

Information Product Redesign as Commercial Expression: Antitrust Treatment of Speech and Innovation

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INTRODUCTION

The plaintiffs, who are in the business of harvesting, refining, and selling this commodity, ask us in essence to rule that because their product is information instead of, say, beef jerky, any regulation constitutes a restriction of speech.¹

One of the Supreme Court's recent rulings with immense significance for antitrust is a First Amendment case that does not even mention antitrust. The case involved an "information product," in the form of data regarding physician pharmaceutical prescribing practices, and the Court found it to be speech entitled to strong First Amendment protection.² What does this ruling mean for the purveyors of information products subject to antitrust scrutiny? The question is not theoretical. The answer, at least according to two high-profile antitrust defendants, is clear – First Amendment-based immunization regardless of competitive effects. I disagree on both points. This Article explains why the legal analysis is not straightforward and why it should not result in such immunization.

Antitrust challenges to the redesign of information products, the factual setting upon which this Article focuses, implicates speech and competition values (including dynamic efficiency concerns). This Article not only addresses this increasingly important intersection but also attempts to expose and root out some of the profoundly misguided paradigms that dominate this legal setting more generally. Foremost among them is the strong propensity for all-or-nothing thinking. Despite antitrust's ostensible facility with tradeoffs entailing some degree of nuance, the courts have been largely unwilling or unable to transcend binary outcomes when either speech or innovation are implicated. This Article explains why such legal middlegrounds, while frequently difficult and sometimes involving lexicographic preferences, can be and must be established.

Search engine giant Google was sued by the website operator KinderStart. KinderStart's website provides a search engine and directory for content associated with the topic of young children. Its lawsuit alleged that Google engaged in anticompetitive conduct including the manipulation of its PageRank system so as to deflate the ranking of websites competing with Google in niche markets. Google maintained that the "antitrust claims [were] barred by the First Amendment."³ Along similar lines, the dominant television ratings company Nielsen was sued by a local station, Sunbeam Television, that alleged Nielsen had hastily introduced a flawed modification to its system of measuring audience size to enable Nielsen to exclude potential competitors in the ratings market. Nielsen responded that, "[its] ratings are opinions that are protected by the First Amendment and,

¹ *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 53 (1st Cir. 2008), *abrogated by* *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011).

² *Sorrell v. IMS Health Inc.*, 131 S. Ct. at 2659. *See generally* 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*").

³ Defendant Google Inc.'s Motion to Dismiss Plaintiff's Second Amended Complaint at 17 n.7, *KinderStart.com LCC v. Google, Inc.*, No. C 06-2057 JF (RS), 2007 WL 831806 (N.D. Cal. 2007).

thus, cannot give rise to antitrust liability.”⁴ 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.

In recent decades the information product sector of the economy, fueled heavily by the Internet, has grown dramatically.⁵ The generation, processing, and distribution of information is an increasingly important part of the economy and a source of competitive advantage and, owing to various scale, scope, or network characteristics,⁶ information product markets may become highly concentrated. The significance of antitrust law and competition policy considerations within this context flows naturally from these attributes. Not surprisingly, these markets have attracted antitrust scrutiny.

Antitrust complaints involving information products frequently challenge product designs, more specifically redesigns, as anticompetitive.⁷ As the Google and Nielsen matters illustrate, one defense by the purveyors of information products is to cast their product redesigns as “expressions,” i.e., speech entitled to First Amendment protection. A second defense involves casting the product redesigns as “innovations” and, therefore, procompetitive.

While such speech and innovation-based defenses are distinctive in their provenance and operation, within the antitrust context they have similar manifestations. Both yield polar

⁴ Nielsen’s 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).

⁵ See INTERNET, ECONOMIC GROWTH AND GLOBALIZATION: PERSPECTIVES ON THE NEW ECONOMY IN EUROPE, JAPAN AND THE USA 313 (Claude E. Barfield, Gunter Heiduk & Paul J.J. Welfens eds., 2003) (“Increasing importance has . . . been attached to knowledge created from information and to the power shifts involved in the growth of a knowledge elite who understand how to work with data [and] knowledge[.]”); Robert Hahn, Am. Enter. Inst., *Regulating Our Way to Freedom?*, THE AMERICAN (Jan. 8, 2009), <http://www.american.com/archive/2008/november-december-magazine/regulating-our-way-to-freedom> (describing “the Internet . . . [as] the supreme purveyor of information”).

⁶ See *id.*

⁷ See, e.g., *MediaStream, Inc. v. Microsoft Corp.*, 869 F. Supp. 2d 1095, 1107 (N.D. Cal. 2012) (“The FAC alleges that . . . Microsoft sought to exclude competitors by technologically integrating the Windows Media platform with Windows operating system.”); *In re Apple iPod iTunes Antitrust Litig.*, 796 F. Supp. 2d 1137, 1143 (N.D. Cal. 2011) (“Plaintiffs respond that the software updates in iTunes 4.7 were in fact designed to . . . end RealNetwork’s interoperability with the iPod”); *Sunbeam Television Corp.*, 763 F. Supp. 2d at 1351 (“Sunbeam contends that Nielsen’s implementation of Local People Meters constitutes both exclusionary conduct and antitrust injury.”), *aff’d*, 711 F.3d 1264 (11th Cir. 2013); *Search King, Inc. v. Google Tech., Inc.*, CIV-02-1457-M, 2003 WL 21464568, at *2 (W.D. Okla. May 27, 2003) (“Search King asserts the devaluation occurred . . . because Google learned that PRAN [PR Ad Network] was competing with Google”); see also FED. TRADE COMM’N, FTC FILE NUMBER 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 (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.”).

outcomes. If the redesign at issue is deemed protected speech, it is then immunized from antitrust scrutiny. If it is not protected by the First Amendment, what this Article refers to as “nominal speech,” 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.⁸ The courts do not assess the magnitude of any bona fide innovation, nor do they 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.⁹ 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 as overly simplistic approaches that would effectively immunize all anticompetitive speech or innovation so long as those characteristics are not pretextual. By establishing a middle ground baseline for the protection of speech in the antitrust context, the Article significantly departs from analyses of potentially anticompetitive conduct involving information products (e.g., Google's alleged manipulation of its

⁸ Some courts have nominally held that nonpretextual innovation may form the basis for an antitrust violation. *See United States v. Microsoft*, 253 F.3d 34, 65 (D.C. Cir. 2001) (“As a general rule, courts are properly very skeptical about claims that competition has been harmed by a dominant firm’s product design change. . . . Judicial deference to product innovation, however, does not mean that a monopolist’s product design decisions are per se lawful.” (citations omitted)). In theory, this antitrust analysis requires balancing procompetitive innovation against anticompetitive effects. *See Microsoft*, 253 F.3d at 59 (“[T]he plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit.”). 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 991, 1000 (9th Cir. 2010) (citing *Microsoft*, 253 F.3d 34) (“Although one federal court of appeals has nominally included a balancing component in its test, it has not yet attempted to apply it.”); *MediaStream, Inc. v. Microsoft Corp.*, 869 F. Supp. 2d 1095, 1107–08 (N.D. Cal. 2012) (noting that “[a] design change that improves a product by providing a new benefit to consumers does not violate antitrust laws ‘absent some associated anticompetitive conduct,’” but finding that the pleadings insufficiently alleged any anticompetitive conduct). Pretextual innovation obviously receives no weight in the antitrust analysis.

⁹ 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.

PageRank system) offered by the antitrust community.¹⁰ Those observers, steeped in antitrust and with a near single-minded focus on economic values, largely appear to treat First Amendment issues as an all-or-nothing constraint rather than as a choice. If the First Amendment binds, then there is no interesting antitrust analysis. If it is not applicable, then only a conventional antitrust analysis is necessary. This approach either explicitly or implicitly assumes that the law, as applied to the arguably intermediate levels of speech represented in information products, will continue with its current polar treatment.

All-or-nothing positions fail to protect either First Amendment 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 purpose. Presently, both speech and innovation analyses are characterized by de facto polar outcomes. Part II contends 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. Given each firm's market power, product redesigns which generate Google's PageRank listings and Nielsen's television audience share ratings have

¹⁰ 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 (2012); Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Case Google*, 34 HARV. J. L. & PUB. POL'Y 171 (2011).

the potential to affect competition.¹¹ Both companies argue, in essence, that their allegedly anticompetitive redesigns are effectively immunized from antitrust scrutiny because they are speech-based innovations. Either speech or innovation, the companies claim, provide ample justification for such protection.¹² 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. The algorithm is revised continually to improve the search engine's performance.¹³ Google is the dominant firm in the search engine market with an estimated market share of nearly seventy percent in the United States.¹⁴ The anticompetitive potential of Google's PageRank system is fairly direct. Numerous web-based competitors to 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.¹⁵ Furthermore, even in markets where Google does not directly compete, it may have an incentive to bias its PageRanks to favor firms paying for special listings over firms that do not.¹⁶ Profound concerns regarding such "search bias" have resulted in antitrust investigations across the

¹¹ See *Sunbeam Television Corp.*, 711 F.3d at 1269 (noting that "[Nielsen] is currently the leading provider of radio audience measurement services in the United States."); Jessica Lee, *Google's Search Market Share Shoots Back to 67%*, SEARCH ENGINE WATCH (Aug. 16, 2013), <http://searchenginewatch.com/article/2289560/Googles-Search-Market-Share-Shoots-Back-to-67> (noting that Google "remains the uncontested top search engine in the U.S.").

¹² *Sunbeam Television Corp.*, 763 F. Supp. 2d at 1345; *KinderStart.com LLC v. Google, Inc.*, No. C 06-2057 JF (RS), 2007 WL 831806, at *13 (N.D. Cal. 2007); *Search King, Inc.*, 2003 WL 21464568, at *3.

¹³ See L. Gordon Crovitz, *Information Age: Google Search: Regulation Leads to Innovation*, WALL ST. J., Oct. 7, 2013, at A15 (noting Google's switch to a new search algorithm called Hummingbird in October 2013).

¹⁴ See Lee, *supra* note 11 (reporting that Google's has a market share of 67%, while competitors Bing and Yahoo respectively hold 17.9% and 11.3%).

¹⁵ Senator Michael S. Lee, in *The Power of Google: Serving Consumers or Threatening Competition?: Hearing Before the H. Subcomm. On Antitrust, Competition Policy, & Consumer Rights of the S. Comm. on the Judiciary*, argued that "[n]o 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." 112th Cong. 5 (2011), available at <http://www.judiciary.senate.gov/pdf/11-9-21SchmidtTestimony.pdf>; 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-content/uploads/2011/11/Googles-Transformation-from-Gateway-to-Gatekeeper-Edited.pdf> ("Google's competing vertical and information content services sites give it the incentive—and its dominance in search and search advertising gives it the—to exclude competition from independent sites.").

¹⁶ *Google's Dominance*, 21(40) CQ RESEARCHER 953, 960 (Nov. 11, 2011).

globe including by the European Commission, Brazil, and the U.S. Federal Trade Commission (FTC).¹⁷ Numerous private parties have also sued Google on multiple grounds including antitrust. Each of the three Google matters addressed herein (FTC, KinderStart, and Search King) illustrate a different aspect of the intersections between antitrust, speech, and innovation.

The Federal Trade Commission (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.”¹⁸ In January 2013, a unanimous FTC closed its “search bias” investigation without launching a formal complaint.¹⁹

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.²⁰ 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.²¹ Nonetheless, it was satisfied that Google’s justification for those modifications, improved customer experience, was

¹⁷ *Brazil Antitrust Court Opens Investigation into Google*, WALL ST. J. (October 11, 2013), <http://online.wsj.com/article/BT-CO-20131011-707362.html>; 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 (January 3, 2013), *available at* <http://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc>. 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. After two previous rejections, Google’s February 2014 proposed settlement offer has satisfied the EC Competition Commissioner, though not necessarily Google’s critics.

¹⁸ FED. TRADE COMM’N, *supra* note 7, at 2.

¹⁹ *Id.* at 1; Edward Wyatt, *U.S. Ends Inquiry on Web Search; Google is Victor*, Jan. 4, 2014, at A1.

²⁰ *See* FED. TRADE COMM’N, *supra* note 7, at 2-3 (“[C]hanges to Google’s search algorithm could reasonably be viewed as improving the overall quality of Google’s search results.”).

²¹ *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 strategies to manipulate the search algorithm. *See generally* Frank Pasquale, *Internet Nondiscrimination Principles: Commercial Ethics for Carriers and Search Engines*, 2008 U. CHI. LEGAL F. 263, 283-84 (describing the “black hat” search optimization tactics and the “Google Death Penalty”).

“supported by ample evidence.”²² Additionally, the FTC had “not found sufficient evidence” of manipulation to “unfairly disadvantage” vertical competitors.²³

The primary connective tissue linking the FTC’s general findings regarding the pro and anticompetitive effects with the ultimate legal outcome is the agency’s reluctance to “second-guess a firm’s product design decisions” given the existence of amply supported procompetitive justifications.²⁴ Unfortunately, the FTC’s statement lacks any meaningful nuance regarding the magnitudes of the various pro or anti-competitive effects and their nexus with the search engine modifications.²⁵

The FTC’s statement does not acknowledge any First Amendment or speech-based issues. 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 such issues were raised, perhaps the FTC declined to address them because the case was disposed of on other grounds. And, in fact, that was the outcome to a private action KinderStart instituted against Google. The antitrust action was dismissed and the First Amendment claims were never resolved. However, in contrast to 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 is that Google removed its website from Google’s search engine results and assigned it a PageRank of zero. The result, it was alleged, was a “cataclysmic fall of 70%” in its web traffic.²⁶ 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.²⁷ Nonetheless, the treatment of Google’s proffered First Amendment defense warrants closer consideration.

Google asserted that it was immunized by the First Amendment and, as such, was “shielded from all liability,” including any antitrust liability. This defense was extensively argued, but the court reserved judgment. Google sought to analogize its conduct to that of Moody’s in *Jefferson County v. Moody’s*, 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 “constitutionally protected expression of opinion” and “immune from Sherman Act

²² FED. TRADE COMM’N, *supra* note 7, at 3.

²³ *Id.*

²⁴ *Id.*

²⁵ 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 to its search bias investigation).

²⁶ Complaint at 7, *KinderStart.com LCC v. Google, Inc.*, 2006 WL 3246596 (N.D. Cal. July 13, 2006) (No. C 06-2057 RS).

²⁷ *KinderStart.com LCC*, 2006 WL 3246596.

liability.”²⁸ The court’s decision dismissing KinderStart’s first amended complaint with leave to amend also reserved judgment, but suggested that it would have treated such a claim skeptically.²⁹ It 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.”³⁰ The court’s decision dismissing KinderStart’s 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 others runs counter to a long-standing principle in American jurisprudence that the press are not entitled to greater First Amendment protection per se. 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 PageRankings has enjoyed some success, for example, in *Search King* where Google was sued for tortious interference with contractual relations and antitrust violations.³¹ The district court’s primary reference point regarding the tort claims was an Oklahoma case involving tortious interference with prospective business advantage.³² The court’s decision turned on whether or not the holding in one tortious interference context applied to the other. The key holding at issue was whether the rankings constituted opinions, and then the extent to which being held to be an “opinion” rendered them per se legal and thus immune from the interference claim.³³ The court found that Google’s PageRankings constituted “opinion.”³⁴ What is important here is the nuance with which the court assesses 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.

²⁸ *KinderStart.com LLC*, 2006 WL 3246596, at *10 n.6 (discussing *Jefferson Cnty. Sch. Dist. v. Moody’s Investor’s Servs., Inc.*, 175 F.3d 848, 851 (10th Cir. 1999)).

²⁹ *See KinderStart* 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.’”).

³⁰ *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 Communications Decency Act. *Id.* at *21 (citing the Communications Decency Act § 230(c)(2)(a), 47 U.S.C.A. § 230 (2006)).

³¹ *See Search King, Inc. v. Google Tech., Inc.*, CIV-02-1457-M, 2003 WL 21464568, at *1–2 (W.D. Okla. May 27, 2003).

³² *See also id.* at * 3 (discussing *Gaylord Entm’t Co. v. Thompson*, 958 P.2d 128, 149–50 (Okla. 1998)).

³³ *Id.*

³⁴ *Id.*

These recent examinations regarding arguably illegal 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 warrant?³⁵ How should the antitrust system handle the tension between possible pro and anticompetitive effects often associated with product redesign and innovation? These arguments 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. Nielsen's audience measurement system reflects two key methodologies: how to develop audience samples and how to extrapolate ratings from those samples.³⁶ In 2008 Nielsen replaced its older meter-diary system with its local people meter (LPM) system to generate audience ratings.³⁷ In *Sunbeam Television Corp. v. Nielsen Media Research, Inc.*, Sunbeam, an owner of a local television station which broadcasts news and entertainment programs, alleged that its advertising revenues decreased by \$1 million per month after Nielsen introduced its LPM system.³⁸ Sunbeam claims that Nielsen recognized the new system's substantial defects but, nonetheless, rushed it to market in order to preempt competition.³⁹ In particular, Sunbeam claims, Nielsen "removed" the incentive for cable operators to "develop a competing technology by promising in advance that [LPMs] would lead to higher cable ratings."⁴⁰ Its lawsuit alleges state and federal antitrust violations and other various business torts against Nielsen.⁴¹

Nielsen did not dispute that it had market power. Instead, it argued that the audience ratings constituted protected opinion and, as such, it should be immunized from antitrust

³⁵ 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, e.g.*, *L-3 Comm'n's Integrated Sys., L.P. v. Lockheed Martin Corp.*, 2008 WL 4391020 (N.D. Tex. Sept. 29, 2008); *David L. Aldridge Co. v. Microsoft Corp.*, 995 F. Supp. 728, 749 (S.D. Tex. 1998) (citing *Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Pubs., Inc.*, 108 F.3d 1147, 1151, 1152 (9th Cir. 1997), and *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 288 n.41 (2d Cir. 1979)).

³⁶ *See TV Measurement*, NIELSEN, <http://www.nielsen.com/us/en/nielsen-solutions/nielsen-measurement/nielsen-tv-measurement.html> (last visited Jan. 21, 2014).

³⁷ *Id.* *See generally* KAREN BUZZARD, TRACKING THE AUDIENCE: THE RATINGS INDUSTRY FROM ANALOG TO DIGITAL (2012).

³⁸ *Sunbeam Television Corp. v. Nielsen Media Research, Inc.*, 711 F.3d 1264, 1268 (11th Cir. 2013).

³⁹ 711 F.3d at 1268.

⁴⁰ *Sunbeam Television Corp. v. Nielsen Media Research, Inc.*, 763 F. Supp. 2d 1341, 1353 (S.D. Fla. 2011).

⁴¹ *See generally* 711 F.3d at 1268. A closely related case involved *erinMedia* who claimed to be a potential entrant into the audience rating market.

action.⁴² 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.⁴³ 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.⁴⁴

The court did not revisit and resolve Nielsen's First Amendment defense because it granted summary judgment for Nielsen on the antitrust claims. 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 "reflecting that Nielsen viewed the cable operators as a potential competitive threat" and that "[t]here is some ambiguous evidence suggesting that Nielsen implemented [LPM] to stave off that threat."⁴⁵ Ultimately, the court's ruling turns on its conclusion that Sunbeam was unable to support its claim of the LPM's "inferiority" to the predecessor Meter-Diary system.⁴⁶

The court's specific rejection of Sunbeam's antitrust claims based on Nielsen's product redesign was couched in terms that suggest 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 relative ability or inability to adjudicate such matters. As a related matter, the second concern involves the disincentivizing of 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. That inquiry required, at times, distinguishing between antitrust theory and practice.

As technology and legal sensibilities continue to evolve, society is now experiencing the rise of cases in which antitrust challenges to information product redesigns are encountering First Amendment-based defenses. In the foregoing antitrust matters, the First Amendment-based defenses were raised but not resolved owing to the dismissal of the investigation or the lawsuit on antitrust grounds often involving innovation claims. Those First Amendment questions, therefore, remain unanswered. To begin answering those questions, Part II analyzes the historic protection of First Amendment interests specifically

⁴² See Transcript of Hearing on Defendant's Motion to Dismiss, *Sunbeam Television Corp. v. Nielson Media Research, Inc.*, 763 F. Supp. 2d 1341 (S.D. Fla. 2011) (No. 09CV60637), 2009 WL 8595918. See also, Nielsen's Motion to Dismiss the Complaint and Supporting Memorandum at 15 ("Those ratings are opinions that are protected by the First Amendment and, thus, cannot give rise to antitrust liability.").

⁴³ See Transcript of Hearing on Defendant's Motion to Dismiss, *Sunbeam Television Corp. v. Nielson Media Research, Inc.*, 763 F. Supp. 2d 1341 (S.D. Fla. 2011) (No. 09CV60637), 2009 WL 8595918.

⁴⁴ *Id.*

⁴⁵ 763 F. Supp. 2d at 1353.

⁴⁶ *Id.*

within antitrust settings, precedent that is found to be somewhat lacking. Fortunately, by expanding its discussion to include First Amendment precedent beyond the narrow confines of antitrust matters, defamation and commercial speech, Part II provides a more complete foundation for the analysis.

The centrality of information products in modern life and commerce is undeniable. Under the mantle of innovation, 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 complexity between innovation and consumer welfare and, in particular, the notion that innovation may have both pro and anticompetitive effects.

II. ANTITRUST TREATMENT OF THE 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 raised questions regarding the ability of antitrust law to navigate the noneconomic and dynamic efficiency considerations raised within the context of high-tech information products. Given antitrust law's inherent common-law nature,⁴⁷ 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 Antitrust Act's two primary provisions, §§ 1 and 2, which proscribe collusion and monopolization, respectively.⁴⁸ Another important antitrust provision, for instant purposes, is § 5 of the Federal Trade Commission Act, which proscribes "unfair methods of competition."⁴⁹ 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*.⁵⁰ There are, however, two aspects of the information product cases at issue, aspects with oftentimes varying magnitudes, whose

⁴⁷ 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.").

⁴⁸ 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.").

⁴⁹ 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 § 5 of the FTC Act.

⁵⁰ See *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (noting 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*, 552 U.S. 3, 10 (1997))).

respective analysis within antitrust cases arguably lack nuance. They are speech and innovation.

Part II'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 continue to 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."⁵¹ In so doing, it articulates a very powerful yet cabined constitutional right: for speech to be protected from government interference, but not from private restrictions.⁵² 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.⁵³

This Section begins with a discussion of Supreme Court precedent addressing First Amendment challenges to the Sherman Act. They hold that no First Amendment solicitude at all is accorded when speech is only nominally present. This would include, for example, per se illegal conduct, such as horizontal price fixing, effectuated through speech. 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, speech interests do not always present as fully political or nominal in character. 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

⁵¹ U.S. CONST. amend. I.

⁵² 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.").

⁵³

commercial advertising and defamation rulings discussed illustrate both the value and viability of more nuanced approaches to First Amendment protections. Collectively, these examples further suggest 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 speech 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 Antitrust 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. While most Supreme Court precedent at issue correctly 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.⁵⁴

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.*, the Court easily rejected a First Amendment challenge to a Missouri statute mirroring § 1 of the Sherman Act.⁵⁵ The Court acknowledged that anticompetitive agreements were generally "brought about through

⁵⁴ Notable exceptions in the scholarly literature include James Hurwitz. 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.

⁵⁵ 336 U.S. 490, 491 n1 (1949). 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, this rationale was made explicit in antitrust cases wherein a constitutional challenge to the Sherman Act was made owing to what the defendants viewed as a distinguishing feature which, in the case of *Giboney*, was the labor union context. *Id.*

speaking or writing.”⁵⁶ 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.”⁵⁷ *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.⁵⁸

The First Amendment also has been invoked unsuccessfully to challenge § 2’s prohibition on monopolization. *United States v. Lorain Journal* 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.⁵⁹ The Supreme Court affirmed the district court’s decision that this policy violated § 2, and Lorain Journal was enjoined from engaging in such conduct in the future.⁶⁰

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.⁶¹ The Court emphasized that Lorain Journal’s proffered justifications were all wholly anti-competitive.⁶² More specifically, the newspaper offered no speech-based defense (e.g., substantive editorial discretion exercised when reviewing advertisements for possible publication).⁶³ In doing so, however, the Court implicitly suggests a more messy 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.

⁵⁶ *Giboney*, 336 U.S. at 502.

⁵⁷ *Id.*

⁵⁸ See, e.g., *Nat’l Soc. of Prof’l Engineers v. United States*, 435 U.S. 679, 697 (1978); *Giboney*, 336 U.S. 490.

⁵⁹ *United States v. Lorain Journal Co.*, 342 U.S. 143, 145 (1951).

⁶⁰ *Id.* at 144.

⁶¹ Technically, Lorain Journal sought immunization from antitrust liability under the First Amendment’s Press Clause rather than Free Speech Clause. 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 (whether greater or lesser) from First Amendment rights that are accorded to speakers outside the press context. 3 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH §§ 22:10, 22:12–13 (2013). 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.

⁶² See also *United States v. Lorain Journal Co.*, 92 F. Supp. 794, 798 (N.D. Ohio 1950).

⁶³ *Id.* at 798, 800–01. The newspaper tracked who advertised on the radio and then summarily canceled their contracts to advertise in the newspaper. The newspaper not only acknowledged its anticompetitive motivation, but sought to justify it.

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 its application 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 conventional petitioning.

Eastern Railroad Presidents Conference v. Noerr Motor Freight (Noerr) provides the seminal articulation regarding First Amendment protection of anticompetitive petitioning.⁶⁴ 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.”⁶⁵ 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.”⁶⁶

The Court summarily dismissed the antitrust action as violating the First Amendment, more specifically, the right to petition the government.⁶⁷ 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.”⁶⁸ Moreover, the presence of economic self-interest on the part of the petitioners was deemed irrelevant for purposes of First Amendment protection. To hold otherwise, the Court concluded 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.”⁶⁹

But what if the speech at issue in an antitrust action was part of a government boycott? 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 – indirect political boycotts. The issue became whether, and ultimately which, boycotts warrant immunization from antitrust scrutiny. These cases delineate a binary outcome system for judicial decision making in which fact patterns are divided into two outcome categories.⁷⁰ Namely, when boycotters’ interests are deemed political they are

⁶⁴ 365 U.S. 127 (1961). For a seminal discussion of *Noerr* see generally Hurwitz, *supra* note 54.

⁶⁵ *Noerr*, 365 U.S. at 128.

⁶⁶ *Id.* at 129.

⁶⁷ *Id.* at 139–40.

⁶⁸ *Id.* at 136.

⁶⁹ *Id.* at 139.

⁷⁰ In a binary outcome system, the assignment of the fact patterns to one or the other category determines the outcome applied to the fact pattern. This system contrasts with one in which assignment to a category determines the appropriate analysis that the fact pattern receives, but it does

immunized. When the boycotters are economically self-interested, they are not considered political and, therefore, they are subject to the full force of the antitrust laws. But the insufficiency of this simplistic approach is suggested and, perhaps even raised, by the Supreme Court's rulings themselves. By its extreme terms, the Court's polar approach cannot accommodate more complex realities entailing mixed motives in which the boycotters' actions reflect both economic self-interest as well as noneconomic or political interests.⁷¹

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, the judiciary,⁷² executive,⁷³ or administrative agencies.⁷⁴ An important challenge regarding the boundaries of this immunization category concerned "economically tooled" boycotts. In *Missouri v. National Organization for Women*, for example, the National Organization for Women (NOW) organized a boycott of Missouri's convention industry to pressure the state to support adoption of the then pending Equal Rights Amendment to the U.S. Constitution.⁷⁵ *NOW* constituted a case of "first impression" because the circumstances surrounding such boycotts differed so substantially from the more direct government petitioning that had historically received immunization from the antitrust laws.⁷⁶

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. 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.

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

not determine the 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.

⁷¹ See generally Hillary Greene, *Antitrust Censorship of Economic Protest*, 59 DUKE L.J. 1037 (2010); Kay P. Kindred, *When First Amendment Values and Competition Policy Collide: Resolving the Dilemma of Mixed-Motive Boycotts*, 34 ARIZ. L. REV. 709 (1992).

⁷² *Cal. Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 611–612 (1972); *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 57 (1993).

⁷³ *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 669–70 (1965).

⁷⁴ *Cal. Motor Transport Co.*, 404 U.S. at 611–612.

⁷⁵ *Missouri v. Nat'l Org. for Women, Inc.*, 620 F.2d 1301, 1302 (8th Cir. 1980).

⁷⁶ *Id.* at 1304.

searching inquiry, but it retains an all-or-nothing character. In sum, the category of immunized speech was expanded, but still retained an all-or-nothing character.

A critical question that *NOW* implicitly raised was 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*. It rejected the First Amendment defense of a boycott undertaken by a group of the trial lawyers because it was seen as an economically-motivated effort by market participants to increase the payments they would receive.⁷⁷ 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 they were condemned after a traditional application of the antitrust laws.

Several aspects of *Superior Court Trial Lawyers* are particularly noteworthy. The majority's decision to withhold any First Amendment solicitude appeared to be heavily driven by their concern regarding the inability of establishing any viable intermediate treatment. More specifically, the majority held that to offer some First Amendment solicitude would rip a hole in the fabric of the antitrust laws. 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. Such an analysis, in contrast to per se illegality, would obviously entail a more searching legal inquiry (which typifies virtually all other antitrust questions) but the underlying antitrust analysis would not have incorporated any First Amendment solicitude. The boycott, if found to be unlawful anticompetitive conduct under the rule of reason, could have been 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. The majority's decision, therefore, is particularly revealing regarding 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 that would include First Amendment considerations.⁷⁸ Stated alternatively, there was arguably an inability, as well as an abiding reluctance, to generate an outcome that represented a middle ground that accommodated both First Amendment and antitrust values.⁷⁹

⁷⁷ *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 426 (1990).

⁷⁸ For a more comprehensive and critical analysis of the Court's treatment of noneconomic factors in antitrust cases including, specifically, *Claiborne Hardware* and *Superior Court Trial Lawyers*, see Greene, *Antitrust Censorship*, *supra* note 71.

⁷⁹ 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,

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

NAACP v. 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."⁸⁰ The white merchants sued claiming that, among other things, the boycott violated Mississippi's antitrust statute.⁸¹ The Mississippi Supreme Court held that "boycotts to achieve political ends are not a violation of the Sherman Act, after which [its] statute is patterned."⁸² 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, "there is no suggestion that" any of the defendants competed with the "white businesses" being boycotted or that they were motivated by "parochial economic interests."⁸³ Such statements were incorrect and, it would seem, the Court would have understood their inaccuracy even at the time. For example, the counsel for the boycotted merchants did more than "suggest," they explicitly argued to the Court that some of the boycotters owned businesses that competed with those being boycotted. Prominent commentators who have considered this issue appear to concur that *Superior Court Trial Lawyers* would deny boycotters First Amendment of any solicitude including, of course, immunization.⁸⁴ Some endorsed, while others criticized that outcome.

While the boycotts themselves were very different, the defendants in both *Claiborne Hardware* and *Superior Court Trial Lawyers Ass'n* invoked a First Amendment-based defense to antitrust complaints. The challenge for courts when evaluating this defense stemmed 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

e.g., Hillary Greene, *Patent Pooling Behind the Veil of Uncertainty: Antitrust, Competition Policy, and the Vaccine Industry*, 90 B.U. L. REV. 1397 (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 standard setting).

⁸⁰ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 889 (1982).

⁸¹ *Id.* at 889, 894.

⁸² *NAACP v. Claiborne Hardware Co.*, 393 So.2d 1290, 1301 (Miss. 1980) (citation omitted).

⁸³ *Claiborne Hardware*, 458 U.S. at 915.

⁸⁴ See, e.g., 1B PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* 191–92 (3d ed. 2006).

ground is undeniable, as in *Superior Court Trial Lawyers*, the cost imposed on society is arguably 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 given more complicated speech interests. 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 on display 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 arguably sub-optimal in itself as well as having the potential to undermine the legal discourse regarding these matters more broadly. Particularly when a legal decision rule is all-or-nothing and it 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, which explicitly adopts an "intermediate" 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.⁸⁵ Over time, even though the Court did not champion First Amendment protection for commercial speech, it avoided reaffirming its exclusion from protection. In 1976 the Court explicitly held that commercial speech, in the form of unadorned advertising, deserved some measure of First Amendment protection. The case, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, invalidated a state law prohibiting certain advertising by pharmacies.⁸⁶

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.⁸⁷ It observed, moreover, that individuals may at times find information regarding commercial goods to be as important as or more important than political discourse.⁸⁸ The importance of commercial speech is a function of multiple interests: the speakers (sellers), the potential audience (buyers), and society as a whole.⁸⁹ While acknowledging the immense importance of commercial speech, the Court also established its lower position in the First Amendment hierarchy. The First Amendment provided a basis for "insuring that the stream of commercial information flows cleanly as well as freely" but such speech receives a different, lesser, standard of protection.⁹⁰

The commercial speech standard received its seminal articulation in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*.⁹¹ The majority further emphasized many of the general themes characterizing *Virginia State Board of Pharmacy*.⁹² *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

⁸⁵ 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 . . . the Constitution imposes no such restraint on government as respects purely commercial advertising.").

⁸⁶ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976).

⁸⁷ See *id.* at 765 ("So long as we preserve a predominately free enterprise economy . . . It 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.").

⁸⁸ See *id.* at 763.

⁸⁹ See *id.* at 762–65.

⁹⁰ *Id.* at 772.

⁹¹ 447 U.S. 557 (1980).

⁹² *Id.* at 561–62. It should be noted that the Court's ruling was fractured—resulting in a majority opinion by Justice Blackmun and accompanied by two concurring opinions (Burger, C.J. and Stewart, J.), as well as a dissent (Rehnquist, J.).

advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.⁹³

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 particular speech, commercial speech, can be vital to society while, at the same time, imposing some limits on when that same 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.⁹⁴

As always, the lines drawn within one case almost invariably spawn further litigation to identify where the line falls in more ambiguous cases.⁹⁵ What 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. The intermediate scrutiny standard will be discussed subsequently when considering the Supreme Court’s 2011 ruling in *Sorrell v. IMS Health, Inc.*⁹⁶

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 is long been recognized that, “Freedom of speech is, as it always has been, freedom to tell the truth and comment fairly upon facts”⁹⁷ 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.”⁹⁸ 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?

⁹³ *Id.* at 566.

⁹⁴ See Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 7 (“[T]he impossibility of specifying the parameters that define the category of commercial speech has haunted its jurisprudence and scholarship.”); see also *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980).

⁹⁵ An example of such a case is *State Univ. of N.Y. 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, was characterized by 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 470, 477.

⁹⁶ 131 S. Ct. 2653 (2011).

⁹⁷ See *Sweeney v. Schenectady Union Pub. Co.*, 122 F.2d 288, 291 (2d Cir. 1941).

⁹⁸ SMOLLA, *supra* note 61, § 23:1.

The seminal case regarding defamation is *New York Times Co. v. Sullivan* (*Sullivan*).⁹⁹ 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.”¹⁰⁰ Between the Courts 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. A one-page advertisement, run in the *New York Times*, was found to “libelous per se.” As such, the jury was instructed that general damages were presumed. 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 verdict to distinguish punitive from compensatory damages.¹⁰¹ The Alabama Supreme Court affirmed the lower court in all respects.¹⁰²

The U.S. Supreme Court reversed Alabama’s high court. It held that the First Amendment requires that public officials cannot “recover[] damages for a defamatory falsehood relating to his official conduct” unless the official proves “‘actual malice’-that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”¹⁰³ In so doing, the Court established a “conditional privilege” because it served to “immuniz[e] honest misstatements of fact.”¹⁰⁴ Moreover, the burden for not only establishing falsity but also malice was placed 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 is no basis for finding actual malice.

Despite the precedential strength that *Sullivan* has acquired over the decades, it is useful to recognize the dissension in the Court when it 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.¹⁰⁵ More specifically, all 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.¹⁰⁶

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 . . . and that it must be protected if the freedoms of expression are to

⁹⁹ 376 U.S. 254 (1964).

¹⁰⁰ *Id.* at 299.

¹⁰¹ *Id.* at 262–63.

¹⁰² *Id.* at 263.

¹⁰³ *Id.* at 280.

¹⁰⁴ *Id.* at 298 & 282 n. 21.

¹⁰⁵ *Id.* at 267.

¹⁰⁶ *Id.* at 293 (Black, J., concurring).

have the ‘breathing space’ that they ‘need . . . to survive.’”¹⁰⁷ As a practical matter, of course, this meant 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, his or her speech to have been truthful and the speaker did not evince a reckless disregard for the truth.¹⁰⁸ This reflected the Court’s concern that aggressively punishing false speech will chill non-false speech and that in certain circumstances the benefits of ensuring a less constrained public debate exceeds the costs of non-malicious false speech.¹⁰⁹

This compromise position, which creates another treatment category for speech in the defamation context, underscores the need for a comprehensive understanding of the 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 treatment.

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, the law can be easily guided to 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 that, “‘Malice,’ even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove.”¹¹⁰ As a practical matter, they did not believe that the majority’s legal formulation of malice which was intended in theory to protect the First Amendment would in fact do so in practice.¹¹¹ “Stopgap measures like those the Court adopts are in my judgment not enough.”¹¹² This criticism was forcefully echoed by Justice Goldberg, also joined by Justice Douglas, who rejected 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.”¹¹³

The adoption of these legal middle grounds regarding restrictions on advertising and defamation of public officials demonstrate the viability of more nuanced positions that transcend an all-or-nothing approach. These examples also highlight that developing any

¹⁰⁷ *Id.* at 271–72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

¹⁰⁸ *Id.*

¹⁰⁹ *See also id.* 284–85.

¹¹⁰ *Id.* at 293 (Black, J., concurring).

¹¹¹ *Id.* at 295.

¹¹² *Id.*

¹¹³ Justice Goldberg accepted that any legal standard would contain certain “gray areas”; 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.

particular approach is an art is 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 both a determination regarding the harm of a polar approach coupled with the practical contribution of the intermediate approach.

3. First Amendment and Information Products

This Article began with a discussion of novel invocations of the First Amendment as a defense to antitrust actions involving the redesign of information products. It then explained the historic relationship between the First Amendment and antitrust and situated that relationship within First Amendment jurisprudence more broadly. None of those seminal cases involved the information product context this Article addresses. Such a wide-ranging review is necessary because the courts themselves have not directly addressed the questions at issue in a meaningful way. A further complication is that the existing legal doctrines cannot be easily imported and unambiguously applied to this information product context.

Perhaps nothing better reinforces these two assessments regarding the limitations of existing legal precedent than to review some of the most prominent arguments that, whether explicitly or implicitly, reject 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 recent, 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.¹¹⁴ The white paper specifically addresses competition policy

¹¹⁴ See generally EUGENE VOLOKH & DONALD M. FALK, GOOGLE: FIRST AMENDMENT PROTECTION FOR SEARCH ENGINE SEARCH RESULTS (2012), available at <http://www.volokh.com/wp-content/uploads/2012/05/SearchEngineFirstAmendment.pdf>.

considerations in a section whose title summarizes the authors' conclusion, "The First Amendment Protects Search Engine Results Against Antitrust Law."¹¹⁵

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"?¹¹⁶ They begin by invoking the *Noerr* doctrine and citing snippets of 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[]."¹¹⁷ As discussed, *Noerr* concerns core political speech, namely, the right to petition the government. It immunizes an entire speech category (government petitioning) from the antitrust laws even when it is blatantly anticompetitive. 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, not only do Volokh and Falk reinforce such a polar approach but also they fail to explain why the speech at issue should fall into the "all" or immunization category.

The white paper's subsequent treatment of two seminal antitrust cases involving newspapers is equally unavailing. In both *Associated Press v. United States*¹¹⁸ and *Lorain Journal Co. v. United States*,¹¹⁹ the Supreme Court unequivocally held that decisions by newspapers regarding content are subject to antitrust scrutiny and, ultimately, condemnation as well. In *Associated Press*, for example, the by-laws of the news gathering organization "hindered and restrained the sale of interstate news to non-members who competed with members."¹²⁰ 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."¹²¹

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 *Lorain Journal*'s failure to proffer any defense reflecting editorial discretion. 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.¹²²

¹¹⁵ *Id.* at 20.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 20–21 (citation omitted).

¹¹⁸ 326 U.S. 1 (1945).

¹¹⁹ 342 U.S. 143 (1951).

¹²⁰ *Associated Press*, 326 U.S. at 13.

¹²¹ *Id.* at 20.

¹²² 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

Attorney Kurt Wimmer, whose clients include Microsoft, wrote what is effectively a response to Volokh and Falk's white paper.¹²³ Wimmer rejects that the speech at issue is immunized from the antitrust laws. He argues that the speech at issue is "commercial speech" and, consistent with intermediate scrutiny, that it is both properly subject to the antitrust laws and, moreover, warrants no First Amendment solicitude. As a practical matter, Wimmer is effectively arguing that the speech at issue receives no First Amendment solicitude. What, if any, legal precedent does Wimmer claim supports this position? 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."¹²⁴ 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.¹²⁵ Wimmer merely asserts that such competitive manipulation "also constitutes a *form of* commercial speech."¹²⁶ 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 addresses.

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 restrictions on commercial speech are subjected to "intermediate scrutiny." Wimmer restates the appropriate *Central Hudson* standard and he

have considerable market power ("a virtual monopoly" or "substantial monopoly") VOLOKH & FALK, *supra* note 114, at 23. 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, 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.

¹²³ See generally Kurt Wimmer, *The Proper Standard for Constitutional Protection of Internet Search Practices* (Jan. 17, 2014), available at [http://www.mediacompolicy.org/uploads/file/First%20Amendment%20Issues%20in%20Search%20and%20Antitrust%206-21-12%20%20%20%20\(1\).pdf](http://www.mediacompolicy.org/uploads/file/First%20Amendment%20Issues%20in%20Search%20and%20Antitrust%206-21-12%20%20%20%20(1).pdf) (arguing that Google's search practices do not deserve First Amendment protection under the intermediate scrutiny standard appropriate for commercial speech).

¹²⁴ *Id.* at 13.

¹²⁵ *Id.* Google has been criticized for practices associated with its "sponsored search results" which Wimmer characterizes as "unquestionably advertisements." *Id.*

¹²⁶ *Id.* (emphasis added).

argues that the antitrust regulation of Google's allegedly anticompetitive search practices meets this standard. He references 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." Moreover, he references no precedent addressing this first prong notwithstanding the fact that this "intermediate scrutiny" standard was introduced in 1980.¹²⁷

Moreover, 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...."¹²⁸ 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 here-to-fore absent middle ground which this Article then proposes.

Of course, there are many more positions advocated regarding the First Amendment issues associated with search engines or software algorithms more generally.¹²⁹ 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.¹³⁰ To conclude otherwise, he argues, would require "upending existing case law" and require radical changes to First Amendment doctrine.¹³¹ 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."¹³² He proposes one possible category of algorithm-based speech that might

¹²⁷ Wimmer relies upon two quotations, from President 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.

¹²⁸ *Id.* at 13.

¹²⁹ Professor Dan Burk's *Patenting Speech* constitutes among 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.

¹³⁰ Stuart Minor Benjamin, *Algorithms as Speech*, 161 U. PA. L. REV. 1445, 1471 (2013).

¹³¹ *Id.* at 1472.

¹³² *Id.* at 1446.

be excluded from First Amendment protection in the future, namely, “outputs that do not reflect human decisionmaking.”¹³³

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”¹³⁴ 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.¹³⁵ 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.¹³⁶

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 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.¹³⁷ At a minimum, this ruling underscores the serious need to finally 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.¹³⁸ As described by the court, medical doctors prescribe pharmaceuticals to their patients and pharmacies fill those prescriptions. Consequently, the pharmacies have become repositories for extensive information regarding doctors’ prescription practices. Pharmacies frequently sell that information to data aggregators or intermediaries, such as the named plaintiff IMS Health. IMS Health removes patient related information, as HIPPA requires, and repackages or restructures the information. Ultimately, pharmaceutical companies purchase and mine the data, a practice known as detailing, to better understand the prescribing practices of individual doctors. The marketing departments then use this information to enable their

¹³³ *Id.* at 1479.

¹³⁴ Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495, 1496 (2013).

¹³⁵ See, e.g., James Grimmelman, *Speech Engines*, U. MINN. L. REV. (forthcoming 2014) (despite referencing the FTC’s inquiry into search engine bias there is no substantive engagement with antitrust law).

¹³⁶ 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).

¹³⁷ See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2659 (2011).

¹³⁸ *Id.*

companies' drug representatives to more effectively target physicians.¹³⁹

The Court held that the "sale, disclosure, and use" of this prescribing information was speech.¹⁴⁰ Moreover, the Court determined that the Vermont statute evinced speaker and content-based discrimination.¹⁴¹ The majority focused repeatedly, in both the oral argument and their opinion, upon the fact that the legislation was expressly enacted to influence the marketplace for ideas.¹⁴² The directed marketing, facilitated by detailing practices, was "effective speech" in that it influenced prescribing patterns and increased costs. The legislature sought to combat those cost increases by weakening the associated speech. 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.¹⁴³

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.¹⁴⁴ Precedent regarding commercial speech addressed advertising restrictions rather than constraints on information as a product itself; a product whose conveyance to a buyer or user constitutes the core market activity of information provision firms.¹⁴⁵ Nonetheless, the Court was unanimous in its finding that the First Amendment protected speech in the "sale, disclosure, and use" of information.¹⁴⁶ 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.¹⁴⁷ Unfortunately, *IMS Health* provides scant guidance regarding how to apply an "intermediate" scrutiny test within antitrust settings, both because the legal setting is quite

¹³⁹ Supra XX.

¹⁴⁰ See *id.* at 2663.

¹⁴¹ See *id.*

¹⁴² See *id.* at 2661; Transcript of Oral Argument, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (No. 10-779), 2011 WL 1559992. The Supreme Court entertained considerable debate regarding the legislation's purpose, affect, and motivation. 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. *Id.* at 2669. But that the doctors themselves retained an individual interest in this information as well. 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.*

¹⁴³ See *IMS Health*, 131 S. Ct. 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.") (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976)).

¹⁴⁴ See *IMS Health*, 131 S. Ct. at 2663.

¹⁴⁵ See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (opinion of Stevens, J.); see also *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 (1980); *Va. State Bd. of Pharmacy*, 425 U.S. at 772.

¹⁴⁶ *IMS Health*, 131 S. Ct. at 2663.

¹⁴⁷ See *id.* at 2667.

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 – 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.¹⁴⁸ Such conduct is evaluated under the rule of reason standard that condemns “unreasonable” restraints of trade. Though first articulated in the seminal 1914 *Standard Oil* decision, antitrust 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.¹⁴⁹ *Grinnell Corp. v. U.S.* provides the seminal articulation of unlawful monopolizing under § 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.”¹⁵⁰ The generality and flexibility associated with the underlying legislation and the key legal precedents constitutes both a strength and weakness of antitrust law.

¹⁴⁸ See 15 U.S.C. § 2 (2012).

¹⁴⁹ See also *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 66 (1911).

¹⁵⁰ *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

This Section briefly delineates the key antitrust doctrines and case law applicable to innovation matters. After introducing the governing antitrust law, Sherman Act § 2, 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 § 2 case law to information products is complicated both by their speech-based nature 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 § 2 conduct involving product innovations that have both anticompetitive effects and pro-competitive benefits. Because none of the key cases in this jurisprudence involves speech, the law has developed independently from the additional speech considerations that information product contexts frequently raise.

Changes to products themselves are amongst the most common allegations of unlawful, predatory product redesign.¹⁵¹ One common allegation is that the redesign creates intentional, and potentially unnecessary, incompatibilities with rival products.¹⁵² 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 redesign 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 industry giants such

¹⁵¹ Predatory design may constitute product change that does, or does 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.

¹⁵² See, e.g., *C.R. Bard, Inc. v. M3 Systems 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).

as Microsoft and IBM.¹⁵³ Consider, for example, the predatory design found in *United States v. Microsoft* where it was alleged among other things that Microsoft's monopoly operating system was designed to integrate its own Internet browser in ways that disadvantaged browser rivals.¹⁵⁴ The guiding legal principles were clear and required the establishment of anticompetitive harms and procompetitive benefits, and then balancing them to determine overall competitive effects. 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.¹⁵⁵ The plaintiff bears the burden to establish the requisite harm.¹⁵⁶ 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.¹⁵⁷ 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."¹⁵⁸

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:

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.¹⁵⁹

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.¹⁶⁰ In contrast to per se illegal price-fixing activity, for example, the conduct at issue in § 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

¹⁵³ *E.g.*, *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (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).

¹⁵⁴ 253 F.3d at 59.

¹⁵⁵ *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>.

¹⁵⁶ *See Microsoft*, 253 F.3d. at 58.

¹⁵⁷ *Id.* at 59.

¹⁵⁸ *Id.* (emphasis added).

¹⁵⁹ *In re IBM Peripheral EDP Devices Antitrust Litig.*, 481 F. Supp. 965, 1003 (N.D. Cal. 1979) (emphasis added), *aff'd sub nom.*, 698 F.2d 1377 (9th Cir. 1983).

¹⁶⁰ *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

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, benefits to consumers, are generally addressed in terms of whether one or more legitimate business justifications underlie the conduct in question.¹⁶¹ 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.¹⁶² If the defendant asserts such a 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.¹⁶³ 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

¹⁶¹ The extent to which this treatment is rooted in precedent remains unclear. Although predatory design has arisen in cases over many past decades, “[t]he Supreme Court has not yet expressly accepted the validity of a business justification defense.” ABA MODEL JURY INSTRUCTIONS FOR CIVIL ANTITRUST CASES B-113 (2005).

¹⁶² 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 that it 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.

¹⁶³ 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.”).

justification” and pretext are defined, the court may avoid the ultimate balancing contemplated in the final stage of the rule of reason analysis.¹⁶⁴

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 v. Microsoft*:

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 demonstrating that a design choice is entirely devoid of technological merit.¹⁶⁵

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.¹⁶⁶

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 innovation was to eliminate the complementary product of a rival. . . . [I]f plaintiffs show anti-competitive harm from the formulation changes, that harm will be weighed against any benefits presented by defendants.¹⁶⁷

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.¹⁶⁸ In

¹⁶⁴ “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. Ut. 1999) (quoting *In re IBM Peripheral EDP Devices Antitrust Litig.*, 481 F. Supp. at 1003).

¹⁶⁵ 72 F. Supp. 2d at 1312–13 (citation omitted).

¹⁶⁶ See *Abbott Labs. v. Teva Pharms. USA, Inc.*, 432 F. Supp. 2d 408 (D. Del. 2006).

¹⁶⁷ *Id.* at 422 (emphasis added) (citation omitted).

¹⁶⁸ 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, §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-à-vis competitors' products which were technically linked to or dependent upon the monopolist's product) may be scrutinized under § 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).

Allied Orthopedic v. Tyco Health Care, the Ninth Circuit held that such balancing is both “unwise” and “unadministrable.”¹⁶⁹

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.¹⁷⁰

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.¹⁷¹ This disagreement regarding the appropriate analysis of alleged predatory design has been largely side-stepped 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 either the claimed innovation is found to be pretextual or that the plaintiffs do not argue against the existence or size, magnitude, or benefit of the claimed innovation. The Circuit Court’s ruling in *Microsoft* illustrates the latter situation. The Circuit Court held that although Microsoft made general claims about the value of integrating the browser and the

¹⁶⁹ *Allied Orthopedic Appliances, Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 1000 (9th Cir. 2010).

¹⁷⁰ 592 F.3d at 1000. Similarly, in *In re 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, “because 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.” 796 F. Supp. 2d 1137, 1144 (N.D. Cal. 2011) (citing *Tyco Health Care*, 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 Systems, Inc.*, 157 F.3d 1340 (Fed. Cir. 1998).

¹⁷¹ 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, 118–21 (1982). They note, for example, the following sequence of judicial rulings. In 1978 Judge Conti, in *ILC Peripherals Leasing*, 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.” *Id.* at 119–20. A year later, in 1979, Judge Schnacke, in *Transamerica Computer*, 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 120 & 120 n. 216 See *supra* note XX (quoting Schnacke’s proposed standard). Hurwitz & 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.” *Id.* at 120. See generally Alan Devlin & Michael Jacobs, *Anticompetitive Innovation and the Quality of Invention*, 27 BERKELEY TECH. L.J. 1 (2012) 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.” *Id.* at 10–21.

operating system, it “neither specifies nor substantiates those claims.”¹⁷² Microsoft argued that it had “valid technical reasons” for this integration and for overriding the user’s choice of a default browser.¹⁷³ 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 offered no rebuttal whatsoever. Accordingly, Microsoft may not be held liable for this aspect of its product design.”¹⁷⁴

Taken at face value, the absence of cases undertaking explicit balancing could be explained by a distribution of pro and anticompetitive effects in § 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 weight 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 of 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 are 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 arguably 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 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

¹⁷² *United States v. Microsoft*, 253 F.3d 34, 66 (D.C. Cir. 2001).

¹⁷³ *Id.* at 67.

¹⁷⁴ *Id.*

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 § 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.¹⁷⁵

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 this slate clean after each.”¹⁷⁶ 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.”¹⁷⁷ Monopoly broth case law reflects concerns about the under-inclusiveness of § 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 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.”¹⁷⁸

While the monopoly broth theory has been successfully invoked only infrequently, it remains good law. For example, the court in *Free Hand Corp. v. Adobe Sys. Inc.* opined that:

Furthermore, this Court need not decide whether a plaintiff can survive a motion to dismiss by alleging a series of procompetitive [sic?? Should be anticompetitive] acts that, in the aggregate, combine to violate the antitrust laws. The allegations of

¹⁷⁵ See, e.g., *City of Mishawaka v. Am. Elec. Power Co., Inc.*, 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, 2008 WL 4911230 (N.D. Cal. Nov. 13, 2008).

¹⁷⁶ *Cont’l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

¹⁷⁷ *Id.*

¹⁷⁸ *Tele Atlas N.V.*, 2008 WL 4911230 at *2 n.1 (citation omitted).

anticompetitive acts, and their alleged aggregated anticompetitive effect, fall squarely within the bounds of established monopoly broth theory.¹⁷⁹

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 the determinations regarding redesign, undermines the aggregate approach that is essential to monopoly broth theory.¹⁸⁰ 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 treatment 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, mitigates 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.¹⁸¹ It then applies those frameworks to examples of antitrust challenges that focus on product redesigns by Google and Nielsen.

A. Recommendations

The recommended frameworks propose, as a baseline matter, a more nuanced treatment of innovation and speech-based defenses to antitrust actions. 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.

¹⁷⁹ 852 F.Supp. 2d 1171, 1184 (N.D. Cal. 2012).

¹⁸⁰ 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.

¹⁸¹ Recall that innovation is defined broadly herein to include product improvements that do not necessarily embody technological change.

The recommendations regarding antitrust's interface with speech and innovation-based defenses receive separate treatment initially. The implications of the commingling of speech and innovation in information product redesign upon those recommendations is then discussed. In particular, consider 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 co-exist 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 sole reliance on the spill-over from protecting innovation to protect speech amounts to no protection at all. 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 where there is no cognizable 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.¹⁸² 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.¹⁸³ This issue is clearly an instance illustrating the proverbial "devil is in the details."

¹⁸² See U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 155, at 2.

¹⁸³ See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) ("[T]he plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit."); *C.R. Bard, Inc. v. M3 Systems, Inc.*, 157 F.3d 1340 (Fed. Cir. 1998). *But see* *Allied Orthopedic Appliances, Inc. v. Tyco Health Care Grp.*, 592 F.3d 991, 1000 (9th Cir. 2010) ("There is no room in this analysis for balancing the benefits or worth of a product improvement against its anticompetitive effects."); *In re Apple iPod iTunes Antitrust Litig.*, 796 F. Supp. 2d 1137, 1143 (N.D. Cal. 2011) ("If a monopolist's design change is an improvement, then courts may not 'balanc[e] the benefits or worth of [the] product improvement against its anticompetitive effects.'" (alterations in original) (quoting *Allied Orthopedic Appliances, Inc.*, 592 F.3d at 1000)).

This recommendation identifies discrete competitive effects amenable to at least first order balancing; 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; and underscores the folly associated with ignoring important, but complex, realities in favor of unrealistic shortcuts.¹⁸⁴

More specifically, because courts would be required 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.¹⁸⁵ 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.¹⁸⁶ A redesign's consequences for a rival's ability to compete would also be relevant. Anticompetitive redesigns which involved ostensibly intentional incompatibilities or redesigns that increased the customer switching costs¹⁸⁷ would constitute evidence of an attempt by the defendant to raise rival's costs or to deter

¹⁸⁴ While the treatments of each legitimate business purpose share common elements, treatment under antitrust law is not identical. To the extent that non-innovation purposes also receive polar outcome treatment, the recommendations for innovation would also apply.

¹⁸⁵ 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").

¹⁸⁶ 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 the prices to be adjusted for quality. This is particularly difficult in product design contexts wherein the qualitative value of a given innovation may well engender significant debate. Further complicating such assessments is that the products as redesigned and as earlier designed may target somewhat different markets.

¹⁸⁷ 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 changes from an open to a closed procurement system, which increases the switching costs of those using the marketplace and, in turn, raises rivals' costs. *Id.* at 582–84.

entry; both of those circumstances are linked to decreases in competition and increases in market price.^{188 189}

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.¹⁹⁰ A logical starting point for assessing an innovation's magnitude is to estimate the value a consumer receives from the change.¹⁹¹ Estimating such procompetitive effects involves standard marketing techniques that firms typically undertake as part of their product development and launch.¹⁹² More specifically, the actual price that consumers were willing

¹⁸⁸ If evidence of anticompetitive intent exists, then it may also inform estimates of competitive effects by indicating the expected qualitative effect of the redesign.

¹⁸⁹ See 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.

¹⁹⁰ 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 which include: "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 (2d ed. 2005) 374 (ed. Kenneth Kahn et al). 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 multi-faceted "final business evaluation" whose dimensions include: market share, market attractiveness, product evaluation, cost forecast, and sales forecast. EDWIN C. 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. Kahn, PMDA HANDBOOK, *supra* note X, 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 (47%) were the least accurate forecasts. *Id.* at 374.

¹⁹¹ 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), available at <http://www.concurrences.com/Journal/Issues/No-4-2013/Doctrines-1492/Legal-rules-for-predatory?lang=fr>.

¹⁹² 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 (2002)(ed. Paul Belliveau et al.) "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

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.¹⁹³ 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.¹⁹⁴ 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.

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.¹⁹⁵ If one can establish that the offending conduct 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 which may be viewed as relatively separable from the other changes (e.g., changes to the underlying software code). Evidence which suggests the defendant was both aware of potential anticompetitive effects and that the defendant considered design alternatives that had very similar (or even superior) innovative qualities but without the anticompetitive effect would

perceived alternatives." *Id.* at 89. It entails addressing three questions whose answers are generally complex, relative, and dynamic. *Id.* at 90. "1. How will the CPV attributes be judged in the marketplace? 2. What alternatives to the potential offerings exist? 3. How might competitors offering alternatives attempt to influence the customer's balance scale?" *Id.* at 101.

¹⁹³ Richard Gilbert, *Holding Innovation to an Antitrust Standard*, 3 COMP. POL'Y INT'L 47 (2007), available at <https://www.competitionpolicyinternational.com/file/view/4602>.

¹⁹⁴ 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 cautions, therefore, 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. PERSPECTIVES 29, 31 (1991) (noting, 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").

¹⁹⁵ *United States v. Microsoft Corp.*, 253 F.3d 34, 65 (D.C. Cir. 2001).

weigh against the defendant.¹⁹⁶ 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.¹⁹⁷

Balancing. Balancing the pro and anticompetitive effects of the design change 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 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.¹⁹⁸ The D.C. Circuit has embraced balancing in theory, but it only finds antitrust liability when innovation is pretextual.¹⁹⁹ 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.²⁰⁰ 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

¹⁹⁶ 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).

¹⁹⁷ 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 (discussing, in the context of merger analysis, the informational problems associated with the use of less restrictive alternatives test); see also Pitofsky, *infra* note 258, 1067 n.44 (discussing the use of political concerns as tie-breakers in merger analyses).

¹⁹⁸ See, e.g., *Allied Orthopedic Appliances, Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 1000 (9th Cir. 2010).

¹⁹⁹ See *Microsoft*, 253 F.3d 34, 59 (D.C. Cir. 2001).

²⁰⁰ But see Jacobson et al., *supra* note 185, 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).

anticompetitive effect.²⁰¹ If the anticompetitive consequences were essential to motivate the conduct at issue, it would be condemned. In its simplest form, as applied to product redesign, this test would examine the change in benefit to the consumer assuming no change in the competitive situation, e.g. the hypothetical price, and the costs of the redesign to the firm undertaking it. 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.²⁰² These tests constitute alternatives through which decisions regarding antitrust liability can be evaluated and are potentially useful inputs to the approach recommended herein.²⁰³ However, problems with both approaches concern the estimation of consumer benefit, discussed previously, and the difficulties associated with estimating unobservable effects.

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 to 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, while some may be so marginal that they would not seem worthy of special treatment. Internal documents as well as expert 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.^{204 205}

²⁰¹ Janusz A. Ordover & Robert D. Willig, *An Economic Definition of Predation: Pricing and Product Innovation*, 91 YALE L.J. 8, 9 (1981); Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The “No Economic Sense” Test*, 73 ANTITRUST L.J. 413 (2006); A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct-Are There Unifying Principles?*, 73 ANTITRUST L.J. 375 (2006).

²⁰² Salop, *supra* note 189, at 325.

²⁰³ The evaluation of these tests is beyond the scope of this Article. *See generally* Gilbert, *supra* note 193, at 77 (concluding that the “no economic sense” test best provides “a wide berth for innovation”); Jacobson et al., *supra* note 185, at 33 (advocating for usage of the “consumer welfare” test); Salop, *supra* note 189, 313–14 (same).

²⁰⁴ The differences between the outcomes of the EU and U.S. evaluations of Google’s search engine practices suggests that the European Commission may have done some balancing of pro and anticompetitive effects during their investigation. The FTC dropped the investigation, noting generally the presence of procompetitive innovation, which presumably the EC also recognized, yet decided to move forward nonetheless.

²⁰⁵ In merger reviews, prospective comparisons of innovation versus price effects are frequently made. Gilbert, *supra* note 193, at 75.

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.²⁰⁶ 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 have no appreciable effect on innovation incentives and, in any event, has not been empirically established.²⁰⁷ Furthermore, anticompetitive effects also affect the innovation by their rivals, either by suppressing rivals' actual innovation or by reducing rivals' incentives to innovate.²⁰⁸ The innovation embodied in the product redesign, therefore, is not the only innovation effect at issue. The link between anticompetitive conduct and rival innovation, therefore, suggests that assessments regarding innovation effects that focus solely upon the defendant's innovations may be dangerously incomplete.²⁰⁹

While the unworkability and chilling innovation arguments against a balancing approach may be overstated, there is clearly some merit to them. The recommendations mitigate these concerns by adopting a presumption favoring innovation over anticompetitive effects. Balancing only occurs when innovation magnitude assessments that 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.

²⁰⁶ See, e.g., Gilbert, *supra* note 193, at 76.

²⁰⁷ 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.").

²⁰⁸ 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.").

²⁰⁹ But see Gilbert, *supra* note 193 (arguing that innovation effects are sometimes underestimated because they do not account for the impact of innovation on complementary markets).

2. Treatment of Speech

Speech is the expression or communication of ideas.²¹⁰ 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 discussion regarding innovation assumed *arguendo* the absence of any cognizable speech interest associated with the information product design, this Section offers recommendations regarding how to assess 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 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. Quintessential values within this context whose antitrust significance has been debated include the role of small businesses and business influence on political power. While positions vary considerably, the terms of the debate do not. To what extent, if at all, is the 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 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 but it does not confer either immunity from the law nor does it declare the law unconstitutional.

a. *Definition*

The information products at issue herein constitute “speech” as colloquially defined. Whether such expression warrants any First Amendment solicitude and if so, how much, requires more refined distinctions than the political speech (immunized) and non-speech (no solicitude) categories that have been recognized in the antitrust law. Towards that end, this Article proposes two categories: nominal speech and cognizable speech. The antitrust

²¹⁰ See generally Thomas Scanlon, *A Theory of Freedom of Expression*, in *THE PHILOSOPHY OF LAW* 153–71 (R.M. Dworkin ed., 1977).

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. When the cause of action concerns changes that do not implicate content, nominal speech is present and it receives no solicitude in the antitrust analysis.

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. As such, purely functional changes to information products would not receive speech-based solicitude. Stated alternatively, given purely functional changes to information products, the potentially anticompetitive redesign merely entails a different mechanism by which to convey the same content and 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, 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.²¹¹

Nominal speech receives no First Amendment solicitude and, as such, constitutes an "outcome category" because the same legal outcome obtains 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, two dimensions along which to distinguish the nature and strength of such speech interests are also proposed. 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 various types of speech, as embodied in information products, can be distinguished.

²¹¹ See *United States v. Lorain Journal Co.*, 92 F. Supp. 794, 799 (N.D. Ohio 1950).

Sliding Scale. Distinguishing between nominal and cognizable speech constitutes a necessary first step to create a middle-ground category for speech protection. All members of that middle-ground category are given a base level of solicitude in the antitrust analysis. The next step is to develop treatment criteria that would 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.²¹² The protection accorded the speech at issue increases as content of the speech is (1) more *transparent* regarding the “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 that information is generally known by the receivers of the speech. 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.²¹³ 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 revenues come from reader

²¹² An alternative approach, rejected herein, is a pure sliding scale based on transparency and independence as dimensions. The 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.

²¹³ 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) (requiring online advertising disclosures to be “clear and conspicuous”) *available at* <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>; 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), <http://www.ftc.gov/news-events/press-releases/2013/06/ftc-consumer-protection-staff-updates-agencys-guidance-search> (“[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 128 at 1183.

subscriptions as opposed to from advertising by the firms whose products are evaluated.²¹⁴ 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 that speech.²¹⁵ 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 disclosures are received by listeners. This is the rationale for treating independence of the relevant content from strong financial or nonfinancial interests as a separate dimension.²¹⁶

The recommended treatment of speech content in terms of these characteristics contrasts with its traditional role in First Amendment cases in which content-based restrictions are extremely disfavored as a matter of law.²¹⁷ In the antitrust setting, speech-based questions do not challenge per se the antitrust laws themselves as 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.²¹⁸

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 those of the defendant's competitors. This

²¹⁴ See also Randall Stross, *A Shopper's Companion, Still Going Strong*, N.Y. TIMES, Dec. 10, 2011, at B3 ("[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.").

²¹⁵ In practice, transparency matters only in the presence of underlying bias. In theory, then, if there is no bias, then transparency and independence are not relevant. If there is bias, the biased speech is "better understood" by listeners if the bias is disclosed.

²¹⁶ Another thorny problem involves product changes that involve "content" changes associated with repositioning information products in the marketplace. Such content changes may support the underlying cause of action and the change itself would appear to be a change in the underlying point of view. The recommendation does not accord special treatment to such content changes largely because such motivations seem too easy sanctuaries for intended anticompetitive conduct.

²¹⁷ 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*, 124 S. Ct. 2783, 2788 (2004))).

²¹⁸ Technically, speaker-based discrimination characterizes application of the antitrust laws as firms with market power are treated differently than those without market power. The 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.

Article designates speech interests other than the defendant's as "secondary speech interests" that is, speech interests of those other than the defendant which are oftentimes held by the defendant's competitors. 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. 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.²¹⁹

As discussed subsequently, the recommendation permits plaintiffs to raise secondary speech arguments as an offset to the defendant's speech interest. More aggressive efforts to incorporate secondary speech interests were rejected. For example, the possibility that secondary speech interests that were deemed greater than the primary speech interest could be treated as an additional anticompetitive effect was rejected because it would have been analogous to allowing, at least implicitly, a plaintiff to bring a First Amendment-based action against private party, something the First Amendment does not sanction.

b. *Protection*

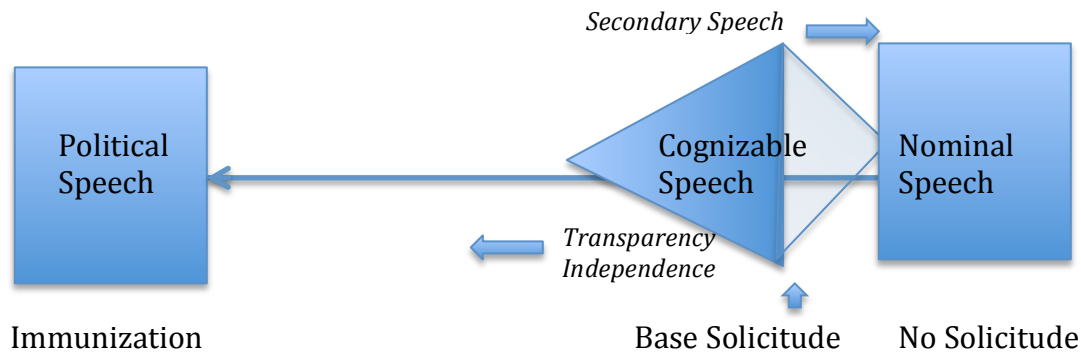
Given the foregoing mechanisms to distinguish between cognizable and nominal speech and to calibrate the strength of the former along at least two dimensions, the recommended speech-based protections can be addressed. This Article recommends treating cognizable speech, invoked as a defense to an antitrust 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" which "reduces" the level of anticompetitive harm. Such an offset is analogous to the role of "plus factors" in a price-fixing analysis.²²⁰

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 otherwise would 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, cognizable speech can never rise to the level

²¹⁹ Effective speech competition is somewhat decoupled from market share in the sense that easy access to the "speech" in question may not depend on the level of market share. If market share correlates heavily with distribution availability, then market share would be a relevant factor in determining the level of speech diversity in the market. But sometimes, as in the case of Internet search engines or browsers, access to even low market share alternatives is easy and market share would not be as important a factor.

²²⁰ See William E. Kovacic, *The Identification and Proof of Horizontal Agreements Under the Antitrust Laws*, 38 ANTITRUST BULL. 5 (1993) for a discussion of the role of plus factors in establishing horizontal agreements.

sufficient to effectively confer immunization from antitrust action as advocated by Volokh and Falk and others.²²¹ 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 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.²²² 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.

²²¹ See generally VOLOKH & FALK, *supra* note 114. Volokh and Falk advocate for speech defenses to antitrust actions and appear to desire the courts to treat the speech at issue as if it were political speech, which would result in immunization against antitrust action. 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., Inc. v. Town 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.

²²² 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)). *Id.* at 139.

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. One key determination in *Central Hudson* concerns whether the public interest promoted by the statute in question exceeds a threshold sufficient to justify its incursion on commercial speech interests. In the recommendation here, the question is whether the competition interest exceeds a threshold to justify overriding the speech interest attached to speech in the cognizable speech category. 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.²²³ 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.²²⁴ When speech 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 particular significance of pretrial motions. Similarly, the extent to which concerns about how to craft antitrust remedies consistent with the First Amendment is also considered.

²²³ See discussion *supra* Part II.A.2.a (discussing commercial speech).

²²⁴ SMOLLA, *supra* note 61, § 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 by the government need not be the 'least restrictive' method of achieving its objective.").

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 a modification of 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.”²²⁵ The significance of this case, *Levitch v. Columbia Broadcasting Sys., Inc.*, for instant purposes, lies in the limited nature of the broadcasters’ First Amendment defense. They did not claim that the First Amendment immunized the challenged conduct from antitrust scrutiny. Instead, the defendants advocated imposing “a higher standard of pleading upon plaintiffs, to insure the plaintiffs seek to challenge economic conduct and not protected First Amendment conduct.”²²⁶ 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.”²²⁷ The defendants also argued that the plaintiffs failed to state an antitrust cause of action even under “normal pleading requirements.”²²⁸

The district court ultimately dismissed the antitrust claims after subjecting them to *traditional* pleading requirements.²²⁹ 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.²³⁰ Despite its apparent willingness to consider modifying the pleading standard, albeit in some 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.²³¹ Speech displaying both “editorial” and “economic” (i.e., anticompetitive) qualities would be subject to traditional pleading requirements.²³² The court found that the broadcasters challenged conduct was not “easily characterized” because the

²²⁵ *Levitch v. Columbia Broadcasting Sys., Inc.*, 495 F. Supp. 649 (S.D.N.Y. 1980). In addition to antitrust claims, the plaintiffs also argued that the defendants had violated their First Amendment rights. Such claims against commercial broadcasters, licensed and regulated by the FCC, had repeatedly failed owing the absence of government action. The plaintiffs in *Levitch* were similarly unsuccessful.

²²⁶ *Id.* at 661.

²²⁷ *Id.*

²²⁸ *Id.* at 660.

²²⁹ *Id.* at 662, 679.

²³⁰ The claims brought under § 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 § 1 claims, and § 2 tying claims. *Id.* at 665, 679.

²³¹ *Id.* at 661–62.

²³² *Id.* at 662.

same decisions regarding what to air can be viewed as “editorial discretion” and as part of an anticompetitive boycott.²³³ Therefore, it applied the traditional pleading requirement.

The court reached the merits of the broadcaster’s First Amendment-based defense despite the fact that such a determination, as a practical matter, could have been avoided. Nonetheless, the court very clearly limited the reach of its rejection of arguments that the First Amendment required antitrust pleading requirements. “Although insufficient to impose a greater procedural burden upon plaintiff that this pleading stage,” the court held that speech-based concerns “may very well impose a greater burden upon plaintiffs in the disposition of this action.”²³⁴

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.²³⁵ 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.²³⁶ 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 First Amendment rights are not implicated during the liability phase of an antitrust proceeding.

In *National Society of Professional Engineers v. United States*, 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.²³⁷ The engineering society had argued that such a restriction was necessary because price competition would undermine safe engineering practices.²³⁸ The majority rejected the professional society’s core position that competition itself constituted the problem.²³⁹ 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, it upheld the prohibition on the professional society continuing to deter such competition and the requirement that it affirmatively publicize its new policy

²³³ The conduct at issue clearly implicated fundamental editorial prerogatives regarding program selection. However, the broadcaster’s 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.

²³⁴ *Id.* at 662.

²³⁵ *Id.* at 697–98.

²³⁶ *Id.* at 697.

²³⁷ 435 U.S. 679 (1978).

²³⁸ *See id.* at 695–96.

²³⁹ *See id.* at 696 (“[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable.”).

consistent with the Court's ruling.²⁴⁰ However, the Circuit Court found unconstitutional, under the First Amendment, a third remedy that required the defendant to affirmatively endorse the desirability of price competition.²⁴¹ The Supreme Court affirmed the Circuit's Court decision regarding remedies. 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."²⁴² Burger argued that, "The First Amendment guarantees the right to express such a position and that right cannot be impaired under the cloak of remedial judicial action."²⁴³

ES Development, Inc. v. RWM Enterprises, Inc., also a § 1 case, illustrates the potential pitfalls associated with broad speech restrictions as remedial measures in antitrust cases.²⁴⁴ The district court found the defendant automobile dealers conspired to prevent the entry of a prospective competitor to the Chesterfield Auto Mall.²⁴⁵ The defendants were enjoined from "individually communicating with their respective manufacturers concerning the Mall for the *indefinite* future."²⁴⁶

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."²⁴⁷ 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."²⁴⁸ The Circuit Court, relying upon *Central Hudson*, defined properly tailored remedies as "'narrowly drawn[. . .] extend[ing] only as far as the interest it serves."²⁴⁹ 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"²⁵⁰ 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.²⁵¹

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

²⁴⁰ *United States v. Nat'l Soc. of Prof'l Engineers*, 555 F.2d 978 (D.C. Cir. 1977), *aff'd*, 435 U.S. 679 (1978).

²⁴¹ *See id.* at 984.

²⁴² *Nat'l Soc. of Prof'l Engineers*, 435 U.S. at 701 (Burger, J., concurring in part and dissenting in part).

²⁴³ *Id.*

²⁴⁴ 939 F.2d 547 (8th Cir. 1991).

²⁴⁵ *Id.* at 550.

²⁴⁶ *Id.* at 558 (emphasis added).

²⁴⁷ *Id.* at 558.

²⁴⁸ *Id.*

²⁴⁹ *Id.* (quoting *In re Primus*, 436 U.S. 412, 438 (1978))

²⁵⁰ *Id.*

²⁵¹ *Id.* at 559.

present are not the traditional commerce-related speech interests embodied in commercial advertising that involves speech about the products. The products at issue involve the conveyance of information and are themselves arguably speech.²⁵² 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.

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 competitor's sites by effectively demoting them in its PageRankings.²⁵³ Various bases for causes of action could be alleged regarding such conduct including raising rival's costs and disparagement.²⁵⁴ 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.²⁵⁵ The 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.²⁵⁶ 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

²⁵² See also *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2659 (2011).

²⁵³ See, e.g., *The Power of Google: Serving Consumers or Threatening Competition: Hearing Before the H. Subcomm. on Antitrust, Competition Policy & Consumer Rights of the S. Comm. on the Judiciary*, 112th Cong. (2011) (testimony of Jeremy Stoppelman, Co-founder and CEO, Yelp! Inc.), available at <http://www.judiciary.senate.gov/meetings/the-power-of-google-serving-consumers-or-threatening-competition>; 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/>.

²⁵⁴ 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 considering factors such as the stance with which the message was received and the ability of the target of the message to respond (e.g., message disseminated to an identifiable audience). Very infrequently have courts been receptive to disparagement as an antitrust cause of action.

²⁵⁵ VOLOKH & FALK, *supra* note 114 at 4–5 (“[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, *supra* note 115 (“The First Amendment Protects Search Engine Results Against Antitrust Law”).

²⁵⁶ For completeness sake, it is clear that Google's PageRanking would not qualify as political speech and gain immunization from the antitrust laws.

implications for the amount of traffic those sites receive, especially given Google's market share in the general search engine market.²⁵⁷ It is possible that Google might also favor firms who purchase ad links from Google. 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 their 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 data about the case), would at the very most confer only the minimum level of speech solicitude in the antitrust analysis.²⁵⁸ 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: determine the scope of the relevant innovation at issue and estimate 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 separable.²⁵⁹ 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.²⁶⁰ Then, given a definition of the redesign at issue, the procompetitive effect is assessed by estimating the

²⁵⁷ See also Lee, *supra* note 11 (noting Google's ascent to a 67% share of the search engine market).

²⁵⁸ See generally Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1067 & n.44 (1979) (advocating for a limited role for political considerations in antitrust).

²⁵⁹ 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 where such a subdivision is quite clear.

²⁶⁰ Jacobson et al., *supra* note 185, at 9.

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, a comparison of the rankings of firms in the affected markets by other general search engines, and the change in sales resulting from the modifications.²⁶¹ Because the anticompetitive effect depends on how much traffic the redesign diverted, the source and quantity of referrals to the allegedly disadvantaged web sites can be analyzed to assess the size of the effect of the redesign.

Given a § 2 violation, the defendants must not only cease their misconduct but also, oftentimes, abide by remedial measures.²⁶² 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 overtime) 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 avoid easy circumvention.²⁶³ 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 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 relatively recent product change from the meter diary to the LPM system for measuring

²⁶¹ 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 7, at 2.

²⁶² 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 1 (2008), available at http://www.justice.gov/atr/public/reports/236681_chapter9.pdf.

²⁶³ In its second settlement proposal to the European Commission, Google offered to give greater prominence to the web sites of the firms that were allegedly the targets of Google's conduct. The European Commission rejected this proposal. See James Kanter, *Google Makes New Offer to Settle its European Union Antitrust Case*, N.Y. TIMES, Sept. 10, 2013, at B3; Charles Arthur, *European Commission Rejects Google's Latest Proposals to Settle Antitrust Case*, THE GUARDIAN (Dec. 20, 2013, 10:10 AM), <http://www.theguardian.com/technology/2013/dec/20/european-commission-rejects-google-proposals-antitrust-case>.

television audience shares. One allegation (“predatory innovation”) was made by a potential market entrant, erinMedia, who claimed that Nielsen marketed its own version of an ostensibly improved technology audience measurement system to preempt erinMedia’s entry despite Nielsen’s keen awareness of the new system’s profound flaws.²⁶⁴ Other allegations concern Nielsen forcing its subscribers into contracts that required the return of Nielsen’s data if the subscribers switched to another rating service (“licensing restrictions”) and that Nielsen biased its new system to favor ratings of large cable operators (“biased ratings”). Sunbeam argued that both of these actions impeded entry. Nielsen, like Google, responded that its product redesigns were “protected speech” and immunized from antitrust laws.²⁶⁵

Although Nielsen’s audience market share measurements would arguably meet the *IMS Health* standard for speech, the proposal requires examination of each cause of action to see if the implicated speech involved content and is, therefore, cognizable. Nielsen’s replacement of the older meter-diary system with the local people meter (LPM) system would be cognizable speech only if the cause of action involved content. This is a different question than whether the system itself constitutes speech.

Consider first erinMedia’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.²⁶⁶ Such restrictions operate on the conveyance of the information and 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 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,

²⁶⁴ See *Sunbeam Television Corp. v. Nielsen Media Research, Inc.*, 711 F.3d 1264, 1268 (11th Cir. 2013).

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 1269 n.11.

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 partially 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.²⁶⁷ 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.²⁶⁸ 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 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 brot theory by

²⁶⁷ See also *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).

²⁶⁸ Note that under the current legal treatment, Nielsen's ability to introduce a poor implementation of the system and have it protected from antitrust has the potential for reducing the incentives of actual and potential competitors from innovating in this market space.

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 broth 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 engaging the special challenges posed to antitrust law by potentially anticompetitive conduct in the form of redesigns to information products.