SPEECH, INNOVATION, AND COMPETITION

BY GREGORY DAY[1]

1 Assistant Professor, University of Georgia Terry College of Business; courtesy appointment University of Georgia School of Law. This Article significantly relies on, as well as restates, the arguments in Gregory Day, Monopolizing Free Speech, __ Fordham L. Rev. __, __ (forthcoming in 2020). Readers should consult the above article for a more complete, nuanced recitation of the theories presented herein.

CPI ANTITRUST CHRONICLE
FEBRUARY 2020

I. INTRODUCTION

Critics contend that concentrated power in digital markets has generated threats to free speech. For a variety of reasons, market power is naturally thought to concentrate in digital markets. The consequence is that "big tech" is said to face little competition; Facebook controls 72 percent of the social media market[2] while the parent of YouTube (72 percent of the video market)[3] is Google (92 percent of the search market).[4] This landscape has potentially vested private companies with unprecedented power over the flow of information. If Facebook, for example, decides to ban certain types of speech or ideas, it would potentially deprive a significant number of people of that information. Observers have indeed alleged that market power mixed with innovation gives big tech the power and incentives to impede speech.

Two types of suppressed speech are alleged: commercial and expressive. In terms of expressive speech, *both* sides of the political aisle assert that tech firms advance an ideological agenda. Facebook, Twitter, or YouTube are alleged to push certain narratives while suppressing others depending on one's political biases. Lending credence to this fear, it is well known that Facebook polices content shared over its platform, evidenced by its in-house oversight board (also known as its "speech Supreme Court")[5] and an internal memo posing the question: "What should be the limits to what people can express?"[6] Controversy has notably emerged where platforms have restricted mundane types of speech including images of breast-feeding or plus-size expression as well as more controversial forms of speech regarding, for instance, anti-vaccination literature.

The other type of harm is commercial. Some observers allege that Amazon alters search results or buries entries to promote its own products.[7] Another claim is that tech firms abridge commercial speech such as advertising. Google, as AdSense's parent company, is said to manipulate the color, placement, and font of advertisements to impede information about rival products while promoting its own goods.[8]

2 *Social Media Stats Worldwide*, StatCounter, http://gs.statcounter.com/social-media-stats (last visited Aug. 1, 2019).

3 *YouTube Market Share and Competitor Report*, Datanyze, https://www.datanyze.com/market-share/online-video/youtube-market-share (last visited Aug. 1, 2019).

4 Jeff Desjardins, *How Google Retains More Than 90% of Market Share*, Bus. Insider (Apr. 23, 2018; 7:35PM), https://www.businessinsider.com/how-google-retains-more-than-90-of-market-share-2018-4.

5 Daphne Keller, *Facebook Restricts Speech by Popular Demand*, Atlantic (Sept. 22, 2019), https://www.theatlantic.com/ideas/archive/2019/09/facebook-restricts-free-speech-popular-demand/598462/.

6 Conor Friedersdorf, *The Speech that Facebook Plans to Punish*, Atlantic (Dec. 11, 2018), https://www.theatlantic.com/ideas/archive/2018/12/facebook-punish-censorship/577654/.

7 Joseph Hicks, *Google May Be Favoring Its Own Search Ads Over Competition, Report Says*, Fortune (Jan. 20, 2017), https://fortune.com/2017/01/20/google-search-engine-advertising-ads/.

8 Matt Binder, *Google Hit with $1.7 Billion Fine for Anticompetitive Ad Practices*, Mashable (Mar. 20, 2019) (describing the liability incurred by Google in Europe for anticompetitive practices in the advertising market).

This landscape has suddenly turned free speech into a significant and popular antitrust issue. Senators Elizabeth Warren *and* Ted Cruz have remarkably adopted similar positions, both insisting that enforcers should crack down on the platforms' dominance over free speech. The abolition of "Net Neutrality" was even led by lawmakers who asserted that antitrust would better protect internet speech.[9] In another development, Senator Josh Hawley has recently proposed the "Ending Support for Internet Censorship Act," which would require the largest platforms to receive validation from the FTC.[10] Additionally, editorials now fill the *New York Times*, *Wall Street Journal*, and *Washington Post*, arguing that antitrust should promote free speech. Even the Department of Justice Antitrust Division ("DOJ") has recently asserted that "greater openness and free speech" could entail a virtue of digital competition.[11]

While observers have long accused the media of bias, it was less common in prior generations for observers to express fears that companies could effectively suppress speech. Private actors not only lacked market power over the contours of information, but they were *supposed* to discriminate against ideas. In *Abrams v. United States*,[12] Justice Oliver Wendell Holmes popularized the theory of a marketplace of ideas. His position, which inspired modern theory of the First Amendment, was that market forces should determine an idea's value rather than the government. Because the state might err in deciding which speech to suppress or promote, society would benefit if private actors, in vigorous debate, allowed the market to play the role of censor. But since this right (as well as expectation) to challenge specific ideas extends to corporations, the question of whether tech firms abuse their market power to suppress speech and information is largely a modern concern.

This contribution delves into the emergence of rhetoric calling for antitrust to promote free speech in the digital era, questioning its viability and logic. Part II discusses the greater challenges posed by digital markets to put the issue into a greater context. Part III then reviews case law which demonstrates the obstacles of promoting free expression under the antitrust laws. Finally, Part IV asserts that antitrust's precedent has misconstrued the true value of ideas and information. In doing so, this contribution argues that enforcement should foster the economic virtues of commercial speech from monopolies and trade restraint — a position to which the DOJ has suddenly seemed amenable[13] — but resist governing political, social, and expressive forms of speech.

II. COMPETITION IN DIGITAL MARKETS

It is important to situate the question of whether antitrust should promote free speech within the greater debate over antitrust's role in the information economy. The issue with the information economy is that it differs significantly from the industrial era when antitrust was established. Principally, enforcement has relied on price signals to gauge whether conduct has eroded consumer welfare yet digital markets tend to eschew prices by offering low and zero-price services. Without (high) prices, an antitrust lawsuit must overcome the formidable hurdle of showing a non-price injury such as diminished quality or innovation. To date, claims have seldom succeeded when relying on non-price effects, calling into question antitrust's role in digital markets.[14]

A growing number of scholars and observers have nevertheless expressed alarm about the market dominance achieved by the leading tech firms. To this camp, Amazon, Google, Facebook, and others have collected such massive troves of consumer data, and developed such effective processes of analyzing it, that rivals cannot possibly compete in their respective markets. Further, critics assert that big tech has consciously exploited their data advantages to create barriers to entry.[15] Without meaningful competition, an array of social and economic harms are said to prevail, including damaged elections, fake news, and diminished privacy.

9 Bob Goodlatte, *Use Antitrust Laws, Not Regulations to Protect the Internet*, The Hill (Sept. 16, 2014, 12:46 PM), http://thehill.com/special-reports/net-neutrality-september-16-2014/217862-use-antitrust-laws-not-regulations-to.

10 David French, *Josh Hawley's Internet Censorship Bill Is an Unwise, Unconstitutional Mess*, Nat'l Rev. (June 20, 2019), https://www.nationalreview.com/2019/06/josh-hawley-internet-censorship-bill-unconstitutional/.

11 *"And Justice for All": Antitrust Enforcement and Digital Gatekeepers*, Dep't of Justice, Justice News (Jun. 11, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-antitrust-new-frontiers.

12 250 U.S. 616 (1919).

13 *"And Justice for All": Antitrust Enforcement and Digital Gatekeepers*, Dep't of Justice, Justice News (Jun. 11, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-antitrust-new-frontiers ("By protecting competition, we can have an impact on privacy and data protection. Moreover, two companies can compete to expand privacy protections for products or services, *or for greater openness and free speech on platforms*.") (emphasis added).

14 *"Blind[ing] Me with Science": Antitrust, Data, and Digital Markets*, Dep't of Just. (Nov. 8, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-harvard-law-school-competition (explaining the importance of non-price competition, especially in digital markets).

15 See, e.g. Gregory Day & Abbey Stemler, *Infracompetitive Privacy*, 61 Iowa L. Rev. 74-76 (2019).

Another group of commentators have, however, pointed out that consumers are typically satisfied with big tech's low-cost, high-quality services, challenging the argument that consumers have suffered any effects of anticompetitive conduct.[16] This camp stresses that if social and economic harms arise from platform services, then big tech might have violated some laws but not the antitrust laws. And when considering the manner in which markets animated by network effects tend to cluster market power, they note that greater enforcement in digital markets wouldn't likely upset the status quo. With this in mind, skeptics have criticized reforms calling for enforcement in digital markets as futile and populistic.

As debate rages over antitrust's role in digital markets, scholars, agencies, courts, and politicians have increasingly wrestled with whether speech affects consumer welfare. Because the modern economy has given private companies newfound power over the flow of information and speech, the question of whether the marketplace of ideas should entail an actual market, governed by antitrust, is timely and important.

III. LITIGATING SPEECH UNDER THE ANTITRUST LAWS

Without attracting much attention, several plaintiffs have already sought to promote their right to free speech under the Sherman Act — a litigation strategy which is perhaps antithetical to modern antitrust. Each of their theories was essentially that antitrust should protect the vibrancy of speech from monopolies and trade restraints. For example, Gab AI ("Gab"), a social media firm known for hosting "alt-right" speech, claimed that its exclusion from Google's Android platform suppressed free speech and thus violated antitrust laws.[17] Other examples[18] include the lawsuit initiated by former candidate Gary Johnson which asserted that the Presidential Debate Commission had abused its market power in impeding alternative viewpoints from the presidential debates.[19] Also, a processor of credit cards argued that, due to its support of WikiLeaks, Visa and Mastercard excluded it from the market, which "suppressed the market place of ideas" in violation of antitrust law.[20]

Each of these cases ran into substantial obstacles. The primary problem is that the Sherman Act, per its plain text, may only govern "trade" and "commerce." According to this line of reasoning, because ideas and speech are considered non-economic — as they lack traditional indicia like scarcity and excludability — the marketplace of ideas may not fit within antitrust's purview. And even sidestepping this issue, antitrust is only meant to promote competition for the *economic* benefit of consumers. Despite whether one measures market efficiency via prices, quality, or innovation, litigants would likely struggle to show how suppressing the marketplace of ideas caused such a harm. Although the plaintiff might have suffered an economic injury, antitrust is meant to promote *consumer* welfare rather than those of individual competitors. So without proof of an antitrust injury suffered by consumers or markets — despite whatever harm the plaintiff incurred — the antitrust claim would necessarily fail.

For example, the court in *Johnson* rejected the anticompetitive effect alleged by Mr. Johnson because the marketplace of ideas "refer[s] to ideas, not products or services that are traded in a commercial marketplace, and thus this claim does not allege a cognizable antitrust injury." It asserted further that, "calling political activity a 'marketplace' does not make it so… As with holding political office, running for political office is not 'commerce' under antitrust law."[21] *DataCell* held similarly: "If the products in DataCell's market are ideas, then the antitrust laws cannot help DataCell. Congress created antitrust laws to protect free market competition, not to protect the free exchange of ideas."[22]

With this background, several questions persist. Should the courts continue to exclude ideas from antitrust's scope? Have courts ignored the economic value of ideas and expression with the rise of digital markets? Or, in fact, should courts and scholars rethink antitrust's consumer welfare standard? To this latter camp, which is colloquially (or pejoratively) known as "hipster antitrust," antitrust is ill-equipped to remedy the modern harms arising out of digital markets; as innovation evolves the nature of commerce, markets, and power, antitrust must potentially respond with wholesale changes.

---

16 Geoffrey A. Manne & R. Ben Sperry, *The Problems and Perils of Bootstrapping Privacy and Data into an Antitrust Framework*, CPI Antitrust Chronicle (May 2015).

17 Complaint at 42, *Gab AI Inc. v. Google, LLC*, No. 2:17-cv-4115-AB (E.D. Pa. Sept. 14, 2017); *Id.* See also Harper Neidig, *Social App Popular with 'Alt-Right' Files Antitrust Lawsuit Against Google*, The Hill (Sept. 15, 2017, 1:21 PM), http://thehill.com/policy/technology/350885-gab-files-antitrust-lawsuit-against-google.

18 See, e.g. *Levitch v. Columbia Broad. System, Inc.*, 697 F.2d 495, 495-96 (2d Cir. 1983); *Lorain Journal Co. v. United States*, 342 U.S. 143, 148 (1951).

19 *Johnson*, 869 F.3d at 979.

20 *DataCell ehf. v. Visa, Inc.*, 2015 WL 4624714, at *6 (E.D. Va. July 30, 2015).

21 *Johnson*, 2016 WL 4179269, at *1.

22 *DataCell*, 2015 WL 4624714, at *6.

IV. OPTIMAL ANTITRUST AND SPEECH

This Part makes the case that antitrust should promote commercial speech but resist protecting social, political, and expressive content. To begin, enforcement must abandon characterizing ideas and information as *per se* non-economic. Consider that the primary goods exchanged in today's economy are known as "information products," described as commodities receiving their character and value from an underlying idea. Firms can even compete by offering information products at zero-prices. Indeed, information products exist within a wide variety of economic activities, powering various modern industries as well as the progression of innovation.

Take the platform industry. The top six platforms claim a combined market capitalization of one trillion dollars in providing "free" forums to express political opinions, social expression, and other ideas. Influencers and similar users have also notably capitalized on the flow of expression through platform technology. Or consider the communications sector: it is said that no other industry wields more power to suppress speech, surpassing even the government. As Tim Wu remarked, "[w]e sometimes treat the information industries as if they were like any other enterprise but they are not. For their structure determines who gets heard."[23]

Other areas where ideas and information fill a vital economic role include industries relying on innovation. According to the U.S. Supreme Court, the Constitution may potentially shield aspects of R&D, including the "sale, disclosure, and use" of commercial and scientific information, describing "laboratory results" as protected speech.[24] Scholarship has likewise suggested that innovation embodies the inventor's expressive choices found within the product's design, effectively linking innovation to speech.[25] And since innovation is "the single, most important component of long-term economic growth,"[26] the conclusion may follow that innovation depends on a vibrant and free marketplace of ideas.

However, antitrust cannot and should not promote every type of expression, as it would likely create friction with the U.S. Constitution. Since individuals must enjoy the ability to disfavor or outright reject repugnant, dangerous, and erroneous speech, the First Amendment guarantees the right to be free of "compelled speech." This principle has even inspired the courts to carve out exceptions from antitrust's scope such as the *Noerr-Pennington* doctrine. By implication, proposals to condemn platforms when they censor political, social, and expressive speech would create irreconcilable tension with the right to reject speech.

That said, competition generates commercial information while exclusionary conduct can suppress it. The U.S. Supreme Court explained the importance of commercial information in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc*,[27] remarking that it "not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest dissemination of information."[28] If the abridgement of commercial information causes individuals to select goods or services that they otherwise wouldn't — rendering the market qualitatively worse — consumer welfare has been eroded.

Courts and agencies have even seemed amenable to this theory. When certain companies refused to compete for online advertising space in *In re: 1-800 Contacts*, *Inc*,[29] the FTC asserted that the abridged commercial speech had the effect of driving up prices; "[w]hen information is withheld from consumers, it frustrates their ability to compare the prices and offerings of competitors."[30] Though the case turned on prices, it sheds light on the economic harms of suppressing commercial speech within antitrust litigation. Then, in 2019, the DOJ stated in a speech that protecting competition could foster free speech in digital markets, perhaps reflecting the market's quality.

---

23 Tim Wu, The Master Switch: The Rise and Fall of Information Empires (2010).

24 *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2659, 2666 (2011); *IMS Health Inc. v. Sorrell*, 630 F.3d 263, 274 (2d Cir. 2010).

25 Dan L. Burk, *Patenting Speech*, 79 Tex. L. Rev. 99, 100, 112–13 (2000) ("[M]y automobile, my running shoes, my table cutlery . . . is the embodiment of some artisan's or engineer's design… The designers think carefully about what they are composing. That careful thought, some of which may include very innovative ideas, is translated into embodiments of steel, cloth, or latex.").

26 Nathan Rosenberg, *Innovation and Economic Growth*, OECD (2004), https://www.oecd.org/cfe/tourism/34267902.pdf.

27 425 U.S. 748, 760 (1976).

28 *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561-62 (1980).

29 *In the Matter of 1-800 Contacts, Inc.*, a corporation, Respondent, 2018 WL 6078349, at *1 (2018).

30 *Id.* at *1.

Furthermore, companies involved in innovation may have incentives to exclude the ideas underlying a competitor's R&D. The issue is that the suppression of ideas would unlikely implicate the antitrust framework until the information transitions into an actual product or service, or at least the laboratory stage.

To test whether the exclusion of commercial speech eroded consumer welfare, antitrust courts should have the authority to question whether impeded commercial speech rendered "a market failure of ideas." This would entail scrutinizing whether consumers could have benefited from the commercial information but for the exclusionary behavior. Such a standard would remain true to antitrust's spirt where enforcement may only condemn acts harming the market rather than individual competitors. So, if a platform colludes with a marketing firm to suppress commercial speech, this should violate Section 1 as an anticompetitive effect. It could even produce a conventional anticompetitive effect if the lack of advertising led consumers to purchase a higher-priced product. Diminished quality would entail the manipulation of consumers away from their desired product.

Further, antitrust emphasizes systemic harms which makes it an ideal regime to foster commercial speech. There is a general requirement of market power, limiting enforcement to conduct where the market power of a firm prevented the market from self-correcting.[31] Theoretically, a firm lacking market power wouldn't be able to suppress speech if competitors could provide an alternative forum. The proposed test would thus replicate the Horizontal Merger Guidelines which inquires into whether the content could exist on an interchangeable forum.[32] Focusing on market power would also assuage concerns that enforcement might levy liability on small businesses. The implication is that a monopolist (or otherwise dominant firm) must dominate a market — such as Facebook, Google, or AT&T — to commit the proposed offense. Furthermore, if a prima facie case is made, the defendant could still survive scrutiny under the rule of reason test.

Examples of actionable harm would include the suppression of online advertising. At issue is that a company like Google could, as alleged, bolster its market share while eliminating market information, eroding consumer welfare. While this practice has drawn antitrust liability in Europe — where enforcers found Google "denied other companies the possibility to compete on the merits and to innovate — and consumers the benefits of competition"[33] — American enforcers have refused to follow Europe's lead.[34] Along the same lines, platforms have suppressed content about their competitors' goods to elevate their own products which, again, the FTC refused to challenge. This was the case despite the FTC remarking that, "[u]ndoubtedly, Google took aggressive actions to gain advantage over rival search providers."

Finally, using enforcement to promote commercial speech would conform to the First Amendment while also advancing antitrust's purpose. Note that the purpose of antitrust and the commercial speech doctrine is to foster market efficiency.[35] Further, courts have ruled that antitrust has the constitutional authority to abridge as well as compel forms of commercial speech such as warning and disclosure labels. As such, precedent suggests that enforcement can foster commercial speech in light of, and notwithstanding, the First Amendment.

V. CONCLUSION

This contribution explored the rise of rhetoric calling for antitrust to remedy threats to free speech. While antitrust's framework might underestimate the modern value of ideas and information, the argument is that antitrust must resist pursuing social goals such as speech. However, enforcement does have the authority to promote commercial speech, which would foster consumer welfare.

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

32 U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines 23 (2010).

33 Harper Neidig, *EU Fines Google $1.7B over Advertising Agreements*, the Hill (Mar. 20, 2019, 7:41AM), https://thehill.com/policy/technology/434859-eu-fines-google-17-billion-over-advertising-agreements.

34 Press Release, *State of the Federal Trade Commission Regarding Google's Search Practices*, In the Matter of Google, Inc., FTC File 111-0163 (Jan. 3, 2013), available at https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf.

35 Ramsi A. Woodcock, *The Obsolescence of Advertising in the Information Age*, 127 Yale L.J. 2204 (2018).

CPI COMPETITION POLICY INTERNATIONAL

CPI Subscriptions

CPI reaches more than 35,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.