a manner akin to that of political speech, which would result in immunization against antitrust action. See *id.* at 895-96. But speech in a commercial context is quite different. See, e.g., *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380-81 (1977); *Linmark Assocs. v. Twp. of Willingboro*, 431 U.S. 85, 98 (1977); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 & n.24 (1976). Its social purpose is typically to provide information that may shape a future purchase decision. See, e.g., *Va. State Bd. of Pharmacy*, 425 U.S. at 773. Information, in turn, is a critical input to better decision-making and hence more efficient markets. From this perspective, chilling such speech should be avoided owing to its impact on efficient decision-making. But rather than suggesting a lexicographic preference for protecting such speech, as would be consistent with immunization against antitrust action, this Article argues that speech should be considered along with those factors that are normally considered in an antitrust analysis.

expected to evolve as the legal system acquires experience from the use of the approaches and with the specific application to information product markets. Such learning is facilitated by open discourse; such discourse is obscured when courts avoid balancing by finding that it is unnecessary because of disingenuous or suspect earlier assessments.<sup>275</sup> One implication of such learning is that, over time, the sliding scale would likely receive increasingly more weight in determining the size of the minus factor.

More generally, the creation of a cognizable speech category situated between the polar cases of no solicitude and full solicitude is in keeping with the First Amendment jurisprudence's demonstrated capacity for greater nuance, as reflected in its distinctive approaches regarding commercial speech and defamatory speech.<sup>276</sup> One key determination in *Central Hudson* concerned whether the public interest promoted by the statute in question exceeded a threshold sufficient to justify its incursion on commercial speech interests.<sup>277</sup> In the instant recommendation, the question is whether the competition interest exceeds the threshold to justify overriding the cognizable speech interest. In both circumstances, a key focus is on the size of the non-speech interest: the intrinsic speech interest is not distinguished across the types of speech that fall in the respective categories.

Nonetheless, the legal middle ground this Article advocates is distinguishable from the intermediate scrutiny standard applied to government restrictions on commercial advertising.<sup>278</sup> Direct First Amendment challenges examine whether a given law is constitutional, and the law is upheld or struck down. Intermediate scrutiny differs from strict scrutiny in the criteria that must be met for a law to withstand constitutional challenge.<sup>279</sup> When speech

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<sup>275</sup> Decision-making suffers when a small set of situations dictate preferences and decision-makers engage in "irrational consistency" by extending these preferences to decisions involving dissimilar situations. See ROBERT JERVIS, PERCEPTION AND MISPERCEPTION IN INTERNATIONAL POLITICS 138-39 (1976) ("Unless the cost of balancing values is terribly high . . . it will be in the decision-maker's interest to choose explicitly. Were he aware of the costs and conflicts, he might examine his own values and the evidence more carefully, extend his search to additional alternatives, and seek creative solutions." (footnote omitted)).

<sup>276</sup> Scanlon has aptly observed that "at least some element of balancing seems to be involved in almost every landmark First Amendment decision." Scanlon, *supra* note 262, at 154. He further argues that "[t]he balancing in such decision is not always strictly a matter of maximizing good consequences, since what is 'balanced' often includes personal rights as well as individual and social goods." *Id.* at 154 n.3.

<sup>277</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980) ("The State must assert a substantial interest to be achieved by restrictions on commercial speech.").

<sup>278</sup> See *supra* Part II.A.2.a (discussing commercial speech).

<sup>279</sup> SMOLLA, *supra* note 45, § 20:19 ("The test for commercial speech differs from strict scrutiny in two ways. First, the regulation need not be justified by a 'compelling' governmental interest; a 'substantial' interest will suffice. Second, . . . the means employed

considerations arise in the information product redesign contexts at issue, the constitutional analysis concerns the particular application of the antitrust law rather than the law itself. It is unnecessary, therefore, for recognition of speech to confer immunity or no immunity from antitrust law.

The sliding scale proposed herein does allow for some variation in the net speech interest within the category. What is critical with respect to workability, however, is that a specific underlying value of speech is not being determined for the speech embodied in each information product at issue. Rather, each embodiment of speech receives a category-level value to which adjustments are made based on factors that affect how easily the listeners can evaluate the speech. For example, no attempt is made to compare the underlying value of speech embodied in Nielsen's television ratings and Google's page rankings, but speech value assigned to the category can be adjusted within a given context based on its transparency and independence as well as the secondary speech interests involved.

c. *Pretrial Motions and Remedies*

The recommendation thus far has focused on a middle ground approach for addressing cognizable speech interests when assessing antitrust liability. As related matters, pretrial motions and remedies should also reflect, as necessary, any speech interests. The frequency with which the antitrust matters at issue herein have been resolved at the pleading stage underscores the significance of pretrial motions. Though, as a practical matter, the remedies stage is actually reached infrequently, the ability to craft antitrust remedies consistent with the First Amendment is essential to the overall legal process.

*Pretrial Motions.* Assuming arguendo the presence of a bona fide speech interest, to what extent—if at all—should such interests force a modification of not only the actual antitrust analysis (which this Article recommends), but also the analysis undertaken at either the motion to dismiss or summary judgment stages of the proceedings? Only one published opinion appears to have directly addressed this issue.

In the early 1980s, twenty-six independent film producers and directors alleged that CBS, NBC, and ABC undertook a “concerted policy” to “freeze . . . [plaintiffs] out of the documentary film market.”<sup>280</sup> The significance of this case, *Levitch v. Columbia Broadcasting Systems, Inc.*,<sup>281</sup> for instant purposes, lies in the limited nature of the broadcasters' First Amendment defense. They did not claim that the First Amendment immunized

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by the government need not be the ‘least restrictive’ method of achieving its objective.”).

<sup>280</sup> *Levitch v. Columbia Broad. Sys., Inc.*, 495 F. Supp. 649, 655, 654 (S.D.N.Y. 1980). In addition to antitrust claims, the plaintiffs also argued that the defendants had violated their First Amendment rights. *Id.* at 654. Such claims against commercial broadcasters, licensed and regulated by the FCC, had repeatedly failed owing to the absence of government action. The plaintiffs in *Levitch* were similarly unsuccessful. *Id.* at 656.

<sup>281</sup> 495 F. Supp. 649 (S.D.N.Y. 1980).

the challenged conduct from antitrust scrutiny. Instead, the defendants advocated imposing “a higher standard of pleading upon plaintiffs, to insure that plaintiffs seek to challenge economic conduct and not protected First Amendment conduct.”<sup>282</sup> Defendants argued that the plaintiffs failed to meet this higher pleading standard. That alleged failure, in turn, provided the basis for the “defendants’ First Amendment defense and their motion to dismiss in connection therewith.”<sup>283</sup> The defendants also argued that the plaintiffs failed to state an antitrust cause of action even under “normal pleading requirements.”<sup>284</sup>

The district court ultimately dismissed the antitrust claims after subjecting them to *traditional* pleading requirements.<sup>285</sup> In sharp contrast to most cases this Article discusses, the *Levitch* court ruled on the availability of the proffered First Amendment defense because if found to have merit, the defense would have affected the standard for assessing the sufficiency of the plaintiff’s claims.<sup>286</sup> Despite its apparent willingness to consider modifying the pleading standard, albeit in a largely unspecified manner, the court framed its decision as a choice between polar outcomes. More specifically, it ostensibly held that only “purely editorial” speech would receive First Amendment solicitude in the form of antitrust immunity.<sup>287</sup> Speech displaying both “editorial” and “economic” (i.e., anticompetitive) qualities would be subject to traditional pleading requirements.<sup>288</sup> The court found that the broadcasters’ challenged conduct was not “easily characterized” because the same decisions regarding what to air can be viewed as “editorial” discretion and as part of an anticompetitive boycott.<sup>289</sup> Therefore, it applied the traditional pleading requirement.<sup>290</sup>

The court reached the merits of the broadcasters’ First Amendment-based defense despite the fact that such a determination, as a practical matter, could

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<sup>282</sup> *Id.* at 661.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 660.

<sup>285</sup> *Id.* at 662, 679.

<sup>286</sup> The claims brought under section 2 of the Sherman Act, which were both monopolization and attempted monopolization, failed because the court concluded the plaintiffs could “prove no relevant product market in which any of the network defendants share exceed[ed] 33 percent.” *Id.* at 668. The court also dismissed the plaintiff’s section 1 claims, and section 2 tying claims. *Id.* at 665, 679.

<sup>287</sup> *Id.* at 661-62.

<sup>288</sup> *Id.* at 661.

<sup>289</sup> *Id.* The conduct at issue clearly implicated fundamental editorial prerogatives regarding program selection. However, the broadcasters’ decisions to air only in-house productions, the court further concluded, “could arguably be construed as an impermissible boycott and an attempt to interfere with business relationships in a manner proscribed by the antitrust laws.” *Id.* at 661.

<sup>290</sup> *Id.* at 662.



have been avoided.<sup>291</sup> Nonetheless, the court very clearly limited the reach of its rejection of arguments that the First Amendment required antitrust pleading requirements. “[A]lthough insufficient to impose a greater procedural burden upon plaintiffs at the pleading stage,” the court held that speech-based concerns “may very well impose a greater burden upon plaintiffs in the disposition of this action.”<sup>292</sup>

*Remedies.* Once an antitrust violation is found, the court is “empowered to fashion appropriate restraints” that will deter future violations by the defendants and will eliminate the unlawful benefits continuing to accrue to them.<sup>293</sup> The resulting remedial measures “may curtail the exercise of liberties that the [defendants] might otherwise enjoy;” such restrictions on liberties may be necessary or even unavoidable given the nature of the violation.<sup>294</sup> The First Amendment has been successfully invoked as a limitation upon the extent to which a proven antitrust violator’s speech may be coerced or restricted as a remedial measure. As the following cases demonstrate, First Amendment rights may arise at the remedies phase even when such rights are not implicated during the liability phase of an antitrust proceeding.

In *National Society of Professional Engineers v. United States*,<sup>295</sup> the Supreme Court famously condemned on antitrust grounds the challenged professional regulations governing engineers that prohibited price advertising prior to an engineering contract being awarded.<sup>296</sup> The professional society had argued that such a restriction was necessary because price competition would undermine safe engineering practices.<sup>297</sup> The majority rejected the professional society’s core position that competition itself constituted the problem.<sup>298</sup> While the determination of the professional society’s antitrust liability is well known, less attention has focused on the debate regarding the constitutionality of the remedies imposed.

The D.C. District Court imposed three remedial measures, and the Circuit Court only upheld two of them, namely the prohibition on the professional society continuing to deter such competition and the requirement that it affirmatively publicize its new policy consistent with the court’s ruling.<sup>299</sup> The Circuit Court found unconstitutional, under the First Amendment, the third

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<sup>291</sup> *Id.* at 660 (acknowledging that consideration of defendants’ First Amendment defense was not necessary unless plaintiffs proved successful in antitrust analysis).

<sup>292</sup> *Id.* at 662.

<sup>293</sup> *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978).

<sup>294</sup> *Id.* at 697.

<sup>295</sup> 435 U.S. 679 (1978).

<sup>296</sup> *Id.* at 679.

<sup>297</sup> *See id.* at 695-96.

<sup>298</sup> *See id.* at 696 (“[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable.”).

<sup>299</sup> *United States v. Nat’l Soc. of Prof’l Eng’rs*, 555 F.2d 978 (D.C. Cir. 1977), *aff’d*, 435 U.S. 679 (1978).

remedy, which required the defendant to affirmatively endorse the desirability of price competition.<sup>300</sup> The Supreme Court affirmed the Circuit Court's decision regarding remedies.<sup>301</sup> Chief Justice Burger dissented from the portion of the judgment that prohibited the engineering society from stating in its published ethical standards its viewpoint that "competitive bidding is unethical."<sup>302</sup> Burger argued, "The First Amendment guarantees the right to express such a position and that right cannot be impaired under the cloak of remedial judicial action."<sup>303</sup>

*ES Development, Inc. v. RWM Enterprises, Inc.*,<sup>304</sup> also a section 1 case, illustrates the potential pitfalls associated with broad speech restrictions as remedial measures in antitrust cases.<sup>305</sup> The district court found the defendant automobile dealers conspired to prevent the entry of a prospective competitor to the Chesterfield Auto Mall.<sup>306</sup> The defendants were enjoined from "individually communicating with their respective manufacturers concerning the Mall for the *indefinite* future."<sup>307</sup> While the Eighth Circuit affirmed the district court's decision to include relief that hinders the defendant's exercise of commercial speech, it further noted that such "broad equitable powers are not without limit."<sup>308</sup> In particular, "[a] proper tailoring of relief to the exigencies of a particular case is especially important in cases such as the present one, in which the relief granted necessarily carries constitutional ramifications."<sup>309</sup> The circuit court, relying upon *Central Hudson*, defined properly tailored remedies as "'narrowly drawn[.]. . . extend[ing] only as far as the interest it serves."<sup>310</sup> It then held the district court's restriction to be "inappropriate" because it constituted an "open-ended restriction upon [defendants'] individual exercise of their constitutionally protected rights of commercial speech . . ."<sup>311</sup> The case was remanded to the district court for determination of a reasonable time limit for the injunction; the circuit court suggested a time frame of two to three years.<sup>312</sup>

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<sup>300</sup> *See id.* at 984.

<sup>301</sup> *Nat'l Soc. of Prof'l Engineers*, 435 U.S. at 699.

<sup>302</sup> *Id.* at 701 (Burger, J., concurring in part and dissenting in part).

<sup>303</sup> *Id.*

<sup>304</sup> 939 F.2d 547 (8th Cir. 1991).

<sup>305</sup> *Id.* at 548.

<sup>306</sup> *Id.* at 550.

<sup>307</sup> *Id.* at 558 (emphasis added).

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *Id.* (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 565 (1980)).

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* at 559.

B. *Application and Discussion*

This Section fleshes out the foregoing recommendations by applying them to the Google and Nielsen antitrust cases involving information products. The speech interests present are not the traditional commerce-related speech interests embodied in commercial advertising that involve speech about the products. Rather, the products at issue involve the conveyance of information and are themselves arguably speech.<sup>313</sup> In both settings, the social significance of this information is self-evidently high. Google's search engine is used to obtain information that is all-encompassing (e.g., political as well as commercial), and the Nielsen ratings affect a media outlet's ability to sustain itself through advertising revenues. While these cases facilitate elaboration of the recommendations, a comprehensive analysis remains premature.

*Google.* Competitors of Google's various vertical search engine sites (e.g., online shopping sites) have argued that Google's general search engine, which generates a web page ordering in response to user search queries, has unfairly disadvantaged competitors' sites by effectively demoting them in its PageRank system.<sup>314</sup> Various bases for causes of action could be alleged regarding such conduct, including raising rivals' costs and disparagement.<sup>315</sup> Google's speech-based defense appears to be that its PageRank system is analogous to the editorial judgment a newspaper exercises when selecting which stories to run and, therefore, constitutes "opinions" warranting antitrust immunity.<sup>316</sup> The

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<sup>313</sup> See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2659 (2011).

<sup>314</sup> See, e.g., *The Power of Google: Serving Consumers or Threatening Competition: Hearing Before the S. Subcomm. on Antitrust, Competition Policy & Consumer Rights of the S. Comm. on the Judiciary*, 112th Cong. (2011) (testimony of Jeremy Stoppelman, Cofounder and CEO, Yelp! Inc.), available at <http://www.judiciary.senate.gov/imo/media/doc/11-9-21StoppelmanTestimony.pdf>, archived at <http://perma.cc/Z8DM-2NNV>; see also Matthew Ingram, *Google's Zagat Buy Could Give Search Critics More Ammo*, GIGAOM (Sept. 9, 2011, 10:03 AM), <http://gigaom.com/2011/09/09/googles-zagat-buy-could-give-search-critics-more-ammo/>, archived at <http://perma.cc/9MES-D37P>.

<sup>315</sup> For disparagement to provide the basis for an antitrust action it must do more than hurt a competitor; it must undermine competition in the market. To undermine competition, the disparagement must deceive parties (e.g., customers) whose support is important to the viability of competitors. In a handful of reported cases that considered disparagement as potentially anticompetitive conduct, courts have assessed the impact of the message by analyzing factors such as the stance with which the message was received and the ability message's target to respond (e.g., message disseminated to an identifiable audience). Very infrequently have courts been receptive to disparagement as an antitrust cause of action. See *supra* note 50.

<sup>316</sup> Volokh & Falk, *supra* note 148, at 886, 884 ("[E]ach search engine's editorial judgment is much like many other familiar editorial judgments [including] . . . about which wire service stories . . . are to go 'above the fold' . . . . And all these exercises of editorial judgment are fully protected by the First Amendment."); see also *id.* at 895 (Part III of their article is entitled, "The First Amendment Protects Search Engine Results Against Antitrust

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speech analysis, which is an input to the general antitrust analysis under the recommendation, is examined first.

Under this Article's proposed speech analysis, the first inquiry is whether Google's page rankings, as generated by its general search engine, constitute cognizable speech.<sup>317</sup> The information product is the ranking of web pages in response to a search query. A systematic and undeservedly low ranking of competitors' (vertical) web sites can be interpreted as an implicit denigration of those competitors, which potentially has significant implications for the amount of traffic those sites receive, especially given Google's market share in the general search engine market.<sup>318</sup> Allegations regarding anticompetitive (unduly depressed) page rankings concern substantive content and, not, for example, purely its conveyance or other aspects of nominal speech. Such allegations, therefore, implicate cognizable speech as defined herein.

Given the presence of cognizable speech, the next step entails examination of the content's independence and transparency, which further informs the level of speech-based solicitude warranted. Here, the content at issue is not revenue independent. If Google's own vertical site search links are ranked higher and its rivals ranked lower, Google can be expected to increase its revenue. Furthermore, the content is not transparent. Absent appropriate disclosures, most users of Google's general search engine cannot be expected to know which firms Google owns or has a large financial interest in. Thus, under the proposal, Google's cognizable speech interests, absent secondary speech interests (which are not analyzed here given lack of public information about the case), would at the very most confer only the minimum level of speech solicitude in the antitrust analysis.<sup>319</sup> That is, this speech interest would influence, in Google's favor, only extremely close antitrust decisions.

The antitrust analysis would balance the pro- and anticompetitive effects of redesigns to Google's PageRank system while accounting for speech as a minus factor. Without greater knowledge about the specifics of the case, it is impossible to predict the ultimate outcome under the recommendations. However, the case can be used to illustrate inquiries that bear on key determinations required in the proposal.

Assessment of the procompetitive effect can be divided into two steps: (1) determining the scope of the relevant innovation at issue, and (2) estimating the magnitude of the innovation. In cases where multiple "innovations" exist within a "single" product redesign, an important question will sometimes be whether parts of the redesign are reasonably integrated or are essentially

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<sup>317</sup> For the sake of completeness, it is clear that Google's PageRank would not qualify as political speech and gain immunization from the antitrust laws.

<sup>318</sup> See Lee, *supra* note 18 (observing Google's ascent to a 67% share of the search engine market).

<sup>319</sup> See generally Pitofsky, *supra* note 250, at 1067 & n.44 (advocating for a limited role for political considerations in antitrust).

separable.<sup>320</sup> For example, if the allegedly anticompetitive aspect of the redesign consists of fairly contained software code which, if removed, would not adversely effect the redesigned product, then a court might favorably respond to a plaintiff's argument that the redesign at issue should be limited to a subset of the full redesign which would, of course, change the balance of pro- and anticompetitive effects in favor of the plaintiff.<sup>321</sup> Then, given a definition of the redesign at issue, the procompetitive effect is assessed by estimating the magnitude of the innovation by, for example, comparing and assessing the changes of the page rankings relative to other search engines.

One can partially gauge the anticompetitive effects by determining the relative reliance of the affected market on referral links by Google's general search engine, comparing the rankings of firms in the affected markets by other general search engines, and evaluating the change in sales resulting from the modifications.<sup>322</sup> Because the anticompetitive effect depends on how much traffic the redesign diverted, the source and quantity of referrals to the allegedly disadvantaged websites can be analyzed to assess the size of the effect of the redesign.

Given a section 2 violation, the defendants must not only cease their misconduct, but also, oftentimes, abide by remedial measures.<sup>323</sup> In theory, remedies involving anticompetitive page rankings would entail algorithm revisions to eliminate the predatory redesign. Given the dynamic nature of the marketplace (the natural changing of rankings over time) and the frequency with which search algorithms are revised, instituting meaningful remedial measures would be challenging. Designing appropriate antitrust remedies may require particular attention to ensuring the sufficiency of their scope so as to

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<sup>320</sup> This is a form of a less restrictive alternatives inquiry, because the question is essentially whether a different design could have achieved all of the desired consumer benefits while avoiding the anticompetitive effects. Recognizing the challenges and dangers of such an approach, the proposal recommends limiting the use of this approach to settings in which such a subdivision is quite clear.

<sup>321</sup> Jacobson et al., *supra* note 240, at 9.

<sup>322</sup> The FTC's public statement announcing the closing of its Google investigation noted that "other competing general search engines adopted many similar design changes, suggesting that these changes are a quality improvement with no necessary connection to the anticompetitive exclusion of rivals." See FED. TRADE COMM'N, *supra* note 10, at 2.

<sup>323</sup> The Department of Justice Antitrust Division's 2008 report on single-firm conduct, which it has since withdrawn, stated that "[t]he central goals of remedies in government section 2 cases are to terminate the defendant's unlawful conduct, prevent its recurrence, and re-establish the opportunity for competition in the affected market. Section 2 remedies should achieve these goals without unnecessarily chilling legitimate competitive conduct and incentives." DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT, ch. 9, at 143 (2008), available at [http://www.justice.gov/atr/public/reports/236681\\_chapter9.pdf](http://www.justice.gov/atr/public/reports/236681_chapter9.pdf), archived at <http://perma.cc/N4TZ-E435>.

avoid easy circumvention.<sup>324</sup> However, emphasis upon ensuring the adequacy of antitrust remedies may require tempering so as to avoid the potential for unduly chilling speech. Such chilling would be more likely to occur when the speech at issue is not indirectly protected through the operation of antitrust law (e.g., protection of innovation).

*Nielsen.* Nielsen has dominated the television audience measurement market for decades and has been the subject of numerous antitrust lawsuits and investigations. Here, the proposed frameworks are applied to allegations taken from antitrust cases involving Nielsen's replacement of older meter-diary with the LPM for measuring television audience shares. The presence or absence of cognizable speech turns on whether or not the antitrust cause of action concerns content.

Consider first Sunbeam's allegation that Nielsen engaged in predatory innovation. Though the product redesign generates content (audience ratings), the allegation itself does not concern content. Therefore, Nielsen's speech would be classified as nominal speech for the purposes of this antitrust cause of action. Here, the redesign is treated as a conventional (non-speech) product redesign—the speech embodied in the Nielsen's product is essentially collapsed into pure innovation. Also consider the restrictions that limited how the licensee of Nielsen's ratings could use the data and allegedly increased the costs of switching to another rating provider.<sup>325</sup> Such restrictions operate on the conveyance of the information; hence, for the purpose of this cause of action, Nielsen's information product would also be classified as nominal speech.

Finally, consider the allegation that Nielsen biased its rating system to favor large cable operators, which, in turn, increased barriers to entry by making it less attractive for key buyers to switch to competing rating products. As with predatory innovation, the antitrust issue concerns deterring entry, but unlike predatory innovation, the means by which entry is deterred is alteration of the content of a rating product. Hence, under the recommended approach, this cause of action implicates cognizable speech.

Given that cognizable speech is implicated, the next step is to determine, using the dimensions of independence and transparency, whether the strength of the speech interest justifies a relatively larger or smaller minus factor in the antitrust analysis. The bias in the rating system will not confer direct revenue

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<sup>324</sup> In its second settlement proposal to the European Commission, Google offered to give greater prominence to the websites of the firms that were allegedly the targets of Google's conduct. The European Commission rejected this proposal. See Charles Arthur, *European Commission Rejects Google's Latest Proposals to Settle Antitrust Case*, THE GUARDIAN (Dec. 20, 2013), <http://www.theguardian.com/technology/2013/dec/20/european-commission-rejects-google-proposals-antitrust-case>, archived at <http://perma.cc/7X8A-CVPP>; James Kanter, *Google Makes New Offer to Settle its European Union Antitrust Case*, N.Y. TIMES, Sept. 10, 2013, at B3.

<sup>325</sup> *Sunbeam v. Nielsen*, 711 F.3d 1264, 1269 n.11 (11th Cir. 2013).

benefits to Nielsen if Nielsen does not receive different payments depending on the ratings. If this is the case, then Nielsen's system is revenue independent. However, Nielsen presumably presents its ratings as unbiased so that, if a bias exists, it is not transparent, in part, because a bias is not disclosed and, in part, because listeners do not have an alternative way of assessing whether a system is biased. Lack of transparency is a strong argument against increasing the size of the minus factor beyond the minimum level provided in the cognizable speech category.

Finally, one can argue that secondary speech interests exist and are sufficiently strong to offset the primary speech interest. Secondary speech interests would be interests associated with the deterred entrants who, presumably, are prevented from introducing their information product to the market. Given the difficulty of generating speech about household viewing absent any alternative rater in most markets, finding a secondary speech interest is plausible. Such a recognition, combined with the weakness of the (cognizable) primary speech, makes it possible that no net speech interest will inure to Nielsen in the antitrust analysis.

For those antitrust causes of action implicating only nominal speech, the antitrust analysis would proceed with no First Amendment solicitude. If an innovation-based defense is proffered, this Article recommends actually balancing the design's pro- and anticompetitive effects. Given the likelihood that Nielsen would eventually have introduced some variant of the LPM system, a key issue revolves around timing, with the plaintiffs arguing that the redesign at issue either did not constitute an innovation (given its defects) or the innovation was small.<sup>326</sup> Potential competition is a factor that usually accelerates the introduction of redesigned products, perhaps, merely reducing the level of innovation embodied in the redesign.

Under current antitrust law, Nielsen's redesign would not likely be deemed pretextual. As a switch to a technology similar to that of the potential entrant and likely to have been adopted in the future, the redesign would probably be seen as embodying some innovation, which under an all-or-nothing antitrust analysis would lead to a finding of no antitrust liability.<sup>327</sup> Under the recommendation, a small innovation can be outweighed by a large anticompetitive effect, making it more likely (all things being equal) that such a scenario could result in antitrust liability. Evidence of the magnitude of the innovation would include analyses of the change in data collection costs and analyses of the improvement in accuracy of the redesigned system's measurements. Thus, for example, if the redesign resulted in modest cost

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<sup>326</sup> See *Sunbeam Television Corp. v. Nielsen Media Research, Inc.* 763 F. Supp. 2d 1341, 1352-53 (S.D. Fla. 2011), *aff'd*, 711 F.3d 1264 (11th Cir. 2013).

<sup>327</sup> Note that under the current legal treatment, a dominant firm's ability to introduce a poor implementation of the system that is protected from antitrust liability has the potential for reducing the incentives of actual and potential competitors from innovating in this market space.

reductions but no change in accuracy, because premature deployment led to many errors, the procompetitive effect would seem to be relatively small.

The primary anticompetitive effect at issue in Nielsen is deterred entry. Establishing this effect requires both the identification and the assessment of potential competition pursuant to standard antitrust analysis. Relevant evidence would include internal planning documents regarding the implementation schedule and where and how aggressively the new system was rolled out. Additionally, a plaintiff could argue a monopoly broom theory by establishing that the product redesign was only one of multiple allegedly anticompetitive actions taken to suppress competition and the actions together showed both an intent to suppress competition as well as a more effective means by which this goal could be accomplished. A strong monopoly broom argument provides one mechanism by which an anticompetitive effect can be strengthened enough to overcome a small, procompetitive innovation effect.

Part III revisited the Google and Nielsen examples identified at this Article's outset to illustrate how the recommended framework could be applied to speech and innovation-based defenses made in antitrust actions involving information products. Adoption of the recommended middle ground has the advantage of more realistically handling the speech and innovation issues that will emerge increasingly in the future, and the disadvantage of increased complexity. Arguably, the latter difficulties have been exaggerated by those favoring simpler determinations, but, in any event, one should expect those difficulties to decline as courts gain experience with balancing and as the principles that guide the determinations are further developed and refined. Thus, the proposal offers both an immediate improvement over the existing system and a promise for further progress.

#### CONCLUSION

The information economy has given rise to the emergence of powerful firms in the business of information products. Some of these firms, such as Google and Nielsen, dominate their respective markets and have had product redesigns questioned and, at times, challenged as anticompetitive by private parties and governments alike. These firms have typically responded to these allegations by arguing that the product changes at issue embody procompetitive innovations and, therefore, are not anticompetitive. An additional defense argued with increasing frequency is that their products constitute protected speech and should be immunized entirely from antitrust scrutiny.

When those product redesigns are decidedly incremental and arguably anticompetitive, the application of all-or-nothing legal standards provides inadequate protections for the underlying First Amendment rights and competition policy values at stake. Towards that end, this Article advocates more nuanced mechanisms that offer legal middle grounds as alternatives to the polar outcomes resulting from the application of current law. The analytical frameworks recommended are admittedly and, indeed, intentionally more complex than currently exist. But, that complexity derives from converting de



facto rules and implicit assumptions into express determinations, as well as from engaging the challenge of trade-offs between incommensurate values posed by potentially anticompetitive conduct in the form of redesigns to information products.